THE ILLINOIS CONVEYANCES ACT: A 200-YEAR-OLD LABYRINTH WHOSE CHANGING WALLS CONTINUE TO PROVIDE INADEQUATE PROTECTION FOR SUBSEQUENT PURCHASERS

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I. INTRODUCTION

The Illinois Conveyances Act (Act) has been a muddled and marshy labyrinth for nearly two centuries. The plain language of the Act demands that "[a]ll . . . deeds and title papers . . . be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record."[1] This simple sentence outlines the effect of unrecorded conveyances of real property with respect to creditors and subsequent purchasers. When read in isolation, the statute appears rather elementary as being a so-called "pure-notice" statute; however, when late nineteenth-century Illinois courts applied it to disputes, its interpretation became a clouded labyrinth in which courts wandered until settling on a result that does not reflect the language of the statute.[2]

The Illinois General Assembly should act to eliminate the discord that exists between the "pure-notice" Act and the case law that has interpreted it as "race-notice," thereby reestablishing the Act's proper application as a "pure-notice" recording act. However, Senate Bill 2953, which advocates a "pure-race" act, is not the appropriate solution. Section II will briefly introduce what a recording act is and outline the current state of the Act. Section III will analyze how the Act, because of its plain language as passed by the Illinois General Assembly, is a pure-notice statute, how the courts have come to interpret it as a race-notice statute, and how Senate Bill 2953 would turn all of this upside-down by transforming the Act into a pure-race type. While Senate Bill 2953 may eliminate any confusion about the current discord between pure-notice versus race-notice, the bill may create worse problems. Most importantly, Section III will examine why the distinction between the types of recording acts matters with regard to

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1. 765 ILL. COMP. STAT. 5/30 (2012).
2. *See, e.g.*, Doyle v. Teas, 5 Ill. (4 Scam.) 202 (1843); Brookfield v. Goodrich, 32 Ill. 363 (1863); Simmons v. Stum, 101 Ill. 454 (1882); Delano v. Bennett, 90 Ill. 533 (1878).

modern Illinois conveyances and will apply the three types of recording acts to recent cases to juxtapose how the results can vary depending on which type of act is applied and which act produces the most equitable results. In conclusion, Section IV demands that the Illinois General Assembly adopt an unmistakable pure-notice recording act to end the uncertainty that has lasted nearly two centuries.

II. BACKGROUND

One morning in Illinois, Oscar Owner sells his house to Aaron. That afternoon, Brian, with absolutely no knowledge of the sale to Aaron, also buys the same house from Oscar. When Brian arrives at the courthouse to record his deed, he sees Aaron leaving after having just recorded his deed. Who gets Oscar's house? Aaron or Brian? The answer depends on whether the Illinois Conveyances Act is interpreted as written by the General Assembly or is interpreted according to case law.

There are three types of recording acts regarding subsequent purchasers: pure-race, pure-notice, and race-notice.[3] A pure-race recording act is basically a race to the courthouse in which the purchaser who *records first* wins.[4] Pure-notice recording acts give priority to subsequent purchasers who pay value *without notice* of the prior unrecorded claims with no requirement to record the instrument.[5] A race-notice act is a hybrid of these two and requires that a subsequent purchaser acquire for value *without notice and record* before prior unrecorded claims to receive protection.[6] When applying both the pure-notice and race-notice recording acts, there are three types of notice. Actual notice is information concerning the fact that is directly communicated to the party, such as Oscar telling Brian that he sold the house to Aaron that morning.[7] Constructive notice means notice arising solely from the record, regardless of whether the subsequent purchaser ever saw any of the information

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3. 112 AM. JUR. PROOF OF FACTS 3D 419 (2010). An explanation of each type is included:

> There are three different types of recording statutes found in the United States. These statutes include the race statute, the notice statute, and the race-notice statute. In a state that uses a race recording statute, the party who records his or her deed first will be given priority regardless of any notice of prior unrecorded instruments. In contrast, a notice recording statute is a statute that provides that an unrecorded conveyance is invalid as against a subsequent bona fide purchaser for value and without notice. . . . The race-notice recording statute combines restrictions found in both the race and notice statutes. A race-notice recording statute provides that an unrecorded conveyance is invalid against a subsequent purchaser for value who first records without knowledge of any prior unrecorded instruments.

Id.

4. 11 THOMPSON ON REAL PROPERTY 158 (David A. Thomas ed., 2d. ed., 2002).
5. *Id.* at 159.
6. *Id.* at 160.
7. RICHARD ROY BELDEN POWELL, POWELL ON REAL PROPERTY § 82.02[1][d][i] (1997).

contained therein.[8] Inquiry notice means notice of some apparently extraneous fact sufficiently curious or suspicious that a normal person should, as a matter of law, make an investigation about it, such as Brian seeing Aaron unloading the moving truck in front of Oscars house the day Brian purchased the property from Oscar.[9]

The Illinois Conveyances Act has been classified as all three types at various points in time.[10] From the time Illinois became a state in 1818 until 1833, the Act was substantially changed three different times. It began as a pure-race statute in 1818,[11] was changed to a race-notice statute in 1827,[12] reverted back to a pure-race statute in 1829,[13] and then was finally reworded in 1833 as a pure-notice statute.[14] Other than minor linguistic

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8. *Id.* § 82.02[1][d][ii].
9. *Id.* § 82.02[1][d][iii].
10. Taylor Mattis, *Recording Acts: Anachronistic Reliance*, 25 REAL PROP. PROB. & TR. J. 17, 26-28 (1990).
11. *See* An Act Establishing the Recorder's Office, § 8, 1819 ILL. LAWS 19, 20. This section of the Act read as follows:

> [E]very such deed or conveyance . . . which shall be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee, for valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the proving and recording of the deed of conveyance, under which such subsequent purchaser or mortgagee shall claim.

Id.

12. *See* An Act Concerning Conveyances of Real Property, § 15, 1827 ILL. LAWS 101. This section of the Act read as follows:

> [E]very such writing, that shall at any time after the publication hereof, remain more than twelve months after the making of such writing, and shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent *bona fide* purchaser or mortgagee, for valuable consideration, unless such deed, conveyance or other writing, be recorded as aforesaid, before the proving and recording of the deed, mortgage or writing, under which, any such subsequent purchaser or mortgagee shall claim.

Id. (emphasis added). Note that the inclusion of the words "bona fide," whether intentional or not, created a race-notice statute.

