Equity's Darling and the Legal Estate in the Nineteenth Century

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Abstract: Bona fide purchase of a legal estate represents a fundamental doctrine of Equity jurisprudence. The orthodox understanding of that defence explains its availability and rationale in terms of the defendant's acquisition of a legal property right. However, there are 'exceptions' to this, such as when the defendant purchases an equitable interest and seeks to defend it against a prior 'equity' (known as the rule in *Phillips v Phillips*). This seems an arbitrary approach: why emphasise one instance of the defence, the purchase of a legal title, while describing the other instance as an 'exception'? When we examine the historical development of bona fide purchase, we do not find a convincing explanation for this approach. Instead, the orthodox understanding of the defence as we know it today is revealed for what it is; a habit of mind that formed in response to a series of contingent developments in the mid-nineteenth century.

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I Introduction

This article seeks to answer the following question: *when*, and in response to what factors, did our present-day conception of bona fide purchase emerge? 'Equity's Darling' has long been a hallmark of Equity jurisprudence across the common law world, and much about the defence can only be learned by studying its historical development.[1] The history behind bona fide purchase makes for interesting reading: analysis reveals both a 'problem' and a 'gap' in the literature, neither of which have been sufficiently addressed in either the case law or commentary to date.

First, the 'problem': the orthodox understanding of the defence requires that Equity's Darling gets the legal estate in order to take free of prior equitable entitlements.[2] Indeed, there are both judicial,[3] and academic,[4] statements to the effect that the avowed *purpose* of the defence is to clear the purchaser's legal title of prior equitable interests or claims. This configuration of interests in a priority dispute therefore not only represents the focal instance of the defence, but also provides the terms of reference within which the defence is rationalised today.[5] The traditional explanation of good faith purchase turns upon Equity's lack of

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[1] For a recent illustration of this, see: David Fox, 'Purchase for Value Without Notice' in Paul Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018).

[2] Mike Macnair, 'Development of Uses and Trusts: Contract or Property, and European Influences and Images' (2015) 66 Studi Urbinati A - Scienze giuridiche, politiche ed economiche 305, 329.

[3] *Taylor v Blakelock* (1886) 32 Ch D 560, 569; *Foskett v McKeown* [2001] 1 AC 102 (HL) 129; *Independent Trustees Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 [89].

[4] For example, the relevant section of *Goff & Jones* is entitled 'Bona Fide Purchase as a Method of Acquiring Clear Legal Title to Property': Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [29.03].

[5] As a survey of the main practitioners' texts demonstrates: John McGhee and Steven Elliott (eds), *Snell's Equity* (34th edn, Sweet & Maxwell 2019) [4-023]; John D Heydon, Michael J Leeming and Peter G Turner, *Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2015) [8-225], [8-240]-[8-245]; Lynton Tucker, Nicholas Le Poidevin and James

'jurisdiction' over the good faith purchaser when she acquires a legal title.[6] Yet, as we will further see below, a major difficulty with this explanation is that it overlooks the rule in *Phillips v Phillips*,[7] which makes the defence available to the purchaser of an equitable interest against a prior 'mere equity'. It is not as though the rule in *Phillips* is novel;[8] the rule has been with us since at least 1861.[9] Why then did the defence come to be so closely associated with the defendant's acquisition of a legal title?

This question highlights a 'gap' in the literature, which itself requires historical analysis: to understand why the orthodox explanation for good faith purchase was adopted, despite its inconsistency with the rule in *Phillips*, we need to determine *when* it was adopted.[10] Interestingly, though good faith purchase of a legal title represents a well-established rule of private law today, this has not always been true. In fact, we will see bona fide purchase was the subject of conspicuous uncertainty and widespread disagreement as late as the latter half of the nineteenth century.[11]

This article therefore seeks to make an original contribution to the literature by telling a story that has been overlooked to date; namely, the historical uncertainty surrounding a fundamental rule of Equity jurisprudence in the mid-nineteenth century, how that uncertainty came about, and how it came to an end. This article articulates this uncertainty by reference to a functional difference in *how* the defence was used in Chancery's 'auxiliary' and 'exclusive' jurisdictions prior to the Judicature Reforms. The uncertainty was not resolved, so much as it was superseded by: (i) institutional and procedural change effected by the Judicature Reforms; and (ii) a rejection of the premise upon which Lord Westbury had explained the availability of the defence to the purchaser of an equitable interest (i.e., the rule in *Phillips*).

For a period of time from the late nineteenth century onwards, bona fide purchase of a legal title was the sole context in which the defence was, for all intents-and-purposes, available. It was during this period that the orthodox understanding of bona fide purchase was developed, such that the whole orientation of the defence was cast in terms of clearing legal titles of prior equitable claims. As has long been suspected,[12] there is no contemporary impetus for us to build an explanation for bona fide purchase around the defendant's acquisition of a legal title *specifically*, and this article will provide necessary historical context to help explain why this is.

The article divides into four sections. In the first section, we will consider the orthodox understanding of good faith purchase and a brief historical overview of *when* the defence was available to plead by reference to the kinds of right acquired by the defendant. The second

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Brightwell, *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020) [44-121]; Stuart Bridge, Elizabeth Cooke and Martin Dixon, *Megarry & Wade, The Law of Real Property* (9th edn, Sweet & Maxwell: Thomson Reuters 2019) [5-009].

[6] *Pilcher v Rawlins* (1871-72) LR 7 Ch App 259, 268–69; William Swadling, 'Restitution and Bona Fide Purchase' in William Swadling (ed), *The Limits of Restitutionary Claims: A Comparative Analysis* (UKNCCL 1997) 80–81.

[7] *Phillips v Phillips* (1861) 4 De GF&J 208, 45 ER 1164.

[8] Dominic O'Sullivan seems to have first coined the term 'the rule in *Phillips v Phillips*' to refer specifically to the third category of bona fide purchase Lord Westbury outlined in *Phillips v Phillips*, in which the defendant-purchaser of an equitable interest may raise the defence against a prior 'mere equity': Dominic O'Sullivan, 'The Rule in *Phillips v Phillips*' (2002) 118 LQR 296.

[9] Though there are earlier authorities in which the defence was made available to the purchaser of an equitable interest against a prior claim to rescind: *Malden v Menill* (1737) 2 Atk 8, 26 ER 402; *Bowen v Evans* (1844) 1 Jo&Lat 178. For further analysis, see section II below.

[10] Though Professor Fox undertakes an excellent overview of the historical development behind bona fide purchase in Fox (n 1), he does not consider the rule in *Phillips*. In addition, Mike Macnair has observed that the defence was only limited to those who acquired the legal estate, and used it to defeat prior equitable interests, in the nineteenth century: Macnair, 'Development of Uses and Trusts: Contract or Property, and European Influences and Images' (n 2) 329. However, Macnair does not trace the stages behind this specific development in detail, so much as he makes the observation in passing.

[11] See section III below

[12] James B Ames, 'Purchase for Value Without Notice' (1887) 1 HLR 1, 11–12; Kit Barker, 'After Change of Position: Good Faith Exchange in the Modern Law of Restitution' in Peter Birks (ed), *Laundering and Tracing* (OUP 1995) 196–97; Ben McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 247.

section will then articulate and explain the uncertainty surrounding the doctrine in the mid-nineteenth century. A third section will provide a brief overview of *Phillips v Phillips*, delivered in 1861, which was held out by its contemporaries as a seminal decision that went some way to address the confusion surrounding good faith purchase.[13] As we will see, the reasoning in *Phillips* plays a central role in explaining how the orthodox understanding of good faith purchase came about. The fourth section will then outline the process of incremental development by which the rule in *Phillips* receded from legal consciousness for the period of roughly a century, during which time the orthodox understanding of bona fide purchase had free rein to develop and indurate within legal scholarship.

II The Orthodox Understanding of Bona Fide Purchase

Traditionally, it is said that Equity's Darling needs to get the legal title in order to raise the defence; the implication being that, without the legal title, the defence is *prima facie* unavailable.[14] As we saw in the introduction, this cannot be readily squared with the rule in *Phillips*,[15] which allows the defendant purchaser of an equitable interest to raise the defence against a prior 'mere equity'.[16] To be sure, there is an awareness of this issue in the practitioners' texts, where the rule in *Phillips* is often described as an 'exception',[17] or a 'qualification',[18] to the otherwise general requirement that the defendant get in the legal title. Yet this only postpones the next question: how can a rule framed in terms of the acquisition of a legal title convincingly make an 'exception' for its non-acquisition?[19] Moreover, why is it not simply arbitrary to essentialise the legal title as the focal instance of bona fide purchase, and think of the rule in *Phillips* as an 'exception' or a 'qualification' to that rule?[20] These are not questions to which we readily find answers in the relevant case law or literature, where, understandably, only descriptive accounts of the relevant law are provided.

The intuitive approach is therefore to trace the origins of the idea that Equity's Darling must get the legal title; when exactly did this approach to understanding and explaining the defence take root?

A Bona fide purchase: a brief historical overview

We may take as a helpful starting point the approach suggested in the most recent edition of *Goff & Jones*, in which the following statement is made:

> In equity, the rule that a bona fide purchaser of legal title takes free of any equitable title or interest in the property was largely settled during the Chancellorship of Lord Nottingham, in the late seventeenth century. The bona fide purchase rule does not protect purchasers of equitable title, the parties being assumed to have intended that the purchaser should receive nothing more than the vendor has to give.[21]

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[13] See section IV below.
[14] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 [62].
[15] O'Sullivan (n 8).
[16] *Phillips v Phillips* (n 7) 218, 1167.
[17] *Serious Fraud Office v Litigation Capital Ltd* [2021] EWHC 1272 (Comm), [2021] 5 WLUK 206 [138]; Tucker, Le Poidevin and Brightwell (n 5) [44-121]; Jamie Glister and James Lee, *Hanbury & Martin Modern Equity* (22nd edn, Sweet & Maxwell 2021) [1-041].
[18] McGhee and Elliott (n 5) [4-024]-[4-026]; Bridge, Cooke and Dixon (n 5) [5-010]-[5-014].
[19] Adam Reilly, 'Does "Equity's Darling" Need a Legal Title? Reassessing *Pilcher v Rawlins*' (2016) 10 J Eq 89, 96.
[20] Recently, Foxton J acknowledged that the rule in *Phillips*, though it is described as an 'exception', 'is not properly so-called'. However, there is presently no clear metric by which we may, or may not, classify certain instances of the defence as an 'exception': *Serious Fraud Office v Litigation Capital Ltd* (n 17) [139].
[21] Mitchell, Mitchell and Watterson (n 4) [29-08].

