February 1954

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Recommended Citation
Clyde L. Colson, Limits of Title Search Under the West Virginia Recording Act, 56 W. Va. L. Rev. (1954). Available at: https://researchrepository.wvu.edu/wvlr/vol56/iss1/3

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LIMITS OF TITLE SEARCH UNDER THE WEST VIRGINIA RECORDING ACT

CLYDE L. COLSON*

THERE is a serious question whether the limited search customarily made by title examiners in West Virginia is a safe one, both with respect to the interests of the prospective purchaser, and also with respect to the possible liability of the examiner for having negligently failed to discover recorded instruments which are or may be a cloud on title. Everyone is agreed that there must be a search of the records from the date each grantor in the chain of title acquired his title down to the date when it appears that by an instrument of record he has transferred the title. The difference of opinion centers around the question whether it is necessary to carry on the search in the name of a grantor after he appears to have conveyed record title. In actual practice no such additional search is made and the lawyers of the state seem to be of almost unanimous opinion that no such search is necessary. An attempt will be made in this article to show that the customary practice is not safe, at least so long as the question remains undecided in West Virginia. In this connection we shall so far as possible avoid discussions of what the law should be. We are more interested in trying to determine what the law is under our statutes and decisions, and what risks a title examiner may be taking under the present West Virginia practice, when he ignores certain questions which so far as we have been able to discover are still unanswered in this state.

In an effort to present the problem in its simplest form, we shall confine our discussion to situations in which there are successive deeds by the same grantor, each purporting to convey the title in fee simple. It will also be assumed, unless the contrary is stated, that the second grantee was a subsequent purchaser for value, the only question to be considered being whether he was a purchaser with or without notice of prior rights. It should be kept in mind, however, that the identical problem is presented when the grantor executes successive instruments of any kind which are recordable under our statute. In thus limiting our discussion to

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the rights of successive purchasers, we are not unmindful of the problems concerning the rights of creditors under the recording acts, which in West Virginia is an entirely different question.

The problem in its simplest form is presented by the following supposed set of facts with respect to the title of Blackacre:

1940—A by deed of record acquired title in fee.
1941—A conveyed to B who failed to record his deed.
1942—A conveyed to C who had actual notice of B's unrecorded deed. C recorded his deed immediately.
1943—B recorded his deed.
1944—C conveyed to D who had no actual notice of the deed to B.

In this situation who has title to Blackacre, B or D? Is D a bona fide purchaser entitled to protection under our recording act, or does the fact that B's prior deed from A was on record at the time D bought from C deprive D of such protection? In other words does D have record notice of B's rights?

This question is an open one in West Virginia and in probably more than half the other states, but in a majority of those jurisdictions where the question has been decided it is held that D is not a bona fide purchaser because of the constructive notice afforded him by the record of B's deed. Unless and until our court decides that D does not have constructive notice of B's deed, a lawyer cannot on the basis of the title search ordinarily made in this state assure D, the prospective purchaser, that he will acquire good title from C. This would mean, then, that both for the protection of his client, D, and for his own protection, he should continue his search in the grantor index under the name of A from 1942, when A apparently transferred his record title, right on down to the date of the title search. Otherwise he could never be sure that a possible prior deed had not subsequently been placed on record. A similar search would of course have to be made with respect to every other grantor appearing in the chain of title. The answer to the question whether such an extensive search is required will necessarily depend upon the proper interpretation of our recording act.

General discussions found in most textbooks and decisions concerning the effect and operation of American recording acts will be of little help in our effort to solve this problem. It is doubtful whether any other field of the law contains so many erroneous generalizations and reflects such confusion of thought.
concerning a problem as important as the one under discussion. The confusion stems primarily from a failure to appreciate the fact that recording statutes are of three distinct types, each differing materially from the other two in operation and effect. However possible it may be to generalize with respect to any particular type of statute, it seems clear that with few relatively unimportant exceptions, only error and confusion can follow any effort to state general rules applicable to all three. That will explain why this article contains so few citations. It is believed that a bit of a priori reasoning will be more profitable. This belief is held nonetheless firmly, in spite of the fact that there is now abroad in the land, particularly in West Virginia, the heresy (with some of which there can be no disagreement) that law professors, as a result of their too-long sojourn in the ivory tower, are dispensing mostly theory which will be of relatively little practical use to their students after graduation, and that they would be doing a better job if they devoted more time to matters of practical or “bread and butter” importance, which is by hypothesis impossible for most of them because of their lack of practical experience. It just may be that this article deals with a problem concerning which the practicing lawyer may obtain worthwhile practical advice from a purely theoretical discussion.

