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A Historical Sketch of the American Recording Acts

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by P. H. Marshall*

THE RECORDING ACTS have come into existence primarily to fulfill the "needs" and requirements of the people enacting them—the ultimate need being the protection of the bona fide purchaser for value in a real estate conveyance. However, the requirements of the people throughout the historical development of the law differed greatly. It is quite clear that the forerunning statutes of today's recording acts were based upon a revenue preservation basis rather than the protection of anyone.[1] As land conveyance became more frequent, this pecuniary basis was transformed into a more equitable one, which finally formulated the recording acts of today.

In the era before the existence of the Roman Empire, a limited need for system of land registry was evident although unrecognized. During this period there was no one kingdom stable enough to preserve an absolute estate for any length of time. Thus, even if the need would have been realized and manifested into a recording act there could be no enforcement of land rights. The earliest writings were mainly of military operations, gods and a few legal codes which did not concern themselves primarily with the land law.[2] Most of the population couldn't read or write much less check a public record if one was maintained for checking purposes. Possession was the only evidence of ownership.[3] Needless to say possession of land changed with every victory on the battlefield. For the most part the need for public documentary proof of land ownership was unnecessary,[4]

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1 Plucknett, *A Concise History of The Common Law*, pp. 12-13, Lawyers Cooperative Publishing Co., Rochester (1925).

2 North and Van Buren, *Real Estate Titles and Conveyancing*, p. 114, Prentice Hall Inc., New York (1940).

3 Kocourek and Wigmore, *Formative Influences of Legal Development*, pp. 617-618, Little, Brown and Company, Boston (1918).

4 Kocourek and Wigmore, *op. cit.*, 617.

for land was conveyed within a limited area and less frequently due to the ancient modes of transportation. Thus, it was possible for land to be conveyed under the "eyes of everyone" and the witnesses to this act were always close to the land which was conveyed. The publicity of the conveyance was visible and notorious enough to give a third person notice that no competing right could be paramount to the first interest which was established by possession.[5] When one was observed to have been in constant possession it was a fair assumption that he had a land right in the property although there was no written record substantiating that right.[6] In some societies such as in ancient Greece and the Roman Empire, owners and lenders of money used fence posts to give notice that certain lands were encumbered by a hypothec.[7] But still no public documentary evidence of land ownership or encumbrance existed.

The Romans gave us a portion of their laws through the "Twelve Tables" and the "Four Books" of the Justinian Code as far as public legal laws were concerned. However, the Roman law of property recognized several modes of land transfer; by tradition, "mancipatio" and the unilateral method known as "uscapio." The latter was essentially a public mode which was in every way the equivalent of registration.[8] Land still was conveyed within a limited area and there was no overwhelming need for a recording act. Also, it appears as though land sales as a type of conveyance were not frequent for land was power and the only permanent possession that a father could endow his son. Thus, enactment of a recording act to fulfill a commercial need at that time for the protection of a bona fide purchase was not as imperative as it has now come to be.

With the fall of the Roman Empire, so too fell the land rights of the vanquished Romans. The barbaric kings who occupied these conquered lands gave huge tracts of land to their generals to secure their loyalty.[9] These generals soon became known as

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[5] *Ibid.*

[6] *Ibid.*

[7] *Id.*, p. 618. It should be noted also that contracts in relation to land such as easements were in existence and in use from the very earliest times although unwritten.

[8] *Ibid.* This type of land transfer was used more frequently than the "mancipatio" method of conveyance.

[9] Morris, *A History of the Law*, p. 110, McGraw-Hill, New York (1910).

Dukes and Marquis who held the land by grant from the king and by power from one another. These lords in turn sub-infeudated the land granted to them.[10] As these grants were made throughout Europe, more land became under "legal" ownership with proportionately more conveyances. However, this latter type of conveyance became more secret, for the limited "clan" type of society and notoriety of conveyance was gone due to the wide dispersement of peoples.[11] Thus, the first need for the recording acts became apparent. As land became known as wealth it was not to be supposed that the lords who owned these vast estates would request a legal system of public land record when they could have the same by cheaper illegal means.

