Problems on Recording Statutes

*Consider the following deeds to Blackacre. In the following deeds, "→" means a transfer for valuable consideration; "⇒" means the transfer was made without consideration (*i.e.*, though a devise, intestate succession, or an* inter vivos *transfer (gift)).*[†]

At the end of the following series of deeds, who owns Blackacre under –

- *the North Carolina statute (Supp. 166)?*
- *the Florida statute (CB 700)?*
- *the California statute (CB 700)?*
- *the Massachusetts statute (Supp. 166)?*

Do NOT rely on the descriptions of the statutes as notice or race-notice or race; look at the actual language of the statutes themselves.

1. **2020: O → A.** **A records.**
2024: O → B. **B doesn't record.**

In any of the states, A wins.

The common law. First, note that A would win under the common law rule: after O sold Blackacre to A, O had nothing left to convey, so B got nothing. The only way that B might ever prevail over A under the common law would be by adverse possession. For example, maybe A never moved in. Then O sold the property to B in 2024, and B moved in. If the statute of limitations were 10 years, and B satisfied all the requirements of adverse possession, then B would gain ownership in 2034.

Of course, B would have an action against **O** as of 2024, but that may not be satisfactory to B for two reasons. First, a judgment against O may be impossible to obtain (say because O cannot be located) or meaningless (if O has gone bankrupt, for example). Second, even if a judgment can be obtained against O for return of the purchase money and associated damages, it may be that B simply wants Blackacre, not the money.

The recording statutes. Given that A would win out over B under the common law – meaning A could, for example, successfully bring an action in 2024 to eject B – the question is then whether the recording statute would dictate a different result. As is shown below, none of the recording statutes divests A, the first purchaser, where A has immediately recorded. Since the recording statutes don't apply, the common law rule does, and as noted A wins under the common law. The result makes sense in terms of the underlying policy: to give people in A's position an incentive to record immediately. That way, if O tries to sell the land twice, people in B's position should be able to find the earlier deed to A and avoid being defrauded.

[†] "Consideration" here refers to something of value that is given in exchange for the grant of the property interest. Typically it would be money.

A would win in Florida. The statute provides that "no conveyance," including O's conveyance to A, "shall be good" against "subsequent purchasers for a valuable consideration and with notice" [*i*.e., BFPs][1] **unless** the same (meaning A's deed) is recorded. A's deed **is** recorded"; therefore, the statute does not invalidate A's deed, and the first-in-time rule applies. Note that it doesn't matter in this example whether or not B is a BFP for value; the point is that by recording, A has protected himself, so that even if B had no actual notice of the deed, A would still be protected.

A would win in North Carolina. The statute provides that "no conveyance of land," including O → A, "shall be valid" as against "purchasers for a valuable consideration," such as B, "but from the time of registration." Here, A has registered — or recorded (it's the same for our purposes) — his deed. Thus, the statute doesn't invalidate A's deed, and A prevails.

A would win in California. The statute provides that "[e]very .conveyance of real property" "is void as against any subsequent purchaser . . . in good faith and for a valuable consideration from the same vendor" — "whose conveyance is first duly recorded." In this case, A's deed is not void as against B, even if B is a BFP, because B's deed *isn't* the "first duly recorded"; *A's* deed is the first duly recorded.

Finally, A would win in Massachusetts. Under that statute, a "conveyance of an estate" is invalid against "any person" [with certain listed exceptions, found in the phrase, "except the grantor or lessor … notice of it"] "unless it … is recorded." Since A's deed is recorded, the statute does not apply and A wins under the common law.

For each of the following hypotheticals, you should go through the exercise of relating your conclusion (or argument, where the answer isn't clear) as specifically as possible to the language of the four statutes. Only by attempting to work through the language yourself will you learn how to read statutes of this sort.

Two additional notes about recording statutes.

(a) In the above hypothetical, B didn't record. Does that fact make B lose automatically, without going through the analysis above? No. Nothing in any of the recording statutes provides that a deed is invalid simply because it is not recorded. This has long been the rule. *See Earle v. Fiske*, 103 Mass. 491 (1870) ("A deed duly signed, sealed and delivered is sufficient, as between the original parties to it, to transfer the whole title of the grantor

[1] Strictly speaking, it is inaccurate to use "BFP" to cover the entire preceding phrase. "Bona fide purchaser" simply means the person took by a written instrument (purchaser) and was without notice or reason to know. It says nothing about consideration. Still, it's fine to use BFP to mean "paid valuable consideration and had no notice or reason to know, as is common. Referring to a BFP in this context is a convenient way to avoid having to use a lengthy phrase, but keep in mind that notice and payment of money are distinct aspects.

to the grantee, though the instrument of conveyance may not have been acknowledged or recorded. The title passes by the deed, and not by the registration.").

(b) What about interests not covered by the recording statute? Take Massachusetts as an example. The beginning of the statute sets out the interests that are subject to it: (a) "[a] conveyance of an estate in fee simple, fee tail, or for life," (b) a lease for more than seven years from the making thereof," and (c) an assignment of rents or profits from an estate of lease." Any one of these three interests, if unrecorded, is void against a subsequent purchaser, unless the subsequent purchaser is on the list the statute provides: (a) "the grantor or lessor," (b) the grantor's "heirs and devisees," or (c) "persons having actual notice" of the unrecorded deed.