Fortunately, a few of the better authorities who have considered the operation and effect of recording statutes can be of material help in our effort to find a clear path through the mass of irreconcilable statements and decisions in this field. They have recognized that the key to the problem lies in a clear understanding of the differences in the recording statutes. On the basis of the type of recording statute in each state, Patton classifies American jurisdictions into three groups, each of which we must examine in some detail: (1) Pure race jurisdictions, (2) Pure notice jurisdictions, and (3) Notice-race jurisdictions.

Pure Race Jurisdictions. Under the recording acts of a very small minority of American jurisdictions, priority of right is made entirely dependent upon priority of record, without any regard to notice or lack of notice. If the case stated above should arise in a jurisdiction having this type of statute, C’s right is clearly superior to that of B, simply because C won the race to the record office, and this despite the fact that C took the deed with actual notice that A had given a prior deed to B. In other words in a
pure race jurisdiction priority of right depends upon the winning of the race to the recording office.¹

**Pure Notice Jurisdictions.** Approximately two-thirds of the states have recording acts under which priority is dependent, not upon a race to the registry, but upon whether at the time a person became a purchaser he had notice of the rights of a prior grantee.²

**Notice-Race Jurisdictions.** In approximately one-third of the states, in order to obtain priority over the grantee under a prior unrecorded deed, a purchaser must not only take his conveyance without notice of the rights of the prior grantee, but he must also win the race to the registry, placing his deed on record before the prior deed is recorded.³

On the basis of discussions with numerous West Virginia lawyers, there seems to be a wide diversity of opinion as to which type of recording statute we have in this state. Some argue that our statute is of the first type under which the only question is priority of record. Many others argue that ours is of the third type under which, as between purchasers without actual notice, priority of right will depend upon priority of recording. According to Patton, however, who seems to have made the most thorough study of the recording acts in the various states, West Virginia is classed among those states having recording statutes of the pure notice type.⁴ Such specific discussion of the problem as may be found in our cases would seem to indicate that Patton is correct, despite some dicta to the contrary and despite the opinion held by a substantial number of West Virginia lawyers that ours is a notice-race statute.

It is no wonder that such a difference of opinion exists because countless statements can be found in supposed authorities on the subject, stating without qualification that as a general rule priority of right depends upon priority of record, for which proposition cases from either pure race or notice-race jurisdictions are cited indiscriminately.⁵ Statutes of both these types are in the minority, however, and cases from such jurisdictions are not even in point

¹ *Patton, Land Titles* § 8 (1938).
² *Id.* § 9.
³ *Id.* § 10.
⁴ *Id.* § 9 n.105.
⁵ For example, see 1 *Jones, Mortgages* § 570 at 755 (8th ed. 1928), where it is said: "The order of priority between persons claiming liens on the same property, by mortgage or otherwise, is fixed by the order in which they are filed for record. In other words, priority of record gives priority of title, as a general rule. . . ."
on the question of the operation of recording acts in states which have a pure notice statute. The conclusion that in the normal situation ours is a pure notice statute, priority of right being in no way dependent upon priority of record, is borne out by the fact that with respect to one particular case we have a statute which does give priority to the first recorded deed. This is the statute dealing with the situation in which both deeds are recorded on the same day. If priority as between these deeds is not covered by other provisions of the statute, it is provided that priority shall be given to the deed first recorded. The implication is clear that with respect to deeds recorded on different days the result under the normal rule may well be otherwise. If in every case priority of right is dependent upon priority of record, it would be entirely pointless for the legislature to provide this rule with respect to deeds recorded on the same day.

As between two successive grantees from the same grantor, it is abundantly clear from the West Virginia cases that priority depends not upon priority of recording but solely upon whether the second grantee at the time he became a purchaser had actual or constructive notice of the prior conveyance. Of course he had such notice if the deed was recorded at the time the second conveyance was made, and even though it was unrecorded the second grantee may or may not have had notice thereof. As between the two purchasers, priority depends entirely upon this matter of notice. A later recording of the first deed in a pure notice juris-

