
CHAPTER VIII

TITLE RECORDS AND THE TRANSFER OF PROPERTY

We have seen in previous chapters how important it is for those who assert property rights to let others know what exactly is being asserted. The rules of first possession, for example, are designed to make clear to those who would potentially compete for a resource that the resource belongs to someone else. For ongoing ownership, markers like boundary stones and name tags serve to put others on notice of ownership claims. Starting with the ancient civilizations, written records of various sorts have also served to evidence ownership. With the collection of these records in a centralized location, those who might have some interest in the state of a property's title need only look up the information.

Title records are deeply intertwined with transfers of property. Although persons other than potential purchasers might have reason to consult title records, purchasers—broadly conceived to include lenders—are the main users of title records. By investigating the state of title through the title records, a potential purchaser (usually having employed an expert) can gain assurance at reasonable cost that he or she is acquiring what the seller claims to have for transfer.

Good title records promote transferability. The use of such a system serves the collective interest of all potential sellers, as well as the individual interests of potential buyers. As a result, most modern systems of records do more than act as repositories of information. Instead, title records (especially land records) carry with them legal effect. In many systems, achieving an *in rem* effect and the ability to bind third-party good faith purchasers is only possible by filing one's interests in the public records. Some systems, such as those in Australia (the "Torrens" system) and Germany, explicitly strip out invalid claims and title defects, thereby affording nearly conclusive legal title. Things are not quite so tidy in the United States, where almost all localities employ a system of recordation more like France's, but as we will see, various recording acts and doctrines make the system of land records essential to the shape and scope of property that is actually transferred from one person to another.

There is another sense in which transfer lies at the heart of a system of property records: It is the possibility of transfer that makes the state of title more difficult to establish. If each owned thing were assigned an owner who could not alienate it (with ownership going indefeasibly to the heirs or to the state upon death), property would be a lot less complicated—and a lot less useful. In the following materials we begin with some general principles for establishing a valid transfer of property

designed to enhance the security of transfers. We then turn to the bedrock principle that an owner can only convey what the owner owns, and to an important exception to this principle, in favor of good faith purchasers. Finally we survey some systems of records of ownership in various resources, including most prominently land.

A. TRANSFER AND ALIENABILITY

The right to transfer is considered an important attribute of owner sovereignty. The right to transfer enhances owner autonomy, because it permits the owner to shed responsibility for things that no longer suit the owner's wants or needs, and at the same time to acquire other things that may be better suited to the owner's wants and needs. Moreover, the right to transfer confers a significant power on the owner, in that the owner is allowed in effect to appoint his or her successor as the new owner of the asset—something not possible if the owner sheds responsibility by abandonment or destruction (see Chapter IV). The right to transfer also promotes the efficient allocation of resources. If the current owner is not capable of extracting the most value from a resource (as measured by the willingness of others to pay for the output generated by the use of the resource), then a transfer can be negotiated with someone else who can perhaps do better. The process does not work perfectly of course. Transaction and information costs (and lack of self-knowledge by underperforming owners) defeat many potential transfers. But over time and over a large range of things, free transferability probably generates a higher level of socially-desired output than can be obtained from other methods of managing resources. Finally, voluntary transfer is undoubtedly a less conflict-prone method of hiring and firing the gatekeeper/managers of resources than other methods of changing managers. Adverse possession and eminent domain (or for that matter, might-makes-right) are other ways of changing managers, but each has a tendency to generate litigation or worse. Voluntary transfer—where both the outgoing and the incoming manager are willing volunteers in the transfer of owner sovereignty—tends to go much more smoothly.

As we saw in Chapter V, one way the law promotes transferability of property is by putting severe limits on the ability of owners to block transfers, for example by trying to create restraints on alienation or by creating contingent interests in property not certain to vest within the period of the Rule Against Perpetuities. This Chapter focuses on ways in which the law actively seeks to promote transfer of property. Paradoxically, one way the law does this is by imposing some additional constraints on what owners do when they transfer property. For example, the law requires that owners provide adequate evidence of a transfer of ownership, either by delivering the thing to the new owner or by executing an appropriate writing, and it provides powerful incentives for owners to publicly record certain kinds of major transactions in property—all in the interest of making it easier for future transactions

in the property to take place. A little bit of restriction on the freedom on owners to transfer today generates a lot more transfers down the road.

Transfers of property come in two basic types: exchanges (*quid pro quos*), in which an owner relinquishes title to some owned thing in exchange for a reciprocal transfer of some other thing (including money); and gifts, in which an owner relinquishes title to some owned thing in favor of another person without explicitly receiving or expecting to receive something in return. The law of exchanges of property is bound up with the law of contracts and is primarily studied in courses on contracts. The law of gifts is bound up with the law of trusts and estates and is often studied in courses on these topics. Here we will consider only selected topics in these areas that bear on the sovereign owner's right to transfer her owned thing.

We begin with some rules designed to enhance the transferability of assets by imposing certain requirements necessary to establish a valid transfer of some thing. Later, we turn to registration or recording of rights.

1. RULES DESIGNED TO ENHANCE TRANSFERABILITY

The law has long favored transferability of property. One early landmark we briefly encountered in Chapter V was the Statute *Quia Emptores* of 1290, which provided for the alienability of land *inter vivos*. Feudal property systems did permit alienability but with severe and often confusing restrictions: Substituting one tenant for another might impact the quality of the feudal services owed, especially if they were in kind, such as military service. The feudal incidents themselves were abolished with the Statute of Tenures in 1660. By the same token, livery of seisin and its system of witnesses to a public act tended to keep land transactions a local affair, in contrast to the modern systems of land records we will explore later in this Chapter. Restrictions on the dead hand like the Rule Against Perpetuities and the abolition of the fee tail were also thought to promote alienability. In eighteenth-century America the shift toward freer alienability also involved making property more available to the claims of creditors. Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 *Harv. L. Rev.* 385 (2006). Common property, like a village grazing field, by contrast, was and is not fully alienable: The use as a grazing commons is stable and long term, and sustainable use depends on keeping those with access relatively close-knit and not allowing transfer to potential overusers. Common property remains important today but it lay at the heart of feudal systems. Many of the restrictions designed to promote the stability of the feudal system were customary. The move from feudal to modern property systems involved a removal of many of these restrictions and a generally more skeptical attitude toward custom. As we have seen, standardization of property through the *numerus clausus* principle was in part anti-feudal and designed to promote alienability.

Ask yourself as we encounter land records in this Chapter how the *numerus clausus* works together, or not, with a system of title records.