Turning our attention toward the seventeenth century, it is true to observe that the bona fide purchaser of a legal title would take free of prior equitable interests.[22] Yet, we will see below that the above quote cannot serve as an *exhaustive* statement of the defence's scope in the seventeenth century and onwards.[23] If anything, the defence had a much greater ambit between the seventeenth and nineteenth centuries than it has today.[24] A few examples will help illustrate the point.

In equity's auxiliary jurisdiction, further analysed below,[25] good faith purchase was available against a claimant suing on a *legal* title,[26] against a defendant who had not necessarily acquired any interest whatsoever at the time of her purchase.[27] Moreover, though we saw above that the rule in *Phillips* as we know it today dates from 1861, there were previous cases in which bona fide purchase of an equitable interest had been successfully pleaded against prior claims to rescind.

A foremost example is *Malden v Menill*, delivered in 1737, in which three sisters agreed to release their interests under a marriage settlement, so as to enable their mother and brother to suffer a recovery, free several estates from the settlement, and then sell them to the purchaser Menill.[28] The mother and brother died after the contract had been finalised, but *before* two terms of years had been conveyed to Menill.[29] The original marriage settlement had stipulated that these two terms were to be held by trustees and, in the event that the parents died without male issue, they were to be used to raise portions to the extent of £4000 for the sisters.[30] Upon their brother's death, the sisters sought to keep the terms vested in trustees in order to raise the £4000, arguing that their release was voidable for mistake, they not having known at that time the full extent of their entitlements under the will. Their trustees therefore retained the two terms of years, and Menill sought a transfer.[31] Lord Hardwicke held that, properly construed, the relevant contingency on which the sisters' interests depended had not occurred.[32]

Nonetheless, Lord Hardwicke also held that Menill had acquired an equitable interest for value,[33] and therefore took free of the sisters' claim to rescind the release, such that he was entitled to a conveyance of the terms regardless:[34] 'Mr. Menill has given very amply for this estate, and shall a mistake of the parties, who knew nothing of the £4000 at the time, turn to the prejudice of a fair purchaser?'.[35] There were further decisions in the early-to-mid nineteenth

[22] David Yale (ed), *Lord Nottingham's Chancery Cases*, vol II (B Quaritch 1961) 66 (italics added).
[23] As Yale noted: 'The numerous cases of tacking… might easily give rise to a supposition that the legal estate was in all cases an essential ingredient of the plea; but this would be an erroneous view of the classic doctrine of equity… it was generally immaterial whether the purchaser had a legal or an equitable title, or indeed any sort of title': ibid 162.
[24] Macnair, 'Development of Uses and Trusts: Contract or Property, and European Influences and Images' (n 2) 322; Yale (n 22) 162.
[25] See section III below.
[26] Yale (n 22) 68; Christopher Columbus Langdell, *A Summary of Equity Pleading* (2nd edn, CW Sever 1883) 216–20.
[27] See text at n 93-94 below.
[28] *Malden v Menill* (n 9) 9, 402.
[29] ibid 10, 403.
[30] ibid 8, 401. On the practice of setting up terms to raise portions for daughters under a marriage settlement, see: Neil Jones, 'Trusts in England After the Statute of Uses: A View from the 16th Century' in Richard Helmholz and Reinhard Zimmermann (eds), *Itinera Fiduciae* (Duncker & Humblot 1998) 189
[31] As counsel for Menill stated, '[t]he objection started by the plaintiffs was never made till some of the purchase money was paid, nor even till the assignment of these very terms was drawn and ingrossed, and upon the very brink of being executed by them': ibid 11, 403.
[32] ibid 12–13, 404.
[33] Indeed, the vendor had acquired a decree for specific performance in 1732: ibid 9, 402.
[34] '[S]till the defendant Mr. Menill, is intitled to his *equity*, for the heirs of [the deceased brother] ought to perform [the conveyance]': ibid 14, 405.
[35] ibid 13, 405.

century in which the defendant purchaser of an equitable interest could raise the defence against prior claims to rescind.[36]

As late as the mid-nineteenth century therefore, the true position of the bona fide purchaser was most accurately described by Lord Cranworth L.C. in *Colyer v Finch*, delivered in 1856, in which he observed that:

> [T]he principle on which the Court protects a purchaser for valuable consideration without notice, is *wholly regardless of what estate he has*. It may be that he has not the legal title, but that will be quite unimportant as to a court of equity interfering or refusing to interfere. His equity depends on this—that he stands, equitably, in at least as favourable a position as his opponent, and therefore the Court will not interfere against him.[37]

It follows that, at some point following 1856, the defence came to be tied specifically and exclusively to the acquisition of the legal title,[38] and it is in this period that we must seek an answer to our question.

A promising candidate is *Pilcher v Rawlins*, decided in 1874, because it is most often cited as authority for the orthodox understanding of the defence in the case law,[39] practitioners' texts,[40] and academic commentary.[41] *Pilcher* concerned a transfer of a legal mortgage to third-party purchasers in breach of trust, and Sir W.M. James L.J. held that: '[A] purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase some legal title, some legal right, some legal advantage… is… an unanswerable plea to the jurisdiction of this Court'.[42] The difficulty, as noted above, is that the rule in *Phillips* predates the judgment in *Pilcher*, and it obviously cannot be said that Chancery ever lacked 'jurisdiction' over disputes between purely equitable entitlements.[43] It might therefore be thought that Sir W.M. James L.J. was attempting something novel in *Pilcher v Rawlins*; specifically, to reframe bona fide purchase by consciously tying its availability to the acquisition of the legal estate?

This is unlikely. If anything, there is evidence to suggest that Sir W.M. James L.J. did not ascribe to the orthodox understanding of bona fide purchase for which *Pilcher v Rawlins* is cited today.[44] A few years after *Pilcher*, in *Heath v Crealock*, Sir W.M. James L.J. allowed the defence of bona fide purchase to the purchasers of an equity of redemption, on the basis that '[it] is a rule without exception, that from a purchaser for value without notice this Court takes away nothing which that purchaser has honestly acquired'.[45] The defence was obviously not therefore limited to the purchaser of a legal title in His Lordship's eyes, and we may conclude that the orthodox understanding of bona fide purchase had not taken shape by 1874.

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[36] *Sturge v Starr* (1833) 2 My&K 195, 196, 39 ER 918, 919 (A, a bigamist, induced his second wife, B, to assign her equitable interest under a trust to C. When C filed a bill, B invoked A's fraudulent misrepresentation as a defence, 'but that fraud could not affect the rights of a bona fide purchaser'); *Bowen v Evans* (n 9) 263–64 (A, claiming under a will, sought to impugn the transfer of a legal estate to B for fraud. Before B had acquired the legal estate, B purported to transfer the estate to trustees under a marriage settlement to secure a rent-charge to C, which D then inherited: 'he being a purchaser for value, without notice, though of an equitable interest only, the bill must be dismissed as against him with costs') .

[37] *Colyer v Finch* (1856) 5 HL Cas 905, 920-21, 10 ER 1159, 1165.

[38] Reilly (n 19) 94.

[39] *Serious Fraud Office v Litigation Capital Ltd* (n 17) [133]-[135]; *MacMillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1995] 1 WLR 978 (Ch) 1000; *Midland Bank Trust Co Ltd v Green* [1981] AC 513 (HL) 528.

[40] Bridge, Cooke and Dixon (n 5) [5-005]; Glister and Lee (n 17) [1-039]; Tucker, Le Poidevin and Brightwell (n 5) [44-139]; McGhee and Elliott (n 5) [4-018].

[41] Birke Häcker, 'Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model' (2009) 68(2) CLJ 324, 351 n 163; Kit Barker, 'Bona Fide Purchase as a Defence to Unjust Enrichment Claims: A Concise Restatement' (1999) 7 RLR 75, 76 n 10; William Swadling, 'A New Role for Resulting Trusts?' (1996) 16 LS 110, 127 n 107.

[42] *Pilcher v Rawlins* (n 6) 268–69.

[43] Langdell (n 26) 213.

[44] Reilly (n 19) 106–08.

[45] *Heath v Crealock* (1874-75) LR 10 Ch App 22 (CA) 33.

Several questions therefore present themselves. At what point in time did the orthodox understanding of the defence emerge, and in response to which factors? Why did it emerge *at the time* at which it did? Moreover, the rule in *Phillips* was a feature of Equity jurisprudence throughout this period of change and remains law up to the present day; why was this instance of the defence overlooked in favour of an account that essentialised good faith purchase in terms of the legal title? We have at least established that our answer must be found at some point in the late nineteenth century, and this happens to be a period in which a great deal of uncertainty surrounded the doctrine of bona fide purchase. Understanding the nature of this uncertainty will go some way to clarifying the developments which eventually led to the widespread adoption of the orthodox understanding of the defence as we know it today.