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7 See Alexander v. Andrews, 135 W. Va. 403, 64 S.E.2d 487 (1951), in which at p. 407 our court said: "But our recording Act, Code, 40-1-9, makes a perfectly valid and effective conveyance void as to creditors and subsequent purchasers for valuable consideration without notice, until such deed is duly admitted to record in the county wherein the property conveyed is situated; and, therefore, while the grantor has nothing to convey, when he executes a subsequent deed for the same property, to a different party, then by force of this statute, his grantee in the subsequent deed gets title to the land in cases where the grantee in the first deed fails to record his deed before the second deed is executed, and where the grantee in the second deed can qualify as a purchaser for value and without notice of the first deed." (Italics supplied.) Note that this case involved a contest between C and B which B won. Although C had no notice of B's unrecorded deed at the time he obtained and recorded his deed, he received constructive notice thereof when B recorded before C had completed payment of the full purchase price. Had the case involved the additional fact of a conveyance from C to D, a purchaser without actual notice of B's deed in spite of the fact that it was on the record, it would have presented the very problem we are trying to solve. Should this case arise it seems clear that our court would have to charge D with constructive notice of B's deed, unless it wished to deprive B of the victory he won in the actual case.
prediction can in no way deprive the second grantee of the priority he had already achieved. The point we are trying to make will probably be clear if we first review the situation as it existed at common law in the absence of any recording statute. We shall then consider the extent to which the rights of the parties were changed by the recording statutes, and the theory upon which such change in priority was brought about.

At common law, if A first conveyed land to B and later conveyed the same land to C, the problem was easy. B had priority for the simple reason that after the conveyance to him A had nothing left to convey to C. Whether C did or did not have notice of the prior conveyance had nothing to do with the case. “Prior in time, prior in right.” B won for no other reason than that he obtained the first deed. In a way it is too bad that the problem is not still that simple.

As a matter of fact, the solution was equally easy under the original registry or recording acts, the material and only difference being that the common-law rule was changed so that priority of right was made to depend upon priority of record rather than upon priority of conveyance. Such statutes were of the pure race type. It may well be that the operation of such a statute as originally conceived would prevent the first conveyance from being effective until B recorded. Title presumably remained in A until B placed his deed on record, such recording being necessary to make the deed effective even as between grantor and grantee. But whatever may have been the original idea, it soon became the accepted view that under any type of recording act B, the first grantee, in the absence of an express provision to the contrary, acquired the legal title from A just as he would have at common law, but that in order to maintain his common-law priority as against a subsequent transferee within the protection of the act he had to place his deed on record.

Under a pure race statute, this means that in order to maintain his common-law priority as against a subsequent purchaser, whether with or without notice, B must record his deed before the second deed is recorded. From B’s point of view this is the most stringent requirement of all recording acts. Under a pure notice statute, in order to maintain his common-law priority as against

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8 PATTON, LAND TITLES § 8 at p. 36, where it is said that pure race statutes “follow more nearly the original idea that registry should be the final act in the process of transferring title. . . .”
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a subsequent purchaser without notice, B must record first. Stated another way, this means that in order to assure himself that there cannot possibly be a subsequent purchaser without notice, B must record his deed immediately upon its receipt. On the other hand, it is clear that under a pure notice statute B has priority as against a subsequent purchaser with notice, whether he records first, or second, or for that matter whether he ever records. Under a notice-race statute, the requirement from B's point of view is less burdensome than under a pure notice statute. Even as against a subsequent purchaser without notice, it is only necessary for B to place his prior deed on record before the second deed is recorded, though it was unrecorded at the time C became a purchaser.

Probably the best explanation of the result reached under all three types of statute is the power theory, so clearly set forth in one of Aigler's articles. According to this theory, even though A has transferred all his title to B there remains in A, until B's deed is recorded, the legal power to vest title in a subsequent grantee who is within the protection of the recording act. Again, for purposes of clarity, let us examine the extent of A's power under each type of statute. Under a pure race statute, A has power to vest title in a subsequent purchaser, whether with or without notice of B's rights, who records his deed before B's deed is placed on record. Under a pure notice statute A has power to vest title in a subsequent purchaser who, at the time he receives his conveyance, has no actual or constructive notice of B's prior rights. Under a notice-race statute A's power may also be exercised only in favor of a subsequent purchaser without notice of B's prior rights, but even so any attempted exercise of the power will be ineffective unless the second grantee outruns B to the record office.

Viewed from B's position this means that in order to deprive A of this power, or in other words, in order to maintain his common-law priority, B must place his deed on record as soon as possible. If B acts promptly, which he must do in order to protect himself against all contingencies, he is given priority not because his recorded deed gives subsequent purchasers notice of his rights, but because by recording his deed he has deprived A of the power he would otherwise have to divest B's title in favor of someone within the protection of the recording statute. It must nevertheless be emphasized that lack of notice is important in all jurisdictions.