THE STATUTE OF FRAUDS

One doctrine designed to promote transferability requires that certain important transfers of property be memorialized by a writing. The most prominent example of such a rule, which will poke its head up from time to time in these materials (although it is primarily covered in the course in contracts) is the Statute of Frauds. Originally enacted by Parliament in 1677 under the title “An Act for Prevention of Frauds and Perjuries,” 29 Car. II, c. 3, some version of the Statute of Frauds is part of state law everywhere in the United States except in Louisiana. It contains several provisions of importance to the law of property. Section one provides that interests in land, including leases, must be “putt in Writeing and signed by the parties soe making or creating the same” or else they “shall have the force and effect of Leases or Estates at Will onely.” Section two excepts from this requirement “all Leases not exceeding the terme of three years.” Section three provides that no interest in land may be “assigned granted or surrendered unlesse it be by Deed or Note in Writeing signed by the party soe assigning granting or surrendering the same.” Section four provides, in part, that “noe Action shall be brought * * * upon any Contract or Sale of Lands * * * or any Interest in or concerning them * * * unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith.” In short, any conveyance of a property right in land (other than a short term lease) and any contract for the assignment, surrender, or sale of a property right in land must be in writing and signed by at least one of the parties.

There has been a longstanding debate whether the Statute of Frauds, especially as applied to contracts for sales of goods and services, prevents more frauds than it promotes. But there is not much doubt that, as applied to transfers of property rights in land, it has increased the overall security of property rights, and hence has enabled transfers of property to occur more frequently and at lower cost. Indeed, the original statute was passed as a substitute for a system of registration of rights in land, and was widely perceived as successfully promoting greater security in land markets. See Philip Hamburger, *The Conveyancing Purposes of the Statute of Frauds*, 27 *Am. J. Legal Hist.* 354 (1983). So we see one example of a restriction on alienation—a law that interferes with the ability of owners to dispose of property by oral agreement or in an unsigned writing—which nevertheless functions to enhance the overall transferability of property. See also Anthony T. Kronman & Richard A. Posner, *The Economics of Contract Law* 253–67 (1979); Jason Scott Johnston, *The Statute of Frauds*, in *The New Palgrave Dictionary of Economics and Law* (Peter Newman ed., 1998).

2. THE DELIVERY REQUIREMENT

In several contexts, the law requires that a transfer take place only if the thing being transferred or some evidence of title is delivered to the transferee. For example, whenever land or an interest in land (such as an easement) is transferred by deed (a formal writing evidencing a transfer), the transfer is deemed to have taken place only if the deed is delivered to the transferee. Thus, if the transferor makes out a deed to the transferee, informs the transferee that the deed has been signed and sealed, and then puts the deed in his safe, courts will hold that no valid transfer has occurred. As the expression goes, the deed must be “signed, sealed, and *delivered*” before the transaction is complete.

The other prominent type of transfer that requires delivery is a gift. Here, the law requires either a deed of gift (which must be delivered) or actual delivery of the object given. What is the purpose of insisting on delivery to the recipient before the courts will recognize a valid gift?

Irons v. Smallpiece

King’s Bench, 1819.
106 Eng. Rep. 467.

Trover for two colts. Plea, not guilty. The defendant was the executrix and residuary legatee of the plaintiff’s father, and the plaintiff claimed the colts, under the verbal gift made to him by the testator twelve months before his death. The colts however continued to remain in possession of the father until his death. It appeared further that about six months before the father’s death, the son having been to a neighboring market for the purpose of purchasing hay for the colts, and finding the price of that article very high, mentioned the circumstance to his father; and that the latter agreed to furnish the colts any hay they might want at a stipulated price, to be paid by the son. None however was furnished to them till within three or four days before the testator’s death. Upon these facts, Abbott, C.J., was of opinion, that the possession of the colts never having been delivered to the plaintiff, the property therein has not vested in him by the gift; but that it continued in the testator until at the time of his death, and consequently that it passed to his executrix under the will; and the plaintiff therefore was nonsuited.

* * *

■ ABBOTT, C.J. I am of opinion that by the law of England, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee. Here the gift is merely verbal, and differs from a donation mortis causa only in this respect, that the latter is subject to a condition, that if the donor live the thing shall be restored to him. Now it is a well established rule of law, that a donation mortis causa does not transfer the property without an actual delivery. The possession must be transferred, in point of fact; and the late case of *Bunn v. Markham*, 2 Marsh. 532, 171 Eng.

Rep. 268 (Assizes 1816), where all the former authorities were considered, is a very strong authority upon that subject. There Sir G. Clifton had written upon the parcels containing the property the names of the parties for whom they were intended, and had requested his natural son to see the property should pass to the donees. It was therefore manifestly his intention that the property should pass to the donees; yet as there was no actual delivery, the Court of Common Pleas held that it was not a valid gift. I cannot distinguish that case from the present, and therefore think that this property in the colts did not pass to the son by the verbal gift; and I cannot agree that the son can be charged with the hay which was provided for these colts three or four days before the father's death; for I cannot think that that tardy supply can be referred to the contract which was made so many months before.

■ HOLROYD, J. I am also of the same opinion. In order to change the property by a gift of this description, there must be a change of possession: here there has been no change of possession. If indeed it could be made out that the son was chargeable for the hay provided for the colts, then the possession of the father might be considered as the possession of the son. Here however no hay is delivered during the long interval from the time of the contract, until within a few days of the father's death; and I cannot think that the hay so delivered is to be considered in execution of the contract made so long before, and consequently the son is not chargeable of the price of it. * * *

NOTES AND QUESTIONS

1. *Irons* is usually cited for the proposition that delivery is a requirement for a valid gift. If this is so, then why did the judges seem to think that the result might have been different if the father had charged the son for hay shortly after the son reported that prices for hay were too high in the market? At that time, the colts still remained in the custody of the father. Does this perhaps suggest that the judges in *Irons* regarded delivery as just one piece of evidence tending to show that a valid gift has been made? Is the delivery requirement here a functional substitute for the signed writing required in other contexts by the Statute of Frauds? If so, how well does it perform the "fraud preventing" function? Courts sometimes stretch the notions of constructive and symbolic delivery where intent is clear. See, e.g., *Hawkins v. Union Trust Co.*, 175 N.Y.S. 694 (App. Div. 1919) (holding that delivery of letter by decedent evidencing intent to give plaintiff a disused yacht was sufficient to complete gift).