In England after the Anglo-Saxons conquered the Britons, the Anglo-Saxons themselves were conquered by the Normans in the Battle of Hastings in 1066, from which date the English feudal system appears to have flourished.[12] The only documentary evidence of land title were the original privately held grants from the king to the tenants in chief until the compilation of the "Doomsday Book" in 1086. Being made up in two volumes this book was the first public document in English constitutional history.[13] The "Doomsday Book" was and still is the oldest public record of land ownership.[14] The "need" at this point in time was the settling of the Crown's source of taxation. This book completely described franchises, land values, types of tenures, services, boundaries of counties, villages, and subtenants of all the land which at that time made up the Kingdom of William The Conqueror.[15] Nevertheless, along with preserving the sources of the Crown's revenue this book gave to the world the idea that a public record was a technical thing containing certain officially compiled documents which were beyond question—this idea has been extended from the court of exchequer to all courts of law.[16]

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10 Casner and Leach, *Cases and Text on Property*, pp. 251-252, Little, Brown and Company, Boston (1951).

11 North and Van Buren, *op. cit.*, p. 125.

12 Morris, *op. cit.*, p. 113.

13 Plucknett, *op. cit.*, p. 12.

14 *Ibid.*

15 *Ibid.*

16 Plucknett, *op. cit.*, p. 13.

With this "new look" in systematized land ownership there was more use and consequently more commercial value in the land. Due to the growing frequence of land conveyances and the unrest of the lords who were losing some of their services by sub-in-feudation of tenants, the courts passed the Statute Quia Emptores (1290) which added impetus to the expanding commercial use of sale of land by facilitating the alienation of land.[17] Thus, a commercial need was beginning to formulate.

At this point it would be well to survey the copyhold type of land tenure for it may have possibly been that this type of tenure shaped the later American Colonies' recording acts.[18] The copyholder or unfree tenant in land was named such by the type of service rendered to the lord—which usually was of a menial nature. In turn, for these services the unfree tenant had land rights which were evidenced in the manorial records. The copyholder could by surrender and conveyance transfer his right subject to the lord's approval and payment of a fine. Upon transfer and conveyance the new copyholder was given a copy of his rights which were evidenced in the aforesaid manner. As the feudal system deteriorated it can be clearly seen that these manorial records were incorporated and became the first elements of a registry system in the English boroughs, villages and eventually cities.[19] It was from these sections of England that a large portion of the early American Colonists emigrated.[20]

It cannot be safely said that England was the sole source in the development of the recording act, for Germany, France and Holland were also known to have had early recording statutes of some note.[21] Taking the latter as an example, it is known that as early as 1529 transfers of allodial lands were required by local ordinances to be acknowledged before a court where the land lay.[22] Failure to acknowledge the transfer rendered the transfer documents void. In 1580 ordinances were passed to have all documents registered and no sale or alienation was said to be sealed

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17 Casner and Leach, *op. cit.*, p. 259.

18 Haskins, *Beginnings of the Recording System in Massachusetts*, p. 281, Boston University Law Review (1941).

19 *Id.*, pp. 283-285.

20 Morrison and Commager, *Growth of the American Republic 1000-1865*, p. 52, McGraw-Hill, New York (1950).

21 Haskins, *op. cit.*, p. 282.

22 *Id.*, p. 283.

and signed if not perfectly registered.[23] The deed was the standard instrument of transfer and was as important as the registry itself.[24] These early Dutch land acts, it is contended, could have had a strong influence on the later American Colonies' recording acts.

