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ROBIN HOOD WAS RIGHT, OR, NEVER TRUST A SHERIFF: THE RELATIONSHIP BETWEEN SHERIFFS' SALES AND THE MARYLAND RECORDING ACT

ALICE A. SOLED*

It all too frequently happens that the same tract of land is transferred to successive transferees by the same transferor. This most commonly occurs in the context of successive transfers by the same individual. It also occurs, however, when the successive transfers are made by a public official, such as a sheriff, on behalf of the same individual, or when one transfer is made by an individual and another is made by a public official on his behalf. The resolution of the dilemma posed by this situation long has been a fertile source of controversy.

At common law, the first transferee usually was preferred over all subsequent transferees of the same land from the same transferor, even when the subsequent transferees were bona fide purchasers for value and without notice of the first transfer. The common law priority of the first transferee was justified on the theory that, after the transferor made the first transfer, he had nothing left to convey to any subsequent transferee.\(^1\) The only noteworthy exception to this rule gave priority to a subsequent transferee when the interest in land received by the first transferee was purely equitable, and the subsequent transferee acquired a legal interest in the same land from the same transferor for value and without notice of the prior equitable interest.\(^2\)

\(^1\) 5 H. TIFFANY, THE LAW OF REAL PROPERTY §§ 1257, 1258, 1260 (3d ed. 1939); Aigler, The Operation of the Recording Acts, 22 Mich. L. Rev. 405, 405–06 (1924); e.g., Fallass v. Pierce, 30 Wis. 443, 473 (1872) (dictum).

\(^2\) 5 H. TIFFANY, supra note 1, §§ 1257, 1258, 1260; Aigler, supra note 1, at 405–06; e.g., Hallett v. Alexander, 50 Colo. 37, 48–50, 114 P. 490, 495 (1911) (dictum); McClure v. Tallman, 30 Iowa 515, 520 (1870) (dictum); see, e.g., Boynton v. Haggart, 120 F. 819, 823–24 (8th Cir.) (dictum), cert. denied, 191 U.S. 573 (1903); Memphis Land & Timber Co. v. Ford, 58 F. 452, 455–56 (8th Cir. 1893) (dictum); Burns v. Berry, 42 Mich. 176, 178–79, 3 N.W. 924, 925 (1879) (dictum); Messersmith v. Smith, 60 N.W.2d 276, 282 (N.D. 1953); Zimmer v. Sundell, 237 Wis. 270, 274, 296 N.W. 589, 591 (1941) (dictum); Fallass v. Pierce, 30 Wis. 443, 473 (1872) (dictum).

\(^3\) 5 H. TIFFANY, supra note 1, § 1261; Aigler, supra note 1, at 406. This exception has been extended to deny priority to a transferee of a purely equitable interest in land as against a subsequent transferee of a purely equitable interest in the same land from the same transferor who took his equitable interest for value and
Today, in every one of the United States, the common law rule has been changed by a recording act that denies priority to a transferee of an interest in land as against a subsequent transferee of an interest in the same land from the same transferor if the prior transferee fails to comply with the requirements of the recording act. Every recording act is either a "notice" statute, a "race" statute, or a "notice-race" statute. Each establishes different criteria for denying priority to the first transferee of an interest in land.

Under a "notice" statute, a transferee of an interest in land, whose conveyance is of a type entitled to be recorded, is denied priority as against a subsequent transferee if the subsequent transferee acquires his interest for value and without notice of the prior transfer before the prior transferee records. Under a "race" statute, a transferee of an interest in land is denied priority as against a subsequent transferee if the subsequent transferee records his transfer before the prior transferee records. This is true even if the subsequent transferee is not a bona fide purchaser for value and without notice of the prior transfer. Finally, under a "notice-race" statute, such as that in effect in Maryland, a transferee of an interest in land, whose conveyance is of a type entitled to be recorded, is denied priority as against a subsequent transferee only if the subsequent transferee both is a bona fide purchaser for value without notice of

without notice of the prior equitable interest and thereafter acquired the legal title to such land without notice of the prior equitable interest. E.g., Fitzsimmons v. Ogden, 11 U.S. (7 Cranch) 2 (1819); United States v. Detroit Timber & Lumber Co., 131 F. 668 (8th Cir. 1904) (indicating that subsequent transferee of equitable interest is preferred even though legal title acquired after notice of the defect), aff'd, 200 U.S. 321 (1906); Oviatt v. Brown, 14 Ohio 285 (1873); see Bayley v. Greenleaf, 20 U.S. (7 Wheat.) 46 (1822).

5. Id.
6. Not all types of conveyances of interests in land are entitled to be recorded. If it is not of a type entitled to recordation, a conveyance is not subject to the priority provisions of the recording acts. 4 AMERICAN LAW OF PROPERTY, supra note 4, § 17.8.
7. Throughout this article, the phrase "subsequent transferee" shall mean "subsequent transferee of an interest in the same land from the same transferor," except when a different meaning is indicated expressly or is necessarily inferable from the context.
8. 4 AMERICAN LAW OF PROPERTY, supra note 4, § 17.5.
9. Id.
10. Id.
11. MD. REAL PROP. CODE ANN. §3-203 (1974). The author is aware that the proper reference to this statute, mandated by the Maryland Legislature, is to the "Real Property Article." However, Uniform System of Citation (otherwise known as "the Blue Book") mandates the form in which this statute is cited throughout this article.
the prior transfer and records his transfer before the prior transferee records.\textsuperscript{12}

In light of the above-described statutory changes in the common law priorities, it is noteworthy that, in \textit{Lewis v. Rippons},\textsuperscript{13} the Court of Appeals of Maryland pronounced, albeit as dictum, that as between two successive purchasers of the same land from the same sheriff on execution sale, the \textit{first} purchaser would have priority even if the second purchaser were a bona fide purchaser for value, without notice of the prior transfer, who recorded his deed from the sheriff before the prior transferee recorded. This article will demonstrate that this dictum, which is diametrically opposed to the expected result under a notice-race statute such as that in effect in Maryland, is based upon a misconception and misapplication of prior Maryland law.

\textit{Rippons} involved an execution sale on March 13, 1968, of two parcels of land, known as “Tract 2” and “Tract 3,” which were owned by the same judgment debtor and which had been seized by the Sheriff of Dorchester County pursuant to a writ of \textit{fieri facias}.\textsuperscript{14} Although these two tracts were in fact distinct parcels of land, the description of “Tract 3,” as it appeared in the deed conveying it to the judgment debtor, included within the boundaries of “Tract 3” the land known as “Tract 2.” Furthermore, this deed to “Tract 3” made specific reference to this inclusion. The “Tracts” were sold in numerical order:\textsuperscript{15} “Tract 2” was sold to Mr. Rippons and “Tract 3” — the description of which included “Tract 2” — was then sold to Mr. and Mrs. Harding. Both Mr. Harding and Mr. Lewis, who later purchased “Tract 3” from Mr. Harding, were present when “Tract 2” was sold to Mr. Rippons and both were aware of this sale. The purchase price for each of the parcels was paid to the sheriff on the day of the sale. On April 3, 1968, the sheriff conveyed “Tract 3” to

\begin{itemize}
  \item \textsuperscript{12} 12. \textit{American Law of Property, supra} note 4, § 17.5; \textit{e.g.}, \textit{Busey v. Reese}, 38 Md. 264 (1873); \textit{United States Ins. Co. v. Shriver}, 3 Md. Ch. 381 (1851), \textit{aff'd sub nom. General Ins. Co. v. United States Ins. Co.}, 10 Md. 517 (1857); \textit{see, e.g.}, \textit{Fertitta v. Bay Shore Dev. Corp.}, 252 Md. 393, 250 A.2d 69 (1969); \textit{Grayson v. Buffington}, 233 Md. 340, 196 A.2d 893 (1964); \textit{Tyler v. Abergh}, 65 Md. 18, 3 A. 904 (1886); \textit{Gill v. Griffith}, 2 Md. Ch. 270 (1848).
  \item \textsuperscript{13} 13. 282 Md. 155, 383 A.2d 676 (1978).
  \item \textsuperscript{14} 14. A writ of \textit{fieri facias} is a common law writ that commands the sheriff to seize and sell the property of a judgment debtor to satisfy the judgment debt.
  \item \textsuperscript{15} 15. Although the order in which the “Tracts” were sold was disputed both at the trial and on appeal, the trial judge found as a fact that the “Tracts” were sold in numerical order and the Court of Appeals affirmed, stating that “the chancellor’s determination as to the order of sale was not clearly erroneous.” 282 Md. at 160, 383 A.2d at 679–80.
\end{itemize}
the Hardings by a deed that contained the same metes and bounds description as that contained in the deed of "Tract 3" to the judgment debtor, but which otherwise made no reference to the inclusion of "Tract 2" within the boundaries of "Tract 3." The Harding deed was duly recorded. Thereafter, on December 22, 1972, the Hardings conveyed "Tract 3" to Mr. and Mrs. Lewis by a deed that contained the same description of "Tract 3" as that contained in the sheriff's deed of "Tract 3" to the Hardings. On May 3, 1973, the sheriff finally conveyed "Tract 2" to Mr. Rippons by a deed that was duly recorded.

In 1976, Mr. Rippons brought a proceeding to quiet title to "Tract 2." The Circuit Court of Dorchester County decreed Mr. Rippons to be the absolute owner of that tract. The Court of Appeals granted certiorari prior to consideration of the Lewis' appeal by the Court of Special Appeals and, without dissent, affirmed the circuit court. The Court of Appeals held that Mr. and Mrs. Lewis were not entitled to "Tract 2" by operation of the notice-race priorities provisions of the recording act,16 despite the fact that their predecessors' deed to "Tract 3," which included "Tract 2," was recorded before the recording of the sheriff's deed of "Tract 2" to Mr. Rippons. The court's holding was based on its conclusion that, because he was aware of the sale of "Tract 2" to Mr. Rippons, Mr. Lewis was not a bona fide purchaser for value and without notice.17

After enunciating its holding, which clearly was correct on the facts,18 the Rippons court proceeded to state an alternative ground


17. 282 Md. at 162, 383 A.2d at 680.

18. On the facts as given, neither Harding, who purchased "Tract 3" at the sheriff's sale, nor Lewis, who purchased "Tract 3" from Harding, was a bona fide purchaser for value and without notice, because both were present at the sale when "Tract 2" was sold to Rippons. Consequently, neither was entitled to the benefit of the applicable version of the "notice-race" priorities provisions of Md. Real Prop. Code Ann. § 3-203 (1974). See, e.g., Fertitta v. Bay Shore Dev. Corp., 252 Md. 393, 250 A.2d 69 (1969); Grayson v. Buffington, 233 Md. 340, 196 A.2d 893 (1964); Tyler v. Abergh, 65 Md. 18, 3 A. 904 (1886); Busey v. Reese, 38 Md. 264 (1873); United States Ins. Co. v. Shriver, 3 Md. Ch. 381 (1851), aff'd sub nom. General Ins. Co. v. United States Ins. Co., 10 Md. 517 (1857); Gill v. Griffith, 2 Md. Ch. 270 (1848). It is disturbing to note, however, that the court made no reference to Harding's bona fides or lack thereof; it was concerned solely with Lewis' lack of bona fides. It is true that it generally is held that a person in Lewis' position is protected under a notice-race recording statute if he
for its decision. The court asserted that because title to "Tract 2" passed to Rippons, the first purchaser, by operation of law upon its sale to him by the sheriff, a deed from the sheriff was not necessary to vest legal title in him.19 According to the court, "Tract 2" therefore could not have been sold by the sheriff to Harding, the second purchaser.20 Implicit in the alternative ground for its decision is the court's belief that no subsequent purchaser would have been entitled to "Tract 2" by operation of the notice-race priorities provisions of the recording act even if he had been a bona fide purchaser for value and without notice. According to the court, because

title to these tracts passed to the purchasers upon the sale of them by the Sheriff . . . . the subsequent deeds had no effect upon that title other than to confirm it. Therefore which deed was executed and recorded first is irrelevant to the decision in this case.