Suppose T has a property interest that is not described in the first list – say, T is the tenant in a two-year lease in Massachusetts, and suppose the two-year lease is not recorded:

2023: L → T (2 years). T doesn't record.
2024: L → A (sale of the property). A records.

This represents a very ordinary transaction. L leased real property in Massachusetts that he owned (say, a warehouse) to T for two years, and then sold the property to A the next year. Under the common law, T can occupy the warehouse for the second year of her lease (so long as T pays rent, now to A). All L could convey to A as of 2024 was ownership subject to the remaining year of the 2-year lease to T.

Does the Massachusetts recording act change this result? No, it does not, because a 2-year lease isn't on the first list above: it's not one of the following: "[a] conveyance of an estate in fee simple, fee tail, or for life," (b) a lease for more than seven years from the making thereof," and (c) an assignment of rents or profits from an estate of lease." There's no need to ask whether A falls within the second list, *i.e.*, is (a) "the grantor or lessor," (b) the grantor's "heirs and devisees," or (c) "persons having actual notice" of the unrecorded deed. Of course, you would also want to check the state's landlord/tenant laws to see what they might provide.

Similarly, adverse possession is not subject to the recording statutes. Any recording statute is going to list (typically at the beginning) the kinds of interests that are expected to be recorded, and which may be put at risk under the statute if they are not. That means that recording a deed does not protect the title holder from a subsequent adverse possessor. Or a prior one, for that matter.

2. 2020: O → A. A doesn't record.
2024: O → B. B records. B knows nothing of the O → A conveyance.

B wins under Florida's statute. A's *unrecorded* deed is not good against "subsequent purchasers for a valuable consideration and without notice." (To put it more laboriously, no conveyance (the O → A deed) shall be valid against "subsequent purchasers for a valuable consideration and without notice" (B) unless "the same" (the O → A deed) be recorded, which it was not.) B paid for the property, and did not have actual notice of the deed to A.

Nor did B have constructive notice of the deed to A, precisely because it was unrecorded. Consider what happens if you vary the facts: (a) Suppose B did in fact happen to know of the O → A deed. She would lose under the Florida statute. (b) What if B had not recorded? It wouldn't matter under the Florida statute; she would still prevail over A. That's why it's called a notice statute. (She would have to worry, however, about being displaced by a later BFP, so it would still make sense for her to record.)

B wins under the North Carolina statute. It provides that A's deed is valid against "purchasers for a valuable consideration from the donor" only "from the time of registration." Since A hasn't recorded, A can't prevail over B. B, in contrast, can prevail over A because her deed is valid against others from the time she recorded her deed. Even if A were to get around to recording his deed in late 2024 (after B had bought the property and recorded the deed), A would lose out because he would not be the first to record. Suppose, by the way, that B did know of the O → A deed. It would make no difference under the North Carolina statute. You would still say that A's conveyance could be valid as against "purchasers for a valuable consideration" *only* "from the time of registration," which hasn't yet happened in A's case. It's for that reason that we call North Carolina's statute a race statute: nothing turns on notice.

B wins under the California statute. A's deed is "void as against any subsequent purchaser . . . of the same property . . . in good faith and for a valuable consideration, whose conveyance is first duly recorded." B is a subsequent purchaser in good faith and for a valuable consideration, and B recorded before A. Suppose that B did know of the O → A deed. B would lose under the California statute That is, A's unrecorded deed would be "void" only against a "subsequent purchaser" in good faith who recorded first; B recorded first, but if B knew about the O → A deed, B would not be "in good faith." The "good faith" or "*bona fide*" aspect of the test refers to what B knows or should've known about A's deed.

In Massachusetts, B wins as well. "A conveyance" (O → A) shall not be valid "against any person" unless it is recorded, according to the statute, and A's deed wasn't recorded. That doesn't end the analysis because the statute does provide that even if the deed is not recorded, it can be valid against the listed persons. The question is whether B falls on that list.

- Is B the grantor (or lessor if this had been a lease for more than seven years)? No.
- Is B the grantor's heir or devisee? No.
- Is B a person having actual notice of it? No.

Since B doesn't fall on the list of exceptions, the unrecorded O → A deed won't be valid against B. This means that B prevails over A.

3. 2020: O → A. A doesn't record.
2024: O ⇒ B. B records. B in fact knows nothing of the O → A conveyance.

A wins out under the Florida statute. No unrecorded conveyance (O→A) shall be valid against any "subsequent purchaser[s] for a valuable consideration and without notice." Does that latter phrase describe B? B may be "without notice." But is B a "subsequent

purchaser[s] for a valuable consideration"? No. B got it for free (see the key at Supp. 166A above). Therefore the statute does not invalidate A's interest as against B; and under the common law, A wins.

A also wins out under the California statute. A's deed would be "void as against any subsequent purchaser . . . in good faith and for a valuable consideration, whose conveyance is first duly recorded." B recorded before A and did not know of the deed to A, but B is not a purchaser for valuable consideration.

