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situation presented in the principal case; thus, one may only surmise as to what may be the result when, and if, such a question is properly presented to our highest tribunal. There is much in the language of that opinion, however, that would permit one to reasonably conclude that our court would follow the reasoning of those courts placing a controlling emphasis upon the label given the crime committed in reaching a decision denying recovery.[17] Yet, there is nothing in the opinion indicating that the policy under consideration was the comprehensive type policy purporting to protect the insured against loss due to "theft" *and* "larceny." It is not, therefore, too much to hope that our court when confronted with such a policy will recognize that "theft" as used therein should be given its common thought meaning, perhaps that found in *Bouvier's Law Dictionary*[18] where theft is thus defined:

"A popular term for larceny.
"It is a wider term than larceny and includes other forms of wrongful deprivation of property of another.
"Acts constituting embezzlement or swindling may be properly so called."

CLARK C. TOTHEROW.

Recordation—Priority by—Title by Estoppel as Affected by

Timber land was owned by three brothers and three sisters as tenants in common. One brother, without authority from the others, purported to sell all the timber to the defendant by an unsealed instrument dated November 15, 1946. On November 27, 1946, the sisters deeded their interest to the three brothers, whereby each brother acquired an additional one-sixth interest in the land. On December 14, 1946, all three brothers deeded the timber to the plaintiff, who had no actual notice of the earlier instrument. On December 16, 1946, the defendant recorded his instrument of November 15th. On December 18, 1946, the plaintiff's deed was recorded. Last, the deed from the sisters was recorded on January 15, 1947. Plaintiff sought an injunction against further cutting and removal of timber by defendant, to which the defendant counterclaimed and sought specific performance of the unsealed instruments against the three brothers and their grantee. *Held:* The unsealed instrument of November 15 was an enforceable contract to convey, by which the defendant was entitled to the original one-sixth interest owned by the vendor, but the plaintiff was entitled to the rest of the timber,

[17] Theft is defined as larceny. Larceny is given its common law definition including the requirement that the taking must be under such circumstances as to amount technically to a trespass. Great emphasis is placed on whether or not the act of the wrongdoer meets the common law or statutory requirements of larceny.
[18] BOUVIER, LAW DICTIONARY 3267 (Rawle's 3d ed. 1914).

including the one-sixth interest acquired by the brother after he had contracted to convey to the defendant.[1]

SECTION I—PRIORITY BY RECORDATION

The court ruled that when the defendant registered his instrument "he thereby established his right to receive a conveyance of the one-sixth undivided interest . . . even against a person *thereafter*[2] purchasing such interest . . . for a valuable consideration."[3] It is believed that such language was inapplicable to the facts, since the plaintiff acquired his interest *before* the defendant recorded.

Where *A* conveys an interest in realty to *B* and later conveys the same interest to *C*, with *C* recording first, our court has uniformly held that *C* has the better title, saying ". . . the one first registered will confer the superior right."[4] Here *C* is the subsequent purchaser and the recording acts have almost invariably been regarded as intended to protect subsequent purchasers and creditors only.[5] Thus under the recordation acts the grantor retains a power[6] to defeat his earlier conveyance, if not recorded, by a subsequent conveyance to a second grantee.[7] This encourages prompt recordation. In North Carolina, even though *C* has actual notice of the prior conveyance he will prevail. "No notice, however full or formal, will take the place of recording" and since *B* fails to record, *C* is not put on notice.[8] This oft-repeated and applied phrase is intended to give sanctity to the recording statutes. The two phrases last above quoted are of such common legal parlance that they are often used to reach decisions in which clear analysis would compel different results.