III Uncertainty and Its Sources in the Case Law

A striking feature of the Equity jurisprudence of the mid-nineteenth century is the degree and extent of uncertainty and disagreement that surrounded bona fide purchase. Observations to this effect are oft-repeated, in both the case law,[46] and in the academic commentary.[47] What is more, these disparate sources are consistent in their diagnosis of the *source* of the problem; namely, fundamental inconsistency in the authorities.[48] A few illustrative examples will help elucidate the point. Haynes, a Chancery barrister and textbook author, wrote on bona fide purchase specifically, and observed in 1880 that:

> [A] reference to the judicial authorities discloses an amount of conflict in the decisions greater, perhaps, than has attended the development of any other Equity rule or doctrine; and such statements as we find of any general principle are almost equally at variance.[49]

That same year, we see the same observation made at the bench in *Cave v Cave*, in which Fry J stated:

> That defence, as we all know, has been the subject of a great deal of decision, and it is by no means easy to harmonise the authorities and the opinions expressed upon the subject. Criticisms upon old cases lie many strata deep, and eminent Lord Chancellors have expressed diametrically opposite conclusions upon the same question.[50]

Yet, just over twenty years later, in the first edition of his *Principles of Equity*, Ashburner was able to observe that:

> Nothing in equity has occasioned more controversy than the nature and limits of the protection which is given to such a purchaser; *fortunately the law is now settled*, and it will be sufficient to state shortly the various cases in which the doctrine has been, or may be, applied.[51]

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[46] *Joyce v De Moleyns* (1845) 2 Jo&Lat 374, 377; *Attorney-General v Wilkins* (1853) 17 Beav 285, 291, 51 ER 1043, 1046.
[47] Langdell (n 26) 213.
[48] Walter Ashburner, *Principles of Equity* (1st edn, Butterworth & Co Ltd 1902) 67.
[49] Frederick Haynes, *Observations on the Defence of Purchase for Valuable Consideration Without Notice* (W Maxwell & Son 1880) 2.
[50] *Cave v Cave* (1880) 15 Ch D 639, 646.
[51] Ashburner (n 48) 67.

These sources helpfully frame our task in the remainder of this article. First, we need to elucidate how the case law came to be inconsistent. Second, we need to ask how it was resolved, or at least, was perceived to have been resolved. Ultimately, we will see that the uncertainty was not so much resolved as it was simply rendered redundant by two main developments: (i) procedural and institutional change external to the case law, particularly that brought about by the Judicature Reforms; and (ii) the reasoning within, and subsequent reception of, Lord Westbury's judgment in *Phillips v Phillips*. The upshot of these twin-developments took a few decades to find its place within lawyers' conventional wisdom; this fact explains why, although the problem had risen to prominence in the 1850's, it was not perceived to have been conclusively settled before the early twentieth century.

For present purposes though, we need to approach the first issue; how was it that the case law of this period was so inconsistent as to engender widespread confusion among lawyers?

A Uncertainty: three broad stages

The answer to our question developed in three broad stages, but each stage stemmed from a kind of category-error made by lawyers in the mid-nineteenth century. The plea was available across two distinct 'heads' of Chancery jurisdiction, further discussed below, the 'auxiliary' and 'exclusive' jurisdictions.[52] However, the plea played two very different 'roles' within the context of each of these heads of jurisdiction; whereas the plea played an 'ancillary' or 'procedural' role under the auxiliary head, it played a 'proprietary' role in the exclusive jurisdiction. In three stages, things came to ruin.

First, lawyers fell into error by overlooking the distinct roles played by the plea under each head of jurisdiction; they instead treated the case law as a single source, elucidating a unitary doctrine of good faith purchase.[53] Second, with time the view came to be held that the defence was *generally* available, regardless of the classification of interests held by each of the parties to the dispute. Finally, case law delivered under the aegis of this 'broad' view of the defence came to contradict, not only prior authorities on good faith purchase, but also, the 'first in time' priority rules, both at law and in equity. The end result was that by the 1850's things had reached a stage at which no-one could know with certainty when the defence was, and was not, available to plead, particularly in the context of priority disputes in the exclusive jurisdiction.

In order to clearly articulate how the problem came about, we must first grasp the 'three heads' scheme of jurisdiction, which provided the framework in which lawyers and legal commentators of the period arranged the case law and doctrine.

i The 'three heads' scheme

By the mid-nineteenth century, there was already a long case law tradition that described the plea of bona fide purchase using the terminology of 'jurisdiction'; when successfully raised, Chancery had 'no jurisdiction' over the defendant.[54] A defendant who had made a purchase honestly, and in good faith, had an equal claim in conscience to that of the claimant;[55] for this reason, Chancery would simply dismiss the claimant's bill vis-à-vis the defendant.[56]

[52] *Phillips v Phillips* (n 7) 217, 1167; Haynes (n 49) 29.
[53] Reilly (n 19) 108.
[54] *Wortley v Birkhead* (1754) 2 Ves Sen 571, 574, 28 ER 364, 366; *Stanhope v Earl Verney* (1761) 2 Eden 81, 85, 28 ER 826, 828; *Jerrard v Saunders* (1794) 2 Ves Jr 454, 457-58, 30 ER 721, 723.
[55] *Harvey v Woodhouse* (1730) Fitzg 144, 145, 94 ER 692, 692–93.
[56] *Bowen v Evans* (n 9) 264.

Yet this only went to explain *how* the defence operated once it had been raised and successfully made out. The difficult question was when exactly the defence was available and why? It was in response to these specific questions that the case law came to be uncertain in the mid-nineteenth century.

By the 1850's, Chancery practitioners' texts had come to use three 'heads' of jurisdiction under which they categorised the substantive and procedural law: the auxiliary, concurrent, and exclusive jurisdictions.[57] The 'auxiliary' jurisdiction broadly concerned procedural, pre-suit doctrines designed to facilitate the prosecution of a suit in the common law courts.[58] The 'concurrent' jurisdiction had two dimensions: first, it embraced equitable doctrines that were premised upon the inadequacy of common law remedies;[59] but it also included scenarios in which the Chancery would itself *effectively* sit as a court of law,[60] adjudicate a dispute that was otherwise litigable in the law courts,[61] and apply the substantive common law rules (albeit using Chancery's procedural tools).[62] Chancery would take this course for pragmatic reasons, either to avoid a multiplicity of suits,[63] or simply to make the superior procedural mechanisms of Chancery available to the claimant.[64] The 'exclusive' jurisdiction, as the name implies, concerned all issues solely recognised and litigable in Chancery;[65] such as where the claim related to an equitable interest,[66] or the claimant sought an equitable remedy.

As Yale observes,[67] the three heads of jurisdiction were first used as a classificatory scheme by Fonblanque,[68] though Fonblanque credited Lord Resdesdale's *Treatise on Pleading* as the original source of the scheme.[69] However, as a means to arrange *both* Chancery's substantive and procedural doctrines,[70] the scheme only later gained prominence in the hands of Joseph Story,[71] though it also had its detractors.[72] No doubt thanks to Story's eminence on both sides of the Atlantic,[73] the scheme was widely observed, and continued to be used for

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[57] For brief, but extensive, overviews of the 'three heads' scheme and its origins, see: David Yale, 'A Trichotomy of Equity' (1985) 6 JLH 194; Mike Macnair, 'Equity and Conscience' (2007) 27 OJLS 659, 664–66.

[58] Yale (n 22) 160–63; Ashburner (n 48) 5–11.

[59] Ashburner (n 48) 4.

[60] '[T]he plaintiff came in equity to obtain legal relief in respect of a legal matter, with respect to which a Court of Equity had precisely the same jurisdiction as a Court of Law': *Manners v Mew* (1885) 29 Ch D 725, 734 (North J).

[61] See Lord Herschell's description of the concurrent jurisdiction as one in which 'the plaintiff… selected the Court of Chancery as the tribunal to enforce a legal right': *Ind, Coope & Co v Emmerson* (1886) 33 Ch D 323 (CA) 312.

[62] As Lord Westbury described the concurrent jurisdiction, 'the Court of Equity was not asked to give the Plaintiff any equitable as distinguished from legal relief': *Phillips v Phillips* (n 7) 217, 1167; *Collins v Archer* (1830) 1 Russ&M 284, 289-90, 39 ER 109, 111; *Pearce v Creswick* (1843) 2 Hare 286, 293, 67 ER 118, 121–22; Edmund H Snell, *The Principles of Equity: Intended for the Use of Students and the Profession* (Stevens & Haynes 1868) 25; Ashburner (n 48) 3.

[63] *Ryle v Haggie* (1820) 1 Jac&W 234, 237, 37 ER 364, 365.

[64] *Ochsenbein v Papelier* (1872-73) LR 8 Ch App 695, 697; *Ind, Coope & Co v Emmerson* (1887) 12 App Cas 300 (HL) 305.

[65] Ashburner (n 48) 2; Langdell (n 26) 213.

[66] 'Whenever courts of equity deal with equitable rights wholly unrecognised by courts of law, then, without doubt, the jurisdiction is exclusive': Frederick Haynes, *Outlines of Equity: Being A Series of Elementary Lectures On Equity Jurisdiction, Delivered At The Request of the Incorporated Law Society; With Supplementary Lectures on Certain Doctrines of Equity, And Observations On The Defence Of Purchase For Valuable Consideration Without Notice* (5th edn, William Maxwell & Son 1880) 35.

[67] Yale (n 57) 195.

[68] 'The jurisdictions exercised by courts of equity may be considered in some cases as affiliant to, in some concurrent with, and in others exclusive of the jurisdiction of courts of common law': Henry Ballow, *A Treatise of Equity*, vol I (John Fonblanque ed, 1st edn, Printed for Messrs Byrne J Moore, W Jones, E Lynch & H Watts 1793) Bk I, Ch I, § 3, p 10 n (f).

[69] '[A] work, from which the editor has, in this division, and in many other particulars, drawn very considerable assistance': ibid Bk I, Ch I, § 3, p 11 n (f). Though, as Macnair notes, the *explicit* division of Equity into 'three heads' of jurisdiction is not present in Mitford's Treatise: Macnair 'Equity and Conscience' (n 57) 664 n 24.

[70] '[T]he three general heads are concerned more with matters of substance than procedure': Yale (n 57) 197.

[71] Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (1st edn, Hilliard, Gray & Co 1836) 32–3.

[72] Yale (n 57) 195–96; Macnair, 'Equity and Conscience' (n 57) 664–65.