. . . . [G]iven the finding of the chancellor that Tract 2 was sold first, it follows that upon its sale title vested in Rippons, and that the land described as Tract 2 could not have been sold by the Sheriff at the same sale as a part of Tract 3.21

This conclusion is the reverse of that to be expected from a standard application of the priorities provisions of the recording acts. For, the effect of these provisions, where applicable, is to give title to the second purchaser of the same land from a common grantor if the second purchaser is a bona fide purchaser for value and without notice who records first, even though the grantor "had nothing left to sell" after his transfer to the first purchaser.22 Thus, by implying that the second purchaser's priority of record would not have entitled him to ownership of "Tract 2" even if he had been a

is a bona fide purchaser for value and without notice, even if his predecessor in title is not. 4 AMERICAN LAW OF PROPERTY, supra note 4, § 17.11, at 567. It is also generally held, however, that a person in Lewis' position is protected under a notice-race statute, even though he is not a bona fide purchaser for value, if his predecessor in title took such title for value and without notice. Id. at 567–68.

19. Throughout this article, use of the phrase "title passed to the purchaser by operation of law upon its sale to him by the sheriff" or a similar phrase carries with it as a corollary by implication the concept that a deed from the sheriff is not necessary to vest legal title in the purchaser.


21. Id. at 162, 166, 383 A.2d at 680–81, 682 (emphasis supplied) (footnote omitted). In the footnote to the italicized sentence quoted above, the court emphasized its point by stating: "We take cognizance of Code (1974), § 14-103(a) Real Property Article, which has no bearing on this case." Id. at 162 n.2, 383 A.2d at 681 n.2.

22. See notes 95 & 96 and accompanying text infra.
bona fide purchaser for value and without notice, the court necessarily implied that sheriffs' sales are not subject to the priorities provisions of the recording acts under any circumstances.

The reasoning of the court which gives rise to the implication that sheriffs' sales are not subject to the priorities provisions of the recording acts under any circumstances appears to have been based on one or more of the following actual or possible misconceptions. The first misconception under which the court labored was a misapplication of the oft-repeated "rule" that the legal title to Maryland realty sold by a sheriff on execution sale passes to the purchaser thereof by operation of law upon the sale, so that a deed from the sheriff is not necessary to vest legal title in the purchaser.\textsuperscript{23} This misconception resulted in an erroneous conclusion that the recording of a deed from the sheriff is not essential to the passage of legal title to the property sold by him. This conclusion in turn served as the basis for a second misconception, an erroneous assumption that the recording of a "deed" has no role in the establishment of priorities under the recording acts if the recording of such "deed" is not essential to the validity of a transfer of the legal title to the property.\textsuperscript{24} In fact, even if the court was correct in its view that the recording of a deed from the sheriff is not essential to a valid transfer of title by him, this assumption ignored two essential distinctions: first, the distinction between the role of recording in validating a transfer of legal title and the role of recording in determining priorities,\textsuperscript{25} and second, the distinction, insofar as the role of recording in the establishment of priorities is concerned, between the situation in which a "deed" is not entitled to be recorded,\textsuperscript{26} and that in which a "deed" may, but need not, be recorded.\textsuperscript{27} Although not expressed in \textit{Rippons}, it is possible that the court's opinion was influenced by a third and final misconception: that a purchaser at a sheriff's sale always and necessarily takes subject to prior unrecorded equities. If present, this misconception possibly results from a confusion between the situation in \textit{Rippons}, which involved a controversy between two transferees of the same

\textsuperscript{23} The court stated and applied this "rule" in \textit{Rippons}. See 282 Md. at 162-66, 383 A.2d at 680-82. The "rule" and its application by the court are analyzed at notes 51 to 77 and accompanying text infra.

\textsuperscript{24} See \textit{id.} at 162-66, 383 A.2d at 680-82.

\textsuperscript{25} See notes 79 to 123 and accompanying text infra.

\textsuperscript{26} In this case its recording has no effect on priorities. See note 123 and accompanying text infra.

\textsuperscript{27} See notes 97 to 102 and accompanying text infra.
land from the same sheriff on execution sale, and the situation in
which the controversy is between a transferee of land from a
judgment debtor and a purchaser of the same land from a sheriff at
an execution sale. 28

PASSAGE OF LEGAL TITLE TO LAND SOLD 
AT A SHERIFF’S SALE

Courts frequently have enunciated the “rule” that the legal title
to Maryland realty sold by a sheriff on execution sale passes eo
instanti to the purchaser by operation of law without any need for a
deed or other instrument in writing. 29 Despite the many assertions of
this “rule,” a recorded (or recordable) muniment of title always has
been considered essential to the passage of a nonvoidable title to
Maryland realty when it is sold at a sheriff’s sale 30 because such a
sale is within the Statute of Frauds 31 and the rationale and policy of
the recording acts. 32 It further would appear, in fact, that, at the
present time, a deed from the sheriff is essential to the passage of
legal title to land at a sheriff’s sale, in which case the deed clearly
would be subject to the priorities provisions of the recording acts. 33

In Maryland, statutory law provides that, as a general rule, “no
estate of inheritance or freehold, declaration or limitation of use,
estate above seven years, or deed may pass or take effect unless the
deed granting it is executed and recorded.” 34 This language, or
language substantially identical to it, has been part of Maryland’s

28. See notes 138 to 183 and accompanying text infra.
29. E.g., Remington v. Linthicum, 39 U.S. (14 Pet.) 84 (1840); Van Ness v. Hyatt,
28 F. Cas. 1044 (C.C.D.C. 1837) (No. 16,867), aff’d, 38 U.S. (13 Pet.) 294 (1839); Lewis v.
Rippons, 282 Md. 155, 383 A.2d 676 (1978); Preissman v. Crockett, 194 Md. 51, 69 A.2d
797 (1949); Dorsey’s Lessee v. Dorsey, 26 Md. 388 (1868) (dictum); Stump v. Henry, 6
Md. 201, 61 Am. Dec. 300 (1854); Alexander v. Walter, 8 Gill 239, 50 Am. Dec. 688 (Md.
1849) (dictum); Tomlinson’s Lessee v. Devore, 1 Gill 345 (Md. 1843); Balch v.
Zentmeyer, 11 G. & J. 267 (Md. 1840); Estep and Hall’s Lessee v. Weems, 6 G. & J. 303
(Md. 1834); Barney v. Patterson’s Lessee, 6 H. & J. 182 (Md. 1823); Boring’s Lessee v.
Lemmon, 5 H. & J. 223 (Md. 1821); Duvall v. Waters, 1 Bland 569, 18 Am. Dec. 350
passes by sale, return and deed); Bull’s Lessee v. Sheredine, 1 H. & J. 410 (Md. Gen.
Ct. 1803) (same).
30. See notes 53 to 66 and accompanying text infra.
31. See notes 53 to 55 and accompanying text infra.
32. See notes 58 & 59 and accompanying text infra.
33. See notes 67 to 77 and accompanying text infra.
34. MD. REAL PROP. CODE ANN. §3-101(a) (1974).
statutory law since 1766, and it has been construed consistently to mean that the legal title to land can be validly transferred only by a duly executed and recorded deed or by operation of law. Neither a duly executed but unrecorded deed, nor a deed which is defectively executed and therefore not entitled to be recorded, is effective to pass the legal title to the land purportedly conveyed by it. Such a deed, however, has been held to be effective between the parties to the conveyance and against those with notice thereof, at least if it was made for a consideration. These holdings apparently are based on the theory that such a deed operates as a contract to convey.


40. E.g., Stebbins-Anderson Co. v. Bolton, 208 Md. 183, 117 A.2d 908 (1955); Caltrider v. Cables, 160 Md. 392, 153 A. 445 (1930); Dyson v. Simmons, 48 Md. 207 (1878); Cooke's Lessee v. Kell, 13 Md. 469 (1859); Salmon v. Claggett, 3 Bland 125 (Md. Ch. 1830); see, e.g., Bourke v. Krick, 304 F.2d 501 (4th Cir. 1962) (dictum); West v. Pusey, 113 Md. 569, 77 A. 973 (1910); Nickel v. Brown, 75 Md. 172, 23 A. 736 (1892); Price v. McDonald, 1 Md. 403, 54 Am. Dec. 657 (1851); Johns v. Reardon, 3 Md. Ch. 57 (1852), aff'd sub nom. Johns v. Scott, 5 Md. 81 (1853); Gill v. Griffith, 2 Md. Ch. 270 (1848).

41. E.g., Price v. McDonald, 1 Md. 403, 54 Am. Dec. 657 (1851); Salmon v. Claggett, 3 Bland 125 (Md. Ch. 1830); see, e.g., Bourke v. Krick, 304 F.2d 501 (4th Cir. 1962); West v. Pusey, 113 Md. 569, 77 A. 973 (1910); Nickel v. Brown, 75 Md. 172, 23 A. 736 (1892); Dyson v. Simmons, 48 Md. 207 (1878); Johns v. Reardon, 3 Md. Ch. 57 (1852), aff'd sub nom. Johns v. Scott, 5 Md. 81 (1853); Gill v. Griffith, 2 Md. Ch. 270 (1848).

42. Compare Berman v. Berman, 193 Md. 614, 69, A.2d 271 (1949) (holding that a gratuitous unacknowledged and unrecorded deed of land is void even as between the parties thereto) with cases cited in notes 40 & 41 supra (which involved transactions for consideration).

43. See, e.g., Caltrider v. Cables, 160 Md. 392, 153 A. 445 (1930); Cramer v. Roderick, 128 Md. 422, 98 A. 42 (1916); West v. Pusey, 113 Md. 569, 77 A. 973 (1910);
which effectively transfers to the grantee the equitable title to the land purportedly conveyed by the deed without the need for recordation. It follows, therefore, that such a deed, like a contract to convey, cannot be effective at all, even between the parties or against those with notice of their transaction, unless it complies with the requirements of the Statute of Frauds.