13. *See* An Act to Amend the Act Concerning the Conveyances of Real Property, § 4, 1829 ILL. REV. CODE OF LAWS 25. This section of the Act read as follows:

> [Unrecorded interests] shall be adjudged void as against any subsequent purchaser, or mortgagee, for valuable consideration, unless such deed or conveyance shall be recorded before the recording of the deed or conveyance under which such subsequent purchaser, or mortgagee, shall claim.

Id.

14. *See* An Act Abolishing the Office of State Recorder, § 5, 1833 ILL. REV. STAT. 587-88. This section of the Act read as follows:

> [A]ll deeds and other title papers, which are required to be recorded, shall take effect, and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice, and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record in the county where the said lands may lie.

Id.

clarifications, the 1833 statute still stands today.[15] The Act currently states as follows:

> All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged *void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record*.[16]

Academics classify the statute according to its text as a pure-notice statute.[17] The courts, however, although not always clearly, have classified the 1833 statute as a race-notice statute by placing upon subsequent purchasers a duty to record their deed before it can be valid.[18] A quick search of academic articles that cite and attempt to classify the Illinois Conveyances Act reveals the following:

- It should come as no surprise that these fitful legislative enactments have led to substantial confusion concerning the proper categorization of the Illinois statute. Most authorities recognize, however, that the current Illinois statute properly places Illinois in

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15. The current statute reflecting minor changes from 1837 and 1845 says, "[A]ll such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record." 765 ILL. COMP. STAT. 5/30 (2012). Compare this language with the 1833 statute, which said, "[A]ll such deeds and title papers shall be void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record in the county where the said lands may lie." An Act Abolishing the Office of State Recorder, § 5, 1833 ILL. REV. STAT. 587-88. The relevant parts of the statute are identical. But, because the 1833 statute was part of an act to eliminate the state recorder and establish county recorders, it contained a necessary clarification about county recorders that is no longer necessary.

16. 765 ILL. COMP. STAT. 5/30 (2012) (emphasis added).

17. *See, e.g.*, PHILIP H. WARD, JR., WARD ON TITLE EXAMINATIONS § 135.3 (2005); PATTON AND PALOMAR ON LAND TITLES §§ 7-8 (3d ed. 2003); AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES §§ 17.4-.5 (A. James Casner ed., 1952); POWELL, *supra* note 7, § 82.02; Ray E. Sweat, *Race, Race-Notice and Notice Statutes: The American Recording System*, 3 PROB. & PROP., May/June 1989, at 27, 31.

18. *See* 11 THOMPSON ON REAL PROPERTY, *supra* note 4, at 158; Guard *ex dem.* Robinson v. Rowan, 3 Ill. 499, 502 (1840); Brookfield v. Goodrich, 32 Ill. 363, 367 (1863); Simmons v. Stum, 101 Ill. 454, 457 (1882); W. Chi. St. R.R. v. Morrison, Adams & Allen Co., 43 N.E. 393, 398 (Ill. 1896); Reed v. Eastin, 41 N.E.2d 765, 768 (Ill. 1942); Petta v. Host, 115 N.E.2d 881, 887 (Ill. 1953); Echols v. Olsen, 347 N.E.2d 720, 726 (Ill. 1976); Kovacevic v. City of Chicago, 365 N.E.2d 104, 108 (Ill. App. Ct. 1977); Life Sav. & Loan Ass'n of Am. v. Bryant, 467 N.E.2d 277, 282 (Ill. App. Ct. 1984); Goldberg v. Ehrlich (*In re* Ehrlich), 59 B.R. 646, 649-50 (Bankr. N.D. Ill. 1986); Source One Mortg. Servs. Corp. v. Jones, No. 88 C 8441, 1994 U.S. Dist. LEXIS 333, at *11 (N.D. Ill. Jan. 12, 1994); Farmers State Bank v. Neese, 665 N.E.2d 534, 540 (Ill. App. Ct. 1996); Fed. Nat'l Mortg. Ass'n v. Panice, No. 93 C 7730, 1996 U.S. Dist. LEXIS 8950, at *14-15 (N.D. Ill. June 24, 1996).

the *notice* category, [but] Illinois courts historically have added the requirement of prior recording.[19]

- Illinois is not simply a "race" jurisdiction. Rather, Illinois is a '*race-notice*' jurisdiction.[20]
- [Some] states have statutes that are difficult to define as notice or race-notice. . . . Georgia, Illinois, and New Hampshire have statutes in a form that could be construed as *pure notice* statutes, but they have been interpreted by their state courts as *race-notice*.[21]
- The other two types of statutes—called either "Notice" or "Race-Notice"—expressly introduce equitable considerations by adjusting priorities based on actual knowledge. The differences between the two are *elusive*.[22]
- [R]espected scholars continue to classify the Illinois act as a *notice* type, ignoring [case law] applying the act as if it were *race-notice*. The status of the Illinois recording act has been muddled for over a century.[23]
- Examples of *race-notice* states are California and Illinois.[24]
- It is noted that various scholars classify the Illinois statute as a *notice* statute notwithstanding that in 1882, the Illinois Supreme Court applied the statute in a manner that indicates that the court construed the statute as if it were a *race-notice* recording act.[25]

This brief search demonstrates the dissidence that exists. Scholars apparently disagree with courts. Courts apparently disagree with the text of the Act. The Act is elusive. Although first-year law students attempting to decipher recording acts may disagree, the discord about classifying a recording act is not ordinary for most states whose classification is readily identifiable.

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19. Mattis, *supra* note 10, at 26-28 (emphasis added).
20. Barbara A. Gimbel & Edward J. Andersen, *Lender Leap-Frog: Conventional Subrogation in Lien Priority Disputes*, 94 ILL. B.J. 494, 495-96 (2006) (emphasis added).
21. Charles Szypszak, *Real Estate Records, the Captive Public, and Opportunities for the Public Good*, 43 GONZ. L. REV. 5, 28 (2008) (emphasis added).
22. Charles Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663, 667 n.23 (2003) (emphasis added) (citing the Illinois Conveyances Act in a footnote *without classifying it*).
23. 11 THOMPSON ON REAL PROPERTY, *supra* note 4, § 92.08(d), at 161-62.
24. Seth S. Katz, *Federal Debt Collection Under the Federal Debt Collection Procedures Act: The Preemption of State Real Estate Laws*, 46 EMORY L.J. 1697, 1722 n.190 (1997) (emphasis added).
25. Charles B. Sheppard, *Assurances of Titles to Real Property Available in the United States: Is A Person Who Assures A Quality of Title to Real Property Liable for A Defect in the Title Caused by Conduct of the Assured?*, 79 N.D. L. REV. 311, 316 n.37, 367 (2003) (emphasis added).

