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PRIORITIES IN THE LAW OF MORTGAGES

I.

At the common law priority of right as between successive transfers of interests in land by the same transferor is determined by priority in time.¹ If *A*, who is seised in fee, makes a grant of a term for years to *B* and subsequently grants another term to *C*, the second termor, *C*, is not entitled to enter upon the land until the first term has ceased by effluxion of time, surrender or otherwise. So if successive freehold interests are carved out of the fee by different conveyances, the estate of the second grantee cannot take effect until the estate of the first grantee has terminated.² This results from the fact that if a grantor has transferred a present interest and right to possession there is no present interest left for the second transferee. *Notice* and *lack of notice* have no scope of operation in such a case. The good faith of the purchaser can give rise to no interest where none can exist.³ Neither did the absence of a valuable consideration affect the priority as between successive transferees from the same transferor at the early law, except where it was provided otherwise by statute.⁴

¹ Ralph W. Aigler, *The Operation of the Recording Acts*, 22 Mich. L. Rev. 405, 406 (1924).

² Likewise, if *A*, who is seised of Blackacre in fee, transfers the fee to *B* and then purports to transfer the fee to *C*, the latter would take nothing at law. There is a total absence of title in *A* to transfer to *C*.

The departure from this rule, resulting from the recording acts, will be subsequently discussed.

³ *Iowa Land & Trust Co. v. United States*, 217 Fed. 11 (1914).

⁴ There are some statutes that have this effect. For instance, the statute of 27 Eliz., c. 4, provides that transfers of interests in land made for the purpose of defrauding subsequent purchasers for a valuable consideration are void as to such purchasers. A conveyance made without valuable consideration, and followed by a conveyance for value by the grantor, was voidable under this statute. *Adams' Equity*, 5th Am. ed., 303.

The bankruptcy and insolvency acts provide that certain transfers made by a bankrupt or insolvent shall be void. The principles that govern, in construction of these acts, are foreign to this discussion.

As between competing successive equitable interests in the same subject matter, created by the same transferor, the general equitable doctrine concerning priorities is that the order of time governs. If the owner of an equitable interest, the legal estate being outstanding, has mortgaged his interest or granted an annuity and afterwards undertakes to convey his whole interest to a purchaser, the latter acquires only such interest as was left in his transferor after the mortgage or annuity was made.⁵ If the subsequent transferee has notice, at the time of the transfer, of the prior competing equitable interest, priority of right is ordinarily not affected thereby.⁶

There are some apparent exceptions to the rule that as between successive competing equitable interests priority of right is determined by the order of time in the creation of such interests, and in these situations *notice* may be important. In order to include these exceptions, the principle is sometimes expressed in this form: "‘As between persons having only equitable interests, *qui prior est tempore potior est jure.*’" ⁷ But this principle applies only where the equitable interests are, except as to time, *equal* one to the other. For instance, *A*, who has acquired the later equitable interest in Blackacre from *R*, will be entitled to priority over *B*, who has acquired an earlier equitable interest in Blackacre from *R*, only when, according to those principles of right and justice which a court of equity recognizes and is governed by, he has acquired a *better* equitable interest than that of *B* or an equitable interest *superior* to that of *B*. As a practical matter, the equitable interests of *A* and *B* are *equal* only in those instances where a court of equity will

⁵ Tiffany on Real Property, 2nd ed., § 566 (c); Phillips v. Phillips, 4 De G. F. & J. 208 (1861), per Lord Westbury.

"It is the settled doctrine of this court that where the equities of the parties are equal, and neither has the legal title, the one who has the prior equity must prevail." Per Chancellor Walworth, in Grimstone v. Carter, 3 Paige's Ch. 420, 436 (1832).

⁶ Tiffany, *op. cit. supra* note 5.

⁷ Rice v. Rice, 2 Drew. 73, 77 (1853), per Sir R. T. Kindersley, V.-C.

refuse to lend its assistance to either one as against the other in a suit where these interests are competing.⁸ Equality is lacking where the transferee of the earlier equitable interest has, by his statements or careless conduct, misled the transferee of the later equitable interest.⁹ In *Rice v. Rice*¹⁰ a vendor conveyed certain land without receiving the purchase money; the receipt of it, however, was indorsed on the deed, and the title deeds were delivered to the purchaser. The latter made a mortgage to *E*, by a deposit of the title deeds, and absconded. It was held that, as between the vendor's *lien* for the unpaid purchase money and the interest of the equitable mortgagee, the possession of the title deeds and the fact of the indorsement of the receipt of the purchase money on the deed gave the equitable mortgagee the *better* equitable interest and, hence, priority of right. When we consider the English system of conveyancing, that was in use at the time of this decision, and the indorsement that *R* made upon the deed, it is quite obvious that *E* was misled here and that he had the *superior* equitable interest. In *Hume v. Dixon*¹¹ one *K*, who had the legal title to certain land subject to a vendor's *lien*¹² in favor of the plaintiff,

⁸ The principles on which a court of equity acts to protect a *bona fide* purchaser for value without notice are not confined, in their operation, to cases where he has got in the *legal* interest. If the holder of the subsequent equitable interest stands equitably in at least as favorable a position as his opponent, the court will not interfere against him. *Colyer v. Finch*, 5 H. L. Cas. 905, 920 (1856), per Lord Cranworth.

⁹ "The general rule [as between competing non-recordable equitable interests] . . . is that he who is first in time is first in right, but this is not of universal application. In a contest between equities it is not allowed to prevail where it appears from any fact or circumstance in the case, independent of priority of time, that the holder of the junior equity has the better right to perfect his equitable title or interest by calling in the outstanding legal estate. In such case he has the better equity. *Prima facie*, however, the assignee of an equity must abide the case of the assignor, and the superiority of the equity of the first purchaser is, in general, undeniable, unless he has been guilty of laches, which vitiate his title or deprive him of the right to enforce it against others who have been more vigilant." Per Stone, J., in *Churchill v. Little*, 23 Oh. St. 301, 310 (1872).

¹⁰ *Op. cit. supra* note 7.

¹¹ 37 Oh. St. 66 (1881).

¹² Professor Pomeroy says that by the overwhelming weight of authority the *lien* of a vendor for unpaid purchase money, where not expressly reserved,

sold and undertook to convey the land to *H* for a valuable consideration, but the deed was defective as a conveyance of the legal title because the officer who took the acknowledgment of it omitted to subscribe the same. It was held, in reliance on *Rice v. Rice*, that *H's equity* was superior to that of the vendor to enforce his lien. The plaintiff had voluntarily placed the legal title in the hands of *K* so that he appeared to be the owner of the complete title, and *H* acted on the faith of *K's* ostensible ownership. The plaintiff should have expressly reserved a lien for the unpaid purchase money or should have reduced his claim to a mortgage and thus have been enabled to record it and give at least constructive notice to all who subsequently acquired interests in the land. This would have conformed to the requirements of the recording act.

In England an equitable interest or an *equity* has been postponed to a subsequently acquired interest or *equity* in many cases because of a failure to obtain or retain possession of the title deeds to the land in controversy. This would rarely, if ever, occur in the United States where, under our systems of conveyancing, the possession of the title deeds possesses no general significance. In *Farrand v. Yorkshire Banking Company*¹³ *E* made a loan to *R* to enable him to complete the purchase of certain property. *R* gave bond to *E* to secure the repayment of this sum and agreed that he would, as soon as the purchase was completed, execute a legal mortgage on the property in favor of *E* and, upon receipt of the title deeds, deposit them with the solicitor of *E* to enable him to prepare a mortgage. The purchase was soon completed but *R* did not hand the deeds over to the solicitor; he deposited them with the Yorkshire Banking Company as security for an overdraft. The Company had

is an equitable interest *in rem*; *i. e.*, it is more than a mere equity or right to enforce payment of the unpaid purchase money. Pomeroy's Equity Jurisprudence, 4th ed., § 720, note 2, b.

¹³ [1888] L. R. 40 Ch. Div. 182.

no notice of *E*'s rights. On the faith of its security, the Company continued the current account with *R* for about twenty-two years, when there was a balance due it for which it demanded payment. *R* was unable to pay, so the Company began enforcement proceedings. The executors of *E* gave notice of his rights. The Company claimed priority since it had no notice of *E*'s claim. In an action brought by the executors of *E* to establish their claim and to determine the matter of priority, it was held that the circumstances were such as to give the Company priority. *E* was careless in not calling for the deeds, thus enabling *R* to create the equitable interest in the Company. The latter was more vigilant in having obtained possession of the chief evidence of title without notice of *E*'s rights. *E* had not sought to obtain possession of the deeds for a long period of time during which the Company continued the current account with *R* without notice of *E*'s rights. Possession of the title deeds, at the time of this decision, was of great significance in the English system of transferring interests in land. In respect to mortgages, it was customary for one who advanced money on what was intended to be a first mortgage to receive the deeds.¹⁴ The possession of the title deeds by one whom they showed or purported to show to be entitled to the land was proof *prima facie* that there was no mortgage on the land.¹⁵ So it was advisable that an intending mortgagee should, for his own protection, obtain, if possible, the possession of the deeds and retain them.

Two general situations, in connection with the possession of the title deeds, have been presented by the English cases: (1) That where the mortgagee has not obtained possession of the deeds; and (2) That where he has obtained possession of them but has returned them to the mortgagor for some purpose. The cases where the mortgagee did not ob-

¹⁴ Falconbridge, *Law of Mortgages*, 2nd ed., 88.

¹⁵ *Op. cit. supra* note 14.

tain possession of the deeds have been arranged in the following classes:¹⁶ (1) Where the mortgagee made no inquiry for them, he has been postponed to a subsequent mortgagee who has obtained possession of them believing that the land was unencumbered; (2) Where the first mortgagee made inquiry for them and received a reasonable excuse for their non-delivery, he has not been postponed to a subsequent mortgagee who acquired the possession; (3) Where the first mortgagee has received a part of the deeds under the reasonable belief that he was receiving all of them, he has not been postponed to a subsequent mortgagee or purchaser who had no notice of the first mortgage; and (4) Where the first mortgagee has left the deeds in the hands of the mortgagor for the purpose of enabling him to borrow on the security of the land, he has been postponed to a subsequent mortgagee notwithstanding that the mortgagor has exceeded his authority, if such was true, in making the second mortgage.

The cases where the first mortgagee has received the title deeds but has subsequently returned them to the mortgagor, who has deposited them with a second mortgagee as security for a loan, may be classified as follows: (1) Where the deeds have been returned to the mortgagor upon a reasonable representation made by him as to the object in borrowing them, the mortgagee has not been postponed to a subsequent mortgagee or purchaser;¹⁷ and (2) Where the deeds have been returned to the mortgagor for the purpose of borrowing upon the security of them, but with the expectation that the mortgagor would disclose the existence of the prior mortgage, the first mortgagee has been postponed to the second mortgagee.¹⁸ It is difficult to reconcile these two classes of cases.

¹⁶ Northern Counties of England Fire Ins. Co. v. Whipp [1884] L. R. 26 Ch. Div. 482, 491, 492, and cases cited.

¹⁷ Martinez v. Cooper, 2 Russ. 196 (1826) (Delivery of deeds to mortgagor in order that they might be shown to an intending purchaser, who wished to see what the covenants were; purchaser bought without knowledge of the mortgage).

¹⁸ Briggs v. Jones [1870] L. R. 10 Eq. Cas. 92.

In each the first mortgagee has made it possible, by a surrender of the deeds, for the mortgagor to make the mortgage to a *bona fide* second mortgagee. In each instance the mortgagor has violated the trust reposed in him. There is this difference, however. In the second instance, the mortgagor uses the deeds for the purpose intended.

The general rule being, as above discussed, that as between competing equitable interests, he who is prior in time will prevail unless, by his representation or conduct, he has misled the later incumbrancer or purchaser, a qualification has been suggested to the effect that the equitable interests should be acquired from the same person,¹⁹ and that if acquired from different persons the subsequently acquired interest should be protected in favor of one who acquires it *bona fide* and for value. Thus, if *B*, a trustee for *A*, makes an equitable mortgage to *E*, the *cestui que trust* and *E* each have an immediate equity against *B*. *E* will be postponed to *A* because no interest passed to *E*. It is argued, also, that "since the rights of each are mutually exclusive, so far as equitable relief against the trustee is concerned, it is only fair that he who first secured his right should prevail."²⁰ On the other hand, if *A*, who holds an equity of redemption in trust for *B*, conveys his equitable interest to *G* for value, and *G* takes without notice of *B*'s claim, *G* would take free from such claim.²¹ "In such a case the personal right in favor of *B* against *A* to enforce a trust is not in its nature exclusive of a like personal right in favor of the purchaser against the legal owner, and consequently there would

¹⁹ Ames, Purchaser for Value Without Notice, 1 Har. L. Rev. 1, 8, 9.

²⁰ Note, 24 Har. L. Rev. 490, 491.