In Massachusetts, the answer depends on whether B took by gift, or by devise or intestate succession. Recall the analysis in number 2: the conveyance (O—>A) shall not be valid against anyone if it is not recorded, and A's deed wasn't recorded. As noted earlier, that doesn't end the analysis because the statute does provide that even if the deed is not recorded, it can be valid against the listed persons. The question is whether B falls on that list. Is B the grantor or his lessor, heir or devisee? If so, then B falls on the list of persons against whom even the unrecorded deed could be valid. If B took by an *inter vivos* gift, then B does not appear to fall on the list. Does it make sense, as a matter of policy, to draw this distinction? Should a court hold that the legislature could not have intended to draw such a distinction; or should it say it's up to the legislature to correct any errors, if indeed it is an error?

Note that if A is living on the property, B might be said to have inquiry notice of the O → A grant. How would that affect the analysis under the preceding statutes?

Although the North Carolina statute is usually called a "race" statute, timing isn't necessarily everything under it. By one account, A would appear to win out. The statute makes A's interest void only against other "purchasers *for a valuable consideration*" who record first. To simplify: At first reading, it might appear that the statute says that the O → A deed would not be valid to pass an interest against another purchaser but from the time of registration. Actually, though, it doesn't say "purchaser," but "purchaser[] for a valuable consideration." B doesn't qualify on that ground. (Purchaser simply means someone who takes by a written instrument, not someone who buys it; that is why the phrase "purchaser for a valuable consideration" is not redundant.)

On the other hand, as noted in the comments on number 4 below, the North Carolina statute doesn't have the word "subsequent" in it, unlike California and Florida. So there's no reason why you couldn't analyze it this way: "No conveyance" (O → B) is valid against a purchaser for valuable consideration (which A clearly is) but from the time it (the O → B deed) was registered. Or, to put it differently, the deed to B is valid as against a purchaser for valuable consideration from the time at which it was registered, though not earlier. Since B's deed is registered, it's valid against A.

Which of these two readings should prevail? The second one is in a general way more consistent with the idea of a race statute, since B wins under it by recording first. But if being first to record is all that matters, why include the reference to "purchasers for a valuable consideration"?

After he became a Justice of the North Carolina Supreme Court, Henry Groves Connor, the state legislator who sponsored the 1885 Act on which North Carolina's statute is based wrote that the statute:

> applies only to deeds, contracts to convey, and leases of land. The statute is directed to the protection of creditors and purchasers for value. The evil which [the statute] was intended to remedy was the uncertainty of title to real estate caused by persons withholding deeds, contracts, etc., based upon a valuable consideration, from the public records. This evil could not exist in regard to wills, as the devisee [is] not a purchaser for value, but [takes] as donee or volunteer.[2]

What does this remark suggest? Note that he said that the statute applies to "deeds, contracts to convey, and leases of land," but that the evil to which the statute was addressed did not include wills. If the recording statute simply does not apply to wills, then it would matter whether the "⇒" symbol in the problem signifies a will or a gift. If the former – if we read the problem as "O [the testator] ⇒ B" – the statute would not apply, and we would go by the common law first-in-time approach, in which case A wins. Note how strange that might seem: A wins in a state with a race statute, even though A did not record and B did.

Note, though, that Justice Connor's remark ambiguous. One way to see this is that Justice Connor also talks about people "withholding deeds, contracts, etc." A deed can effect a transfer of a gift, or a transfer by a sale. The 2024 transaction, "O [still alive] ⇒ B" could be an *inter vivos* gift, not a will, and would be accomplished by a deed from O to B. So did he mean the statute applied only to deeds in case of transfers for value, but not to deeds that effectuate a gift, and not to wills?

Another way to see the ambiguity is to consider Justice Connor's underlying account of what the law was intended to accomplish. He seems to say that:

(1) the law was intended to protect purchasers for value, and
(2) the law was intended to address the problem of people causing uncertainty in land title by not recording a deed based on valuable consideration.

If in applying the statute we are guided by (1), *B* shouldn't be protected, because whether the transfer in 2024 was a gift or a testamentary disposition, it was for free – *i.e.*, not based on valuable consideration. If in applying the statute we are guided by (2), however, *A* shouldn't be protected, because A caused a problem with the land records by failing to record.

One way to reconcile these different accounts of the statute's purpose would to be question whether A "caused uncertainty" in the title in the relevant sense. Did A cause B any uncertainty? Maybe not. An individual who receives land for free (whether by gift or devise) is not going to do a title search before deciding whether to accept it (why look a gift horse in the mouth?); since B does not rely on the absence of a record of the deed to A, there is no practical sense in which A caused B any uncertainty. This would suggest that A should win.

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[2] Bell v. Crouch, 43 S.E. 911, 912 (N.C. 1903) (quoted in Charles Szypszak, *North Carolina's Real Estate Recording Laws: The Ghost of 1885*, 28 N.C. CENTRAL L.J. 199, 210 (2012)).

It does seem from the history of the statute that a typical example of the problem the legislature had in mind was a landowner borrowing from a lender, who did not record the mortgage; then the landowner borrowed from another lender who was unaware of the prior encumbrance. This, too, strongly suggests that the interpretation that has A winning and B losing is the correct one, since B did not act in reliance on the apparent absence of any prior conveyance of an interest.

4. 2020: O → A. A doesn't record.
2024: O → B. B doesn't record. B knows nothing of the O → A conveyance.

B wins out under the Florida statute. A's unrecorded deed is not valid against "subsequent purchasers for a valuable consideration and without notice." B's own failure to record is irrelevant.

