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## POSSIBLE IMPROVEMENTS IN THE RECORDING ACTS.

CHARLES T. McCORMICK\*

It is probable that most of the disinterested students of our system of registration of *documents* of title would agree that the best treatment of the system would be to abolish it. A system which involves the laborious following of the entire trail of title at each transfer of an interest in the land ought perhaps to be discarded in favor of another system entirely—the system of registration of *titles* whereby the participation by the state itself in the transfer enables the purchaser to get a reliable title without an examination to the source.<sup>1</sup> I should not dispute the desirability of such an exchange.

But despite the example that Continental countries have offered for at least five hundred years of the operation of the more scientific system<sup>2</sup> and its widespread adoption in the British Dominions under the name of the Torrens system, its acceptance in the United States has been exceedingly slow.<sup>3</sup> If we shall not have the Recording Acts always with us, it is at least apparent that unless the momentum of reform shall be greatly accelerated the prevailing system and its perplexing problems must be dealt with in most of the states for many years to come. An attempt to

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<sup>1</sup> J. R. Rood, "Registration of Land Titles," 12 MICH. LAW REV. 379; E. C. Massie, "Perfection of the Torrens System," 2 VA. LAW REG. N. S., 750.

<sup>2</sup> "Progress in Land Title Transfers," by Alfred G. Reeves, 8 COL. LAW REV. 439, 444.

<sup>3</sup> Seventeen states are listed as having Title Registration Acts, in a recent article "The Conclusiveness of a Torrens Certificate of Title," by L. M. Staples, 8 MINN. LAW REV. 200 (1924).

repair what we have, since we are not likely to replace it soon with a new model is justified by the virtue of necessity.

The ideal goal of the Recording Acts is to furnish in the public record office a complete history of the title of every tract of land within the jurisdiction to the intending purchaser or incumbrancer, so that he may determine therefrom whether the title is good. Practicality does not admit of the complete attainment of this ideal under our recording system, however. The passage of title by descent, by adverse possession, and by marriage, cannot be conveniently reflected upon the record-books, or at least most states have failed to make effective provision for their recordation. Nevertheless, the intending purchaser must satisfy himself from other sources as to these factors and must take the risk of the correctness of the results of his investigations.<sup>4</sup> Conceding that absolute reliability of the record cannot be practically attained, yet in the writer's opinion a much nearer approach could have been attained, and the courts (and to a less degree the legislatures) have unwisely restricted the scope and effectiveness of the records. My complaint is in three counts, and I feel sure that every lawyer of experience would be able to extend the list in important particulars. It appears to me that the unreliability of the records is unduly enhanced (1) by the alphabetical basis of the indexes to the records, (2) by the doctrine that a recorded instrument does not convey notice to an intending purchaser unless it is in the chain of his title, and (3) by the rule usually obtaining that the mere delivery of a deed to the recording officer gives the instrument the effect of a recorded deed despite the officer's failure to index or transcribe it.

## I.

It is a frequent saying of busy lawyers, as to text books, that "if it isn't in the index, it isn't in the book." In the old leisurely days books were read from cover to cover, but today more frequently they are consulted only for particular references. A similar evolution has occurred in the recorder's office. Practically all of our recordation systems were organized under pioneer conditions. While the record-volumes were still few, often no index at all was provided. Then as the number grew it became increasingly difficult to trace a title by thumbing the pages of the volumes wherein the deeds were transcribed at large, and

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<sup>4</sup> Other examples of such gaps in the record, varying according to locality, will occur to any one who has given an opinion on a title. Many are pointed out in an article by H. W. Chaplin, in 12 HARV. LAW REV. 24, entitled "The Element of Chance in Land Title."

indexes were provided, often unofficially and of grace, by the recorder, and later it became customary to require them by statute. Sometimes the indexes were prepared separately for each volume, but later it became the more usual practice to maintain a general index.<sup>5</sup> Naturally, these early recorders, usually elected for short terms, and none too expert in their work, prepared the indexes in the easiest way that would at all answer the purpose. If A were offering land for sale to B, B or his lawyer, beginning at the last link of the chain, would if he, as would often occur, had as his only information about the title the name of the seller and the description of the land, seek first to find the deed to A, and whether A had already parted with or incumbered his title, and then make a similar search as to A's grantor, and so on to the state's patent. It being impracticable to do this by reading all the records of deeds in the country, how should a guide be devised? The two obvious ways would be (a) an index listing all conveyances together (with references to the volumes where each was copied) which pertained to the particular piece of *land*; *i. e.*, an index arranged *territorially*, or (b) an index of all deeds in the county arranged *alphabetically* by the names of the grantors and grantees therein. Of these, the first, the territorial would be obviously the more satisfactory to the searcher, but the second, the alphabetical index, is the easier to prepare and maintain, and was the form which was almost universally adopted.