In conformity with these doctrines, the legal title to Maryland land which is sold at a tax sale or by a trustee at a chancery sale vests in its purchaser only upon the delivery to him of a duly executed deed to such land. This vesting is retroactive to the day of the sale, but apparently occurs only when the deed is recorded. Absent such a deed, the purchaser of land at a tax sale or a chancery sale acquires only an equitable title to the land.
On the other hand, when Maryland realty is sold by a sheriff on execution sale, the legal title to the land apparently passes *eo instanti* to the purchaser by operation of law, without any need for a deed or other writing to effect the passage of legal title to him.\(^{51}\) Careful analysis, however, indicates that this deviation from the general rule is more apparent than real; a recorded muniment of title always has been considered essential to the passage of a nonvoidable legal title to Maryland realty at a sheriff's sale.\(^{52}\)

In the first place, it uniformly has been held that, "a sheriff's sale of land being within the Statute of Frauds, some memorandum in writing is necessary to be made."\(^{53}\) More specifically, the "sale must be proved either by a deed, the sheriff's return, or by some note or memorandum in writing, in order to comply with the requisitions of the statute of frauds . . . ."\(^{54}\) Consequently, at the very least, a

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52. *See* notes 53 to 66 and accompanying text *infra.*


54. Estep and Hall's Lessee v. Weems, 6 G. & J. 303, 306 (Md. 1834); *accord,* Alexander v. Walter, 8 Gill 239 (Md. 1849) (dictum); Hanson v. Barnes' Lessee, 3 G. & J. 359, 22 Am. Dec. 322 (Md. 1831); Fenwick v. Floyd's Lessee, 1 H. & G. 172 (Md. 1827); *see,* *e.g.*, Langley v. Jones, 33 Md. 171 (1870); Wright v. Orrell, 19 Md. 151 (1862); Balch v. Zentmeyer, 11 G. & J. 267 (Md. 1840).
purchaser of land at a sheriff's sale cannot acquire any enforceable rights to the land, and thus cannot acquire a nonvoidable legal title to it, absent a writing that evidences the sale in compliance with the requirements of the Statute of Frauds.\(^5^5\) In fact, there are judicial

\(^{55}\) See Forsyth v. Brillhart, 216 Md. 437, 140 A.2d 904 (1958). There the court stated:

Notice, actual or constructive, of a contract [for the sale of land] which is unenforceable under the Statute of Frauds, will not prevent the person having such notice, who purchases the property from the original owner and receives a transfer of the title, from obtaining a good title . . . . [F]or there were no enforceable equities attaching under the former contract.

Id. at 441–42, 140 A.2d at 907 (1958). The theory that the legal title to land sold on execution sale passes to the buyer by operation of law without any need for an instrument in writing to effect such passage appears to be inconsistent with the rule that a sheriff's sale of land must be "proved" by a "memorandum in writing." See notes 51, 53 & 54, supra. The theory that the legal title to land sold on execution sale passes to the buyer by operation of law seems clearly to be based on section III of the Statute of Frauds, 1677, 29 Car. 2, c. 3, § III, codified in Maryland at MD. REAL PROP. CODE ANN. § 5-103 (1974), which is the only section that exempts transfers by operation of law from the writing requirements of the Statute of Frauds. This view is supported by the fact that the author of Alexander's British Statutes placed his reference to this theory in the annotations to section III of the Statute of Frauds. See 'J. ALEXANDER, supra note 46, at 522. The basis of the rule that a sheriff's sale of land must be "proved" by a "memorandum in writing" is not so clear, however. Although the Court of Appeals never has stated which section of the Statute of Frauds requires that a sheriff's sale of land be "proved" by a memorandum in writing, it apparently intended to refer either to section III or to section IV(4) of the statute. Section III provides that "no . . . Estates, or Interests, either of Freehold, or Terms of Years, . . . of, in, to, or out of any . . . Lands, Tenements, or Hereditaments, shall . . . be . . . granted . . . unless it be by Deed or Note in Writing, signed by the Party so . . . granting . . . the same, . . . or by Act and Operation of law." Statute of Frauds, 1677, 29 Car. 2, c. 3, § III. The present Maryland statute contains substantially identical language. See MD. REAL PROP. CODE ANN. § 5-103 (1974). Section IV(4) provides that "no Action shall be brought . . . upon any Contract or Sale of Lands . . . or any Interest in or concerning them . . . unless the Agreement upon which such Action shall be brought, or some Memorandum or Note thereof shall be in Writing, and signed by the Party to be charged therewith . . . ." Statute of Frauds, 1677, 29 Car. 2, c. 3, §§ IV(4), (6) (emphasis in original). For the current version of this section, see MD. REAL PROP. CODE ANN. § 5-104 (1974), which contains substantially identical language. To say that the requirement that a sheriff's sale of land be "proved" by a writing is based on section III appears to conflict with the theory, based on section III, that the passage of legal title on such a sale occurs by operation of law, without the need for an instrument in writing. See, e.g., Simonds v. Catlin, 2 Cai. R. 61, 63–64, Cole & Cai. Cas. 346 (N.Y. Sup. Ct. 1804). In fact, if such passage of title indeed occurs by operation of law, then, by reason of section III, it ought to be provable by parol evidence. See Morris v. Harris, 9 Gill 19 (Md. 1850). Conversely, if the requirement of a writing is based on section III, legal title to land sold at execution sale can pass only by a writing executed in compliance with the requirements of the Statute of Frauds. See, e.g., Simonds v. Catlin, 2 Cai. R. 61, Cole & Cai. Cas. 346 (N.Y. Sup. Ct. 1804). However, to say that section IV(4) is the basis of the requirement that a sheriff's sale of land be "proved" by a writing is equally troublesome. Section IV(4) applies in terms to "any Contract or Sale of Lands." See Statute of Frauds, 1677, 29 Car. 2, c. 3, § IV(4)
statements to the effect that compliance with the writing requirement of the Statute of Frauds is essential to the passage of legal title to land sold by a sheriff on execution sale.\textsuperscript{56}
Moreover, not only must a sheriff's sale of land be "proved" by a writing, but such writing also must be recorded. Recording is required for the same reasons which require all conveyances of land to be recorded: "[i]n no other way can the leading object of the legislature, the 'securing the estates of purchasers' be effected; their design was, that all rights, incumbrances, or conveyances, touching, connected with, or in any wise concerning land, should appear upon the public records."
Maryland law contemplates that, in the normal course of events, the recorded writing evidencing the sale shall be the sheriff’s return. After selling land on execution sale, the sheriff is required to file a return evidencing the sale, which return must be recorded. Once a return is recorded, the record operates as constructive notice which protects the purchaser at the sheriff’s sale against all subsequent purchasers, even those for value and without actual notice, of the same land either from the same or another sheriff or from the judgment debtor himself. In fact, the entire proceedings, including the judgment and the writ of execution, as well as the return, operate as constructive notice of the sale, if and when they are recorded.

893 (1964); Lowes v. Carter, 124 Md. 678, 93 A. 216 (1915); South Baltimore Harbor & Improvement Co. v. Smith, 85 Md. 537, 37 A. 27 (1897); Nickel v. Brown, 75 Md. 172, 23 A. 736 (1892); Hoffman v. Gosnell, 75 Md. 577, 594, 24 A. 28, 32 (1892) (“[T]he object of the registry laws was to prevent frauds actual or constructive from being perpetrated, through the medium of unrecorded instruments, which are intended to qualify muniments of title which gave record notice of absolute ownership.”); Murguiondo v. Hoover, 72 Md. 9, 18 A. 907 (1889); Sitler v. McComas, 66 Md. 135, 138, 6 A. 527, 528 (1886) (“[T]he prime object of the registry laws [is] to preserve evidence of the true state of the title.”); Cooke’s Lessee v. Kell, 13 Md. 469 (1859); Hudson v. Warner and Vance, 2 H. & G. 415 (Md. 1828); United States Ins. Co. v. Shriver, 3 Md. Ch. 381 (1851), aff’d sub nom. General Ins. Co. v. United States Ins. Co., 10 Md. 517 (1857); Gill v. Griffith, 2 Md. Ch. 270 (1848); Salmon v. Clagett, 3 Bland 125 (Md. Ch. 1830); Jackson v. Terry, 13 Johns. 471 (N.Y. Sup. Ct. 1816).


61. MD. R.P. 619b. This rule is derived from MD. ANN. CODE art. 17, § 35 (1951), which had its origins in ch. 119, §§7 & 8, 1817 Md. Laws 129. Similarly, in Duvall v. Waters, 1 Bland 569, 590, 18 Am. Dec. 350, 368 (Md. Ch. 1827), the court stated, without reference to the 1817 statute, that the return required to be made by the sheriff must be recorded.

62. See, e.g., Balch v. Zentmeyer, 11 G. & J. 267 (Md. 1840) (dictum); 61 Op. Md. ATT’y GEN. 87, 93–95 (1976). In Balch, the court denied the claim to priority of one Palmer, who received a deed from the judgment debtor, Hay, after the land in question was sold by the sheriff and a deed executed by him to the execution purchaser. The court stated that “Palmer could not be considered as a purchaser without notice. The return of the sheriff, connected with the levy, made long before his deed from Hay, indicated that there had been a sale of the land by the sheriff to some one.” 11 G. & J. at 282.

63. E.g., Darraugh v. Preissman, 193 Md. 448, 67 A.2d 262 (1949) (judgment operates as constructive notice); Manton v. Hoyt, 43 Md. 254 (1875) (same); Balch v. Zentmeyer, 11 G. & J. 267 (Md. 1840) (dictum) (return operates as constructive notice); see, e.g., Blanch v. Collison, 174 Md. 427, 432–33, 199 A. 466, 469 (1938); Murguiondo v. Hoover, 72 Md. 9, 18 A. 907 (1889); Sanders v. McDonald, 63 Md. 503 (1885); Manahan v. Sammon, 3 Md. 463 (1853); 61 OP. MD. ATT’y GEN. 87 (1976). In Sanders, the court stated:

Moreover, the proceedings being for the sale of mortgaged premises consisting of real estate, they were proceedings in rem . . . and the decree, and all the proceedings upon which it was based, and the proceedings had thereunder, are, by statute, required to be recorded, and any person dealing with the
because their record is mandated by law. Moreover, it has been held that the rule that legal title to land sold by a sheriff on execution sale passes to the purchaser by operation of law, applies only when the sale is made under an execution issued by a court of record, the proceedings of which are a matter of public record and thus operate as constructive notice. If, however, no return is made by the sheriff, or if the sheriff's return is not recorded, some other writing, normally a deed from the sheriff, must be made and recorded before a purchaser of land at a sheriff's sale acquires a nonvoidable legal title to the land as against subsequent purchasers for value and without notice.

subject-matter of the decree must be taken to have had notice of the legal import and operation of all such proceedings.

63 Md. at 510 (1885). Similarly, in Manahan the court said: "Here, too, the insolvent papers being filed before the sale, and therefore being matters of record, Sammon is considered as having knowledge of Greene's application. Under these circumstances Sammon took no title by the sale ...." 3 Md. at 472. In Murguiondo, which involved an analogous situation, the Circuit Court of Baltimore City decreed a sale of mortgaged land lying partly within Baltimore City and partly within Baltimore County. Before the bill, the decree, and the trustee's report of sale in the Baltimore City proceeding were filed in Baltimore County as required by statute, Md. Ann. Code art. 16, §72 (1888), the land in Baltimore County was sold and conveyed, pursuant to proceedings in Baltimore County, to one who had no actual notice of the Baltimore City Circuit Court proceedings. The court held that the purchaser of the Baltimore County land had priority, stating, with respect to §72 of art. 16 of the Code of 1888:

Evidently, the Legislature meant to provide for notice to all who might treat with the owners or apparent owners of the land for the sale, lease or loan on mortgage of the exact condition of title. The design was clearly the same as underlies the registry laws and was supplemental of them .... The diligence needed in the record of deeds, to protect against subsequent transactions in ignorance of the deed given, should also be required here .... It has always and frequently been decided in this State that the object of our laws for the registry of deeds and mortgages was to prevent abuses and deceits growing out of pretended titles .... As we have said, the Legislature manifestly had the same object in view in making the provision under discussion. It was intended to keep people advised of proceedings taking place in a place or county where the lands did not lie and which affected the lands where they did lie. The statute fixes no time within which it shall be done. But in harmony with the rule which obtains in the registry of deeds and mortgages, and to secure the object sought, the statute ought to be construed as requiring this record notice to be given, at least, before a sale of the lands.