The instant decision demanded such clear analysis, where *A* contracted to convey to *B*, then conveyed to *C*, but *B* recorded prior to *C*. Failure to grasp the distinction between this situation and the one above mentioned where *C* recorded first, will lead to a trap into which some

[1] Chandler v. Cameron, 229 N. C. 62, 47 S. E. 2d 528 (1948).
[2] Italics supplied.
[3] Chandler v. Cameron, 229 N. C. 62, 64, 47 S. E. 2d 528, 530 (1948).
[4] Combes v. Adams, 150 N. C. 64, 68, 63 S. E. 186, 187 (1908).
[5] *E.g.*, Patterson v. Bryant, 216 N. C. 550, 5 S. E. 2d 849 (1939); Glass v. Lynchburg Shoe Co., 212 N. C. 70, 192 S. E. 899 (1937); Warren v. Williford, 148 N. C. 474, 62 S. E. 697 (1908); Wallace v. Cohen, 111 N. C. 103, 15 S. E. 892 (1892). As between the parties a conveyance is valid without registration, *e.g.*, Weston v. Lumber Co., 160 N. C. 263, 75 S. E. 800 (1912); McBrayer v. Harrill, 152 N. C. 712, 68 S. E. 204 (1910); Leggett v. Bullock, 44 N. C. 283 (1853).
[6] Concerning the nature of this power, see Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710, 756 (1916); Aigler, *The Operation of the Recording Acts*, 22 MICH. L. REV. 405, 415 (1923).
[7] 5 TIFFANY, REAL PROPERTY §1262 (3d ed. 1939).
[8] *E.g.*, Patterson v. Bryant, 216 N. C. 550, 5 S. E. 2d 849 (1939); Lanier v. Roper Lumber Co., 177 N. C. 200, 98 S. E. 593 (1919); Fleming v. Burgin, 37 N. C. 584 (1843).

courts have fallen. The decision in the principal case is adverse to the subsequent purchaser who was misled by the state of the record, caused by the failure of *B* to record promptly. The court cites *Combes v. Adams,*[9] but in that case the subsequent purchaser recorded first, and the holding was correct that the first recorded instrument took priority. It is suggested that the court in the principal case could have bolstered its opinion by citing several North Carolina decisions[10] in which strong dicta appear to the effect that the subsequent purchaser must record first, to obtain priority in this situation. While the dicta seem to require the subsequent purchaser for value to register his deed before the prior purchaser records his, such was the fact in each case, therefore these are not square holdings that the subsequent purchaser would have lost priority had this not been true.

In *Builders' Sash & Door Co. v. Joyner,*[11] as in the instant case, the prior purchaser recorded before the subsequent purchaser. The Court held that the prior registry should prevail, without citing any authority to that effect, and without taking into account the considerations raised in this note.

The North Carolina registration act is without any express provision that the subsequent purchaser must record first to obtain priority.[12] The majority of courts with similar statutes hold their acts do not require a prior registration of the subsequent conveyance in order for it to have priority over an earlier executed one.[13] Recordation statutes

[9] 150 N. C. 64, 63 S. E. 186 (1908).

[10] *See, e.g.,* Tocci v. Nowfall, 220 N. C. 550, 561, 18 S. E. 2d 225, 232 (1941); Eaton v. Doub, 190 N. C. 14, 19, 128 S. E. 494, 497 (1925); Sills v. Ford, 171 N. C. 733, 741, 88 S. E. 636, 640 (1916); Collins v. Davis, 132 N. C. 106, 111, 43 S. E. 579, 581 (1903); Maddox v. Arp, 114 N. C. 585, 588, 19 S. E. 665 (1894).

[11] 182 N. C. 518, 109 S. E. 259 (1921) (where first grantee in plaintiff's chain of title, whose deed was prior in execution, registered his conveyance one day after date of deed to first grantee in defendant's chain); *accord,* McHan v. Dorsey, 173 N. C. 694, 92 S. E. 598 (1917) (deeds filed simultaneously for record, one prior in execution given priority).

[12] N. C. GEN. STAT. (1943) §§47-18 and 20. For a complete classification of the statutes in the various states, see, 2 POMEROY, EQUITY JURISPRUDENCE §646 (5th ed. 1941).