[73] As Plucknett observed of Chancery commentaries in this period, 'none of [these] works equalled in renown and longevity the *Commentaries on Equity Jurisprudence* of judge Story': Theodore Plucknett, *A Concise History of the Common Law* (3rd edn, Butterworth & Co Ltd 1940) 622.

decades after it had been rendered obsolete by the Judicature Reforms.[74] That it survived as long as it did comes as something of a surprise, as it suffered from an innate vagueness at the edges of each head of jurisdiction.[75] In sources from the period, we often see the observation that certain doctrines which had been classified under one head properly belonged under another.[76] The overall scheme therefore exhibited, in Macnair's words, a 'rag-bag' quality.[77]

Nonetheless, the scheme provided a lens through which lawyers of the period sought to understand *when* the plea was available to raise; namely, in the 'auxiliary' and 'exclusive' jurisdictions. The difficulty came when some sought to abstract a general conception of bona fide purchase from the totality of the case law across each head of jurisdiction, with the result that the case law would become hopelessly incommensurable by the late 1850's.

B Bona fide purchase in the 'auxiliary' and 'exclusive' jurisdictions

As noted above, because good faith purchase was viewed to be a single rule, a plea to Chancery's 'jurisdiction', lawyers overlooked the different orientations of the defence under the labels 'auxiliary' and 'exclusive'. This was a crucial oversight, because the plea played two distinct 'roles' under each head of jurisdiction. To elucidate this point fully, we need to further analyse the plea in the auxiliary and exclusive jurisdictions.

i Bona fide purchase in the 'auxiliary' jurisdiction

Equity's auxiliary jurisdiction comprised a number of different kinds of bill, but each shared the same basic premise; namely, that Chancery would provide 'assistance' to a dispute that properly belonged in the law courts.[78] The paradigm case within the auxiliary jurisdiction would see a claimant suing, or seeking to sue, on a legal title.[79] The claimant's primary motive to file a bill in Chancery would have been to seek, or secure, one of two kinds of evidence in support of her suit at law. First, she may have sought the discovery of title-deeds or other documents in the defendant's possession, without which she could not establish her title at law, but which were beyond the procedural reach of the law courts.[80] Alternatively, she may have sought to perpetuate the testimony of witnesses in case they died before she would have been able to file her bill at law.[81] These were not the sole bills comprehended in equity's auxiliary jurisdiction,[82] but they are illustrative of the role that bona fide purchase played in this context.

Insofar as the claimant could not establish a legal title to land without documents in the defendant's possession, not infrequently, the claimant's bill for 'discovery' would also seek 'relief' by way of the delivery-up of those same documents.[83] This would necessarily pit the interests of claimant and defendant directly against one another, at least insofar as both parties

[74] Yale (n 57) 194–5.
[75] '[A]s the grounds of jurisdiction often run into each other, any attempt at a scientific method of distribution of the various heads would be impracticable and illusory': Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (n 71) 94.
[76] Langdell (n 26) 215.
[77] Macnair, 'Equity and Conscience' (n 57) 665.
[78] John N Pomeroy, *A Treatise on Equity Jurisprudence: As Administered in the United States of America*, vol 2 (1st edn, AL Bancroft 1882) 1366–7; Ballow (n 68) 10.
[79] Yale (n 22) 68; Haynes (n 49) 7–17.
[80] *Belchier v Butler* (1760) 1 Eden 523, 529-30, 28 ER 789, 791.
[81] For example, when the claimant was entitled to a future or reversionary interest which had not yet vested, but which she could foresee being disputed in some future suit: Haynes (n 66) 125–26.
[82] See generally: Edmund H Snell, *The Principles of Equity: Intended for the Use of Students and the Profession* (JR Griffith ed, 2nd edn, Stevens & Haynes 1872) 501–521.
[83] *Belchier v Butler* (n 80) 529–30, 791; Langdell (n 26) 213–20.

sought possession of the *same* land or title-deeds.[84] For this reason, so long as the defendant could maintain the plea of bona fide purchase, the whole gamut of equitable intervention would be closed off to the claimant: she could not have discovery,[85] nor the perpetuation of testimony,[86] nor an injunction to restrain the defendant from setting-up terms at law.[87] As Lord Loughborough articulated the effect of the plea in the auxiliary jurisdiction, 'you cannot attach upon [the defendant's] conscience… *any* demand whatever'.[88] The result would be for Chancery to dismiss the claimant's bill entirely and leave the parties to proceed at law unaided.[89]

The crucial point for our purposes is to note that, within the auxiliary jurisdiction, bona fide purchase played a primarily 'ancillary' role.[90] The only question for Chancery in this context was whether it ought to involve itself in a 'legal' suit by helping the claimant to gather evidence in support of that suit.[91] It follows that, in the auxiliary jurisdiction, the plea was purely 'procedural', in the sense that it was wholly agnostic to any question of substantive title in property law.[92] This is demonstrated by the fact that the plea was available *even if* the defendant had failed to acquire any kind of interest whatever at the time of her acquisition of documents, such as title-deeds, in relation to which the claimant sought discovery.[93] Such was made clear by Lord Eldon in *Wallwyn v Lee*:

> Is it not worth consideration, whether the very principle of this plea is not this: "I have honestly and *bona fide* paid for this, in order to make myself the owner of it; and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril, in which you state I have placed myself in the article of purchasing *bona fide*". Is it not worth consideration, whether every plea of purchase for valuable consideration, without notice, does not admit, that the Defendant has no title. If he has a good title, why not discover?[94]

There was therefore no real issue of property law relevant to the plea in the auxiliary jurisdiction; no issue of resolving priority disputes between successive proprietary interests.[95] The very opposite was true in Chancery's exclusive jurisdiction, where the plea answered a purely 'proprietary' question: can the defendant keep the right acquired at the time of her purchase free from adverse claims, or does she take subject to a prior interest vested in the claimant? Strictly, there was no real issue of 'jurisdiction' whatsoever, for the simple reason

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[84] For an overview of the action of ejectment, see: Alfred WB Simpson, *A History of the Land Law* (2nd edn, Clarendon Press 1986) Ch 7.
[85] *Hoare v Parker* (1785) 1 Bro CC 578, 581, 28 ER 1308, 1310.
[86] *Jerrard v Saunders* (n 54) 458, 723.
[87] Terms at law would effectively grant the defendant a superior title to the possession of land as against the claimant: Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America*, vol II (6th edn, Little, Brown & Co 1853) 243–44.
[88] *Jerrard v Saunders* (n 54) 458, 723; *Ind, Coope & Co v Emmerson* (n 64) 305.
[89] *Bassett v Nosworthy* (1673) Rep t Finch 102, 103, 23 ER 55, 56.
[90] '[E]quity assumed to exercise in favour of litigants in the courts of common law, in aid of the assertion of their legal rights': Edmund Snell, *The Principles of Equity: Intended for the Use of Students and the Profession* (Archibald Brown ed, 12th edn, Stevens & Haynes 1898) 13.
[91] Langdell (n 26) 213–14.
[92] Story, *Commentaries on Equity Jurisprudence* (n 78) 996; Edward Sugden, *A Concise and Practical Treatise of the Law of Vendors and Purchasers of Estates* (14th ed, H Sweet 1862) 791–92.
[93] Yale (n 22) 163.
[94] *Wallwyn v Lee* (1803) 9 Ves Jr 24, 33-34, 32 ER 509, 512.
[95] The basis of the plea in this context was not therefore to protect the defendant's acquisition of a right, but rather to *restrain* the claimant from her potentially 'unconscionable' use of the title-deeds once they had been delivered-up to her: Langdell (n 26) 214.

that there was no other court competent to resolve equitable priority disputes,[96] particularly given the practicalities of a suit involving several encumbrancers.[97] It follows that, unlike the auxiliary jurisdiction, Chancery could not have been *agnostic* about the acquisition of property rights; in a 'proprietary' dispute between several interests, the court needed to inquire what right the defendant had acquired, whether it was legal or equitable, when exactly she had acquired it, etc.

Within the exclusive jurisdiction there was therefore an intrinsic connection between the acquisition of a property right on one hand, and the plea of good faith purchase on the other, in a way that was *not* true of the auxiliary jurisdiction.

ii An irreconcilable case law heritage

Despite this fundamental difference in how the plea was used in the auxiliary and exclusive jurisdictions, the case law was nonetheless treated as a single, undifferentiated source elucidating the contours of a unitary rule.[98] The result was that lawyers drew upon case law from Chancery's auxiliary jurisdiction when seeking authorities with which to answer the 'proprietary' question in the exclusive jurisdiction. If case law in the auxiliary jurisdiction suggested that the plea was available against prior legal interests, while case law in the exclusive jurisdiction suggested that the plea was also available against prior equitable interests, the view would eventually emerge that the plea was generally available, *irrespective* of the classification of the rights of the parties to the dispute.[99] This is indeed what happened, and this approach soon wrought confusion in the case law.[100] The resulting uncertainty had two aspects: first, there was an internal inconsistency in the case law, between the newer decisions and the older authorities;[101] but also, there was an external inconsistency between the case law and the 'first in time' priority rules, both at law and in equity. This latter point is worth exploring further.

In a dispute between two or more equitable interests, the applicable priority rule was, and remains, that 'where the equities are equal, the first in time is first in right'.[102] This was an ancient rule, laid down in Lord Nottingham's time,[103] and consistently reaffirmed thereafter.[104] Yet this rule was contradicted by the decision in *Penny v Watts*, in which Ms Stone was entitled to a £2000 legacy under her uncle's will. Her uncle had died in 1831, leaving his wife (Ms Stone's aunt) as executrix of his estate. In 1835, in contemplation of Ms Stone's marriage to John Penny (the eventual claimant), she and her aunt agreed that, in exchange for Ms Stone's releasing her legacy, the aunt would 'by good and sufficient conveyances in the law, or by her last will and testament… seise, invest and secure to them, the said John Penny and Elizabeth

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[96] '[T]he complex conveyancing practices of the period had the effect that legal title to land in many cases practically could not be litigated without the assistance of equity': Macnair, 'Development of Uses and Trusts: Contract or Property, and European Influences and Images' (n 2) 322.