72 Md. at 15-16, 18 A. at 908-09 (1889).

64. Md. R.P. 619.

65. Dorsey's Lessee v. Dorsey, 28 Md. 388 (1868) (title to land sold under an execution issued by a justice of the peace (a court not of record) passes to the purchaser only when the sale has been ratified and confirmed, unlike the result where the sale is under an execution issued by a court of record).

66. See Duvall v. Waters, 1 Bland 569, 18 Am. Dec. 350 (Md. Ch. 1827); Kent Bldg. & Loan Co. v. Middleton, 112 Md. 10, 75 A. 967 (1910). In Duvall, the court stated that
Moreover, whatever the rule may have been in the past, the legal title to land sold by a sheriff on execution sale now should be held to pass to the buyer only by the recordation of a duly executed deed made by the sheriff. Sheriffs are under a duty, recognized by the legislature, to convey the land sold by them on execution sale to the buyer. This duty now is imposed by statute, effective in 1974, that for the first time in Maryland's legislative history, requires a sheriff to convey the legal title to land sold by him on execution sale to the buyer. The legislative imposition of this duty on the sheriff may itself be sufficient to mandate that legal title to land sold on execution sale passes to the buyer only upon execution and recordation of a deed to him. Even prior to the enactment of this

"[i]t seems to have been always considered and held, that, although the title to land . . . passed by the sale made by the sheriff; yet some written evidence of the sale was necessary, and that evidence should be recorded." 1 Bland at 590, 18 Am. Dec. at 368 (emphasis added).

67. See Md. Cts. & Jud. Proc. Code Ann. § 11-509 (1974) ("If a sheriff sells any interest . . . in any property, he shall convey it to the purchaser upon payment of the purchase price"). That the legislature even prior to the enactment of section 11-509 of the Courts and Judicial Proceedings Article considered sheriffs to be under a duty to convey land sold by them on execution sale is indicated further by Article 87, section 25, of the Maryland Annotated Code, which provided that:

If any sheriff shall make sale of any lands or tenements and shall die without executing a deed of conveyance to the purchaser, the court out of which the execution issued under which the lands were sold may, on the application of the purchaser . . . order and direct the sheriff for the time being . . . to execute a deed of conveyance to the purchaser . . . . This section shall apply to all officers making sales under executions.

Md. Ann. Code art. 87, § 25 (1957). This language first was enacted as ch. 102, § 4, 1813 Md. Laws 91, and remained in force continuously, with minor variations, until it was repealed. Ch. 2, § 2, 1973 Md. Laws 1st Spec. Sess. 4. It was replaced by section 2-103 of the Courts and Judicial Proceedings Article, which merely provides that "[w]hen an officer leaves office for any reason, any duty not fully performed, including the collection of fees, becomes the responsibility of his successor in office." Apparently, however, no change in the law was intended. See Revisor's Note to Md. Cts. & Jud. Proc. Code Ann. § 2-103 (1974). For judicial recognition that a sheriff is under a duty to convey the land sold by him on execution sale to the purchaser, see Warfield v. Dorsey, 39 Md. 299, 17 Am. Rep. 562 (1874); Langley v. Jones, 33 Md. 171 (1870).


69. See Young v. Ward, 88 Md. 413, 421, 41 A. 925, 928 (1898). There the court stated: "But an order of ratification of a sale, in a proceeding under a statute which contemplates the execution of a deed to pass the legal title, will only give the purchaser an equitable title unless the statute otherwise provides . . . ."
statute, moreover, Maryland sheriffs, in practice, always have conveyed the land sold by them on execution sale to the buyers of that land.\textsuperscript{70} And this practice has been recognized by the legislature for many years. For example, the legislature has provided a statutory form of sheriff's deed since 1856,\textsuperscript{71} and, until 1974, it expressly provided for the appointment of someone to execute a deed to the buyer at an execution sale if the sheriff died before doing so.\textsuperscript{72} Because such an unvarying practice virtually mandates a holding that "the law conforms to the practice,"\textsuperscript{73} a deed from the sheriff must be considered essential to the conveyance of a nonvoidable legal title to the land sold by him.

If, as indicated above, the execution of a deed by the sheriff is essential to the passage of a nonvoidable legal title to land sold on execution sale, such a deed must be recorded to render it valid and effective other than merely between the parties to the conveyance and against those with notice of it.\textsuperscript{74} Consequently, such a deed clearly is subject to the priorities provisions of the recording act.\textsuperscript{75} Thus, if a purchaser at an execution sale records his deed from the sheriff first, he clearly is entitled to protection against subsequent purchasers,\textsuperscript{76} and, if he is a bona fide purchaser for value and

\begin{footnotes}
\item[70] 25 Op. Md. Att'y Gen. 466 (1940) (describing this practice); see e.g., Boring v. Lemmon, 5 H. & J. 223 (1821).
\item[71] See ch. 154, §72, 1856 Md. Laws 253. The present section prescribing the form of sheriff's deed is Md. Real Prop. Code Ann. §4-202(d) (1974).
\item[73] In Hays v. Richardson, 1 G. & J. 366 (Md. 1829), the Court of Appeals held that grants and conveyances of de novo rights of way should be acknowledged and recorded in the same manner as deeds conveying corporeal interests in land. In support of its conclusion, the court stated:
\begin{quote}
If we entertained even strong doubts as to what originally should have been the construction of this Act of Assembly (of which we have none) they would in a moment be removed by adverting to the single fact, . . . that from the year 1767 to the present day, grants and conveyances of de novo rent charges, rights of way, &c. have been as uniformly acknowledged and recorded, as deeds conveying the land itself. This contemporaneous unvarying construction of the Act of Assembly for sixty years, ought not to be disregarded but upon the most imperious and conclusive grounds.
\end{quote}
Id. at 385. For other examples of judicial recognition that "the law conforms to the practice," see Tayloe v. Thomson's Lessee, 30 U.S. (5 Pet.) 358 (1831); Westpark, Inc. v. Seaton Land Co., 225 Md. 433, 171 A.2d 736 (1961); Arnreich v. State, 150 Md. 91, 132 A. 430 (1926) (citing and quoting from Hays with approval).
\item[74] See notes 34 to 42 and accompanying text supra.
\item[76] See, e.g., Cooke's Lessee v. Kell, 13 Md. 469 (1859).
\end{footnotes}
without notice, he has an equally clear right to protection against prior purchasers. 77

APPLICATION OF THE PRIORITIES PROVISIONS OF RECORDING ACTS TO SHERIFFS' SALES IF TITLE PASSES BY OPERATION OF LAW

Even if the legal title to land sold by a sheriff on execution sale is considered to pass to the purchaser without any need for the execution or recording of a sheriff's deed, it seems clear that such a deed, if it is in fact executed and recorded, should be subject to, and entitled to the benefits of, the priorities provisions of the recording act. 78

As previously indicated, 79 the purpose of the recording acts is "to avoid abuses and deceits by mortgages and pretended titles, and for the protection of creditors," 80 by requiring that "all rights, incumbrances, or conveyances, touching, connected with, or in any wise concerning land, should appear upon the public records." 81 These records serve as "'notice to all the world, so that there may be no deceit practiced upon any one.'" 82

The recording acts accomplish this purpose in two ways. First, specified transfers of land or interests in land are rendered void, except between the parties and against those with notice of the transfer, unless they are effected by duly recorded instruments in writing. 83 This may be termed the validating function of recording. Second, priorities are established between successive transfers of land or interests in land of a type entitled to recordation, based, in


78. See Md. REAL PROP. CODE ANN. § 3-203 (1974).

79. See notes 58 & 59 and accompanying text supra; Aigler, supra note 1; Philbrick, Limits of Record Search and Therefore of Notice, Part I, 93 U. PA. L. REV. 125 (1944).


83. See notes 34 to 42 and accompanying text supra.
part at least, on the sequence in which they are validly recorded. 84 Except in a "race" jurisdiction, 85 this may be viewed as the notice function of recording. 86

At common law, priority in right generally was determined by priority in time. 87 This is because once the owner of land validly transferred it, he had no interest remaining in himself that he could convey to a subsequent transferee. 88 If a land owner made successive transfers of his land or of interests in it, the first transferee in point of time usually had priority. 89 The only major exception to the general rule gave preference to the subsequent transferee if the first transferee received only an equitable interest in the land and the subsequent transferee acquired a legal estate in the same land for value and without notice of the prior transfer. 90 All three types of recording acts have changed the common law priority rules by making priority of recording to some extent determinative of priority of right. 91 For example, application of a notice-race statute, such as that in effect in Maryland, 92 to successive land transfers of a type entitled to recordation entitles the first transferee to priority against all subsequent transferees if his transfer also is the first to be validly recorded. 93 However, the first transferee is not entitled to priority against any subsequent transfer made to one who took for value and without notice of the prior transfer and who first validly recorded the transfer made to him. 94

84. See Aigler, supra note 1, at 405–07; Philbrick, supra note 79, at 127–28. For the section of the Maryland act concerning priorities, see Md. Real Prop. Code Ann § 3–203 (1974):

Every recorded deed or other instrument takes effect from its effective date as against the grantee of any deed executed and delivered subsequent to the effective date, unless the grantee of the subsequent deed has:

(1) Accepted delivery of the deed or other instrument

(i) In good faith,

(ii) Without constructive notice under § 3–202, and

(iii) For a good and valuable consideration, and

(2) Recorded the deed first.

85. See note 9 and accompanying text supra.

86. See Aigler, supra note 1, at 409–14; Philbrick, supra note 79, at 146–47.

87. See notes 1 & 3 and accompanying text supra.

88. See note 2 and accompanying text supra.

89. See notes 1 & 3 and accompanying text supra.

90. See note 3 and accompanying text supra.

91. See note 4 and accompanying text supra.


Thus, while at common law the first transferee of land generally had priority, the effect of the priorities provisions of the recording acts is that the failure of the first transferee to record leaves the transferor with the power to transfer a good title to a subsequent bona fide purchaser for value and without notice, thereby divesting the title of the first transferee. In other words, the effect of the priorities provisions of the recording acts really is that the person claiming under the instrument in question by his failure to observe the direction of the statute confers upon the party who executed the instrument ... a sort of statutory power to displace the interest vested by the execution of the instrument. This power may be effectively exercised only in favor of those specified in the statute, usually subsequent purchasers and incumbrancers. The recording ordinarily has no effect so far as the vesting of the intended interest in the transferee is concerned; the interest vests as fully and completely without as with recording. The failure to record simply puts someone into a position to divest that interest.

The Maryland recording acts provide for the recording of two types of transfers: those that must be recorded if they are to be valid other than between the parties to the conveyance and against those with notice of it, and those that may be recorded, although their validity in no wise is dependent upon recordation. Not only does recordation of either type of transfer operate as constructive notice

95. Aigler, supra note 1, at 415, 416; Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 YALE L.J. 710, 756 (1917); Philbrick, supra note 79, at 157; see, e.g., Boynton v. Haggart, 120 F. 819 (8th Cir.) (dictum), cert. denied, 191 U.S. 573 (1903); McClure v. Tallman, 30 Iowa 515 (1870); Burns v. Berry, 42 Mich. 176, 3 N.W. 924 (1879); Hetzel v. Barber, 69 N.Y. 1 (1877); Jackson v. Chamberlain, 8 Wend. 620 (N.Y. Sup. Ct. 1832); Lessee of Paine v. Mooreland, 15 Ohio 435 (1846); Zimmer v. Sundell, 237 Wis. 270, 296 N.W. 589 (1941).

