WHAT WERE LORD WESTBURY'S INTENTIONS IN PHILLIPS V PHILLIPS? BONA FIDE PURCHASE OF AN EQUITABLE INTEREST

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ABSTRACT. *In* Phillips v Phillips, *Lord Westbury stated that, against a bona fide purchaser faced with an 'equity' to rescind, "the Court will not interfere". This has been interpreted to mean that purchasers of even an equitable interest shall take free of prior equities. Yet the distinction between 'equities' and equitable interests has been, and remains, uncertain; some have therefore questioned the intent behind Phillips. This paper shall elucidate Lord Westbury's intentions within their historical context and argues that Phillips offers a coherent, functional explanation of both: (i) the protection given to equity's darling; and (ii) how that protection was effected.*

KEYWORDS: legal History, Equity, Priority, Bona Fide Purchase.

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I. INTRODUCTION

The equitable defence of bona fide purchase for value without notice has been, and remains, a foundational rule of equity jurisprudence. As Lord Briggs recently observed of the doctrine: "Equity has a special fondness for bona fide purchasers for value without notice. That is why they are called equity's darlings".[1] The defence has traditionally served a foremost role in settling priority disputes between legal and equitable property rights in the conveyancing context,[2] but has also demarcated the outermost limits of equitable intervention; for against equity's darling, a court of equity does not exercise jurisdiction.[3] The defence continues to play a similar role in equitable doctrine today,[4] though within a much narrower compass. In a small and ever-diminishing corner of unregistered conveyancing in England and Wales, the defence still operates.[5] However, it is really within the context of equitable proprietary remedies, such as the range of claims available following a breach of trust,[6] or claims to rescind or rectify voidable transfers of title,[7] that bona fide purchase retains an ongoing practical significance.

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[1] *Re Stanford International Bank Ltd* [2019] UKPC 45, [2020] 1 B.C.L.C. 446, at [70].

[2] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] A.C. 424, at [62] Lord Neuberger.

[3] *Wortley v Birkhead* (1754) 28 E.R. 364, 366 (Ch.); D.E.C. Yale (ed.), *Lord Nottingham's Chancery Cases,* vol. II, (London 1961), 160.

[4] D. Fox, "Purchase for Value Without Notice" in P. Davies, S. Douglas and J. Goudkamp (eds.), *Defences in Equity* (Oxford 2018), 54.

[5] S. Bridge, E. Cooke and M. Dixon, *Megarry & Wade, The Law of Real Property*, 9th ed., (London 2019), [5–006].

[6] Fox, "Purchase for Value Without Notice", 54.

[7] *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch. 281, at [162]–[167]; A. Nair, *Claims to Traceable Proceeds: Law, Equity and the Control of Assets* (Oxford 2018), [7.28].

We nowadays treat the acquisition of the legal estate as a necessary precondition to raising the defence.[8] However, in 1861, Lord Westbury laid down the following rule in *Phillips v Phillips*:

> [W]here there are circumstances that give rise to an equity as distinguished from an equitable estate—as for example, an equity to set aside a deed for fraud, or to correct it for mistake—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere.[9]

Though Lord Westbury did not explicitly say as much in the gobbet above, His Lordship has been subsequently interpreted as holding that, when faced by a prior 'equity', the bona fide purchaser of even an equitable interest may also plead the defence.[10] *Phillips* therefore represents an exception to the otherwise general approach that disputes between successive *equitable* entitlements are resolved using the 'first in time' priority rule.[11] Where both parties assert equitable rights, the reasoning in *Phillips* remains practically important in demarcating those disputes resolved by the bona fide purchase defence, from those resolved using the equitable priority rules.[12] For this reason, the rule is not yet pure legal history but still belongs in practitioners' texts.

This paper concerns the proper interpretation of *Phillips v Phillips*. The decision has been insightfully analysed by Dominic O'Sullivan QC in a paper in which he argues that Lord Westbury has been widely, and consistently, misunderstood.[13] In truth, Lord Westbury would not have resolved disputes between 'equities' and equitable interests by using the title-clearing defence.[14] Rather, on Lord Westbury's true view, disputes between 'equities' and equitable interests were always resolved using the 'first in time' priority rule.[15] Such is clear, O'Sullivan argues, from Lord Westbury's decision in *Eyre v Burmester*, delivered less than a year after *Phillips*, which saw a prior 'equity' to rescind come head-to-head against a subsequent equitable interest acquired by a bona fide purchaser.[16] Despite this, Lord Westbury seemingly disregarded his statement in *Phillips* and applied the 'first in time' rule in favour of the prior, rescinding-claimant.[17] Lawyers subsequently overlooked *Eyre v Burmester* with the net-result that a number of taxonomical problems attributable to the application of the rule in *Phillips* have arisen; namely, the confusion as to which entitlements are 'mere equities' and why.[18]

Although O'Sullivan's article is almost two decades old, it remains the most thorough, contemporary exegesis of the decision in *Phillips* within that decision's historical context.[19] This paper seeks to revisit that context to argue against a key pillar of O'Sullivan's thesis; namely, Lord Westbury's true intentions behind the judgment in *Phillips v Phillips*.[20] In truth,

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[8] Bridge et al., *Megarry & Wade*, 9th ed., [5-009]; J. McGhee and S. Elliott (eds.), *Snell's Equity*, 34th ed., (London 2019), [30–065]; L. Tucker, N. Le Poidevin and J. Brightwell, *Lewin on Trusts*, 20th ed., (London 2020), [44–121].

[9] *Phillips v Phillips* (1861) 45 E.R. 1164, 1167 (Ch.).

[10] *Ernest v Vivian* (1864) 33 L.J. Ch. (N.S.) 513, 519.

[11] *Halifax Plc v Omar* [2002] EWCA Civ 121, [2002] 2 P. & C.R. 26, at [68].

[12] Ibid., at [68].

[13] D. O'Sullivan, "The Rule in *Phillips v Phillips*" (2002) 118 L.Q.R. 296, 296–300.

[14] Ibid., at 309.

[15] Ibid., at 310.

[16] Ibid., at 311–15.

[17] Ibid., at 312–13.

[18] Ibid., at 314–16.

[19] Moreover, the last edition of his co-authored text on the law of rescission suggests that O'Sullivan still holds to the views set out in his L.Q.R. piece. A footnote cites the paper and comments, "[i]t is doubtful that later cases correctly understood Lord Westbury's true opinion on this point": D. O'Sullivan, S. Elliott and R. Zakrzewski, *The Law of Rescission*, 2nd ed., (Oxford 2014) at [21.69] n. 107.

[20] Given this narrow focus, this paper shall not engage with the full range of argument O'Sullivan makes against the rule in *Phillips* in his L.Q.R. piece, particularly his observations upon the competing explanations for the rule as a 'defence' of bona

Lord Westbury meant what he said in *Phillips*. Not only did O'Sullivan not accurately interpret *Eyre v Burmester*, but his paper also overlooked a subsequent dispute in the same litigation that puts Lord Westbury's views beyond doubt.[21]

The paper shall first elucidate the reasoning in *Phillips* within its historical context; we shall see that Lord Westbury undertook an extensive survey of bona fide purchase within the legal and procedural landscape of 1861 with the likely aim of addressing contemporary uncertainty surrounding the defence. O'Sullivan's argument shall then be considered in light of the *Eyre v Burmester* litigation and rejected in sections three and four. A fifth section will then defend the rule in *Phillips* against that claim that the application of its ratio rests on an uncertain distinction between 'equities' and equitable interests.[22] Lord Westbury only used this terminology to articulate a conceptual argument that bona fide purchase had a distinct *function* from that performed by the equitable priority rules. Whereas bona fide purchase enabled the defendant to keep a right *in specie* free a claim to that same right,[23] the equitable priority rules governed disputes between a number of equitable proprietary rights.[24]

II. *PHILLIPS V PHILLIPS* (1861)

Phillips v Phillips was an equitable priority dispute between an equitable annuitant and a subsequent equitable interest arising under a marriage settlement. Both at first instance,[25] and before Lord Westbury,[26] the defendants' plea of bona fide purchase was dismissed. Rather, the dispute was resolved by the 'first in time' equitable priority rule which, in the absence of postponing conduct,[27] ranks equitable interests in order of their creation. On the facts of *Phillips*, this rule gave priority to the claimant's prior annuity.

The dispute originated in the intestate death of William Phillips in 1820, when his eldest son and heir-at-law, John Phillips, made a number of provisions for the family.[28] In February 1820, John signed a deed under which he promised to: (i) pay each of his younger siblings £150; and (ii) granted an annuity of £20 per annum to his youngest brother, also William Phillips, payable upon the death of their mother, Rebecca Phillips. In return for John's undertaking, each of the younger siblings assigned their shares in their father's personal estate to him. Moreover, Rebecca Phillips promised to support the younger William financially until her death, at which time the annuity would become payable.[29] The deed recited that William Phillips senior was, at the time of his death, entitled to two legal estates both of which were mortgaged such that the legal estates were outstanding in trustees; it was the Blanaway estate that secured the younger William's annuity.[30]

One year later, in May 1821, John Phillips transferred the Blanaway estate to trustees to hold on settlement in anticipation of his marriage to Mary Roberts. It was under the terms of

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fide purchase as opposed to the defendant purchaser acquiring a 'superior equity' to the claimant by pleading the defence: O'Sullivan, "The Rule in *Phillips v Phillips*", 319–22.

[21] As is made clear in a footnote directing the reader to subsequent litigation in the *Eyre v Burmester* dispute and omitting the 1864 decision: O'Sullivan, "The Rule in *Phillips v Phillips*", 311 n. 88.

[22] Namely, "an equity as distinguished from an equitable estate": *Phillips v Phillips* (1861) 45 E.R. 1164, 1167 (Ch.).

[23] A. Nair and I. Samet, "What Can 'Equity's Darling' Tell Us about Equity?" in D. Klimchuk, I. Samet and H. Smith (eds.), *Philosophical Foundations of the Law of Equity* (Oxford 2020), 284.

[24] Ames, "Purchase for Value Without Notice", 3; B. McFarlane, *The Structure of Property Law* (Oxford 2008), 187–88, 243–44.

[25] *Phillips v Phillips* (1861) 66 E.R. 382, 385 (Ch.).