Such improvements as are possible in the alphabetical index have generally been introduced, by statute or upon the initiative of recorders; *e. g.*, the index notations now include not merely the names of grantor or grantee, as the case may be, but also (a) the character of the instrument, as deed, mortgage, assignment of lien, etc., (b) a short description of the land, and (c) dates of the instrument and its recording. Ingenious methods have also been devised for separating, upon different pages the entries pertaining to parties of the same surname. But the defect is inherent in the plan. Imagine the task of tracing a title through some Smiths and Joneses in a county like Los Angeles County, California, where as many as 1800 instruments are recorded in a day.<sup>6</sup> One must read and reject fifty entries for each one that bears on the title. The confusion is added to in those states which provide a different index for each type of transfer, incumbrance, caveat,

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<sup>5</sup> The history of the American system of deed-recording is traced in an article by F. C. Hackman of the Seattle Bar, styled "Indexes to Title Records," 17 *LAWYER & BANKER*, 26 (1924).

<sup>6</sup> 17 *LAWYER & BANKER*, at p. 27.

etc., each alphabetical by name and complete in itself. Idaho furnishes an extreme case, for there by statute, thirty distinct sets of indexes must be kept by the hard-pressed recording officer.<sup>7</sup> Even if the preferable form of one general alphabetical system be kept (as in Washington, see Remington's 1915 Code, Sec. 8787), and even with loose-leaf devices, the indexes become excessively voluminous and inconvenient to use.

The unbusiness-like character of these official indexes, tolerated by the casual searcher, was perceived and remedied, so far as his private purposes were concerned, by the professional searchers, *i. e.*, the abstractors. This class have devised a guide to the records based upon the common sense notion that the main subject of the search is *information about one particular piece of land*. In other words, for their own use they have prepared indexes, or have arranged their data taken from the records, upon the *territorial* plan. The entire area covered is divided into tracts corresponding to the individual holdings, or to the subdivisions or lots usually dealt in, and as to each such tract all instruments or official transactions pertaining to the title of the tract are listed or abstracted together in one place. Of course, if the tract is divided by later transfers, new lists are made but are easily joined by reference to the parent list. When such a set of "block-books" has been prepared, and duly maintained, the references to each chain in the title are at once at the searcher's hand. He need read nothing whatever about instruments which do not affect his land, and he has before him references to every one which does.

If any index at all is to be kept by the recording officials, a reasonably efficient one should be. No doubt the private interest of the abstractors, the experts in title records, has naturally deterred them from advocating any change in the cumbrous official index system, a system which is impractical, even for the average lawyer, as an avenue of search. The same inertia or conservatism that characterizes all government offices has naturally been manifested in the deed registry, which lags behind private enterprise, as did the Exchequer in England, which still used the notched wands for tallies when the merchants in their counting-houses had for centuries been practicing book-keeping by double entry.

The first step, then that I would suggest to improve the recording system is legislation requiring that the recorder shall keep one and only one index, arranged according to convenient divisions of the land in the county. Such legislation should be carefully

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<sup>7</sup> Sec. 3636, COMP. ST. IDAHO, 1919, cited in 17 LAWYER & BANKER, at p. 29.

framed to bring under one roof such usually widely scattered provisions, as those concerning the recording of mechanic's liens, judgments and decrees affecting land, notices of *lis pendens*, judgment liens, attachments, homestead exemption claims, and all of the other multitudinous court-house transactions which can affect a title, and which now necessitate search in as many separate indexes. One tract, one index, should obviously be the rule, and the one index should reveal in one place all the transactions affecting the title so far as those transactions are required to be disclosed in the public records.

This step, with more or less completeness, has been taken in a few jurisdictions. In New York City, for example, where the mass of records to be indexed early attracted legislative attention, a change in the direction of the territorial index was made. In 1887 an Act<sup>8</sup> applicable only to New York City and County, provided that an official map should be prepared and that thereafter all records of conveyances instead of being made in books of the usual type should be kept in volumes each of which should be limited to transfers in a single city block, and that each volume should be separately indexed, alphabetically. This is change in the right direction so far as it indicates a shift to the territorial basis, but it seems to the writer much less important to keep the records themselves territorially than it is to keep the index in that way. Much more effective is the legislation in South Dakota, which provides that, in addition to the traditional grantor-grantee alphabetical index, there shall be kept indexes according to the territorial divisions of the land in the county; *i. e.*, sections, quarter-sections and town-lots.<sup>9</sup> Unfortunately, two sets of these, one for liens and another for other instruments are required, instead of having them consolidated in one.