It is harder to infer from the language of the statute who wins in North Carolina where neither A nor B has yet recorded. One could read the statute to provide that A's *unrecorded* deed will be valid against subsequent "purchasers for a valuable consideration" *only* from the date that A registers his title. Since A hasn't yet registered his title by recording it, A's deed would be invalid against B's deed. Note, however, that the word "subsequent" doesn't appear in this statute. Thus A could argue that B's deed can be valid to pass title as against A only "from the time of registration" of B's deed, which hasn't happened yet. Thus the statute invalidates B's interest. One way to view this is that since the statute doesn't pick a winner and – given that it's a race statute – it might make the most sense to view it as not applying when neither party has recorded. In that case one falls back on the common law first-in-time rule, and A wins out. If subsequently A records before B does, then A will still win out. If B gets around to recording before A does, then at that point B will win out.

A wins out under the California statute. That statute makes his interest void only against "any subsequent purchaser . . . of the same property . . . in good faith and for a valuable consideration, . . . *whose conveyance is first duly recorded*." B has not recorded yet. Since the statute doesn't invalidate A's interest, A wins out under the common law.

The analysis under the Massachusetts statute is more complicated. As an initial matter, it might appear to be identical to the analysis in number 2, and B would win. That is, "a conveyance" (O → A) shall not be valid "against any person" unless it is recorded, according to the statute, and A's deed wasn't recorded. That doesn't end the analysis because the statute does provide that even if the deed is not recorded, it can be valid against the listed persons. The question is whether B falls on that list. Is B the grantor or his lessor, heir or devisee? No. Is B a person having actual notice of it? No. Since B doesn't fall on the list of exceptions, the unrecorded O → A deed won't be valid against B. It is irrelevant that B did not record, which is what one might expect in a pure notice statute.

This is not, however, the end of the matter — which is why, once again, it's necessary to look at the language of the statute, and not simply type it as notice, race, or race-notice. What is to stop A from making the following argument? "A conveyance" (the O → B

conveyance) shall not be valid "against any person" (and A is "any person") unless it is recorded, and B's deed wasn't recorded. Once again, that doesn't end the analysis because the statute does provide that even if the deed is not recorded, it can be valid against the listed persons. The question is whether A falls on that list. Is A the grantor or his lessor, heir or devisee? No. Is A a person having actual notice of the O → B deed? No. (Obviously A *now* knows of the deed, at the time of the litigation, but A didn't know of it at the time A bought the property or B bought the property.) Since A doesn't fall on the list of exceptions, the unrecorded O → B deed won't be valid against A.

Read this way, the statute would seem to allow A to claim B's deed was invalid against A, and B to claim that A's deed was invalid against B. How could this happen? The problem lies in the lack of any reference to "subsequent purchasers." For example, with fairly minimal change, the statute could have been written, "a conveyance … shall not be valid as against the grantor or lessor, his heirs and devisees, and subsequent purchasers having actual notice of it." (You should be able to see why this would still be a bad way to write the statute.) But it wasn't written that way. Do you think a court should read the word "subsequent" into the statute?

There is another complication regarding the Massachusetts statute: Suppose Blackacre had a house on it, and A was living in it when B bought it. Suppose further that B made no inquiries of A as to what A was doing there, but that had B done so, A would have said "I own the place," and showed B the deed. Assuming that the court would read "subsequent" into the statute, would B still win? The question would be whether B falls on the list of people against whom A's deed could be valid despite its not being recorded. That boils down to the following: would B be a person having "actual notice" of the O → A deed? B could say that she did not actually know of the deed, which would appear to be true. But then it would appear that B is rewarded for not doing a minimally careful investigation. Once again, could A argue that the legislature could not have intended to reward carelessness, and that the courts should read actual to include constructive? Or should it be up to the legislature to make the change, if one is needed? If the court thought that it was important not to reward sloppy investigations by prospective buyers, how would that influence its interpretation of what amounts to "actual" notice in particular sets of facts? Recall the questions that arose in relatively of title (for example) about what constituted "actual" possession.

5. **2020: O → A.** **A doesn't record.**
2023: O → B. **B doesn't record. B knows nothing of the O → A conveyance.**
2024: **A records.**

A would argue that the statute protects him because he did, after all, record — even if it was two years after the conveyance, and a year after B innocently purchased the property. A's argument would be that the statute invalidates his deed as against a subsequent BFP like B only if A's deed is not recorded. A might argue that unless there's something in the statute that deems it unrecorded if it's not recorded before a later purchaser acquires it, the court should follow the plain language of the statute, treat his as "recorded," and conclude that his recorded deed is protected.

B would argue that A's *unrecorded* deed was not valid against "subsequent purchasers for a valuable consideration and without notice." The problem, B would say, is that A just recorded too late under this statute. Why would it be too late? The purpose of all of these statutes is to penalize to some degree those who don't record their deeds. Has A "recorded" in any meaningful sense? Clearly, he has not recorded in a way that gives notice to B; if B did a title search in 2023 before buying the property, she would have found no evidence of the 2020 O →A deed.