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except those having a pure race statute. The mere fact that a deed is properly on record will prevent any subsequent purchaser from being a purchaser without notice. For any lawyer who represents a prospective purchaser, it therefore becomes very important to know what recorded deeds will be considered as giving his client record notice of the rights of the grantee under the recorded deed. Obviously, if a particular deed even though recorded does not give notice, there is no reason for concern on this score. On the other hand, if a particular deed which is in fact on record is held to give constructive notice, then the lawyer must in fairness to his client make whatever search may be necessary in order to discover the recorded deed. Necessarily then the limits of the title examination which a lawyer should make in a pure notice jurisdiction must in the very nature of things depend upon what recorded deeds do or do not give record notice. We shall see later that the problem is more complicated in a notice-race jurisdiction.

As a guide to the lawyer in fixing the limits of his search, little help can be derived from the statement often made that since only deeds in the chain of title give constructive notice, it is unnecessary to look for deeds not in the chain of title. That would be fine and good if the phrase "chain of title" had any definite, accepted meaning. As a matter of fact, the phrase is used more often as a means of explaining the result than as an aid in deciding any particular question. Obviously if the court determines that a particular deed gives no notice in spite of the fact that it is on record, an easy explanation is to say that the deed is not in the chain of title. On the other hand if the court feels that the deed should be held to give constructive notice, it will simply say that a subsequent purchaser has notice because the recorded deed is in the chain of title.

This is not to say that the concept of a chain of title is not of material help in many situations. What is meant is that in the difficult cases where help is needed it is of little value. In the normal case there will be a continuous and unbroken chain of conveyances, starting with the original valid patent and coming on down through successive grantors to the present owner, from whom your client proposes to purchase the land. A search of the grantor index under the name of each successive owner, from the date he acquired title down to the date when he appears by a
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recorded deed to have conveyed title to the next owner, will ordinarily bring to light all instruments which might constitute a cloud on the title of the prospective vendor. The fact that this is nearly always the case probably explains why the average lawyer confines his search to this limited period. Our problem, however, is whether this fact also constitutes a justification for the normal practice, or whether a more extensive search should be made in order to guard against the complications discussed in this article.

The oft-stated proposition that "a recorded deed not in the chain of title gives no notice" may help us solve as well as explain those cases in which the deed is clearly outside the chain. For example, if a prospective vendor, D, whose title is under examination, is the last grantee in an unbroken chain running from the state through A, B, and C down to D, it is obvious that a purchaser from D cannot be charged with notice of a deed of the same land executed by a grantor, X, who is a complete stranger to the title under which the purchaser would claim, even though X's deed had been placed on record. Except in states where the Torren's system of recording is in effect, there would be no earthly way to find this deed from X unless the title examiner looked at every deed on record. The same problem in modified form is presented by another situation. Suppose that A, who has title, conveys to B. B never records his deed but conveys title to C who places his deed on record. Obviously a subsequent purchaser from A would have no practicable way to discover this deed from B to C, even though it is recorded. So far as is known, no court would place upon the purchaser, or upon his lawyer, the unreasonable requirement of examining every recorded deed in order to determine whether such a transaction had occurred. This test of the reasonableness of the search that may or should be required should be kept in mind for its possible bearing upon the answer to our main problem. The matters just dealt with are expressly covered by the West Virginia statute which provides that a purchaser shall not be affected "by the record of a deed or contract made by a person under whom his title is not derived. . ."\textsuperscript{10}

It is easy enough to see that a purchaser should not be charged with notice of a recorded deed from a grantor who is in no way connected with the chain of title under which the purchaser claims. The crux of our problem, however, is this: Assuming

\textsuperscript{10} W. VA. CODE c. 40, art. 1, § 15 (Michie, 1949).
that a particular grantor is in the chain of title under examination, is a prospective purchaser charged with notice of all possible recorded transfers made by this particular grantor at any time, or is he charged with notice only of such instruments as were made and recorded in a more limited period, as for example, from the date when the grantor first acquired title down to the date when by the record he first appears to have transferred his title? This limited period is of course the only period covered by the title examination customarily made.

For the sake of convenience in discussing the problem, let us consider the different times when a deed from a particular grantor, A, may have been placed on the record. There are three more or less distinct periods involved:

1. The period before A had any title.
2. The period during which A was the record owner.
3. The period after A apparently ceased to be the record owner.