More ambitious, if not more effective, is the legislation in Wyoming,<sup>10</sup> which enjoins upon the County Clerk the duty to keep not only an alphabetical index system of the usual type, but also a set of "abstract books" similar to those kept in private abstract offices, with entries corresponding not merely to the bare identification of the documents customary in an index, but giving more elaborate summaries of the instruments, customary in the abstracts used in Southern and Western states, including "description of the premises, and such other pertinent marginal remarks as will show whether such instrument was properly witnessed and

<sup>8</sup> N. Y. LAWS, 1887, C. 718.

<sup>9</sup> COMP. LAWS, SO. DAK. (1910), Secs. 867, 868 & 869.

<sup>10</sup> WYOMING COMP. STATUTES, ANNOTATED (1920), Secs. 1496-1502.

acknowledged or not." This seems to me to impose a duty on the clerk, which could better be done by the abstractor, but is certainly far preferable to legislation which gives no territorial guide at all to the records.

Wisconsin is characteristically progressive as to this matter. A statute of that state<sup>11</sup> provides that where such "tract-indices" have been heretofore kept they must be continued, and that counties wherein there are first-class cities may, by vote of the county-board, adopt such a system of indexes, and may provide for a daily report from all of the other officers to the recorder of all transactions affecting land titles, to enable the recorder to keep the same complete. The county board is authorized to incur the expense necessary to have such a system installed by private parties, but the recorder must maintain it thereafter. That, of course, points the way to a scientific, uniform, index,—an index which makes the public land records an understandable picture of title, instead of a Cubist riddle to which only the abstractor can furnish the key.

## II.

The first suggested change, from the name-index to the land-index, renders possible the second.

The purpose of the Recording Acts is, so far as practicable to furnish to the searcher a picture of the title to the particular land under search, and to enable him to rely on the information so secured. This is accomplished by permitting a purchaser to disregard a transfer which is *not* recorded, of which he has no knowledge, and, on the other hand, by treating him as if he had knowledge of such instruments as *are* recorded *if a proper search would have revealed them*.<sup>12</sup> Some of the implications of this purpose are, for example, that an instrument recorded *after* the purchaser acquires his interest does not convey the effect of notice to him, for he must be able to rely on what a search will reveal at the time he purchases.<sup>13</sup> Similarly, it seems questionable that a purchaser of tract "A" should be treated as being affected with notice of the terms of a previous recorded conveyance of tract

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<sup>11</sup> WIS. STATUTES, (1923), Sec. 59, 55.

<sup>12</sup> These complementary effects of the Recording Acts are analyzed in an article by Prof. Aigler, "The Operation of the Recording Acts," 22 MICH. LAW REV. 405 (1924).

<sup>13</sup> Lynchburg Perpetual Bldg., etc., Ass'n, v. Fellers, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851 (1898); Lowden v. Wilson, 233 Ill. 340, 84 N. E. 245 (1908).

“B,” not being within the scope of a reasonable search,<sup>14</sup> but the weight of authority seems to the contrary.<sup>15</sup>

But this principle has been carried to the extreme limit by the courts when they hold, as they almost unanimously do, that an intending purchaser is not affected with notice of a previous deed, though duly recorded and correctly describing the same land when such previous deed was made by a party who was not the apparent record owner at the time the deed was made,<sup>16</sup> and that one who holds the legal title under such previous recorded deed is subject to have that legal title divested by a wrongful sale of the land to a purchaser who is without actual knowledge of his claim.

It is agreed that this doctrine which so amazingly strips of efficacy the record of such an instrument may be traced directly to the method of search under the alphabetical index system.<sup>17</sup> Let us suppose a chain of recorded deeds from A (who had title) through B to C. C offers the land to P. Let us suppose further that in fact B, before he had acquired any interest in the land, granted it by warranty deed to X, who immediately recorded his deed. The theory of the courts is that P, in making his search, will find in the index to grantees the deed to C by B, and to B by A, and then, looking at the index to grantors, under the name B, will find no conveyance by B *after* he got apparent title from A. This is the extent of the customary and reasonable search, which need not be widened to inquire for deeds *before* B got title. The result is that if the claim of X, to the after-acquired title, is regarded as an equitable one,<sup>18</sup> it will be cut off though duly placed of record, if P decides to purchase and does so for value without actual notice.<sup>19</sup>

A cognate situation develops when B, in the case above described, instead of conveying to X *before* B got title, makes a conveyance to X *after* B has parted with his legal title to C, *e. g.*, by deed absolute in form, but intended as a mortgage. Here again, though the recorded deed to X may have given him good

<sup>14</sup> *Glorieux v. Lighthipe*, 86 N. J. L. 199, 96 Atl. 94, Ann. Cas. 1917-E 484 (1915); *cf. Thompson v. Cole*, (Tex. Civ. App.) 126 S. W. 923 (1910).