96. Aigler, supra note 1, at 415; accord, Hohfeld, supra note 95, at 756; Philbrick, supra note 79, at 157.


98. See MD. REAL PROP. CODE ANN. §3-102 (1974), which provides: "Any other instrument affecting property, including any contract for the grant of property or any subordination agreement establishing priorities between interests in property, may be recorded. The recording of any instrument constitutes constructive notice from the date of recording." E.g., Bourke v. Krick, 304 F.2d 501 (4th Cir. 1962); Kingsley v. Makay, 253 Md. 24, 251 A.2d 585 (1969); Westpark, Inc. v. Seaton Land Co., 225 Md. 433, 171 A.2d 736 (1961); Lowes v. Carter, 124 Md. 678, 93 A. 216 (1915); South Baltimore Harbor & Improvement Co. v. Smith, 85 Md. 537, 37 A. 27 (1897).
which protects the transferee against a subsequent transfer,\textsuperscript{99} but, if the transferee is a bona fide purchaser for value and without notice who records first, it also operates to protect the transferee against all prior transfers that may be, but are not, recorded, even those whose validity is not dependent upon recording.\textsuperscript{100} That is to say, the priorities provisions of the Maryland recording acts\textsuperscript{101} apply to all instruments entitled to be recorded, not merely to those whose recording is essential to a valid transfer of legal title.\textsuperscript{102} The history of the priorities provisions of the Maryland recording acts demonstrates that the acts were intended to apply in this manner. Maryland has had a notice-race priority statute since 1825.\textsuperscript{103} Between 1860 and 1972, the application of the statute was limited "to all deeds of mortgage, and to all other deeds or conveyances to the validity of which recording is necessary."\textsuperscript{104} In

\begin{footnotes}
\item[99] The recordation of a transfer whose recording is essential to its validity operates as constructive notice of the transfer. \textit{E.g.}, Cooke's Lessee v. Kell, 13 Md. 469 (1859). The recordation of a transfer which \textit{may} be recorded, although its validity is not dependent upon recordation, also operates as constructive notice of the recorded transfer. \textit{E.g.}, Bourke v. Krick, 304 F.2d 501 (4th Cir. 1962); Lowes v. Carter, 124 Md. 678, 93 A. 216 (1915); South Baltimore Harbor & Improvement Co. v. Smith, 85 Md. 537, 37 A. 27 (1897).
\item[100] Recordation protects the transferee against prior transfers that \textit{must} be, but are not, recorded, \textit{e.g.}, Busey v. Reese, 38 Md. 264 (1873); United States Ins. Co. v. Shriver, 3 Md. Ch. 381 (1851), \textit{aff'd sub nom.} General Ins. Co. v. United States Ins. Co., 10 Md. 517 (1857), and against prior transfers which \textit{may} be, but need not be and are not, recorded, \textit{see, e.g.}, Bourke v. Krick, 304 F.2d 501 (4th Cir. 1962). \textit{See} notes 103 to 121 and accompanying text \textit{infra}.
\item[102] \textit{See, e.g.}, Lowes v. Carter, 124 Md. 678, 93 A. 216 (1915); South Baltimore Harbor & Improvement Co. v. Smith, 85 Md. 537, 37 A. 27 (1897); Johns v. Reardon, 3 Md. Ch. 57 (1852), \textit{aff'd sub nom.} Johns v. Scott, 5 Md. 81 (1853); United States Ins. Co. v. Shriver, 3 Md. Ch. 381 (1851), \textit{aff'd sub nom.} General Ins. Co. v. United States Ins. Co., 10 Md. 517 (1857). \textit{For a discussion of this proposition, see} notes 103 to 121 and accompanying text \textit{infra}.
\item[103] Ch. 203, §1, 1825 Md. Laws 201: "... in case of several deeds ... for the same lands, ... the deed ... which shall be first recorded according to law, shall have preference ... \textit{Provided}, that the deed ... so to be preferred, be made bona fide, and upon good and valuable consideration. ..." Between 1860 and 1972, the statute provided: "Where there are two or more deeds conveying the same land or chattels real, the deed or deeds which shall be first recorded according to law shall be preferred, if made bona fide and upon good and valuable consideration." \textit{Md. Ann. Code} art. 21, §13 (1957), originally enacted as and containing language identical to \textit{Md. Code Pub. Gen. Laws} art. 24, §17 (1860), \textit{repealed by ch.} 349, §1, 1972 Md. Laws 1010. Language substantially similar to this appears at \textit{Md. Real Prop. Code Ann.} §3-203 (1974).
\end{footnotes}
1972, however, the legislature repealed the notice-race priority statute and reenacted it without this restrictive language.\textsuperscript{105} Thus, the Maryland legislature expressly changed the priority provision to apply,\textsuperscript{106} as it did prior to 1860,\textsuperscript{107} to all transfers entitled to be recorded, whether or not recording is essential to their validity.

Moreover, the mere fact that recording is not essential to a valid transfer of the legal title to land does not preclude application of the priorities provisions of the recording acts to the transfer. In at least two situations analogous to the one under discussion — estoppel by deed and assignment of an expectancy — it has been held that failure to record the writing evidencing a transfer of title by operation of law results in loss of priority under the recording acts.

The estoppel by deed situation arises when a transferor duly executes and delivers to his transferee a conveyance of land that he does not then own, and he thereafter acquires title to the land which he previously conveyed. In this situation, the general rule, at least when the conveyance was made by warranty deed, is that the transferor is estopped to assert his after-acquired title against his transferee.\textsuperscript{108} Maryland is in accord with the majority of jurisdictions that observe this rule in holding that title to the after-acquired property vests in the transferee by inurement, that is, by operation of law, immediately upon the acquisition of such title by the transferor:\textsuperscript{109} there is no need either for a further conveyance by the transferor to his transferee or a judicial decree confirming title in the transferee.\textsuperscript{110} A question of priorities arises, however, if, after the transferor acquires the title previously conveyed by him, he conveys it to a second transferee, who is a bona fide purchaser for value and who records the conveyance before receiving actual notice of the conveyance to the first transferee. If the first transferee records or rerecords his deed after the transferor acquires and records the title and before the transferor conveys the title to the second transferee, it


\textsuperscript{107} Ch. 203, § 1, 1825 Md. Laws 201.

\textsuperscript{108} 3 American Law of Property, supra note 4, § 15.19.

\textsuperscript{109} See, e.g., Columbian Carbon Co. v. Kight, 207 Md. 203, 114 A.2d 28 (1954); Poultney v. Emerson, 117 Md. 655, 84 A. 53 (1912); Funk v. Newcomer, 10 Md. 130 (1856).

\textsuperscript{110} 3 American Law of Property, supra note 4, § 15.21.
seems clear that the first transferee has priority under the recording acts: he recorded his conveyance after he acquired title to the property by operation of law and before any transfer was made to the second transferee. 111 If, however, the first transferee records his deed only at some time prior to the acquisition of title by the transferor, and does not rerecord thereafter, most jurisdictions hold that the second transferee has priority under the recording acts. 112 This conclusion is based upon the theory that the record of the deed to the first transferee is outside the transferor's chain of title and thus does not afford constructive notice to the second transferee. 113 The second transferee therefore is entitled to protection under the recording acts against the prior improperly recorded transfer by operation of law. 114 Finally, if the first transferee either fails to record his deed, or records it only after the second transfer is made and recorded, which is the situation most closely analogous to the one under discussion, the second transferee clearly has priority under the recording acts. 115

A similar result was reached in a case involving the assignment of an expectancy, the second situation analogous to that under discussion. In Lena v. Yannelli, 116 a New Jersey court was faced with the problem of determining the priority between the assignee under an enforceable assignment of an expectancy and a judgment creditor of the assignor who obtained his judgment after the expectancy was realized and before any effective recordation of the assignment. In 1957, Yannelli effectively assigned his expectant interest in his mother's estate to his brothers and sisters by an instrument in writing made for an adequate consideration. On August 28, 1959, Yannelli's mother died, leaving all of her property, including the land in question, equally to her four children by a duly executed will. This will was admitted to probate on September 11, 1959. On December 14, 1959, judgment was entered against Yannelli in favor of the defendant, Flaster. It was not until December 22, 1959, that Yannelli's 1957 assignment was filed with the Surrogate of Essex County. By analogy to the estoppel by deed situation, the

111. Semon v. Terhune, 40 N.J. Eq. 364, 2 A. 18 (1885); 3 American Law of Property, supra note 4, § 15.22, at 850 n.8.
112. 3 American Law of Property, supra note 4, § 15.22; 4 id. § 17.20.
113. 4 American Law of Property, supra note 4, § 17.20.
114. Id.
115. Burke v. Beveridge, 15 Minn. 205, 15 Gil. 160 (1870); Aigler, supra note 1, at 417; see Smith v. Williams, 44 Mich. 240, 6 N.W. 662 (1880); W. Rawle, The Law of Covenants for Title § 259, at 408-09 n.1 (5th ed. 1887).
court held that the judgment creditor had priority. In reaching its conclusion, the court observed:

On the date . . . [the assignment] was executed . . . Yannelli could not make a conveyance, for he had then no existing property rights to convey. When . . . [his mother] died . . ., however, something came into existence upon which the assignment of March 1, 1957 could operate. What had previously been a mere assignment of an expectancy was converted at that moment into an effective conveyance . . . without any additional act on . . . [Yannelli's] part or supplementary document from him. 117

The court found, however, that although the assignee of the expectancy would have priority absent an applicable recording act, 118 the assignment of an expectancy was an “instrument of the nature of a conveyance” which was subject to the New Jersey recording act. 119 Consequently, the assignment was void as to the defendants because it was not recorded prior to the rendition of the judgment in their favor and the defendants had no actual knowledge of the assignment. As the court noted, “if judgments had not been entered against . . . [Yannelli] or if the assignment had been placed on record promptly after . . . [his mother’s] death,” the assignment would have been unassailable. 120

The Yannelli court supported its conclusion by an explicit analogy to the estoppel by deed situation. It posed the problem:

If . . . Yannelli, instead of executing an assignment, had made and delivered documents which were deeds in form though not in fact (because of his lack of ownership), would there be any serious question about priority for his creditors on judgments entered against him after his mother’s death and before the recording of the deeds? I think a negative answer to this question is to be implied . . . such deeds would be instruments in the nature of conveyances . . . and judgment creditors would be entitled to protection against them . . . . My conclusion is that the assignment . . . having become entitled at . . . [Yannelli’s mother’s] death to the same effect between the parties as a deed, must be recorded to insure priority over

117. Id. at 261–62, 188 A.2d at 313.
118. Id. at 261, 188 A.2d at 312.
119. Id. at 262, 188 A.2d at 313.
120. Id.
judgment creditors and the others who, in the absence of recording, are protected...121

The results in these two situations involving transfers by operation of law — estoppel by deed and assignment of an expectancy — and their supporting rationale make it clear that the recording of an instrument entitles it to the benefits of the priorities provisions of the recording acts if the instrument, though effecting a valid transfer of title without recording or merely evidencing a transfer by operation of law, is entitled to be recorded.122 This is so even though the recording of an instrument has no effect on priorities if the instrument is not entitled to be recorded.123

A sheriff’s deed conveying to the purchaser land sold on execution sale is clearly entitled to be recorded,124 even if it is viewed merely as evidencing a transfer by operation of law.125 In Baxter v. Sewell,126 for example, the Court of Appeals of Maryland held that recordation of a sheriff’s deed of land sold by him on execution sale affords constructive notice which protects the purchaser at the