[13] Steele v. Spencer, 1 Peters 552, 7 L. Ed. 259 (U. S. 1828) (construing Ohio recordation act); Miller v. Merine, 43 Fed. 261 (1890) (construing Mo. statute); Steiner v. Clisley, 95 Ala. 91, 10 So. 240 (1891); Brown v. Nelms, 86 Ark. 368, 112 S. W. 373 (1908) [*contra:* Glasscock v. Mallory, 139 Ark. 83, 213 S. W. 8 (1919); Penrose v. Doherty, 70 Ark. 256, 67 S. W. 398 (1902)]; Van Eepoel Real Estate Co. v. Sarasota Mills Co., 100 Fla. 438, 129 So. 892 (1930) (where mortgagee did not record a purchase money mortgage until after mechanic without notice completed work, mortgagee was estopped to claim priority over mechanic's lien, though mechanic's lien was filed subsequent to recording of mortgage); Feinberg v. Stearns, 56 Fla. 279, 47 So. 797 (1890); Randell v. Hamilton, 156 Ga. 661, 119 S. E. 595 (1923); McGuire v. Barker, 61 Ga. 339 (1878); Bank of Farmington v. Ellis, 30 Minn. 270, 15 N. W. 243 (1883); Craig v. Osborne, 134 Miss. 323, 98 So. 598 (1924) (where doctrine was clearly stated); Owens v. Potts, 149 Miss. 205, 115 So. 336 (1928) (while noting that Miss. by statute in 1924 amended its recordation act so as to change the rule laid down in Craig v. Osborne, *supra,*

of many states require priority of registry by express provision that a conveyance is void against any subsequent purchaser "whose conveyance is first duly recorded."[14] Only three other jurisdictions[15] have been found which reach the result of the instant case without such express wording in their acts.

A clear illustrative decision of the majority view above, where the recordation statute is without such express provision, is *Swanstrom v. Washington Trust Co.*,[16] where the owner conveyed certain property to the appellant on December 5, 1903. A portion of the same property was conveyed to the respondents, for valuable consideration, on May 27, 1904. Appellant's deed was recorded June 10, 1904, and the respondent's deed was not recorded until March 7, 1905. The respondents contended their deed had priority, because they were bona fide purchasers without actual or constructive notice of the prior and unrecorded deed. The appellant contended that its deed had priority because it was first in time and first recorded. Judgment for the respondents was affirmed: "It is not necessary that the subsequent conveyance should be recorded in order to gain priority, unless the statute so provides."

As pointed out by one author,[17] "where through the neglect of the first grantee to record his deed, a subsquent party has been led to part with a valuable consideration, a race for registry between the two does not afford a proper criterion by which their rights should be determined." Another author,[18] commenting on the statutes requiring subsequent purchasers to record first to insure priority, notes that there is

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the court applied the rule of that case because the transaction involved occurred prior to the amendment); Sanborn v. Adair, 29 N. J. Eq. 338 (1878); Northrup v. Brehmer, 8 Ohio 392 (1838); Turpin v. Sudduth, 53 S. C. 295, 31 S. E. 245 (1898); King v. Fraser, 23 S. C. 543 (1885); Ranney v. Hogan, 1 Posey, Unrep. Cas. 253 (Tex. 1880); Nichols v. De Britx, 178 Wash. 375, 35 P. 2d 29 (1934); Swanstrom v. Washington Trust Co., 41 Wash. 561, 83 Pac. 76 (1906). *But cf.* Fallass v. Pierce, 30 Wis. 443 (1872) (after great deliberation and several rehearings court decided that its statute required the subsequent purchaser to record first by express provision to that effect, but was fully cognizant of the opposing view in absence of such provision).

[14] A typical statute of this type is CAL. CIV. CODE (1941) §1214, which provides: "Every conveyance of real property, other than a lease for a term not exceeding one year, is void against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, *whose conveyance is first duly recorded*, . . ." Insertion of such a clause does not solve all difficulty, see, Note, 14 CALIF. L. REV. 480 (1925).

[15] Simmons v. Stum, 101 Ill. 454 (1882); Houlahan v. Finance Consol. Mining Co., 34 Colo. 365, 82 Pac. 484 (1905) (Colo. adopted Ill. statute, hence the Ill. view was followed) (see AIGLER, CASES ON TITLES, 848 n. 17 (3d ed. 1942) for criticism that the Ill. court has read something into the statute); Whitesides v. Watkins, 58 S. W. 1107 (Tenn. 1900) (where court felt bound by its earlier decision of Copeland v. Bennett, 10 Yerg. 355 (Tenn. 1837), though Barton, J., stated that if the question was an open one, he would be of the opinion that the law was otherwise, giving a clear analysis of the problem).