Surprising as it may seem, the rule in some states requires that a search of the records be made backward indefinitely under the name of each grantor, for any recorded deed he may have given at any time before he became the owner of record. Assume, for example, that at a time when A has the title, B by warranty deed conveys the land to C, who immediately places his deed on record. Thereafter A conveys to B. If we stop right here, in many states B's after-acquired title will under the doctrine of estoppel by deed immediately vest the prior deed to C, so that legal title becomes vested in C. Suppose, however, that after B gets his deed from A he records it, so that he appears to have record title. If B then conveys to D, a purchaser without actual notice of C's rights, we are faced with the question whether D takes with constructive notice of the prior recorded deed from B to C, under which C acquired title by estoppel. Under the rule adopted in some states C has priority over D, and in such a jurisdiction D's lawyer would have to search the record for the prior deed that was executed by B and recorded by C when B had neither actual nor record title. In a majority of jurisdictions, however, the view is taken that although as between B and C the doctrine of estoppel by deed will vest title in C, the doctrine will not be applied as between C and a subsequent purchaser from B, the apparent record owner, if such purchaser took without actual notice of C's rights. Under this view the prior deed
from B to C even though on record does not give constructive notice, and therefore in such a jurisdiction the title examiner employed by a prospective purchaser from B is under no necessity to search the records for such a deed.  

Fortunately for West Virginia lawyers it is clear that no search need be made for such a deed recorded during this first period before B acquired title. Our statute adopting the majority rule stated above provides that a purchaser shall not be affected "by the record of a deed or contract made by any person under whom the title of such purchaser is derived, if it was made by such person, and was recorded, before he acquired the legal title."  

Note well, however, that although the dividing line between the first and second periods suggested above may be clear in fact, it is nevertheless a possible source of confusion. The line is drawn not at the date B recorded his deed from A, but goes back to the date of the deed itself. Consequently, even in West Virginia under our statute, and in other states which follow the majority rule, a limited search must be made prior to the date when B became the record owner for possible deeds that may have been executed by B before he had any title but were recorded after the date on which B acquired title from A.  

Aside from this possible confusion as to when the period begins, there is no problem so far as the second period is concerned. Everybody is agreed that a search must be made, under the name of each successive grantor, for incumbrances and other clouds on title that may have been created by any instrument executed by him that was placed on record after the date on which he acquired title, but before the date on which by a recorded instrument he apparently transferred title to the next grantor.  

Our real trouble is with respect to the third period, between the date on which each grantor in the chain of title apparently disposed of his record title and the date on which the title search is being made. Of course, if the matter is judged on the basis of the practice almost universally followed by title examiners, there is no real problem here either, because one simply does not search that part of the record. Our main question, however, is whether  

11 Patton, Land Titles § 45.  
13 Patton, Land Titles § 45 n.75 where it is said: "The rule requires, however, that a subsequent purchaser examine back to the date of the deed to his grantor, and not merely to the date on which it was recorded."
a lawyer may with safety fail to make this additional search, however burdensome it may be.

Keeping in mind the general observations made thus far, let us return to the problem presented at the beginning of this article. The facts were these:

1940—A by deed of record acquired title in fee.
1941—A conveyed to B who failed to record his deed.
1942—A conveyed to C who had actual notice of B’s unrecorded deed. C recorded his deed immediately.
1943—B recorded his deed.
1944—C conveyed to D who had no actual notice of the deed to B.

The question is, did D acquire good title when he bought from C in 1944?

No universally correct answer to this question can be made. In the first place we must know what type of recording statute was in effect in the jurisdiction where the transaction occurred. In a pure race jurisdiction D obviously has priority over B. Although at the time of his purchase C had notice of B’s prior unrecorded deed, he nevertheless won his race with B to the record office. As soon as C’s deed was placed on record, B’s rights were completely and irrevocably divested. Therefore C had good title which he could and did convey to D in 1944. Thus in a pure race jurisdiction the general practice of title examiners is entirely safe, if the jurisdiction also follows the majority rule with respect to the problem of estoppel by deed, rendering unnecessary a search for deeds given by a grantor before he acquired title.

Most of the controversy concerning this problem has centered around the question whether D has notice of B’s rights merely by reason of the fact that B’s deed was on record at the time D bought from C. Obviously, this question of notice can arise in either a pure notice jurisdiction or in a notice-race jurisdiction, but for reasons to be stated later, it is extremely doubtful whether the question is of any real importance in a notice-race jurisdiction. We will, however, overlook that matter for the time being. Getting back to our main problem, the legal title which B acquired in 1941 was not divested by the 1942 conveyance from A to C, because C took with actual notice of B’s unrecorded deed. The fact that C recorded his deed first in no way affected B’s title for the simple reason that there is nothing in either a pure notice statute or in a notice-race.
race statute that gives protection to a purchaser with notice. Therefore title was still in B at the time he recorded his deed in 1943. Now we come to the heart of the matter. When D became a subsequent purchaser of the land in 1944 did he or did he not have record notice of B's actual legal title, as evidenced by B's recorded deed? Although this question has arisen in relatively few jurisdictions, a majority of the courts that have directly decided the question hold that D does have constructive notice of B's rights.\(^{14}\) Philbrick among others has severely criticized this view.\(^{15}\)