121. Id. at 263–64, 188 A.2d at 314.
122. See notes 97 to 121 and accompanying text supra.
125. Even if a deed from the sheriff is not essential to the passage of legal title to Maryland realty on a sheriff’s sale, it is clear that such passage of legal title must be evidenced by a recordable muniment of title. See notes 53 to 56 and accompanying text supra. Such muniment of title, moreover, must be recorded, or, at the very least, may be recorded, since all muniments of title to land are within the policies of the recording acts, see notes 57 to 66 and accompanying text supra, and its record operates as constructive notice of its contents. See notes 62 to 65 and accompanying text supra. Further, whatever prior law may have been, such muniment of title, when recorded, now is within the protection of the priorities provisions of the recording acts, at least when the controversy is between two transferees of the same land from the same sheriff on execution sale, as distinguished from the situation in which the controversy is between a transferee of land from a judgment debtor and a purchaser of the same land from a sheriff on execution sale. See notes 179 to 195 and accompanying text infra.
126. 3 Md. 334 (1852).
sheriff's sale against a subsequent transferee of the property. The Baxter court remarked:

But it must be remembered, that the sheriff's deed to Sewell and his lease to Swan were also recorded, and were notice to these defendants that Sewell claimed title to the property. They purchased under Baxter and wife in the face of this notice, and, if their vendors had no title, they cannot complain if the owner of the property asserts his rights.\textsuperscript{127}

It is well established, moreover, that a purchaser of land from a sheriff on execution sale will be protected against subsequent transfers of such land by the judgment debtor, that is, transfers of such land made by the judgment debtor after entry of the judgment under which the land was sold on execution sale.\textsuperscript{128} When the transfer is made by the judgment debtor after entry of the judgment but prior to the execution sale, the priority of the purchaser at the execution sale generally is said to be based on the fact that the entry of the judgment operates as constructive notice of the lien of the judgment to all subsequent transferees from the judgment debtor.\textsuperscript{129} On the other hand, when the transfer is made by the judgment debtor after the execution sale but before the purchaser at the sale

\textsuperscript{127} Id. at 340. It is interesting to note that, in Baxter, the sequence of events was: First, Swan, the judgment debtor, transferred the land in question to his daughter. Although the transfer was duly recorded, it was claimed to be in fraud of Swan's creditors. After the transfer was made, Sewell and another creditor recovered judgments against Swan for money owed to them prior to the conveyance to Swan's daughter. The land in question then was sold under writs of \textit{fiere facias} issued upon these judgments, and it was purchased by Sewell, who duly recorded his deed. Sewell then leased the land to Swan, the judgment debtor. Swan's daughter then transferred portions of this land to the defendants. As indicated in the text accompanying this note, however, the defendants were held not to be bona fide purchasers for value and without notice because the record of Sewell's deed from the sheriff afforded them constructive notice of his claim. This conclusion is contrary to the general rule that, if after the recording of a deed from an owner there is later recorded another deed from the same grantor to a different grantee . . . a purchaser from the first grantee is without notice of any rights of the second grantee unless it is by reason of some fact other than the record; the purchaser's obligation to examine the grantor's indices as to that grantor ceased at the date of recording of the first deed.

\textsuperscript{128} E.g., Darraugh v. Preissman, 193 Md. 448, 67 A.2d 262 (1949); Manton v. Hoyt, 43 Md. 254 (1875); Miller v. Wilson, 32 Md. 297 (1870); Campbell v. Lowe, 9 Md. 500, 66 Am. Dec. 339 (1856); Balch v. Zentmeyer, 11 G. & J. 267 (Md. 1840); McMchen v. Marman, 8 G. & J. 57 (Md. 1836).

\textsuperscript{129} E.g., Darraugh v. Preissman, 193 Md. 448, 67 A.2d 262 (1949); Manton v. Hoyt, 43 Md. 254 (1875).
obtains a deed from the sheriff, it has been indicated that the record of the sheriff’s return operates as constructive notice which prevents the judgment debtor’s transferee from being a bona fide purchaser for value and without notice. In both of these situations, the record of the judgment and the record of the sheriff’s return operate as constructive notice because they are mandated by law, that is, by Rule 619 of the Maryland Rules of Procedure. Consequently, the fact that the recording of judgments and of sheriffs’ returns made pursuant to them, although mandated by law, is expressly mandated other than by the statutory provisions generally requiring the recording of transfers of interests in land, probably explains why the general land recording provisions usually are not cited in situations in which the subsequent transfer is made by the judgment debtor.

If, however, as in the situation under discussion, both the subsequent transfer and the prior transfer are made by a sheriff on execution sale under the same judgment, the record of the judgment logically cannot afford notice to the sheriff’s second transferee of the rights of the sheriff’s first transferee. The only means by which the sheriff’s second transferee could be put on constructive notice of the rights of the sheriff’s first transferee are either the record of the return made by the sheriff on the sale to his first transferee or the record of the deed made by the sheriff to his first transferee. If, however, no document evidencing the sheriff’s sale to his first transferee is recorded, we reach the question of the extent to which the sheriff’s second transferee is protected against the sheriff’s first transferee when the second transferee is the first to record. In this situation, the policy underlying the recording acts dictates that the loss should fall on the first transferee, whose failure to demand and

130. E.g., Balch v. Zentmeyer, 11 G. & J. 267 (Md. 1840); 61 OP. MD. ATT’Y GEN. 87, 93–95 (1976) (enumerating various records, in addition to the land records and including sheriff’s returns, that provide constructive notice).
131. See notes 62 to 64 and accompanying text supra.
132. Md. R.P. 619 is derived from Md. ANN. CODE art. 17, § 35 (1951), which had its origins in Ch. 119, §§ 7 & 8, 1817 Md. Laws 129.
record a deed enabled the second transferee to be a purchaser without notice.\textsuperscript{137}

\textbf{RELEVANCE OF THE IDENTITY OF THE PRIOR PURCHASER TO THE APPLICATION OF THE PRIORITIES PROVISIONS OF THE RECORDING ACTS TO SHERIFFS' SALES}

The problem of the extent to which a purchaser of land at a sheriff's sale is protected against a prior purchaser of the same land when the subsequent purchaser records first may arise in one of two situations. The most common situation is that in which the controversy is between a purchaser of land on execution sale and a prior purchaser of the same land from the judgment debtor. In the second situation, which concerns us here, the dispute is between two successive purchasers of land on execution sale under the same judgment.

Regardless of which situation is involved, however, two propositions are established. First, if the prior purchaser has no enforceable rights, the subsequent purchaser has priority,\textsuperscript{138} even if he has notice of the first purchaser's claim.\textsuperscript{139} Thus, in \textit{Cockey v. Milne's Lessee},\textsuperscript{140} the Court of Appeals of Maryland held that a purchaser of land from a sheriff on execution sale, whose deed from the sheriff was duly executed and recorded, had priority over the successor in interest to the mortgagee of such land; although this mortgage was executed, and apparently recorded, prior to the rendition of the judgment under which the land was sold by the sheriff, it was defectively acknowledged and lacked a statutorily required affidavit. In holding that the execution purchaser had priority, the court stated:

The law is well settled in this State that the registration of a deed defectively acknowledged, is not constructive notice to a

\textsuperscript{137} See, \textit{e.g.}, Busey v. Reese, 38 Md. 264, 269 (1873).
\textsuperscript{138} \textit{E.g.}, Forsyth v. Brillhart, 216 Md. 437, 140 A.2d 904 (1958) (rights of first purchaser unenforceable due to failure to comply with Statute of Frauds); Cockey v. Milne's Lessee, 16 Md. 200 (1860) (rights of first purchaser unenforceable due to lack of statutorily required affidavit on mortgage under which first purchaser claimed as successor to mortgagee); Gill v. McAttee, 2 Md. Ch. 255 (1851) (rights of first purchaser unenforceable due to inability to prove a binding agreement for a mortgage, which agreement would operate as an equitable lien if proved). \textit{But see} Caltrider v. Caples, 160 Md. 392, 153 A. 445 (1931) (dictum) (rights of first purchaser, to whom a deed was executed by the judgment debtor paramount to those of a subsequent judgment creditor even though the former's contract did not comply with the Statute of Frauds; in \textit{Forsyth}, first purchaser never received a deed from contract vendor).
\textsuperscript{139} Forsyth v. Brillhart, 216 Md. 437, 140 A.2d 904 (1958).
\textsuperscript{140} 16 Md. 200 (1860).
subsequent *bona fide* purchaser, and cannot affect him without actual notice. . . . It is unnecessary for us, in this case, to decide whether a party claiming under an attachment levied upon the property, is entitled to the same protection as a *bona fide* purchaser against a prior deed defectively executed; because we consider that the want of the affidavit, under the Act of 1846, is fatal to the validity of the mortgage . . . whether it be assailed by a creditor or a subsequent *bona fide* purchaser.\(^{141}\)

Similarly, in *Forsyth v. Brillhart*,\(^{142}\) the Court of Appeals of Maryland held that a purchaser of land, whose deed was duly executed and recorded, had priority over the vendee under a prior contract for the sale of such land, even though the subsequent purchaser had actual notice of the prior contract when he took title, because the prior contract was unenforceable due to lack of compliance with the Statute of Frauds. In support of its conclusion, the court said:

Notice, actual or constructive, of a contract which is unenforceable under the Statute of Frauds, will not prevent the person having such notice, who purchases the property from the original owner and receives a transfer of the title, from obtaining a good title; nor will it render the transaction fraudulent . . . and the fact that the new grantee had notice of the prior agreement creates no legal objections to the second conveyance, for there were no enforceable equities attaching under the former contract.\(^{143}\)

Consequently, in the situation under discussion, when the controversy is between two successive purchasers of land on execution sale under the same judgment, and the first purchase is not evidenced by any writing sufficient to comply with the requirements of the Statute of Frauds, the second purchaser necessarily has priority if his own purchase is evidenced by a writing which complies with the Statute of Frauds.\(^{144}\)

Second, a prior purchaser can have enforceable rights although he has not recorded, as where the transfer to him, though entitled to be recorded, is not required to be recorded,\(^{145}\) or where the transfer to him, though required to be recorded, is effective without recording as

\(^{141}\) *Id.* at 207.

\(^{142}\) 216 Md. 437, 140 A.2d 904 (1958).

\(^{143}\) *Id.* at 441-42, 140 A.2d at 907.

\(^{144}\) See notes 53 to 55 and accompanying text *supra*.

between the parties and against those with notice.\textsuperscript{146} In these situations, the prior purchaser can be denied priority against the subsequent purchaser under a notice-race statute such as that in effect in Maryland\textsuperscript{147} only if the subsequent purchaser is a bona fide purchaser for value and without notice of the prior transfer who records his transfer before the prior purchaser records.\textsuperscript{148} Thus, if the subsequent purchaser buys a tract of land at an execution sale without notice of the prior transfer and records his transfer before the prior purchaser records, the crucial question is whether a purchaser at an execution sale can be a bona fide purchaser \textit{for value} and without notice. In Maryland, although it appears to be well settled that a judgment creditor who purchases land on execution sale under his own judgment cannot be a bona fide purchaser \textit{for value},\textsuperscript{149} a purchaser of land on execution sale who is not the judgment creditor can be a bona fide purchaser for value.\textsuperscript{150}

Prior to \textit{Lewis v. Rippons},\textsuperscript{151} every case that considered the question of whether a purchaser of land on execution sale who records first is protected against a prior purchaser of the same land involved a controversy between a purchaser on execution sale and a prior purchaser from the judgment debtor.\textsuperscript{152} These cases have held,

\textsuperscript{146} An example is a conveyance of an interest in land. \textit{See} cases cited in notes 40 to 42 \textit{supra} and text accompanying notes 36 to 44 \textit{supra}.