2. Why impose restrictions on gifts that do not apply to sales? In many cultures gift-giving involves an elaborate system of quid pro quo and constitutes a major part of the economy. A classic study is Marcel Mauss, *The Gift: Forms and Functions of Exchange in Archaic Societies* (Ian Cunnison transl., 1954). Is a quid pro quo absent from gift-giving in our own culture? A related but not identical distinction between gifts and sales arises in tax law (because gifts are not includable in the donee's income and are not deductible to the donor). In the leading decision, the U.S. Supreme Court

indicated that transferor intent was crucial—namely whether the donor made the transfer from a “detached and disinterested generosity” or “out of affection, respect, admiration, charity or like impulses.” *Commissioner v. Duberstein*, 363 U.S. 278, 285 (1960) (citations and internal quotation marks omitted). Factfinders were instructed to discover this by applying the “mainsprings of human conduct to the totality of the facts of each case.” *Id.* at 289. Does the common law do any better? How distinct are gifts, exchanges, and thefts anyway? See Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 Fla. L. Rev. 295 (1992).

3. When we say that an asset is inalienable, what does this mean? Quite a number of assets can be given away but not sold. They are market-inalienable. Recall the discussion of body parts and personhood in Chapter III and the excerpt from Margaret Jane Radin. Other assets, like a vote or one’s entire person, cannot be transferred at all. See, e.g., Richard A. Epstein, *Why Restrain Alienation?*, 85 Colum. L. Rev. 970, 984–87 (1985); Lee Anne Fennell, *Adjusting Alienability*, 122 Harv. L. Rev. 1403, 1412 n.34, 1421–22 (2009); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 Colum. L. Rev. 931 (1985). What distinguishes things that cannot be given away or sold from other things, and what distinguishes things that can be given away but not sold from things that can be either given away or sold?

4. The opinions in *Irons* refer to gifts *causa mortis*, which means gifts in contemplation of death. Such gifts are will substitutes, and rules governing their validity developed even earlier than the law on ordinary gifts, like the one in *Irons*. A valid gift *causa mortis* requires, in addition to delivery, that the donor die after making the gift. If the donor recovers, the gift is nullified. Implementing the delivery requirement can be especially difficult when one is on her deathbed, as the following case illustrates.

Foster v. Reiss

Supreme Court of New Jersey, 1955.

[112 A.2d 553](#).

■ VANDERBILT, C.J. On April 30, 1951 the decedent, Ethel Reiss, entered a hospital in New Brunswick where she was to undergo major surgery. Just prior to going to the operating room on May 4, 1951, she wrote the following note in her native Hungarian language to her husband, the defendant herein:

My Dearest Papa:

In the kitchen, in the bottom of the cabinet, where the blue frying pan is, under the wine bottle, there is one hundred dollars. Along side the bed in my bedroom, in the rear drawer of the small table in the corner of the drawer, where my stockings are, you will find about seventy-five dollars. In my purse there is six dollars, where the coats are. Where the coats are, in a round tin box, on the floor, where the shoes are, there is two

hundred dollars. This is Dianna's. Please put it in the bank for her. This is for her schooling.

The Building Loan book is yours, and the Bank book, and also the money that is here. In the red book is my son's and sister's and my brothers address. In the letter box is also my bank book.

Give Margaret my sewing machine and anything else she may want; she deserves it as she was good to me.

God be with you. God shall watch your steps. Please look out for yourself that you do not go on a bad road. I cannot stay with you. My will is in the office of the former Lawyer Anekstein, and his successor has it. There you will find out everything.

Your Kissing, loving wife,
Ethel Reiss 1951-5-4.

She placed the note in the drawer of a table beside her bed, at the same time asking Mrs. Agnes Tekowitz, an old friend who was also confined in the hospital, to tell her husband or daughter about it—"In case my daughter come in or my husband come in, tell them they got a note over there and take the note." That afternoon, while the wife was in the operating room unconscious under the effects of ether, the defendant came to the hospital and was told about the note by the friend. He took the note from the drawer, went home, found the cash, the savings account passbook, and the building and loan book mentioned in the note, and has retained possession of them since that time.

The wife was admittedly in a coma for three days after the operation and the testimony is in dispute as to whether or not she recovered consciousness at all before her death on the ninth day. Her daughter, her son-in-law, Mrs. Waldner, an old friend and one of her executrices who visited her every day, and Mrs. Tekowitz, who was in the ward with her, said that they could not understand her and she could not understand them. The defendant, on the other hand, testified that while she was "awful poor from ether" after the operation, "the fourth, fifth and sixth days I thought she was going to get healthy again and come home. She talked just as good as I with you." The trial judge who saw the witnesses and heard the testimony found that

After the operation and until the date of her death on May 13, 1951 she was in a coma most of the time; was unable to recognize members of her family; and unable to carry on intelligent conversation * * * Mrs. Reiss was never able to talk or converse after coming out of the operation until her death.

The decedent's will gave \$1 to the defendant and the residue of her estate to her children and grandchildren. The decedent's personal representatives and her trustees under a separation agreement with the defendant, brought this action to recover the cash, the passbook, and the building and loan book from the defendant, who in turn claimed

ownership of them based on an alleged gift *causa mortis* from his wife. The trial court granted judgment for the plaintiffs, concluding that there had been no such gift. The Appellate Division of the Superior Court reversed, and we granted the plaintiff's petition for certification to the Appellate Division.

The doctrine of *donatio causa mortis* was borrowed by the Roman law from the Greeks, 2 Bl.Com. 514, and ultimately became a part of English and then American common law. Blackstone has said that there is a gift *causa mortis* "when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, to keep in case of his decease." 2 Bl.Com. 514. Justinian offered this definition:

A gift *causa mortis* is one made in expectation of death; when a person gives upon condition that, if any fatality happen to him, the receiver shall keep the article, but that if the donor should survive, or if he should change his mind, or if the donee should die first, then the donor shall have it back again. These gifts *causa mortis* are in all respects put upon the same footing as legacies. * * * To put it briefly, a gift *causa mortis* is when a person wishes that he himself should have the gift in preference to the donee, but that the donee should have it in preference to the heir. Walker's Just., at 119.