According to Philbrick, the area of the required title search should be limited by the reasonableness of the requirement. Only those recorded instruments which a title examiner may reasonably be required to look for should be held to give record notice. Starting from the premise that it is wholly unreasonable to require the title examiner to search down to date under the name of each grantor appearing in the chain of title, for possible clouds on title that may have been created by recorded instruments from each grantor, he concludes that the deed to B, recorded in 1943, should not constitute record notice to D, a purchaser who subsequently buys the land from C. He cites the almost universal practice of title lawyers as evidence of the unreasonableness of the majority rule, under which it is necessary for the title examiner to look for B's deed. Presumably most lawyers are reasonable men who do all that they feel is reasonably necessary.

Conceding the weight and relevance of these arguments in any jurisdiction in which the question remains open, it should again be pointed out that the lawyer is running a substantial risk when he proceeds on the assumption that should the question ever arise, his court would find these arguments convincing. Furthermore, the reasonableness or unreasonableness of the search here involved is purely and simply a question of the amount of time and work which should be required of the lawyer. If he looks far enough under A's name in the grantor index, he can easily enough find this deed to B. It could even be said that Philbrick's argument boils itself down to this—that it is unreasonable to make a lawyer work so hard. Although it is only a matter of degree, note how this situation differs from the case where a recorded deed entirely

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\(^{14}\) Tiffany, Real Property § 1269 (3d ed. 1939).

\(^{15}\) Philbrick, Limits of Record Search and Therefore of Notice, 93 U. of Pa. L. Rev. 125, 259, 391 (1944-45). This was by all odds the most helpful and best article found dealing with the general subject of recording acts.
disconnected from the chain of title under examination is generally held not to give constructive notice, and this on the ground that it would be unreasonable to expect a lawyer to find that deed, there being no possible way to discover it short of reading all the deeds in the record office. Conceding that it is debatable whether such a deed as B's should be held to give constructive notice, we should again emphasize the fact that in any pure notice jurisdiction which has not yet decided the question, such as West Virginia, there is an equally debatable question whether a title examiner is fulfilling the duty he owes his client to act with due care and diligence, when he concerns himself not at all about the possibility of there being such a deed as B's on record.

Consider next the situation in a notice-race jurisdiction. Here we run into a strange and surprising anomaly. Remember that whenever a question of priority as between two conflicting deeds arises in a notice-race jurisdiction, the subsequent purchaser who wishes to establish his priority over a grantee under a prior deed must satisfy two requirements. Not only must he obtain his deed without notice of the rights of the prior grantee, but even if he does so, he must place his deed on record before the competing deed has been recorded. We have already mentioned that with respect to the first requirement of notice, the problem in a notice-race jurisdiction is identical to that presented in a pure notice jurisdiction. It is interesting and surprising to note that most of the decisions that accept Philbrick's argument, that B's recorded deed does not give D notice, are from notice-race jurisdictions. Right here is where the anomaly comes in. Let us concede for a moment that Philbrick and these minority decisions are correct in saying that because of the unreasonableness of the search involved, B's deed though recorded is not constructive notice to a subsequent purchaser from C. It would then necessarily follow that D can meet the first requirement of a notice-race statute, namely, that he be a purchaser without notice. It by no means follows, however, that D has priority over B. As a matter of fact, exactly the opposite is true because D can never meet the second requirement of a notice-race statute, that he place his deed on record before B's competing deed is recorded. D was behind the eight ball to begin with. B had already won the race for the registry even before D left the
post. Philbrick admits this to be true, but fails to go on from there to what appears to be an inescapable conclusion.

If D is bound to lose his contest for priority simply because B's deed was first recorded, then in order adequately to protect the interests of his client, D's lawyer must of necessity make such a search of the records as will bring B's deed to light, however unreasonable and onerous such a search may be. Unless the lawyer is willing to advise D to proceed upon the assumption that he can obtain good title from C, an assumption that simply cannot be true in a notice-race jurisdiction because D can never record before B, then it is imperative that the lawyer look further in the records under the name of A as grantor for deeds executed by A before but recorded after the date on which the deed to C was recorded. If this were not so, we would in this situation be disregarding the second requirement of a notice-race statute, thus turning it into a pure notice statute and nothing more.