[16] 41 Wash. 561, 83 Pac. 1112 (1906).

[17] WEBB, RECORD OF TITLE §13 (1891).

[18] 5 TIFFANY, REAL PROPERTY 1276 (3d ed. 1939).

considerable force to the opposite view and that the statutory provisions involve a departure from the theory that a purchaser is to be protected from a prior unrecorded conveyance because he is in effect a purchaser without notice thereof. Whatever may be the legalistic or logical arguments, it is believed that the intent and purpose of the registration acts is to require such recordation as will provide public records, which may be relied upon by parties about to acquire an interest in the property, to indicate the exact status of title.[19] It is believed that the instant decision has just the opposite effect. The failure of the first purchaser to record was a prejudice to the subsequent purchaser, who, by his best efforts at the time of parting with valuable consideration, could not determine from the record that the earlier conveyance had been made. The first purchaser was not prejudiced by the failure of the second grantee to record, since he had already parted with his consideration. To require a subsequent conveyance of title to be recorded so that a prior purchaser of the same property may be able to obtain information of its existence would not be in furtherance of the general purpose of the registration acts, which is to protect those who are entitled to rely on the public records from being undone by *prior* secret conyevances. The instant decision in effect writes into our recordation statute the clause noted above.[20]

It is conceivable that the present decision is an invitation to fraud. Such might be the case where *B* fails to record until he hears that *C* has just purchased relying on the record, and then beats *C* to the registry. If the court is faced with such a situation it might be induced, by such a clear instance of the obvious injustice of its present view to change its position to that of the weight of authority. This is especially true in view of the fact that the considerations brought forth in this comment have never been discussed and appraised by the court. The usual reason given by the court for its result, namely to encourage prompt registration, is unsound in this case, for *B*, whose failure to record promptly caused *C*'s difficulty, wins under this decision.

DAVID N. HENDERSON.

SECTION II—TITLE BY ESTOPPEL AS AFFECTED BY RECORDATION

The scope of this section is limited to the one-sixth interest the vendor acquired after he had purported to sell all the timber to defend-

[19] For avowals of such purpose, see Grimes v. Guion, 220 N. C. 676, 679, 18 S. E. 2d 170, 172 (1942); Dorman v. Goodman, 213 N. C. 406, 412, 196 S. E. 352, 355 (1938); Quinnerly v. Quinnerly, 114 N. C. 145, 148, 19 S. E. 99 (1894); Blevins v. Barker, 75 N. C. 436, 438 (1876); Womble v. Battle, 38 N. C. 182, 190 (1844); Fleming v. Burgin, 37 N. C. 584, 589 (1843).

[20] *Supra*, note 14.

ant, which plaintiff claimed by a deed from vendor subsequent to his acquisition of the interest. Plaintiff should have prevailed as to all the timber since failure of the defendant to record until after plaintiff purchased should give the latter priority, as heretofore pointed out.[21] The court overlooked that logic and, on the oft-repeated generality that first on record is first in priority, ruled that defendant was entitled to specific performance as to the original one-sixth interest owned by vendor. However, in holding that plaintiff was entitled to the one-sixth after acquired interest, it is believed the court failed to apply its priority rule consistently.