²¹ The English cases reach the same result whether the equities are, or are not, mutually exclusive. See *Cave v. Cave* [1880] L. R. 15 Ch. Div. 639. This is said to be in accord with the English doctrine that the assignee of a chose in action takes subject to all prior equities against the assignor. Note, 24 Har. L. Rev. 490, 491. In *Cave v. Cave* the trustee of an equity of redemption assigned it to a purchaser for value without notice; the latter was postponed to the *cestui*. Here the *cestui*'s right is one against the fraudulent assignor; and the assignee's right is against the legal owner. So these rights are not mutually exclusive, because they are against different persons. Note, 24 Har. L. Rev. 490, 491.

seem to be no reason that the former, though earlier in time, should exclude the latter, though such rights against the *same* person in regard to the land are necessarily exclusive one against the other, and, consequently, it is proper to prefer the one which was the first acquired. This view . . . conforms in principle with the doctrine, more generally accepted in this country, that the assignee of a chose in action, for value and without notice of the equities in a third person, takes free of such equities.”²²

Where there is a contest between the claimant of a legal interest in certain land and the claimant of an equitable interest, both of which the same transferor purported to create, the normal basis of priority is order of time.²³ “Here, however, the doctrine of *bona fide purchaser* may reverse the order. If the transferee of the legal estate was a purchaser for value without notice he will be preferred even as against the older equity.”²⁴ A court of equity will not deprive a defendant of his subsequent original purchase of a legal interest in an estate for value without notice of the plaintiff’s prior equitable interest. The scope of operation of this doctrine includes a mortgagee, for he is considered as a purchaser *pro tanto*.²⁵

“It is sometimes said, in the most unlimited terms, that a purchase for a valuable consideration, and without notice of any kind of interest, is a defense under all circumstances, which constitutes a complete and absolute bar to every

²² 2 Tiffany, *op. cit. supra* note 5, at § 566.

²³ Aigler, *op. cit. supra* note 1, at p. 406.

²⁴ *Op. cit. supra* note 23.

“Nor will this court permit the party having the subsequent equity to protect himself by obtaining a conveyance of the legal title, after he has either actual or constructive notice of the prior equity. . . . To protect a party, therefore, and to enable him to defend himself as a *bona fide* purchaser for a valuable consideration, he must aver in his plea, or state in his answer, not only that there was an equity in himself, by reason of his having actually paid the purchase money, but that he had also clothed his equity with the legal title before he had notice of the prior equity.” Per Chancellor Walworth, in *Grimstone v. Carter*, *op. cit. supra* note 5, at pp. 436, 437.

²⁵ *Willoughby v. Willoughby*, 1 T. R. 763 (1756), per Lord Chancellor Hardwicke.

species of adverse claim, legal or equitable, or to obtain any species of relief. There are *dicta* of the ablest judges, which, taken literally, without limitation, would go far to sustain this view . . . Such modes of declaring the doctrine plainly need some limitation and restriction. Taken in their literal and unqualified form, they are opposed to conclusions established by an overwhelming weight of judicial authority, and to the settled practice of courts of equity.”²⁶

“The protection given to the *bona fide* purchaser had its origin exclusively in equity,²⁷ and is based entirely upon the fact that the jurisdiction of equity is ancillary and supplemental to that of the law, and upon the conception that a court of chancery acts solely upon the *conscience* of litigant parties, by compelling the defendant to do what, *in foro conscientiae*, he is bound to do . . . The protection given to the *bona fide* purchaser simply means . . . that from the relations subsisting between the two parties . . . equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so, and the parties must be left to their pure legal rights, liabilities and remedies . . . In the vast majority of cases the protection is only given to a defendant, and as a consequence the doctrine itself is commonly spoken of, and ordinarily treated, as essentially a matter of defense.”²⁸ The

²⁶ Pomeroy, *op. cit. supra* note 12, at § 737.

²⁷ “The doctrine of bona fide purchaser originated in equity jurisprudence. . . .” Per Thomas, J., in *Starr Piano Co. v. Baker*, 62 So. 549 (Ala. App. 1913).

²⁸ In *Phillips v. Phillips*, 4 De G. F. & J. 208, 217, 218 (1861), Lord Westbury groups the cases in which the plea of *bona fide purchaser* for value without notice would be a bar to equitable relief into three classes: (1) Where an application is made to the auxiliary jurisdiction of the court by the possessor of a legal title, as in bills for the surrender of title deeds belonging to the plaintiff—a rule that does not apply where the court exercises a legal jurisdiction concurrently with courts of law; (2) Where a person, who has purchased an equitable interest in land without notice of a prior equitable interest therein held by another person, subsequently acquires an outstanding legal interest in his own right, he will not be deprived of this advantage by a court of equity—a doctrine known as *tabula in naufragio*; (3) Where the plaintiff seeks to enforce some equity, as an equity to set aside a deed for fraud, the plea of *bona fide purchaser* is a defense. The

very few instances²⁹ in which affirmative relief is granted to the *bona fide* purchaser are exceptional; they rest upon their special facts, and arise from the fraud of the defendant against whom the relief is awarded.”³⁰

The doctrine of *bona fide* purchaser is not a rule of property. The application of the doctrine does not determine the question of title between the parties. As a general rule, equity simply refuses to interfere and do an *unconscientious* act by depriving a defendant of the advantage accompanying the purchase of the legal interest made in good faith and for value. So the doctrine is generally applicable as a shield in the hands of a defendant, to protect him against the claim asserted by his adversary.³¹

It is well settled that a *bona fide* purchaser of a legal interest in land will not be deprived thereof at the instance of the holder of a prior equitable interest. “The typical case of protection of an innocent purchaser is the case where the defendant has bought a legal title from a fraudulent trustee or vendee.”³² But the *bona fide* purchaser of property is protected not only against the equitable claim of a

term “equity” is used in contra-distinction to “equitable estate.” Lord Westbury does not include that class of cases where the purchaser acquires the legal interest from a misconducting trustee without notice of the trust.

“The rule as to proof of bona fide purchase is that the party pleading it must first make out satisfactory proof of purchase and payment. This is affirmative, defensive matter, in the nature of confession and avoidance, and the burden of proving it rests on him who asserts it. . . . This done, he need go no further, and prove he made such purchase and payment without notice. The burden here shifts, and if it be desired to avoid the effect of such purchase and payment, it must be met by counter proof, that, before the payment, the purchaser had actual or constructive notice of the equity or lien asserted, or, of some fact or circumstance, sufficient to put him on inquiry, which, if followed up, would discover the equity or incumbrance.” Per Stone, J., in *Barton v. Barton*, 75 Ala. 400, 402 (1883).

²⁹ See illustrations in Pomeroy, *op. cit. supra* note 12, at §§ 780-784.

³⁰ Pomeroy, *op. cit. supra* note 12, at § 738.

³¹ *German Savings & Loan Soc. v. De Lashmutt*, 67 Fed. 399 (1895), per Bellinger, J.; Pomeroy, *op. cit. supra* note 12, at § 739.

³² Ames, *op. cit. supra* note 19, at p. 4.

cestui que trust but against all sorts of equitable claims to the land.³³ And the same doctrine applies to protect the *bona fide* purchaser of chattels.³⁴

It is not essential "that the innocent purchaser obtain the entire legal interest in the property, either in quantity or duration. The purchaser of an aliquot part of the estate, the grantee for value of a rent charge, or the lessee for value, may keep the interest actually acquired from the fraudulent legal owner."³⁵ "Closely akin to a lessee's right is the interest of a pledgee. His right is a legal right *in rem*, and fundamentally different from the lien of an equitable incumbrancer, which is a right *in personam*. The innocent pledgee of a chattel may, therefore, retain his pledge until the claim thereby secured is satisfied."³⁶

A *bona fide* purchaser will, furthermore, be protected as against a prior equity, although he did not obtain the legal interest at the time of his purchase, if he acquired an irrevocable power to acquire the legal interest upon the performance of some condition. The fact that he receives notice of the prior equity before performance of the condition is immaterial.³⁷ In *Dodds v. Hills*³⁸ a trustee of shares in a company wrongfully pledged them to *E* and executed a power in him to register himself as owner of them. When this arrangement was made *E* had no notice of the trust; and, after having received notice thereof, he

³³ Clark, Principles of Equity, § 85.

³⁴ *White v. Garden*, 10 C. B. 919 (1851) (One *P* obtained goods by fraud and then sold them to a *bona fide* purchaser); see Vold on Sales (Hornbook Series) pp. 377-380.

³⁵ Ames, *op. cit. supra* note 19, at p. 4.

³⁶ Ames, *op. cit. supra* note 19, at p. 4.

"Title-deeds are, it is true, so far accessory of the title to the land as to pass with it to the grantee, although not mentioned in the deed of conveyance. But they are not inseparably attached to the title. The owner of the land may sever them, if he will, and dispose of them as chattels. If, therefore, the owner of land, after creating an equitable incumbrance in favor of *A*, should subsequently give *C* an equitable mortgage by a deposit of the title-deeds, *A* could not compel the surrender of the deeds by *C*, if the latter had no notice of the prior incumbrance." Ames, *op. cit. supra* note 19, at pp. 4, 5.

³⁷ Ames, *op. cit. supra* note 19, at p. 5.

³⁸ 2 H. & M. 424 (1865).

registered the transfer. The court refused to deprive the lender of his security.³⁹ A purchaser for value and without notice of a prior equitable interest in land will be protected in equity not only where he has obtained the legal interest or acquired an irrevocable power to call for it but also where he has the better right to call for the legal interest than his adversary.⁴⁰ A court of equity will not interfere against him, at the instance of the one having a prior equitable interest, according to the maxim that where the equities are equal, the law shall prevail. Where the purchaser has acquired the legal interest he will be entitled to priority at law, as well as in equity.

The protection given to a defendant under the *bona fide purchaser* doctrine has not been confined to a defendant who has obtained the legal interest contemporaneously with his original purchase or to a defendant who has acquired an irrevocable power to obtain the legal interest or has a better right to call for it than his adversary. Cases have been included within the scope of operation of the doctrine where it has been necessary to determine the order of priority as between a complainant who has a prior equitable interest in land and a defendant who, having originally been the *bona fide* purchaser of a subsequent equitable interest, has afterwards acquired the legal interest. The "most frequent instance in England is that of three or more successive mortgages by conveyance, *A*, *B*, and *C*, where the first only would obtain the legal estate and the others an equitable one. If *C*, at the time of loaning his money and taking his mortgage, has no notice of *B*'s prior incumbrance,—that is, was a *bona*

³⁹ ". . . the lender [*E*] was able to complete his title under the power without further assistance from the delinquent trustee. If the lender required the performance of some further act on the part of the trustee to complete his title, and if before such performance he received notice of the trust, the loss would fall upon him; for in the case supposed he could not obtain the title without making himself a party to the continuance of the breach of trust." Ames, *op. cit. supra* note 19, at p. 6, note 1.

⁴⁰ *Town of St. Johnsbury v. Morrill*, 55 Vt. 165, 168 (1882), per Judge Powers.

fide purchaser of the equitable estate,—on afterwards learning of *B*'s claim,⁴¹ he may buy in or procure a transfer of *A*'s mortgage to himself, and may thus put himself in a position of perfect defense against the enforcement of *B*'s lien; he thus acquires, in fact, not only a defense to any suit brought by *B*, but the absolute precedence over *B* in the satisfaction of the liens out of the mortgaged premises. This particular application of the doctrine to successive mortgages is known in the English equity as the rule concerning 'tacking' . . .⁴²

A series of rules on the doctrine of tacking were laid down in *Brace v. Duchess of Marlborough*.⁴³ (1) If a "third mortgagee buys in the first, though pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee shall tack the first mortgage to his third mortgage;" (2) "If a creditor by judgment, statute, or recognizance buys in the first mortgage, he shall not tack it to his judgment,

⁴¹ If "the prior claimant is a *cestui que trust*, and the title of the purchaser is thus subject to a trust either express or implied, he cannot, after notice of such a defect, protect himself by acquiring the legal estate from the trustee." Pomeroy, *op. cit. supra* note 12, at § 769.

⁴² Pomeroy, *op. cit. supra* note 12, at § 768.

"It is the established doctrine in the English law that if there be three mortgages in succession, and all duly registered, or a mortgage, and then a judgment, and then a second mortgage upon the estate, the junior mortgagee may purchase in the first mortgage, and tack it to his mortgage, and by that contrivance 'squeeze out' the middle mortgage, and gain preference over it. The same rule would apply if the first as well as the second incumbrance was a judgment; but the incumbrancer who tacks must always be a mortgagee, for he stands in the light of a *bona fide* purchaser, parting with his money upon the security of the mortgage. . . . The courts say, that up to the time of the decree settling the priorities, the party may tack, or struggle for the *tabula in naufragio*. The English doctrine of tacking was first solemnly established in *Marsh v. Lee* [2 Vent. 337 (1671)] under the assistance of Sir Matthew Hale, who compared the operation to a plank in a shipwreck gained by the last mortgagee; and the subject was afterwards very fully and accurately expounded by the Master of the Rolls, in *Brace v. Duchess of Marlborough* [2 P. Wms. 491 (1728)]." 4 Kent's Comm., 12th ed., 176, 177.