The Act currently does not require that deeds and other instruments be recorded to be effective.[26] On the contrary, an Illinois deed is effective immediately between the parties as soon as it is executed and delivered.[27] But, according to the Act, and with respect to third parties, the instrument must be recorded to be valid against subsequent purchasers who take without notice.[28] The issue is whether the subsequent purchaser must also record or if taking title without notice suffices. The Act itself does not say that a subsequent purchaser must record.[29] The phrase "until *the same* shall be filed for record" refers to the original deed, not the subsequent purchaser's deed.[30] As will be shown, Illinois courts, despite the literal text of the Act, have consistently held that taking without notice is not alone sufficient and have added a requirement that subsequent purchasers also record. Therefore, by statutory legislation, Illinois should be classified as a pure-notice state. However, by judicial interpretation and possible legislative acquiescence, Illinois is generally classified as a race-notice state.

Applying a pure-race act to the hypothetical dispute between Brian and Aaron about the sale of Oscar's house, Aaron would obviously prevail because he recorded first. Applying a pure-notice act, which is the literal wording of the current Illinois Conveyances Act, Brian would prevail because at the time he received his deed he had no knowledge of the transaction between Oscar and Aaron. Lastly, applying a race-notice statute, Aaron would win because even though Brian took title without notice of Aaron, Brian did not record his deed before Aaron. Thus, whether the Act is interpreted as a pure-notice act or a race-notice act completely changes the outcome of this situation. The Illinois General Assembly could promptly and easily eliminate any disagreement about which outcome is most equitable and which is intended, and this may be part of what was intended with Senate Bill 2953. Applying only the pure-notice text of the statute, Brian wins. Including the Illinois judiciary's contribution of the recording requirement by subsequent purchasers, Aaron wins. Under Senate Bill 2953, Aaron wins because he recorded first.

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26. WARD, *supra* note 17, § 135.3.

27. 13 ILL. LAW AND PRAC. *Conveyances* § 7 (2012). This legal encyclopedia on Illinois law states:

> A deed signed, sealed, and delivered becomes at once binding and effective. On the other hand, a deed must take effect on its execution and delivery or not at all . . . . Even though executed, a deed has no effect to pass title until delivered; it takes effect, not from the date of its execution, but from the date of its delivery.

Id.

28. *See* 765 ILL. COMP. STAT. 5/30 (2012).

29. *See* Mattis, *supra* note 10, at 29 ("Nothing in the statute refers to any recording by *B*, the subsequent purchaser, of her deed or instrument. This conclusion alone should establish that the statute is not properly classified as race-notice.").

30. *Id.*

Admittedly, the transactions between Oscar, Aaron, and Brian may be over-simplified, unusual, and plausibly contain badges of fraud on the part of Oscar. But, transactions involving bona fide subsequent purchasers are not uncommon. Similar situations are widespread, even recently, in the recording of instruments involving bankruptcy,[31] tax sales,[32] mortgage assignments and foreclosures,[33] government takings,[34] zoning disputes,[35] and even when a deed was recorded in the wrong county.[36] As such, the Illinois Conveyances Act has broad-sweeping effects and protects purchasers in various transactions that occur statewide every day. In our modern, interstate economy, purchasers and creditors relying on the Act should be able to refer to it and quickly identify what type of recording act it is. They should not have to interpret an "elusive"[37] statute clouded by case law that produces an outcome incongruent with the statute itself.

III. ANALYSIS

To unravel the history establishing how the Illinois Conveyances Act has reached its current application, Part A will begin by briefly perusing the Act's legislative history to identify what, if anything, was intended by the General Assembly that passed the Act. In Part B, the legislative intent, if any, will be juxtaposed with the Act's application by early judicial interpretations to demonstrate how and why they were flawed, despite the fact that those interpretations are the current state of the law. Part C will discuss the effects of Senate Bill 2953 contrasting the bill with both the original legislative act and the case law to show how it severely conflicts with both. Finally, Part D will counter-pose all three types of recording acts and show why, based on a few examples of modern conveyances, a pure-notice type is the most appropriate for Illinois. Part D will also explain why a legislative change is necessary while making a few suggestions about what a more conclusive pure-notice statute could look like.

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31. *See* Polo Builders, Inc. v. Kamil, 433 B.R. 700 (Bankr. N.D. Ill. 2010).
32. *See In re* Smith, 614 F.3d 654, 656 (7th Cir. 2010); *In re* Application of the Cook Cnty. Treasurer, 706 N.E.2d 465 (Ill. 1998).
33. *See* Fed. Nat'l Mortg. v. Kuipers, 732 N.E.2d 723 (Ill. App. Ct. 2000); Aames Capital v. Interstate Bank, 734 N.E.2d 493 (Ill. App. Ct. 2000); Farmers State Bank v. Neese, 665 N.E.2d 534 (Ill. App. Ct. 1996); Banco Popular v. Beneficial Sys., Inc., 780 N.E.2d 1113 (Ill. App. Ct. 2002).
34. *See* United States v. Hall, No. 07-CR-30022-MJR, 2008 WL 4594839 (S.D. Ill. Oct. 15, 2008).
35. *See* King v. DeKalb County, 917 N.E.2d 36 (2d. Dist. 2009).
36. *See* Bulgarea v. Nat'l City Mortg., No. 08 B 19992, 2010 WL 3614278 (Bankr. N.D. Ill. Sept. 9, 2010).
37. *See* Szypszak, *supra* note 22, at 667.

A. Unidentifiable Intentions of the 1833 General Assembly Induce Judicial Independence

Although the cardinal rule of statutory construction is to ascertain and give effect to the true intent and meaning of the legislature, there is little information available about what the Illinois General Assembly intended when it passed the 1833 recording act.[38] To make matters worse, the General Assembly passed the recording act as a small part of a much larger and more comprehensive bill that covered a number of aspects of conveyance law. Aside from the minor linguistic adjustments of 1837 and 1845, Illinois' current recording statute is part of the Act Abolishing the Office of State Recorder.[39] Unlike modern bills that are accompanied by findings, purpose, committee reports, sponsor statements, and debate, there is little record surrounding the 1833 bill which is attainable without extensive and exhausting rummaging through what might, but probably does not, exist in Springfield. The General Assembly's true intent remains unknown.