* * * There is some doubt in the New Jersey cases as to whether as a result of a gift *causa mortis* the property remains in the donor until his death, or whether the transfer is considered absolute even though it is defeasible. In any event, a gift *causa mortis* is essentially of a testamentary nature and as a practical matter the doctrine, though well established, is an invasion into the province of the statute of wills * * *

In *Ward v. Turner*, 2 Ves.Sr. 431, 28 Eng. Rep. 275, 279 (Ch. 1752), Lord Chancellor Hardwicke said that "it was a pity that the Statute of Frauds did not set aside all these kinds of gifts." Lord Eldon expressed the opinion that it would be an improvement of the law to strike out altogether this peculiar form of gift, but since that had not been done, he felt obliged to "examine into the subject of it." *Duffield v. Elwes*, 1 Bligh (N.S.) 497, 533, 4 Eng. Rep. 959, 972 (K.B. 1827). Our own Vice-Chancellor Stevenson referred to it as "that ancient legal curiosity." *Dunn v. Houghton*, 51 A. 71, 78 (N.J. Ch. 1902), and then later said that such gifts are "dangerous things":

These gifts *causa mortis* are dangerous things. The law requires, before Mr. Hitt can come into this court and claim \$10,000 as an ordinary testamentary gift from Mrs. Thompson, that he should produce an instrument in writing signed by Mrs. Thompson, and also acknowledged with peculiar solemnity by her in the presence of two witnesses, who thereupon subscribed their names as witnesses. That is what Mr. Hitt would have to prove if he claimed a testamentary gift in the ordinary form of

one-third of Mrs. Thompson's estate. And yet, in cases of these gifts *causa mortis*, it is possible that a fortune of a million dollars can be taken away from the heirs, the next of kin of a deceased person, by a stranger, who simply has possession of the fortune, claims that he received it by way of gift, and brings parol testimony to sustain that claim. *Varick v. Hitt*, 55 A. 139, 153 (N.J. Ch. 1903). * * *

The first question confronting us is whether there has been "actual, unequivocal, and complete delivery during the lifetime of the donor, wholly divesting him [her] of the possession, dominion, and control" of the property[.] * * *

Here there was no delivery of any kind whatsoever. We have already noted the requirement so amply established in our cases of "actual, unequivocal and complete delivery during the lifetime of the donor, wholly divesting her of the possession, dominion, and control" of the property. This requirement is satisfied only by delivery by the *donor*, which calls for an affirmative act on her part, not by the mere taking of possession of the property by the donee. * * *

Here we are concerned with three separate items of property—cash, a savings account represented by a bank passbook, and shares in a building and loan association represented by a book. There was no actual delivery of the cash and no delivery of the indicia of title to the savings account or the building and loan association shares. Rather, the donor set forth in an informal writing her desire to give these items to the defendant. Although the writing establishes her donative intent at the time it was written, it does not fulfill the requirement of delivery of the property, which is a separate and distinct requirement for a gift *causa mortis*. The cash, passbook, and stock book remained at the decedent's home and she made no effort to obtain them so as to effectuate a delivery to the defendant.

We disagree with the conclusion of the Appellate Division that the donee already had possession of the property, and therefore delivery was unnecessary. Assuming, but not deciding, the validity of this doctrine, we note that the house was the property of the deceased and, although defendant resided there with her, he had no knowledge of the presence of this property in the house, let alone its precise location therein; therefore it cannot be said that he had possession of the property. * * *

But it is argued that the decedent's note to her husband in the circumstances of the case was an authorization to him to take possession of the chattels mentioned therein which when coupled with his taking of possession thereof during her lifetime was in law the equivalent of the delivery required in the Roman and common law alike and by all the decisions in this State for a valid gift *causa mortis*. Without accepting this contention, it is to be noted that it has no application to the present case, because here at the time the defendant obtained her note the decedent was in the operating room under ether and, according to the

finding of the trial court, *supra*, after the operation and until the date of her death on May 13, 1951 she was in a coma most of the time; was unable to recognize members of her family; and unable to carry on intelligent conversation * * * Mrs. Reiss was never able to talk or converse after coming out of the operation until her death.

In these circumstances the note clearly failed as an authorization to the defendant to take possession of the chattels mentioned therein, since at the time he took the note from the drawer the decedent was under ether and according to the findings of the trial court unable to transact business until the time of her death. * * *

The judgment of the Appellate Division of the Superior Court is reversed and the judgment of the Chancery Division of the Superior Court will be reinstated.

■ JACOBS, J. (with whom Wachenfeld and William J. Brennan, Jr., JJ., agree) dissenting. The decedent Ethel Reiss was fully competent when she freely wrote the longhand note which was intended to make a gift *causa mortis* to her husband Adam Reiss. On the day the note was written her husband duly received it, located the money and books in accordance with its directions, and took personal possession of them. Nine days later Mrs. Reiss died; in the meantime her husband retained his possession and there was never any suggestion of revocation of the gift. Although the honesty of the husband's claim is conceded and justice fairly cries out for the fulfillment of his wife's wishes, the majority opinion (while acknowledging that gifts *causa mortis* are valid in our State as elsewhere) holds that the absence of direct physical delivery of the donated articles requires that the gift be stricken down. I find neither reason nor persuasive authority anywhere which compels this untoward result. See Gulliver and Tilson, *Classification of Gratuitous Transfers*, 51 *Yale L.J.* 1, 2 (1941):

One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power. This is commonplace enough but it needs constant emphasis, for it may be obscured or neglected in inordinate preoccupation with detail or dialectic. A court absorbed in purely doctrinal arguments may lose sight of the important and desirable objective of sanctioning what the transferrer wanted to do, even though it is convinced that he wanted to do it.

Harlan F. Stone in his discussion of *Delivery in Gifts of Personal Property*, 20 *Col.L.Rev.* 196 (1920), points out that the rule requiring delivery is traceable to early notions of *seisin* as an element in the ownership of chattels as well as well as land; and he expresses the view that as the technical significance of *seisin* fades into the background, courts should evidence a tendency to accept other evidence in lieu of

delivery as corroborative of the donative intent. See Philip Mechem, *The Requirement of Delivery in Gifts of Chattels*, 21 Ill.L.Rev. 341, 345 (1926). Nevertheless, the artificial requirement of delivery is still widely entrenched and is defended for modern times by Mechem (*supra*, at 348) as a protective device to insure deliberate and unequivocal conduct by the donor and the elimination of questionable or fraudulent claims against him. But even that defense has no applicability where, as here, the donor's wishes were freely and clearly expressed in a written instrument and the donee's ensuing possession was admittedly *bona fide*; under these particular circumstances every consideration of public policy would seem to point towards upholding the gift. * * *