"It is essential to the existence of this equity that there shall be legal right in the party claiming to tack, or such superior equitable right as gives him a preferable claim to the legal estate; that both the claims shall be vested in him in the same character, and not one in his own right, and the other as executor or trustee; and that the advance, in respect to which the equity is claimed, shall have been made expressly or presumptively on the credit of the estate, without notice of the mesne equity." Adams, *op. cit. supra* note 4, at p. 333.

⁴³ *Op. cit. supra* note 42.

etc., because he did not lend his money on the credit of the land, has no present right therein, nor can he be called a purchaser;” (3) If “the first mortgagee lends a further sum to the mortgagor upon [the security of] a statute or judgment, he shall retain against the mesne mortgagees till the statute or judgment is paid [but the advance must be made without notice, actual or constructive, of such mesne incumbrance];” (4) “If a puisne incumbrancer [*e. g.*, a fourth mortgagee] buys in a prior mortgage [*e. g.*, a second mortgage], and the legal title be in a trustee or in any third person [*e. g.*, a first mortgagee], then the buying in such first prior mortgage will not avail,” since the legal interest is outstanding. A corollary of the third rule has been suggested, *viz.*, “that if the first mortgagee takes, without notice, an assignment of the third incumbrance, the latter incumbrance takes precedence over the second.”⁴⁴

In *Peacock v. Burt*⁴⁵ one *R*, owner in fee of certain land, executed a legal mortgage to *E-1*, who assigned the mortgage to *A*. Subsequently, *R* assigned his equity of redemption to *E-2*, who gave written notice of her mortgage to *A*. *A* afterwards made a further advance to *R*, which, by an indenture, *R* charged on the same land. Then *A* joined with *R* in executing a transfer of and further charge on the land in favor of *E-3*, without informing the latter of the intervening incumbrance.⁴⁶ It was held that *E-3*, who had

⁴⁴ Campbell, *Cases on Mortgages*, 408, note 1.

⁴⁵ 4 L. J. (N. S.) Ch. 33 (1834).

⁴⁶ Professor Ames said that this was not a case involving the doctrine of tacking, but that the situation was the same in substance as if *A* had reconveyed to *R* and *R* had then made a legal mortgage to *E-3*. Ames, *op. cit. supra* note 19, at p. 15, note 5.

The first rule of tacking gives a first mortgagee a power to deal with a third mortgagee or a grantee, where a second mortgagee exists, in a capricious manner. Also, it is contra to the general rule that a prior *equity* cannot be “squeezed down” by a purchaser getting in the legal interest with notice of such equity.

Since *E-2* had given notice to *A*, should he be protected under the doctrine of *Dearle v. Hall*, 3 Russ. 1, 48 (1828)? *Peacock v. Burt* goes further than *Dearle v. Hall* because in the former case *E-3* acquired the legal title; it involves real

obtained the legal estate, was entitled to priority over *E-2*. If *E-3* had merely purchased *A*'s interest and taken a transfer thereof he would have had priority over *E-2* regardless of the doctrine of tacking. But as to the further charge created in favor of *E-3*, we have involved an application of the third rule of tacking. *E-3* made this advance without notice of *E-2*'s incumbrance and obtained the legal interest in the land. When *E-3* became assignee of *A* the sum that *A* advanced to *R*, after he had received notice of *E-2*'s mortgage, became a prior charge on the land in favor of *E-3*. It was not material whether *E-3* paid by making an advance to *R* or by taking an assignment from *E-1*. The latter method of paying involves an application of the corollary to the third rule of tacking.

"The assumed equity of the principle [of tacking] is, that the last mortgagee, when he lent his money, had no notice of the second incumbrance; and the equities between the second and third incumbrancers being equal, the latter, in addition thereto, has the prior legal estate or title, and he shall be preferred."⁴⁷ But it is assuming too much to say that the rights of these two incumbrancers are equal. The second mortgagee is prior in point of time, and, considered abstractly, seems to have an equal *equity* so that the maxim, *qui prior est tempore, potior est jure*, applies as to the third incumbrancer. By acquiring the first mortgage, the third mortgagee acquires, by substitution, the rights of the first mortgagee in respect to the security held by him, and he justly acquires nothing more.⁴⁸

estate. The doctrine of the latter case was considered inapplicable to equitable interests in land until the passage of The Law of Property Act, 1925, 15 Geo. V, c. 20 § 137, which changed the rule so as to include such interests within the operation of that doctrine.

⁴⁷ Kent, *op. cit. supra* note 42, at p. 177.

⁴⁸ In *Wortley v. Birkhead*, 2 Ves. Sen. 571, 574 (1754), Lord Hardwicke discussed the doctrine of tacking as follows: "It [the rule that a third mortgagee having taken his mortgage without notice of a second mortgage on the land, then purchases the first mortgage on the property, shall take priority over the second mortgage] could not happen in any other country but this; because the jurisdiction of law and equity are administered here in different courts, and creates

The doctrine of tacking applies to all property, real or personal.⁴⁹ "The application of the doctrine of tacking to personalty [in England] is to a great extent excluded by the rules as to priority by notice in case of mortgages of choses in action and equitable interests in funds . . . and by statutory regulations as to priority by registration in cases of mortgages of chattels and ships."⁵⁰

"Protection by tacking was abolished [in England] by the Vendor and Purchaser Act, 1874 . . . but this enactment was repealed as to England by the Land Transfer Act, 1875 . . . and as to Ireland by the Conveyancing and Law of Property Act, 1881 . . . Tacking is not applicable to registered charges under the Land Transfer Act, 1875 . . . By the Yorkshire Registries Act, 1884 . . . no priority or protection by legal estate or tacking is given or allowed after the commencement of the Act . . . Registration in Middlesex is not notice, and the general rules as to tacking apply to mortgages of lands in that country . . . The doctrine of tacking is virtually excluded in Ireland by the Irish Registry Act (6 Ann., c. 2) . . ."⁵¹ It has been abolished in England, except in certain situations, by the Law of Property Act, 1925, sec. 90.

In the United States the doctrine of tacking is generally rejected. It has been criticised on the ground that it is inconsistent with principles of equity.⁵² The doctrine could have no application in a "lien" jurisdiction for the mortgagor remains the *legal*, as well as the *equitable*, owner of the mortgaged premises subject to the *legal lien* of each mortgagee. Even in a "title" state the first mortgagee (legal)

different kind of rights in estates. And, therefore, as courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates . . . if the law and equity are administered by the jurisdiction, the rule, *qui prior est tempore potior est jure*, must hold."

⁴⁹ In *Calisher v. Forbes*, L. R. 7 Ch. 109 [1871] an equitable incumbrancer of a fund was allowed to take a further advance as against *mesne* incumbrancers.

⁵⁰ Note, 18 Eng. Rul. Cas. 526.

⁵¹ Note, 18 Eng. Rul. Cas. 526, 527.

⁵² Campbell, *op. cit. supra* note 44, at p. 409, note 3.

acquires only a *qualified* legal interest which is not as complete as that normally acquired under the English law. In this class of jurisdictions the subsequent mortgagees (legal) acquire *legal liens*, and, as the doctrine of tacking only applies so as to cut off *mesne* equities, it would be inapplicable. The recording of the *mesne* incumbrance, if it is recordable, would render the doctrine inapplicable. Some of the recording statutes in this country authorize the recording of instruments evidencing equitable interests in land, including executory contracts for the sale of land. The result of compliance with the provisions of such a statute, by the transferee of a *mesne* interest, would necessarily be a modification of the doctrine of tacking; and such transferee would take priority over a transferee of an interest in the land after that date. Where, however, the recording statute does not, either expressly or by implication, authorize the recording of an instrument evidencing an equitable interest in land, the doctrine would be inapplicable in the law of mortgages for the reason advanced above.

The doctrine of tacking is quite distinct from, and depends upon a different principle from, that which governs in consolidation of incumbrances. The two doctrines have, in some respects, a similar effect, and consolidation has been referred to as a form of tacking.⁵³ Tacking is the uniting of two or more debts charged on the same property. Consolidation is the right of one who has acquired two or more mortgage debts respectively charged on different properties, under mortgages made by the same mortgagor, to refuse to be redeemed as to one of these mortgages unless redeemed as to the other or others.

“If a trustee in violation of his trust mortgages trust property to *X* and then gives a second mortgage—*i. e.*, mortgages the equity of redemption—to *Y*, it is clear that the doctrine of *bona fide* purchaser for value applies to *X* because he gets

⁵³ See *Selby v. Pomfret*, 3 De G. F. & J. 595 (1861).

legal title; as to whether it applies to *Y* also there is a conflict of authority. Decisions which protect the *cestui* against the purchaser are usually supported on the basis that the *cestui's* right has ceased to be merely that of a claimant against the trustee and has become a property right which can be cut off only by a transfer of the legal title by the trustee. Decisions which protect the purchaser against the *cestui* are usually justified on the ground that the doctrine of *bona fide* purchaser for value without notice is a salutary one and should be extended to protection of other property rights than legal interests.”⁵⁴

II.

Under the *bona fide purchaser doctrine notice*⁵⁵ is of importance as affecting priority of right. Also, in determining whether competing equities are *equal* or *unequal*, notice plays an important part. But, under the doctrine of tacking, it was settled in England that a *bona fide* purchaser of an equitable interest, without notice of a prior equitable interest outstanding, might, even on subsequently receiving notice of this interest, acquire the outstanding legal interest and thus obtain priority over the transferee of the *mesne* interest.⁵⁶ The general doctrine as to the effect of notice on priority of right is stated to be that a transferee of a legal or equitable interest in land, even for a valuable consideration, but with notice that another person has already received a transfer of an equitable interest in the same property, created by the same transferor, takes his interest subject to the prior one.⁵⁷ On the other hand, the transferee of a legal interest, who paid a valuable consideration therefor

⁵⁴ Clark, Principles of Equity, § 304.

The question as to what would be the effect of notice of a *mesne* equitable interest in mortgaged land, where a first mortgage (legal) includes future advances within its security and the mortgagee lends a further sum to the mortgagor after he has such notice, will be considered *infra*.

⁵⁵ The question as to what constitutes “value” will be considered *infra*.

⁵⁶ Pomeroy, *op. cit. supra* note 12, at § 769.

⁵⁷ Pomeroy, *op. cit. supra* note 12, at § 591.

but who had no notice of an outstanding equitable interest existing in favor of another transferee, created by the same transferor, takes free from the prior equitable interest.⁵⁸

At an early date Lord Hardwicke, in *Le Neve v. Le Neve*,⁵⁹ stated the doctrine to be that the transferee of a legal interest, although for a valuable consideration, who has notice of an outstanding competing equitable interest, is not entitled to priority over that interest for the notice makes the transferee of the legal interest a *mala fide* purchaser; that this is a species of fraud. But Lord Hardwicke was considering a case involving a construction of the statute of 7th Anne, c. 20, which was designed to protect subsequent purchaser and mortgagees against prior secret conveyances and fraudulent incumbrances. Both the preamble and the body of this statute show that it was enacted to prevent fraud.⁶⁰ But it is too much to conclude from this decision that the whole *bona fide purchaser* doctrine is based upon *fraud*. Lord Hardwicke was considering the effect of an *actual* notice, which might be considered as a species of fraud. But the decisions certainly show that the notice which is sufficient to affect the priority of right as between competing interests may fall short of constituting *fraud*.

There may be a sufficient notice under the *bona fide purchaser* doctrine to affect priority of right without there being *knowledge*. For instance, the record of a deed or mortgage, when properly made, is constructive notice to all subsequent purchasers and mortgagees; but such subsequent transferees may not have knowledge of the existence of the prior competing interest or its contents. The effect is the same as if the subsequent transferee did have such knowledge. On the other hand, if a prior transfer is not properly recorded, the record will not constitute constructive notice to subsequent transferees; yet, the subsequent purchaser or

⁵⁸ *Op. cit. supra* note 57.

⁵⁹ Amb. 436 (1747).

⁶⁰ Webb on Record of Title, § 215.

mortgagee may have knowledge of the prior transfer, obtained either from an examination of the record that is made or from other reliable sources. Such knowledge would be sufficient to preserve the position of advantage acquired by the first transferee.