Prior to the passage of the 1833 bill, Illinois' recording act was a pure-race type,[40] and there is no real indication of whether a change to a pure notice type (as indicated by the language of the statue) was intended, or better yet, why it was intended. Regardless of why, the General Assembly's clearly established a no-notice requirement by which subsequent purchasers could take title.[41] What was not clear was why the recording requirement for subsequent purchasers was eliminated. The Act does contain at least one sentence that could give some insight: its title, "An Act Abolishing the Office of State Recorder."[42] Conveyance instruments are now recorded in the county where the property is located not in Springfield.[43] This change could have influenced the determination of the duties of subsequent purchasers.[44] But, because the General Assembly gave

38. *See* People v. Frieberg, 589 N.E.2d 508, 517 (Ill. 1992).
39. An Act Abolishing the Office of State Recorder § 5, 1833 ILL. REV. STAT. 587-88.
40. *See* An Act to Amend the Act Concerning the Conveyance of Real Property § 4, 1829 ILL. REV. CODE OF LAWS 25 (1829).
41. An Act Abolishing the Office of State Recorder § 5.
42. *Id.*
43. *See* 765 ILL. COMP. STAT. 5/28 (2012).
44. Although purely speculative, the statute was possibly changed from a pure-race to pure-notice type because the recorder's office would now be closer to the property transferred and, therefore, more easily accessible for recording deeds. Thus, prior purchasers would be held to a higher standard because having the recorder's office closer meant that the failure to record was a greater infraction towards subsequent purchasers acting in reliance on recorded chains of title. Therefore, because it should have been easier for prior purchasers to record their interests, subsequent purchasers should have been given greater protection when relying on the record. After all, "The purpose of the priority provision of the Conveyances Act is to protect subsequent purchasers against unrecorded prior instruments." 27A ILL. LAW AND PRAC. *Mortgages* § 58 (2012).

no real guidance about why the change was made, courts were left with broad discretion to interpret the Illinois Conveyances Act as they wished.

B. Early Illinois Courts Improperly Interpreted the Conveyances Act To Have a Recording Requirement

In 1843, only ten years after the General Assembly had established the new recording act, the Supreme Court of Illinois took an unusual approach to interpreting the Act by giving an unprecedented definition to the term "subsequent purchaser."[45] The case was *Doyle v. Teas*. Teas executed an installment agreement for the sale of land to Doyle with the last payment being due fifteen months from the date of contract.[46] Three days later, Teas deeded the same land to Munson, who allegedly did not have notice of the prior transaction.[47] Doyle recorded his installment contract seven days before Munson recorded his deed.[48] The Illinois recording statute, if interpreted by its plain language as a pure notice act, would have given title to Munson because he took his deed without notice of Doyle, regardless of who recorded first. However, the court did not do this and took an unusual and mind-boggling approach instead. The court said that "[t]he word subsequent, as used in the recording act, must have reference to the *recording*, and *not the date of the instrument*, and such indeed is the literal and grammatical construction."[49] The court basically said that one does not become a purchaser until he or she records. Or, in other words, recording was the act that ultimately completes a purchase.

The court's interpretation clashed with the plain meaning of the term "purchaser" and with the policy underlying the recording act. Public policy would protect a "purchaser" at the point of purchase who relies on information provided by the public record. A subsequent purchaser should not have to be concerned that a prior purchaser records before him or her; instead, subsequent purchasers should be required to check the record at the courthouse and then pursue their purchases, thereby promoting security and marketability of titles based on the availability of the records.[50]

Usually, the term "buyer" encompasses virtually anyone who acquires any interest in property for valuable consideration.[51] The purchaser's investment is significant in determining at what point he merits protection.[52] Most recording acts refer to purchasers for value or valuable consideration,

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45. Doyle v. Teas, 5 Ill. (4 Scam.) 202, 252-53 (1843).
46. *Id*. at 204-05.
47. *Id*. at 205-06.
48. *Id.* at 206.
49. *Id.* at 252 (emphasis added).
50. *See* POWELL, *supra* note 7, § 82.02[1][c][ii]; THOMPSON, *supra* note 4, § 92.08(b), at 159.
51. *See* POWELL, *supra* note 7, § 82.01[2][a].
52. *Id.*

but payment is required to qualify a party for protection.[53] Black's Law Dictionary defines purchaser as "one who obtains property for money or other valuable consideration; a buyer."[54] So, most authorities define a purchaser as someone who exchanges valuable consideration for an interest in property. These descriptions combined with ordinary common sense, do not suggest that recording the instrument of purchase makes one a purchaser, but the Supreme Court of Illinois held otherwise.

The court interpreted the Illinois recording act again in 1863 in the case of *Brookfield v. Goodrich*.[55] Two deeds were handed to the recorder on the same day, at the same time, and by the same person, but of course, one was stamped and recorded before the other.[56] The court held that "the [recording] statute itself, and the policy of the recording law, give the deed first filed and recorded the preference."[57] This reasoning is flawed because the recording statute does not give the first deed filed and recorded the preference; instead, the statute gives preference to the deed between the grantor and first grantee when the subsequent grantee takes title with notice of the prior purchaser.[58] The statute, as written and passed by the General Assembly, provides protection and preference to "subsequent purchasers, without notice" of the unrecorded prior conveyance at the time of purchase.[59]

Several later decisions affirmed the *Brookfield* holding, and lower courts have dutifully followed those precedents. For example, only fifteen years later, the Supreme Court of Illinois again addressed the question in *Delano v. Bennett*, saying, in dicta, that although the deed to the subsequent purchaser was the later one, it would pass title to the subsequent purchaser if it were recorded before the earlier deed, thereby reaffirming *Brookfield* by stating that "under our recording laws the deed first filed and first recorded is given preference."[60]

Again, relying on the 1863 *Brookfield* decision, the Illinois Supreme Court addressed the same question about a subsequent good faith purchaser in 1882 in *Simmons v. Stum* and held, "[T]he deed made to [the subsequent purchaser] could not take effect so as to cut off the [first] mortgage unless [the deed] was first on record."[61] In doing so, the court clearly read a recording requirement into the statute. Any court following precedent has

