Michigan Law Review

Volume 57 | Issue 4

1959

Priorities

Edgar N. Durfee
University of Michigan Law School

PRIORITIES

Edgar N. Durfee

[Among those of Edgar Durfee's colleagues who were familiar with this paper it came to be known as "Little Nemo," for a reason that will become apparent to the reader. It is taken from his mimeographed *Cases on Security,* third edition, published in 1938. Possibly it was published earlier but there is a gap in the evidence. It did not appear in the first edition published in 1934 but no copy of the second edition has been located. In a few places its age shows, for example in the reference to Walsh as the author of the most recent text on real property, and it should of course be read with an understanding of the time factor. A few cross-references and passages directed to classroom or other student use have been deleted but these changes are minor. Otherwise, with exception of some bracketed citations, the text is just as it was published. Because of its length it is being published in the *Review* in two parts.]

THIS note will attempt an elementary view of the whole subject of priorities. In one sense it will be shallow, avoiding microscopic details as far as possible. In another sense it will be deep and somewhat difficult to follow, as any elementary study must be. Its method will be essentially comparative. Things which have not been commonly associated in professional thought will be brought together, exhibiting their resemblances or differences, as the case may be. The emphasis will be on legal concepts,—in other words, upon lawyers' thinking—but we must examine these concepts critically, which means that we must give some attention to their social implications.

ORIENTATION

It is assumed that the reader has considerable knowledge of this subject, but it is also assumed that his knowledge is of the fragmentary sort which our profession has usually cultivated. To bring this learning into focus, it is necessary to be quite explicit about its disjointed character. We have not commonly thought of the whole subject of priorities as one subject. Priorities with respect to land have been discussed in courses and in treatises on land law; priorities with respect to chattels are treated as part of the subject of sales; like problems concerning corporate stock are made a chapter in the law of corporations, etc. But these lines of cleavage are crossed by others. For example, in treating of trusts we take up the priority problems which are generated by that legal institution, lumping as far as possible cases of land, chattels and intangibles. Again we set out to discuss creditors' rights and remedies and promptly find ourselves dealing with priority problems, touch-

ing all of the several types of property. So, in this course, when we came to study subrogation we took the priority problems in our stride, and later on we shall do the same thing in our study of real securities. Query whether you have taken any course in this school which did not bring up some problems in priorities? Perhaps Torts? If so, it was by virtue of careful exclusion of such questions, for they may be the critical questions in a case involving tort to property.

But this is not the whole story. Even within particular fields, such as land law, one does not find a well-organized and systematic treatment of priorities. This may be illustrated by reference to the most recent text on real property, that of Walsh. The author's only systematic discussion of priorities is in a chapter entitled "Recording of Deeds and Conveyances." Common law and equity doctrines of priority get one short paragraph, introductory to this chapter, and the discussion of the recording acts is substantially confined to their operation in cases of bona fide purchase. The vital and difficult questions concerning their effect upon creditors is given one brief and wholly inadequate paragraph at the end. These remarks are not made for the purpose of disparaging Walsh, for the point is precisely that his treatment of priorities is typical of real property literature. Nor is it the intention to condemn the whole profession for its casual way of dealing with this subject. The reason for this critique of prevailing methods is that one cannot understand the law of priorities unless he is conscious of the disjointed way in which it has grown up.

In this connection it may be well to observe that the title we have chosen, "Priorities," does not have any settled meaning. Lawyers use this term frequently, but in the context of a particular case, which makes it quite unnecessary to inquire how much of the law belongs under this head. In texts and digests this term has not been used as the title for a distinct department of the law, except in Tiffany's *Real Property,* where it is the caption of a chapter. As one would expect (words being both cause and effect of thought) Tiffany has the best rounded treatment of this subject to be found in the real property books.

Now a word of caution is needed. We must not exaggerate the disjunctive character of the law of priorities. Frequently authorities from one field are applied in another, viewed perhaps as analogy rather than direct authority. And sometimes we have been too much given to doctrinal generalization, ignoring factual dif-

ferences which exist, for example, between land and chattels. How could it be otherwise, since related things must be subjected to comparative study if we are to grasp either their resemblances or their differences, and few lawyers have even as much as started upon a comparative study of priorities.

DEFINITION OF TERMS

It will save time in the end if we spend time now in definition of certain terms which inevitably enter into any discussion of priorities. The word "title" has a wealth of meanings. Sometimes it is used to denote absolute ownership—that is to say, the most absolute ownership known to the law, which in the case of land is the unencumbered fee simple. In this sense there can be but one title to any given *res,* and to speak of "conflicting titles" would be a contradiction in terms. But "title" is also used in a more limited sense. A lawyer would not hesitate to say, *"A* has title to Blackacre," if he believed *A* to be owner subject only to an outstanding term for years, or easement, or mortgage. Again, he might say that a mortgage has title, meaning that the whole legal estate of mortgagor (presumably a fee simple) is transferred to mortgagee, leaving but an equitable estate in the former. How far this is a true statement of mortgage law we need not at this moment inquire: it is enough to note this use of the word "title."

Next we come to some most interesting uses of this term. Conveyancers, especially when they are dealing with priorities, apply it to all kinds of property rights,—for example, to a term for years as well as to a fee, and to a mortgagee's interest whether regarded as a title in the sense above indicated, or as a lien. If *A* negotiates a sale to *B* of a leasehold estate in land, or a note and mortgage of land, *B*'s counsel will advise an examination of *A*'s "title." Then, after a preliminary examination which throws up certain dubious points requiring closer scrutiny, the examiner might be heard to say that, *"A* has a title," meaning merely that his claim is not wholly unfounded. In his discussion of the reserved points, the examiner may use the word "title" in still another sense, as indicating the transactions and events on which *A*'s claim rests—execution of deeds, entry of judgments, enjoyment of possession, birth of heirs and death of ancestors, etc. Again, with a slight shift of meaning, he may apply the term to the documents of title, or to the abstract of such documents. But what are the points under discussion? Seventy years ago, one of the owners in *A*'s

chain of title executed a mortgage which has never been released. Fifty years ago, another of *A*'s predecessors executed a deed in which his wife, if any, did not join. One of the links in the chain is a will of doubtful meaning, or doubtful validity. At each point, there are possible adverse claims—possible merely, not actively asserted at this time. Discussion of these points moves in the realm of probability, and the probabilities are weighed, not merely counted. *How likely* is it that this claim will be asserted, and *how serious* will it be, if asserted? Again, if we pass this title, *how likely* that other conveyancers will reject it when *B* wishes to sell? Finally, you may find the examiner displaying a dual personality. As lawyer, he may render an opinion that the title is unmarketable, pointing out the flaws which are regarded as fatal, perhaps with a suggestion that *A* can cure them by a bill to quiet title, but, as man of affairs, he may advise *B* that the defects are not serious enough to warrant rejection of a good bargain. As in most of the practical affairs of life, relativity is the order of thought. Titles are seldom absolutely good or absolutely bad, except in professors' hypotheticals.

Observe, now, that in the conveyancer's senses of the word "title," we may have conflicting titles, and a large segment of the lawyer's business is summarized by that expression. It embraces all disputes concerning property except those which turn on the rights of enjoyment pertaining to a particular kind of estate or interest, typified by the nuisance case where each party admits the other's "title" but disputes the contents of that bundle.

Now comes another of those conveniently evasive phrases of the conveyancer, "paper title." Sometimes it carries the implication that there is really no title, only paper, but at least as often it is noncommittal on this point. And it does not necessarily mean a title which is all on paper, with a chain of deeds all the way from Uncle Sam to the present owner. Interjection of intestate succession as the link between two of the parties in the chain does not deprive the title of this name.[1] Neither is it improper to apply it to a title which originates, not in a patent from the sovereign, but in adverse possession, provided that the present claimant has

[1] Modern probate practice commonly gets the inheritance link into the court record, as a matter of course, and thence it may get into the records of the register of deeds. In the older practice, still surviving in some measure, there was no formal record of inheritance unless controversy led to an ejectment or a bill to quiet title, or some other belligerent proceeding.

a sheaf of conveyances connecting him with the original disseisor. How many conveyances? Would one be enough? This is another point on which our profession has not troubled itself with exactness. When your material is relative, you need a vocabulary well stocked with elastic words.