In England, prior to the Statute of Enrollments (1536), the common mode of transfer of real property was by livery of seisin which method remained the standard of conveyance in England until the English Real Property Act of 1845.[25] The enfeoffment took place at the time of sale on or in view of the land and was so notorious in character and witnessed by so many that need for recorded evidence of the transaction was thought to be wholly unnecessary within the communities. Each conveyance was usually evidenced by a Charter of Enfeoffment. But with the improvement of transportation facilities the need for land registration became more apparent. Land also could have been subject to a lease or mortgage so that the papers privately held in reference to land materially increased. Include papers relating to tax matters and estates and we have a voluminous amount of documents being privately held which could easily be lost, forged, or stolen.[26] Thus, after a land conveyance a subsequent purchaser came into possession of a great mass of papers relating to his property which were known as the muniments of title.[27] Each land owner had to privately preserve all those papers for it was never known when any particular document might play its crucial role in the defense of the true owner's land title against a fraudulent claim.[28] Two main objections to this method of evidencing land ownership arose: (1) In the event that the grantor subdivided his parcel of land, which of the two subsequent grantees were to receive the irreplaceable muniments of title? If the property were subdivided further then more complications would set in. (2) If the seller were out of possession a subsequent bona fide purchaser was left wholly unprotected when he dealt with the land if the documents of title were not recorded in

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23 *Id.*, p. 293. The enactment of this type of local land registry ordinance became common to all parts of Holland.

24 *Id.*, p. 284.

25 *American Law of Property*, Vol. IV, sec. 17.4, p. 537, Little, Brown and Company (1952),

26 North and Van Buren, *op. cit.*, p. 115.

27 North and Van Buren, *op. cit.*, p. 117.

28 *Ibid.*

a public record.[29] The enactment of the Statute of Uses in 1535, along with the aforesaid objections of privately held documents of title, greatly increased the task of the English Courts.[30] The Statute of Uses, being enacted to preserve the king's revenues put an end to the creation of future uses and in effect permitted the increased private and secret bargains and sales of real estate. This effect placed the subsequent bona fide purchaser for value in a more precarious situation when he dealt with a fraudulent vendor.

The English Courts upon whom the ill effects of the Statute of Uses fell enacted the Statute of the Enrollments in 1536.[31] This statute was designed to rectify some of the inequities which were permitted under the law through the traditional private evidencing of land ownership.[32] This act was designed to give a freehold conveyance all the notoriety of livery of seisin and a deed was required to give the validity.[33] Thus the Statute of Enrollments was the first act which recognized the commercial need of land registration in protecting a subsequent bona fide purchaser from fraudulent conveyances of land and the concealment of land transfers. The act provided in part,

> ". . . that no manor lands, tenants or other hereditaments shall pass, alter, or change from one to another . . . by reason of any bargain or sale thereof, except that the same bargain and sale thereof be made by a writing intended, sealed, and enrolled in one of the kings courts at Westminster . . . within six months next after the date of same writing intended." [34]

Title to the land would be held in suspense until the completed act of enrollment had been consummated. However, the shrewd lawyers who were trained in "loophole" finding, soon devised the ingenious method of lease and release, which device was successful in evading the requirements of the Statute of En-

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[29] *Ibid.*

[30] Moynihan, *A Preliminary Survey of the Law of Real Property,* p. 108, West Publishing Company, St. Paul (1940).

[31] *Id.,* p. 51, King Henry VIII enlisted the support of the common law courts to assist him in having this statute passed much to the displeasure of the courts of equity. Because the number of use actions, which were within the jurisdiction of the courts of equity, would be diminished along with their authority.

[32] *Id.,* p. 108.

[33] *Ibid.*

[34] *American Law of Property, op. cit.,* p. 537.

rollments.[35] It soon became evident that the act was to take its place alongside all the other acts which tended to place restraints upon the powerful landowners' freedom of private land ownership.

However, stemming from this ineffectual act came the acts for the counties of Middlesex and York in 1708 which acts successfully did protect the bona fide purchaser from the negligence or fraud of a previous grantee.[36] Transfers were to be adjudged void as against prior purchasers and mortgagee for a valuable consideration unless the conveyance was registered before the deed of a subsequent purchaser or mortgagee had been registered. Nevertheless, for the most part the idea of recording acts never became generally accepted throughout England and registry was limited to certain English counties and boroughs, due primarily to the resistance on the part of the wealthy land owners to any regulation.[37] Thus the only type of English act that exists today provides for mere enrollment of deeds, which in effect is a public land index. Deeds once registered can be retained privately by the grantee—no act provides for recording.[38]