Notice has been classified as *actual*, *implied* and *constructive*,⁶¹ but there is no difference between them as to its consequence. The decisions show that there is a want of pre-

⁶¹ "The term constructive notice, or some similar term, ought to be applied exclusively to the notice that is imparted by the record, which is absolute and need not in any sense or degree be actually communicated. . . . where notice is imputed from facts and circumstances not amounting to knowledge, nor justifying the inference of actual personal knowledge, but is presumed from information such as imposes the duty of inquiry, it is often termed constructive notice, and is in this sense but a degree of actual notice in its broader meaning. The fact of actual possession may be entirely unknown to an adverse party, and yet by it, under the general rule, he is constructively charged with actual notice of the possessory title, as distinguished from notice by a record of that title. The notice in these last instances is sometimes, and without doing violence to the meaning of words, called implied notice; but as used in the law-books this term is ordinarily applied to that notice which is imputed by law to the principal, because his agent has knowledge, or is affected by matter of fact in any other form or degree sufficient to charge notice. . . . Actual notice is more frequently spoken of in its general sense as contra-distinguished from notice by the record, but in a more limited sense, and as distinguished merely from the implied and constructive notice last referred to. In this sense it means that the facts upon which notice is predicated in some manner directly tend to show that information of the adverse right was personally brought home to the consciousness of the party charged." Webb, *op. cit. supra* note 60, at § 221.

"There are two classes of actual notice, which for convenience may be designated as 1. *Express*, which includes all knowledge or information coming to the party to be charged, of a degree above that which depends upon collateral inference, or which imposes upon him the further duty of inquiry; and 2. *Implied*, which imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them. In other words, where he chooses to remain voluntarily ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest. . . . It [implied notice] differs from express notice for the reason that the latter is supposed to be absolutely convincing in itself, while the former merely suggests to the mind of the person to be thereby affected, the existence of the fact to which his attention is directed, and points out the means by which he may obtain positive and convincing information. It differs on the other hand from *constructive* notice, with which it is frequently confounded, and which it greatly resembles, with respect to the character of the inference upon which it rests; constructive notice being the creature of positive law, or resting upon strictly *legal* inference, while implied notice arises from inference of *fact*." Wade on the Law of Notice, §§ 5, 8.

"Legal or implied notice . . . is the same as constructive notice, and cannot be controverted by proof." Per Selden, J., in *Williamson v. Brown*, 15 N. Y. 354, 359 (1857)

cision in the use of these terms by the courts, especially, in the use of the latter two. The difficulty has arisen in connection with the proof of notice, where there is no actual knowledge of a prior competing interest in the property involved in the particular action or suit. There is, also, a great diversity of opinion among text-writers in determining what kinds of notice come within each of the three classes. The diversity of opinion which exists as to the particular kinds of notice that come within each of the three classes, into which notice has been divided by some judges and text-writers, is not of practical importance. The important problem is to determine what constitutes a sufficient notice, where there is no positive information that a prior competing interest in the property exists. Where there is positive information there is actual notice; but where there is no positive information, there are still certain situations in which the facts are sufficient to charge a subsequent mortgagee or other purchaser with notice. The difficulty exists in the latter factual situations and it is with these that the writer is mainly concerned in this discussion. Professor Pomeroy divides notice into two general classes, actual and constructive;⁶² and this classification is made by many judges. The latter class includes all of those cases where there is no positive information that a prior competing interest in the property exists, yet, the factual situation is such as to warrant the conclusion that the subsequent transferee of an interest in the property had notice of such prior interest.

Where notice is *actual*, knowledge is generally a necessary resultant. Some authorities proceed upon the theory the actual notice and actual knowledge mean the same thing, in cases where it is necessary to determine what the expression "actual notice," as it is used in the recording statutes, means. In *Lamb v. Pierce*⁶³ Morton, J., goes so far as

⁶² Pomeroy, *op. cit. supra* note 12, at § 593.

⁶³ 113 Mass. 72 (1873).

to say that, although the party taking the second transfer of property had knowledge of the existence of a prior competing interest, as it was not proved that he had knowledge that a deed had been given to the first transferee, he was not chargeable with *actual* notice of the deed. The Massachusetts statute required *actual* notice in order to affect priority of right as between competing interests. *Constructive* notice of an unrecorded transfer would not be sufficient to preserve the position of advantage of the transferee under such a transfer; the subsequent *bona fide* purchaser for value would be entitled to priority. Proof of open and notorious occupation and even of improvement, or of other facts which would be reasonably sufficient to put a purchaser upon inquiry, are not sufficient to affect the matter of priority, according to this view.

Other authorities take a more liberal view in defining "actual notice," where that expression is used in the recording statutes. They advance the theory that the recording statutes were intended to protect only those who purchase in good faith, and not to protect those who purchase *mala fide*. Yet it is recognized that when the term "actual notice" is used in a statute some effect must be given to it as meaning more than what would be sufficient as constructive notice.⁶⁴ Notice is held to be actual when the subsequent transferee of an interest in land has actual knowledge of such facts as would put a prudent man upon inquiry, which, if prosecuted with reasonable diligence, would lead to actual notice of the competing interest in the property. Where the intending subsequent transferee has such information it is his duty to make inquiry, and he is guilty of bad faith if he fails to do so; he will be charged with the actual notice that the law presumes he would have received if he had made the inquiry. For example, where constructive notice is sufficient, it is generally held that actual, open and visible

⁶⁴ See *Brinkman v. Jones*, 44 Wis. 498 (1878).

occupation of land by the transferee of an unrecorded interest therein, whether known to the subsequent transferee or not, is sufficient notice to such transferee of the interest of the prior transferee. Under the latter view as to the meaning of "actual notice," such occupation by the first transferee would not of itself be sufficient to affect priority of right as between him and a subsequent *bona fide* transferee for value. Something more is required; and it seems to be sufficient that the subsequent transferee knew of the occupation.⁶⁵ It is not necessary that he have actual knowledge of the precise claim of the prior transferee. Actual notice is not taken to mean the same thing as actual knowledge.

Actual notice is said to be information concerning the prior claim or interest; whereas, constructive notice assumes that no information concerning the prior claim or interest exists.⁶⁶ The distinction between the two classes of notice is said to depend upon the manner of obtaining information and not upon the amount of information.⁶⁷ In actual notice there is knowledge of the factual basis of the prior interest. It is said that actual notice may be established as a conclusion of fact either by direct or circumstantial evidence;⁶⁸ Whereas, constructive notice is said to be that where information is inferred by operation of legal presumptions.⁶⁹ The legal presumption of notice exists where the intending subsequent transferee of an interest in a certain tract of land either has information of certain facts which, while they are not sufficient of themselves to constitute actual notice of a prior competing interest, are sufficient to put a prudent person upon an inquiry as to the existence of the prior interest which *does* exist, or where certain facts do exist concerning

⁶⁵ See *Brinkman v. Jones*, *op. cit. supra* note 64.

⁶⁶ *Pomerory*, *op. cit. supra* note 12, at § 595.

⁶⁷ *Op. cit. supra* note 66.

⁶⁸ *Op. cit. supra* note 66.

⁶⁹ *Pomerory*, *op. cit. supra* note 12, at § 604.

the prior interest which, while the intending subsequent transferee does not know of them, are sufficient as a matter of law to preserve the position of advantage obtained by the prior transferee. If, for instance, *G* is negotiating for the purchase of Blackacre from *R* and he sees or learns that the land is not in *R*'s possession but is possessed by a third person, this is sufficient to put *G* upon an inquiry as to the nature of the occupant's interest in Blackacre. On the other hand, in those jurisdictions where the possession of a third person is sufficient notice to an intending purchaser, without regard to whether he knows of the fact of possession, the legal presumption of notice arises apart from the lack of knowledge of the fact of possession. Likewise, the recording of a recordable instrument evidencing a prior interest in Blackacre is regarded as sufficient to preserve the position of advantage in favor of a transferee whether a subsequent transferee knows of the record or not. In the one class of cases the presumption is *prima facie* and, hence, rebuttable; in the other class, the presumption is absolute. Where rebuttable, the presumption of notice may be overcome by evidence showing that the inquiry was made and it failed to disclose the existence of any competing prior interest.⁷⁰

There is no general rule by which to determine when a *due inquiry* as to the existence of prior competing interests has been made. Professor Pomeroy has made the following classification of the authorities upon the subject of what constitutes a proper inquiry:⁷¹

(1) Where the prior interest is such as would ordinarily be evidenced by a recordable instrument, then a search of the proper record would be necessary to constitute a *due inquiry*; and if the record did not disclose the existence of the interest, the inquiry would generally be sufficient. But

⁷⁰ Pomeroy, *op. cit. supra* note 12, at § 607.

⁷¹ *Op. cit. supra* note 70, note 1.

where an intending transferee has information concerning some matter *in pais*, some interest *dehors* the record, or concerning some matter which would not necessarily be shown by the record, then a search of the records alone would not be *due inquiry*.

(2) An intending subsequent transferee who has received information concerning a prior interest in the property in controversy should seek information from his transferor.

(3) In some instances an examination of the record and a questioning of the vendor would not constitute a *due inquiry*. It is necessary, in such cases, to seek information from third persons. Where a third person is in possession of the land or is said to claim some interest therein, an inquiry from such person has been considered as being necessary to constitute a *due inquiry*.

Professor Pomeroy classifies the species of constructive notice where the presumption of notice may be overcome by *due inquiry* as follows:⁷²

(1) That where an intending transferee has information concerning certain matters *in pais*, which, although they do not directly tend to show the existence of a prior competing interest in the property in controversy, are sufficient to put him, as a prudent man, upon an inquiry concerning the same.

(2) That derived from the possession of some third person.

(3) To some extent, that derived from the pendency of an action affecting the property.

The same author classifies the species of constructive notice where the presumption seems to be absolute as follows:⁷³

(1) That derived from recordation of a recordable instrument.

(2) That derived from statutory *lis pendens*.

⁷² *Op. cit. supra* note 71.

⁷³ *Op. cit. supra* note 71.

(3) That derived from a recital or reference in an instrument forming an essential part of the intending transferee's title.

(4) That where notice has been given to the intending transferee's proper agent.

The aforementioned species of constructive notice will now be considered in some detail. Where a transferee of an interest in land has, at the time of the transfer, knowledge of certain matters *in pais*, which, although they do not directly show the existence of a prior competing interest, are sufficient to put him, as a prudent person, upon an inquiry concerning the existence and nature of the interest, a presumption arises that such transferee has obtained information of what he might have learned by making a *due inquiry*. Where a visible object or structure exists upon certain land which reasonably suggests the existence of a competing interest in the land, the subsequent transferee of an interest in the land is charged with constructive notice of the existence of that interest. It has been held, for example, that a graded railway track across a farm operates as constructive notice of the rights of the railway company to the purchaser of the land.⁷⁴ A mill race and dam have been held to operate as constructive notice of easements for the use of water rights encumbering the property.⁷⁵ A number of chimney-pots, visible on the roof of a house, being in excess of the flues belonging to the house, have been held to give notice to the purchaser of the house that there was an agreement to grant an adjoining property owner an easement for the purpose of the passage of smoke.⁷⁶

⁷⁴ Paul v. The Connorsville, etc., R. R. Co., 51 Ind. 527 (1875).

" . . . when a person purchases property where a visible state of things exists which could not legally exist without the property being subject to some burden, he is taken to have notice of the extent and nature of that burden." Per Brett, L. J., in Allen v. Seckham [1879] L. R. 11 Ch. Div. 790, 795.

⁷⁵ Raritan Water Power Co. v. Vegte, 21 N. J. Eq. 463 (1869).

⁷⁶ Hervey v. Smith, 22 Beav. 299 (1856).

The general system and practice of recording instruments in this country renders this species of constructive notice of little practical importance. The matter has been of greater importance in England due to the system of conveyancing used there. The most frequent cases involve the absence or non-production of title deeds. The inability of the transferor to produce the deeds, or knowledge on the part of the intending transferee that the deeds are in the possession of a stranger, indicates the existence of an outstanding interest in the land to which the deeds relate. Professor Pomeroy has classified the cases where this problem is involved as follows:⁷⁷

(1) Where the intending transferee knows that the deeds are in the possession of a third person; this is generally considered as operating to give constructive notice of the interest which such third person might have in the property to which the deeds relate, especially if the intending transferee intentionally omits to make any inquiry concerning the nature of the third person's possession.

(2) Mere absence or non-production of the title deeds is not now considered as operating to give constructive notice to the intending purchaser, if he in good faith inquires for them and is given a reasonable excuse for their non-production. Omission to make further inquiry is not the "culpable neglect" which the English cases now require, under such circumstances, to constitute constructive notice.

(3) Omission to make any inquiries concerning the title deeds relating to the property operates as constructive notice to the intending transferee; this is considered by the English cases to be "culpable negligence."⁷⁸

⁷⁷ Pomeroy, *op. cit. supra* note 12, at § 612.