Defendant based his claim to the after acquired interest on the theory that one who purports to convey an interest in realty which he does not own but which he later acquires is estopped to assert title thereto inconsistent with the conveyance.[22] Historically, the estoppel depended on the presence of covenants of warranty in the instrument, the purpose being to avoid circuity of action;[23] today, if any part of the instrument shows an intention to convey a certain estate the vendor is thereafter estopped to assert he did not have title,[24] even though he has no liability on the instrument.[25] Apparently the present basis is analogous to estoppel in pais,[26] but distinguishable in that it depends solely on representation within the instrument.[27]

[21] See Section I, *supra.*

[22] *E.g.,* Keel v. Bailey, 224 N. C. 447, 31 S. E. 2d 362 (1944); Shenandoah Life Ins. Co., Inc. v. Sandridge, 216 N. C. 766, 775, 6 S. E. 2d 876, 881 (1939); Olds v. Cedar Works, 173 N. C. 161, 91 S. E. 846 (1917); Weeks v. Wilkins, 139 N. C. 215, 51 S. E. 909 (1903); Bell v. Adams, 81 N. C. 118 (1879).

For collection of decisions from other states see 58 A. L. R. 345-430 (1929), supplemented in 144 A. L. R. 554-585 (1943).

[23] BIGELOW, ESTOPPEL, 423 (6th ed. 1913); McGehee, *Estoppel and Rebutter in N. C.,* 1 N. C. L. REV. 152, 153 (1922).

[24] Van Rensselaer v. Kearney, 11 How. 297 (U. S. 1850); Keel v. Bailey, 224 N. C. 447, 31 S. E. 2d 362 (1944); Woody v. Cates, 213 N. C. 792, 197 S. E. 561 (1938); Baker v. Austin, 174 N. C. 433, 93 S. E. 949 (1917); Weeks v. Wilkins, 139 N. C. 215, 51 S. E. 909 (1893); Taggert v. Risley, 4 Ore. 235 (1872).

[25] RAWLE, COVENANTS FOR TITLE, 251 (5th ed. 1887).

[26] BIGELOW, ESTOPPEL, 361 (6th ed. 1913); 4 TIFFANY, THE LAW OF REAL PROPERTY 1230 (3d ed. 1939).

[27] Stevens v. United States, 29 F. 2d 904 (C. C. A. 8th 1928); N. C. Joint Stock Land Bank v. Moss, 215 N. C. 445, 2 S. E. 2d 378 (1939); Finch v. Smith, 171 Okla. 307, 58 P. 2d 850 (1936); Masterson v. Bouldin, 151 S. W. 2d 301 (Tex. Civ. App. 1941); *see* Brinegar v. Chaffin, 14 N. C. 108, 110 (1831). *But cf.* Cartwright v. Jones, 215 N. C. 108, 1 S. E. 2d 359 (1939); Jackson v. Mills, 185 N. C. 55, 115 S. E. 881 (1923).

Perhaps an important factor in the main case, although the court did not mention it, was that defendant knew the vendor owned only a one-sixth interest at the time of the agreement. Furthermore, only the vendor signed, while the language of the instrument was "*We* do hereby sell and convey all. . . ." It could be argued that the vendor never bound himself to sell unless all his co-owners signed. If the truth appears on the face of the instrument there is ordinarily no estoppel. Gilmer v. Poindexter, 10 How. 257 (U. S. 1850); *cf.* Ayer v. Philadelphia Brick Co., 159 Mass. 84, 34 N. E. 177 (1893); Harmon v. Christopher, 34 N. C. Eq. 459 (1881).

The instrument on which defendant sought specific performance contained all the necessary elements of a conveyance, except for a seal.[28] It is well established in North Carolina that an unsealed instrument otherwise adequate as a conveyance of land is treated as a contract to convey and enforcible against subsequent purchasers with record notice.[29] The court, relying on Corpus Juris, stated that the vendor, as distinguished from a subsequent purchaser claiming under him, would, by virtue of the instrument, be estopped to assert as against defendant any title inconsistent with that he had contracted to convey.[30] Although certain writers have said that the doctrine of title by estoppel cannot be applied to a contract to convey,[31] it is believed the North Carolina position is sound. The cases cited by these writers, and other cases in which the principle was urged but not applied, can be distinguished on the grounds that the courts were dealing either with void contracts or those not purporting to affect title to realty.[32] It is argued that the extent of the estoppel is only to prevent the vendor from asserting a title inconsistent with his purported conveyance, and the claim of an after acquired title is perfectly consistent with a mere promise to convey.[33] It should be noted that the language of the instrument with which we are concerned was not that of promise, but of present conveyance.[34] Furthermore, a contract to convey land is an actual conveyance of equitable title,[35] and specific performance is granted readily in equity.[36] In view of the close affinity of law and equity, it would

[28] Chandler v. Cameron, 227 N. C. 233, 41 S. E. 2d 763 (1947).