There has been much disparity of opinion as to the origin of the recording acts in the American Colonies—the primary question being: were the recording acts of the American Colonies an equitable extension of the earlier English acts regarding land registry (Statute of Enrollments) but primarily indigenous to the American Colonies,[39] or was the basis for the American acts a combination of Dutch and English copyhold origin:[40]

Professor T. H. Beale[41] states that the early American Colonial acts could have possibly stemmed from four sources:

a. Dutch system of land registration;
b. System of acknowledgment prevalent in borough customs;
c. Enrollments of bargains and sales under 27 Henry VIII C 616 (1536);
d. Local customs of York and Middlesex by which registries were provided.

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35 Moynihan, *op. cit.*, p. 109.
36 *American Law of Property, op. cit.*, p. 536.
37 North and Van Buren, *op. cit.*, pp. 115-116.
38 *Ibid.*
39 *American Law of Property, op. cit.*, p. 525.
40 Haskins, *op. cit.*, p. 286.
41 *American Law of Property, op. cit.*, p. 535.

Prof. Beale's viewpoint is that of all the possibilities or origin the Statute of Enrollments was probably the most important influence on the American recording acts, however, he places no overwhelming credence upon this source. He discounts entirely the Dutch system, borough customs and registry systems of Middlesex and York.[42] He takes the view, subject to a few qualifications, that the American recording acts were mainly indigenous to the American Colonies, and background, if any, came from the Statute of Enrollments.

Mr. G. L. Haskins,[43] diametrically opposed, states that the Pilgrims that settled the American Colonies were of a "copyhold" origin and therefore could not have been familiar with the Statute of Enrollments which dealt mainly with freehold land tenure.[44] He further states that the Dutch system of land registration could have had an influence upon the Plymouth Colony Pilgrims from their short stay at Leyden. Tending to substantiate his view he states that the deed was the instrument of transfer and was as important as registration itself. Acknowledgment of the deed was also required in the first Massachusetts Bay Colony and Plymouth Colony acts, which ideas were included in the provisions of the earlier Dutch acts for land registration.[45] The Massachusetts Bay act can be considered for all intents and purposes the father act of all the recording acts in the United States.[46]

My viewpoint upon the question as to which writer was correct in his analysis as to origin is that both were correct. It appears as though each of the suggested origins could have played their respective roles in influencing the original Massachusetts acts. In support of this view it appears that on one side pilgrims of all different religious and economic classes settled in the Bay Colony and could have offered their particular contribution to the recording acts both copyhold and freehold.[47] On the other side of the question the construction of the first Massachusetts acts appears to have contained similar ideas and even wording as did the Statute of Enrollments.[48]

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[42] *American Law of Property, op. cit.*, p. 535.
[43] Haskins, *op. cit.*, p. 282.
[44] *Id.*, p. 284.
[45] *Ibid.*
[46] *Id.*, p. 285.
[47] Morrison and Commager, *op. cit.*, p. 52.
[48] *American Law of Property, op. cit.*, p. 538.

However, the question of the exact origin of the recording act in the American Colonies is not as important as the question of why were the recording acts of more importance to land ownership and conveyancing in the American Colonies than in England. There could be many reasons. One main reason could be that the Pilgrims and other colonists were primarily an oppressed class in England both economically and religiously.[49] Being deprived of their land rights without being permitted to refer to any written law such as a recording act,[50] the colonists possibly motivated by a desire to rectify these inequities suffered in England, formulated the recording acts which would secure their land rights. The colonists could point to these public documents in case of a land dispute or fraudulent claim and determine by the facts so recorded which party would prevail. Also a bona fide purchaser dealing with the land was protected from a prior grantee who negligently had failed to record his title, which right if recorded would have served as notice to all the world as to his prevailing right to the land. Along with the uncertainty of land rights another possible motive for early acceptance by the colonies was to discourage undesirables and fraudulent land claimants from settling in their towns.[51] Thus the recording acts played an important role in formulating the economic and social unity of the earlier American settlements.[52]