[26] *Phillips v Phillips* (1861) 45 E.R. 1164, 1166 (Ch.).

[27] *Rice v Rice* (1853) 61 E.R. 646, 648 (Ch.).

[28] *Phillips v Phillips* (1861) 66 E.R. 382, 382–83 (Ch.).

[29] *Phillips v Phillips* (1861) 45 E.R. 1164, 1166 (Ch.).

[30] Ibid., at 1164.

this settlement that the defendants to the eventual suit in *Phillips*, John Phillips junior and George Phillips, claimed title as bona fide purchasers. A few years later, in 1825, John Phillips senior died intestate.

In December 1839 Rebecca Phillips died and William Phillips' annuity became payable.[31] The first quarterly instalment fell due the following March but was unpaid. William Phillips filed suit shortly afterwards, seeking an account and payment of the annuity together with the appointment of a receiver. By the time of suit, the equity of redemption in the Blanaway estate had devolved to John and George Phillips, which they held as equitable tenants in common.[32] Their bill answered the claimant's claim in several ways: (i) that the annuity was void for want of consideration; (ii) that the suit ought properly to be enforced at law; and (iii) that the claim fell within the Statute of Limitations.[33]

It was only later on, at a subsequent hearing, that the defendants sought to raise the plea of bona fide purchase.[34] As the legitimate children of John and Mary Phillips claiming under the marriage settlement, the defendants could be plausibly described as 'purchasers for value' of their equitable interest under the law as it then stood. There was a longstanding legal fiction that the children of a marriage were themselves parties to the settlement and so were 'purchasers' of any title held under that settlement.[35] Moreover, marriage consideration had long been recognised as 'valuable' consideration, both at law and in equity.[36] In terms of 'notice' of the prior annuity, this had to be assessed in May 1821 at the time John Phillips senior had transferred his interest in the Blanaway estate into the settlement.[37] This was the most difficult element of the plea for the defendants to meet,[38] but they relied upon: (i) their father's covenant of 1821 that the Blanaway estate was unencumbered save for a prior legal mortgage;[39] and (ii) their mother's affidavit, sworn at the hearing, in which she denied any knowledge of the annuity at the time of her marriage.[40]

Placing the substantive elements of the plea to one side however, the defendants' main difficulty was a rule of pleading; the issue was that they had sought to raise the plea by way of an affidavit subsequently to, and separately from, their initial answer to the claimant's bill. That the defendants tried to plead bona fide purchase at the hearing in this way was troublesome in two respects: (i) they had not pleaded the defence at the time of their initial answer to the claimant's bill; and (ii) nor had they *explicitly* denied notice in their answers.[41] This raised a basic issue of procedural fairness: then, as now, the broad purpose of pleading was to establish the arguments that were central to the dispute and therefore notifying each side of the issues they would need to address at the hearing.[42] Yet, more prosaically, there was an established rule of pleading that stood in the defendants' way, and on which point they failed before Sir

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[31] *Phillips v Phillips* (1861) 66 E.R. 382, 383–84 (Ch.).
[32] *Phillips v Phillips* (1861) 45 E.R. 1164, 1165 (Ch.).
[33] *Phillips v Phillips* (1861) 66 E.R. 382, 383–84 (Ch.).
[34] Ibid., at 385–86.
[35] *Felton Harvey and Dorothy his Wife v Solomon Ashley and Others* (1748) 26 E.R. 1150, 1152 (Ch.); *Hill v Gomme* (1839) 41 E.R. 366, 368 (Ch.).
[36] "[I]t has never been doubted that marriage is a valuable consideration": *Clarke, Representative of Dickinson, Deceased v Wright* (1861) 158 E.R. 350, 361 (Ex.); A. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford 1987), 364–73; Law of Property Act 1925, s. 205(1)(xxi).
[37] *Bassett v Nosworthy* (1673) 23 E.R. 55, 56 (Ch.).
[38] Sir John Stuart V.C. made the obvious point of the defendants that "they never could have had notice, because they were unborn persons at the time when the consideration passed": *Phillips v Phillips* (1861) 66 E.R. 382, 385 (Ch.).
[39] *Phillips v Phillips* (1861) 45 E.R. 1164, 1165 (Ch.).
[40] The defendants failed on both of these points at first instance, Sir John Stuart V.C. holding that neither the covenant nor the affidavit provided sufficient evidence of a lack of notice: *Phillips v Phillips* (1861) 66 E.R. 382, 385 (Ch.).
[41] Ibid., at 383.
[42] Ibid., at 384.

John Stuart V.C. at first instance.[43] It is worth briefly unpacking this point to make clear Lord Westbury's likely objectives in his judgment in *Phillips*.

A. The Procedural Issue

To any bill in equity, the defendant could respond in one of three ways. The defendant could 'demur' (i.e. refuse to answer) a bill which contained an obvious defect or drafting error, or which failed to disclose a material claim.[44] Assuming the bill was not defective, the defendant was obliged to 'answer' the bill on oath, stating whether the facts outlined in the bill were true.[45] However, if the claimant was dissatisfied with the initial answer, he or she was entitled to amend his or her original bill in order to compel further answer from the defendant.[46] This process would normally continue until the dispute had come to a head in some way and a hearing became necessary. To avoid the obligation to answer on oath, with the attendant risk of perjury, it was necessary to raise a 'plea'.[47] A plea functioned by delineating the dispute to a single cause or issue which would provide a complete defence, either to the claimant's whole bill or to a particular claim within the bill.[48] Any claim to which the defendant could plead bona fide purchase was one on which the claimant could not compel an answer.[49] Frequently, this would render the entire claim redundant, with the result that the claimant's bill was dismissed entirely.[50] It was in this sense that bona fide purchase functioned as a 'plea in bar' to equitable relief, thereby providing the defendant with a complete defence.[51]

As a corollary of this, it had been an established rule of pleading for several decades prior to *Phillips* that bona fide purchase had to be pleaded *alongside* the defendant's 'answer' to the claimant's bill.[52] This was not only so as to give the claimant fair warning, as noted above, but also because the plea's success or failure would determine the *extent* to which the defendant needed to answer the bill, if at all.[53] The defendants attempts to side-step this difficulty in *Phillips* were unsuccessful before Stuart V.C. who found against them for having surprised the claimant with new issues raised at the hearing, which deprived him "of the privilege of having questions fairly stated and fairly put in issue".[54]

Therefore, there was a procedural reason to find for the claimant in *Phillips*, which Lord Westbury upheld on review: "[t]he Vice Chancellor in his judgment refused to admit the defence… and I entirely agree with him in the conclusion that such a defence requires to be pleaded by the answer, more especially where an answer has been put in".[55] However, Lord Westbury continued:

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[43] Ibid., at 385.

[44] J. Story, *Commentaries on Equity Pleadings and the Incidents Thereof According to the Practice of the Courts of Equity, of England and America*, 6th ed., (Boston 1857), 432–41; C.C. Langdell, *A Summary of Equity Pleading*, 2nd ed., (Cambridge Mass. 1883), 106–08.

[45] *Rowe v Teed* (1808) 33 E.R. 794, 797 (Ch.); Langdell, *A Summary of Equity Pleading*, 2nd ed., 226.

[46] J. Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill*, 5th ed., (London 1847), 15–16; C.C. Langdell, "Discovery under the Judicature Acts, 1873, 1875. Part II" (1897) 11 H.L.R. 205, 207–08, 211–12.

[47] C.C. Langdell, "Discovery under the Judicature Acts, 1873, 1875. Part I" (1897) 11 H.L.R. 137, 138.

[48] Story, *Commentaries on Equity Pleadings*, 6th ed., 582–3.

[49] Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery*, 5th ed., 158, 229; Langdell, *A Summary of Equity Pleading*, 2nd ed., 215–19.

[50] Story, *Commentaries on Equity Pleadings*, 6th ed., 412; *G. Cooper, A Treatise of Pleading on the Equity-Side of the High Court of Chancery* (London 1809), 281.

[51] *Bassett v Nosworthy* (1673) 23 E.R. 55, 56 (Ch.).

[52] *Lord Portarlington v Soulby* (1833) 58 E.R. 628, 628; H Seton, *Forms of Decrees in Equity, and of Orders Connected with Them: With Practical Notes*, 3rd ed., vol 2, (London 1862), 1054.

[53] *Rowe v Teed* (1808), 33 E.R. 794, 797 (Ch.); *Ovey v Leighton* (1825) 57 E.R. 335, 336 (Ch.).

[54] *Phillips v Phillips* (1861) 66 E.R. 382, 385 (Ch.).

[55] *Phillips v Phillips* (1861) 45 E.R. 1164, 1166 (Ch.).

> But I do not mean to rest my decision upon that particular ground because I have permitted the argument to proceed with reference to the general proposition… that the doctrine of a Court of equity was… that it would give no relief whatever to any claimant against a purchase for valuable consideration without notice.[56]

This gives important context to Lord Westbury's wider purpose in *Phillips*; His Lordship was not content to dismiss the suit on a point of pleading but went on to provide a substantive rationale for the procedural outcome. This observation is worth making because, given the lengths to which Lord Westbury went to explain the doctrine of bona fide purchase, it is highly unlikely that the judgment in *Phillips* does not represent Lord Westbury's considered view on that doctrine. The question is: why did Lord Westbury see fit to embark on this task and what exactly was he trying to achieve?

The answer is to be found by placing *Phillips* in its historical context; although Lord Westbury did not explicitly say as much, it is highly likely that His Lordship was seeking to address the conspicuous uncertainty surrounding bona fide purchase in this period.[57] As Fry J would observe of the doctrine just two decades after *Phillips* was decided, "[c]riticisms upon old cases lie many strata deep, and eminent Lord Chancellors have expressed diametrically opposite conclusions upon the same question".[58] For this reason, as was observed of *Phillips* at the time, Lord Westbury could not provide a single, overarching enunciation of bona fide purchase fit to reconcile the cases, but had to make do with a survey of those contexts in which the plea was most frequently raised.[59]

As we will see more thoroughly in the next section of the paper, Lord Westbury was constrained to adopt this method because the plea was widely available across several, distinct contexts which rendered it impossible to hone the defence down to a single fact-pattern.[60] As a result, there was an authoritative view that saw bona fide purchase as an absolute bar to equity's jurisdiction, *regardless* of the interests held by the parties to the dispute. Lord St Leonard's extra-curial writing gave formidable weight to decisions consistent with this view of the defence.[61] Such a view posed an obvious temptation to the defendants in *Phillips*,[62] who after all were purchasers of an *equitable* interest for marriage consideration faced with a prior equitable interest.[63]

Therefore, Lord Westbury's implicit aim in *Phillips* was to explain both: (i) *why* the defence of bona fide purchase was, for reasons of substance, unavailable to the defendants; and (ii) *why* their dispute was instead to be resolved using the 'first in time' priority rule.[64] The distinction between 'equities' and 'equitable interests' in his third category of bona fide purchase served both ends simultaneously by predicating each rule's distinct sphere of operation upon an initial classificatory exercise.[65] This served to recharacterise bona fide

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[56] Ibid., at 1166.