[97] '[A]ll the persons interested in the examination of… title (with certain exceptions..), whether mortgagees, or other incumbrancers , or successive tenants for life, must be made parties to the suit': F Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* (2nd ed, William Benning & Co 1847) 3; Haynes (n 49) 60.

[98] Reilly (n 19) 108.

[99] 'Other learned minds… have insisted, that… the plea of a purchase for a valuable consideration without notice, is a good plea in all cases, against a legal, as well as against an equitable claim': Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America*, vol I (6th edn, Little, Brown & Co 1853) 720–21.

[100] 'In some of these cases, the judicial expressions of opinion have been so broad and unlimited, that, taken literally, they would allow the protection of... [the] defense… in every kind of suit brought to obtain any species of relief, and against any plaintiff, whether holding a legal or an equitable estate': Pomeroy (n 78) 1315–16.

[101] *Gomm v Parrott* (1857) 3 CBNS 47, 57-59, 140 ER 655, 659–60.

[102] This remains the applicable rule, to the extent that the general law has not been displaced by a statutory code: McGhee and Elliott (n 5) [4-019]; Fox (n 1) 74.

[103] Heneage Finch, *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (David Yale ed, CUP 1965) 210.

[104] *Brace v Duchess of Marlborough* (1728) 2 P Wms 491, 494, 24 ER 829, 831; *Rice v Rice* (1853) 2 Drew 73, 78, 61 ER 646, 648.

Stone… all and every the real estates of her… situate, lying and being within the county of Salop'.[105] John Penny was apparently ignorant of this agreement, only learning of its existence in 1846.[106]

The aunt subsequently married John Watts in 1843, placing the Salop estates on settlement for him in December 1843.[107] However, the Salop estates had previously been mortgaged by the original testator, such that the legal estate was outstanding in mortgagees; only the equity of redemption was transferred into the settlement.[108] Penny filed a bill seeking specific performance of the 1835 agreement.[109] Lord Cottenham L.C. held that, if the agreement could be proved, it was one over which specific performance would be ordered,[110] and 'will shew that the Plaintiff had an equitable title by contract to have the devised estates conveyed to him'.[111] Counsel for the defendant, citing case law from both the auxiliary and exclusive jurisdictions,[112] pleaded the general defence of bona fide purchase in relation to Watts' equitable interest under the settlement.

Now, Richard Bethell, the future Lord Westbury, appeared on behalf of the claimant, and gave a foretaste of the kind of reasoning he would later use in *Phillips v Phillips*. He argued that, as both Penny and Watts each had vested equitable interests, the bona fide purchase defence was unavailable; instead, the 'first in time' priority rule ought to apply in favour of the claimant's earlier interest.[113] Despite this, the plea was held to be available to the defendant both at first instance, and then on appeal. Initially, Sir Knight Bruce V.C. held that the defendant took free of the claimant's interest as a good faith purchaser;[114] by contrast, Lord Cottenham L.C. held that Watts had constructive notice of the 1835 agreement at the time of his marriage.[115] Either way, the broad view of the defence of bona fide purchase had seemingly displaced the 'first in time' equitable priority rule in a dispute between successive equitable interests.[116]

The same problem presented itself in the concurrent jurisdiction. Long established case law had held that, in the concurrent jurisdiction, good faith purchase was not available to plead in a dispute between two or more legal titles.[117] These disputes were instead resolved using the 'first in time' rule.[118] Yet, in *Attorney-General v Wilkins* in 1853, the plea was allowed to a claimant suing to enforce a legal rent charge against a legal estate vested in the defendants. Observing that the authorities were hopelessly inconsistent,[119] Sir John Romilly M.R. reasoned

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[105] *Penny v Watts* (1849) 1 Mac&G 150, 154, 41 ER 1220, 1222.
[106] ibid 153, 1221.
[107] ibid 157, 1223.
[108] *Penny v Watts* (1850) 2 De G&Sm 501, 515, 64 ER 224, 231.
[109] The claim is most explicitly stated in an earlier instalment of the same litigation: *Penny v Watts* (1846) 2 Ph 149, 150, 41 ER 898, 899.
[110] That a specifically performable contract for a sale of land would generate an equitable interest was well-established long before the mid nineteenth-century. As Jessel M.R. famously observed: 'the effect of a contract for sale has been settled for more than two centuries': *Lysaght v Edwards* (1876) 2 Ch D 499, 506; Mike Macnair, 'The Conceptual Basis of Trusts in the Later 17th and 18th Centuries' in Richard Helmholz and Reinhard Zimmermann (eds), *Itinera Fiduciae* (Duncker & Humblot 1998) 231.
[111] *Penny v Watts* (n 105) 167, 1227.
[112] *Penny v Watts* (n 108) 517, 231; *Penny v Watts* (n 105) 162, 1225.
[113] '[T]hat it being admitted that the legal estate was outstanding, the plea of purchase for valuable consideration without notice could not be set up, and that the rule *qui prior est tempore, potior est jure*, was applicable': *Penny v Watts* (n 105) 160, 1224. See quotation at n 151 below.
[114] Though heard in August 1848, the Vice Chancellor's judgment only appears in the 1850 report: *Penny v Watts* (n 108) 521, 233.
[115] *Penny v Watts* (n 105) 167–69, 1227.
[116] Though the dispute was eventually dismissed: *Penny v Watts* (n 108) 530, 237.
[117] *Rogers v Seale* (1681) Freem Ch 84, 84, 22 ER 1073, 1073; *Williams v Lambe* (1791) 3 Bro CC 264, 265, 29 ER 526, 527; *Collins v Archer* (n 62) 292, 112; Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (n 99) 719.
[118] Sydney S Bell, *The Law of Property as Arising from the Relation of Husband and Wife* (T & JW Johnson 1850) 242.
[119] *Attorney-General v Wilkins* (n 46) 293, 1046.

from first principles.[120] However, in so doing, he derived his understanding of the nature of the defence by reference to case law drawn from the auxiliary jurisdiction:

> [A] Court of Equity holds that it is not equitable for a person who has bought for valuable consideration without notice of any claim to be deprived of that for which he has paid his money… But it is said that this proposition, expressed in that *general and extended sense*, cannot be maintained…. [instead] the Court will afford assistance against a purchaser for value, when the claim made against him is a legal and not an equitable claim. I am, however, unable to see why the rule should be limited only to cases where the right is merely equitable, and not be extended to the cases where it is legal… [I]n the case of a purchase for value without notice, the principle of the Court is neither to afford assistance, nor to do anything to prejudice the rights. It will not afford assistance against the purchaser, and it will not, at his instance, restrain any person from proceeding against him, *but it will leave all parties to their remedies at law*.[121]

What the Master of the Rolls observed in the gobbet above was perfectly true as a description of the 'ancillary' role played by the plea in Chancery's auxiliary jurisdiction; but the reasoning was inapt when applied to a dispute between successive legal rights in the concurrent jurisdiction. Worse still, the broad view of the defence's availability had a powerful advocate in the form of Sir Edward Sugden, latterly Lord St. Leonards, who in both his judicial decisions,[122] and extra-curial writing,[123] argued in support of it.[124] The following passage from the fourteenth edition of Sugden's *Vendors and Purchasers*, published in 1862, is illustrative of this view:

> Equity may not be able to interfere with the legal estate in favour of a purchaser, but still it will allow him to defend himself against a claim under it. It will not assist the legal claimant against the purchaser without notice. *It regards not the quality of the estate, but the character of the person*. In the great majority of cases the purchaser has only an equitable estate, in some no actual estate.[125]

We can immediately see the ultimate source of the confusion surrounding bona fide purchase in the passage above. The method of abstracting a generalised conception of good faith purchase from the authorities, without observing the distinct 'roles' played by that defence in the auxiliary and exclusive jurisdictions, led lawyers even of Lord St. Leonards' eminence toward an unworkable conception of the defence. *Attorney-General v Wilkins* was subsequently followed,[126] and by the 1850's, a sufficient number of inconsistent cases had accumulated and brought matters to a head.[127]

How was this uncertainty addressed, if not resolved? Really, the law needed two innovations. First, it needed an authoritative decision that counteracted the broad view of the

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[120] 'It is therefore necessary to consider the principle upon which the Court proceeds': ibid 293, 1046–47.
[121] ibid 292–3, 1046.
[122] *Bowen v Evans* (n 9) 263–64; *Joyce v De Moleyns* (n 46) 377.
[123] See Lord St. Leonards' response to Lord Westbury's decision in *Phillips v Phillips*: Sugden (n 92) 797–98.
[124] The extent of Lord St. Leonards influence as a jurist can be discerned from the dedication to him in the sixth edition of *Lewin on Trusts*, where it is observed of his *Treatise on Powers* that 'the admirable treatise of Lord St. Leonards is in every one's hands': Thomas Lewin and Frederick A Lewin, *A Practical Treatise of the Law of Trusts* (6th edn, W Maxwell & Son 1875) 501.
[125] Sugden (n 92) 791 (italics in the original).
[126] *Lane v Jackson* (1855) 20 Beav 535, 539, 52 ER 710, 711; *Gomm v Parrott* (n 101) 58–9, 660.
[127] See the observation of the Court of Common Pleas in 1857 that '[o]n referring to the authorities, it appears that this is a point which has been much controverted': *Gomm v Parrott* (n 101) 57–9, 659–60.

defence espoused by Lord St. Leonards. Second, within equity's exclusive jurisdiction, lawyers needed some rule-of-thumb by which to explain: (i) the plea's relationship with substantive proprietary interests; (ii) and also, the relationship between the defence and the equitable priority rules. Both came to the law through Lord Westbury's judgment in *Phillips v Phillips*.[128]

IV Lord Westbury's response: *Phillips v Phillips* (1861)

Though *Phillips v Phillips* is nowadays widely cited, the decision enjoyed much greater renown among its contemporaries than it does today. Pomeroy's assessment of Lord Westbury's efforts, and their significance in resolving the longstanding uncertainty surrounding bona fide purchase, is worth quoting at length:

> Amidst this apparent conflict and real uncertainty, various judges had attempted to find a mode of reconcilement, and to formulate a rule which should furnish a universal criterion. It remained, however, for Lord Westbury to bring order out of the confusion, and by his remarkable grasp of principles and wonderful power of generalisation to reduce the doctrine into a universal formula, so accurate and comprehensive that it has been taken by most subsequent text-writers as the basis for their discussions, and has been accepted by subsequent judges almost without exception.[129]

Similar assessments were not uncommon at the time.[130] The high esteem in which *Phillips* was once held reflects the perceived efficacy with which Lord Westbury addressed the confusion latent within the authorities, and the conceptual terms in which he explained the plea's role, and availability, in the exclusive jurisdiction.