The Plymouth Colony was the first known American Colony to have had a deed recorded in 1627. Along with the contract of sale, parties to the contract, bounds, and terms were also required to be recorded into the book of the colony.[53] In 1636 the Plymouth Colony Committee issued a proclamation that:

> "all sales and exchanges, giftes, morgages, leases of houses or lands the sale of which was to be acknowledged before the governor to the public record and fees to be paid." [54]

Nevertheless, by far the most important single legislation that influenced the history of recording in America was the Massachusetts Bay Colony "Order of the Court" in April 1634.[55] This act provided for guarantee of land title, gave the first evi-

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49 Haskins, *op. cit.*, p. 287.
50 *Ibid.*
51 *Id.*, p. 289.
52 *Id.*, p. 290.
53 *American Law of Property, op. cit.*, p. 527.
54 *American Law of Property, op. cit.*, p. 528.
55 Haskins, *op. cit.*, p. 287.

dence of the present rule of priority of recording in the "Books of Possession." By 1640 the Massachusetts Colony had passed an act, the elements of which are contained in all of the present-day recording acts of every state.[56] The act provides in part:

> "For avoiding all fraudulent conveyances, and that every man may know what estate or interest other men may have . . . it is therefore ordered, that after the end of this month no morgage, bargains, sale or graunt hereafter to bee made of any houses, lands, rents, other hereditaments, shalbee of force against an other person except by grauntee and his heires, unless the same bee recorded . . . and if any such grauntee, etc., being required by the grauntee, etc., to make all acknowledgment of any graunt, etc., by him made shall refuse so to do, it shalbee in the power of any magistrate to send for the party so refusing and commit him to prison . . ." [57]

It can be readily observed that acknowledgment was a prerequisite to recording (possibly the Dutch influence) along with the requirements of copying the whole deed into the record. Priority of recording meant priority of title (possibly the influence of the Statute of Enrollments), unless possession was given to the grantee. Although the present day American acts do not contain this last provision (regarding possession), courts have held that possession is enough to give the subsequent purchaser inquiry notice.[58] Thus they place the subsequent purchaser in a position of having constructive notice because he was negligent in his search for the true owner.

From the acts of Massachusetts Bay Colony and the Plymouth Colony most of the surrounding colonies derived their ideas for recording acts.[59] Pennsylvania taking up the salient ideas of these prior acts passed along the main premises to its neighbors (i.e.) the North West Territory of Ohio.[60] This territory enacted in 1795 an improved act providing that deeds not acknowledged or proved and recorded within twelve months of execution "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration, unless such deed or conveyance be recorded before the proving and recording of the deed or conveyance under which a subsequent purchaser

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56 *Id.*, p. 288.

57 *American Law of Property, op. cit.*, p. 534.

58 *American Law of Property, op. cit.*, p. 529.

59 *Id.*, p. 530.

60 *Id.*, p. 533.

or mortgagee shall claim." [61] Thus this commercial need was further recognized by this act which proved to be a model for its surrounding territories. Later, however, the act was amended as to treatment of mortgages and oil and gas leases in a race type of recording act.

Taking the race type of act, which was the first type of three main classes of recording acts, in its chronological order we find that the courts in England and America which gave a strict construction to the literal wording of the Statute of Enrollments had the date of the enrollment or registry, being the sole test of priority as between common grantees of the same land from a fraudulent seller.[62] Thus, the first to register was the party to prevail. No qualification is made as to the second buyer being bona fide or without notice of prior encumbrance no matter how full and formal the notice might be.[63] An example of this type of act may be found in Ohio in which the statute enforces race features only as against mortgages and oil and gas leases.[64] In the jurisdiction of Ohio the courts reason thusly—that the subsequent mortgagee with notice doesn't commit fraud but prevents it. He is viewed as a vigilant creditor anxious to secure his debt.[65] The virtue in this type of act is that it places an importance upon the information the title examiner may find in the records.[66] Also it prevents a fraudulent mortgagor from wantonly defrauding the public, in having priority in time rule priority in title. The Ohio Revised Code provides:

> SECTION 5301.23. EFFECTIVE DATE OF MORTGAGES.
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> "All mortgages properly executed shall be recorded in the office of the county recorder of the county in which the mortgaged premises are situated and take effect from the time they are delivered to the recorder for record. If two or more mortgages are presented for record on the same day, they shall take effect in the order of presentation. The first mortgage presented must be the first recorded, and the first recorded shall have preference."