⁷⁸ It is clear that there is no *negligence* in the cases dealing with the problem of constructive notice as that term is ordinarily understood. There is no duty on the part of a subsequent transferee to make any inquiry concerning the whereabouts of the title deeds such as would give rise to an action for damages for a failure to perform it. If it is a duty, it is not a duty owing to the transferee of a prior competing interest. It is merely the course which an intending subsequent

Where an intending transferee finds the apparent owner of property, with whom he is dealing, in possession of all of the deeds, he is in a position analagous to that of an intending transferee in this country who examines the record and finds the intending transferor's title free from competing interest.⁷⁹ In each instance, the intending transferee stands in a like position of advantage and protection.

An intending transferee of land is conclusively presumed to have notice of every matter connected with or affecting the property that appears, either by description of parties, by recital, by reference, or otherwise, on the face of any recordable deed which is recorded and which forms an essential link in the chain of instruments through which he must derive his title.⁸⁰ This rule applies to recorded instruments evidencing *equitable* interests in the property as well as to recorded instruments evidencing *legal* interests.⁸¹ Where the instrument evidencing the prior interest is not recorded but is referred to in the instrument evidencing a competing interest that is subsequently transferred to another person, the latter is chargeable with notice of the prior interest and takes subject thereto;⁸² and this would be so whether the prior instrument is recordable or not. For instance, if *E* takes a mortgage on Blackacre from *R* who claims Blackacre under a will, by which the land is encumbered with legacies in favor of *C* and *D*, *E* cannot deduce his title without the will, and therefore will be chargeable with notice of the interests of *C* and *D*.⁸³ The reason for these rules is that they give security in land ownership.⁸⁴

transferee, dealing *bona fide* and in the manner that a prudent person would deal for his own benefit, would follow with a view to his own security. Per Fry, L. J., in *Northern Counties of England Fire Ins. Co. v. Whipp*, *op. cit. supra* note 16.

⁷⁹ *Pomerory, op. cit. supra* note 12, at § 612, note 1.

⁸⁰ *Pomerory, op. cit. supra* note 12, at § 626.

⁸¹ Cf. *Digman v. McCollum*, 47 Mo. 372 (1871).

⁸² *Morrison v. Morrison and Berry*, 38 Iowa 73 (1874).

⁸³ *Thompson v. Blair*, 7 N. C. 583, 591 (1819), per Taylor, C. J.

⁸⁴ *Op. cit. supra* note 80.

This phase of the doctrine of constructive notice does not apply to collateral and immaterial instruments incidentally referred to, not relating to the title transferred, but only to the consideration.⁸⁵ Thus, if a *mesne* purchaser of Blackacre, as a part of the consideration for the purchase, conveys Whiteacre to his grantor, and the latter conveyance recites or refers to an instrument affecting the title to Blackacre, a subsequent purchaser of Blackacre is not chargeable with constructive notice of the instrument referred to in the deed of Whiteacre. Neither does the doctrine of constructive notice apply where the recital states nothing that would arrest the attention of a prudent person. "Thus, where the recital in a deed was in substance that it was made in pursuance of a contract with A, of whom the grantee was assignee, and as such entitled to the conveyance, it was held that the legal inference from the facts was in support of the title, and there was nothing therein imposing upon a *bona fide* mortgagee the duty of examining the contract of assignment for the purpose of ascertaining if there were latent defects in the title, or latent equities in favor of the assignor."⁸⁶

In England and in most jurisdictions in the United States the actual possession of real estate operates of itself as notice of the interest or interests in the property held by the occupant.⁸⁷ The doctrine is based upon the theory that an intending transferee will take the ordinary precaution

⁸⁵ *Kansas City Land Co. v. Hill*, 11 S. W. 797, 802 (1889), per Pitts, Spec. J.

⁸⁶ 1 *Beach on Modern Equity Jurisprudence*, § 357.

⁸⁷ *Webb, op. cit. supra* note 60, at § 228, and cases cited in the notes thereto. ". . . the effect of the constructive notice, due to possession, is a notice of everything which a party interested in the premises would get by inquiring of the party in possession. In other words, the actual possession of the premises puts any person . . . seeking to acquire title [to the premises] . . . to an inquiry of such person [the occupant of the premises] as to what his title actually is . . ." Per *Pitney, V. C.*, in *Essex County Nat. Bank v. Harrison*, 40 Atl. 209, 211 (N. J. Eq. 1898).

The same doctrine has been applied in this country under the Torrens Laws. *Follette v. Pacific Light & P. Corp.*, 208 Pac. 295, 23 A. L. R. 865. See note to this case in 23 A. L. R. 979 *et seq.*

See note, "Possession of Land as Notice of Title," 13 L. R. A. (N. S.) 49-140.

to learn what the situation of the property actually is; and, if found to be occupied, he will institute an inquiry to ascertain by whom and in what right.⁸⁸ Such possession, in order to be sufficient to constitute notice, must be an actual, open, visible, and exclusive possession inconsistent with the title of the apparent owner by the record.⁸⁹ The possession must be unequivocal, and unambiguous. It is insufficient if equivocal, temporary, or occasional. It must be of a character which would put a prudent person upon inquiry; it must be such as to incite inquiry; it must indicate that some person other than he who appears by the record to be the owner has an interest in the property. The sufficiency of the facts depend upon a variety of circumstances. The ex-

⁸⁸ *Truesdale v. Ford*, 37 Ill. 210, 214 (1865), per Walker, C. J.

⁸⁹ In *Truesdale v. Ford*, *op. cit. supra* note 88, it was held that there was no error in giving the following instruction to the jury: "The mere piling of wood or lumber, or rails or offal upon a tract of land or lot, unaccompanied by any other act denoting ownership, is not such possession as would constitute notice to a *bona fide* purchaser of such tract of land or lot, unless such piling of wood or lumber should constitute, in the estimation of the jury, an open, visible and exclusive possession of the lot in the person piling such wood or lumber." In *Farmers State Bank of Eyota v. Cunningham*, 234 N. W. 320 (Minn. 1931), the plaintiff levied upon the interest of C in a tract of land and purchased the same on execution sale. This property adjoined a tract upon which C resided with his sons, C having purchased it from L and executed a contract for a deed thereto to his sons before the plaintiff levied upon it. The sons lived with their father and they did most of the farm work, the father working mostly about the barn. The court held that the question of whether the tract levied upon was in possession of the father under the unrecorded contract for a deed to the sons, or was in the possession of the sons, was for the jury to determine.

The use for which the land is adapted is of importance in determining whether there is occupation as distinguished from trespasses. For instance, in North Carolina, the annual making of turpentine on land constitutes possession. *Bynum v. Carter*, 4 Ired. Law 310 (1844). But the entry upon or acts upon the land may be upon so small a part thereof that it would amount to only an inadvertent encroachment without a claim of right, or be considered as permissive and not adverse. In the western states where, under the pre-emption laws, entries have been made upon public lands by persons unable to reduce the whole of the lands to actual occupation by fencing, *i. e.*, by enclosure, and cultivation, other acts of user have been considered sufficient, such as occupation of a portion of the tract and the blazing of trees, so as to mark the boundaries of the claim. See discussion in *Plume v. Seward*, 4 Cal. 96, 60 Am. Dec. 599 (1854). In Iowa the running of a plowed furrow around a tract of prairie land has been considered as a sufficient possession to operate as notice. *Buck v. Holt*, 74 Iowa 294, 37 N. W. 377 (1888). Laying down a sidewalk, and putting up of a real estate agent's signboard, announcing the vacant lot for sale, was held a sufficient notice in *Hatch v. Bigelow*, 39 Ill. 546 (1864).

tent and character of the property, and the uses to which it may be put, are matters of considerable importance in determining whether or not the occupancy of it is sufficient to put a purchaser upon inquiry.⁹⁰ Neither residence nor cultivation are necessary to constitute an *actual* possession, when the property is so situated as not to admit of any useful improvement, and the continued claim of the party is evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right.⁹¹

“There is a difference between that bare possession, without any claim of legal or equitable title to the land, such as may be eventually asserted under the statutes of limitation, and possession under color or claim of title. In the case of a naked trespasser, the possession must be defined by actual occupancy or inclosure, or at least by the existence of visible and definite boundary marks, since otherwise, unless it be by a statutory limitation of the amount that bare possession will give title to, there is nothing by which the possession can be constructively extended an inch beyond the actual occupancy.”⁹² This rule applies where the claim is not evidenced by a written instrument. “But where the possession is by virtue of some unrecorded instrument, or equitable claim of title, there is not in the nature of the case any reason why the rule as to its character and sufficiency should be different, whether it is invoked to charge notice

⁹⁰ Farmers State Bank of Eyota v. Cunningham, *op. cit. supra* note 89, at p. 231, per Wilson, C. J.

⁹¹ Royall v. The Lessee of Lisle and Others, 15 Ga. 545, 548 (1854), per Lumpkin, J.; The Lessee of Ewing v. Burnet, 11 Pet. 41, 53 (1837), per Mr. Justice Baldwin.

“This doctrine [that neither residence or cultivation is necessary to constitute the possession necessary to operate as notice] is obliged to be true, because it results from the necessity of the case. Suppose, for instance, in North Carolina, where the courts hold that the cutting of timber is not such an occupancy as would amount to an adverse possession, would it not be otherwise, if the pine land was appropriated, yearly, to the making of turpentine? And so, in the mountain districts of this State, the gold and copper mines are usually distinguished by the *number* of the lot on which they are found.” Per Lumpkin, J., in Royall v. The Lessee of Lisle and Others.

⁹² Webb, *op. cit. supra* note 60, at § 234.

or to support the statute of limitations. If the claim is by virtue of an unregistered conveyance, the possession, in either case, is usually held to extend to the limits defined in the written instrument, the same as if it were of record."⁹³

The rule is universal that if the possession be consistent with the recorded interest, it is no notice of an unrecorded interest. Where, for instance, a husband and wife are in possession of certain property, and the records disclose that they are tenants in common, the wife's possession does not operate as notice of an interest under an unrecorded quit-claim deed from her husband of an undivided one-half interest in the property. Her possession is not inconsistent with a continuance of the co-tenancy of her husband.⁹⁴ But there may be a visible or notorious change in the possession of the wife, sufficient to put an intending transferee of an interest in the property upon an inquiry as to whether there has been a transfer of an interest to her.

When the occupation of one person is not exclusive, but in connection with another, with whom there exists a relationship sufficient to account for the situation, and the circumstances do not suggest an inconsistent claim, then such a possession will not operate as notice of an interest not evidenced by a recorded instrument. A possession of this kind is neither open, notorious, nor unequivocal. Where a widow contributed a part of the purchase money of a farm, and her brother, who contributed the remainder, took title thereto in his own name without her knowledge, it was

⁹³ *Op. cit. supra* note 92.

Compare the early Texas statute providing that "the peaceable and adverse possession . . . as against the person having the right of action shall be construed to embrace not more than one hundred and sixty acres, including improvements, or the number of acres actually enclosed should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument." *Craig v. Cartwright*, 65 Tex. 413, 423 (1886).

⁹⁴ *Ildvedsen v. First State Bank of Bowbells*, 24 N. D. 227, 139 N. W. 105 (1912).

held that the fact that she lived on the farm with him did not give notice of her resulting trust to a purchaser from him.⁹⁵ The possession of a part of a house by a mother will not operate as constructive notice to a mortgagee of her son, who occupies the rest of the house and who has the record title to the whole, that the mother has a life estate in the part occupied by her, where there is nothing in the construction of the house to indicate separate possession by her.⁹⁶

The possession of land by a tenant or lessee operates as notice to subsequent transferees not only of interests connected directly with the lease but also of interest acquired by collateral agreements. This rule prevails both in England and in this country.

While the fact that a tenant is in possession operates as notice of his own interests, there is a conflict of opinion as to whether the possession also operates as notice of interests of persons through whom he claims. The English courts adopt the view that the tenant's possession does not operate to put a subsequent transferee upon an inquiry as to the lessor's title, since a tenant is not obligated to disclose to whom he pays rent, and it would be unreasonable to impute notice of a fact which might not be discoverable by inquiry.⁹⁷ Such a view seems to be inconsistent with the broad principle that the possession of tenant operates as notice of *all* of the interests which the tenant has obtained from the landlord-transferor and the rule that notice of the lease is notice of its contents,⁹⁸ for, if notice of the contents of the lease exists, there is a disclosure of the identity of the lessor and the situation is the same as if the landlord is in possession. The objection to this theory would seem to be that it builds one presumption upon another.

⁹⁵ *Harris v. McIntyre*, 118 Ill. 275, 8 N. E. 182 (1886).

⁹⁶ *Rankin v. Coar*, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661 (1890).

⁹⁷ *Hunt v. Luck* [1901] 1 Ch. Div. 45; Note, 12 Col. L. Rev. 549, 550.

⁹⁸ *Hall v. Smith*, 14 Ves. 426 (1807); Note, 12 Col. L. Rev. 549, 550.