[57] W. Ashburner, *Principles of Equity*, 1st ed., (London 1902), 67; *Cave v Cave* (1880) 15 Ch. D. 639, 646.

[58] *Cave v Cave* (1880) 15 Ch. D. 639, 646.

[59] As was observed of *Phillips* at the time: F. Haynes, *Observations on the Defence of Purchase for Valuable Consideration Without Notice* (London 1880), 4–5

[60] *Attorney-General v Wilkins* (1853) 51 E.R. 1043, 1146 (Ch.); *Colyer v Finch* (1856) 10 E.R. 1159, 1165 (H.L.); E. Sugden, *A Concise and Practical Treatise of the Law of Vendors and Purchasers of Estates* 14th ed., (London 1862), 721.

[61] "Till the case of *Phillips v Phillips* the validity of the defence against an equitable title appears not to have been questioned": Sugden, *A Concise and Practical Treatise*, 14th ed., 798, 796–98.

[62] *Phillips v Phillips* (1861) 66 E.R. 382, 384 (Ch.); *Phillips v Phillips* (1861) 45 E.R. 1164, 1165 (Ch.).

[63] On the specific meaning of 'purchaser' in the context of the defence, see: *Great Investments Ltd v Warner* [2016] FCAFC 85, at [105]; Bridge et al., *Megarry and Wade*, 9th ed., [6–008].

[64] Indeed, in the decade prior to *Phillips*, there had been a couple of decisions in which the defence had been successfully pleaded by the purchaser of a vested equitable interest *against* a prior vested equitable interest and even a prior registered judgment: *Penny v Watts* (1850) 64 E.R. 224, 233; *Lane v Jackson* (1855) 52 E.R. 710, 711.

[65] *Ernest v Vivian* (1864) 33 L.J. Ch. (N.S.) 513, 519; *Cave v Cave* (1880) 15 Ch. D. 639, 646; *Keate v Phillips* (1881) 18 Ch. D. 560, 578–80; *Re Ffrench's Estate* (1887) 21 L.R. (Ir.) 283, 304–05, 319–22, 331–33 (C.A. Ir.); *Cloutte v Storey* [1911] 1

purchase as a relatively narrow, instance-specific doctrine quite distinct from the equitable priority rules. By this means, Lord Westbury had rejuvenated an orthodoxy first laid down by Lord Nottingham,[66] but which had since been obscured by two centuries of often inconsistent authority.

With this outline of the context in which *Phillips* was decided, we can better appreciate Lord Westbury's true thoughts on bona fide purchase.

B. Lord Westbury's Substantive Reasoning

In substantive terms, Lord Westbury's primary strategy was to reason by a process of elimination. Recall that the defendant's proposition was that the bona fide purchase doctrine was an absolute bar to equity's jurisdiction and *generally* available to innocent purchasers regardless of the interests held by each party to the dispute. In response, Lord Westbury surveyed "the three cases in which the defence in question is most commonly found" and concluded that "[n]one of them involve the case that is now before me".[67]

1. Auxiliary jurisdiction

The first of Lord Westbury's categories of bona fide purchase was the plea's role within equity's auxiliary jurisdiction. By 1861, Chancery practitioners had become accustomed of thinking of equitable doctrine in terms of three heads of jurisdiction: auxiliary, concurrent and exclusive.[68] The three heads were premised upon the split-jurisdictions of law and equity.[69] For this reason, perhaps, it did not survive the Judicature Reforms as a classificatory scheme.[70] The auxiliary jurisdiction mostly concerned pre-suit procedure, such as the discovery of documents and the perpetuation of testimony.[71] The claimant who filed a bill under the auxiliary jurisdiction was not necessarily seeking any kind of *substantive* relief in Chancery.[72] Rather, the claimant would typically only come into Chancery to avail of its superior procedural mechanisms so as to unearth evidence needed for a parallel suit in the common law courts.[73] Therefore, the claimant who filed a bill under the auxiliary jurisdiction often did so with an eye toward vindicating a legal title in the law courts.[74]

However, if the claimant needed Chancery's aid to discover documents he or she believed to be in the defendant's possession,[75] such as title-deeds needed to prove the claimant's title to the legal estate,[76] then a bill for discovery would almost inevitably include a prayer for

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Ch. 18, 24 (C.A.). Though we will see in section V that the distinction between 'equities' and interests was only terminological; the ultimate distinction between bona fide purchase and the equitable priority rules reflected a conceptual difference of 'function'.

[66] Namely, that bona fide purchase was unavailable in the context of a priority dispute between several equitable interests: Yale, *Lord Nottingham's Chancery Cases*, 162, 475; D.E.C. Yale, *Lord Nottingham's "Manual of Chancery Practice" and "Prolegomena of Chancery and Equity"* (Cambridge 1965), 210.

[67] *Phillips v Phillips* (1861) 45 E.R. 1164, 1167 (Ch.).

[68] D.E.C. Yale, "A Trichotomy of Equity" (1985) 6 J.L.H. 194, 194–97.

[69] The taxonomy was not conceptually rigorous and there was no detailed consensus amongst writers as to which doctrines belonged under which head of jurisdiction: M. MacNair, "Equity and Conscience" (2007) 27 O.J.L.S. 659, 656–6.

[70] Yale, *A Trichotomy*, 194.

[71] *Ind, Coope & Co v Emmerson* (1887) 12 App. Cas. 300, 305 (H.L.); Ashburner, *Principles of Equity*, 1st ed., 10–11.

[72] Though substantive relief was not infrequently sought in the same bill: *Ind, Coope & Co v Emmerson* (1887) 12 App. Cas. 300, 305 (H.L.).

[73] Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery*, 5th ed., 64–7, 155–56, 226–29.

[74] R. Willoughby, *The Distinctions and Anomalies Arising Out of the Equitable Doctrine of The Legal Estate* (Cambridge 1912), 24.

[75] J. Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Cambridge Mass. 1913), 266.

[76] *Wallwyn v Lee* (1803) 32 E.R. 509 (Ch.).

substantive relief; namely, the delivery-up of those deeds.[77] This would necessarily prejudice the defendant insofar as those title-deeds could then be used to bring an action of ejectment against him or her in the law courts.[78] From a very early period therefore, equity would not grant discovery or relief against a defendant who could plead bona fide purchase of the title-deeds,[79] giving the defendant the practical advantage of disabling the claimant from regaining possession of the land in the law courts.[80]

This first category obviously had no application to the disputants in *Phillips*; the claimant was not seeking discovery in aid of proving a legal title but was suing on an equitable annuity.

2. *Tabula in naufragio*

Lord Westbury's second category was the *tabula in naufragio* ('plank in a shipwreck') doctrine.[81] The paradigm context in which the doctrine applied was an equitable priority dispute: a subsequent incumbrancer would acquire an equitable interest bona fide and without notice of prior interests, only to then discover such interests; in this context, the defendant was permitted to cast around for a legal right with which to improve his or her position.[82] Though the legal right would necessarily be acquired *with* notice of prior interests, this did not affect the defendant so long as his or her initial purchase had been made without notice.[83] If the 'shipwreck' was an equitable priority dispute, then the legal 'plank' was the way by which a subsequent incumbrancer could escape the 'first in time' priority rules and avail of the alternative rule that: 'where the equities are equal, the legal title prevails'.[84]

There were two broad ways in which a legal right could help the defendant. Certain rights, such as an old satisfied term, would give the defendant the paramount right to possess land at law.[85] Depending on the circumstances, this right to possession may provide the defendant with leverage against a prior equitable incumbrancer for whom obtaining possession of the land was the first step toward realising an equitable right of redemption.[86] Alternatively, the defendant could acquire a precedent legal mortgage to which he or she could then 'tack' his or her subsequent equitable mortgage.[87] In both instances it was not necessary that the legal title was vested in the defendant personally; it would suffice if the right was held by a trustee on the defendant's behalf thereby giving the defendant the 'better right' to call for the legal title as against prior incumbrancers.[88]

The defendants in *Phillips* sought to bring themselves within the scope of the *tabula in naufragio* doctrine by arguing that the fact of their possession of the land constituted a 'tabula' of which they would not be deprived as bona fide purchasers. This was obviously untenable: the legal tabula had to give the defendants the paramount legal *right* to possess the land at law;

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[77] Ames, *Lectures on Legal History*, 266.

[78] *Carver v Pinto Leite* (1871–72) L.R. 7 Ch. App. 90 (C.A.); Sugden, *A Concise and Practical Treatise*, 14th ed., 503.

[79] *Bassett v Nosworthy* (1673) 23 E.R. 55, 55 (Ch.).

[80] Ibid., at 56; Langdell, "Discovery under the Judicature Acts, 1873, 1875. Part II", 211–12.

[81] *Phillips v Phillips* (1861) 45 E.R. 1164, 1167 (Ch.); Yale, *Lord Nottingham's Chancery Cases*, 69–87.

[82] *Marsh v Lee* (1670) 86 E.R. 473, 474 (K.B.); *Le Neve v Le Neve* (1747) 26 E.R. 1172, 1175–77 (Ch.); *Wortley v Birkhead* (1754) 28 E.R. 364, 365–66 (Ch.); *Willoughby v Willoughby* (1756) 28 E.R. 571, 579 (Ch.); Yale, *Lord Nottingham's Chancery Cases*, 69–87, 160–64.

[83] *Wortley v Birkhead* (1754) 28 E.R. 364, 366 (Ch.).