[29] Chandler v. Cameron, 227 N. C. 233, 41 S. E. 2d 763 (1947); Willis v. Anderson, 188 N. C. 479, 124 S. E. 834 (1924); Vaught v. Willisma, 177 N. C. 77, 97 S. E. 237 (1918). *Accord,* Winston v. Williams & McKeithan Lumber Co., 227 N. C. 339, 42 S. E. 2d 218 (1947); Lumber Co. v. Corey, 140 N. C. 462, 53 S. E. 300 (1906).

[30] 66 C. J., Vendor-Purchaser, p. 1031 (1934). The cases cited do not involve contracts to convey.

[31] PATTEN, TITLES §126 (1938); Lawler, *Estoppel to Assert an After Acquired Title in Pa.,* 3 U. OF PITT. L. REV. 165, 167 (1937).

[32] Harkness v. Underhill, 1 Black 316 (U. S. 1862) (contract void as against public policy); Palm Springs Co. v. Palm Springs Land Co., 36 Cal. App. 2d 730, 98 P. 2d 530 (1940) (inadequate description); Harkins v. Hatfield, 221 Ky. 91, 297 S. E. 1109 (1927) (contract void as against public policy); Mass. Gas & Oil Co. v. Go-Gas Co., 259 Mass. 585, 156 N. E. 871 (1927) (not a contract to convey); Oilphant v. Burns, 146 N. Y. 218, 40 N. E. 980 (1895) (not a contract to convey). *See* Bradley Estate Co. v. Bradley, 97 Minn. 161, 163, 106 N. E. 110, 111 (1906).

[33] Lawler, *Estoppel to Assert an After Acquired Title in Pa.,* 3 U. OF PITT. L. REV. 165, 167 (1937).

[34] "We do hereby sell and convey all the merchantable timber. . . . This conveyance is made. . . ." Chandler v. Cameron, 227 N. C. 233, 41 S. E. 2d 763 (1947).

[35] Winston v. Williams & McKeithan Lumber Co., 227 N. C. 339, 42 S. E. 2d 218 (1947).

[36] "While it is universally conceded that specific performance is a matter of discretion, the best authorities agree that where a contract relating to land is not objectionable legally, it is as much a matter of course for a court of equity to decree specific performance as it is for a court of law to give damages for a breach thereof." Stamper v. Stamper, 121 N. C. 251, 253, 28 S. E. 20, 21 (1897).

seem only logical that the doctrine of title by estoppel should apply to any instrument which legally or equitably affects title to land.[37]

In fact, there is good authority in equity for the same results as to the vendor, without reference to this estoppel doctrine. The fact that the vendor does not have title at the time he contracts to sell is no bar to specific performance, if he perfects title before performance is due.[38]

If we assume, as did the court, that the instrument would entitle the defendant to the after acquired interest as against the vendor, the next question is whether it will be effective against others. The theory that title by virtue of the estoppel inures by operation of law must be considered in connection with the policy of the recordation statutes to protect subsequent bona fide purchasers of land. North Carolina has adopted the rule that subsequent purhasers from the vendor are not bound unless they have record notice of the prior conveyance.[39] It is a generally recognized principle that a purchaser is not required to search the record beyond the time each vendor in the chain obtained title.[40] Obviously, as against subsequent purchasers, this rule defeats one claiming title by estoppel if he records before his vendor obtains the interest, since the record is off the chain of title.[41] To prevail he must record after the vendor acquires the interest and before the subsequent purchaser records.[42] This is exactly our case. Defendant recorded nineteen days after the vendor acquired the additional one-sixth interest, and two before plaintiff recorded his deed. On previous North Carolina holdings, as illustrated in this case as to the interest originally owned by the vendor,[43] defendant should have also prevailed as to the

[37] Allen v. Allan, 146 Ga. 204, 91 S. E. 22 (1916); Pring v. Swarm, 176 Iowa 153, 157 N. W. 734 (1916); Miller v. Miller, 283 S. E. 1085 (Tex. Civ. App. 1926); Texas Pacific Co. v. Fox, 228 S. E. 1021 (Tex. Civ. App. 1921); *cf.* James v. Nelson, 90 F. 2d 910 (C. C. A. 9th 1937), *cert. denied,* 302 U. S. 721 (1937).