When Ethel Reiss signed the note and arranged to have her husband receive it, she did everything that could reasonably have been expected of her to effectuate the gift *causa mortis*; and while her husband might conceivably have attempted to return the donated articles to her at the hospital for immediate redelivery to him, it would have been unnatural for him to do so. It is difficult to believe that our law would require such wholly ritualistic ceremony and I find nothing in our decisions to suggest it. The majority opinion advances the suggestion that the husband's authority to take possession of the donated articles was terminated by the wife's incapacity in the operating room and thereafter. The very reason she wrote the longhand note when she did was because she knew she would be incapacitated and wished her husband to take immediate possession, as he did. Men who enter hospitals for major surgery often execute powers of attorney to enable others to continue their business affairs during their incapacity. Any judicial doctrine which would legally terminate such power as of the inception of the incapacity would be startling indeed—it would disrupt commercial affairs and entirely without reason or purpose. * * *

NOTES AND QUESTIONS

1. As implied by this case, gifts *causa mortis* potentially override other more formal methods of disposing of property upon death—here the will giving the husband \$1. (Putting aside the possible effects of the separation agreement, the husband would probably be entitled to more than this under a forced share statute. See Chapter V.) What is the rationale for insisting on the delivery requirement in the context where the intentions of the deceased seem unequivocally clear? Is it because, as the majority's reference to the Statute of Frauds suggests, the court is worried about the possibility of fraud being perpetrated in some other case? Formalities like drawing up a new will can prevent self-interested parties from perpetrating frauds, but they can do so at the cost of defeating true transferor intent. Or, does the delivery requirement provide additional assurance that the donor adequately appreciates the potential finality of the decision she is making? Cf. Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 800–03 (1941) (describing the “cautionary” function of certain legal formalities). But why doesn't the carefully composed letter satisfy this concern?

2. The New Jersey Supreme Court has not overruled *Foster* but in a later case it adopted a position closer to that advocated by the dissent. In *Scherer v. Hyland*, 380 A.2d 698, 701–02 (N.J. 1977), a woman endorsed a settlement check in blank and placed it on the kitchen table along with a suicide note in the apartment she shared with the plaintiff and then committed suicide. The court held this satisfied the constructive delivery requirement for a valid gift *causa mortis* in light of the unambiguous evidence of donative intent and the “universally understood” act of endorsing a check, which makes it negotiable. But the delivery requirement may still be alive in New Jersey. A lower court in a more recent case, relying in part on *Foster*, held that an oral expression by the decedent to the plaintiff that she wanted her to have her wedding and engagement ring when she died was not enough where there was no attempt at delivery, “physically, constructively, or symbolically.” *In re Estate of Link*, 746 A.2d 540, 544 (N.J. Super. Ch. 1999).

3. Does one draw any comfort from the fact that the note was in Mrs. Reiss’s own hand? About half the states accept a will unattested by witnesses if it is in the testator’s own hand—a so-called holographic will. The Uniform Probate Code takes this approach as well. Uniform Probate Code § 2–502(b) (formerly § 2–503). New Jersey did not permit holographic wills when *Foster* was decided, but amended its probate code in 1977 to make them enforceable. See *Will of Nassano*, 489 A.2d 1189, 1190–91 (N.J. Super. Ct. App. Div. 1985). Would this change the outcome on the facts of *Foster*? Note that even in jurisdictions that accept holographic wills, the court must be satisfied that the writing reflects the intentions of the deceased and was not the product of coercion.

4. What additional acts would have been required to establish delivery in this case? If Adam had retrieved the pass books and the cash, had handed them to Ethel, and she had immediately handed them back, would this be enough? What is the point of requiring such a ritual?

Gilbert v. McSpadden

Court of Civil Appeals of Texas, 1936.

91 S.W.2d 889.

■ ALEXANDER, JUSTICE. On March 19, 1927, Tom Gilbert and wife executed and acknowledged a deed conveying to Gilbert’s daughter, Mrs. Conde Scroggins, and his son, B. C. Gilbert, two tracts of land in Briscoe county, and on the same day they executed and acknowledged another deed conveying to Gilbert’s daughter, Mrs. Cecil McSpadden, two tracts of land, one in Hill county and the other in Freestone county. Each deed recited a consideration of \$1 and love and affection. Tom Gilbert kept the deeds in his possession and continued to exercise dominion over the land. On December 19, 1931, he took the deeds from his bank box in Quitaque in Briscoe county and started to the home of his daughter, Mrs. Scroggins, in Borger for the avowed purpose of delivering the deeds to her to be recorded. He arrived at the home of his said daughter at about 8 o’clock in the evening of December 20, 1931, and retired for the night.

The next morning he was found dead in bed. Shortly thereafter the children found the deeds in his grip in his room. They immediately took possession of the deeds and had them recorded and are now claiming title to the land by virtue of said conveyances. Mrs. Georgia Oakes Gilbert, as administratrix of the estate of Tom Gilbert, deceased, claims that the deeds were never properly delivered and that as a result said land still belongs to the estate of the deceased, Tom Gilbert, and that she as administratrix is entitled to the title and possession of the land, together with the rents that have been collected therefrom, for the purpose of paying the debts owing by said estate.

It is a well-established rule that a deed does not become effective until it is delivered. It is also well settled that in order to constitute a delivery of a deed the facts and circumstances in evidence must show an intention on the part of the grantor that the deed shall presently become operative and effective. The rule is stated in 8 R.C.L. 985, as follows: "While delivery may be by words or acts, or both combined, and manual transmission of the deed from the grantor to the grantee is not required, it is an indispensable feature of every delivery of a deed, whether absolute or conditional, that there be a parting with the possession of it, and with all power and control over it, by the grantor, for the benefit of the grantee at the time of the delivery. The dominion over the instrument must pass from the grantor with the intent that it shall pass to the grantee, if the latter will accept it. And where the proof fails to show that the grantor did any act by which he parted with the possession of the deed for the benefit of the grantee, the question of intent becomes immaterial. In other words, delivery may be effected by any act or word manifesting an unequivocal intention to surrender the instrument so as to deprive the grantor of all authority over it or of the right of recalling it; but if he does not evidence an intention to part presently and unconditionally with the deed, there is no delivery. * * * And while the rule that the grantor must part with all dominion and control over his deed does not mean that he must put it out of his physical power to procure repossession of it, nevertheless, if the deed remains within the grantor's control and liable to be recalled, there is, according to almost unanimous authority, no delivery, notwithstanding that he has parted with its immediate possession. * * *" In the case at bar there was possibly an intention to deliver the deed at some date in the future, but the grantor retained possession and control of it until his death, without having evidenced an intention that it should presently become effective. There was, therefore, no such delivery as to validate the conveyance.