In terms of the purpose of the recording statute, B has a strong argument, and – while one would need to check the caselaw to be sure – B would probably win. But that conclusion is subject to one caveat: is there something in the Chapter 695 ("Record of Conveyances of Real Estate") that would determine this issue? That might be suggested by the phrase in § 695.01, "recorded according to the law." There's nothing, however, that clearly addresses this situation. For example, Fla. Stat. § 695.11 provides that instruments are deemed to be recorded at the time the clerk's office a unique recording number. But this doesn't add much to the analysis, since it's clear that A recorded after B purchased the land; the question is what impact that sequence has. (You are not responsible, by the way, for being familiar with anything in the Chapter 695 besides the excerpt from § 695.01(1) at CB 700.)

The same issue – as to whether to regard A's deed as "recorded" –would arise in Massachusetts. The question of what it means to "record" is taken up in more detail in Numbers 8-10, *infra.*

A wins out under the North Carolina statute. A's deed could be valid against "purchasers for a valuable consideration," but only from the date that A registers his title. By recording in 2024, A has made his title valid as against B's. Note that if B had recorded in 2023, B would prevail over A even though A recorded in 2024.

A wins out in California. That statute makes A's unrecorded deed void only against "any subsequent purchaser . . . of the same property, . . . in good faith and for a valuable consideration, . . . *whose conveyance is first duly recorded*." B is a BFP, but not one "whose conveyance is first duly recorded." Thus, the statute doesn't invalidate A's interest, and A wins out under the common law. By recording in 2024, A has made certain that B will never prevail over him. It will never be possible for B to claim that she was a subsequent BFP whose conveyance was first duly recorded.

6. **2020: O → A. A doesn't record or take possession.**
2023: O → B. B records. B knows nothing of the O → A conveyance.
2024: B → C. C was the lawyer who drew up the O → A deed. C records.

Note that the dispute is now between A and C. Make sure in hypotheticals like these that you first identify who the contending parties are. Both O and B have conveyed away whatever interest they may have had. No court is going to find that either O or B somehow owns the property in those circumstances. It's purely a question of whether A or C wins out.

C wins out under all the statutes. Why would C win under a notice statute or a race-notice statute, either of which would seem to require that C be a bona fide purchaser? Note that C is not a BFP: he knew about the prior conveyance to A. The answer is that C wins under the **shelter doctrine**. The "shelter doctrine" is described at CB 699. The doctrine works as follows: B got a good title from O. (If you do not understand why, see the preceding examples.) Having acquired a good title, B can now convey it to C even if C does not himself qualify for protection under the recording act. C would not qualify for protection under a notice or race-notice statute because C knew about the O → A deed. (*Optional*: How would you judge C's behavior as a lawyer under the Model Rules of Professional Conduct, Rule 1.9 (Duties to Former Clients)?)[3]

Why have the shelter doctrine? The usual reason given is that without the shelter doctrine, B might find it difficult or impossible to sell her property. The O → A deed, for example, might become notorious if O's fraudulent ways were generally exposed and there were a widely publicized scandal. That would then mean that everyone would know about the O → A deed, and it would be hard for anyone to be a purchaser "without notice" of A's claim.

In this hypothetical, you should note, C does not need to rely upon the shelter doctrine to prevail as against A under North Carolina's race statute. Why not? Because A's conveyance is not "valid to pass any property interest as against . . . purchasers for a valuable consideration from the donor . . . but from the time of registration." The deed to A cannot prevail over the deed to C because A did not record before C.

7. 2020: O → A. A doesn't record or take possession.
2023: O → B. B records. B knows nothing of the O → A conveyance.
2024: B → O. O records.

The preceding example (number 6) might lead you to believe that O would win out under the shelter doctrine. Most courts would make an **exception to the shelter doctrine** under these circumstances. Otherwise, O would have sold the land twice, and bought it back once, ending up with both Blackacre *and* A's purchase money. (B is not harmed because O paid B to get the property back.)

Note also that this exception might suggest an argument you could make in number 6 on behalf of A, depending on the facts. If C was acting on O's behalf, you could in effect say that C was O's agent, and should fall under this exception to the shelter doctrine.

[3] Available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_9_duties_of_former_clients.html

8. 2020: X → O. O records.
2023: O → A. A records, but the clerk's office mistakenly records the deed in the grantor index under "D" instead of "O."
2024: O → B. B records. B knew nothing of the earlier conveyance to A.

The dispute here is between A and B; both X and O have conveyed away whatever interest they may have had. This is the problem of **mis-indexed deeds**. A would claim that he is first in time and therefore prevails under the common law, unless the recording statute provides otherwise. A would argue that a subsequent purchaser could prevail over A under a notice statute such as Florida's only if A had failed to record his deed, and here, he did record it. A would argue that his deed could be invalidated under a race-notice statute such as California's only if B were a subsequent BFP *who recorded before A*, which B did not do.

B, however, would have arguments of her own. B would claim that A's deed was not "recorded," in this sense: there is no way that she could have ever found the deed to A by a reasonable search of the title records.

Before purchasing from O, B would first want to know where O got the title from. So B would check O under the grantee index, and find the X → O deed. (She would then continue on in the grantee index, looking up X, etc., all the way up to the sovereign.)

Then, working her way back down the chain of title, B would end up checking to see whether O had conveyed the property to anyone since acquiring it in 2020. B would not, of course, find the O → A deed, because that deed was misindexed in the grantor index under **D**. Why should B check the *D* index for 2020-2024 (or any other index besides the part of the *O* index that covers the period from 2020-2024)?