Phillips concerned an equitable priority dispute between an equitable annuity and an equitable interest held under a subsequent marriage settlement.[131] Among other arguments, the defendants, as the issue of the marriage, pleaded bona fide purchase. They argued that the plea was generally available, and operated independently of the classification of property rights vested in the parties to the dispute.[132] The authorities cited by the defendants included *Penny v Watts* and *Attorney-General v Wilkins*.[133] There was a procedural reason to reject the defendants' plea; under the contemporary rules of Chancery pleading, they had failed to raise the plea alongside their original answer to the claimant's bill, and so they were unable to raise it subsequently.[134] However, counsel for the defendants argued that, if admitted, the defence would be 'conclusive, for in no case would a Court of Equity interpose as against a purchaser for value without notice'.[135]

Lord Westbury upheld the original decision to dismiss the defendants' attempt to raise the plea, and found in favour of the claimant as the prior encumbrancer.[136] *Phillips* therefore reasserted the orthodoxy that bona fide purchase was *not* available in a dispute between successive equitable interests.[137] Yet the real thrust of the judgment in *Phillips* was to dispel

[128] Pomeroy (n 78) 1317.
[129] ibid.
[130] Ames (n 12) 1; Haynes (n 49) 5.
[131] For a full exegesis of the facts and reasoning of the decision, see: Adam Reilly, 'What Were Lord Westbury's Intentions in *Phillips v Phillips*? Bona Fide Purchase of An Equitable Interest' (2021) 80 CLJ 156, 159–68.
[132] *Phillips v Phillips* (n 7) 212, 1165.
[133] ibid 213, 1165–66.
[134] ibid 214, 1166; Reilly (n 131) 161–62.
[135] *Phillips v Phillips* (n 7) 212, 1165.
[136] ibid 218–19, 1168.
[137] ibid 215, 1166.

the general view of the defence associated with Lord St. Leonards and, in attempting to raise the defence in aid of their equitable interest against the claimant's annuity, the defendants in *Phillips* had given Lord Westbury the opportunity in which to do it.[138] Such is clear from the fact that His Lordship deliberately addressed the defendants' arguments from first principle,[139] rather than simply dismiss them on a point of pleading.[140] For our purposes, there were two main respects in which Lord Westbury sought to address, and helped to resolve, the uncertainty surrounding good faith purchase in this period.

First, Lord Westbury rejected the premise behind the defendants' invocation of the plea; the defence was *not* generally available to all defendant-purchasers, but was an instance-specific doctrine, available only in a number of discrete contexts.[141] Lord Westbury's method was to survey the contexts 'in which the defence in question is most commonly found',[142] and to assert that, outside of those specific contexts in which the plea had been previously recognised, it was otherwise unavailable.[143] It was incorrect to abstract from the several contexts in which the defence was available a single, generalised doctrine of good faith purchase that functioned independently of those discrete contexts. By implication, it followed that case law concerning the plea in Chancery's auxiliary jurisdiction had to be kept distinct from case law drawn from the exclusive jurisdiction, and vice versa; each 'instance' or 'context' in which the plea was available had to analysed on its own terms.[144]

Second, as noted above, Lord Westbury re-established the traditional relationship between the plea and the legal and equitable 'first in time' priority rules.[145] In terms of successive legal rights, Lord Westbury approached the issue in terms of the three heads of jurisdiction, making clear that the plea was not available in the concurrent jurisdiction, where Chancery 'exercises a legal jurisdiction concurrently with Courts of Law' and does not grant 'any equitable as distinguished from legal relief'.[146] Lord Westbury expressly disapproved of the reasoning and outcome in *Attorney-General v Wilkins*.[147]

In terms of the equitable 'first in time' rule, Lord Westbury went further and provided a rationalisation by which to explain the availability of bona fide purchase when the defendant had only acquired an equitable interest; namely, by distinguishing between a vested equitable interest and a 'mere equity'.[148] Where the claimant asserted an 'equity', the subsequent purchaser of an equitable interest could raise the plea; but it was otherwise where both parties held vested equitable interests, as in *Phillips* itself. Lord Westbury then explained the application of the equitable 'first in time' priority rule in terms of the *nemo dat* principle;[149] all that the defendants had acquired under the marriage settlement was an equitable estate against which their father had already granted an annuity to the claimant. If the stated purpose of bona fide purchase was to allow the defendants to keep the fruits of their purchase, then the plea had nothing to contribute where the right acquired by the defendants had itself been 'cut down' in favour of the claimant prior to its transfer.[150] Lord Westbury reasoned that:

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[138] The defendants cited the thirteenth edition of Sugden's treatise on conveyancing in favour of their view of the plea: ibid 213, 1165.
[139] '[I]n order to deal with the argument it becomes necessary to revert to elementary principles': ibid 215, 1166.
[140] A point that did not go unobserved by Lord St. Leonards: Sugden (n 92) 797.
[141] Reilly (n 131) 163.
[142] *Phillips v Phillips* (n 7) 218, 1167.
[143] ibid.
[144] ibid 217, 1167.
[145] ibid 215, 1166.
[146] ibid 217, 1167; Sugden (n 92) 797; Haynes (n 49) 29.
[147] *Phillips v Phillips* (n 7) 219, 1168.
[148] ibid 218, 1167.
[149] *Serious Fraud Office v Litigation Capital Ltd* (n 17) [285].
[150] Reilly (n 131) 181.

> The subsequent grantee takes only that which is left in the grantor. Hence 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'… The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers at the time when they took their securities… had notice of the first incumbrance or not.[151]

On Lord Westbury's approach therefore, the distinct application of each rule turned upon a prior process of classification of the claimant's entitlement as either an equitable interest or an 'equity'. This was a novel way to approach the question, and it has since been heavily criticised for the vagueness surrounding the nature and content of the 'mere equity'.[152] Nonetheless, Lord Westbury's approach was soon adopted as the best means of explaining the plea's sphere of operation relative to the equitable priority rules,[153] and remains the position today.[154]

By virtue of *Phillips v Phillips*, the broad view of bona fide purchase espoused by Lord St. Leonards gradually fell out of favour.[155] It would eventually receive its quietus with the passage of the Judicature Reforms, which we will further analyse below. There is therefore a sense in which *Phillips v Phillips* stands at a crossroads in our legal history; the decision marked a departure from an older, much-contested doctrine of bona fide purchase towards something closer to the view of the defence we hold today. We have not yet fully traced this process of development though. For instance, we saw above that *Phillips* made the plea of bona fide purchase available to the purchaser of an equitable interest, albeit in relatively narrow circumstances. Why therefore did the plea come to be rationalised solely in terms of the acquisition of a legal title? For, as we saw above, this approach had not been made by the 1870's.[156] Answering this question is the task of the next section of the article.

V From 'then' to 'now': bona fide purchase after the Judicature Reforms

The answers to the questions with which we closed the last section of the article are to be found in two, broad developments. First, a series of procedural and institutional changes brought about by the Judicature Reforms rendered the auxiliary jurisdiction obsolete,[157] and with it, the case law that had generated much of the uncertainty surrounding good faith purchase prior to *Phillips v Phillips*. Second, and somewhat ironically, while lawyers were content to accept Lord Westbury's re-assertion of the 'first in time' priority rule in *Phillips v Phillips*, the rule in *Phillips* fared less well because few followed Lord Westbury in characterising the claim to rescind as an 'equity'. The rule in *Phillips* was therefore deprived of practical application, and caught the imagination of few commentators, with the upshot that Equity's Darling came to be associated with the acquisition of the legal estate. We will take each point in turn.

A The impact of the Judicature Reforms 1873-75

[151] *Phillips v Phillips* (n 7) 215–16, 1166.
[152] O'Sullivan (n 8) 310; Heydon, Leeming and Turner (n 5) [4-210].
[153] *Newton v Newton* (1868) LR 6 Eq 135, 140; *Cave v Cave* (n 50) 646–48; *Re Ffrench's Estate* (1887) 21 LR (Ir) 283 (CA Ir) 308–09, 320–22, 331–32.
[154] *Serious Fraud Office v Litigation Capital Ltd* (n 17) [139].
[155] Ames (n 12) 1.
[156] See section II above.
[157] *Ind, Coope & Co v Emmerson* (n 64) 310.

As noted above, a great deal of the case law heritage upon which the broad, generalised conception of bona fide purchase had been built, originated in the auxiliary jurisdiction. In this context, we saw that the whole *point* of the defence was to determine the extent to which Chancery would involve itself in a dispute otherwise destined for the law courts. The defence therefore answered a purely 'ancillary' question under the auxiliary head of jurisdiction; its case law had no business answering the 'proprietary' question posed within the exclusive jurisdiction, in which equitable priority disputes came to be resolved. That the case law was nonetheless used in such a way was a significant contributing factor to the confusion that surrounded bona fide purchase from the 1850's onwards.

With the Judicature Reforms however, there came a unified court system which, in time, would come to develop its own system of procedure.[158] Lord Selborne, among the foremost architects of the Judicature Reforms,[159] explained the ramifications of this development for the defence of bona fide purchase in *Ind, Coope & Co v Emmerson*. The claimant sought discovery and delivery-up of title-deeds in the defendants' possession, the latter having purchased land from an heir-at-law, the claimant's father, who was not entitled to sell it.[160] The defendants pleaded bona fide purchase, and the issue was how the old cases concerning the plea in the auxiliary jurisdiction interacted with s 24(2) of the 1873 Act, which provided that the new High Court would give 'every equitable defence… such and the same effect… as the Court of Chancery ought to have given… *before* the passing of this Act'.