The judgment is reversed and the cause remanded, with instructions to the trial court to ascertain the amount of rents due the administratrix and to render judgment in her behalf as such administratrix for the title and possession of said land, together with the rents therefrom. Said judgment, however, should be so drawn as not to bar any right that appellees may have as heirs or devisees of Tom Gilbert, deceased, to

recover said land, or so much thereof as may remain in the hands of the administratrix, after said estate has been fully administered.

NOTES AND QUESTIONS

1. As suggested by the facts of *Gilbert*, there is a good deal of overlap between cases involving delivery of deeds and those involving gifts. The decision also suggests that the deed cases, like cases involving gifts *causa mortis*, frequently involve attempts by parties of relatively modest means to devise a substitute for the formalities of the Wills Act. Should the law in these cases focus more on the intention of the donor, and less on whether all “dominion and control” over the deed has passed from the donor to the donee? Or would it be a better strategy to focus on ways to make wills easier and cheaper for ordinary folks to execute? See Reid Kress Weibord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. Rev. 877 (2012) (discussing various reform proposals).

2. Should the delivery requirement for deeds to real property apply only to gratuitous transfers and not to arm’s length sales of real property? Consider in this regard that delivery (either of the object or a writing evidencing a contract) is not required in order to make a binding contract for the sale of personal property. The Uniform Commercial Code (UCC), roughly speaking, establishes a default rule that title passes on delivery. See UCC § 2–401. But delivery is not essential to the formation of a binding contract, UCC § 2–204, and the parties are free to make alternative arrangements regarding the passage of title. What accounts for the difference? Is it because land is presumed to be unique, whereas personal property (at least in the typical case) is not? Or is the delivery requirement for deeds to land just a holdover from the past, land transactions not having been “modernized” by a reform effort like the Uniform Commercial Code? Can you think of other functions the delivery requirement might play in the context of ordinary real estate transactions that do not apply to sales of personal property?

3. Should the requirement that the parties observe formalities like the delivery requirement be applied on categorical grounds (gifts and deeds of real property—yes; sales of personal property—no), or should formalities be required or not based on more fine-grained “situational” criteria? See Adam Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situation Theory*, 91 Wash. U. L. Rev. 797 (2014).

B. LAND TRANSACTIONS

Personal property gifts and sales tend to be discrete events. A land transaction is stretched out over time, and extends from negotiation, to contract execution, to closing and delivery, and finally recordation. Consider the purchase of residential real estate. The seller will usually employ a real estate agent and have the property listed. The buyer will often have a real estate agent during the search process. When the buyer is interested in a particular property, the buyer will ask her real estate agent, or possibly a lawyer, to make an offer in writing. This may be

preceded or followed by negotiation. Once a written offer is accepted by the seller, it is a contract, which will govern the dealings of the seller and the buyer until the closing. The Statute of Frauds requires any contract for the sale of real estate to be in writing (and signed by the person against whom it is being enforced). The real estate broker engaged by the seller will earn a commission, a percentage of the final sales price. States vary in terms of when the broker earns this commission. The law in many states provides a default rule that the broker earns the commission when the broker finds a buyer who is “ready, willing, and able” to buy the property. In such states, if the seller chooses not to sell, the seller is still liable to the broker for the commission (unless the seller and the broker have contracted for something else).

Even though the parties have an enforceable contract for sale, the seller remains in possession, because there is more work to be done before the property can change hands. The purchaser will typically seek credit to finance the purchase (see Chapter VII) and will have the state of the title investigated. Title examination will also be accompanied by an inspection of the premises for defects and any facts that might call the seller’s title into question, such as possession by a third party. As we will see, the lawyer might check the land records and any other relevant records, or hire a title expert (perhaps an employee of a title insurance company) to conduct the search. Some title companies maintain their own set of records, called “title plants.” Such companies will often insure title against the types of defects that a search should uncover, but not against facts like adverse possession that such a record search would not reveal.

Title insurance policies can be issued for owners or mortgage lenders. The latter generally insist on being covered by such a policy, which is almost always required in order to make the mortgage available on the secondary market. Both owners’ and mortgage lenders’ policies are contracts of indemnity, but unlike most forms of insurance the policy is paid for in a single lump-sum premium. The insurance company’s duty is to indemnify loss from title defects that existed as of the date the policy was issued, and to defend the title against legal attacks on it (and relatedly also to cure the title defect if that is possible within the policy limits). If a title defect is found by the company and disclosed to the purchaser, it is not covered by the policy; nor are defects known to the purchaser and not disclosed to the title insurer. Only problems with the title itself are covered; survey errors, adverse possession claims, and regulatory actions by government that may lower the market value of land are excluded. Sometimes the exclusions from a title insurance policy are so extensive that the policy in effect covers only what is to be found in the land records, in which case the policy serves as a guarantee of the title company’s search of the records and resulting pronouncement on the state of the title. The need for title searches and title insurance are quite characteristic of recording systems. As we will see, registration systems

have a guarantee built into them: The registrar of deeds will check documents for their validity and will “purge” defects and invalid claims. Registration systems are accompanied by a guarantee fund that indemnifies title holders against errors by the registrar.

Our recording system shapes the land sale contract as well. The contract will state that the seller will provide marketable title at the closing. Marketable title is title that is free from defects and encumbrances but need not be perfect title; rather some notion of reasonableness animates this standard, such that marketable title is sometimes said to be title that is free from reasonable doubt or title that a reasonable person would accept. Nonetheless, the buyer is not expected to “purchase a lawsuit.” For example, a claim of adverse possession or someone else’s colorable claim to have title would make title unmarketable. An encroachment of a building like those we saw in Chapter I would make title unmarketable (and would involve the purchase of a lawsuit), but an overhanging awning or cornice probably would not render title unmarketable. A body of case law has built up around the notion of marketable title, in cases where purchasers have tried to back out of the deal based on the failure to provide marketable title. 1 Milton R. Friedman, *Contracts and Conveyances of Real Property* ch. 4 (7th ed. 2005).

At the closing, the parties will execute the necessary documents and effect the transfers. The seller will execute and deliver the deed to the buyer. The buyer will make out a check to the seller for the rest of the purchase price (or will direct her attorney to disburse funds from an escrow account into which the purchase money was deposited prior to the closing), and will often also execute a note and mortgage for the lender. After the closing the buyer finally takes possession of the property. Also after the closing, the contract is no longer operative but is said to “merge” with the deed. This means that any covenants that continue to bind the seller must be part of the deed if they are to bind at all. And if there is breach the buyer must sue on the deed, not the land sale contract. Deeds come in different varieties, depending on what sort of guarantee the seller makes to the buyer. A general warranty deed contains a covenant by the seller that he is able to, and does, convey good title to the buyer. It usually contains covenants that the seller has possession, the right to convey, that there are no encumbrances (easements, mortgages, etc.) other than those stated in the deed, that the seller will defend the buyer’s title against attack, that the buyer will have quiet enjoyment, and that the seller will execute any further documents needed to provide clear title. By contrast, a quitclaim deed contains no covenant of title; such a deed conveys to the buyer whatever the seller had but contains no assurance as to what that is. A special warranty deed gives a covenant against title defects stemming from acts of the grantor and related parties, but not other defects. Again, deed covenants can be supplemented by title insurance.