We have seen that in a pure race jurisdiction D would always win because C's deed was recorded first, and that in such a jurisdiction it is never necessary to make any further search of the records after finding that A's deed to C had been recorded. We have seen further that under a notice-race statute the further search is imperative, wholly without regard to the question of whether B's later recorded deed is constructive notice to D. It therefore necessarily follows that only in a pure notice jurisdiction is there any room for argument concerning the necessity of bringing the search down to date under the name of each grantor who appears in the chain of title. In such a jurisdiction the answer will depend entirely upon whether B's recorded deed gives notice to D of B's rights. On this pure question of record notice, a court might reasonably decide either way. Attention is again called to the fact, however, that the majority of courts that have decided the question hold that B's recorded deed does give notice. This weight of authority becomes even more imposing if we confine the count to decisions from pure notice jurisdictions, disregarding those from notice-race jurisdictions which agree with Philbrick's view. As we have seen, those decisions as to notice have no relevance on the point under discussion, namely, the necessity of searching the

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10 Philbrick, supra note 15, at 391, where he says: "Since by hypothesis B's deed is recorded before D's deed is taken, the latter can never satisfy a requirement of prior recording, and so D must, in a notice-race jurisdiction, always fail."
record for B's later recorded deed, unless we are incorrect in our conclusion that such a search is imperative in a notice-race jurisdiction.

It is interesting to observe that in Virginia a few years back the question of the proper limits of title search was the subject of some discussion and difference of opinion. The author of a student note concluded that it was necessary to bring the search down to date in the case of each grantor.\(^\text{17}\) A practicing lawyer took the contrary view in a later note,\(^\text{18}\) concluding that the Virginia court in the case of *Bowman v. Holland*\(^\text{19}\) had adopted the minority view that a subsequently recorded prior deed does not give constructive notice to a purchaser from the grantee under a previously recorded deed. Although Philbrick agrees that Virginia has adopted the minority view,\(^\text{20}\) there is some doubt whether *Bowman v. Holland* actually stands for that proposition, as witness the editorial note\(^\text{21}\) at the conclusion of the lawyer's comment.

However that may be, the question of the necessity of bringing the title search down to date may still be an open one in Virginia because of some uncertainty as to the nature of the Virginia recording act. If it is true, as stated by the student editor, that the act protects only a purchaser without notice "whose conveyance shall be first duly recorded",\(^\text{22}\) then of course Virginia is a notice-race jurisdiction, in which as we have seen above it is imperative that the title be searched down to date, entirely apart from the question of notice which is relevant only to the first requirement of a notice-race statute. An ingenious argument has been made that although to begin with Virginia had a pure notice statute, it was turned into a notice-race statute by an amendment that substituted the words "all purchasers" in place of the former language "all subsequent purchasers".\(^\text{23}\) No case was found specifically holding that the amendment had this effect. Furthermore, Patton still classifies Virginia as a pure notice jurisdiction.\(^\text{24}\) It would appear then that the limited title search normally made is adequate only if Virginia is a pure notice jurisdiction, and then

\(^{17}\) *Note*, 26 Va. L. Rev. 385 (1940).

\(^{18}\) *Id.* at 381.

\(^{19}\) 116 Va. 805, 83 S.E. 303 (1914).


\(^{21}\) 26 Va. L. Rev. 835 (1940).

\(^{22}\) *Id.* at 386.

\(^{23}\) 2 MINOR, *REAL PROPERTY* § 1312 (2d ed. 1928).

\(^{24}\) PATTON, *LAND TITLES* § 9 n.105.
only if Bowman v. Holland may properly be interpreted as having adopted the minority view on the question of notice. Until these doubts are resolved, the only safe course to follow in Virginia would be to bring the search down to date.

Another situation which is bound to arise as frequently as that already considered, also raises the question of the necessity of searching the record down to date under the name of each grantor. Assume the following set of facts, in which different dates have been used in order to avoid confusion with the case discussed above:

1945—A by deed of record acquired title in fee.
1946—A conveyed to B who failed to record his deed.
1947—A conveyed to C who had no notice of B's unrecorded deed.
1948—B recorded his deed.
1949—C recorded his deed.
1950—B conveyed to D who had no actual notice of the deed to C.

Who has title, D or C? As an aid in answering this question, consider the transaction step by step. The deed from A to B in 1946 placed legal title in B, but since B failed to record his deed, this left in A the power to divest B's title by a conveyance to any subsequent purchaser within the protection of the recording act. Here again the result depends upon the type of recording statute involved. The answer is easy in a pure race jurisdiction and in a notice-race jurisdiction. In order for C to win in either type of race jurisdiction, he would have to record his deed before the prior deed to B was recorded. Since this did not happen, B's title was never divested in such a jurisdiction, and consequently D got good title when he bought from B in 1950.