[84] *Brace v Duchess of Marlborough* (1728) 24 E.R. 829, 831 (Ch.); *Willoughby v Willoughby* (1756) 28 E.R. 571, 582 (Ch.); E. Snell, *The Principles of Equity: Intended for the Use of Students and the Profession*, 1st ed., (London 1868), 108.

[85] *Willoughby v Willoughby* (1756) 28 E.R. 571, 578 (Ch.); *Goleborn v Alcock* (1829) 57 E.R. 894, 895 (Ch.).

[86] *Chinnery v Evans* (1864) 11 E.R. 1274, 1283 (H.L.); *Willoughby v Willoughby* (1756) 28 E.R. 571, 579 (Ch.).

[87] By 'tacking' we mean the defendant's amalgamating his or her two securities to the prejudice of an intermediate, equitable incumbrancer. In order to 'tack' securities in this way the defendant obviously needed to get the *precedent* legal mortgage: *Phillips v Phillips* (1861) 45 E.R. 1164, 1167 (Ch.); *Rooper v Harrison* (1855) 69 E.R. 704, 713–14 (Ch.).

[88] *Willoughby v Willoughby* (1756) 28 E.R. 571, 579 (Ch.).

the mere fact of possession of the land did not qualify.[89] As Lord Westbury noted, "[t]he purchaser will not be deprived of anything that gives him a legal right to the possession, but the possession itself must not be confounded with the right to it".[90] Indeed, the freehold estates were vested in legal mortgagees who did not hold those estates on trust for the defendants. Moreover, there was no 'practical advantage' to securing possession of the land against a prior, equitable annuitant who did not have any right to redeem specific land. In short, there was no analogy to draw between the dispute in *Phillips* and the typical fact-pattern in which the *tabula in naufragio* doctrine operated.

3. The third category: 'equities' and 'equitable interests'

It is worth our setting out the third of Lord Westbury's categories of bona fide purchase again in full:

> [W]here there are circumstances that give rise to an equity as distinguished from an equitable estate—as for example, an equity to set aside a deed for fraud, or to correct it for mistake—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere.[91]

We should pause here and make three observations. First, Lord Westbury had set himself the task of surveying the extant legal landscape to gather together common instances of the plea, and therefore, His Lordship was obliged to acknowledge a significant number of cases in which the court had recognised bona fide purchase as a defence against claims to rescind or rectify a deed, whether the defendant had acquired a legal estate,[92] or an equitable interest.[93] By 1861, these decisions were not few and must have been present to Lord Westbury's mind.[94] However, no prior decision *within* this line of authority had phrased the defence's availability in terms of an initial distinction between 'equities' and 'equitable interests';[95] though the phraseology was not novel, the use of it to distinguish the title-clearing defence from the equitable priority rules represents an original contribution of Lord Westbury.[96]

Therefore, and second, it is highly *unlikely* that Lord Westbury intended to exclude bona fide purchasers of equitable interests from his third category. Though strictly the third category was expressed in such a way as to be agnostic as to the type of right acquired by the defendant,[97] the distinction between 'equities' and 'equitable interests' would have otherwise been redundant if Lord Westbury had intended to limit the defence to those who had acquired legal

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[89] Ibid., at 579; *Chinnery v Evans* (1864) 11 E.R. 1274, 1283 (H.L.) (Lord Westbury).

[90] *Phillips v Phillips* (1861) 45 E.R. 1164, 1167 (Ch.).

[91] Ibid., at 1167.

[92] *Earl of Ardglasse v Muschamp* (1684) 23 E.R. 438, 439 (Ch.); *Warrick v Warrick & Kniveton* (1745) 26 E.R. 970, 972 (Ch.); *Bell v Cundall* (1750) 27 E.R.63, 63 (Ch.); *Kennedy v Green* (1834) 40 E.R. 266, 274 (Ch.); *Addis v Campbell* (1841) 49 E.R. 394, 397 (Ch.).

[93] *Malden v Menill* (1737) 26 E.R. 402, 405 (Ch.); *Sturge v Starr* (1833) 39 E.R. 918, 919 (Ch.); *Kennedy v Green* (1834) 40 E.R. 266, 274 (Ch.); *Robert Cole Bowen, a Minor, by his Mother and Next Friend v John Evans and Others* (1848) 9 E.R. 1090, 1100 (H.L.); *Bellamy v Sabine* (1857) 44 E.R. 842, 847 (Ch.); *Ogilvie v Jeaffreson* (1860) 66 E.R. 147, 158 (Ch.). For this reason, it is something of a misnomer to speak of 'the rule' in *Phillips v Phillips* as though it first arose in 1861; it is more accurate to say that Lord Westbury rationalised a pre-existing rule.

[94] Lord Westbury had served as counsel in several cases concerning rescission in the years immediately prior to *Phillips*, and had successfully invoked the plea of bona fide purchase for the defendants in *Bowen v Evans* before the Lords in 1848: *Bowen v Evans* (1848) 9 E.R. 1090, 1098 (H.L.); *Gresley v Mousley* (1859) 45 E.R. 31, 33–34 (Ch.); *Harper v Hayes* (1860) 45 E.R. 731, 732–33 (Ch.).

[95] There was an alternative line of authority in which the claim to rescind was characterised as an immediate equitable interest: *Stump v Gaby* (1852) 42 E.R. 1015, 1018 (Ch.); *Gresley v Mousley* (1856) 69 E.R. 789, 791 (Ch.).

[96] *Westminster Bank v Lee* [1956] Ch. 7, 18–19.

[97] As observed by O'Sullivan: O'Sullivan, "The Rule in *Phillips v Phillips*", 309.

rights in the way O'Sullivan suggests.[98] Finally, the language vis-à-vis bona fide purchase in the gobbet above is extremely clear; if Lord Westbury had meant to say that the defence was *not* available to the purchaser of an equitable interest against a prior equity then His Lordship chose his words uncharacteristically poorly.[99]

In any event, Lord Westbury used the distinction between 'equities' and 'equitable interests' to dispose of the defendants' attempt to raise the plea in *Phillips*. The claimant was not seeking to rescind nor to rectify the marriage settlement under which the defendants' claimed. Indeed, the claimant did not have any kind of an 'equity' but a vested equitable interest, with the result that "grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, 'Qui prior est tempore potior est jure'".[100]

C. Phillips: Concluding Remarks

Lord Westbury did not manage to quell the uncertainty surrounding bona fide purchase entirely, but it was no small achievement that *Phillips* was accepted by near-contemporaries as having conclusively delineated the equitable priority rules from bona fide purchase.[101] Within thirty years of the decision in *Phillips*, Ames was able to state in the inaugural issue of the *Harvard Law Review* that:

> It seems to have been a common opinion in early times that a court of equity would give no assistance against a purchaser for value without notice. But, in *Phillips v Phillips*, which at once became, and has since continued to be, the leading authority on this subject, this doctrine, which Mr. Sugden [the Lord St. Leonards] strenuously defended to the last, was definitively rejected.[102]

By way of his survey of the doctrine, together with his method of reasoning by process of elimination, Lord Westbury established that bona fide purchase was not *generally* available to any-and-all purchasers who could discharge the elements of the plea. For O'Sullivan, the outline above does indeed represent orthodoxy,[103] but that orthodoxy is itself the product of a consistent misinterpretation of Lord Westbury's reasoning.[104] In O'Sullivan's analysis, Lord Westbury's true approach to bona fide purchase and the equitable priority rules was very different from that presented above. We are now in a sure position to evaluate O'Sullivan's argument.

III. O'SULLIVAN'S ANALYSIS

There are two broad limbs to O'Sullivan's thesis concerning Lord Westbury's views on bona fide purchase. First, concerning bona fide purchase, O'Sullivan maintains that Lord Westbury did not in truth think that the defence was available to the purchaser of an equitable interest

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[98] Ibid., at 308–09.

[99] Lucidity was a particular virtue of Lord Westbury's judgments, which Holdsworth held up as "remarkable for their clear polished style, their clarity and their conciseness": W. Holdsworth, *A History of English Law*, 1st ed., vol. XVI, (London 1923), 87.

[100] *Phillips v Phillips* (1861) 45 E.R. 1164, 1166 (Ch.).

[101] *Ernest v Vivian* (1864) 33 L.J. Ch. (N.S.) 513, 519; *Cory v Eyre* (1863) 46 E.R. 58, 65 (Ch.); *Cave v Cave* (1880) 15 Ch. D. 639, 646 (Ch.); Ashburner, *Principles of Equity*, 75–7.

[102] J Ames, "Purchase for Value without Notice" (1887) 1 H.L.R. 1, 1.

[103] O'Sullivan, "The Rule in *Phillips v Phillips*", 304, 310.

[104] Ibid., at 297.

when faced with a prior 'equity' to rescind.[105] Rather, Lord Westbury would have limited it to those purchasers who had acquired a legal *right or advantage* on the occasion of their purchase.[106] O'Sullivan claims that we can see evidence for this view in *Phillips* in which, as we saw above, Lord Westbury rejected the defendants' argument that their factual possession of land gave them a 'legal advantage' which, as bona fide purchasers, a Court of equity would not deprive them.[107]

O'Sullivan buttresses this interpretation of *Phillips* by reference to Lord Westbury's decision in *Eyre v Burmester*, in which the demarcation between bona fide purchase of an equitable interest and the 'first in time' priority rule was relevant to the outcome. The claimant Eyre had been granted a legal mortgage over several Irish estates owned by his solicitor, John Sadleir. Eyre's mortgage was registered in December 1854.[108] However, Sadleir was deeply indebted to a bank in London from whom he then sought to borrow a further £95,000. The bank agreed and had advanced £75,000 by early August 1855 before its solicitor discovered the prior mortgage to Eyre.[109] The bank refused to proceed unless Sadleir got a release of Eyre's mortgage. Sadleir convinced the bank that he could secure the release by offering Eyre alternative securities; satisfied by this, the bank forwarded the remaining money to Sadleir and the mortgage was completed.[110]