How could one resolve a question like this? It's clearly a problem in which both A and B are innocent, and seem to have done about everything they could've done. The courts are divided on the issue. See CB 712 Question 4. Apart from any statute that might apply, B may have a slightly stronger argument here. That is, B could argue that A was in a better position to prevent O from carrying out his fraudulent scheme; A at least could have gone to the court a few days after recording to see if the deed had been indexed properly. A, being the "cheapest cost avoider," should be the one to bear the cost here so that others in his position will check the records out in the future.

9. 2006: X → O. O records.
2009: O → A. A does not record.
2020: O → B. B knows of the 2009 O → A deed. B records.
2023: A records the 2009 O → A deed.
2024: B → C. C has no actual knowledge of the O → A deed.

The dispute here is between A and C. X, O, and B have all conveyed away whatever interest they may have had. Once again, this hypothetical raises the question of what constitutes "recording" — here when A "**records too late**". That is, there is no way that C

would find the O → A deed by a reasonably limited title search. He would look B up in the grantee index, and find the 2020 O → B deed. Then he would look O up in the grantee index and find the 2006 X → O deed. Then C would look up O in the 2006-2020 grantor indexes to see if O conveyed away his interest before executing the 2020 O → B deed that C had found in the title search. In attempting to see whether O had in fact conveyed away the property before selling it to B, C would probably look only in the grantor indexes for the period 2006-2020. If so, C would not find the 2009 O → A deed, because it was not recorded until 2023, at which point it would be indexed. C would then conclude that B had good title. (Why would C not look in the later indexes? It's not hard to see how burdensome the search would become, if for every deed you found in the chain of title, including older ones, you had to search the indexes for all subsequent years to find a deed like +the one 2009 deed recorded in 2023. (Note that the O → A deed would be recorded in the indexes for the time at which it was received for recordation -- *i.e.*, 2023.)

Even though there seem to be good reasons for holding for C (see the explanation to number 5), the courts are divided on this issue. Some would hold for A as against C. A's deed is recorded, and (as pointed out in number 1 above), the recording statutes generally invalidate a prior *unrecorded* deed against subsequent purchasers who fulfill the statutory requirements.

Others would hold that C wins, on the ground that C could not reasonably be expected to search for conveyances by O that were recorded *after* the deed to B. Holding that way would mean that each step along the way, you'd have to check the grantor indexes all the way to the present, which would vastly increase the burdens in title searching. And, after all, isn't it within A's power to do something here? A could have recorded immediately. In effect, then, some courts treat the O → A deed as "unrecorded."

10. **2009: O → A. A records.**
2020: X → O. O records.
2024: O → B. B doesn't know of the 2009 O → A deed. B records.

The dispute here is between A and B; both X and O have conveyed away whatever interests they may have had. Here the problem is that A "**recorded too early**." Under the doctrine of **estoppel by deed** (see CB 611), A would have had good title as against O even after the 2020 conveyance. (All the doctrine means is that if someone like O purports to sell land he doesn't in fact own, the moment that O does acquire title to the land from the true owner, he is "estopped" to deny the buyer's (A's) title. The reasons for the doctrine should be obvious.) The question here is whether A's title could be divested by the subsequent deed from O to B in 2024. A would argue that any recording statute could invalidate his interest against a subsequent BFP only if A's deed were not recorded (or not recorded first, depending on the statute). His deed, he would argue, was recorded immediately, in 2009. B would argue, in contrast, that the 2009 deed was not "recorded" because no reasonable title search would reveal that deed: why should B have to check to see whether O ever conveyed the property *before he got title to it*? Most but not all courts would agree with B. Aside from the fact that there's not much that B could do, consider that A really should've wondered, in 2009, how O could be selling him the property. After all, if A had done a proper

title search in 2009 when he bought the land, he would've been unable to find a deed conveying the property to O, because in fact there was no such deed at the time.

But would this ever happen in real life? Of course. There is no crazy thing leading to legal complications that hasn't happened somewhere, sometime. *See* Sabo v. Horvath, 559 P.2d 1038 (Alaska 1976) (no need to read it unless you're curious).

Note on Problem 1 on CB 700:

This casebook problem may be a little harder to understand than the others in the casebook. The first step in understanding any of the problems in the CB readings is to make your own schematic of the title:

2016: Jennie → Lisa. Blackacre. Not Recorded.
2020: Jennie dies; no will; heir is Jisoo.
2024: Jisoo → Rosé. Blackacre. Rosé pays valuable consideration; no actual notice of the 2016 Jennie → Lisa deed.

The dispute is between Lisa and Rosé. Jisoo is not going to get Blackacre, no matter what. Under the common law, Lisa would say, Jennie had nothing left to give when she died. Does the Massachusetts statute change the result?

Rosé will say an unrecorded deed (Jennie → Lisa) is invalid against "any person" (Rosé) unless that person is on the statute's list of persons as to whom an unrecorded deed *would* be valid. Rosé will say she's a "person," so that unless she (Rosé) is on that list, the 2016 deed is invalid as against Rosé. Is Rosé on the list?

- Is Rosé the grantor? No.
- Is Rosé the grantor's lessor, heir or devisee? No.
- Is Rosé a person having actual notice of it? No.

Since Rosé is not on the list of people as to whom Lisa's unrecorded deed is valid, Rosé wins, and Lisa loses.