Now come the terms "original title" and "derivative title." Each has its utility, and up to a certain point it is convenient to use them antithetically to mark the difference between one title and another. Granted that all titles are derivative in the sense that there can be no title except so far as the state, through its legal system, grants it, yet there are important differences between, let us say, a title by adverse possession and a title by patent from the sovereign with a chain of conveyances from the patentee. We need a pair of terms to express this difference. But these terms cater to the natural thirst of the human mind for perfect antithesis. Almost inevitably, we build a classification of titles as "original" and "derivative." Under the first head we put title by admiralty decree, title by adverse possession, tax title, etc. Under the other head we put title by descent and by will, title by deed, title by execution sale, etc. But does that fit the facts of experience? In the preceding paragraph, we put the case of a title originating in disseisin, ripening by adverse possession, and transferred by deed. Such a title is original from one point of view but derivative from another. Nor is it necessarily a case where the title ripened in the hands of the original disseisor and only then became the subject of transfer. Adverse possession can be established by the aggregate possession of a series of persons who are connected by transfer. Furthermore, a title originating in adverse possession may be good as against one prior owner but not as against another. A life tenant, who could have sued the disseisor, may be barred, while a remainderman, who had no action against the disseisor, is not barred. Again, if one of two former cotenants was under disability of infancy, while the other was sui juris, the latter may be barred while the former is not. Before you can say that a title by adverse possession is a good title, you must consider it in relation to the persons who might contest it. This being so, might it not be better (more useful) to think of title by adverse possession as *derived from* the adverse parties? We might say that the law predicates transfer of title upon the fact of possession, under certain circumstances, very much as it predicates transfer of title upon death, under certain circumstances, or upon the delivery of a

deed, under certain circumstances. The factual bases of transfer in these several cases are different, yet not utterly different. Similar observations hold true of title by bona fide purchase, which is sometimes classified as original because the vendor did not have title to transfer, and the true owner did not make any transfer. Yet you know that bona fide purchase from *T*, trustee, may give title as against *C*, cestui que trust, but not against *X* who has rights superior to both *T* and *C*, let us say by mortgage. In this case, too, you must consider the purchaser's title in relation to the particular adverse claimants, and you would insure this wholesome approach to the case if you thought of bona fide purchase as a process of *derivation* of title *from* these persons. That is surely a more *useful* analysis than one which lumps these cases with the admiralty decree.

On the other hand, the Hohfeldian jurists say, in effect, that there is no such thing as a derivative title. The idea that the rights of *A* can be transferred to *B* involves, they insist, a childish reification of rights, treating them as sticks and stones which can be boxed and shipped. What really happens in the so-called transfer of rights is, in their analysis, the extinguishment of the rights, powers, privileges and immunities of the so-called transferor and the creation of a new set of rights, powers, privileges and immunities in the so-called transferee. Is this a dry philosophy? Certainly no one will discard the handy term "transfer." Yet Hohfeld performed a service in reminding us that there is nothing in the phenomenon of transfer which requires us to think of it as a delivery of the antecedent rights of the transferor. His analysis gives us at least as accurate a description of the results of the transfer. And is it not a better description, in that it leaves a comfortable place for the exceptional cases where a transferee gets more than his transferor had? That is, of course, what happens in cases of bona fide purchase.[2] Hohfeld also makes a place for cases where the transferee gets less than his transferor had, as when a bona fide purchaser from a trustee reconveys to the trustee. In short, what this analysis does for us is to make us quite conscious that there is nothing in the nature of a transfer which makes it *inevitable* that the transferee

2 Or do you prefer the analysis developed in the preceding paragraph? The active vendor may be said to have exercised a power to transfer the interest of the passive third person. Therefore, there are two transferors, the one acting in his own person, the other by agent. This analysis is very neat in some cases but gets you into difficulties in others.

should get precisely the rights of his transferor, neither more nor less. The writer feels sure that careless thinking about ownership as if it were a physical thing, and thinking of transfer of ownership as if it were transportation (aliter, conveyance) of that physical thing, have done much harm. Especially is this true when the reification of transfer is embodied in such telling figures of speech as that "the stream cannot rise higher than its source." That invokes the laws of hydrostatics, which surely is not in order. But that kind of thinking has had distinct influence upon the law of priorities, notably cramping the doctrine of bona fide purchase. Furthermore, a lawyer is in some danger of failing to make the most of existing law if he approaches bona fide purchase problems with the simple notion that "transfer is transfer," and that's all there is to it.

Such reflections drive the writer to the conclusion that a two-fold classification of titles as original and derivative does more harm than good, a conclusion in which he has the support of legal scholars who know more about property than he does. On the other hand, the words "derive," "derivative," etc., are very useful in the discussion of certain priority problems. We could not dispense with them unless we indulged in expensive circumlocutions. The same thing is true of the words "transfer" and "convey." In spite of their misleading implications, we must use them. The course of wisdom, then, is to accept all these words as part of the legal vocabulary, at the same time resolving not to let them become our masters.

For the purpose of the ensuing discussion, the writer proposes to use the word "transfer" with a freedom which might distress some lawyers. He will apply it not only to consensual transfers, "by act of the parties," but also to succession at death, testate or intestate, to expropriation by creditors' process, to subrogation—in short, to all the processes by which, in the common parlance of our profession, one person may succeed to another's rights. In any such discussion as we are entering upon, though distinctions must frequently be drawn, there is constant need for such an inclusive term.

FIRST PRINCIPLES: QUEST FOR A GENERAL RULE

The most intelligible way to state the law of priorities is by the familiar method of rule and exception, and this is the method which lawyers have always pursued, though frequently

a general rule is taken for granted rather than expressed and attention is confined to exceptions, or contrariwise, a general rule is asserted as an absolute, in which case we are to understand that it was simply taken for granted that the exceptions were irrelevant. In using this method it is, of course, important to get a sound general rule, one which does not have to be eaten up by exceptions, and one which is not so obscure that its real meaning must be sought in its implications. What have we here?

One of the broadest generalizations in the whole field of law is the ancient maxim, *qui prior est tempore potior est jure.* He who is prior in time is prior in right. As phrased, it does not tell us to what kind of cases it applies, so that, for example, it might seem to say that he who strikes the first blow in a fight has the stronger legal position, and that one who buys a share of stock in a corporation today has a better share than one who buys tomorrow. Without putting any more silly cases, it becomes apparent that the time-right maxim is not a safe general rule for all departments of the law. Its field of application must be narrowed by reading into it an implied term. Nor is it enough to narrow it to property cases. If you will think through the whole field of property, you will find many points where the time-right formula fits the results which we actually reach, but more, many more, where it does not.[3]

Suppose we narrow to the cases of conflicting titles. Still we are in difficulties. In many of these cases the issue concerns the inherent efficacy of an alleged transfer, as when a deed is challenged as a forgery, or its delivery is denied, or question is raised as to the adequacy of the description of the locus in quo, etc. Again, it may be admitted that a deed is adequate in all formal respects, but fraud or mistake may be urged to vitiate it. In such cases, and others making up a long list, time-sequence has no significance. Even in a case involving issues on adverse possession, where there is a significant time-factor, it would not con-

[3] A complete review of property law from this angle would throw up some interesting cases, all of them, with strong policy factors. For example, you would think at once of the irrigation problem, where the law of some of our arid states gives the first appropriator a superior right of appropriation, but the common law of England, in force almost everywhere in this country, does not. Primogeniture was the rule of descent in the old common law, but it has almost wholly disappeared. In nuisance cases, time-sequence means something: for example, in a typical case of householder against manufacturer, it makes some difference whether house or factory was there first, though you would not say that this is the primary factor in the case. Other cases can be found. But the outstanding point would be that time-sequence is usually irrelevant.

tribute to a solution of the controversy to say, *qui prior est tempore potior est jure.*

There are obvious difficulties in the way of framing a definition of the field in which the time-right maxim is a useful general rule. Yet one hesitates to consign it to the limbo of glittering but meaningless generalizations. Not only is the maxim frequently used by the courts, but our standard terms for expressing the *legal* relation between conflicting titles reek of *time-sequence.* "Prior," "priority," "senior," "junior," all have time-relationship as their primary meaning, yet in the lawyer's mouth they signify, at least as often, a legal conclusion. This speaks more eloquently than any maxim of the prevalence of the notion that time and right are linked in a significant way. Let us, then, abandon the effort to define the jurisdiction of this maxim. After all, definitions are inconvenient things in this relative world. It will be more profitable to devote ourselves to an examination of certain priority problems where the maxim seems to make good.

THE TWO-SQUATTER CASE

A took possession of Blackacre to which he had no title. Then, before the prescriptive period had run in *A's* favor, *B,* likewise without title, disseised *A* and now has possession. *A* sues *B* in ejectment. The time-right maxim gives judgment for *A,* and you will feel the more inclined to rely on it because other things seem to be equal. In fact *A* has usually won in such cases, and, if you seek a simple rule of thumb for this situation, you cannot do better than *qui prior est tempore,* though you may do as well with the familiar doctrine that possession is title against all persons but the true owner. Either is, however, an over-simplification. The decisions are in confusion, and they can't be lined up in a simple yes and no, for count of the weight of authority. There are several lines of decision, and many cases which require interpretation. One gets furthest toward reconciliation of the decisions, and at the same time achieves a socially wholesome doctrine, if one starts, not with time-sequence as his general rule, but with the public interest in peace. If the first squatter was forcibly disseised by the second and brought suit promptly, policy clearly favors the former. To deny him the aid of the state in regaining his possession, would mean that every squatter is an outlaw, open to disseisin by all comers, and anyone who ousted him would in turn be vulnerable to like attack by others, including his disseisee.