It was not until October 1855 that Sadleir convinced Eyre to release his mortgage in exchange for a number of securities; in this transaction, although Eyre had acquired a legitimate mortgage over another estate in Ireland, Sadleir had also handed him forged shares and promissory notes.[111] This was sufficient fraud to render Eyre's release voidable.[112] The legal estates reconveyed to Sadleir remained with him until his suicide in February 1856 and were never transferred to the bank's nominated trustees.[113] In June 1857, the estates were ordered to be sold and the proceeds were transferred to the bank; it was not until June 1858 that Eyre filed a bill to rescind the release and claim a share of the proceeds commensurate with his original mortgage.[114]

In prior litigation before the Lord Chancellor in Ireland, the bank had successfully pleaded bona fide purchase for value without notice of Sadleir's fraud upon Eyre.[115] The Lords held the defence inapplicable on the facts because the bank had failed to get a transfer of a legal estate from Sadleir before he committed suicide. As Lord Westbury noted:

> A purchaser for valuable consideration without notice, will not be deprived by a Court of equity of any *advantage at law* which he has fairly obtained for his protection. But in the present case the estate reconveyed by Eyre, remained in Sadleir, and was never conveyed by Sadleir to the bank.[116]

O'Sullivan interprets this as a statement of principle; bona fide purchase only protected a legal right or advantage, such that the defence was not available to the bank on the facts of *Eyre v Burmester*. O'Sullivan observes:

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[105] Ibid., at 309.
[106] Ibid., at 309.
[107] Ibid., at 309.
[108] *Eyre v Burmester* (1862) 11 E.R. 959, 960 (H.L.).
[109] *Eyre v Burmester* (1864) 46 E.R. 987, 989 (Ch.).
[110] *Eyre v Burmester* (1862) 11 E.R. 959, 960 (H.L.); *Eyre v Burmester* (1864) 46 E.R. 987, 989 (Ch.).
[111] Ibid., at 960.
[112] Ibid., at 964.
[113] Ibid., at 961.
[114] Ibid., at 961.
[115] Ibid., at 962.
[116] Ibid., at 964.

> The indications are that for Lord Westbury, save in the special case of *tabula in naufragio,* the availability of the plea of bona fide purchase did not turn on whether the defendant purchased a legal or equitable interest, but on whether it was raised to protect a *legal right or advantage* he had obtained in making the purchase.[117]

This leads to the second limb of O'Sullivan's argument. Although, in *Phillips,* Lord Westbury unambiguously distinguished 'equities' from 'equitable interests' in his third category of the defence, O'Sullivan maintains that "[i]t is however not clear that Lord Westbury *also* says that the general rule (that rules of equitable priority and… not the plea of bona fide purchase determine the priority of successive equitable interests in property) only applies to interests that are not 'equities'".[118] Lord Westbury did not therefore truly intend the distinction to demarcate bona fide purchase from the 'first in time' priority rule.

Once more, the evidence in support of this second limb is drawn from *Eyre v Burmester*; as we saw above, Lord Westbury seemingly disallowed the defence because the bank had not acquired the legal estate. Insofar as the legal estates remained in Sadleir at the time of his death, counsel for the bank acknowledged that its mortgage was purely equitable vis-à-vis the estates included in the bank's security,[119] but which had previously been released to Sadleir by Eyre.[120] The Lords accepted that the bank had purchased this interest without notice of Sadleir's fraud upon Eyre. Given the bank's bona fide acquisition of an equitable mortgage without notice, Lord Westbury was faced with the exact fact-pattern of the third category of the defence he had previously outlined in *Phillips v Phillips*. Nevertheless, Lord Westbury did not follow that rule but instead applied the 'first in time' priority rule in Eyre's favour. It follows that Lord Westbury's true view was that equities to rescind 'registered' within the equitable priority rules and were not therefore subject to the plea of bona fide purchase. O'Sullivan concludes:

> Thus the innocent purchaser of an equitable interest in property could *not* plead bona fide purchase as against a prior claim to recover that property on rescission; the dispute was regulated by the principles of equitable assignment and priority; and the purchaser therefore obtained the interest subject to the claim to rescind. This is shown in his Lordship's decision in *Eyre v Burmester,* decided several months after *Phillips v. Phillips.*[121]

It is therefore clear that both limbs of O'Sullivan's argument represent two prongs in the same, general attack upon the orthodox interpretation of *Phillips*. It is *because* Lord Westbury limited the defence to those who had acquired a legal right or advantage at the time of their purchase that, in a dispute between an equity and an equitable interest in *Eyre v Burmester,* His Lordship applied the 'first in time' priority rule.

IV. O'SULLIVAN'S READING OF *EYRE V BURMESTER* (1862)

In truth, there is little support to be found in favour of either limb of O'Sullivan's argument in *Eyre v Burmester*. Rather, Eyre's litigation to assert his entitlement to rescind against the

[117] O'Sullivan, "The Rule in *Phillips v Phillips*", 309.
[118] Ibid., at 310.
[119] *Eyre v Burmester* (1864) 46 E.R. 987, 989 (Ch.).
[120] *Eyre v Burmester* (1862) 11 E.R. 959, 963 (H.L.).
[121] O'Sullivan, "The Rule in *Phillips v Phillips*", 311.

defendant bank really tells against O'Sullivan's thesis. We shall reflect upon each limb of his argument to demonstrate this.

A. First Limb: Bona Fide Purchase of a Legal Right or Advantage?

Regarding O'Sullivan's view that Lord Westbury would have limited the defence of bona fide purchase to those who had acquired some legal right or advantage on the occasion of their purchase, the answer must be that the interpretive pickings are slim; neither the structure nor the language of either decision really supports O'Sullivan's view.

Turning first to *Phillips*, the discussion of legal right or advantage was only relevant to the defendants' attempt to invoke the protection of the *tabula in naufragio* doctrine; after all, they were the subsequent equitable incumbrancers who needed the legal 'plank' in the shipwreck. Indeed, the only point in the judgment at which Lord Westbury uses the language of 'legal advantage' is in his discussion of that doctrine. This suggests that Lord Westbury's reference to 'legal advantage' in *Phillips* was purely *negative*; it only sought to deny the defendants a route toward the *tabula in naufragio* and did not advance any *positive* conception of the defence that tied its availability to the acquisition of a legal right or advantage in the way O'Sullivan suggests.

The same point holds true of *Eyre v Burmester*. Again, from the defendant bank's perspective, the doctrine of *tabula in naufragio* made most sense given that the bank had a subsequent equitable interest. The obvious difficulty was that the bank had never acquired the legal estates from Sadleir. Counsel for the bank sought to close this gap via estoppel, arguing that insofar as the release had been made purposefully "with Eyre's knowledge and concurrence" he was estopped from denying the efficacy of Sadleir's acquisition of the legal estate for the bank.[122] The Lords unanimously rejected this argument on a finding of fact; Eyre had not even known about Sadleir's dealings with the bank at the time he had given the release. The other route toward the *tabula in naufragio* was to argue that, despite its non-acquisition of the legal estates, the bank nonetheless had the 'better right' to call for the estates in Sadleir's hands. This argument was also rejected; given the fraud Sadleir had exercised to gain the release, it was Eyre who had the 'better right' to call for those estates.[123] As Lord Westbury noted:

> A purchaser for valuable consideration without notice, will not be deprived by a Court of equity of any advantage at law which he has fairly obtained for his protection. But in the present case the estate reconveyed by Eyre, remained in Sadleir, and was never conveyed by Sadleir to the bank… the claim of Eyre is against Sadleir by paramount right, to recover the estate of which Eyre had been deprived by fraud, and Sadleir acquired no interest to feed his prior contract by virtue of that fraudulent transaction.[124]

Just like the reasoning by elimination we saw in *Phillips*, Lord Westbury's discussion of legal right or advantage in *Eyre v Burmester* was solely negative; the discussion sought only to reject the bank's attempt to raise the *tabula in naufragio* doctrine and cannot be read as a prescription that the defendant acquire a legal right or 'advantage' in order to plead bona fide purchase. Moreover, as we shall see below, in a subsequent dispute in the *Eyre v Burmester* litigation in

[122] *Eyre v Burmester* (1862) 11 E.R. 959, 962–63 (H.L.).
[123] Ibid., at 964. Lord St. Leonards had previously reached the same conclusion on this point: *Bowen v Evans* (1844) 1 Jo. & Lat. 178, 265.
[124] Ibid., at 964.

1864, Lord Westbury recognised the availability of the plea to purchasers of equitable interests.[125] The first limb of O'Sullivan's argument must therefore be rejected.

B. Second Limb: 'Equities' and 'Equitable Interests'

Turning now turn to the second limb of the argument, O'Sullivan sees evidence in *Eyre v Burmester* that, faced with a dispute between an 'equity' to rescind and a subsequent equitable interest, Lord Westbury disallowed the plea of bona fide purchase and resolved the dispute using the 'first in time' priority rule. If this is true, the third category of bona fide purchase outlined in *Phillips* could not have been seriously meant. For two reasons, this inference from *Eyre v Burmester* is also unwarranted.

First, the third category of bona fide purchase was inapplicable on the fact-pattern of *Eyre v Burmester* because the bank acquired its equitable mortgage in August 1855 *before* Eyre was fraudulently induced to release his mortgage in October of that year.[126] The whole logic of bona fide purchase was, and remains, that the defendant acquired an interest without knowledge or notice of *prior* entitlements;[127] the plea had no relevance to the bank because they acquired their interest before Eyre's equity to rescind even existed. Lord Westbury acknowledged as much himself in 1864 when, in a subsequent instalment of the *Eyre v Burmester* litigation, he observed of the Lords' decision in 1862: "[t]he House had *not* to consider the effect of any dealing, subsequent to and on the faith of [Eyre's] release, between John Sadleir and a purchaser for valuable consideration without notice".[128]

This leads to the second key point: O'Sullivan overlooks the *prior* role of rescission in Lord Westbury's application of the equitable priority rules to the dispute. We can see this clearly if we make explicit some of the unstated premises in Lord Westbury's reasoning on this point. To do so, it is worth remembering that, in this period, equitable rescission was understood as a court-administered remedy characterised by a high degree of judicial control and oversight.[129] A claimant who had transferred title under an impugned transaction would file a bill to have that transfer 'set aside'.[130] Relief would be granted in the form of a final decree setting out instructions for a reconveyance of title, the delivery-up and cancellation of relevant conveyancing documents,[131] and the quantification of any monetary payments necessary to effect full *restitutio in integrum* between the parties.[132] The court's overarching aim throughout this process was to unwind the transaction *ab initio*.[133]

A key aspect of rescission was that the transferee was held to be a *constructive trustee* of any property originally transferred by the claimant.[134] The award of rescission explains Lord

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[125] Ibid., at 990.