If the first reason be unsupportable, the view that possession should not operate as notice where inquiry would be unavailing might be based upon the opinion prevailing in England that constructive notice is a conclusive presumption of law.⁹⁹ So the English courts, being confronted with the dilemma of holding that possession of a tenant furnishes absolute notice of the landlord's interest or no notice at all, prefer to take the latter position to avoid the hardship which the former would involve.¹⁰⁰ A more desirable solution of this problem would seem to be to the view that possession raises only a *prima facie* presumption that a subsequent transferee has notice of the interest of the landlord, which may be rebutted by proof that the lessee failed to disclose the identity of the lessor, or claimed the fee.¹⁰¹ If so, the transferee could hardly be required to investigate further. This solution would be satisfactory in a jurisdiction where, as in England, a long series of assignment of leases and sub-leases is not uncommon and where a tenant is qualified to impart information concerning the title of which possession is the main indication.¹⁰²

The English view that possession of a tenant does not operate to give notice of his landlord's interest has been adopted in some jurisdictions in this country.¹⁰³ The rule is enforced in some jurisdictions in this country because of

⁹⁹ "Constructive notice is the knowledge which the Courts impute to a person upon a presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him to further inquiry or from his wilfully abstaining from inquiry, to avoid notice." Per Farwell, J., in *Hunt v. Luck*, *op. cit. supra* note 97, at p. 52.

¹⁰⁰ Note, 12 Col. L. Rev. 549, 550.

¹⁰¹ Wade, *op. cit. supra* note 61, at § 286.

¹⁰² In *Edwards v. Thompson*, 71 N. C. 177, 181 (1874), Rodman, J., said: "The plaintiff further contends that the possession of Simon was notice only of Simon's estate and not of that of Thompson, his landlord. This contention is supported—or seems to be—by the English case of *Hanbury v. Litchfield*, 2 Mylne & R., 629, 633 . . . We apprehend that however reasonable that doctrine may be in England, where a long series of assignments and sub-leases is not uncommon, it has no application to the condition of things existing with us, where such things are almost unknown."

¹⁰³ Webb, *op. cit. supra* note 60, at § 236; Pomeroy, *op. cit. supra* note 12, at § 618.

considerations based upon our recording acts, which are designed to protect subsequent transferees of interests in land against latent equities.¹⁰⁴ A subsequent transferee is, by the law, referred to the record to ascertain the nature of the interest of the person in possession of land. If there is no instrument on record conveying an interest to the possessor, it has been suggested that such transferee can come to no other conclusion than that the person in possession has only such an interest as by the statute of frauds and perjuries may be conveyed without a writing, *viz.*, an estate under a lease or an estate at will. "In the greater number of American cases, however, it is held that a purchaser is bound to make inquiry from the tenant in possession with respect to *all* the rights and interests which he claims to have, and under which he occupies, and is presumed to know all the facts which he might have learned by such inquiry; he must pursue his inquiry to the final source of the tenant's right, and is thus affected with a constructive notice of the landlord's title and estate."¹⁰⁵

Where the tenant of a grantor remains in possession of land, after a transfer by the grantor, as tenant of the grantee, there is a conflict of authority as to whether or not the possession of the tenant operates as notice to a subsequent transferee of an interest in the property. One view, sustained by the weight of authority, is that the tenant's possession is not of itself notice of his new landlord's interest in the land.¹⁰⁶ The minority view is that the mere at-

¹⁰⁴ See *Beattie v. Butler*, 21 Mo. 313 (1855).

¹⁰⁵ *Pomeroy*, *op. cit. supra* note 12, at § 618.

This view appears to be based upon the theory that an inquiry from the tenant would probably disclose the existence of the landlord and the nature of his interest in the property. At least, such inquiry from the tenant would probably disclose the existence of the landlord, and, if so, the subsequent transferee would have to make inquiry from him in order to satisfy the requirement of due diligence.

¹⁰⁶ *King v. Paulk*, 85 Ala. 186, 4 So. 825 (1888); Note, 12 Col. L. Rev. 549, 551.

torment of the tenant to the grantee, without any apparent change of occupancy of the property, is constructive notice of the interest of the new landlord.¹⁰⁷

In some jurisdictions it has been decided that where a grantor of land remains in open, notorious, and exclusive possession thereof after a conveyance of the premises by him, such possession is sufficient to put a subsequent transferee of the same premises upon inquiry as to the equitable rights of such grantor.¹⁰⁸ These decisions have proceeded upon the theory that the fact of such possession is, of itself, inconsistent with the legal effect of the grantor's deed and the immediate right of possession by his grantee—a fact that should favor the presumption that some interest in the premises still remains in the grantor.¹⁰⁹ And this rule prevails even in a jurisdiction where a statute provides that “the property and possession of the grantor passes fully by his conveyance as if seisin had been formally delivered.”¹¹⁰ In other jurisdictions it has been decided that a continued possession by a grantor, after he has conveyed the property, does not operate as notice of any interest claimed by him. The reason generally assigned proceeds upon the ground that by his deed the grantor has in the most formal manner

¹⁰⁷ *Duncan v. Matula*, 26 S. W. 638 (Tex. Civ. App. 1894); Note, 12 Col. L. Rev. 549, 551.

“A difficult application of these principles [concerning the extent to which a tenant's possession operates as notice] was involved in the recent case of *Penrose v. Cooper* (Kan. 1912) 121 Pac. 1103, where a tenant of the grantor remained in possession as tenant of the grantee of an unrecorded deed, and the defendant occupied the position of a purchaser without actual knowledge of the deed. The court repudiated the narrow English view, and held that the possession of the tenant was presumptive notice of his new landlord's title. It apparently ignored, however, the fact that the tenancy had commenced prior to the making of the unrecorded conveyance, and that the defendant had knowledge of the original lease. . . . a purchaser who knows of a lease from his grantor to the tenant in possession should be entitled to rely upon his information without further inquiry, and to refer the tenant's possession to the previous lease, in the absence of any change of occupancy to arouse his suspicions.” Note, 12 Col. L. Rev. 549, 551.

¹⁰⁸ *Gewin v. Shields*, 187 Ala. 153, 65 So. 769 (1914); *Pell v. McElroy*, 36 Cal. 286 (1868); *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646 (1850).

¹⁰⁹ *Pell v. McElroy*, *op. cit. supra* note 108.

¹¹⁰ *Gewin v. Shields*, *op. cit. supra* note 108.

divested himself of all title and the right to possession, and a subsequent transferee is justified in acting upon the presumption that he continues in possession in subordination to the title of his vendee.¹¹¹ "One difficulty with this latter view is that it imputes to a conveyance an effect as a declaration by the grantor, for the purpose of raising an estoppel against him, which is not necessarily in accord with the understanding of the parties or with the legal effect of the conveyance. One executing, for instance, a conveyance of a fee simple title, may perfectly well acquire, by the same or a subsequent transaction, an equity against the grantee or a lease for a limited period, and it is difficult to see why his conveyance should be regarded as a declaration that he has not acquired, or will not acquire, such an interest, or why a subsequent purchaser should be justified in assuming, for the purpose of being relieved from any duty of inquiry, that the grantor's continuance in possession is wrongful rather than rightful."¹¹² In the jurisdictions that adopt this view, there is a conflict of opinion as to whether or not a continuance of possession for a considerable period of time operates as notice of an equity claimed by him. The weight of authority supports the view that it does operate as notice.¹¹³ The minority view proceeds upon the theory that no distinction should be made in such cases for it would be inconsistent with the estoppel created in the grantor's deed and would be contrary to the spirit of the recording laws.¹¹⁴

¹¹¹ *Morgan v. McCuin*, 96 Ark. 512, 132 S. W. 519 (1910); *McEwen v. Keary*, 178 Mich. 6, 144 N. W. 524, L. R. A. 1916B, 1063 (1913); *Baldwin v. Anderson*, 103 Miss. 462, 60 So. 578 (1913).

Another reason that has been given is that the object of the law, in holding that possession operates as notice, is to protect the possessor against the claims of those who do not derive their interests from him,—not to protect him against his own acts, and especially against his own deed. *McEwen v. Keary*, per Bird, J.

¹¹² *Tiffany*, *op. cit. supra* note 5, at § 571 (g).

¹¹³ *Turman v. Bell*, 4 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35 (1891); *Bennett v. Robinson*, 27 Mich. 26 (1873).

¹¹⁴ *Jones v. Grimes*, 115 Miss. 874, 76 So. 735 (1917).

As a general rule, one who is not a party to a suit is not affected by the judgment of the court deciding the controversy. There is an important exception to this rule, *viz.*, "one who acquires from a party to the proceeding an interest in the property, which is at that time involved in a litigation in a court having jurisdiction of the subject matter and of the person of the one from whom the interest is acquired, takes subject to the rights of the parties to the litigation as finally determined by the judgment or decree, and is as conclusively bound by the result of the litigation as if he had been a party thereto from the outset."¹¹⁵ This general common law doctrine is known as "*lis pendens*." This doctrine is one of ancient origin. It was first definitely formulated by Lord Bacon in his twelfth "Ordinance in Chancery" providing that "No decree bindeth any that cometh in *bona fide* by conveyance from the defendant, before the bill is exhibited, and is made no party, neither by bill nor by order; but when he comes in *pendente lite*, and while the suit is in full prosecution, and without any colour of allowance or privity of the court, there regularly the decree bindeth."¹¹⁶ Chancellor Kent's opinion in *Murray v. Ballou*,¹¹⁷ decided in 1815, appears to be the foundation of the doctrine in this country. It generally conceded that *lis pendens*, as applied in our time, originated "in the common law rule obtaining in real actions to the effect that, if the defendant aliened during the pendency of the action, the judgment in the real action overreached the alienation."¹¹⁸ The doctrine now applies in equity as well as at law.

The doctrine of *lis pendens* has been referred to, both in English and American cases as an equitable one based upon constructive notice; "but the better view is that it is founded

¹¹⁵ *Lis Pendens*, 38 C. J., pp. 4, 5.

¹¹⁶ 2 Bacon's Works, 479.

¹¹⁷ 1 John. Ch. 566 (1815).

¹¹⁸ *De Pass v. Chitty*, 105 So. 148, 149 (Fla. 1925), per Terrell, J.

upon the necessity of both equity and common law courts of keeping the subject of the litigation before the court and preventing frustration of the court's judgment or decree."¹¹⁹ The very nature of the doctrine, as it was formulated at the common law, was such as to show that it was not based upon the principles underlying the doctrine of constructive notice. "In fact, it applied in cases in which there was a physical impossibility that the purchaser could know, with any possible diligence on his part, of the existence of the suit, unless all contracts were made in the office from which the writ issued, and on the last moment of the day. For, at common law, the writ was pending from the first moment of the day on which it was issued and bore *teste*; and a purchaser, on or after that day, held the property subject to the execution upon the judgment in that suit as the defendant would have held it, if no alienation had been made."¹²⁰

Because of the severity and harshness of the doctrine of *lis pendens*, statutes have been enacted in many states requiring recordation of a formal notice of the pendency of the suit or action before a *bona fide* purchaser for value is chargeable with notice. These statutes do not, as a general rule, embody all of the law of *lis pendens* in the particular jurisdictions in which they are operative, but are rather regarded as imposing restrictions upon the common law rule otherwise existing upon the subject. Actions or proceedings of a class not embraced within the terms of the particular statute remain subject to the common law rule.¹²¹ Even

¹¹⁹ Clark, *op. cit. supra* note 33, at § 460.

¹²⁰ Newman v. Chapman, 2 Rand. 93, 102 (1823), per Green, J.

"The Court of Chancery adopted the rule, in analogy to the common law, but relaxed, in some degree, the severity of the common law. For no *lis pendens* existed until the service of the subpoena and bill filed; but it existed from the service of the subpoena, although the bill was not filed until long after; so that a purchaser, after service of the subpoena and before the bill was filed, would, after the filing of the bill, be deemed to be a *lite pendente* purchaser." Per Green, J., in Newman v. Chapman.