\textsuperscript{148} \textit{4 American Law of Property}, \textit{supra} note 4, §17.5; \textit{e.g.}, Busey v. Reese, 38 Md. 264 (1873); United States Ins. Co. v. Shriver, 3 Md. Ch. 381 (1851), \textit{aff'd} \textit{sub nom.} General Ins. Co. v. United States Ins. Co., 10 Md. 517 (1857); \textit{see}, \textit{e.g.}, Fertitta v. Bay Shore Dev. Corp., 252 Md. 393, 250 A.2d 69 (1969); Grayson v. Buffington, 233 Md. 340, 196 A.2d 893 (1964); Tyler v. Abergh, 65 Md. 18, 3 A. 904 (1886); Gill v. Griffith, 2 Md. Ch. 270 (1848).

\textsuperscript{149} \textit{E.g.}, Kolker v. Gorn, 193 Md. 391, 67 A.2d 258 (1949); Colonial Bldg. & Loan Ass'n v. Boden, 169 Md. 493, 182 A. 665 (1935); Caltrider v. Caples, 160 Md. 392, 153 A. 445 (1931); Union Trust Co. v. Biggs, 153 Md. 50, 137 A. 509 (1927); Aherne v. White, 39 Md. 409 (1874); Knell v. Green St. Bldg. Ass'n, 34 Md. 67 (1871); \textit{cf.} Tyler v. Ahergh, 65 Md. 18, 3 A. 904 (1886) (holding that an assignee for the benefit of creditors is not a bona fide purchaser for value entitled to priority as against a prior unrecorded deed). \textit{But cf.} Busey v. Reese, 38 Md. 264 (1873) (holding that one who took a deed in payment and satisfaction of a preexisting debt was a purchaser for a valuable consideration so that his deed was entitled to priority over a mortgage executed before, but recorded after, the deed to him was made and recorded).


\textsuperscript{151} 282 Md. 155, 383 A.2d 676 (1978).

\textsuperscript{152} \textit{E.g.}, Georgetown v. Smith, 10 F. Cas. 236 (C.C.D.C. 1830) (No. 5,347); Kingsley v. Makay, 253 Md. 24, 251 A.2d 585 (1969); Stebbins-Anderson Co. v. Bolton, 208 Md.
almost without exception, that a purchaser on execution sale takes subject to prior unrecorded equities, i.e., he is not entitled to the benefit of the priorities provisions of the recording acts against a prior unrecorded equity, even if he records first and has no actual notice.

As a factual matter, the result in these cases is unexceptionable. Each of the cases that reached this result involved either an execution sale to the judgment creditor himself as the purchaser, or a motion or proceeding in which the judgment creditor was joined, to prevent the execution sale from taking place, or a proceeding that was initiated, prior to any execution sale on the creditor's judgment, to determine, among other things, whether the judgment creditor had any rights in the land as against the holder of the prior unrecorded equity. And, because a judgment creditor who purchases land on execution sale under his own judgment cannot be a bona fide purchaser for value, he clearly is not entitled to the


153. E.g., Campbell v. Lowe, 9 Md. 500, 66 Am. Dec. 339 (1856); discussed in text accompanying notes 173 to 183 infra.


benefit of the priorities provisions of the recording acts.\textsuperscript{160} It is equally clear, however, that the rationale of these cases does not necessarily apply to the situation in which the purchaser on execution sale is not the judgment creditor, for such a purchaser can be a purchaser for value.\textsuperscript{161} In fact, the one case found that denied priority to an otherwise enforceable prior unrecorded equity apparently involved a purchaser on execution sale who was not the judgment creditor.\textsuperscript{162}

The rationale of these cases, however, cannot be determined with certainty. Some of the cases state that a purchaser on execution sale takes subject to prior unrecorded equities because the purchaser at a sheriffs sale is substituted to the rights of the judgment debtor,\textsuperscript{163} that is, only what the judgment debtor himself could have transferred.\textsuperscript{164}

\textsuperscript{160}. See note 12 and accompanying text supra.

\textsuperscript{161}. See cases cited in note 150 supra.


\textsuperscript{163}. See id.

\textsuperscript{164}. E.g., Hammer v. Westphal, 120 Md. 15, 87 A. 488 (1913); Valentine v. Seiss, 79 Md. 187, 28 A. 892 (1894); Knell v. Green St. Bldg. Ass'n, 34 Md. 67 (1871); see, e.g., Lewis v. E.F. Schlichter Co., 137 Md. 217, 112 A. 282 (1920); Manton v. Hoyt, 43 Md. 254 (1875). It also has been frequently stated that the judgment creditor "must stand or fall by the real, and not by the apparent rights of the defendant in the judgment." Ahern v. White, 39 Md. 409, 421 (1874); accord, Stebbins-Anderson Co. v. Bolton, 208 Md. 183, 117 A.2d 908 (1955); Kolker v. Gorn, 193 Md. 391, 67 A.2d 258 (1949); Caltrider v. Caples, 160 Md. 392, 153 A. 445 (1931); Union Trust Co. v. Biggs, 153 Md. 50, 137 A. 509 (1927). Further, it frequently has been stated that the "judgment creditor . . . stands in the place of his debtor, and he can only take the property of his debtor, subject to the equitable charges to which it was justly liable in the hands of the debtor . . . ." Dyson v. Simmons, 48 Md. 207, 215-16 (1878); accord, Kingsley v. Makay, 253 Md. 24, 251 A.2d 585 (1969); Stebbins-Anderson Co. v. Bolton, 208 Md. 183, 117 A.2d 908 (1955); Kolker v. Gorn, 193 Md. 391, 67 A.2d 258 (1949); Kinsey v. Drury, 146 Md. 227, 126 A. 125 (1924); Griffin v. Wilmer, 136 Md. 623, 111 A. 114 (1920); Cramer v. Roderick, 128 Md. 422, 98 A. 42 (1916).

In still others, the court has made both statements in support of the result, without regard to the fact that, although these two theories produce the same result where the purchaser at the execution sale is the judgment creditor, they cause different results when applied to the situation in which the purchaser at the execution sale is not the judgment creditor.

Under the first theory, the purchaser at the execution sale is substituted to the rights of the judgment creditor. Because he acquires only the rights of the judgment creditor, who cannot be a bona fide purchaser for value entitled to the benefit of the priorities provisions of the recording acts, the purchaser at a sheriff's sale necessarily will be subordinated to all prior unrecorded equities. This result obtains even if he is someone other than the judgment creditor who took title without notice of the prior equities and recorded first.

Application of the second theory, under which the purchaser at the execution sale is viewed as acquiring the rights of the judgment debtor, should, however, produce different results, depending on the identity of the purchaser. This difference is attributable to the fact that the priorities provisions of the recording acts cause the failure of the first transferee to record to endow the transferor with the power to transfer a good title to a subsequent bona fide purchaser for value and without notice, thereby divesting the title of the first transferee. Thus, if the purchaser at the execution sale is viewed as acquiring what the judgment debtor could have transferred, the purchaser is entitled to the benefit of the priorities provisions of the recording acts if he takes his title without notice of the prior unrecorded equities, records first, and is not the judgment creditor. In these circumstances, he is a bona fide purchaser for value and


167. E.g., Kolker v. Gorn, 193 Md. 391, 67 A.2d 258 (1949); Colonial Bldg. & Loan Ass'n v. Boden, 169 Md. 493, 182 A. 665 (1935); Caltrider v. Caples, 160 Md. 392, 153 A. 445 (1931); Union Trust Co. v. Biggs, 153 Md. 50, 137 A. 509 (1927); Ahern v. White, 39 Md. 409 (1874); Knell v. Green St. Bldg. Ass'n, 34 Md. 67 (1871); cf. Tyler v. Abergh, 65 Md. 18, 3 A. 904 (1886) (an assignee for the benefit of creditors is not a bona fide purchaser for value entitled to priority as against a prior unrecorded deed). But cf. Busey v. Reese, 38 Md. 264 (1873) (one who took a deed in payment and satisfaction of a preexisting debt was a purchaser for a valuable consideration so that his deed was entitled to priority over a mortgage executed before, but recorded after, the deed to him was made and recorded).

168. See notes 95 & 96 and accompanying text supra.

without notice. He thus is a person to whom the judgment debtor himself could have transferred a title good against the prior unrecorded equities. If, on the other hand, the purchaser at the execution sale is the judgment creditor, he will be subordinated to all prior unrecorded equities even if he is viewed as acquiring what the judgment debtor could have transferred. This is because the judgment debtor's power to divest the title of his first transferee is exercisable only in favor of a bona fide purchaser for value, which the judgment creditor is not.

A comparison of *Campbell v. Lowe* with *Kolker v. Gorn* demonstrates that the purchaser at an execution sale should be viewed as acquiring what the judgment debtor could have transferred: the purchaser should be entitled to the benefit of the priorities provisions of the recording acts if he takes without notice, records first, and is not the judgment creditor. In *Campbell*, a judgment was recovered against William Lowe in 1837. Nine years later, in 1846, the land in question was conveyed by Reich to William Lowe and his sister, Urith, as tenants in common. In 1850, the 1837 judgment was revived. In order to satisfy this judgment, William Lowe's interest in the land in question was sold at a sheriff's sale to Campbell, who apparently was not the judgment creditor. *Campbell* then brought

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(1851); Barney v. Patterson's Lessee, 6 H. & J. 182 (Md. 1823). *Compare* *Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339 (1856), *with* *Kolker v. Gorn*, 193 Md. 391, 67 A.2d 258 (1949). These cases are discussed in the text accompanying notes 173 to 183 infra.

170. See text accompanying notes 164 & 165 supra. Compare cases cited in note 164 supra with cases cited in note 165 supra.

171. See notes 95 & 96 and accompanying text supra.

172. E.g., *Kolker v. Gorn*, 193 Md. 391, 67 A.2d 258 (1949); Colonial Bldg. & Loan Ass’n v. Boden, 169 Md. 493, 182 A. 665 (1935); Caltrider v. Caples, 160 Md. 392, 153 A. 445 (1931); Union Trust Co. v. Biggs, 153 Md. 50, 137 A. 509 (1927); Ahern v. White, 39 Md. 409 (1874); Knell v. Green St. Bldg. Ass’n, 34 Md. 67 (1871); cf. Tyler v. Abergh, 65 Md. 18, 3 A. 904 (1886) (an assignee for the benefit of creditors is not a bona fide purchaser for value entitled to priority as against a prior unrecorded deed.) *But cf.* Busey v. Reese, 38 Md. 264 (1873) (one who took a deed in payment and satisfaction of a preexisting debt was a purchaser for a valuable consideration so that his deed was entitled to priority over a mortgage executed before, but recorded after, the deed to him was made and recorded).


174. 193 Md. 391, 67 A.2d 258 (1949). *But see* *Hammer v. Westphal*, 120 Md. 15, 87 A. 488 (1913). In holding that the title to land was not rendered unmarketable by the fact that it was acquired on execution sale, the court in *Hammer* implied that transferees of the purchaser on execution sale, as well as the purchaser himself, would take subject to any prior unrecorded equities that bound the land in the hands of the judgment debtor.