53. *See* THOMPSON, *supra* note 4, § 92.09, at 165-66 (emphasis added).
54. BLACK'S LAW DICTIONARY 1355 (9th ed. 2009).
55. 32 Ill. 363 (1863).
56. *Id.* at 363.
57. *Id.* at 367.
58. *See* 765 ILL. COMP. STAT. 5/30 (2012). The first deed is "void as to all such creditors and subsequent purchasers, without notice, until [it is] filed for record." *Id.*
59. *Id.*
60. Delano v. Bennett, 90 Ill. 533, 534 (1878) (citing *Brookfield*, 32 Ill. at 363).
61. Simmons v. Stum, 101 Ill. 454, 456 (1882).

had to do the same, despite the statute itself not requiring that subsequent purchasers record their instrument, in addition to taking without notice of prior conveyances, in order to prevail against prior purchasers. To demonstrate, the 1985 decision of *Daughters v. Preston* continued to apply the definition of purchaser that had been used in *Doyle v. Teas* by stating that one does not become a subsequent purchaser until he or she records.[62] Requiring subsequent purchasers to record their interests has persisted in the federal courts, with most cases referring to *Davis v. United States*, in which the federal court cited the *Brookfield* and *Simmons* decisions while stating, "Illinois is not a 'notice' jurisdiction, but rather has a recording act which has been construed as 'race-notice.'"[63]

Therefore, in a series of decisions that spanned nearly forty years, the Supreme Court of Illinois established a recording requirement for subsequent purchasers, despite the absence of any such requirement in the Illinois Conveyances Act. Most of these cases, other than *Doyle v. Teas*, are very short and provide little to no insight into the reasons supporting the court's addition of this requirement, other than their persistent aspiration that all deeds be recorded to be effective. As will be discussed, although it may be an arguably admirable aspiration to require recording, the court's longing to promote recording was, in essence, judicial legislation. The court stretched simple and straightforward definitions while establishing a recording requirement for subsequent purchasers to prevail.

Because of the incongruence between the court interpretations and the actual language of the Act, the Illinois General Assembly should step in to clarify its intentions. Instead, the Illinois Senate is considering a step backward. Senate Bill 2953 would thwart, destroy, and reduce what little protection subsequent purchasers have left by reverting the state of the Act to a predicament of which it has been relieved since 1829: the pure-race recording act.

C. The Most Recent Attempt to Clarify the State of the Illinois Conveyances Act: Senate Bill 2953

Even though Senate Bill 2953 is not the appropriate solution, it would eliminate the confusion about whether the recording act is pure-notice or race-notice by eliminating the notice requirement completely. Doing so only leaves one of three recording act options—pure-race—because the other two options both require the subsequent purchaser to take without notice. Senate Bill 2953 would also require that all conveyance instruments be recorded to have any force or effect and states as follows:

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62. Daughters v. Preston, 476 N.E.2d 445, 447 (Ill. App. Ct. 1985).
63. Davis v. United States, 705 F. Supp. 446, 450 (C.D. Ill. 1989).

> All . . . instruments in writing that affect interests in real property and that are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before; and *all these deeds and title papers shall be adjudged void until the same shall be filed for record* with the recorder's office in the county in which the property is located.[64]

Thus, the bill eliminates any reference to subsequent purchasers and creditors, including any reference to notice, and requires that all deeds be recorded to have any effect. The synopsis of the bill further confirms this stating that, by "[a]mend[ing] the Conveyances Act," the change "adds language requiring the instruments to be recorded in the recorder's office in the county in which the real estate is situated," and that "deeds and title papers are void until recorded,"[65] instead of void until recorded as to creditors and subsequent purchasers. This amendment is monumental. By adding and subtracting so much from the Illinois Conveyances Act, the amendment ultimately transforms the Act so extensively that it is barely recognizable. Rather than describing the bill as an amendment, the bill may be more appropriately characterized as adopting a brand new recording act.

Although the amendment removes any reference to creditors and subsequent purchasers, they still have some protection in that, because no instrument is valid until recorded, they may still prevail if they record before any prior purchasers. The most detrimental change, however, is that a subsequent purchaser who takes title with no notice of a prior conveyance, although acting in good faith, may suffer a forfeiture when he or she takes action in reliance on records that do not reflect a prior purchaser's delay or failure to record, especially if the prior purchaser also records first. In the next Part, the disadvantages of Senate Bill 2953 are discussed in comparison with the alternative approaches. All three types of recording acts will be analyzed as possible prospects for Illinois's recording act, but which one would best serve the types of conveyances that occur in twenty-first-century Illinois?

D. A Pure-Notice Recording Act Would Best Suit the Needs of Illinois Conveyances

This Part will provide a brief overview of the advantages and disadvantages of each of the three forms while applying the forms to modern Illinois cases to show how the outcomes vary, thereby showing why a clearly established pure-notice recording act would best promote the most equitable outcome.

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64. S.B. 2953, 97th Gen. Assembly, Reg. Sess. (Ill. 2012) (emphasis added).
65. *Id.*

1. A Pure-Race Statute Is Regressive to Equitable Interests in Illinois Conveyance Transactions

Applying a pure-race recording act, an interest is not enforceable against any purchaser who *records an interest before the other interest is recorded*.[66] In short, the party who wins the race to the courthouse prevails. Despite its popularity in early common law, only two states currently use a pure-race system—Louisiana[67] and arguably North Carolina[68]—which is probably a time-tested sign that better methods exist. At face value, in addition to eradicating actual and inquiry notice, this method arguably abolishes constructive notice because the recording system may be more of a scoreboard determining the winner of the race rather than a means to put the world on notice and facilitate efficient property transactions.[69]

A pure-race act does have advantages, though. Because notice is irrelevant, a subsequent purchaser cannot be second-guessed about whether he or she had notice, thereby resulting in more simplicity and certainty about a purchaser's title.[70] The parties and the courts can quickly eliminate difficult questions about notice from the analysis. Thus, dispute resolution is more efficient because a court does not have to determine fact specific issues about notice and, instead, must simply determine who recorded first.[71] However, drafting laws based solely on helping courts resolve disputes in the easiest and fastest way possible clearly falls short of other more important policy considerations such as promoting justice, equity, and efficient market transactions.