Even with Marquis of Queensberry rules against major violence, the result would be unseemly. Furthermore, we must not think of this problem as if squatters were a distinct race living in a world of their own. In fact they constitute an integral part of the relative world of landholders, and one cannot distinguish the squatter from the true owner at sight, as he can, if his eyesight is good, distinguish cock pheasants from hen pheasants. Therefore, if we declared an open season on squatters, we would be inviting attack on landholders generally. Finally, if we took this position, we would seriously complicate the business of protecting property rights. Landholders who sought the aid of a court would always be put to proof of title, and that is often a large order, both on the fact side and the law side. On the other hand, if we protect possession, as such, against mere intruders, we relieve the landholder from the necessity of proving more than possession, unless and until proof of more is forced by some showing of title in the intruder. Even then, we will not require proof of perfect title but only proof of a title better than the adversary's title. From several points of view, then, policy favors Mr. *A,* the first squatter.

But suppose that Mr. *B,* squatter No. 2, entered peacefully in *A's* absence, and did so under color of title and in good faith, though in fact without title, and suppose that, before *A* brought suit, *B* enjoyed a long and undisturbed possession, though less than that necessary for title by prescription. Now policy does not speak so loud for *A*. Indeed, you may feel that it speaks for *B*. And you can make a very good showing for Mr. *B* on the authorities. Obviously there will be plenty of cases which lie somewhere between the extremes we have put, and through them policy does not draw any bright line. Yet the lawyer who has to advise in any of these sundry situations will be better equipped with the policy analysis, which points to distinguishing factors, than with the time-right maxim, which turns on a factor common to all of the cases. If and when the controversy gets into court, *A's* lawyer will, of course, argue the time maxim: for that purpose it is always useful to one side or the other in any priority problem. To complete the picture, both lawyers in the two-squatter case will argue legal doctrine concerning the right of a party in ejectment to avail himself of the title of a third person with whom he is in no way connected.[4]

[4] See note, 28 MICH. L. REV. 184 (1929). Cases are collected in 46 L.R.A. (n.s.) 487 (1913); 1918F L.R.A. 252.

Tested by the two-squatter cases, the time-right maxim seems to be little more than a statistical truth, like the observation that juries favor natural persons, especially of female sex, over corporations, or that courts favor sureties. Speaking of that kind of thing, have you met the maxim, "Possession [meaning present possession] is nine points [out of ten] in the law"? This apothegm seems never to have found favor with lawyers, but it figures in lay discussion over the cracker-barrel, and sometimes in lay literature. The writer believes that, like the observations noted above, it contains a fair measure of statistical truth and might be useful to the lawyer in the discharge of his advisory functions. It will be seen that it moves in a different realm of thought from the time-right maxim. The latter purports to fix legal rights, to be realized in litigation, while the nine-point maxim suggests practical advantages, including the advantage of not having to litigate, and, if litigation comes, the advantages indicated by the maxim *potior est conditio defendentis.* For land cases, the nine-point maxim doubtless exaggerates the truth which it contains, but for chattel cases, at least for some chattel cases, the ratio should be 99:1.

CONFLICTING CHAINS OF TITLE

It will be seen at once that our heading embraces the great bulk of priority problems. For that very reason, we must distinguish and classify. Suppose *A* presents a patent from the sovereign to *X,* and deeds *X-Y, Y-Z, Z-A.* On the other hand, without connecting himself with the sovereign or with any one in *A's* chain of title, *B* shows deeds *U-V, V-W, W-B,* and asserts continuous adverse possession in *V, W* and himself for over twenty years. We have already seen that this problem cannot be solved by the time-right maxim. Time is significant with respect to the period of prescription, but time-sequence means nothing. Another case: *A* presents the same chain of title as before, and *C,* not connecting himself with the sovereign nor with anyone in *A's* chain of title, presents a decree purporting to quiet title in *V,* and deeds *V-W, W-C.* Again the time-right maxim is useless. The problem turns upon the jurisdiction of the court and the construction of its decree.

Already you see that the case where the time-right maxim is significant is the case where the two chains of title are interconnected, trace to a common source. For example, *A* shows patent

to *X*, and deeds *X-Y*, *Y-Z*, *Z-A*, and *B*, counting on the same patent, shows deeds *X-W*, *W-B*. You don't need to know much property law—you only need to keep your head on straight—to see that, if each of the deeds is an inherently effective transfer (genuine signature, due delivery, absent fraud, etc.), and if neither adverse possession nor bona fide purchase has intervened, the problem of priority between *A* and *B* is the problem of priority between *Y* and *W*, each of whom took a conveyance from *X*. And you know that on that problem the time-right maxim speaks loudly. Of course the same problem would be presented if *B* showed a deed directly from *X* to himself, or if he showed a deed or a chain of deeds from *Y* to himself, or from *Z* to himself. And it would be the same if *B* merely set up a mortgage from any of these parties in *A's* chain of title to himself, or to some third person with whom he connected himself by assignment. And so forth, at length. We have had to lay aside many cases in the process of narrowing our field of inquiry, but the type-case now before us represents an immense group of practical problems involving a great variety of transactions in land, goods, and intangibles.

Conclusion, then: as a general rule, between conflicting titles both based on transfer from the same source, *qui prior est tempore potior est jure*. Now you will observe that this same class of cases comes within the terms of another maxim: *Nemo plus juris transferre potest quam ipse habet*. No one can transfer a greater right than he himself has. In one respect, this is a better maxim than the time-right maxim: it tells us with some precision what kind of case it is talking about, so that we do not need to tack to it a scope-note. At the same time, it asserts all too vigorously the notion that no one *can* transfer more than he has. The mere implications of the words "transfer," "derive," etc. are dangerous enough, but to work with a maxim which shouts *nemo potest* is to invite misunderstanding. Without having taken count, the writer ventures the statement that the courts have made about equal use of these two maxims.[5] That leaves us free choice, and the writer nominates the time-right formula. He likes it because it is a bald statement of a rule, with no pretense of putting the whole philosophy of priorities into one sentence. It also has the

[5] Here, and in all references to judicial use of these maxims, the intention is to include not merely formal statement of the maxims but the use of any paraphase which conveys the same thought.

advantage of being more terse, especially in the elliptical form, "first in time, first in right," and it can even be packed into that hyphenated "time-right" which we have used so frequently in the preceding discussion. Finally, it has the virtue of challenging our attention to the point that the first thing to do with a priority problem is to fix the critical dates, or, as you might say, to subject the case to chronological analysis.

QUI POSTERIOR EST TEMPORE POTIOR EST JURE: HEREIN OF ADMIRALTY LIENS, TAX LIENS AND TAX TITLES

The last point, the importance of dates, remains true when we turn to certain cases where time-sequence operates in reverse. It is the general rule of maritime law that one who furnishes supplies to a ship, or repairs a ship, or salvages a ship, gets a lien on the ship superior to all prior interests therein. It is commonly said to be a lien in rem. Justification for the rule is found in the policy of encouraging these beneficent activities. How else can a master, far from home, get the supplies he needs, or the services he needs? And it is to the ultimate advantage of those having prior interests in the ship that the master be able to keep the ship afloat and complete his voyage. From the rule as stated, it follows that if from time to time a ship gets supplies and/or services from sundry persons, these persons have liens which rank in inverse order of time. The last shall be first, etc.

In like manner, direct taxes on land are commonly made a lien upon the land paramount to all prior interests therein. The names of supposed owners may be placed on the rolls and personal notice of assessment may be given to them, but this is merely a point of convenience and courtesy. As matter of law, the state goes after the land, in rem, and publication is the only notice required, if any.[6] Again you may advert to policy—the ship of state must be kept afloat for the good of all. Or perhaps you will think this but another instance of the immorality of government when its own interests are at stake.

But the lien is merely a first step, a foundation for realization.

[6] Obviously this indicates a rule of action for everyone who has an interest in land: keep a weather eye on taxes. Lienors are peculiarly apt to overlook this point. Thinking of their interests as merely contingent and prospective, they are likely to ignore the hazard of taxes, though they would not do so in the case of property of which they were owners or purchasers.

If someone does not pay the tax seasonably, the state forecloses its lien by a tax sale. And in order to realize its advantage, the state offers to the purchaser a paramount title as of the time when the lien attached. But with tax liens, as with maritime liens, the last is best. Therefore the tax title is subject to the lien of taxes later than that for which the land is being sold, and if those taxes are not paid, the first tax title will be overtopped by a later tax title. Of course the burden of taxes is common to all other titles, and so we can say that a fresh tax title is, in theory, the best possible title—as good as a fresh patent from the sovereign, not yet stained by those flaws, which in the course of the years will inevitably gather upon it like moss. In the case of the tax title, however, there is more than the usual gulf between theory and practice. Tax statutes not infrequently run foul of the constitution, and the procedure of taxing officials is often faulty, and when litigation over tax titles throws up fact questions, a jury of the vicinage is not sympathetic with the tax title claimant. Furthermore, even if one can make the tax title stick, its enjoyment is not wholly enjoyable, by reason of prejudices at which we have previously hinted. For these and other reasons tax titles are seldom purchased by others than professionals, the "tax title sharks," and these gentlemen are always glad to release a title upon payment of the sale price with a fat rate of interest, even after the period of redemption has expired.[7]

We have touched upon maritime liens and upon tax liens and tax titles because a glance at these cases of inverse priority is illuminating. Among other things, we have here a simple demonstration that even when conflicting titles are derived from the same source, priority in time does not necessarily spell superiority in right. When it has that effect, it is because the law maker so chooses. This is not to say that it is silly or unjust or impolitic to prefer the first in time, as a general rule. At least that gives us a sensible solution where other things are equal,—for cases which throw up no material factors except the time-sequence. But that leaves open the really critical question: how much weight should be given to the time-sequence when there are substantial equities in favor of the later title? That is a question which we shall have

[7] Land taxes are not always put in this in rem shape, and personal property taxes seldom if ever are, but we need not examine other methods of tax gathering, for this is not a study in taxation.

before us repeatedly in our examination of the more acute problems of priorities.