The solution becomes more difficult, however, in a pure notice jurisdiction such as West Virginia. Although the conveyance from A to B in 1946 placed legal title in B, his failure to record left in A the power to divest B's title in favor of a subsequent purchaser without notice. That is exactly what happened when A conveyed to C in 1947. Therefore in 1947 C had legal title. The crux of our problem is whether, despite the loss of his title, B may still place himself in a position to divest C's title by recording his deed first. Under the cases, it is clear that as between C and B the recording of B's deed in 1948 in no way affected C's title, so that when C recorded his deed in 1949 he not only had actual
title but also had title of record. Of course, B's recorded deed is a cloud on C's title, and in a proper action C may have this cloud removed from the record. Our court has considered the rights that may be acquired by a grantee from C. Suppose for a moment that in 1949 immediately after C recorded his deed, C had conveyed to X. It is clear that X would have acquired good title from C, the bona fide purchaser, even though X had actual notice or, as in this case, constructive notice of the prior deed to B. It is well settled that once a bona fide purchaser has taken free of prior equitable or legal rights of which he had no notice, he is able to transfer that clear title to a subsequent grantee, even though the grantee has actual or constructive notice of the prior right.25 The truth of the matter is that all the grantee can have notice of is the fact that once upon a time B had a right, which has since been cut off by his grantor's bona fide purchase. Thus in refusing to permit B to enjoin a sale by C, our court had this to say:

"Mrs. Farkas [C] claims to be an innocent purchaser for value. At the time of her purchase the title, so far as the records in the county clerk's office revealed, was in Fay Riddell [A]. The fact that the 'undated' declaration of trust [in favor of B] was recorded two days prior to October 22nd, the date that Mrs. Farkas [C] actually recorded her deed, has no bearing on the latter's title, if she was an innocent purchaser for value at the time of the delivery of the deed."26

A contrary holding would clearly have been wrong because it would have deprived C of the preferred status she acquired when she became a bona fide purchaser.

Is this situation in any way changed because our set of facts happens to involve a conveyance by B to D, instead of a conveyance from C to X? If, before buying from B in 1950, D had employed you as his lawyer to make an examination of B's title, could you safely have assured D that B had good title merely because his deed from A was recorded before C placed his deed on record? Such advice in this situation would, we have seen, be entirely correct in either a pure race or a notice-race jurisdiction. The clear implication from the quoted language of our court, however, is that West Virginia is a pure notice jurisdiction, the rights of C

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25 Id. at § 15.
being in no way dependent upon a race to the registry with B. There is then no way that we can give priority to D, the purchaser from B, unless we say that by recording his deed before C recorded his own, B somehow or other acquired the power to divest C's title in favor of D. Such a construction of our statute would not only turn it into a notice-race statute, at least so far as this situation is concerned, but we would also have to assume that our court would hold that D was a purchaser without notice, in spite of the fact that A's deed to C, representing the true title, was on the record at the time D bought. Again, it seems too clear for argument that so long as it remains an open question whether such a recorded deed gives constructive notice, any lawyer who fails to bring down to date the search under the name of each grantor, which is the only way C's deed can be discovered, is taking a chance which in fairness to his client he ought not to take.

That consideration alone should settle the matter, but the lawyer should also weigh the possibility that he may come under personal liability to his client for failure to make a reasonably careful and diligent search of the record. It is too clear for argument that a diligent search would bring C's deed to light. It is no answer to say that this situation will arise so infrequently as to justify the lawyer in taking this calculated risk. Though willing to assume the personal risk involved, loyalty to the interests of his client should preclude any such gamble. Unless and until our court or the legislature makes it clear that there is no necessity for making a broader search than is ordinarily made by the practicing lawyer, Patton's advice, when he was discussing the first problem posed above, is eminently sound:

"... is a purchaser from C on notice of any rights B may have as against C? Though some courts hold that he is thus placed upon inquiry and charged with notice of any facts which the inquiry would reveal, other courts hold that a purchaser is under no obligation to search the records for conveyances from any particular grantor recorded subsequent to that from which the purchaser's vendor deraigns title; that any such subsequently recorded conveyance is outside the chain of title and does not afford constructive notice. In states having no decision on the subject, the only safe course for an examiner is to treat as a cloud on the title any conflicting deed dated prior to, but recorded after, a deed from the same grantor appearing in the vendor's chain of title."27

27 Patton, Land Titles § 46 at 197-198.