The notice type of recording act was the second class of acts to be developed, the main elements being derived from the race

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61 *Ibid.*

62 *Id.*, p. 538.

63 *American Law of Property, op. cit.*, p. 538.

64 If the lessee is in actual and open possession he is protected even though his lease is not recorded. Ohio Rev. Code, Sec. 5301.09.

65 Mayham v. Coombs, 14 Ohio 428 (1846).

66 *American Law of Property, op. cit.*, p. 539.

type of act.[67] English courts of equity a few years after the passage of the Statute of Enrollments held that "the registry of a deed by one having notice of a prior sale was a fraud upon the first purchaser and that the second purchaser acquires title to the land only as constructive trustee from the first purchaser."[68] The Massachusetts Bay Colony acts acquired the notice idea indirectly from the Statute of Enrollments by protecting a subsequent purchaser in stating that, "any other person than the grauntor and his heires" had no notice if deed was unrecorded.[69] Twenty-five states (including Ohio as to deeds and other land conveyances) have the notice type of recording act. An example of this act is found in the Ohio Revised Code:

> SECTION 5301.25. RECORDING OF INSTRUMENTS FOR THE CONVEYANCE AND ENCUMBRANCE OF LANDS.
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> "All deeds and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements, or hereditaments, other than as provided in Section 5301.23 of the revised code, shall be recorded in the office of the county recorder of the county in which the premises are situated, and until so recorded or filed for record they are fraudulent, so far as it relates and a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of such former deed or instrument."

This type of act appears to place import upon equity as between two conflicting land claimants. Also having the first purchaser record earlier so that he can be protected against the rights of a subsequent bona fide purchaser for value.

Notice—Race as the third type of act appears to be a combination of the two previously mentioned acts. This type states that if a subsequent bona fide purchaser is to have priority he must not only be without notice of the previous transaction but also must be the first to record his claim. Historically it appears that the act was patterned after the acts for York and Middlesex county.[70]

The Period of Grace class of acts places more importance upon the time within which recording should take place. After

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[67] *Ibid.*

[68] *Ibid.*

[69] *American Law of Property, op. cit.*, p. 539.

[70] *Id.*, p. 541.

the expiration of the time granted for recording, these acts take up the features of the notice type of act.[71]

The recording acts of today although they differ in some aspects are very similar in their major provisions; (1) the public record is constructive and absolute notice to the world of all contents of the instruments recorded, (2) they are based upon the idea that if the purchaser fails to inform himself of what is in the record he is negligent, and being negligent he is estopped from making a plea of ignorance, (3) recording takes place in the county where the land lies, (4) every act (except Notice Race) protects a subsequent bona fide purchaser without notice who is not negligent, (5) before the instrument is recorded it must be acknowledged, (6) the whole deed itself must be copied upon the public record.[72]

The dissimilarities are (1) the amount of time within which an instrument may be recorded (carries from 5 days to a year or more from date of execution), (2) classes of creditors which are protected, if at all, (3) parties necessary to an acknowledgment.[73]

Though the different recording acts have contained some inequities they have for the most part met the commercialized needs of our present day economy in fulfilling their real purpose, that of (1) preserving the muniments of title, (2) perpetuating the evidences of voluntary land conveyances, (3) giving the community notice in changes of ownership of property,[74] and most important (4) protecting a subsequent bona fide purchaser.

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71 This class of statute was more important to the purchasers of land in the colonial days primarily because modes of travel were cumbersome and it took a great deal more travel time to arrive at the place where the recordation was to take place.

72 North and Van Buren, *Real Estate Titles and Conveyancing*, p. 119, Prentice-Hall, Inc., New York (1940).

73 *Id.*, p. 120.

74 *Ibid.*