TITLES MORE OR LESS DERIVATIVE: HEREIN OF MECHANICS' LIENS

You can get a liberal education in priorities from a survey of the law of mechanics' liens. In all (or almost all) of our states there are statutes giving liens to all (or almost all) of those persons (laborers, materialmen, contractors, architects, etc.) who contribute to the erection of buildings, and, under many of the statutes, to those who in other ways engage in the improvement of land, e.g., by altering or repairing buildings, or by operations on the land itself, such as grading, ditching, etc. The statutes vary endlessly in their phraseology and they exhibit vital differences in the substance of their provisions, which makes generalization about mechanics' liens somewhat dangerous. Yet the statutes show striking likeness—their resemblances, it might be said, are at least as conspicuous as their differences—which is not surprising in view of the fact that, roughly speaking, they have like objectives which must be attained by like means under like conditions. Add to the picture the well known practice of importing legislation from one state to another, and the equally familiar practice of looking abroad for light on the construction of local statutes. Quite naturally it comes to pass that we have general principles of lien law, a study of which contributes to an understanding of each of the local systems. In the following discussion, we shall avoid questions concerning the scope of the statutes with respect to the kind of improvements, the kind of services and the kind of materials which are covered. We shall likewise avoid details of the procedure required for the perfection of liens—notice, suit, etc. These things are, of course, of first importance, for they go to the existence of the liens which are claimed, but we shall assume these conditions to be satisfied and direct our attention to the priority of the liens, or, as the conveyancer might put it, the "title" of the claimants.

The primary plan of the statutes is disclosed in provisions for liens upon the interest of the "owner" who contracts for the improvement of the land. In one way or another it is made clear that it is not essential to the existence of liens that the contracting "owner" have an unencumbered fee simple, but it is also made

clear that, so far as concerns this primary provision, the liens attach only to his interest whatever it be.[8] In other words, the liens are derivative and consensual, in the same measure as the lien which the common law confers upon the ordinary bailee who stores or otherwise services chattels. Of course the common law never recognized a comparable lien in the case of land. But the contrast between land law and chattel law is greater than that. You may remember that common law gives the innkeeper a lien in rem, comparable to admiralty liens, and some courts have extended the doctrine to carriers. Then modern legislation has given like security to other bailees, notably garage-keepers. Do you see any reason why innkeepers, carriers and garagemen should be given greater protection than other bailees? Could you frame a brief for greater protection to all who service chattels than to those who service land?

Derivation from the contracting "owner" is the primary plan of the mechanics' lien statutes, but some legislatures have toyed with in rem methods. If the "owner" has no title, or an inadequate title (say a life estate, or a fee loaded with prior liens) it follows, on fixture law, that he has no better title to any building he erects upon the land, and *nemo plus juris transferre potest* to the mechanics he employs. But the statutes to which we now refer provide that, where a new building has been erected contractors, laborers and materialmen shall have paramount liens on the building, without reference to the title of the "owner." That sounds very nice in the abstract, but what does it mean in the concrete?

If the building is one which can easily (relatively easily) be moved from the land to another location, separate sale and removal may enable us to work out something, though probably not much, for the lien claimants, and relief in that form will not

[8] The Michigan statute is fairly typical in its provision that, "Every person who shall, in pursuance of any contract . . . between himself . . . and the owner, part owner or lessee of any interest in real estate, build [etc.], . . . and every person who shall . . . perform any labor or furnish materials to such original or principal contractor, or any subcontractor, in carrying forward or completing any such contract, shall have a lien . . . upon . . . the entire interest of such owner, part owner or lessee, [etc.]." Mich. Comp. Laws (1929) §13101 [amended, Mich. Comp. Laws (1948) §570.1]. Would this statute apply where the person making the contract had a life estate?—a reversion?—mere possession? Would it apply if his interest were inalienable?—or alienable only by a conveyance in which his wife joined, as in the case of estate by entireties or homestead? These and like questions we may lay aside. It is enough for our purposes that the statutes generally, if not universally, are of such character as to support the rather guarded statement in the text.

involve serious hazard to those who have superior interests in the land.[9] But in any case, and more especially when the building is one which cannot easily be moved, the way to get maximum realization is to sell land and building as a unit, and distribute the proceeds ratably among the lien claimants and those having prior interests in the land. Can it be said that this process involves no serious hazard to the prior interests? It may precipitate sale at an unfavorable time. Furthermore, sale under a decree cannot realize as much as private sale. Then, when we have sold, we propose to divide the proceeds: how? The only possible way is by valuing land and building separately, and dividing the proceeds in the ratio so established. Anyone who thinks that this assures protection of prior interests in the land simply doesn't know enough about the vicissitudes of the land market and the vagaries of land valuation. That is the practical problem.[10]

Every story should have a moral. This lien on the building which the "owner" does not own may invigorate our philosophy of original titles and derivative titles. You will surely agree that this lien is not original in the sense that maritime liens and tax liens are original. It is based on an agreement with the "owner" who has some kind of title, at least the title which goes under the mystic name of possession. Furthermore, the adverse claims to the building asserted by those who have prior interests in the land are based on a somewhat extreme application of the law of fixtures. Therefore you can say that this lien statute merely effects a minor alteration in the law of fixtures. You cannot, however, make out that this lien on the building which the "owner" does not own is derivative in the ordinary sense, especially if it results in forced sale of the other fellow's land. All this should help to limber up our concepts of original and derivative titles, thereby making them more useful in this relative world of priorities.

A somewhat similar moral would come out of a study of the cases which have established a lien on the land itself as against

[9] It would be too much to say that there can be no injury to them: see Washtenaw Lumber Co. v. Belding, 233 Mich. 608, 208 N.W. 152 (1926), where an old building had been torn down and replaced by the building in question.

[10] The familiar process of partition by sale between cotenants is different in that the ratio of division does not have to be determined by valuation, but is fixed by the terms of the tenancy. Furthermore, the cotenants' situation is one into which they all have come either by purchase, their own voluntary act, or by gift or descent. On the whole, that case does not go far toward establishing the reasonableness of the partition sale which we are examining.

persons who did not, in person or by duly authorized agent, employ the mechanics, but are said to have impliedly consented to the improvement of the land. An implied agency? An informal statutory grant? That sort of analysis wears rather thin in some cases, especially if the statute charges those who "knowingly permit" the improvement and this phrase is given a broad interpretation. The point is, of course, that as you move from contract, in the ordinary sense, through cases of actual consent evidenced by conduct, to cases where there is mere failure to prevent the work, you are moving toward, if not quite reaching, the realm of original lien, in rem.

Yet the concept of derivative title predominates in mechanics' lien law. That, as we observed at the beginning, is the primary plan. The lien is derived from the "owner," carved out of his interest. His interest at what time? Nemo's maxim and the time-right maxim concur in the answer to that question: it is his interest at the time when the lien arises. Therefore the painter who does the interior decorating gets a lien subject to the prior lien of the mason who finished his job before the painter began. But what of the plumber who installed the boiler while the painting was in progress? A microscopic application of the time-right maxim would mean liens for each of these mechanics, growing from day to day—indeed from minute to minute. But working out that theory in a court of justice would be a worse headache than unscrambling the bankrupt broker. Furthermore, as you think your way into the total situation, you will probably come to the conclusion that, as a matter of natural justice, time-sequence means nothing here, and all those who contribute services or materials to a unit-job (say a single building erected under one general contract) should fare alike. Almost all lawmakers have taken this view. Put, as usual, in time language, all liens take effect as of the same date.