[126] "[T]he only foundation of the bank's claim, is the mortgage by Sadleir *prior to* the deed of reconveyance": ibid., at 964 Lord Westbury.

[127] *Great Investments Ltd v Warner* [2016] FCAFC 85 at [105].

[128] *Eyre v Burmester* (1864) 46 E.R. 987, 990 (Ch.); *Gibbs v British Linen Co.* (1875) 4 R. 630, 635 (C.S.O.H.) (Lord Shand).

[129] "[A] Court of Equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence": *Erlanger v The New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218, 1278 (H.L.) (Lord Blackburn).

[130] In the decade following *Phillips*, the traditional equitable terminology of 'setting aside' an impugned transaction came to be recast in terms of the common law distinction between 'void' and 'voidable' transactions: *Richard Oakes v William Turquand and R P Harding (Peek v The Same, In re Overend, Gurney & Co.)* (1867) L.R. 2 H.L. 325, 345–46 (Lord Chelmsford L.C.); *Spackman v Evans* (1868) L.R. 3 H.L. 171, 245 (Lord Romilly); *Reese River Silver Mining Co. Ltd. v Smith* (1869-70) L.R. 4 H.L. 64, 73 (Lord Hatherley L.C.).

[131] *Heath v Crealock* (1874-75) L.R. 10 Ch. App. 22, 30–32 (C.A.).

[132] *Coulson v Allison* (1860) 66 E.R. 117, 120 (Ch.).

[133] *Small v Attwood* (1832) 159 E.R. 1051, 1101 (Ex.); J. Story, *Commentaries on Equity Jurisprudence, as Administered in England and America*, 7th ed., vol. II, (Boston 1857), 219.

[134] J. Pomeroy, *A Treatise on Equity Jurisprudence: As Administered in the United States of America*, 1st ed., vol. 2, (San Francisco 1882), 628–29; Story, *Commentaries on Equity Jurisprudence*, 7th ed., 633.

Westbury's reasoning in *Eyre v Burmester*; it was because Eyre was entitled to rescind that he had the precedent equitable interest against the bank's subsequent equitable mortgage. It is true that Lord Westbury described the outcome in terms of reinstating Eyre to his original security, but placing Eyre back to his position *ab initio* was premised upon equitable relief by way of rescission:

> Whilst the estate remained in Sadleir, so long was it liable to be pursued and recovered by Eyre… the only foundation of the bank's claim, is the mortgage by Sadleir prior to the deed of reconveyance. That mortgage and contract would bind any interest subsequently acquired by Sadleir. But under the reconveyance he obtained none; for, as between Sadleir and Eyre, the latter was still the owner, and might at any time during the life of Sadleir, by bill in equity have set aside the release, and obtained a reconveyance of the estate, and an interim injunction to restrain any alienation of it by Sadleir. This equitable title *still remains unimpaired*, and ought to be preferred to any claim by the bank.[135]

That Eyre acquired an equitable interest by way of equitable rescission is also clear in Lord Westbury's modification of the final order: Eyre would need to account to the bank for the value of a legitimate security he had acquired from Sadleir in exchange for the release; this is best understood as an award of rescission on terms that Eyre make *restitutio in integrum* to Sadleir's successor in title, the bank.[136]

By virtue of rescission, Eyre was entitled to a prior equitable interest as against the bank's subsequent equitable mortgage; Lord Westbury, and the other Lords, *then* applied the equitable priority rules to resolve the dispute. It follows that it was not Eyre's equity to rescind that 'registered' within the equitable priority rules, but rather the equitable interest that arose once that Eyre's claim to rescind had been vindicated at suit.[137] It is only by overlooking rescission as an intermediate step in Lord Westbury's reasoning that O'Sullivan manages to argue that 'equities' were held in *Eyre v Burmester* to bind subsequent interests under the 'first in time' priority rule.

C. Eyre v Burmester (1864)

However, it is not simply that O'Sullivan's interpretation of *Eyre v Burmester* has several weak points; the conclusive argument against O'Sullivan's argument are comments made by Lord Westbury in the Court of Chancery in 1864 in a subsequent dispute between Eyre and the bank. This decision makes clear that Lord Westbury would have allowed the plea of bona fide purchase to the purchaser of an equitable interest against a prior 'equity' to rescind; His Lordship therefore meant that he said in his third category of bona fide purchase in *Phillips v Phillips*.[138]

Of the estates that Eyre had released to Sadleir in October 1855 and which were then mortgaged to the bank, one of them, the Castle Green estate, had only given Eyre an equitable

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[135] *Eyre v Burmester* (1862) 11 E.R. 959, 964–65 (H.L.). To a modern readership, the language used by Lord Westbury is more suggestive of a 'void' rather than 'voidable' transaction. Nonetheless, the proper analysis of *Eyre v Burmester* is that Eyre gave a voidable release to Sadleir. A few years after *Eyre v Burmester*, Lord Chelmsford L.C. clarified that the traditional terminology of 'setting aside' a transaction for fraud in equity equated to rescission of a 'voidable' transaction: *Oakes v Turquand* (1867) L.R. 2 H.L. 325, 345–46.

[136] "[A]ny additional security under the agreement of the 6th October 1855, not comprised in [Eyre's] original mortgage… must be given up or accounted for to the bank": *Eyre v Burmester* (1862) 11 E.R. 959, 965 (H.L.).

[137] "[T]he equity is distinct from, because logically antecedent to, the equitable interest": *Latec Investments Ltd v Hotel Terrigal Pty. Ltd.* [1965] 113 CLR 265, 276 (Kitto J).

[138] For an overview and application of Lord Westbury's reasoning in the 1864 instalment of the *Eyre v Burmester* litigation, see: *Gibbs v British Linen Co.* (1875) 4 R. 630, 636 (C.S.O.H.).

mortgage; the legal estate had been outstanding in a prior mortgagee. Therefore, Sadleir had only acquired the equity of redemption by Eyre's release. A few months later, in December 1855, Sadleir then remortgaged that equitable estate to a firm named Backhouse.[139] The London and County Bank (the defendant in the Lords' decision in 1862) had a prior equitable mortgage but had joined in Sadleir's conveyance to Backhouse expressly undertaking to postpone its security to the subsequent equitable mortgage.[140] It did so in exchange for the lion's share of the money forwarded to Sadleir by Backhouse; of the £36,000 Backhouse advanced to Sadleir he only retained £1000 of it and then paid £35,000 to the bank.[141] After Sadleir's suicide in February 1856, Backhouse sold the land pursuant to a court order and, after the legal mortgage had been discharged, there was a residue of £17,694 which Backhouse kept.

Eyre's bill in the 1864 suit was curiously pleaded; Eyre sought to claim the £17,694 residue for himself, *not* out of the hands of Backhouse, but out of the £35,000 the bank had received before the order for sale.[142] Eyre obviously could not have had a claim to the proceeds of sale that had discharged the legal mortgagee and the Backhouse mortgage; both securities had been acquired by bona fide purchasers. As such, there were no traceable proceeds of the estate against which Eyre could assert his claim to rescind. For this reason, Eyre in effect sought to claim the residue of £17,694 from the bank on the wide premise that the £35,000 it received represented the 'proceeds' of Sadleir's fraud.[143] Lord Westbury rejected the argument, but outlined the circumstances in which Eyre could have been said to have had a viable claim:

> It was ingeniously put in argument… that the money was obtained by the use of a fraudulent instrument, and that the person who had suffered by that use of the fraud which had been practised upon him had a right to pursue that which was obtained by means of that fraud. That might have been perfectly right if the money had been still in the hands of the Messrs Backhouse or in the Incumbered Estates Court. The Plaintiff might then have had a right to say that he was still the prior incumbrancer; and although he could *not have recovered* against the Messrs Backhouse, as purchasers for valuable consideration on the faith of his release, anything to the prejudice of their security, yet he might have pursued, subject to that right, the whole of the property that was comprised in the release, and also in the mortgage to the Messrs. Backhouse. *But that is not the transaction.* The Plaintiff admits that he cannot follow the estate. He admits that he *has no claim* against the Messrs Backhouse.[144]

This gives us a clear insight into Lord Westbury's understanding of bona fide purchase. In the passage above, Lord Westbury considers Eyre's claim to the residue of the Castle Green estate, and explains that, *because* Backhouse had acquired an equitable interest as a bona fide purchaser without notice of Eyre's equity to rescind, it would be entitled to the satisfaction of its equitable mortgage before Eyre could claim the residue; an instance of the 'third party rights' bar to equitable rescission.[145] In short, because Backhouse had acquired an equitable mortgage "as purchasers for valuable consideration on the faith of his release", they took free of Eyre's equity to rescind. Of course, the obvious difficulty from Eyre's perspective was that

[139] *Eyre v Burmester* (1864) 46 E.R. 987, 989 (Ch.).
[140] Ibid., at 990.
[141] The mortgage deed stated the total loan to be £89,072: ibid., at 990.
[142] Ibid., at 990.
[143] Ibid., at 990.
[144] Ibid., at 990–1.
[145] "[The claimant] can rescind the contract only subject to all the rights of innocent third parties": *In Re Overend, Gurney & Co, Ex Parte Oakes and Peek* (1867) L.R. 3 Eq. 576, at 607–08.

the Backhouse mortgage exhausted the proceeds of sale. Yet Lord Westbury also rejected Eyre's claim to a share of the £35,000 received by the bank;[146] in today's language, Eyre did not have a 'proprietary base' in the money Backhouse had originally paid to Sadleir.[147] Moreover, the bank had given value and received *legal* title to the money without notice of Sadleir's fraud; it was therefore entitled to keep that money.[148]

The 1864 decision in the *Eyre v Burmester* litigation contravenes both limbs of O'Sullivan's argument: (i) Eyre's prior mere equity to rescind did *not* register within the 'first in time' priority rules so as to give him priority over Backhouse's subsequent equitable interest; and (ii) Lord Westbury recognised that, as against Eyre's mere equity, the plea of bona fide purchase was available to the purchaser of an equitable interest. O'Sullivan's paper overlooks the 1864 decision which conclusively proves that Lord Westbury did *not* hold the view that O'Sullivan ascribes to him. In consequence, O'Sullivan's argument ought to be rejected.