[38] Nolan v. Highbough, 245 S. W. 146 (Ky. Ct. of App. 1922); Dennett v. Norwood Housing Ass'n, Inc., 241 Mass. 516, 135 N. E. 866 (1922); *accord,* McNeil v. Fuller, 121 N. C. 109, 28 S. E. 299 (1897); Hobson v. Buchanan, 96 N. C. 444, 2 S. E. 180 (1887); *cf.* Turnstall v. Cobb, 109 N. C. 316, 14 S. E. 28 (1891).

[39] Builders' Sash & Door Co. v. Joyner, 182 N. C. 518, 109 S. E. 259 (1921); *see* Virginia-Carolina Bank v. Mitchell, 203 N. C. 339, 344, 166 S. E. 69, 71 (1932).

[40] Wheeler v. Young, 76 Conn. 44, 255 Atl. 670 (1903); Builders' Sash & Door Co. v. Joyner, 182 N. C. 518, 109 S. E. 259 (1921); Truitt v. Grandy, 115 N. C. 54, 20 S. E. 293 (1894); Maddox v. Arp, 114 N. C. 585, 19 S. E. 665 (1894); Breen v. Morehead, 104 Tex. 254, 136 S. W. 1047 (1911). *Contra:* Mortgage Security Co. v. Fry, 143 Ala. 637, 42 So. 51 (1904); Perkins v. Coleman, 60 Ky. 611, 14 S. E. 640 (1890); White v. Patten, 24 Pick. 324 (Mass. 1837); Tefft v. Munson, 57 N. Y. 97 (1874); Javis v. Aikens, 25 Vt. 635 (1853).

[41] See note 40 *supra.*

[42] Semon v. Terhune, 40 N. J. Eq. 364, 2 Atl. 18 (1885); *see* Builders' Sash & Door Co. v. Joyner, 182 N. C. 518, 109 S. E. 259 (1921); PATTON, TITLES §45, p. 46 (1938). If Section I, *supra,* is followed, he must record before the subsequent purchaser *takes his interest.*

[43] Note criticism of this holding, Section I, *supra.*

after acquired interest on prior recordation. Surprisingly, the court found that the instrument, insofar as it related to this interest, was a mere personal contract not affecting title to land and hence not within the recordation statute. Of course, if the instrument was not within the statute, recordation would not give notice.[44] But it did give notice as to the original one-sixth owned by the vendor. The only possible conclusion is that what made the instrument a personal contract as to the one-sixth later-acquired was that it purported to convey an interest not then owned. The only authority cited, and from which the court apparently borrowed the term "personal contract," involves instruments which do not purport to convey land and would not affect title to any land whether or not the promisor owned it.[45]

By the same reasoning, a deed or mortgage purporting to deal with property not then held by the grantor would be a mere personal transaction and not within the recordation statutes. Obviously, if the case is consistently followed, the whole doctrine of title by estoppel will be destroyed as to subsequent purchasers, since it would be impossible to give constructive notive by recordation, and North Carolina has repeatedly held that actual notice is inadequate.[46] A striking inconsistency is that North Carolina recognizes the rule that where a mortgage contains a clause to the effect that any after acquired property will be subject to the mortgage, recordation of the mortgage is notice to subsequent claimants.[47] Although the mortgage clause embraces property not owned by the parties, the court has never referred to this clause as a personal contract.

Perhaps the court felt bound by precedent to follow North Carolina's harsh rule of priority of recordation as to the share originally owned by vendor, but was herein refusing to apply it to an after acquired interest. Unfortunately, nothing in the decision, except the results, suggests any such dissatisfaction or limitation on the rule of priority.