But *what* date? That is a critical question for outsiders,—for example, the bank which lent money on mortgage of this land prior to the completion of the building. Here our lawmakers have split. Most of them have given all contractors, laborers and materialmen liens which relate back to the time the job was begun by visible operations on the land. The rationale is found in certain policy factors. A lien having priority as of a later date would give no assurance to one who was asked to furnish labor or materials at the beginning of the job. Do we want to impose that risk upon

them, or impair the "owner's" credit facilities to the extent that they refuse to assume that risk? On the other hand, a lien as of an earlier date would be a wallop for anyone who had dealt with the "owner" on the faith of his title, as yet unencumbered but later subjected to the antedated lien. To give the lien priority as of the date when visible operations began is stiff, but we can at least say that it was possible for anyone dealing with the "owner" to see the operations, and so to understand what was likely to ensue, assuming knowledge of the law. It should be added that prudence requires inspection of the land in any case, by reason of the doctrine of notice from possession. So, by a process of elimination, we come to the date of visible operations. Other statutes, however, have ignored the notice point, and date the liens from the execution of the "owner's" contract, without requiring the contract to be recorded. Apparently there is no way to guard one's self against the hazard created by that type of statute.

Up to this point we have assumed that, in order to attain equality among the lien claimants, we must (1) give all of them liens as of the same date; and (2) make that date controlling on questions of priority as between the lienors and third persons, e.g., those who lend on mortgage during the progress of the building enterprise. Are these assumptions inevitable? Are they expedient?

In the first place, it is clear that we could effect equality among the lienors without saying that their liens all relate back to a common date. It is quite enough to say that the fund which we are able to realize for them shall be divided among them pro rata. To express this by fictitious dating of the liens may be convenient, but it is so merely because this form of statement is elliptical: it implies the operation of the time-right maxim. Written out in full, the proposition would be: All the mechanics have liens as of the same date; therefore, under the time-right maxim, no one of them has priority over any other; therefore, they must share ratably. With all of the implications expressed, fictitious dating becomes the more cumbrous method of stating the rule of equality.

It is equally clear that we do not have to use fictitious dates to give the lienors priority over intervening claims. For demonstration, we need only turn to a common form of statute which provides that all the liens "are *preferred* to any lien or other encumbrance which may have attached subsequent to the time when the building or improvement was commenced." That states the rule at least as clearly and concisely, with no use of fictions.

Query whether the vogue of fictitious dating is due to its convenience, which is trifling, or to a notion, half conscious, unanalyzed, that the time-right maxim expresses an inexorable rule of law—that in the nature of things "priority is priority," and the only way to prefer the later claim is to make over the facts. Probably, for most of us, this use of time-language is no more than a habit of speech, but a bad habit if it is allowed to control our thinking.

So far, all we have accomplished is to sweep out of the picture a source of misunderstanding. The real problems remain. Let's split them up as far as possible. First, can we attain the desired equality among the lienors without giving all of them the same priority as against third persons? Merely as a mathematical problem, the answer is, yes. For example, where the "owner" has executed a mortgage during the progress of the building operation, we could say that liens of *A, B* and *C,* who began their contributions before the mortgage was executed, are superior to the mortgage, but the liens of *D, E* and *F,* who began their contributions later, are subordinate to the mortgage: then the fund realized from the property, could be distributed thus: (1) set aside for the lienors the amount of the *A, B* and *C* liens; (2) from the balance of the fund, if any, pay the mortgage; (3) from the balance of the fund, if any, and the sum first set aside, pay all the lienors pro rata.

That is easy enough, mathematically, but is the result humanly satisfactory? Even a good communist would not urge that levelling, among the lienors, is the sole desideratum. Rather, he would say that, so long as we have private property, we must have a scheme of priorities, and in that kind of world, *A, B* and *C,* of our hypothetical, have better claims, as against the mortgagee, than do *D, E* and *F,* and it is not altogether satisfactory to rob *A, B* and *C* of that advantage in order to level the whole group. On the other hand, it is not altogether satisfactory to deny the mortgagee his natural advantage over *D, E* and *F,* though that will attain equality among the lienors without depriving *A, B* and *C* of their priority over the mortgagee. The problem, then, is one of choice: what, on the whole, is the best solution, or, if you please, the least objectionable solution? Thinking of that sort presumably went into the common statutes which protect all the lienors against transfers subsequent to the commencement of the job.

Our discussion, so far, has assumed that equality among the lienors is of first importance and that priorities as between the

lienors and third persons must be fitted to that in one way or another. Obviously that is not an inevitable assumption. Some statutes do not observe the equity of equality at all. For all purposes, each mechanic is given a lien as of the time when he commenced his contribution of service or materials.[11] Then there is a compromise position, adopted in a few states. In certain cases (for present purposes we need not define them) all lienors will share ratably if there are no intervening rights of third persons, but, if a third party does intervene, the lienors are divided into two groups, the one consisting of those who are senior to the intervenor, and the other of those who are junior to the intervenor, equality prevailing within each group but not between the groups. Of course intervention of two third persons would give us three groups of lienors, etc.[12]

Up to this point, our discussion has contemplated a unit-job, exemplified by a single building erected under one general contract. You will, however, see at once that there must be acute difficulties in defining the concept of unit-job.[13] Does it depend upon physical relations? If so, what about the double house, two apartments separated by a partition wall? What of the duplex, two apartments separated by a floor? What of the single dwelling with detached garage? What of a group of factory buildings designed for integral use, each part inadequate without the rest? Or does unity depend upon continuity in time? Several buildings erected for the same owner on adjoining lots in successive years, each finished before the next is begun: several such buildings erected at the same time: a single building erected haltingly, with intervals of inaction because of, let us say, financial difficulties? Or is the concept of unity dependent upon a hook-up by contract? Any number of detached buildings erected under one general con-

11 This, by the way, is the furthest frontier, in mechanics' lien law, of the time-sequence concept: nowhere are the liens regarded as accruing from day to day.

12 See Wylie v. Douglas Lumber Co., 39 Ariz. 511, 8 P. (2d) 256 (1932), annotated 83 A.L.R. 925 (1933).

13 Caveat: The writer is in doubt whether the phrase "unit-job" is current coin in the profession. Certainly it is not commonplace, and it may be the writer's invention. Discussion of this problem in judicial opinions naturally turns on the phrases which the legislatures have used, which are various and in the main uncertain of meaning. The language of the applicable statute must, of course, be considered, but it seems to the writer that intelligent construction of the statute calls for recognition of the metaphysical, yet practical problems which necessarily arise from the nature of the situations with which the legislature is dealing. It is for this purpose that he features the phrase "unit-job," which certainly is not to be found in any statute.

tract is a unit job, while a single building erected without any general contract (or, as it is sometimes expressed, the "owner" being his own contractor) is as many units as there are contracts made by the "owner"? These questions should be answered with a view to the practical consequences of the several possible answers: (1) the effect upon the relations of the mechanics, inter se; (2) the effect upon the liens of mechanics as against intervening strangers; (3) facility of administration of the resulting rules. The statutory provisions which bear upon these questions vary widely, and all of them leave difficult questions of construction. The only accurate statement we can make concerning the resultant law is that all of the factors mentioned above enter in, with inevitable confusion, since these factors form endless combinations and permutations.[14]

We have dodged the problem of defining unit-job, but we ought to be clear on one point. The need of defining this concept arises chiefly from the grouping of lienors, whether for the purpose of achieving equality among them, or for the purpose of determining their priority as against third persons. However desirable grouping may be, there must be limits upon it, and the unit-job concept furnishes the most satisfactory approach to the definition of those limits. But it would be too much to say that grouping of lienors is the sole occasion for the unit-job limitation. Even where each lienor stands on his own feet, once we say that his lien dates from the commencement of his work or his delivery of materials, we must fix limits. The carpenter who works on a house of Mr. Owner today should not have a lien dating from his work on another house built for Mr. Owner ten years ago. Apparently the only way we could escape this unit-job problem would be to reckon priorities on the basis of day to day arrival of liens, which we have already found to involve acute difficulties of administration.

Observe, further, that these statutes ordinarily require a notice of claim and then a suit, each within a stated period after the end of the claimant's rendition of services or delivery of materials. Obviously that sort of regulation also necessitates a unit-job concept. The same necessity would exist if we fixed the period with reference to commencement of the job. The only way to fix such time limitations without using this concept would be to merely

[14] See notes 10 A.L.R. 1026 (1921); 54 A.L.R. 984 (1928); 75 A.L.R. 1328 (1931); 97 A.L.R. 771 (1935).

say that no lien should exist except for the value of services and materials furnished within a stated period prior to notice, etc. Then, the limitation would operate progressively from day to day. Compare the problem of limitation of actions on running account.

Now we have one more river to cross. What amount is secured by the liens of those who do not deal directly with the "owner," but with his contractor, or with the latter's subcontractor? The question concerns the extent of the lien even as against the title of the "owner."

First, without having canvassed all of the statutes, the writer ventures the statement that in no case does indirectness of relation, in itself, preclude lien. Rather would he expect to find statutes of the sort which once were common, giving liens only to the humbler sort of artisans, or perhaps including materialmen, but not contractors.