V. *PHILLIPS V PHILLIPS:* THEN AND NOW

If the foregoing analysis is correct, it follows that the orthodox interpretation of *Phillips v Phillips* is true to Lord Westbury's intentions; His Lordship did indeed consider the title-clearing defence to be available to purchasers of equitable interests against prior 'equities'. In disputes concerning purely equitable entitlements, it is this initial distinction that serves to demarcate disputes resolved by bona fide purchase, and those resolved using the 'first in time' priority rule. This is certainly how subsequent cases have understood the task of applying *Phillips*,[149] and the distinction between 'equities' and interests therefore retains practical relevance today. Although competitions between proprietary interests are nowadays usually determined by statutory code, there remain certain classes of dispute in which the traditional priority rules still determine the outcome.[150]

There remains a difficulty however, in that it seems that Lord Westbury solved one practical problem only by introducing another; namely, the ongoing task of identifying the hallmarks of 'equities'.[151] Insofar as there is no certain frame of reference to determine the content and classification of 'equities', we cannot reliably apply bona fide purchase to the *exclusion* of the equitable priority rules.[152] Indeed, this approach has come in for trenchant criticism,[153] such that its utility has been doubted.[154] In the recent-most edition of *Equity: Doctrines and Remedies* the authors repeat a claim made in earlier editions that, "[t]o explain such an exception to the ['first in time' priority rule] in terms of a distinction between mere equities and equitable interests… smacks of circularity and the description of an effect as if it were a cause".[155] It follows that *Phillips* did not manage to solve the ultimate problem raised by that dispute, so much as recast it in taxonomical terms; to paraphrase Lord Eldon, Lord Westbury "missed his object in the extent [to] which he meant to acquire it".[156] A flavour of having identified a *reductio ad absurdum* in Lord Westbury's efforts underlies O'Sullivan's observation that:

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[146] *Eyre v Burmester* (1864) 46 E.R. 987, 990–91 (Ch.).
[147] For an overview of the concept of a 'proprietary base' see: Nair, *Claims to Traceable Proceeds*, 173–81.
[148] *Eyre v Burmester* (1864) 46 E.R. 987, 990–91 (Ch.).
[149] *Double Bay Newspapers Pty. Ltd. v AW Holdings Pty. Ltd.* [1997] 42 NSWLR 409, 423–25.
[150] Such as claims to traceable proceeds: Fox, "Purchase for Value Without Notice", 74–75.
[151] B. Häcker, "Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model" [2009] 68 C.L.J. 324, 329–31.
[152] A. Everton, "'Equitable Interests' and 'Equities' – In Search of a Pattern" (1976) 40 Conv. 209, 219–20.
[153] J.D. Heydon, M.J. Leeming and P.G. Turner, *Equity: Doctrines and Remedies*, 5th ed., (Chatswood NSW 2015), [4–210].
[154] *Ruthol Pty. Ltd. v Mills* [2003] NSWCA 56, at [112].
[155] Heydon et al., *Equity: Doctrines and Remedies*, 5th ed., [4–210].
[156] *Wallwyn v Lee* (1803) 32 E.R. 509, 512 (Ch.).

> [C]oncluding that bona fide purchase of an equitable interest is a defence to a prior equity also requires a narrow reading of Lord Westbury's general rule [outlined in *Phillips*] that the plea of bona fide purchase is inapplicable in determining priority between successive equitable interests in property, which are governed by the rules of equitable assignment and priority. That general rule must be read so as not to extend to 'equities'. This is the orthodoxy today. It provides that the general rule only applies to 'equitable interests', 'equities' are not equitable interests, and for this reason equities are outside the general rule. Subsequent cases have thus been concerned with difficult exercises in taxonomy, determining whether the plaintiff's claim is to be characterised as an 'equitable interest' or an 'equity'.[157]

It is indeed true that the availability of bona fide purchase to those taking equitable interests remains contentious today.[158] It is also true that the uncertainty surrounding *Phillips* is in no small part attributable to Lord Westbury's use of infelicitous language; the term 'equity' has always served as an inexact signifier for a number of distinct rules, interests and claims.[159] Even today, one can see instances of 'equity' being used interchangeably with 'equitable interest'.[160] It must therefore remain true that the *exact* delineation between bona fide purchase and the equitable priority rules remains uncertain.

A. Bona Fide Purchase and Equitable Priority: A Difference of Function

Though we may concede the substance of the criticism above, we should make sure we fully understand what Lord Westbury was seeking to achieve by the distinction drawn between 'equities' and interests. The purpose of this section of the paper is to look beyond the language used in *Phillips* toward the substance of its reasoning, which reveals an underlying, conceptual logic to the decision. In *Phillips*, Lord Westbury could not reject the defendants' invocation of bona fide purchase simply by relying on the citation of authority because, as we saw above, this did not provide a reliable touchstone by which to distinguish the title-clearing defence from the equitable priority rules. For this reason, Lord Westbury sought to explain the distinction in conceptual terms; bona fide purchase served a different *function* from that served by the equitable priority rules. In theory at least, a court would be hard-pressed to confuse the two rules in light of these distinct functions, just so long as it kept the distinction in mind when assessing the claimant's bill for relief. This is ultimately the approach Lord Westbury took in *Phillips*.

What were these distinct functions? The function of bona fide purchase was to enable the defendant to keep a right or advantage *in specie* that the claimant was seeking to take from him or her.[161] By contrast, the equitable priority rules dealt with a number of rights vested in a number of right-holders and sought to rank those rights in a notional queue. The place in the queue was determined by reference to two-factors: (i) the timing at which each right had vested in the right-holder; and (ii) the conduct of each right-holder.[162] In short, had lawyers looked beyond the language used in *Phillips* toward this conceptual distinction, there would not necessarily have been the "difficult exercises in taxonomy" of the kind O'Sullivan rightly criticises.

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[157] O'Sullivan, "The Rule in *Phillips v Phillips*", 310.
[158] *Bainbridge & Anor v Bainbridge* [2016] EWHC 898 (Ch), [2016] W.L.T.R. 943, at [24].
[159] Heydon et al., *Equity: Doctrines and Remedies,* 5th ed., [4–165].
[160] *Akers v Samba Financial Group* [2017] UKSC 6, at [18] (Lord Mance).
[161] Ames, "Purchase for Value Without Notice", 3; McFarlane, *The Structure of Property Law*, 187–88, 243–44.
[162] *Rice v Rice* (1853) 61 E.R. 646, 648 (Ch.).

The first task is to revisit the contemporary *conceptual* understanding of bona fide purchase in 1861. We shall then consider how Lord Westbury distinguished the title-clearing defence from the equitable priority rules in terms of their distinct functions. We will then relate this to Lord Westbury's understanding of equitable rescission to demonstrate how the third category of bona fide purchase corresponded to this difference in function.

B. Bona Fide Purchase in 1861

We saw that the availability of bona fide purchase was a far greater source of uncertainty in the late nineteenth-century than it is today. The main reason for this confusion was that the defence operated at the interstices of several distinct bodies of rules: (i) those rules concerning the split-jurisdictions of the common law and Chancery courts;[163] (ii) those rules concerning Chancery's pleading system;[164] and, of course (iii) the law of property, itself complicated by two nomenclatures of property right.[165] It was therefore difficult to hone the defence down to a single, underlying rationale.[166]

Despite this, a common theme underlay each of Lord Westbury's categories of bona fide purchase in *Phillips*; namely, that the plea, when successfully raised, would render the court inert vis-à-vis the *right or advantage* the defendant had acquired as a good faith purchaser.[167] By 1861, there was already a long tradition in the case law that rationalised the plea in exactly these terms; a Court of equity would not take a right or advantage from a bona fide purchaser.[168] This is what was meant when it was said that, against equity's darling, the court had 'no jurisdiction'.[169] It had no jurisdiction because a defendant who had given value in good faith had an equal claim upon the Court's conscience as did the claimant.[170] For this reason, the claimant had 'no equity', no claim to relief against the defendant.[171] Yet jurisdiction was refused in pursuit of a *functional* end, that of allowing the defendant to keep a right or advantage free from adverse claims. Sir WM James L.J. neatly articulated this core function in 1874, a little over a year following Lord Westbury's death:

> [I]t appears to me… a rule without exception, that from a purchaser for value without notice this Court takes away nothing which that purchaser has honestly acquired. If the purchaser has got possession of a piece of parchment, or of property, or of anything else which he thought he was getting honestly, this Court, in my opinion, has no right to interfere with him.[172]

Of course, the breadth of Sir WM James L.J.'s formulation speaks to the fact that the defence, in terms of its core function, was strictly *agnostic* as to the kind of right the defendant had acquired; the necessity of acquiring a particular kind of right or advantage would be determined by the circumstances of the dispute, rather than by any kind of internal logic to the doctrine of bona fide purchase. So, in the context of an equitable priority dispute, the defendant would

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[163] *Wortley v Birkhead* (1754) 28 E.R. 364, 366 (Ch.).
[164] *Bassett v Nosworthy* (1673) 23 E.R. 55, 56 (Ch.); Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery*, 5th ed., 228.
[165] Fox, "Purchase for Value Without Notice", 65, 69–74; Langdell, *A Summary of Equity Pleading*, 2nd ed., 213.
[166] A Reilly, "Does 'Equity's Darling' Need a Legal Title? Reassessing *Pilcher v Rawlins*" (2016) 10 J. Eq. 89, 108.
[167] *Attorney-General v Wilkins* (1853) 51 E.R. 1043, 1046 (Ch.); O'Sullivan, "The Rule in *Phillips v Phillips*", 300.
[168] *Bassett v Nosworthy* (1673) 23 E.R. 55, 56 (Ch.); *Brace v Duchess of Marlborough* (1728) 24 E.R. 829, 831 (Ch.).
[169] Nair and Samet, "What Can 'Equity's Darling' Tell Us about Equity?", 281.
[170] *Newton v Newton* (1868–69) L.R. 4 Ch. App. 143, 145.
[171] *Ind, Coope & Co v Emmerson* (1887) 12 App. Cas. 300, 305 (H.L.) (Lord Selborne).
[172] *Heath v Crealock* (1874-75) L.R. 10 Ch. App. 22, 33 (C.A.).

need to take a legal estate in order to invoke the *tabula in naufragio* doctrine.[173] By contrast, in equity's auxiliary jurisdiction, the defendant could plead the defence even though he or she had failed to acquire any right at all;[174] the mere "possession of a piece of parchment" would suffice given the practical advantage to the defendant born of the split-jurisdictions of law and equity.