The plea was rejected by the Court of Appeal, the decision being upheld on appeal. In the Lords, Lord Selborne explained that bona fide purchase fell outside the scope of s 24(2) altogether, on the basis that '[t]he defence was, in effect, *"no equity"*, which is a different thing from an "equitable defence"'.[161] However, Lord Selborne went further, and explained that even 'before the passing of the act', the defence had not been available to defendants who had been sued in Chancery's *concurrent* jurisdiction:

> [I]n the present case there is no suit in any other jurisdiction; the High Court of Justice is asked, and is competently asked, to exercise a principal, and not an auxiliary jurisdiction, and to give effect to the legal title, which the plaintiff alleges to be in herself… In the class of cases referred to [i.e., in the auxiliary jurisdiction], the separation and division of jurisdictions between the Courts of Equity and the Courts of Common Law was the real and only ground on which such a defence was admitted. As against an innocent purchaser, sued at law, the Court of Chancery (having no jurisdiction itself to try the title) found no equity requiring it to give assistance to a proceeding brought elsewhere for that purpose. But it is impossible, without departing from that ground, to make the same defence available against discovery (otherwise proper) in a suit in which… the High Court has proper jurisdiction to try, and must try and determine, the question of title… in those cases, in which the Court of Chancery [previously] had concurrent jurisdiction with the Common Law Courts upon legal titles, it was not available against either discovery or relief… *Phillips v Phillips*.[162]

This passage seeks to explain the impact of the Judicature Reforms using the lexicon of the pre-Judicature position; insofar as the Act had made all jurisdiction between law and

[158] Reilly (n 19) 108–09.
[159] Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II' (2004) 22 LHR 565, 593–94.
[160] *Ind, Coope & Co v Emmerson* (n 61) 323.
[161] *Ind, Coope & Co v Emmerson* (n 64) 305.
[162] ibid 305–06.

equity 'concurrent',[163] it followed that the plea was not available *after* 1873, in the very same way in which it had not been available in Chancery's concurrent jurisdiction *before* 1873.[164]

In two respects, the Judicature Reforms brought about a fundamental change in how lawyers would come to understand bona fide purchase in the later decades of the nineteenth century. First, insofar as there was no longer a Chancery, there was obviously no need for an intermediary body of procedural rules to determine the relationship between two distinct court systems.[165] At a fell stroke, the auxiliary jurisdiction was made redundant,[166] and with it, the case law on which the broad view of bona fide purchase had largely been founded. Lawyers no longer had to incorporate a difficult case law heritage into their explanations of *when* good faith purchase was available relative to the 'first in time' priority rules.[167]

Relatedly, and second, bona fide purchase was no longer a 'plea', but would instead become a 'defence' within the language of the 1873 Act, and latterly, the Rules of the Supreme Court of 1883.[168] This is the terminology with which we understand bona fide purchase today, but at the time, the shift in language from 'plea' to 'defence' underpinned a parallel, conceptual shift in how bona fide purchase was conceived; from an overtly procedural rule to one *solely* concerned with substantive right. As noted, with the introduction of a unified court system, there was no longer an 'ancillary' role for good faith purchase to serve. Insofar as the Judicature Reforms left the distinct nomenclatures of legal and equitable rights unaffected,[169] the remaining significance of bona fide purchase was its traditional, 'proprietary' role helping to resolve equitable priority disputes.

These developments therefore had the cumulative effect of turning bona fide purchase into an exclusively substantive rule of property law, where once it had also been a rule of pleading.[170] As such, from 1873 onwards, the only binding authorities concerning the defence were those which established, and described, the various equitable priority rules; foremost among them being *Phillips v Phillips*. As we will now see, the fate of this decision ultimately explains why Equity's Darling came to be essentialised in terms of her acquisition of the legal estate.

B The chequered reception of the rule in *Phillips*

We saw that Lord Westbury predicated the availability of bona fide purchase to the purchaser of an *equitable* interest upon an initial classificatory exercise: against a prior 'equity' the plea was available,[171] but in a contest between two or more equitable interests the 'first in time' priority rule applied.[172] Lord Westbury gave the examples of rescission and rectification to illustrate his reasoning. The use of the term mere 'equity' to denote an entitlement that fell short of being an equitable interest was central to Lord Westbury's explanation for when the plea was available to the purchaser of an *equitable* interest.[173] Nonetheless, subsequent case law in the decades following *Phillips* would not adopt Lord Westbury's lead on this specific point. If Lord Westbury had made several contributions to the wider law in *Phillips v Phillips*,

[163] In the sense that both bodies of substantive law were to be administered from a single court system: Heydon, Leeming and Turner (n 5) [8-245].
[164] David O'Keeffe, 'Sir George Jessel and the Union of Judicature' (1982) 26 AmJLegal Hist 227, 248–49.
[165] After all, reformers of the period diagnosed the distinct court systems, and their attendant procedures, as the main source of the difficulties they sought to address: Lobban (n 159) 598.
[166] O'Keeffe (n 164) 249.
[167] Though some, presumably by force of habit, would continue to do so: Langdell (n 26) 213–14.
[168] See Order XXI of the 1883 Rules: Frederic P Tomlinson, *The Judicature Acts and Rules of the Supreme Court, 1883. With Notes and Index* (RT Reid ed, William Clowes & Sons, Ltd 1883) 188–92.
[169] Joshua Getzler, 'Patterns of Fusion' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) 158.
[170] Fox (n 1) 74.
[171] *Phillips v Phillips* (n 7) 218, 1167.
[172] ibid 215, 1166.
[173] See section IV above.

not all of them were to be adopted by the decision's contemporaries, whether members of the judiciary, or practitioners, or academics.

i Reception of *Phillips* within the case law

To the extent that *Phillips* was cited in the late-nineteenth and early-twentieth centuries, it was most often for the proposition that disputes between successive equitable interests were to be resolved using the 'first in time' priority rule.[174] It also seems that subsequent cases were content to adopt Lord Westbury's distinction between 'equities' and interests as the explanation for when the plea was available to the purchaser of an equitable interest, and when that defence was displaced by the 'first in time' priority rules.[175] However, if the case law had adopted Lord Westbury's distinction between 'equities' and interests, it seems to have otherwise rejected his suggestion that equitable rescission and rectification were to be understood as examples of the former.

We may take rescission as an illustrative example.[176] The correct analysis of the entitlement to rescind had long been contentious, the issue having primarily arisen in the context of the devise or assignment of the claim to rescind. Assignments of pure rights of suit for a valuable consideration were champertous and void,[177] but this bar did not extend to the devise or assignment of a vested interest. For this reason, the proper characterisation of the claim to rescind was of fundamental importance in those cases in which the claim had been devised or assigned. On this specific point, the case law was simply irreconcilable in 1861. In *Prosser v Edmonds*, Lord Abinger had described the claim to rescind as 'a naked right to file a bill in equity—no legal right—no equitable interest'.[178] Yet, just two years before *Phillips*, Lord Westbury had appeared as counsel for the appellant in *Gresley v Mousley*, and had argued that the rescinding-claimant 'was not owner of this estate, but had at most a mere right to set aside the conveyance'.[179] The argument was rejected in favour of applying *Stump v Gaby*,[180] in which Lord St. Leonards had held that the estate transferred under a voidable conveyance was held on trust for the rescinding-claimant from the moment of transfer.[181]

Such authorities were not addressed head-on by Lord Westbury in *Phillips v Phillips*. Perhaps for this reason, *Phillips* failed to turn the tide of subsequent authority, most of which held that rescission in equity gave rise to a proprietary interest *ab initio*.[182] Just six years after *Phillips*, Lord Romilly M.R. held in *Dickinson v Burrell* that the assignor of a claim to rescind had, not only a bare right of suit, but also an 'interest' which could be assigned or devised.[183] Lord Selborne was unambiguous in *Melbourne Banking Corp Ltd v Brougham*, delivered in 1882, when he described the voidable release of a mortgage in the following terms: 'if that release was voidable in equity, it is clear, both on principle and on authority, that there was an

[174] *Newton v Newton* (n 153) 140; *Keate v Phillips* (1881) 18 Ch D 560, 566 (counsel for the plaintiff); *Kettlewell v Watson* (1884) LR 26 Ch D 501, 505 (counsel for appellants); *Re Clarke's Settlement Trust* [1916] 1 Ch 467 (Ch) 474 (counsel for the defendants).
[175] *Cave v Cave* (n 50) 647–48; *Re Ffrench's Estate* (n 153) 311; *Cloutte v Storey* [1911] 1 Ch 18 (CA) 24, 32.
[176] How the claim to *rectify* a voidable instrument was viewed in this period is less clear. *Garrard v Frankel* is often cited for the proposition that the claim to rectify is a 'mere equity' subject to bona fide purchase of an equitable interest. However, the report shows that *Phillips v Phillips* was not cited at all, and that the defendant who pleaded good faith purchase of an equitable interest also had a 'better right' to call for the transfer of a legal mortgage. Neither point suggests that *Garrard* represents a clear-cut instance of the rule in *Phillips*: *Garrard v Frankel* (1862) 30 Beav 445, 460, 54 ER 961, 967.
[177] *Prosser v Edmonds* (1835) 1 Y&C Ex 481, 497, 160 ER 196, 203; *Hutley v Hutley* (1872-73) LR 8 QB 112, 116.
[178] *Prosser v Edmonds* (n 177) 494–95, 202.
[179] *Gresley v Mousley* (1859) 4 De G&J 78, 84, 45 ER 31, 33.
[180] ibid 90, 35.
[181] *Stump v Gaby* (1852) 2 De GM&G 623, 630, 42 ER 1015, 1018; *Gresley v Mousley* (n 179) 33, 84.
[182] As observed in the judgment of Taylor J in *Latec Investments Ltd v Hotel Terrigal Pty Ltd* [1965] 113 CLR 265, 282–84.
[183] 'The right of suit is a right incidental to the property conveyed': *Dickinson v Burrell* (1865-66) LR 1 Eq 337 (Ch) 342.