Indirectness of relation does not preclude lien: but what is the extent of the lien? The commonest problem is that which arises when, at the end of the job, $X remains due from "owner" to contractor, but $X + $Y is owing by contractor to laborers and materialmen. Do the latter have liens for $X only, or for $X + $Y? The lawmakers have split on this point. You can say that the two views involve, on the one hand more use, and on the other hand less use, of the concept of derivative title. In either view, the lien is derivative in the sense that it attaches to the title of the "owner": whether it goes further and takes on something of the in rem character is immaterial to the present inquiry, which concerns the extent of the lien as against the "owner." But many statutes confine the indirect claimant to a lien measured by that of the contractor with whom he has dealt, or, as it is often expressed, to a lien by subrogation. This is in the nature of a double use of the concept of derivative title. In its operation, this type of statute usually limits the indirect lien to a sum less than that which is owing as between the claimant and the intervening contractor, and it often gives the indirect claimant little or nothing. In this connection it must be remembered that the account as between contractor and owner depends not merely upon payments made on the contract but also upon set-off for breach of contract. Hence this type of statute tends, in practice, to reverse the policy of the earlier legislation, which was enacted solely or primarily in aid of those who were suffering from the intervention of irresponsible and crooked contractors between themselves and the responsible

land owner. The contracting system is a modern development, and this modern legislation aimed at one of its evils. In later years, the voice of the contractor has been heard in the legislative halls, and the protection of the lien law has been extended to him, subject to the overriding claims of those to whom he is indebted.[15] That is proper enough, but should the contractor's creditors be limited to subrogation to his lien?

Many legislatures, perhaps most of them, have answered this question in the negative. Subcontractors, laborers and materialmen are given "direct" liens. This is very nice for the laborers and materialmen, but rough on the "owner." He may pay his general contractor in full or breach by the contractor may more than off-set the balance due him, yet the "owner" may find his property plastered with liens. Assuming that the "owner" has the privilege of withholding payments from his contractor until assured that everyone down the line is properly paid (a point which should not be taken for granted, but should be studied in the light of the contract and the lien statute) there are obvious difficulties in the way of ascertaining the facts as payments become due, meaning prima facie due. Sometimes this type of statute enables the "owner" to require from the contractor a sworn statement of his accounts with subcontractors, etc., but query what protection this is to the "owner" who pays on a false statement? In greater or lesser measure, according to the legislative disposition of such details as we have mentioned, the direct lien is a man-trap. Where it flourishes, the "owner" should (1) at the start employ a lawyer who has had experience in this field, counting his fee as money saved; (2) take particular pains to get a contractor who is honest, competent and financially solid; (3) require from him an adequate bond; (4) retain a competent and honest architect to supervise the job, and incidentally get into the principal contract provisions which make him an oriental despot; and (5) pray.

Finally, it should be observed that in setting out two clear-cut methods of securing the persons who do not deal directly with the "owner," we have oversimplified. That adequately pictures the two main lines of approach to this problem, but whichever of these is adopted, many nice questions will arise, each of which,

[15] Surely we don't need to canvass all the statutes before we can say that the contractor is never allowed to dip into the common fund until his subcontractors, laborers and materialmen are satisfied, at least so far as these creditors have appeared and established their claims.

viewed philosophically, presents to legislature and court the choice of making more use or less use of the concept of derivative title. Naturally, these little questions have not been answered uniformly by the lawmakers in either of the two main groups. Result: we do not, strictly speaking, have two types of lien law, but many; not two degrees of derivativeness, but many.[16]

This closes our discussion of the priority problems which are generated by the mechanics' lien laws. But we should not leave this legislation without raising one last question of policy. Assuming all details of the law to have been put in the best possible shape (of course men will differ as to what is the best shape, but let each suit himself), what, then, do you think of the policy of the whole system? There are those who say that the lien laws are responsible for notoriously unwholesome conditions in the construction industry, viz., that men without experience and without capital, and even without integrity, can set up as building contractors, being enabled by this law to buy the necessary materials and place the necessary subcontracts, all on the credit of the "owner's" property, and that such contractors chronically bid below actual cost, to the injury of the whole industry, and chronically fail in the midst of their undertakings, to the sorrow of all concerned. Without doubt there is truth in this position. How much truth? Do these untoward features, along with such others as you have been compelled to leave in your ideal system, outweigh the advantages of your system?[17]

BONA FIDE PURCHASE

Bona fide purchase presents the philosophical problem of the one and the many. You may say that all the cases where one purchases, in good faith, land, goods or intangibles to which his vendor has no title, or a title less than he purports to sell, constitute one legal problem, and that all of the law applicable to such cases is one body of law. If it is put that way, however, it is necessary to add, in a mental footnote, that these cases differ one from another in circumstances which bear upon the relative equities of the parties and introduce variant factors of policy, with a second

16 Authorities are collected in notes, 20 L.R.A. 560 (1893); 50 L.R.A. (n.s.) 159 (1914); 13 A.L.R. 1072 (1921); 68 A.L.R. 1263 (1930); 83 A.L.R. 1152 (1933).

17 See BROOKE, OTHER PEOPLE'S LABOR AND MATERIAL IN THE BUILDING INDUSTRY (1933); Cushman, "The Proposed Uniform Mechanics' Lien Law," 80 UNIV. PA. L. REV. 1083 (1932); comment, Sixth Tentative Draft of Uniform Mechanics' Lien Statute, 41 YALE L. J. 271 (1931).

footnote that Anglo-American law has drawn distinctions which cut very deep. On the other hand, you may say that bona fide purchase is a term which embraces many distinct problems, which are governed by many distinct rules, though naturally enough these rules are somewhat similar to each other and to some extent have been consciously equated to each other, e.g., by taking the decisions as to what constitutes good faith under one rule as pertinent authority on the same question under another rule. It is submitted that you will achieve a better understanding of bona fide purchase if you look at it *both* ways.

Of course this feature of bona fide purchase does not make it unique. It is merely one phase of the problem of classification, which appears in every corner of the legal woods with varying degrees of difficulty and importance. There are two reasons for emphasizing it here. It is a particularly acute problem in the case of bona fide purchase. And the primary purpose of this note is to articulate the law of bona fide purchase, to develop the interrelation of its sundry parts.

The term "bona fide purchase" is ambiguous in that lawyers use it, (1) as a mere description of fact conditions, indicating that a purchase has been made under the belief that the vendor had a good title, with the implication that in fact the vendor had not a good title because there would otherwise be no occasion to talk of bona fide purchase, or (2) as the expression of the legal conclusion that by reason of his bona fide purchase the purchaser got a good title, or at least got a better title than the vendor had, herein overcoming the primary canon of priority, or (3) as the name of a legal rule which dictates this result. In this note, the learned editor will doubtless be guilty of ambiguous use of this term. That can never be avoided unless, perhaps, by the adoption of obviously technical, nondescriptive terms, such as "abracadabra," to indicate rules of law and legal conclusions.

It was indicated above that we have, in effect if not in theory, many distinct rules of law for the problems of bona fide purchase. More than one of these rules is referred to as a rule of bona fide purchase, but other rules which are applied to bona fide purchase situations go by other names, such as estoppel, or apparent authority, or go without any handy name and suffer for it.

Equitable Estoppel. We are not now concerned with estoppel by judgment, nor estoppel by deed, nor estoppel as between landlord and tenant or bailor and bailee, nor with any other (if there

be other) of the ancient common law estoppels, but with equitable estoppel (still so called, though it is now applied about as freely in legal as in equitable actions), otherwise known as estoppel *in pais,* alias estoppel by misrepresentation. Ewart's excellent treatise on Estoppel offers the following analysis of the subject, to which the present writer adds the bracketed comments.

"The essentials of estoppel by misrepresentation will be considered under the following headings:

1. There must be a misrepresentation. [But passive misrepresentation, i.e., nondisclosure, may suffice.]

2. Either (1) by the estoppel-denier (personal misrepresentation); or (2) by some person whose representation he has made credible (assisted misrepresentation). [Or has otherwise aided or abetted.]

3. There must be a disregard of some duty. [Query: Does this indicate a distinct factual element in estoppel, or just a wheel in the analytical machinery? That is to say, if the other elements are made out, is not breach of duty established?]

4. The misrepresentation must be as to fact or law—not merely of intention or opinion. [But this terse statement is somewhat qualified by Ewart in Chapter VI, and if the writer had been more familiar with the American cases, he would have qualified further.]

5. The misrepresentation must be of something material. [What do you mean, material?]

6. Fraud or bad faith in the estoppel-denier is not essential—an innocent misrepresentation will estop. [Query whether bad faith is not material—for example, may it not make up for weakness at some other point, say the point of materiality? Are judges human?]

7. Negligence (carelessness) is sometimes essential. [Query whether estoppel can be made out without some sort of moral culpability which can be called either bad faith or negligence?]

8. The estoppel-asserter must be a person to whom immediately or mediately the misrepresentation was made. [Can we never follow the analogy of tort and crime law—shooting at *A* and hitting *B?*]

9. The estoppel-asserter must, on the faith of the misrepresentation, change his position prejudicially. [May one change his position by doing nothing, while surrounding conditions change?]

10. The estoppel-denier must have reasonable grounds for an-

ticipating some change of position upon the faith of the misrepresentation. [Can this point be wholly isolated from bad faith and good faith?]