The recent case of *In re Bulgarea* illustrates a situation in which a simple race to the courthouse, although the easiest way to determine the prevailing party, does not promote equity.[72] Bulgarea had borrowed money from a lender to purchase some property located in McHenry County and secured the debt with a mortgage.[73] The lender immediately assigned the note and mortgage to National City.[74] National City and Bulgarea recorded their respective mortgage and deed in Lake County, instead of McHenry County where the property was located.[75] Later, Bulgarea obtained a line of credit on the property and gave a mortgage to LaSalle, a different

66. POWELL, *supra* note 7, § 82.02[1][c][i]; THOMPSON, *supra* note 4, § 92.08(a), at 158.
67. LA. REV. STAT. § 9:2721 (2006).
68. N.C. GEN. STAT. § 47-18(a) (2005). *But see* Rowe v. Walker, 441 S.E.2d 156, 158 (N.C. Ct. App. 1995) (suggesting that North Carolina may have become a race-notice statute by way of judicial interpretation).
69. POWELL, *supra* note 7, § 82.02[1][c][i].
70. *Id.*; THOMPSON, *supra* note 4, § 92.08(a), at 158.
71. POWELL, *supra* note 7, § 82.02[1][c][i].
72. 2010 WL 3614278 (Bankr. N.D. Ill. Sept. 9, 2010).
73. *Id.* at *1
74. *Id.*
75. *Id.*

lender.[76] Bulgarea recorded the deed for the line of credit in McHenry County, where the property was located.[77] Later, after Bulgarea filed for bankruptcy and a dispute arose between the two creditors, the court held for LaSalle because "[n]othing in the record in McHenry County, [where the property was located], . . . would have prompted a person . . . to ask Bulgarea additional questions about possible unrecorded mortgages, let alone search for mortgages mistakenly recorded in other counties."[78] Most advocates would agree that this decision was the correct one. But what if the facts were changed just slightly, and ever so realistically?

What if National City caught its mistake about recording in the wrong courthouse and corrected it two days later? What if, during those two days, Bulgarea obtained the line of credit from LaSalle (after LaSalle verified the record at the courthouse and saw nothing about National City, of course)? And, what if during the ensuing chaos resulting from the race to the court house, National City was able to correctly record its mortgage in McHenry County before LaSalle recorded its mortgage? During the resulting litigation, the court would quickly and easily resolve the dispute by noting that the date of the stamp on National City's deed was clearly prior to LaSalle's date. Therefore, LaSalle would be left empty-handed because National City failed to properly record their mortgage the first time. The result, although quick and easy, is clearly unjust, inequitable, and would grossly disturb most lenders who rely on the courthouse's records. This hypothetical is no less likely to have occurred than what actually occurred in *In re Bulgarea*, but, unlike what really happened in the case, most advocates would agree that a pure-race act, like Senate Bill 2953, would not produce the equitable result.

Admittedly, a pure-race act does help promote recording by all, including subsequent purchasers, to protect against additional subsequent purchasers.[79] If the recording system was designed to assist in putting the world on notice of interests in property, this type of act surely promotes that.[80] However, as will be shown, notice-type acts also promote recording without producing the harsh, inequitable results of pure-race acts because a purchaser or creditor must protect itself against additional subsequent purchasers by recording their interests.

One of the worst disadvantages of a pure-race act is that subsequent purchasers who are completely aware of unrecorded prior interests may potentially thwart the system if they can prevail simply by recording first.[81]

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76. *Id.*
77. *Id.*
78. *Id.* at *4.
79. POWELL, *supra* note 7, § 82.02[1][c][iii].
80. *See* 27A ILL. LAW AND PRAC. *Mortgages* § 58 (2012).
81. POWELL, *supra* note 7, § 82.02[1][c][i].

Therefore, allowing persons to take without notice of an interest, without being accountable and bound by that notice, gives no deference at all to the fundamental notion of justice that would demand purchasers to beware when they have actual notice of risks.[82] For example, under a pure-race act, if Bulgarea had told LaSalle about the mortgage he gave to National City, thereby giving notice to LaSalle, and if LaSalle saw that National City had not recorded its interest at the courthouse, LaSalle could then thwart the system despite what it knew, as long as it could get to the courthouse before National City. This type of behavior is anything but good-faith dealing. A pure-race type recording act, like Senate Bill 2953, is not appropriate for modern Illinois conveyances.

2. A Race-Notice Statute Is Better, but Retains Many Disadvantages of a Pure-Race Statute

Under a race-notice statute, a prior interest is not enforceable against a subsequent bona fide purchaser for value who both acquires an interest *without notice* of the prior interest *and records* that interest first.[83] This type of recording act combines the advantages of pure-notice and pure-race by promoting good faith by subsequent purchasers and requiring them to take title without notice, and it also encourages prompt recording to protect against both prior purchasers and additional subsequent purchasers.[84] The Uniform Simplification of Land Transfers Act (USLTA), although unsuccessful, essentially proposed a race-notice act.[85] The attempted adoption of the USLTA may suggest that a race-notice act, despite its advantages, still fails to provide adequate protection to subsequent purchasers.

Like pure-notice statutes, subsequent purchasers are subject to second-guessing by courts about whether they had notice along with the same undependable evidence concerns involved in a notice statute.[86] Returning to the *Bulgarea* hypothetical in which National City corrects its mistake before LaSalle records but after LaSalle issued the line of credit, the disputing creditors would have to produce evidence about what LaSalle really knew. Depending on the surrounding circumstances, the evidence may be scant, disputable, and conflicting. Fact-finders may be left weighing the credibility of the parties, which poses a much more difficult task than simply glancing at the stamp on the recorded documents to see

82. 11 THOMPSON ON REAL PROPERTY, *supra* note 4, § 92.08(c), at 160.
83. *Id.* (emphasis added); POWELL, *supra* note 7, § 82.02[1][c][iii].
84. POWELL, *supra* note 7, § 82.02[1][c][iii]; 11 THOMPSON ON REAL PROPERTY, *supra* note 4, § 92.08(a), at 158.
85. UNIFORM SIMPLIFICATION OF LAND TRANSFERS ACT (USLTA) § 3-202(a) (1977).
86. POWELL, *supra* note 7, § 82.02[1][c][iii].

who prevailed in the race to the courthouse. But, as stated previously, resolving difficult questions is part of the great responsibility placed upon the judicial system.

The main disadvantage of a race-notice act is that, even if a subsequent purchaser takes without notice of a prior conveyance, the subsequent purchaser may still lose the race to the courthouse.[87] In the *Bulgarea* hypothetical, even if LaSalle lacked knowledge of National City's mortgage, they would have lost their interest if they did not prevail in the race.