In *Earle v. Fiske*, 103 Mass. 491 (1870), "Lisa" (using the CB's names) claimed that "Jisoo" had nothing to convey to "Rosé," citing a Connecticut case (*Hill v. Meeker*, 24 Conn. 211 (1855)). Jennie had already conveyed her property to Lisa in 2016, before she died, so the fact that Jisoo was Jennie's heir when Jennie died is irrelevant. (Remember that "heir" means the person(s) designated under a state statute to take someone's property if they die without a valid will.) Lisa was essentially applying the common law thinking to this situation. So did the lower court in this case.

As for its consistency with the statute (which is likely the same as the one in the Supplement, though I haven't verified that): note that as of 2020, Jisoo would lose. Lisa would say, "my deed may be unrecorded, and so invalid against most persons, but it is valid as against persons on the list. And Jisoo is on the list (heir/devisee). So my deed is valid as against Jisoo." This would in fact be a correct reading of what the statute provides *as of 2020*.

What the court held was that the statute says (here, quoting the court's summary of the statute), "an unrecorded deed is binding upon the grantor, his heirs and devisees, and also upon all persons having actual notice of it," but "it is not valid and effectual as against any other persons." Since Rosé is a person, Lisa's unrecorded deed is valid only against the grantor, heir/devisee, or person

with actual notice, and Rosé is none of those. What happened in between 2016 and 2024 was, the court held, irrelevant.

The aim of the statute, the court said, was to make unrecorded deeds invalid except as specifically saved by the statute. Here, it said, Rosé would quite understandably regard Jisoo as the owner because a title search would show that Jennie had been the owner (i.e., Jisoo could search for "Jennie" in the grantee index and would find some deed (the case doesn't say when) with Jennie as the grantee. For example, maybe the title search would uncover a deed in 2000, Xaviera → Jennie. Then the search downward, looking in the grantor indices for Jennie, would uncover no recorded deed in which Jennie conveyed the property to someone. So long as Jisoo could show Rosé proof of Jennie's death (say, by a death certificate) and persuade her that in fact she (Jisoo was Jennie's sole heir), Rosé would have every reason to believe that Jisoo is the owner. As the court put it:

> "It may not be very logical to say that, after a man has literally parted with all his right and estate in a lot of land, there still remains in his hands an attachable and transferable interest in it, of exactly the same extent and value as if he had made no conveyance whatever. But, for the protection of *bonâ fide* creditors and purchasers, the rule has been established that although an unrecorded deed is binding upon the grantor, his heirs and devisees, and also upon all persons having actual notice of it, it is not valid and effectual as against any other persons."

If you'd like to read *Earle v. Fiske*, it follows. It's entirely ***optional***; you're not responsible for reading it. Note that in the hypo above:

"Jennie" is Nancy Fiske
"Lisa" is Ben & Liz Fiske for life; then to Mary Fiske
"Jisoo" is Ben Fiske
"Rosé" is Nicholas Earle

1864: Nancy Fiske → Ben & Liz Fiske for life, then to Mary Fiske. Blackacre. Not recorded.
1865: Nancy Fiske ⇒ (intestacy) Ben Fiske in fee simple.[4]
1866: Ben Fiske → Nicholas Earle. Blackacre. Nicholas Earle pays valuable consideration. Has no actual notice of the 1864 Nancy Fiske → Ben & Liz Fiske for life etc. deed.
1867: The 1864 Nancy Fiske → Ben & Liz Fiske for life etc. deed is recorded.
1868: Lawsuit: Nicholas Earle v. Liz Fiske and Mary Fiske.
1870: *Earle v. Fiske* decided by Supreme Judicial Court of Massachusetts.

[4] We will cover this later, but "fee simple" means full ownership. What the conveyance in 1864 did was give Ben & Liz a "life estate" lasting until they die, and then a remainder in MEF, who would get it in fee simple when both Ben and Liz were dead.

Optional

H. N. Sheldon, for William B. Doyle.

W. A. Herrick, for other parties in interest.

GRAY, J. The testator, in the fifth clause of his will, by directing his executors to procure a suitable residence for his daughter Julia at an expense not exceeding six thousand dollars, and to hold the same in trust for her and her son William "during their lives;" and, "upon the decease of both," devising said property over; clearly gave that daughter and her son an interest during their joint lives and the life of the survivor, which on her death before the testator's did not lapse, but went to her son for life. *Prescott* v. *Prescott*, 7 Met. 141. *Loring* v. *Coolidge*, 99 Mass. 191. This devise to William was not varied by the second codicil, which mentioned the death of his mother, increased a bequest made to his father by another article of the will, and one made to the Warren Academy by the first codicil, and expressly confirmed the will and the first codicil in all other respects. *Decree accordingly.*

NICHOLAS H. EARLE *vs.* ELIZABETH L. FISKE & another.

Under the Gen. Sts. c. 89, § 3, an unrecorded deed is not valid after the death of the grantor, as against one holding by a recorded deed from the grantor's heir, without notice of the former deed.