11. The change of position must be reasonably consequent upon the misrepresentation or the assistance." [Same comment as paragraph 10: and query how far the external standard is applied.]

These eleven propositions Ewart proceeds to elucidate in five hundred and nineteen pages. Perhaps the farther you go with that elucidation the less you will feel you know about estoppel, though you will, of course, be getting the feel of the thing, which is of first importance. You probably will come through with the conviction that Ewart's eleven-fold analysis is quite useless as a succinct statement of the law, but most illuminating as a guide in your study of the law, as a set of sign posts telling you what to look for, which is obviously what Ewart intended it to be.

The editor refrains from solving, here and now, the mystery of estoppel, but will venture a few observations upon its relation to the bona fide purchase problem. The concept of estoppel could have been applied to all the cases which have in fact been disposed of by the rules of bona fide purchase, and the results would have been largely the same. So we find Ewart dealing with practically all these cases, in the main approving the results arrived at but quarrelling with the mode of reasoning, urging that an estoppel analysis would have been preferable. Of course, one wonders whether, if the estoppel concept had been applied to all these cases, the estoppel concept would today be what it is, since the law is shaped by the cases. Anyhow, Ewart's contentions and our speculation about it gives us one clue to the relation of estoppel to bona fide purchase.

We get another clue in this, that the estoppel concept is applied to a great variety of cases which could hardly be said to involve bona fide purchase, in the descriptive sense, and to which the rules of bona fide purchase are inapplicable. For one example, "A man bitten by a dog asked a woman as to who owned it, and she said it belonged to her. He accordingly sued her. *Held* that she would be estopped from denying ownership on the trial if she knew that the inquiry was made for the purpose of finding out who was liable for the injury."[18] So, in cases without number, the estoppel principle has barred an equitable action the institution

[18] Headnote, Robb v. Shepard, 50 Mich. 189, 15 N.W. 76 (1883).

of which has been unreasonably delayed with consequent change in defendant's position. Here estoppel has taken on the name of "laches" and with the multiplication of cases we have come to think of laches as a thing apart. The process is the sort which Ewart, speaking of another situation, aptly called "thought in a groove." But see *Parsons v. Parsons,*[19] where a typical laches case was discussed entirely in terms of estoppel. So one might say that the rules of bona fide purchase constitute a specialized form of estoppel, and some of Ewart's remarks seem to involve that idea. But, if that is said, there should be emphasis on the word "specialized." The rules of bona fide purchase have enjoyed an independent life, not a tribal life in the bosom of the estoppel family, and they have acquired some habits, good or bad, which are not characteristic of estoppel. So we find Ewart frequently quarrelling with the results reached by the rules of bona fide purchase. For example, he is quite unhappy about the distinction which is drawn between legal and equitable estates. Now we have another clue to the relation of things.

We might sumarize thus: Estoppel is a very broad concept applicable to a great variety of situations, among others to cases of bona fide purchase, in the descriptive sense. It springs from elemental notions of policy and justice, and more than most rules of law it has been preserved from crystallization in formulae which might prevent resort, in its application, to its fundamental bases. On the other hand, the rules of bona fide purchase are highly specialized rules, each applicable to certain types of bona fide purchase, in the descriptive sense. They too have, perhaps, sprung from notions of justice and policy, but they have crystallized so far as to make difficult a resort to first principles, except, of course, in borderline cases which fall where there is supposed to be a line but none exists. One of the consequences is this: if a purchaser can make out a case well within the rule of bona fide purchase, he has a clear case, and there is no occasion to talk about estoppel; if his case falls in the penumbra of the rule, he may well argue the application of the rule and also argue estoppel; if his case falls clearly outside the rule, he can still argue estoppel and may get away with it—you never can tell about estoppel, unless the case happens to be exceptionally strong, or exceptionally weak.

Before we close our crude sketch of this elusive subject, we

[19] 101 Wis. 76, 77 N.W. 147 (1898).

should pay our respects to the famous dictum of Ashhurst, J., in *Lickbarrow v. Mason:* "We may lay it down," he said, "as a broad general principle, that, wherever one of two innocent persons must suffer by the acts of a third, he who ["by reposing trust in the third person" is often interpolated] has enabled such third person to occasion the loss must sustain it."[20] Is this not a statement of one phase of estoppel, that which Ewart calls estoppel by assisted misrepresentation? Is not this form of statement oversimplified, and does it not contain a patent ambiguity? It is often advanced as an argument on behalf of a bona fide purchaser, as indeed it was by Justice Ashhurst. But in *Foley v. Smith,*[21] it was turned against the purchaser, "who trusted the bank for the title, which it professed to sell."

What Do You Mean, Bona Fide? Now let us look at the rules of bona fide purchase. We have said that the term "bona fide purchase" is ambiguous in that it is descriptive of facts and indicative of a legal conclusion and at the same time serves as the name of rules of law. If it were accurately descriptive of the facts which, under the rules, give the indicated conclusion, no harm could ensue. But that is not the case.

"Good faith" does not, to say the least, tell the whole story of notice. To actual knowledge and actual suspicion, which touch good faith in fact, we add constructive notice, and therewith whole chapters of technical lore. There is notice by record (involving several man-sized problems,—e.g. the case of defective records through the fault of the recording officer,—e.g. lis pendens as to chattels), notice by possession (particularly tricky—e.g. the case of possession continued from one legal relation to another, as when a tenant for years becomes a purchaser—e.g. joint possession—e.g. discontinuous possession—and what is possession anyhow?), and finally that verbally neat but actually, in application, nebulous rule regarding facts which would put a reasonable man on inquiry, —in effect a negligence test. The nature of the problems thrown up by this last was wittily expressed by Maitland, who complained that the English courts had gone so far that they demanded of a purchaser "not the care of the most prudent father of a family but the care of the most prudent solicitor of a family aided by the skill of the most expert conveyancer." In their enthusiasm for

[20] 2 T. R. 63 at 70, 100 Eng. Rep. 35 (1787).
[21] 6 Wall. (73 U.S.) 492 at 494 (1867).

constructive notice, students will sometimes charge a purchaser with notice of all the existing facts, because a reasonable man would have known that these facts *might* exist. Would this leave anything of the doctrine of bona fide purchase?

Before leaving the subject of notice, we should observe that there is not one rule of notice for all cases, but many rules. For example, in negotiable paper cases, possession occupies an even larger place than in cases of land and goods, though it is not ordinarily discussed in terms of constructive notice but rather in terms of production and delivery of the paper as an essential to the complete transfer which makes one a holder in due course. On the other hand, it is said that the test of constructive notice is not negligence but bad faith. But we admit evidence of facts which would put a reasonable man on inquiry and one wonders *how much* difference it makes which test is laid down in the instructions. Generally speaking, negotiable paper and money may be equated, and likewise land and chattels, but one should not place unlimited confidence in the equations.

What Do You Mean, Purchase? If you agree with the editor that the term "good faith" conceals more than it discloses, you will surely feel that the term "purchase" is a downright fraud. For instance, either of the parties to a sale may be a "purchaser," for the purpose in hand, the one purchasing land or goods or intangibles such as corporate stock, the other purchasing negotiable paper or money. For another instance, one may be a "purchaser" in a transaction of such nature that neither party would in ordinary parlance be called a purchaser,—as when money is paid in satisfaction of a debt. How about mortgages, pledges, and other security transactions? And what is the meaning of the statement, sometimes seen, that a mortgagee is a purchaser *pro tanto*?

Why not rewrite our formula—make it "bona fide transfer"? But not all bona fide transferees are protected. Value must be given for the transfer, and the term "purchase" has, perhaps, a virtue in that it vaguely suggests this requirement.

The law concerning value is horribly confused. The strict view is that the purchaser must give "present value," excluding the transferee who takes property in satisfaction of, or as security for, an antecedent debt, and likewise excluding the transferee who has merely made a promise to the transferor, even though the promise created a contract obligation. The idea is that the equity of bona fide purchase rests upon irretrievable change of position,

such that the transferee cannot be restored to *status quo ante* when the defect in the transferor's title appears. On that postulate, should payment of money or other transfers of property be held to constitute "value" in themselves, without a showing that they can not be recovered by rescission, etc.?

At any rate, the present value rule appears to be too strong for mere human flesh, for it is nowhere maintained in its entirety. A creditor who receives a payment of money in good faith is always protected, and by the weight of authority, now confirmed by N. I. L., the transferee of negotiable paper either as payment or security of an antecedent debt is a holder in due course. With land and chattels, the strict view flourishes, but several courts have held that discharge of an antecedent debt is value, though holding that security of such debt is not value, and it has sometimes been held that both cases involve value. (This being also the view of the Uniform Sales Act.) Furthermore, it is usually (perhaps universally) held that if a creditor, taking security for an antecedent debt, agrees to extend time for a definite period, the length of which seems to be immaterial, he is a bona fide purchaser, at least if he is not charged with notice before the period of extension expires. Of course there is more here than mere security of an antecedent debt, viz., the promise not to sue, and there is more than mere promise after the period of extension has expired, viz. there is performance. But is there any difference from the point of view of substantial change of position?