Overall, the notice inquiry is a welcomed improvement from the pure-race act. The Illinois General Assembly, thus, wisely included a lack-of-notice requirement in 1833,[88] thereby graciously providing much-needed protection to creditors like LaSalle. For creditors, mortgages are assigned in our modern economy every day. The recession of the last few years was a direct result of the rapid and fluid network of lenders who so quickly exchanged mortgages.[89] This network depends on predictability and benefits greatly from the equity provided by notice-type statutes.[90] However, despite its concessions for purchasers and creditors who take without notice, a race-notice statute, by also imposing a recording requirement, retains many of the antique disadvantages of pure-race acts, as will be shown in the following Part, and is not appropriate for modern Illinois conveyances.

3. A Clear, Concise, and Conclusive Pure-Notice Statute Must Ultimately Be Adopted by the Illinois General Assembly To Provide Protection for Subsequent Purchasers

When applying a pure-notice act, a prior purchaser cannot enforce his or her interest against subsequent bona fide purchasers who acquire an interest for value *without notice* of the prior interest.[91] The primary benefit of a notice recording statute is the achievement of equitable results because a subsequent purchaser cannot prevail if the notice of a prior conveyance was a warning to not take action.[92] As such, notice statutes align better with modern notions of fairness and justice than do race-type statutes.[93]

The United States District Court for the Southern District of Illinois recently decided the rather intriguing case of *United States v. Hall*, which

87. *Id.*
88. *See supra* note 14.
89. THOMAS P. LEMKE ET AL., MORTGAGE-BACKED SECURITIES § 1:1 (2012)
90. *Id.*
91. POWELL, *supra* note 7, § 82.02[1][c][ii]; 11 THOMPSON ON REAL PROPERTY, *supra* note 4, § 92.08(b), at 159 (emphasis added).
92. POWELL, *supra* note 7, § 82.02[1][c][ii].
93. 11 THOMPSON ON REAL PROPERTY, *supra* note 4, § 92.08(b), at 159.

helps put these notions into perspective. A criminal defendant had plead guilty to manufacturing and possessing marijuana in his home.[94] By pleading guilty to the charges, he consented to the forfeiture of the property to the federal government.[95] However, the title to the house that he lived in was held by his ex-wife.[96] They had divorced only a few years earlier and the divorce decree awarded the house to the wife "as her sole and exclusive property . . . free and clear of any claim, right or interest of [the husband]."[97] The court had to decide whether the government could take the home used by the defendant to grow marijuana, even though title was held by the wife.[98] The government's main defense was that the ex-wife had not recorded her deed.[99] The court, looking to the Illinois Conveyances Act, determined that the government was not a subsequent purchaser because they did not pay value; the government was also not a creditor because it was not collecting on a debt of the defendant.[100] Because the defendant had "no interest in the subject property . . . the Government, stepping into his shoes, could not revive such an interest."[101] The court ultimately held for the lucky ex-wife,[102] even though the government's arguments about the ex-wife not having recorded her interest were persuasive, and the case could have easily gone the other way.

The *Hall* case demonstrates the injustice that can result when courts rely too heavily on a recording requirement. Although we do not know why the ex-husband was still living in the house, imagine if the ex-wife were to forfeit her interest in the house because her ex-husband was growing marijuana there and she had not recorded her divorce decree. The injustice is obvious.

Even worse, imagine if the marijuana-growing-defendant/ex-husband had sold the house to a subsequent purchaser who knew nothing of the ex-wife's unrecorded divorce decree nor had any knowledge about the pending government forfeiture action because, for some reason, the government's lis pendens action was not on the record. Again, the injustice involved in this transaction should be sufficient to relieve the subsequent purchaser of having to also win the race with the ex-wife to the courthouse to record the deed. This hypothetical illustrates that a recording requirement, whether pure-race or race-notice, can place an unnecessary burden on a good faith purchaser.

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94. 2008 WL 4594839, at *1 (S.D. Ill. Oct. 15, 2008).
95. *Id.*
96. *Id.* at *3.
97. *Id.*
98. *Id.* at *1.
99. *Id.* at *4.
100. *Id.* at *5.
101. *Id.* at *3.
102. *Id.* at *5.

A subsequent purchaser should not have to be concerned that a prior purchaser records before him or her; instead, subsequent purchasers should be required to check the record at the courthouse and then pursue their purchases, thereby promoting security and marketability of titles based on the availability of the records.[103] The conveniences of modern society allow purchasers to record their deeds quickly after the purchase, except in counties where recording is backlogged. Worst-case scenario, a purchaser may have to pay for over-night shipping if the purchase is not consummated in the county where the property is located.

However, despite security based on the records, problems may arise if a court second-guesses whether a subsequent purchaser performed a sufficient title search, or a court may be left deciding difficult factual questions about actual or inquiry notice.[104] For example, it may have been difficult to show that someone purchasing from marijuana-defendant Hall would have notice of Hall's ex-wife's interest in the property, especially if Hall had lived in the house for some time (at least long enough to grow gardens of marijuana) and his ex-wife's interest was unrecorded. To make this situation worse, evidence and testimony may not be as dependable by the time a dispute actually goes to trial.[105] The *Hall* case, decided over two years after the divorce,[106] would undoubtedly produce an array of evidence that may be undependable because divorcing parties or parties involved in criminal behavior may produce drastically conflicting evidence to protect their divided personal interests. Therefore, notice statutes can hinder both the efficiency of the judicial process and the reliability of the record.[107] However, deciding difficult factual questions and resolving challenging disputes is part of what courts and fact-finders are supposed to do. Promoting fairness, justice, and equity for the parties should take precedence over making a fact-finder's job less difficult.