Unlike most sales of personal property, real estate transactions stretch over a considerable period. While the relationship of the seller and the buyer is still governed by the purchase and sale agreement, who owns the property and for what purposes? Consider the following case.

Wood v. Donohue

Court of Appeals of Ohio, First District, 1999.

736 N.E.2d 556.

■ PAINTER, JUDGE. This case involves the ancient doctrine of equitable conversion of real estate—when a contract for the sale of real property is signed, equitable title passes to the buyer. Here, the sale involved a land installment contract. The trial court, presumably relying on the doctrine of equitable conversion, held that the buyer’s equitable estate in the land was equal to the amount of the purchase money the buyer had paid as of December 18, [1984] (the date a third party determined the property had been diminished in value). While appellant Steven B. Donohue (the buyer) and appellee Betty Lou Wood (the seller) both concede that the ancient law should be applied, they differ in the manner in which it should be applied under the peculiar facts of this case.

In 1983, Donohue and his girlfriend, Vicki Schroot, entered into a land installment contract with Wood to purchase a house for \$87,900. Donohue and Schroot made a down payment of \$30,000 and agreed to make monthly payments for the remainder of the purchase price under a thirty-year amortization schedule, with a seven-year balloon payment. The balance of the purchase price was paid in full in 1990.

The house was located on property near the Fernald uranium processing plant in Crosby Township. In 1985, a class action was initiated against the processing plant. Wood, Donohue, and Schroot filed claims. The lawsuit was settled, with the class members receiving monies for the diminution in value of their property as of December 18, 1984. The lawsuit’s filing, settlement, and “diminution date” were all *after* the execution of the land contract. The Fernald trustees awarded \$9,478 as compensation for the diminished value of the property involved in this case and issued a check in 1993 to Donohue, Schroot, and Wood. However, the check was not cashed.

Wood filed a complaint against Donohue, which was later amended to include Schroot and the Fernald Settlement Fund Trustees, seeking a declaration that she was entitled to 65.41% of the settlement check and that Donohue and Schroot were entitled to the remainder. After the Fernald trustees deposited a new check in an interest-bearing escrow account, Wood dismissed them from the case.

The trial court, after a bench trial, entered judgment for Wood, awarding her 65.41% of the settlement and Donohue the remainder. The apportionment was based on the portion of the purchase money paid by Donohue as of December 18, 1984, the date chosen by the Fernald

trustees to determine the diminution amount. (Schroot's counsel appeared and stated on the record before trial that Schroot was surrendering any interest she had in the award. There is, however, no order journalizing her surrender or her dismissal. Instead, the trial court ordered that Schroot take nothing from the settlement.)

Donohue appeals the trial court's decision to apportion the settlement award, contending in his sole assignment of error that the trial court erred in rendering a judgment contrary to law. In support of his assignment, Donohue argues that because he was the purchaser of the property under the land installment contract, he was entitled to the full settlement amount under the doctrine of equitable conversion.

Under the long-recognized doctrine of equitable conversion, where land is contracted to be sold, even under an executory contract, equity treats the exchange as actually taking place when the contract becomes effective. As explained by Lord Thurlow in *Fletcher v. Ashburner* [1 Bro. C.C. 497 (1779)], “[M]oney directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money, or money land.’”

Thus, the seller, in equity, becomes the owner of the purchase money, and the purchaser becomes the owner of the property. “The interest of the vendor under a contract of purchase is a right to receive the balance of the purchase price, which is secured by his retaining the legal title.” *Berndt v. Lusher*, 178 N.E. 14, 15 (Ohio App. 1931).

Ohio courts have analogized the seller's retention of the legal title to the property as a lien “similar to a mortgage for the unpaid purchase price; the title is kept as security for the debt. Furthermore, it is presumed that a vendor with such a lien retains the title, not the land, as security for payment of the price.” *Flint v. Holbrook*, 608 N.E.2d 809, 814 (Ohio App. 1992).

While the concept of equitable conversion has been used predominantly to determine rights under standard sales contracts, the doctrine has also been applied in Ohio to land installment contracts. In *Blue Ash Bldg. & Loan Co.*, a case in which this court determined that the sale of mortgaged property by land installment contracts constituted a “change in ownership” within the meaning of the acceleration-of-payment clauses in mortgage agreements, we applied the doctrine of equitable conversion. We relied, in part, on the following explanation of the interest of a purchaser under a land installment contract: “The vendee obtains an equitable estate entitling him generally to all the incidents of ownership. The vendee has the right to use the property free

from interference of the vendor and is not impeachable for waste unless the security of the vendor becomes impaired.’” *Blue Ash Bldg. & Loan Co. v. Hahn*, 484 N.E.2d 186, 189 (Ohio App. 1984).

We explained that “[u]ntil the vendee has performed all his obligations under the contract and has attained legal title to the property, he does not stand as sole owner of the property. However, he does stand as an equitable owner of the property with the obligations and incidents of ownership attendant to possession of the property.” *Id.* We relied on *Black’s Law Dictionary* to define an “equitable owner” in this manner:

“‘One who is recognized in equity as the owner of property, because the real and beneficial use and title belong to him, although the bare legal title is vested in another, *e.g.*, a trustee for his benefit. One who has present title in land which will ripen into legal ownership upon the performance of conditions subsequent. There may therefore be two “owners” in respect of the same property, one the nominal or legal owner, the other the beneficial or equitable owner.’” *Id.*

We then analogized a land installment contract to the situation where a seller and purchaser have entered into a contract for the sale of land, but legal title has not yet passed, to explain, “‘The purchaser’s interest under an enforceable contract is treated as real property for many purposes under the principles of equitable conversion. He is regarded in equity as the owner, with the legal title held in trust for him. His position is similar to that of a mortgagor, especially where the mortgagee holds the legal title.’” *Id.* We concluded that “the vendee of a land installment contract stands as an equitable owner of property sold under the contract * * *.” *Id.*

This conclusion is further supported by R.C. 5313.01(A), which defines a “land installment contract,” as “an executory agreement * * * [in which a] vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee’s obligation.” This “statutory language clearly describes the vendor’s retention of title ‘as security for the vendee’s obligation’ to pay the balance of the installment payments under the land contract.” In re *Johnson*, 75 B.R. 927, 930 (Bankr. N.D. Ohio 1987).