How about the creditor who fixes a lien on the property by attachment, judgment, or execution? It would not be absurd to call such a creditor a "purchaser," that being in this context a technical term. But the rule against antecedent value stands in the way, and while that rule has been relaxed by some courts, the editor does not know of any single case which has held that such a creditor is a purchaser for value. But suppose the creditor's proceeding goes on to execution sale and, as usual, the creditor buys at that sale for the amount of his judgment or a lesser sum, which is credited on the judgment after deducting the sheriff's fees: is the creditor now a purchaser for value? Authorities differ on this point and so you have a question to consider "on principle." Which way do you go?

There are a few decisions that even a third person who purchases at execution sale and pays cash is not a bona fide purchaser because the sheriff does not purport to give a good title

but only to sell the interest of the judgment debtor, whatever that may be. Compare purchase by quitclaim deed.

In examining decisions regarding title at execution sale, whether of third person purchaser or creditor purchaser, it is important to distinguish between the case of defect in the judgment or in the execution procedure and the case of defect in the debtor's title, a distinction which has not always been observed in encyclopaedic citations.

Inadequacy of consideration is immaterial, except as evidence on the issue of good faith. And when the consideration for a transfer is in part present value and in part discharge (or security) of an antecedent debt, it has been held that the purchaser, if without notice, is fully protected. Yet, where a purchaser pays part of the agreed price without notice of the prior interest and then receives notice before he has completed his payments, it seems never to have been held that the prior interest is cut off, simpliciter. On the other hand, there is little if any authority (some of the cases are obscure) for the view that the purchaser is not to be protected at all. There are two respectable lines of authority, one giving the purchaser an equitable lien for what he has paid before notice, the other giving him the property subject to an equitable lien in favor of the prior party for the unpaid balance of the price. Which is the better solution? Is either one right? How do they square with the decisions on mixed consideration, or the decisions on inadequate consideration? Suppose *A* has paid X dollars as the whole price of land worth 2X dollars, and *B* has paid Y dollars as half the price of land worth 2Y dollars? And there is an interesting problem of constructive notice in some of these partial payment cases. Suppose the purchaser pays part of the price on an instalment contract, and then the instrument which created the prior interest is recorded: does the record give notice to the purchaser?[22] Note that in cases where the purchase money is not fully paid before notice, you are likely to find that there is no conveyance before notice, raising another question which will be touched on later.

We have seen that the definition of value has been relaxed in favor of the purchaser of negotiable paper, but even he cannot make a case on mere promise of value. What, then, shall we say of the case of a bank which, without notice of defect in its customer's title, receives from the latter a check which it credits to his ac-

22 See Jaeger v. Hardy, 48 Ohio St. 335, 27 N.E. 863 (1891).

count? Is it, without more, a holder in due course? If not, what more is needed? Suppose the bank, still without notice, sets off the deposit against the depositor's note? Suppose that, when the deposit is received, the bank holds the depositor's note for a sum exceeding the total deposit, but it does not act in the way of book-keeping set-off until after notice? Suppose the wrongful deposit is followed by a series of deposits and withdrawals, the account always showing a balance in excess of the amount of the wrongful deposit until notice of the adverse interest is received?

What Is the Legal Effect of Purchase in Good Faith? In our cursory examination of the definitions of value and good faith, we have found considerable unity in the subject, along with considerable diversity, the unities perhaps preponderant. As we go on to other aspects of bona fide purchase, we shall find diversities so great that family resemblance almost disappears.

Can we say that one who is a purchaser (giving value in the fullest sense) in good faith (without notice, actual or constructive) necessarily gets good title? Of course, we cannot. Neither would it be wise to say that "in general" the bona fide purchaser prevails, and then state exceptions to that rule, for that has not been the common law approach. We started with "the fundamental principle of property, which secures the title of the original owner against a wrongful disposition by another, and which does not permit one to transfer a better title than he has. The party who claims the benefit of the exception to this principle must come within all the conditions on which it depends."[23] In other words, a bona fide purchaser, like any other transferee, ordinarily gets no better title than his transferor had. How far, then, and in what cases, does the bona fide purchaser rise to a higher level? No useful answer to this question is possible, except one framed in terms of particular species of bona fide purchase.

The Equitable Doctrine of Bona Fide Purchase. In its oldest form, the doctrine seems to have been purely defensive, and to have drawn no distinction between legal and equitable estates. To a bill seeking equitable relief with respect to property, it was a good plea, excusing answer, to show purchase in good faith.[24] In course of time, the doctrine developed into a rule of property

23 Justice Campbell in Combs v. Hodge, 21 How. (62 U.S.) 397 at 405 (1858).

24 See Bassett v. Nosworthy, Rep. t. Finch 102, 23 Eng. Rep. 55 (1673), a bill filed by an heir against a purchaser from devisees for discovery of a revocation of the will.

which could be made the basis of affirmative relief to the purchaser, but it was at the same time narrowed to the terms familiar today, viz. that bona fide purchase of a legal estate cuts off outstanding equities. The type case is bona fide purchase from a trustee (selling wrongfully, not in the exercise of a power of sale) cutting off the interest of cestui. A case of particular interest in this course is that of purchase of the legal estate cutting off equitable liens. It happens, however, that this is not nearly as frequent here as in England. Reasons: In England, all junior mortgages are merely equitable, while here they are probably legal; there money is frequently lent upon a mere deposit of title deeds, creating an equitable lien, while here that practice is almost unknown; and finally our recording acts cut across this field and, where they apply, make the distinction between legal and equitable interests immaterial. Of course, the land recording system is much more complete than the chattel recording system, and so there is more room for the operation of the equity rule of bona fide purchase in the latter case than in the former. Per contra, the fugitive nature of chattels disposes of priority problems in fortuitous ways (identification, proof of title history, etc.) and perhaps it is a stand off.

Most of the reported cases involve purchase of the fee simple of land or the corresponding "absolute ownership" of chattels, and the rule is commonly stated in terms of purchase of "the legal title." There is, however, good authority for the protection of a bona fide purchaser of a lesser legal interest, e.g., a term for years, as against a prior equitable interest. What, for the purpose of this equity rule, is the nature of a mortgage, in those states which say that it does not transfer title but merely creates a lien? Is it a legal lien or an equitable lien? The question may arise in either of two ways: (1) mortgage followed by bona fide purchase from mortgagor, or (2) trust or equitable lien followed by mortgage by the trustee or the owner subject to the equitable lien, with value given in good faith by the mortgagee or by an assignee. Of course, as indicated above, most of the cases of either type will be governed by the recording acts, but a few escape the provisions of the statutes and turn, or may be made to turn, on the equity rule.

Emphasis on legal title has been carried this far, that even when the transferor has legal title and the purchaser parts with money in good faith, the latter is not protected unless he obtains a conveyance before notice. But this objection has often been surmounted, in one way or another, and this is rather to be ex-

pected if the purchaser's case is properly handled, because the objection is so artificial. The point which goes to the justice of the purchaser's claim is change of position without notice, and if we insist on legal title at all it should be merely insistence on such title in the vendor, inviting the purchaser's reliance. In this respect, the case in hand is very different from that to which the English courts applied their famous doctrine of tacking. There a purchaser of an equity who found the legal title in a third person could get in that title and thereby protect his equity. There are miscellaneous cases here in which the bona fide purchaser of an equitable estate, the legal title being outstanding, has been protected against prior equities, but it is doubtful whether any one of them can be regarded as authority for a general rule protecting the purchaser of an equity. It will usually be found that the case went off on the theory that the prior claimant was estopped by his conduct. Sometimes there is talk of "superior equities." That may be regarded as an informal expression of the estoppel principle, but in some instances it pretty clearly involves the idea that equitable interests are of various rank, so that the king can take the queen and the queen can take the jack. The difficulty with the latter notion is that there is no agreement on the grading system. All that comes clear is the *general rule* that, as between competing equities, the prior prevails, bona fide purchase going for naught, and the *estoppel exception* based on the prior claimant's conduct.

What do you think of the equity rule, from the point of view of justice and policy? What do you think of its general shape, and what do you think of its details? The question is worth serious thought because, among other things, it will lead you into a consideration of the actual working of the law. The reports do not indicate that the judges have been much moved by considerations of policy, yet the absence of policy argument in the opinions is not convincing evidence that policy has not actuated the decisions.[25]

[*To be concluded.*]

25 An illuminating discussion of the equity doctrine will be found in HUSTON, ENFORCEMENT OF DECREES IN EQUITY 114-148 (1915). A useful collection of cases, chiefly under the equity rule, will be found in 23 AM. & ENG. ENC., 2d ed., 472 (1903), title, Purchaser for Value and Without Notice. In CYC. and C.J., and in the *American Digest*, there is no such head, and the cases are gathered with considerable confusion of the several rules, under Vendor and Purchaser (land), Sales (chattels and some choses in action), Mortgages (land), Chattel Mortgages, Pledges, Contracts, Assignments, Execution, Judicial Sales, and who knows how many other heads.