The Illinois Appellate Court, Second District, recently decided the unusual case of *King v. DeKalb County*, which further confirms the importance of promoting equity in spite of difficult factual questions. *King v. DeKalb* involved a dispute about the zoning of real property.[108] King purchased fifty-three acres from Hegerman on which King wanted to build a residence and relocate his nursery.[109] King told Hegerman that he wanted to build a residence on the property and Hegerman allowed King to believe

103. *See* POWELL, *supra* note 7, § 82.02[1][c][ii]; 11 THOMPSON ON REAL PROPERTY, *supra* note 4, § 92.08(b), at 159.
104. *See* POWELL, *supra* note 7, § 82.02[1][c][ii].
105. *Id*.
106. *Hall*, 2008 WL 4594839, at *1.
107. 11 THOMPSON ON REAL PROPERTY, *supra* note 4, § 92.08(b), at 160.
108. King v. DeKalb Cnty. Planning Dep't, 917 N.E.2d 36, 38 (Ill. App. Ct. 2009).
109. *Id*.

that the zoning would allow it.[110] However, earlier that year, Hegerman had split a larger parcel creating the fifty-three-acre parcel and a smaller ten-acre parcel (which was sold to a different purchaser) pursuant to county zoning ordinances.[111] The county planning director approved the split and noted that the fifty-three-acre parcel was "not buildable for future residences."[112] The county planning director, as he had done for all other similar zoning approvals, instructed Hegerman to record the approval at the courthouse; but, Hegerman did not record the approval.[113] A title search did not reveal the zoning restrictions.[114]

The court faced a difficult factual question about who was responsible for recording the approval, with all of the parties pointing fingers at each other.[115] The court, relying on the Illinois Conveyances Act, ultimately decided for King by holding, "Clearly [the recording act] authorizes, indeed requires, a recording [by the prior purchaser, not the subsequent purchaser], and, therefore, . . . the failure to record the split of the Hegerman parcel makes the ensuing restrictions void as to a subsequent purchaser without notice—namely, King."[116] Again, like *Hall*, the *King* case was highly disputed, very fact-sensitive, and could have easily reached a different conclusion depending on where the court placed the respective responsibilities. However, in the end, the subsequent purchaser who took without notice prevailed.[117]

The *King* case made no reference as to whether King recorded his interest. Why? Because it was irrelevant in the face of the inequity that would have prevailed if King had forfeited his interests in reliance on the assurances of both Hegerman and the inadequate record at the courthouse. Equity demanded that the bona fide purchaser not suffer because the seller and the county failed to make certain that the zoning changes were recorded in order to provide notice to the world. Whether King had recorded his interest had no bearing on the ultimate resolution of the dispute. What if, for some reason, King had not recorded his interest and a pure-race or race-notice act (both of which would have required King to record) were applied? King would have been deprived of his interest because he failed to record, even though there was no subsequent purchaser or creditor and Hegerman (the prior purchaser) was not seeking an interest. Either type of race act, if applied in the *King* case, would have produced absurd and unnecessary results if King were required to record and failed to do so.

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110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 40-42.
116. *Id.* at 42.
117. *See id.* at 38.

Arguably, unlike race-type acts, a pure-notice statute may not promote recording by subsequent purchasers.[118] On the other hand, because subsequent purchasers could still forfeit their unrecorded interests to additional subsequent purchasers, pure-notice statutes may still promote prompt recordation.[119] Subsequent purchasers like King or LaSalle must record their interests if they want those interests to be protected against purchasers who take title after them. Recording their interests is self-serving and in their best interests. While a pure-notice act may not require recording by law, the risks that befall a purchaser who does not record sufficiently motivate any subsequent purchaser to record his or her interests or else risk a forfeiture to additional bona fide purchasers who are unaware of the unrecorded interests. Without legally requiring it, a pure-notice act fulfills the same objectives of race statutes in the promotion of recording, but without the harsh, inequitable results that so easily arise when race-type statutes are applied.

A pure-notice statute is most appropriate for modern Illinois conveyances because recording one's interest at the courthouse can be quick and easy. Modern modes of transportation and methods of shipment allow most interests to be recorded the same day. Subsequent purchasers should not be deprived of their interests, whether recorded or not, because a prior purchaser delayed in recording the prior conveyances. Likewise, subsequent purchasers must quickly record their subsequent purchases to protect their interests from further subsequent purchasers, and so it continues. A pure-notice act motivates all purchasers and creditors, whether prior or subsequent, to record their interests.

4. A Simple Clarification to the Current Statute Can Correct the Discord

The Illinois Conveyances Act is already written as a pure-notice type act. Senate Bill 2953 would substantially and detrimentally change the very essence of the Act. However, the substance of the Act does not need to be changed at all. To assure that their intentions are clear, the Illinois General Assembly must only make a few minor updates which would overturn the case law and clearly mandate which type of act is intended.

First, the court could refer to and adopt a method used by the Colorado General Assembly to precisely nail down and secure their intentions. This is the text of the Colorado recording act:

> No such unrecorded instrument or document shall be valid against any person with any kind of rights in or to such real property who first records

118. POWELL, *supra* note 7, § 82.02[1][c][iii].

119. 11 THOMPSON ON REAL PROPERTY, *supra* note 4, § 92.08(c), at 160.

> and those holding rights under such person, except between the parties thereto and against those having notice thereof prior to acquisition of such rights. *This is a race-notice recording statute*.[120]

While the language of the rest of the statute may be somewhat convoluted, the Colorado General Assembly precisely pronounced their intention so that, unlike Illinois courts, Colorado courts could not indulge in judicial legislation. The Illinois General Assembly could do likewise by maintaining the Act as it stands and including the following phrase: "This is a pure-notice recording statute." It could go even further by adding, "As a pure-notice recording statute, it shall be interpreted and applied as such." The key is that the Illinois General Assembly should clearly take a stand about their intentions so that the case law will be congruent with the Act as written.

In our modern, interstate economy, purchasers and creditors relying on the Illinois Conveyances Act should be able refer to it and quickly identify what type of recording act it is. They should not have to interpret an elusive statute clouded by case law that produces an outcome incongruent with the statute itself. Regardless of what specific action is taken, a clear pure-notice act should be established because it provides the most protection to subsequent purchasers while still motivating all purchasers and creditors to timely record their interests.

IV. CONCLUSION

Because the 1833 Illinois General Assembly gave no guidance about what was intended when they passed the recording act, courts were left with broad discretion to indulge themselves in a dispensation of judicial legislation in which an unnecessary recording requirement was created for subsequent purchasers. Senate Bill 2953, instead of clarifying the discord that exists, is regressive, unpopular, inequitable, and denies protection for subsequent purchasers who take title without notice of prior purchasers' interests. Instead, the Illinois General Assembly should adopt a simple clarification that would return the Illinois Conveyances Act to its intended pure-notice status, thereby providing much-needed equitable protection to subsequent purchasers and creditors.

120. COLO. REV. STAT. § 38-35-109 (2010) (emphasis added).