<sup>15</sup> *McQuade v. Willcox*, 215 Mich. 302, 183 N. W. 771 (1921); commented on in 20 MICH. LAW REV. 344, and cases cited 2 TIFFANY REAL PROP. 2nd Ed. p. 2190, note 63.

<sup>16</sup> 2 TIFFANY REAL PROPERTY, 2nd Ed., Sec. 567 (d); 39 Cyc. 1728, 1729.

<sup>17</sup> 2 TIFFANY REAL PROPERTY, 2nd Ed., p. 2188; 2 POMEROY EQ. JURISP. 4th Ed., Sec. 658, Note 1. *Harris v. Reed*, Idaho, 121 Pac. 780, 782 (1912).

<sup>18</sup> See *Aigler*, 22 MICH. LAW REV. at pp. 418, 419.

<sup>19</sup> *Breen v. Morehead*, 104 Tex. 254, 136, S. W. 1047, Ann. C. 1914-A, 1285 (1911). But if X is regarded as getting legal title, he prevails. *Ayer v. Phil. & Boston Brick Co.*, 159 Mass. 84, 34 N. E. 177, 21 C. J. 1088 (1895).



equitable title, it is regarded as not within the necessary scope of search by P, and P will prevail over X.<sup>20</sup>

So drastic is this rule that one who gets the *legal* title under a deed and records it, may have his legal recorded title swept out from under him by a subsequent purchaser. Reverting to our lettered puppets: suppose B conveys to X, and this deed is *not* recorded, but X conveys to Y who carefully and promptly records his. Thereafter, B conveys to C, who records, and, as before, offers the land to P. Here, though Y's title is a legal one and his immediate conveyance is recorded, the title rests upon one unrecorded deed, and this will be "void" if P can, despite the record of the deed to Y, be regarded as not required to search for that deed. Here the alphabetical index gives P no clue at all, because in searching up the index of names from C, neither X nor Y appear as grantor or grantee, there being nothing on record to bridge the gap left by the omission from the index of the deed from B to X. Consequently, the courts hold that P will prevail over the prior legal owner, Y.<sup>21</sup>

These results, even under the present system of alphabetical indexes, have been criticized on the ground that the premise upon which they rest,—that a purchaser would reasonably depend upon the official indexes for his information as to the title—is wholly baseless today when reasonable investigation would include the examination of an abstract of title, which would inevitably disclose the recorded instrument, and which so disclosed (even though, made by an apparent stranger to the title) should excite inquiry.<sup>22</sup>

If the change above advocated to an official tract-index be made, the courts would, no doubt hold, as they have in South Dakota,<sup>23</sup> and Wyoming,<sup>24</sup> that any previous recorded instrument relating to the same land, irrespective of the connection of the parties with apparent record title, gives notice to subsequent purchasers of the claims asserted thereunder. This result should be ensured by specific statutory provision.

### III.

The third suggestion for incorporation in any legislative program for the improvement of the recording system is one that

<sup>20</sup> *White v. McGregor*, 92 Tex. 556, 50 S. W. 564, 71 Am. St. Rep. 875 (1899); *Goodkind v. Bartlett*, 153 Ill. 419, 38 N. E. 1045 (1894); 2 *TIFFANY REAL PROP.*, 2nd Ed., p. 2191, n. 68.

<sup>21</sup> *Board of Education v. Hughes*, 118 Minn. 404, 136 N. W. 1095, 41 L. R. A., (N. S.) 637 (1912); Cases cited 2 *TIFFANY R. P.* 2nd Ed., p. 2187, n. 55.

<sup>22</sup> *WEBB, RECORD OF TITLE*, Sec. 158; *Maco Stewart, Esq.*, in 1912 *PROCEEDINGS TEXAS BAR ASSOCIATION*, p. 103.

<sup>23</sup> *Fullerton Lumber Co., v. Tinker*, 22 S. C. 427, 118 N. W. 700, 18 Ann. Cases 11, (1909).