WRIT OF ENTRY against Elizabeth L. Fiske, (wife of Benjamin Fiske,) and Mary E. Fiske, to recover land in Malden. Writ dated April 14, 1868. Plea, *nul disseisin.*

At the trial in the superior court, before *Putnam*, J., these facts appeared: Nancy A. Fiske, being owner of the demanded premises, conveyed them to Benjamin and Elizabeth for their lives, and, subject to their life estate, to Mary E. Fiske, by deeds dated April 22, 1864, but not recorded till 1867, and died in 1865, leaving said Benjamin, her son, as her sole heir, and he in 1866 executed and delivered to the demandant a deed of the premises, which was recorded in the same year. Upon these

facts, the judge ruled that Nancy A. Fiske "had no seisin, at her death, which would descend to Benjamin Fiske, so as to enable him to convey a good title" to the demandant. Upon this ruling, the demandant, who made no claim to any estate less than a fee simple, submitted to a verdict for the tenants, and alleged exceptions.

J. G. Abbott, for the demandant.

R. D. Smith & H. H. Sprague, for the tenants.

AMES, J. The formalities which shall be deemed indispensable to the valid conveyance of land are prescribed and regulated by statute. A deed duly signed, sealed and delivered is sufficient, as between the original parties to it, to transfer the whole title of the grantor to the grantee, though the instrument of conveyance may not have been acknowledged or recorded. The title passes by the deed, and not by the registration. No seisin remains in the grantor, and he has literally nothing in the premises which he can claim for himself, transmit to his heir at law or convey to any other person. But when the effect of the deed upon the rights of third persons, such as creditors or *bonâ fide* purchasers, is to be considered, the law requires something more, namely, either actual notice, or the further formality of registration, which is constructive notice. It may not be very logical to say that, after a man has literally parted with all his right and estate in a lot of land, there still remains in his hands an attachable and transferable interest in it, of exactly the same extent and value as if he had made no conveyance whatever. But, for the protection of *bonâ fide* creditors and purchasers, the rule has been established that although an unrecorded deed is binding upon the grantor, his heirs and devisees, and also upon all persons having actual notice of it, it is not valid and effectual as against any other persons. As to all such other persons, the unrecorded deed is a mere nullity. So far as they are concerned, it is no conveyance or transfer which the statute recognizes as binding on them, or as having any capacity adversely to affect their rights, as purchasers or attaching creditors. As to them, the person who appears of record to be the owner is to be taken as the true and actual owner, and his apparent

seisin is not divested or affected by any unknown and unrecorded deed that he may have made. Gen. Sts. *c.* 89, § 3.

It is argued, however, that, as the unrecorded deed from Nancy A. Fiske was valid and binding upon herself and her heirs at law, nothing descended from her to her son Benjamin, and he had no seisin or title which he could convey to the plaintiff. A case is cited (*Hill* v. *Meeker*, 24 Conn. 211) in which the supreme court of Connecticut (Hinman and Storrs, JJ.) in 1855 decided that a deed of land, not recorded until after the death of the grantor, is valid against a purchaser from his heir at law, although such purchaser has no knowledge of the existence of the deed. From this decision the chief justice (Waite) dissented, saying, "So far as my researches have extended, this is the first case in the whole history of our jurisprudence, in which it has ever been holden that an unrecorded deed shall defeat the title of a *bonâ fide* purchaser or mortgagee, having no knowledge of the existence of any such deed, unless it were recorded within a reasonable time." The cases cited from the decisions of the supreme court of Kentucky are to the effect also that the protection afforded by their registration laws against an unrecorded deed only extend to purchasers from the grantor himself, and not to purchasers from his heirs or devisees. *Ralls* v. *Graham*, 4 T. B. Monr. 120. *Hancock* v. *Beverly*, 6 B. Monr. 531. That court however in a more recent case, decided in 1857, say that, if it were a new question, "and had not been heretofore decided," they should be strongly inclined to give to the statute a liberal construction, and make it operate as a remedy for the whole evil which it was intended to guard against. They add, however, that as the previous decision had become a settled rule of property, it is better that the law should remain permanent, "although settled originally upon doubtful principles." *Harlan* v. *Seaton*, 18 B. Monr. 312.

We do not, under the circumstances, incline to yield to the authority of these cases in the construction of a local statute of this Commonwealth. It appears to us that the plain meaning of our system of registration is. that a purchaser of land has a right to rely upon the information furnished him by the

registry of deeds, and in the absence of notice to the contrary he is justified in taking that information as true, and acting upon it accordingly. It is impossible to see why the unrecorded deed of Nancy A. Fiske should have any greater weight or force after her decease than it had immediately after it was first delivered. It could not be any more or less binding on her heir at law than it was upon herself; he was as much the apparent owner of the land as she had been during her lifetime. The manifest purpose of our statute is, that the apparent owner of record shall be considered as the true owner, (so far as subsequent purchasers without notice to the contrary are concerned,) notwithstanding any unrecorded and unknown previous alienation. As against the claim of this plaintiff, the unrecorded deed of Nancy A. Fiske had no binding force or effect, and the objection of the defendants, that in consequence of her having given that deed nothing descended to her son Benjamin from her, is one of which they cannot avail themselves. As a purchaser without notice, the plaintiff is in a position to say that the unrecorded deed had no legal force or effect; that she died seised; that the property descended to Benjamin, her son and sole heir at law. Upon that assumption, his deed would take precedence over the unrecorded deed of his mother, in exactly the same manner as a deed from his mother in her lifetime would have done over any unrecorded or unknown previous deed from herself. The ruling at the trial was therefore erroneous, and the plaintiff's *Exceptions are sustained.*