The court affirmed a holding of the lower court that title to the after acquired interest inured to plaintiff when the vendor recorded the deed under which he received the interest from his sisters. The implication is that the vendor acquired title only upon recording his deed.

[44] Black v. Solano Co., 114 Cal. App. 170, 299 Pac. 843 (1931) (contract to sell potential personal property); State v. Kirsch, 78 Ind. App. 431, 136 N. E. 36 (1932) (contract with neighbor not to sell to competitor); Sjoblom v. Mark, 103 Minn. 193, 114 N. W. 746 (1908) (contract not to sell liquors on land); Tremaine v. Williams, 114 N. C. 114, 56 S. E. 694 (1907) (contract to cut timber); *see* McAllister v. Purcell, 124 N. C. 262, 32 S. E. 717 (1899) (dictum that a faulty acknowledgment would make registration void).

[45] See note 44 *supra*.

[46] Turner v. Glenn, 220 N. C. 620, 18 S. E. 2d 197 (1942).

[47] Even though the recordation is prior to the acquisition of property by the mortgagor. Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 282, 63 S. E. 1045 (1909).

Unfortunately, language of similar effect has continued to creep into North Carolina decisions,[48] although the court has expressly repudiated the idea when the problem was squarely presented.[49] It has been repeatedly said that an unrecorded instrument is perfectly valid and passes title from the date of its delivery except as to subsequent purchasers or creditors of the *same* grantor.[50] There are no such parties, *i.e.,* grantees or creditors of vendor's sisters, involved in this case, and as to all the rest of the world the vendor had title from the date his deed was delivered. Apparently the confusion has grown out of the previously mentioned rule that a grantee is not bound by claims which are off the chain of title, *i.e.,* recorded before the grantor acquires title.[51] But that does not mean that a grantee can ignore the record prior to the time each grantor in the chain recorded. Rather, he must take notice of the date of the instrument under which his grantor took, which is presumed to be the date of delivery, and check for any claims recorded during the interval when his grantor had title but had not put it on record.[52] The court should consider carefully whether it intends to change the law that title passes on delivery of a deed and that outstanding liens or incumbrances good on acquisition of title take effect at that point, and to establish as law that this occurs instead at the time of recordation. If the court intends any such radical change it should be done expressly, upon clear analysis, and statement of adequate reasons. The present practice of making occasional loose statements to that effect is introducing needless confusion into the law.

GEORGE M. MCDERMOTT.

[48] Savings Bank & Trust Co. v. Brock, 196 N. C. 24, 28, 144 S. E. 365, 367 (1928); *see* Cooper v. N. C. Bank & Trust Co., 200 N. C. 724, 725, 158 S. E. 408, 409 (1931); Colonial Trust Co. v. Sterchie, 169 N. C. 21, 23, 85 S. E. 40, 41 (1915); Note, 7 N. C. L. REV. 96, 98 n. 9 (1928). *Contra:* Linker v. Linker, 213 N. C. 351, 196 S. E. 329 (1938); Johnson v. Leavitt, 188 N. C. 682, 125 S. E. 490 (1924) (in these cases the attachment of the liens is upon acquisition of the property, not upon registration).

[49] Durham v. Pollard, 219 N. C. 750, 14 S. E. 2d 818 (1941); Virginia-Carolina Bank v. Mitchell, 203 N. C. 339, 166 S. E. 69 (1932).

[50] Patterson v. Bryant, 216 N. C. 550, 5 S. E. 2d 849 (1939); Glass v. Lynchburg Shoe Co., 212 N. C. 70, 192 S. E. 899 (1937); Sills v. Ford, 171 N. C. 733, 88 S. E. 636 (1916); Warren v. Williford, 148 N. C. 474, 479, 62 S. E. 697, 699 (1908), Connor, J.: "Defendant says that until the registration of the deed R. had no title. This is a misconception of the registration act. The title vests as against the grantor, and all others except 'creditors and purchasers for value' from the delivery of the deed."

[51] See note 40 *supra.*

[52] See note 49 *supra.*