<sup>24</sup> *Balch v. Arnold*, 9 Wyo. 17, 59 Pac. 434, (1899).

is necessary for any consistent carrying out of the purpose that the public records should be, so far as possible, a guide upon which the intending purchaser may rely. In one glaring respect this reliance is subject to betrayal in most jurisdictions. This danger arises from the rules usually prevailing as to the time or stage in the operations of the recording office, at which the instrument is to be treated as having been "recorded" and hence as being invested with the effect of imparting notice to later purchasers.

The traditional routine in the recording process includes (1) the *delivery* to the recorder of the instrument, (2) the notation by the receiving clerk of a short description of the instrument in a *list* of instruments received, sometimes called the reception book, (3) the *transcribing* of the instrument at large upon the record, and (4) the *indexing* of the instrument, giving the reference to the page of the record, and (5) the return of the original instrument by the recorder to the owner. When does the deed assume the status of a recorded instrument?

Most courts say that it is "recorded" as soon as it is delivered to the recording officer.<sup>25</sup> The practical consequences to the subsequent purchaser are obvious. If the instrument has been delivered to the recorder, but not *indexed*, the purchaser relying on a search in the recorder's office could only have resort to the original instrument, the reception-books, or the transcribed record. The original may be lost, the reception-book entry omitted, and, of course, a search in the record-volumes themselves is out of the question. Nevertheless, if from these impractical sources of information he fails, as often will, to discover the existence of the instrument, he will nevertheless be treated as if he had discovered it. The index is the key which the public provides for its records, and it is the only reasonably effective way of locating the record of the instrument. It seems harsh to impose upon the purchaser the risk of failure to find an instrument, no trace of which is to be seen in this index provided for that purpose. This seems the more inequitable when one reflects that, as has been pointed out,<sup>26</sup> it is perfectly possible for the person who delivers the instrument for record to see that it is properly entered upon the index, and thus becomes accessible to future searchers. In important transactions, at least, the practical effect of the rule suggested would be that the purchase money or the loan would not be turned over

<sup>25</sup> *Sinclair v. Slawson*, 44 Mich. 123, 6 N. W. 207, 38 Am. Rep. 235, (1880); *Throckmorton v. Price*, 28 Tex. 605, 91 Am. Dec. 334, 39 Cyc. 1723, n. 45 (1866).

<sup>26</sup> *Prouty v. Marshall*, 255 Pa. 570, 74 Atl. 550, 25 L. R. A. (N. S.) 1211, 1214, (1909).

until the buyer or lender had actually inspected the index to see that the deed or mortgage had been correctly entered therein.

If the suggested rule were adopted, making the indexing the operative act of recording, the statute should require the recorder to index the instrument forthwith upon its receipt, instead of delaying this until after the instrument is copied into the record-book.<sup>27</sup> Until the instrument is thus transcribed, the index would point to the original instrument in the recorder's files, but after the transcription the reference to the record book would be inserted in the index-entry. Thereafter, of course, the copy in the record-book should be the measure of the notice conveyed. Here again the party who claims under the instrument, who can see to it that a correct copy is made, should bear the risk of errors or omissions of the transcriber.

Some halting steps in the direction suggested have been made. Several states which treat the deed which is not indexed as being nevertheless effectually recorded refuse such effect to a transcript or abstract of judgment which is filed for record, but not indexed.<sup>28</sup> Others hold that the deed has the status of a recorded instrument from the time of its delivery to the recorder, but if after it is transcribed, it is not then indexed, it loses its effect.<sup>29</sup> Others might hold that the index-entry is essential but that being made the recording would relate back to the time the deed was received by the recorder.<sup>30</sup>

It is submitted the full step could be wisely taken of denying any effect to those stages in the registry which precede publication of the deed in the index.

In conclusion: I believe these changes in the registry laws which, *first*, bring together in one place in the index a note of every recorded fact about each particular tract of land; *second*, require all persons without exception thereafter dealing with the land to disregard any of such entries at their peril, and, *third*, dispense with the need to search elsewhere than in the index,—are necessary to bring our Recording Acts into harmony with the improved methods which business has long since sanctioned and employed.

<sup>27</sup> It is said that this practice now obtains in the state of Washington. 17 LAWYER & BANKER, at p. 125.

<sup>28</sup> For example, *Valentine v. Britton*, 127 N. C. 57, 37 S. E. 74 (1900); *Willie v. Smith*, 66 Tex. 31, 17 S. W. 247 (1886).

<sup>29</sup> *Barney v. McCarthy*, 15 Iowa 510 (1864).

<sup>30</sup> *Compae 2 TIFFANY REAL PROPERTY*, 2nd Ed., p. 2200, N. 95.