175. Although the statement of facts in *Campbell* does not clearly indicate whether Campbell was the judgment creditor, it appears from the court's discussion of *Campbell* in *Kolker* that the execution purchaser in *Campbell* was not the judgment creditor. See 193 Md. at 398, 67 A.2d at 261.
a proceeding to compel a sale of the land and division of the proceeds. Urith sought to prove that she was entitled to the entire property, in contravention of the terms of the deed to herself and her brother. She alleged that William’s interest in the property had been conveyed to him as mortgagee only, that she had repaid her debt to him, and that, in 1849, prior to the execution sale, William executed a deed conveying his entire interest in the property to her. In denying Urith the right to prove these facts, the court stated:

[Campbell], at a judicial sale, purchased the interest of William Lowe in this property, in reliance, as we must suppose, upon Reich’s deed to . . . [William] and his sister. [Campbell] was substituted, by law, to the rights of the judgment creditor, under whose execution he made the purchase . . . and cannot be affected by the disclaimer of title made by William Lowe, or by the deed from him to his sister, executed after the judgment became a lien on the property. . . . If the deed could be reformed, as between the defendant and William Lowe, or made to operate differently from the legal import of its terms, to the prejudice of this appellant, by the introduction of matters in pais, contemporaneous with or subsequent to the execution of the instrument, our registry acts would afford little protection to purchasers. 176

In Campbell, the 1846 conveyance of the land to the judgment debtor was made after the rendition of the judgment under which it was sold. The case of Kolker v. Gorn 177 indicates that, although the result in Campbell would have been the same if the conveyance to William and Urith had in fact been made before the rendition of the judgment against William, it would have been different if the purchaser on execution sale had been the judgment creditor. In Kolker, a judgment was obtained against Samuel Gorn in 1948. Pursuant to this judgment, a writ of fieri facias was levied against land that had been conveyed to John Gorn, Samuel Gorn and Samuel’s wife, Margaret, in 1941. The language of the deed of conveyance was held to presumptively create a joint tenancy with right of survivorship among the three transferees. Both Samuel and Margaret Gorn sought to quash the writ on the ground that the deed,

176. 9 Md. at 508, 66 Am. Dec. at 341-42 (emphasis added). Had the transfer in Campbell in fact been made in the form of an absolute conveyance to Urith coupled with a contemporaneous mortgage thereof executed by her to her brother, William, on execution sale of the land Campbell could have acquired only William’s interest in the land as mortgagee. See Ahern v. White, 39 Md. 409 (1874).
177. 193 Md. 391, 67 A.2d 258 (1949).
in reality, conveyed a one-half interest in the land to themselves as tenants by the entireties and a one-half interest in the land to John Gorn. In holding that testimony was admissible in this case to show the true intent of the parties, the court distinguished _Campbell_, stating:

In _Campbell v. Lowe_, . . . it was held that parties to a deed creating a tenancy in common could not vary its terms by proof of a different intention, as against a purchaser for value at sheriff's sale under a _fi. fa._ upon judgment. However, it is well established that a judgment creditor is not in the position of a bona fide purchaser, and his claim is subject to prior, undisclosed equities. . . . It would seem to follow that the wife is not estopped to show the mistake in the deed, unless by misrepresentation, or otherwise, she induced the creditor to give credit on the assumption that the record showed the true state of the title . . . .

. . . We think an execution creditor, who is a stranger to the transaction and stands in the shoes of the debtor subject to all outstanding equities, cannot invoke the parol evidence rule to prevent a party to the deed from showing a mutual mistake by the parties, in the absence of facts raising an estoppel.178

If this is so where the prior purchaser acquired his rights from the judgment debtor, there is even more reason for it to be so where the prior purchaser acquired his rights on execution sale under the same judgment as that under which the subsequent purchaser acquired his rights.179 In this situation, the record either of the sheriff's return180 or of the deed181 evidencing the first sale would afford constructive notice to a subsequent purchaser from the sheriff. Only when neither is filed for record can the subsequent purchaser qualify as one without notice. Failure to file the return for record must be attributed to the sheriff. On the other hand, failure to ensure that a deed is recorded, even if the return is not filed, must be attributed to the first purchaser, who, by such failure, enables the sheriff to sell the land a second time to one who can claim to take without notice. As the Court of Appeals has said, "it would be of

178. Id. at 398, 399, 67 A.2d at 261, 262 (citations omitted).
179. See Murguiondo v. Hoover, 72 Md. 9, 18 A. 907 (1889), discussed in note 63 supra.
dangerous consequences to bona fide purchasers, if, after having paid their money for property sold under competent and legal authority, they should be at the mercy of officers who might make imperfect returns of executions, or if they pleased make no returns at all.”182 In similar situations, the court has remarked that “‘whenever one of two innocent parties must suffer by the acts of a third person, the loss ought in Equity to fall upon him who has enabled the third person to occasion the loss.’”183

EFFECT OF THE LEGISLATIVE ATTEMPT TO SOLVE THE PROBLEM

In 1972, the Legislature sought to provide a clear statutory answer to the question of the extent to which the recording acts apply to sheriffs’ sales. The provision that it enacted184 now reads:

If a legal or equitable interest in land is sold under an execution sale . . . and a deed is executed and delivered to the purchaser by the sheriff . . . or other officer making the sale, the grantee in the deed, when recorded, is entitled to the same protection against the legal or equitable interests of persons not of record as is provided in this article for the benefit of grantees in deeds voluntarily executed, delivered and recorded.185

The explanatory comment that accompanied this language when the provision first was proposed for enactment stated:

Sec. 14–103(a) is a new section which will extend to the purchaser at an execution sale the same protection against prior unrecorded conveyances that is afforded a purchaser by voluntary conveyance from the debtor. Because of the language in Hammer v. Westphal, 120 Md. 15, pointing out the fact that a purchaser at an execution sale acquires only the title of the debtor, the title companies have been unwilling to insure such

182. Estep and Hall’s Lessee v. Weems, 6 G. & J. 303, 307 (Md. 1834). Although the quoted statement was made with respect to the prior purchaser’s need for protection, it applies equally to the subsequent purchaser’s need for protection.


purchaser’s title on the theory that his rights remain subject to any unrecorded interest outstanding.186

Unfortunately, however, the extent to which the legislature has solved the problem, or even changed preexisting law, is debatable. It is true that the language of the new statute makes it clear that a sheriff’s deed is entitled to be recorded and that, when recorded, it is entitled to the benefits of the priorities provisions of the recording act to the same extent as a voluntarily executed recorded deed. This language, however, does not address itself to the judicially perceived obstacles to effective application of the priorities provisions of the recording acts to execution sales.

In the first place, the statute does not in terms solve, or even refer to, the basic problem of whether a purchaser on execution sale can be a purchaser for value. A grantee in a recorded deed made by the owner of land is entitled to protection against a prior unrecorded conveyance only if he takes for value. Consequently, a purchaser on execution sale who records his deed from the sheriff likewise can be entitled to protection against a prior unrecorded conveyance only if he takes for value. If the statutory language quoted above is not to be a nullity, it must be construed, at a minimum, as declaratory of what appears to have been the law prior to its enactment, that is, that a purchaser on execution sale who is not the judgment creditor is a purchaser for value who can acquire from the sheriff what the judgment debtor could have transferred to a bona fide purchaser for value and without notice. It is doubtful, however, whether this language will be construed more broadly, as overturning the time-hallowed rule that a judgment creditor is not a purchaser for value.

The doubt surrounding the interpretation of this statutory language was not resolved by the court’s bald statement in Rippons that “[w]e take cognizance of Code (1974), § 14–103(a) Real Property Article, which has no bearing in this case.”187 Although it is not clear why the court found this statute to be inapplicable, the question whether the “second execution purchaser” took for value apparently was not a factor. Rather, in light of the facts in the case and the expressed reasoning of the court, there are only three possible grounds for the court’s finding that the statute was inapplicable: first, because the “second execution purchaser” took with notice of the rights of the first execution purchaser,188 or,

186. Comment to the House Bill of Title XIV of the Real Property Article, Md. H.B. 439, at 121 (1972).
188. See note 18 supra.
second, because the sale occurred before the effective date of the statute,¹⁸⁹ both of which reasons would be unexceptionable; and third, on the dubious theory, not expressly dealt with by section 14-103(a) of the Real Property Article, that after the sheriff sold the land to the first purchaser, he had nothing more to sell, and thus he lacked the power to sell the land to the second purchaser.¹⁹⁰ The last alternative lends little support to the court’s finding. Even if the legal title to land sold on execution sale passes to the purchaser by operation of law¹⁹¹ — which is questionable¹⁹² — it is only a defeasible title, analogous to an estate on condition subsequent, until a writing evidencing it is executed and recorded.¹⁹³ Thus, so long as the title of the first execution purchaser remains defeasible, the sheriff has not sold the entire interest of the judgment debtor in the land. Rather, he has retained (or, rather, left in the judgment debtor) a transferable interest, analogous to the right of reentry for condition broken.¹⁹⁴ This transferable interest can then be sold by the sheriff on execution sale to another purchaser who, if he takes for value and without notice, can defeat the title of the prior purchaser by recording first.¹⁹⁵

CONCLUSION

In Lewis v. Rippons,¹⁹⁶ the Court of Appeals of Maryland asserted as dictum that the first of two successive purchasers of the same land at a sheriff’s sale has priority, even if the second purchaser was a bona fide purchaser for value and without notice who recorded his deed from the sheriff before the prior transferee recorded. Analysis of Maryland law has indicated that this assertion is unfounded. In Maryland, a sheriff is under a duty to execute a deed of conveyance to the purchaser even if the legal title to land sold by the sheriff on execution sale is considered to pass to the

¹⁹¹. See note 47 and accompanying text supra.
¹⁹². See notes 48 to 71 and accompanying text supra.
¹⁹³. See notes 48 to 71, 91 to 93 and 165 to 167 and accompanying text supra.
¹⁹⁵. See notes 91 to 93, 165 to 167 and accompanying text supra.
purchaser by operation of law.\textsuperscript{197} If this deed is duly executed, it is entitled to be recorded.\textsuperscript{198} Consequently, this deed, when recorded, is subject to, and entitled to the benefits of, the priorities provisions of the recording acts.\textsuperscript{199} Several factors contribute to the conclusion that the failure of a transferee from the sheriff to record his deed leaves the judgment debtor with a "reversionary interest" that can be sold by the sheriff on execution sale to a bona fide purchaser for value and without notice who records first.\textsuperscript{200} First, sheriffs' deeds are entitled to recordation. Second, a purchaser at a sheriff's sale can be a purchaser for value, at least if he is not the judgment creditor. Finally, the priorities provisions of the recording acts render all transfers made or evidenced by an instrument of a type entitled to recordation defeasible until recorded in favor of a subsequent bona fide purchaser for value and without notice who records first.\textsuperscript{201} As the Florida Supreme Court stated in \textit{Emerson v. Emerson},

\begin{quote}
[A]n unrecorded deed does not, under the law, vest an absolute estate. Under the recording statutes, the absolute title rests with the grantor in abeyance, and does not irrevocably pass to the grantee until the deed is recorded. There is such an estate left in the grantor as, upon the recording of a subsequent conveyance to a \textit{bona fide} purchaser for value without notice, divests the entire estate passed by the prior unrecorded deed.\textsuperscript{202}
\end{quote}

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\textsuperscript{197} See notes 63 to 71 and accompanying text \textit{supra}.
\textsuperscript{198} See \textit{MD. REAL PROP. CODE ANN.} § 14-103(a) (1974); notes 116 to 121 and accompanying text \textit{supra}.
\textsuperscript{199} See notes 74 to 180 and accompanying text \textit{supra}.
\textsuperscript{200} See notes 165 to 176 and accompanying text \textit{supra}.
\textsuperscript{201} See notes 91 to 93 and accompanying text \textit{supra}.
\textsuperscript{202} 17 \textit{Fla.} 122, 134 (1879).
\end{flushleft}