¹²¹ Rardin v. Rardin, 102 S. E. 295, 297 (W. Va. 1919), per Lynch, J. In some jurisdictions the statutes are construed as abolishing the common law rule, leaving the statutory law as the only rule upon the subject. Macdermot v. Hayes, 170 Pac. 616 (Cal. 1917).

apart from statutory regulation, the harshness of the doctrine, in its effects upon *bona fide* purchasers, was recognized, and its operation was confined to the extent of the policy upon which it was founded—*i. e.*, to the giving of full effect to the judgment or decree which might be rendered in the action or suit pending at the time of the purchase.¹²²

The ground of judicial necessity, on which the doctrine of *lis pendens* is based, yields to the social interest in favor of free operations of commerce. Hence, the rule does not apply to negotiable paper purchased before maturity.¹²³ As to whether the rule applies to chattels generally, there is a conflict of authority.¹²⁴ In *Murray v. Lilbury*,¹²⁵ a case that is frequently cited, Chancellor Kent holds the doctrine to be applicable to bonds¹²⁶ and mortgages, because he says that they are not usually the subject of ordinary commerce; but he says that he is not prepared to hold that it would affect cash, negotiable paper not due, and movable property,

¹²² "As proof of this, if the suit was not prosecuted with effect, as if a suit at law was discontinued, or the plaintiff suffered a *non-suit*, or if a suit in Chancery was dismissed for want of prosecution, or for any other cause not upon the merits, or if at law or in Chancery a suit abated, although, in all these cases, the plaintiff, or his proper representative, might bring a new suit for the same cause, he must make the one who purchased pending the former suit, a party; and, in this new suit, such purchaser would not be affected at all by the pendency of the former suit at the time of his purchase. In the case of an abatement, however, the original suit might be continued in Chancery, by revivor, or at law, in real actions, abated by the death of a party, by *journees accounts*, and the purchaser still be bound by the final judgment or decree." Per Green, J., in *Newman v. Chapman*, *op. cit. supra* note 120, at p. 103.

"Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties . . ." Per Mr. Justice Harlan, in *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 371, 33 Law Ed. 178, 184 (1888).

"Where there is a purchase *pendente lite*, not only is the purchaser bound by the decree that may be made against the person from whom he derives title, but 'the litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the suit.' . . . He is not a necessary party, because his vendor or grantor remains as the representative of his interests . . ." Per Magruder, J., in *Norris v. Ile*, 38 N. E. 762, 766, 43 Am. St. Rep. 233, 240 (Ill. 1894).

¹²³ *Winston v. Westerfeldt*, 22 Ala. 760 (1853); Note, 22 Har. L. Rev. 455; Clark, *op. cit. supra* note 33, at § 460.

¹²⁴ *Op. cit. supra* note 119.

¹²⁵ 2 John. Ch. 441 (1817).

¹²⁶ Apparently the bonds were non-negotiable.

such as horses, cattle and grain. In a few cases the courts have made a distinction between personal property that is not ordinarily "kept for sale" and "an article of ordinary commerce," concluding that *lis pendens* should apply to the former¹²⁷ for the same reason that it applies to real property. In *Wigram v. Buckley*¹²⁸ the English rule was stated to be that *lis pendens* does not apply to personal property other than chattel interests in land. But this case involved a suit respecting "book debts"—non-negotiable securities.¹²⁹ The better view, —and probably the numerical weight of authority supports this view, —is that all personal property, except negotiable instruments, should come within the scope of operation of *lis pendens*. The probability of the defendant's entirely defeating the object of the suit or action by a transfer of the property *pendente lite* is rather greater in the case of personal property than of real estate. So that, for the protection of litigants, it would seem that a more rigid rule should be adopted to prevent the disposal of personalty than of realty *pendente lite*. The arguments urged in support of the contrary view are drawn from the necessity of adopting no rule that would impair the freedom of commercial transactions, and of protecting *bona fide* purchasers of that of which possession is the chief *indicium* of ownership.¹³⁰

The rule is frequently stated to be that *lis pendens* applies to any transfer of the subject matter of the litigation, or any encumbrance or charge created against it, or any contract entered into affecting it, by *either* party to the con-

¹²⁷ See *North Carolina Land & L. Co. v. Boyer*, 191 Fed. 552, 39 L. R. A. (N. S.) 627 (1911); *Chase v. Searles*, 45 N. H. 511 (1864). In *Carr v. Lewis Coal Co.*, 15 Mo. App. 551 (1884), *lis pendens* was held to apply to a river tug.

¹²⁸ [1894] L. R. 3 Ch. Div. 483.

¹²⁹ In Pennsylvania the doctrine of *lis pendens* is applied to non-negotiable securities. *Diamond v. Lawrence County*, 37 Pa. St. 353, 78 Am. Dec. 429 (1860).

¹³⁰ Note, 14 Am. Dec. 774, 779.

troversy; but the doctrine is ordinarily applied to transfers or encumbrances made by *defendants*, and is ordinarily invoked by plaintiffs.

There is a conflict of authority as to whether the courts of a sister state are bound, by the "full faith and credit" clause of the Federal Constitution, to give the doctrine of *lis pendens* extra-territorial effect. In two jurisdictions the view is adopted that *lis pendens* does not operate beyond the state in which the action is pending, and that the judgment therein is not enforceable as against one who purchases the property involved in the litigation, after its removal from the state, in good faith and without actual notice of the pendency of the action.¹³¹ This view is supported on the basis that the "full faith and credit" clause of the Federal Constitution "goes only to the operation such records [referred to therein] shall have when complete and subsequently offered in evidence, as establishing that certain facts have been adjudicated, and has no reference as to what shall be the incidental effect of a suit which results in such records being made."¹³² In one jurisdiction the view exists that the removal of the property from the state, followed by its sale, does not relieve from the operation of the pre-existing suit or action.¹³³ This view is supported on the basis that when a "judicial proceeding" exists, it operates, not only upon parties and privies, but also upon *pendente lite purchasers*. The latter view seems to conform more nearly to the spirit and letter of the "full faith and credit" clause; and it is the more desirable rule.

Some courts assert the rule to be that a grantee in a quitclaim deed is not entitled to the rights of a *bona fide* purchaser because the nature of this conveyance is such

¹³¹ Carr v. Lewis Coal Co., 96 Mo. 149, 8 S. W. 907, 9 Am. St. Rep. 328 (1888); Shelton v. Johnson, 4 Sneed (Tenn.) 672, 70 Am. Dec. 265 (1857) and note.

¹³² Carr v. Lewis Coal Co., *op. cit. supra* note 131.

¹³³ Fletcher and Sharp v. Ferrel, 9 Dana (Ky.) 372, 35 Am. Dec. 143 (1840).

as to put him upon an inquiry, and indicates that there may be outstanding unrecorded competing interests; so that if there are prior competing interests in the land conveyed by the quitclaim deed the grantee therein takes subject to these interests.¹³⁴ The position of the quitclaim grantee, under this view, is analagous to that of a purchaser of negotiable paper after maturity; in either case, there is the assumption of the risk that there may be outstanding claims. In some of the cases, where this rule is applied, the facts indicated that the quitclaim grantee suspected outstanding claims existed and *took a chance* upon securing priority over them;¹³⁵ the fact that the property was offered to him, in some instances, at a *very low figure* should have been sufficient to *arouse his suspicions*.¹³⁶ Probably in these jurisdictions a quitclaim deed was not the usual form of conveyance. But even if this form of conveyance is not in common use in the jurisdiction and if the form of the instrument is regarded as sufficient to put the grantee upon inquiry as to the existence of outstanding competing equities, it is doubtful as to whether the courts in any jurisdiction would go so far as to hold that the quitclaim grantee is charged with notice of *all* competing equities that might possibly exist in the land conveyed to him. An equity or interest may not only be unknown to such grantee, but undiscoverable by the exercise of reasonable care; and, if an equity of this kind exists, the quitclaim grantee should be considered as a *bona fide* purchaser with regard to it, notwithstanding the recording acts. If the quitclaim grantee has made a diligent search of the records and the prior interest is not recorded, and the grantee has no actual notice of it and cannot discover it by the exercise of reasonable

¹³⁴ Runyon v. Smith, 18 Fed. 579 (Cir. Ct., E. D. Mich. 1883); Lowry v. Brown, 1 Cold. (Tenn.) 456 (1860).

¹³⁵ See Runyon v. Smith, *op. cit. supra* note 134; Derrick v. Brown, 66 Ala. 162 (1880).

¹³⁶ See Derrick v. Brown, *op. cit. supra* note 135.

diligence, he should have priority over it under the recording statutes in any jurisdiction.¹³⁷ Recognizing that such interests might exist, the Supreme Court of the United States and the courts in a few jurisdictions are definitely committed to the rule that a quitclaim deed is *not of itself* sufficient to deprive the grantee therein of the position of a *bona fide* purchaser. It is, however, a circumstance, in a jurisdiction where this form of conveyance is not in common use, along with other circumstances, to be considered in determining whether or not the grantee takes *bona fide*.¹³⁸ In some jurisdictions the courts recognize the doctrine that a quitclaim deed *passes only the interest which the grantor has in the land*; it is sufficient to pass that title but not to enable the grantee to take priority over outstanding equities.¹³⁹

There is a conflict of authority as to whether or not a statute declaring that a quitclaim deed shall be sufficient to pass all the interest which the grantor could lawfully convey by deed of bargain and sale affects the question as to whether a quitclaim grantee is chargeable with notice of prior competing equities. In some jurisdictions such a statute has been declared to have no bearing upon the question

¹³⁷ See *Merrill v. Hutchinson*, 25 Pac. 215 (Kan. 1890); *Johnson v. Williams*, 14 Pac. 537 (Kan. 1887); *Moelle v. Sherwood*, 148 U. S. 21 (1892).

¹³⁸ See *Moelle v. Sherwood*, *op. cit. supra* note 137; *Chapman v. Sims*, 53 Miss. 154 (1876); *Johnson v. Williams*, *op. cit. supra* note 137.

¹³⁹ *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125 (1852); *Snow v. Lake's Administrator*, 20 Fla. 656, 51 Am. Rep. 625 (1884); *Baker v. Woodward*, 12 Ore. 3, 6 Pac. 173 (1884).

"This court has long recognized the doctrine that the immediate grantee under a purely quitclaim deed of release, obtains just such title as his vendor had, and subject to the same defenses, and is not a *bona fide* purchaser without notice within the meaning of the recording acts." Per Brown, J., in *Rabinowitz v. Houk*, 129 So. 501, 510 (Fla. 1930).

"Since the grantor's legal title passes by either form of conveyance [quitclaim or warranty deed] . . . and since the legal title in a purchaser for value is subject only to the equities of which he had notice at the time of the purchase . . . it seems that a quitclaim deed should cut off equities as effectually as a warranty deed in the absence of actual or constructive notice. The rule must therefore rest on the reason commonly assigned, that a quitclaim deed is constructive notice of defects in the grantor's title." Note, 10 Col. L. Rev. 371.

under consideration.¹⁴⁰ The purpose of the legislature in passing the statute is said to be to remove any doubt about the passing of the grantor's title under this form of conveyance, rather than to affect the matter of notice. Other courts, in dealing with this type of statute, take the view that a quitclaim deed is thereby *elevated into a deed of bargain and sale*, so that the quitclaim grantee obtains more than a mere release of any interest that his grantor may have in the property; he is entitled to rank as a *bona fide* purchaser, and, if he gives value and has no notice, for instance, of a prior unrecorded warranty deed, he takes priority over the interest evidenced by the prior deed.¹⁴¹ The former view has been influenced by the fact that the recording statute of the jurisdiction left the question of "good faith" open;¹⁴² the latter view has not been so affected. It seems to be assuming too much to say that the legislature had the recording statute in mind when it passed the statute enlarging the scope of operation of a quitclaim deed; if so, it probably would have declared its intention upon the matter of notice. This is precisely what was done in Minnesota, where the recording statute was amended so as to provide that a quitclaim deed should not affect the question of "good faith" of the grantee therein.¹⁴³

In Missouri, by virtue of the operation of the recording statute, a *bona fide* purchaser under a quitclaim deed is protected against prior competing interests evidenced by unrecorded recordable instruments.¹⁴⁴ The recording act

¹⁴⁰ *Runyon v. Smith, op. cit. supra* note 134; *Baker v. Woodward, op. cit. supra* note 137.

¹⁴¹ *Cutler v. James*, 64 Wis. 173, 54 Am. Rep. 603 (1885).

¹⁴² See *Runyon v. Smith, op. cit. supra* note 134.

¹⁴³ Gen. Stats. of Minn. (1913) § 6844.

¹⁴⁴ *Ridgeway v. Holliday*, 59 Mo. 444 (1875); *Hope v. Blair*, 16 S. W. 595 (Mo. 1891); *Munson v. Ensor*, 7 S. W. 108 (Mo. 1888); *Fox v. Hall*, 74 Mo. 315 (1881). In the latter case the court said: ". . . in *Ridgeway v. Holliday* . . . a quitclaim deed from one whose title had been transferred by adverse possession, was held to pass no right as against the adverse occupant to whom such title had been so transferred, for the reason that such title by possession was not subject to the recording acts and could not be recorded, and the grantee in

is construed as abolishing the equitable doctrine of notice in regard to all instruments coming within the scope of its operation. But if the prior interest is one evidenced by an instrument that is not required to be recorded, or by an instrument that is not required to be recorded but is nevertheless recorded, the equity arising under such instrument is not "cut off" by a subsequent quitclaim deed evidencing a competing instrument. The same is true where the prior interest is one that is not evidenced by any writing. But, to conform to the true spirit of the recording act, it would seem that the prior equity should be reduced to a recordable interest and recorded in order to preserve its position of advantage. The rule in this jurisdiction is undoubtedly affected by the fact that a quitclaim deed which is intended to and purports to convey an absolute right to the land, as contradistinguished from a conveyance of the title or chance of title which the grantor may be supposed to have, was in common use when the rule was formulated.¹⁴⁵ Quite naturally, where this form of a quitclaim deed is in common use, there would be nothing in the form of the deed itself to affect the *bona fide* nature of the transaction. If the quitclaim grantee takes without actual notice of an outstanding competing equity in the land, and without notice of any facts, which, if followed up, would ordinarily lead to knowledge of such competing equity, and if he pays an adequate price for the land, he should be considered as a

the quitclaim deed took only what the grantor could lawfully convey. It has been repeatedly decided by this court that a grantee in a sheriff's deed, made in pursuance of a sale under execution, is a purchaser within the meaning of the recording act, and it is equally well settled that by virtue of such conveyance he takes only such interest as the judgment debtor had. [Citing cases.] . . . In other words, a grantee in a sheriff's deed acquires precisely the same rights which he would have acquired by a quitclaim deed from the judgment debtor, except in cases where the judgment debtor has made fraudulent conveyances before judgment, in which cases the purchaser at execution sale acquires the additional right to set such conveyance aside."