This 'older' conception of the defence is therefore alternative to the more modern formulation that limits the defence to the singular function of clearing legal titles of prior equitable interests in the context of a breach of trust.[175] The structure of the judgment in *Phillips* makes clear why this represents a 'modern' formulation; in 1861 it was simply not possible, in light of the cases, to reduce the defence to a single fact-pattern in which a prior equitable interest faced a subsequent legal title. The modern, narrower conception of the defence was a later development, the description of which is beyond the scope of this paper.[176] What is clear from an analysis of *Phillips* within its historical context is that, at the time it was authored, the third category of bona fide purchase represented just one instance of a more broadly conceived doctrine.[177]

C. Phillips: A Priority Dispute

In light of the analysis above, it is clear that bona fide purchase served a core function; it resolved a dispute in which both parties claimed a right or advantage in the defendant's hands by rendering the court inert vis-à-vis the *right or advantage* the defendant had acquired as a good faith purchaser, thereby enabling the defendant to keep that right or advantage free from adverse claims.[178] This kind of dispute was conceptually distinct from the one litigated in *Phillips*, in which the claimant and defendants were each asserting *distinct* equitable interests and the question was how those interests were to be ranked relative to one another. The hallmark of a priority dispute was therefore conceptual: it was a competition between *two or more* substantive equitable interests.[179]

Viewed in this light, bona fide purchase simply could not perform its core function in *Phillips* and was not therefore available to plead. Two points make this clear. First, the claimant in *Phillips* was not seeking to take the defendants' right away from them; he merely sought to vindicate his own prior equitable interest against the defendants' distinct, subsequent interest.[180] The second issue concerned the nature of the right acquired by the defendants in *Phillips*. Lord Westbury's essential riposte to the defendants was this: if the function of the defence is to enable a defendant to keep a right *in specie*, then it cannot save the defendant from any latent defects or disadvantageous features that are *innate to* that right. As Lord Westbury noted, the claimant's equitable annuity had been 'carved out' of the equitable estate long before it had been transferred to the defendants; all they had acquired was a cake from which a slice had already been taken.[181] As Lord Westbury observed:

> The case, therefore, that I have to decide is the ordinary case of a person claiming under an innocent equitable conveyance that interest which existed in the grantor

[173] "This is the meaning of the rule, that where a man has both law and equity on his side, he shall not be hurt in a Court of equity": *Willoughby v Willoughby* (1756) 28 E.R. 571, 579 (Ch.).
[174] *Wallwyn v Lee* (1803) 32 E.R. 509, 512 (Ch.).
[175] Fox, "Purchase for Value Without Notice", 75.
[176] For a brief overview of key developments, see: Reilly, "Does 'Equity's Darling' Need a Legal Title?", 108–09.
[177] *Great Investments Ltd v Warner* [2016] FCAFC 85, at [106].
[178] *Attorney-General v Wilkins* (1853) 51 E.R. 1043, 1046 (Ch.).
[179] A distinction observed by Haynes, who served as counsel in *Phillips*: Haynes, *Observations on the Defence of Purchase for Valuable Consideration Without Notice*, 58–60, 63.
[180] *Phillips v Phillips* (1861) 45 E.R. 1164, 1166–67 (Ch.).
[181] Ibid., at 1168.

> at the time when that conveyance was made… *that interest was diminished by the estate that had been previously granted to the annuitant*… there is no ground whatever for contending that the estate of the person taking under the subsequent marriage settlement is not to be treated by this Court, being an equitable estate, as subject to the antecedent annuity, just as effectually as if the annuity itself had been noticed and excepted out of the operation of the subsequent instrument. I have no difficulty, therefore, in holding that the plea of purchase for valuable consideration is *upon principle not at all applicable to the case before me*, even if I could take notice of it as having been rightly and regularly raised.[182]

Lord Westbury is here explaining the functional disapplication of bona fide purchase in the context of a dispute between a number of distinct equitable proprietary rights. Such disputes were resolved using the equitable priority rules and this remains the case today.[183]

D. Third Category of Bona Fide Purchase

In light of this fundamental difference in function between bona fide purchase and the equitable priority rules, we can better understand Lord Westbury's thinking behind the third category of bona fide purchase in *Phillips*. For two reasons, an 'equity' to rescind did not trigger the application of the 'first in time' priority rule but was instead subject to the title-clearing defence.

First, the indications are that Lord Westbury viewed equitable rescission as a court-administered remedy,[184] and therefore saw the 'equity' to rescind as a *procedural* power to file a bill, commence suit and then seek the remedy of rescission.[185] We might recall His Lordship's description of the claimant in *Eyre v Burmester* as one who could "at any time during the life of Sadleir, by bill in equity have set aside the release, and obtained a reconveyance of the estate".[186] Insofar as an 'equity' was a *procedural* entitlement to commence suit, it could not 'register' within the 'first in time' rule the function of which was to resolve disputes between vested equitable property rights.[187] Though many scholars would today disagree with the characterisation of the mere equity as a *procedural* power, there nonetheless exists a consensus that, whatever its exact content, the 'equity' is *not* a vested equitable interest and does not therefore register within the equitable priority rules.[188]

Second, a claim to rescind is, in substance, a claim to take a right *away from* the defendant, assuming that the defendant acquired a right from the original transferee under the voidable transaction. The rescinding-claimant is entitled to either a transfer of the same right in the hands of the third party purchaser, or the delivery-up and cancellation of that right.[189] This is a dispute in which bona fide purchase could discharge its core function, and so it should be resolved by reference to the defence. Indeed, it was an established rule at the time,[190] which

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[182] Ibid.

[183] *Rice v Rice* (1853) 61 E.R. 646, 648 (Ch.).

[184] O'Sullivan et al., *The Law of Rescission*, 2nd ed., [11.59]–[11.60], [11.82]–[11.92].

[185] In *Gresley v Mousley*, decided just two years prior to *Phillips* in 1859, Lord Westbury appeared as counsel for the appellant, and argued that the 'equity' to rescind was not a devisable interest; the rescinding-claimant "was not owner of this estate, but had at most a mere right to set aside the conveyance", which right "could not have been assigned, therefore it could not be devised": *Gresley v Mousley* (1859) 45 E.R. 31, 33 (Ch.).

[186] *Eyre v Burmester* (1862) 11 E.R. 959, 964–65 (H.L.).

[187] R. Megarry, "Mere Equities, the Bona Fide Purchaser and the Deserted Wife" (1955) 71 L.Q.R. 480, 480; *Vasiliou v Westpac Banking Corp* [2007] VSCA 113, at [113]–[119].

[188] E. Bant, "Reconsidering the Role of Election in Rescission" (2012) 32 O.J.L.S. 467, 483; Häcker, "Proprietary Restitution after Impaired Consent Transfers", 351.

[189] *Heath v Crealock* (1874-75) L.R. 10 Ch. App. 22, 25 (C.A.).

[190] *Tennent v The City of Glasgow Bank and Liquidators* (1879) 4 App. Cas. 615, 620–21 (H.L.).

has remained with us since,[191] that rights acquired by innocent third parties, without notice of some prior fraud or other vitiating factor, may effectively 'bar' relief *in specie* by way of rescission,[192] or rectification.[193] Where an order of reconveyance would prejudice third party rights, equitable rescission shall not necessarily be barred, but relief shall be designed in such a way as to protect the third party purchaser.[194]

In truth, the taxonomical distinction Lord Westbury drew between 'equities' and interests in *Phillips* was only a convenient shorthand to illustrate what His Lordship viewed as a difference in *function* between the title-clearing defence and the equitable priority rules. This distinction underpins the ratio in *Phillips v Phillips*. Whether or not the third category of bona fide purchase is worth keeping today is a broader question beyond the scope of this paper. However, in approaching that question, our focus should be upon the reasoning in *Phillips* rather than the language through which that reasoning was expressed. After all, Lord Westbury was only making use of terms that were commonplace in his own time and which we have not managed to significantly improve upon since.

VI. Conclusion

Legal history has a unique contribution to make towards giving us a deeper understanding of 'vestigial' doctrines: those legal rules that were developed within the conceptual-framework of a prior age in response to its challenges, but which are now used to address our challenges.[195] This paper has sought to demonstrate this truism in relation to the rule in *Phillips v Phillips*. In that judgment, Lord Westbury said what he meant and meant what he said: the bona fide purchaser of an equitable interest takes free of prior 'equities'. Behind this language lay a conceptual distinction of function between the bona fide purchase defence and the equitable priority rules. From today's perspective, *Phillips* stands for a simple and commendable proposition: a Court of equity shall neither rescind nor rectify a voidable transaction to the prejudice of a bona fide purchaser, whether that purchaser acquired a legal title or an equitable interest.[196] Until we change our minds about the good sense of this approach, *Phillips* shall remain integral, not only to our understanding of legal history, but also to our understanding of the rules we use today and the reasons why we use them.

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[191] *Latec Investments Ltd v Hotel Terrigal Pty. Ltd.* [1965] 113 C.L.R. 265, 277–79; O'Sullivan et al., *The Law of Rescission*, 2nd ed., ch. 20.

[192] H. Seton, *Forms of Decrees in Equity, and of Orders Connected with Them: With Practical Notes*, 3rd ed., vol. 1, (London 1862), 651.

[193] *Garrard v Frankel* (1862) 54 E.R. 961, 967 (Ch.).

[194] One method being to limit the claimant to a monetary payment the original transferee: *Erlanger v The New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218, 1278-79 (H.L.).

[195] *Pham v Gall* [2020] NSWCA 116, at [7]–[9], [53] Leeming J.A.; D. Ibbetson, "What Is Legal History a History Of?" in A. Lewis and M. Lobban (eds.), *Law and History* (Oxford 2004), 34–36.

[196] Ames, "Purchase for Value without Notice", 3.