equitable interest'.[184] A few years later, Lindley L.J. stated that '[s]etting aside a release confers no new title. It removes an impediment to the enjoyment of a pre-existing title'.[185]

The decisions were not all one way on this point,[186] but it would nonetheless be a fair assessment that, by the end of the nineteenth century, the weight of authority was against Lord Westbury's characterisation of the claim to rescind as an 'equity'. In rejecting Lord Westbury's approach, lawyers had *indirectly* nullified the rule in *Phillips*; in a world without practical instances of mere 'equities', there was little that bona fide purchase could do on behalf of the purchaser of an equitable interest. The rule in *Phillips* had been rendered a theoretical possibility without practical application.

ii Reception of *Phillips* within legal commentary

The same basic picture holds true of legal commentary from our period, both in the practitioners' texts, and in academic research. There are two observable strands of which we should take note. First, there is evidence to suggest that the rule in *Phillips* simply failed to gain traction within commentary *at all*, with the upshot that bona fide purchase of an equitable interest did not come to be viewed as a sufficiently important instance of the doctrine to call for specific analysis. This is reflected in several of the main practitioners' texts of the period. In the first edition of *Underhill*, published in 1878, *Phillips* is only cited once, and then solely for the proposition that the 'first in time' rule applied in disputes between equitable interests.[187] In the sixth edition of *Lewin*, published in 1875 (such that we would expect the impact of *Phillips v Phillips* to have taken hold to some degree), the decision is not mentioned.[188]

Much the same held true among academic commentators. Unlike the practitioners' texts cited above, the American jurist James Barr Ames saw fit to engage with the reasoning in *Phillips v Phillips*, and agreed in principle that bona fide purchase was not limited to those defendants who had taken the legal estate.[189] However, Ames completely rejected the distinction between 'equities' and interests on which the rule in *Phillips* was premised: 'the discrimination… between an equity and an equitable estate is an unfortunate one… it is an attempted distinction between convertible terms. Every equity attaching to property is an equitable estate'.[190] The rule in *Phillips* was otherwise conspicuous by its absence from academic discourse at this time. As is well-known, a foremost debate in the private law scholarship of the early twentieth century, on both sides of the Atlantic, was whether an equitable interest was correctly analysed as a proprietary right, or a unique form of obligational right.[191] What is interesting is that the rule in *Phillips* simply did not feature in this debate at all; it seems to have been a shared premise among participants that Equity's Darling needed to get the legal estate.[192]

Second, to the extent that the rule in *Phillips* was initially considered worthy of comment, there is evidence to suggest that the impulse did not last long. An interesting example of this is provided by *Snell*, the thirteenth edition of which was published in 1901, in which the rule in

[184] *Melbourne Banking Corp Ltd v Brougham* (1882) 7 App Cas 307 (PC) 311.
[185] *In Re Garnett* (1886) 33 Ch D 300 (CA) 306.
[186] For example, Lord Westbury's distinction between an 'equity' and an equitable interest was adopted by the Supreme Court of Canada in 1892: *Utterson Lumber Co v Rennie* (1892) 21 SCR 218, 226 per Strong J.
[187] Arthur Underhill, *A Concise Manual of the Law Relating to Private Trusts and Trustees* (Butterworths 1878) 193.
[188] Lewin and Lewin (n 124).
[189] Ames (n 12) 3, 11–12.
[190] ibid 2.
[191] Stuart Anderson, 'Changing the Nature of Real Property Law' in Michael Lobban and others (eds), *Oxford History of the Laws of England, Vol. XII 1820-1914: Private Law* (OUP 2010) 238–40.
[192] Frederick Maitland, 'Trust and Corporation' in Harold D Hazeltine, Gaillard Lapsley and Percy H Winfield (eds), *Maitland: Selected Essays* (CUP 1936) 164–74; Austin W Scott, 'The Nature of the Rights of the "Cestui Que Trust"' (1917) 17 Colum L Rev 269, 278; Walter G Hart, 'The Place of Trust in Jurisprudence' (1912) 28 LQR 290, 296.

Phillips appears intact, '[w]here there are circumstances that give rise to an "equity", as distinguished from an "equitable estate"… the court will not interfere'.[193] Yet, by the fourteenth edition a few years later, the same editor, Archibald Brown, had changed his mind on the continued relevance of this rule. Citing *Stump v Gaby* and *Dickinson v Burrell*, the relevant passage had been modified, and read as follows:

> And although the *"equity"* of the plaintiff in such a case, *to set aside the sale*, is, for some purposes, deemed an *equitable* estate, still such equitable estate in the plaintiff is not permitted to prevail against the complete *legal* estate in the defendant.[194]

This is not a passage friendly to the rule in *Phillips*, because it essentially rejects Lord Westbury's characterisation of the claim to rescind and emphasises the need for acquisition of the 'complete' legal estate. We are therefore left with the impression that the rule in *Phillips* was no longer considered good law, even though *Stump* had been delivered before *Phillips*.[195] There is no obvious explanation why this change of mind occurred at the specific time at which it did, but it doubtless reflected the weight of the case law concerning the claim to rescind up to that point.

iii The return of the rule in *Phillips*

Interest in the rule in *Phillips* would only return to mainstream legal analysis in the mid-twentieth century, with the debate surrounding the nature and content of the deserted wife's 'equity'.[196] A decade or so later, when the authorities on equitable rescission were revisited in the significant decision of *Latec Investments v Hotel Terrigal* in 1965, the High Court of Australia viewed the rule in *Phillips* with a degree of ambivalence.[197] This was in no small part because, as we saw above, the weight of authority characterised the claim to rescind as an equitable interest. Only in the last several decades has there been a renewal of Lord Westbury's concept of a 'mere equity' to understand both rescission,[198] and rectification,[199] and with it, a concomitant renewal of interest in the rule in *Phillips*.[200]

We are left with an interesting observation: it seems as though the rule in *Phillips* simply failed to make a longstanding impression on lawyers of the day, even if *Phillips v Phillips* very much did. Ironically, there is a sense in which the reasoning in *Phillips* was a victim of its own success: though subsequent cases had accepted the premise that 'equities' were to be distinguished from equitable interests,[201] that premise was denuded of any practical importance once claims to rescind came to be characterised as equitable interests. The rule in *Phillips* therefore fell into misuse for the period of a century or so, during which time lawyers

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[193] Edmund H Snell, *The Principles of Equity: Intended for the Use of Students and the Profession* (Archibald Brown ed, 13th edn, Stevens & Haynes 1901) 22.
[194] Edmund H Snell, *The Principles of Equity: Intended for the Use of Students and the Profession* (Archibald Brown ed, 14th edn, Stevens & Haynes 1905) 19-20 (italics in the original).
[195] See also the more elaborate passage in the fifteenth edition: Edmund H Snell, *The Principles of Equity: Intended for the Use of Students and the Profession* (Archibald Brown ed, 15th edn, Stevens & Haynes 1908) 15.
[196] *Bendall v McWhirter* [1952] 2 QB 466 (CA) 480–81; *Westminster Bank v Lee* [1956] Ch 7 (Ch) 19; *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1254.
[197] This is particularly clear in Taylor J's judgment: *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (n 182) 285.
[198] *Daly v Sydney Stock Exchange* (1986) 160 CLR 371, 387; *Lonrho Plc v Fayed (No 2)* [1992] 1 WLR 1 (Ch) 11–12; *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 22; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [122]-[123]; *Vale SA v Steinmetz* [2020] EWHC 3501 (Comm), [2020] 12 WLUK 344 [26].
[199] *Smith v Jones* [1954] 1 WLR 1089 (Ch) 1091–93.
[200] *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch), [2016] 4 WLUK 498 [24]; *MacKay v Wesley* [2020] EWHC 1215 (Ch) [165].
[201] See authorities at n 175 above.

were left to rationalise bona fide purchase by exclusive reference to the acquisition of a legal title as a defence against prior equitable claims. After all, this was the sole instance in which the defence was practically available.

VI Conclusion

> [A]ny dynamic system [requires] a sense for which historical material is essential to be preserved, and which may profitably be discarded. A good knowledge of our legal history and the evolution of our concepts might help us to make such choices.[202]

We began our analysis of the history of bona fide purchase by observing a 'problem' and a 'gap'. Both concerned the historical origins and development of our modern understanding of bona fide purchase, which explains the defence's rationale and availability in terms of the legal title. The 'problem' was how this understanding of the defence ever managed to co-exist alongside the rule in *Phillips*. In contemplating this question, we addressed a 'gap' in the historical literature; namely, the unanswered question as to how bona fide purchase came to be the subject of such widespread disagreement in the mid-nineteenth century, only to then become so singularly associated with the legal title in our time.

We saw that, although lawyers welcomed the clarity with which *Phillips v Phillips* explained the relationship between bona fide purchase on the one hand, and the legal and equitable priority rules on the other, they nonetheless rejected Lord Westbury's characterisation of the claim to rescind as an 'equity', preferring instead Lord St. Leonards' analysis in *Stump v Gaby*. For this reason, the rule in *Phillips* fell out of favour; our 'problem' only arose later on, once the rule in *Phillips* had been reinstituted.

Why does this matter? In truth, we are now well-placed to understand why the orthodox understanding of bona fide purchase should strike us as arbitrary today; it was not a conscious undertaking to explain the defence from first principles, but instead represents the upshot of a series of contingent events in the last decades of the nineteenth century. We currently lack a satisfactory account of the defence that explains when it ought to be available, and why. In truth, the orthodox understanding represents an anachronism; it is an aspect of our legal history which, in Professor Getzler's phraseology, may profitably be discarded.

[202] Getzler (n 169) 167.