¹⁴⁵ In *Munson v. Ensor*, *op. cit. supra* note 144, the court said: "Here the deed is 'remise, release, and forever quitclaim the following described lot,' etc.—a form of conveyance in common use."

bona fide purchaser. But if he did not pay an adequate price, or if he had actual notice of the competing equity, or notice of such facts, which, if followed up, would lead to knowledge of the prior equity, the *bona fide* nature of the transaction would be affected; and this would be equally true if, instead of acquiring his interest under a quitclaim deed, he acquires it under a warranty deed.¹⁴⁶ But, under the Missouri view, these principles would only be operative where the prior competing interest is evidenced by an unrecorded *recordable* instrument.

In Texas it is well settled that where it clearly appears, from the terms of the deed, or, in case of doubt, from the terms of the deed, adequacy of price given, and other circumstances, that the grantor intended to quitclaim to the vendee only such claim or interest in the land as he might own therein, the deed will not support a claim of purchase in good faith. This type of conveyance may be designated as a quitclaim deed in the strict sense. On the other hand, if the deed, although the grantor uses the word "quitclaim" therein, purports to *convey the land*, as contradistinguished from a conveyance of the title or chance of title which the grantor may be supposed to have, it is not such an instru-

¹⁴⁶ Compare the discussion in *Moelle v. Sherwood*, *op. cit. supra* note 137, at pp. 28, 29, 30 (1892): "There may be many reasons why the holder of property may refuse to accompany his conveyance of it with an express warranty of the soundness of its title or its freedom from the claims of others . . . He may hold the property only as a trustee or in a corporate or official character, and be unwilling for that reason to assume any personal responsibility as to its title or freedom from liens, or he may be unwilling to do so from notions peculiar to himself . . . In many parts of the country a quitclaim or a simple conveyance of the grantor's interest is the common form in which the transfer of real estate is made. A deed in that form is, in many cases, as effectual to divest and transfer a complete title as any other form of conveyance. . . . In the . . . case of bargain and sale, he [the grantor] impliedly asserts the possession of a claim to or interest in the property, for it is the property itself which he sells and undertakes to convey. In the . . . case of quitclaim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may possess without asserting the ownership of either. . . . Covenants of warranty do not constitute any operative part of the instrument in transferring the title. That passes independently of them. They are separate contracts, intended only as guaranties against future contingencies."

ment as will charge the grantee with notice of prior equities or prior interests evidenced by unrecorded instruments.¹⁴⁷ One who takes under a quitclaim deed in the strict sense is not protected as a *bona fide* purchaser, under the Texas recording statute.¹⁴⁸ In Arizona, where the recording statute is "taken from Texas," the Supreme Court refused to apply the Texas doctrine, holding that a deed which purported to convey only the "right, title, and interest" of the grantor does not thereby charge the grantee with notice of prior interests evidenced by unrecorded recordable instruments, within the spirit and purpose of the recording statute.¹⁴⁹ This, it is submitted, is the more desirable rule; and it should apply where the prior interest is one that is not evidenced by a recordable instrument, for the equity should be reduced to a recordable interest and recorded.

In jurisdictions where a quitclaim deed will not support a claim of *bona fide* purchase there is a conflict of authority as to whether a purchaser from the quitclaim grantee who takes under a warranty deed is, because there is a quitclaim deed in his chain of title, charged with notice of equities existing against the quitclaim grantor's title. In Texas the fact that there is a quitclaim deed of the strict type in the chain of title is sufficient to charge the grantee in the warranty deed with such notice.¹⁵⁰ In other jurisdictions where the courts adopt either the view that a quitclaim grantee is chargeable with notice, because of the form

¹⁴⁷ *Hagaman v. Shaklee*, 243 S. W. 795 (Tex. Civ. App. 1922); *Duckworth v. Collie*, 235 S. W. 924 (Tex. Civ. App. 1921); *Threadgill v. Bickerstaff*, 29 S. W. 757 (Tex. 1895). See *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304 (1877).

¹⁴⁸ See *Thorn v. Newsom*, 64 Tex. 161, 53 Am. Rep. 747 (1885); *Taylor v. Harrison*, *op. cit. supra* note 147.

¹⁴⁹ *Phoenix Title & Trust Co. v. Old Dominion Co.*, 253 Pac. 435, 59 A. L. R. 625 (1927). See note to this case in 59 A. L. R. 632 *et seq.*

¹⁵⁰ *Houston Oil Co. Niles*, 255 S. W. 604 (Comm'n of Civ. App. of Tex. 1923). See *Cook v. Smith*, 174 S. W. 1094 (Tex. 1915). In the first of these cases the court said: ". . . the holder of a title in which there appears, however remote, a quitclaim deed is prevented from asserting the defense of innocent purchaser as against an outstanding title or secret trust or equity existing at the time the quitclaim deed was executed."

of the conveyance, of prior competing equities, or the view that a quitclaim deed is simply a release of such interest as his grantor has in the land conveyed, a subsequent purchaser who takes from the quitclaim grantee under a warranty deed is not chargeable with notice of equities existing against the quitclaim grantor's title merely because such purchaser's grantor had previously purchased under a quitclaim deed and is not, because of that fact, prevented from acquiring priority over such equities.¹⁵¹ If the immediate purchaser under a warranty deed from a quitclaim grantee may be entitled to rank as a *bona fide* purchaser, *a fortiori* a remote purchaser's position as a *bona fide* purchaser should not be affected by the fact that a quitclaim deed occurs in his chain of title.¹⁵² Whether the purchaser under a warranty deed be an immediate purchaser from a quitclaim grantee or a remote purchaser, the fact that he pays what the parties deem to be the full value of the premises shows that he is bargaining for a valid title. The fact that the equity existing against the quitclaim grantor's title has not been recorded for a considerable period of time before the quitclaim grantee sells the land is a factor of importance under the recording acts. The policy of the recording acts requires that titles to real estate should become matter of public record. If the competing equity is not recordable, it should be reduced to a recordable interest and recorded to preserve its position of advantage. "It is not unreasonable to assume that a quitclaim deed occurs in the line of many titles, where there is no outstanding equity."¹⁵³ It has been said that to extend the rule that a quitclaim grantee is bound to ascertain at his peril what outstanding

¹⁵¹ *McCollum v. Burton*, 127 So. 224 (Ala. 1930); *Bell v. South Arkansas Land Co.*, 196 S. W. 117 (Ark. 1917); *Winkler v. Miller*, 54 Iowa 476 (1880); *Downs v. Rich*, 81 Kan. 43, 105 Pac. 9, 25 L. R. A. (N. S.) 1035 (1909), and note to this case in 25 L. R. A. (N. S.) 1035.

¹⁵² *Rabinowitz v. Houk*, *op. cit. supra* note 139 (remote purchaser by warranty deed where there was a quitclaim deed in the chain of title).

¹⁵³ *Winkler v. Miller*, *op. cit. supra* note 151, at p. 478

equities, if any, exist to a purchaser under a warranty deed from such grantee would "tend directly to impair the selling value of all such property."¹⁵⁴

Where a subsequent transferee of an interest in land, acting himself in the matter, is, according to the principles already discussed, chargeable with actual or constructive notice of a prior unrecorded competing interest in the land, he would be chargeable with notice to the same extent, as a general rule, where, instead of acting himself, he negotiates the purchase through an agent.¹⁵⁵ This rule is based

¹⁵⁴ *Op. cit. supra* note 153.

In *Rabinowitz v. Keefer*, 132 So. 297, 299 (1931), the Supreme Court of Florida said: "In *Snow v. Lake* . . . this court adopted the rule . . . that a grantee in a quitclaim deed could not be a *bona fide* purchaser without notice within the meaning of the recording acts. This construction of the statute has been consistently followed by this court since that time, but . . . it has not been extended in its operation beyond the immediate grantee in a quitclaim, nor do . . . logic or reason require its extension. To further extend the rule would in effect amount to the adoption of a new rule, which new rule would . . . work great injustice and hardship, as is illustrated by the facts in *Rabinowitz v. Houk*, as well as in the present case. It may be that, under the doctrine of *stare decisis*, it is better in many instances to stick to an old rule, especially in cases where the old rule has become a rule of property, than to adopt a new rule, even though the new be better founded in reason than the old. . . . When it comes to the adoption of a new rule of statutory construction, or when an effort is made to extend an old rule beyond the limits hitherto recognized, the courts may well consider the logic, reason, justice, and wisdom, as well as the soundness of the public policy involved, in the step they are about to take."

¹⁵⁵ *Webb, op. cit. supra* note 60, at § 238; *Pomerory, op. cit. supra* note 12, at § 666.

"The *rationale* of the rule has been differently stated by different judges; by some it has been rested upon the presumption of an actual communication between the agent and his principal; by others, upon the legal conception that for many purposes the agent and principal are regarded as one." *Pomerory, op. cit. supra* note 12, at § 666.

"This general rule is of wide application. It embraces in its operation not only ordinary agents and attorneys, but all persons who act for or represent others in business relations and transactions. Thus it applies to directors, managers, presidents, cashiers, and other officers, while engaged in the business affairs of their corporations; to trustees acting on behalf of their beneficiaries; to an agent acting on behalf of a married woman; to one of two or more joint agents; and to all actual agents, whether the agency be express or implied." *Pomerory, op. cit. supra* note 12, at § 667.

See note dealing with "Imputation of Attorney's Knowledge of Facts to His Client," 4 A. L. R. 1592-1623.

"Notice to the agent of a fact which he does not communicate to his principal, when regarded in law as notice to the latter, is not as to him actual, but constructive notice. . . . 'Notice to my agent or counsel is *constructive* notice to

upon expediency; it prevents a transferee from avoiding the results of notice by availing himself of the services of an agent who might be conveniently blind to whatever seemed likely to develop a competing interest in the property.¹⁵⁶

As it is the rule that whether the principal is bound by contracts entered into by his agent depends upon the nature and extent of the agency, so does the effect upon the principal of notice to the agent depend upon the same conditions. That is to say, the knowledge or notice must come to the agent who has authority to deal in reference to those matters which the knowledge or notice affects.¹⁵⁷

In order to charge the principal with notice, the notice or knowledge must, as a general rule, come to the agent while engaged in the same transaction which is sought to be affected by notice; that is, in the same transaction out of which the principal's rights and liabilities arise, which, it is contended, are affected by notice. The reason, again, is one of expediency. A principal should not be subjected to the risk of the agent remembering information received prior to the particular transaction and in connection with matters that were not of any concern to the principal. But if the information was received by the agent so recently and is of such a character as that it is not reasonable to suppose it is absent from the agent's mind while engaged in the later transaction on behalf of the principal, the rule is that the principal is chargeable with the notice coming to the agent.¹⁵⁸

me,' . . ." Per Burks, J., in *Easley and al. v. Barksdale and als.*, 75 Va. 274, 283 (1881). It follows from this that where the statute requires "actual notice" of an equity to preserve its position of advantage, information communicated to the agent will not affect his principal's right as a *bona fide* purchaser unless the agent communicates his information to the principal, if it is sought to charge the principal with notice, through his agent, of the prior competing equity.

¹⁵⁶ Webb, *op. cit. supra* note 60, at § 238.

¹⁵⁷ *Trentor v. Pothen*, 46 Minn. 298, 24 Am. St. Rep. 225 (1891).

¹⁵⁸ Webb, *op. cit. supra* note 60, at § 241.

The principal is not chargeable with notice where the agent, for his own convenience, withholds information that would otherwise affect his principal's rights. The same rule applies where the agent acting for both parties to the transaction conceals information from one at the instance of the other.¹⁵⁹

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(To be continued.)

¹⁵⁹ Pomeroy, *op. cit.* *supra* note 12, at §§ 674, 675.