Thus, the land contract in this case effectively transferred the ownership and equitable title of the property to Donohue. As the equitable owner, Donohue bore all losses, but also was entitled to enjoy all the benefits that might accrue.

The doctrine of equitable conversion is usually applied to determine which party bears the loss when property is damaged by an accidental occurrence after a real estate contract has been entered, but before a deed is executed. The usual scenario involves a determination of who is entitled to insurance proceeds. We see no reason not to apply that analysis to the settlement proceeds in this case. To do so seems especially

equitable where the land installment contract clearly demonstrates that the parties intended for Donohue to bear any loss by providing that (1) while Wood was to maintain “hazard” insurance on the property to the extent of the remaining purchase price, Donohue was to be considered a named insured and had the obligation to pay what constituted the annual premium in monthly installments, (2) the insurance proceeds were to be used either to repair or to reconstruct the property, (3) Donohue was entitled to any excess after reconstruction or repair, and (4) if the property were a total loss, Donohue had the option to repair or reconstruct the property or to apply the proceeds to the purchase price and complete the purchase.

Under the doctrine of equitable conversion, any loss in the property’s value due to an accidental occurrence fell on Donohue as owner of the equitable title. We conclude that, like insurance proceeds, the settlement money from the Fernald trustees provided to Wood was held by her as trustee for Donohue, subject to her own claims for any unpaid purchase money. Thus, under the doctrine of equitable conversion, Wood was only entitled to the proceeds to the extent that she could prove that her security interest in the unpaid purchase money had been impaired. By the time the money was paid, Wood had received the purchase money. Thus, the proceeds should have been paid to Donohue alone. Otherwise, Wood would be unfairly enriched by, in effect, recovering twice on the same property—the purchase price that she asked for and received, and damages for the diminution in value, which she did not suffer.

Accordingly, we affirm the trial court’s judgment as to Schroot. We reverse the trial court’s judgment as to Wood and Donohue. We enter judgment for Donohue, ordering that the entire settlement amount placed in the escrow account, plus all accrued interest, be awarded to him.

Judgment accordingly.

NOTES AND QUESTIONS

1. The doctrine of equitable conversion is sometimes said to derive from the right of the purchaser of land to the equitable remedy of specific performance. The reasoning is that because property in land is unique and an award of damages would not make the purchaser whole, one who contracts to purchase real property is therefore entitled to an order requiring conveyance of the specific rights for which the purchaser has contracted. In the principal case, why, then, does the damages award, which consists of money rather than specific property, go to Donohue? Could one consider the damages award as deferred compensation to Wood for the sale of the property?

2. Many equitable conversion cases involve insurance proceeds. The seller and the purchaser can contract as to who bears the risk of loss and who has the duty to insure, but the default rules vary by state. Some states apply equitable conversion and put the risk of loss on the purchaser from the

moment the contract of purchase and sale was signed. Other states place the loss on the seller until the closing, and still others place the loss on whoever is in possession at the time the loss occurs. (Even in states that apply equitable conversion to risk of loss, the loss falls on the seller if he negligently caused it, say by smoking in bed.) Equitable conversion matters also in how it characterizes an interest. Thus, in a will referring to “my real property” and “my personal property,” these terms track the equitable title. So if the seller dies during the executory period, her interest in the land is considered personal property, and if the purchaser dies before closing, his interest in the land is considered real property. The real versus personal property distinction can matter for other purposes as well, for instance, where real property goes directly to the heir and personal property passes through the hands of the executor. Does all this reflect people’s likely intent or expectations? Or is it carrying a legal fiction too far? How about the rule that equitable conversion applies (at the moment of death) where a will directs real estate to be sold, making the property fall under the category of personal rather than real property?

3. Equitable conversion is equitable in the sense that it was developed by the equity courts and has been shaped by the equitable mode of reasoning. It is often associated with the equitable maxim “equity regards as done that which ought to be done.” More specifically the mechanics of the doctrine involve separation of legal and equitable (beneficial) title. The legal title retained by the seller can be used to establish the seller’s right to remain in possession until the purchase price is paid. It also functions as a kind of security interest should the buyer fail to come up with the funds for the purchase, in an echo of the title theory of mortgages.

4. In *Wood v. Donohue*, if we assume that the purchase price negotiated by the parties in 1983 reflected the diminished value of the property due to its proximity to the uranium processing plant, why would Ms. Wood be unjustly enriched by receiving a portion of the settlement award? Wouldn’t the settlement simply offset the lower price she received on the sale because of the location of the plant? If the settlement had been agreed upon before the parties signed the land sale contract in 1983, but the proceeds were distributed after the contract was executed, would Donohue be entitled to the settlement proceeds? Or on these facts would they belong to Wood?

NOTE ON LAND DEMARCATION

In a transfer of land, or in any assertion of ownership of land, it is essential to know exactly what land is being claimed (or is covered by a mortgage, and so on). Deeds accordingly must contain some description of the land. Likewise, as we will see, part of the keeping of land records involves identifying the land. For all these purposes, some system of land demarcation is required.

Most land demarcation systems fall into one of two broad categories. Historically the more common is the *metes and bounds* system, in which land boundaries are marked using monuments like rocks, trees, and other

structures as well as compass directions, distances, and angles (“courses and distances”). This system prevails in the Eastern states. A metes and bounds description consists of directions for a trip around the perimeter of a parcel (as in “start at the big stone by Lake Lemon and then proceed North 25 Degrees East for 150 rods . . .”). Mistakes in this system are easy to make. Not only do monuments like trees or fences rot away, but it is not uncommon for a description to fail to achieve closure (returning to the starting point), to have some overlap with the description of an adjacent parcel, to contain misstatements like substituting “south” for “north,” and so on. For example, parts of Texas uses metes and bounds for claims tracing to Spanish land grants (while the rest of the state uses a version of the rectangular survey), which can lead to some knotty litigation, as described by one court:

None of the original monuments on the ground to Porcion 72 and none of the original monuments to the grants which surround this porcion, including the location of the Rio Grande River in 1767 can be found today. Appellant admits that all of these monuments of the original surveys have disappeared except as to the beginning point of the 1767 survey of Porcion 72 which he contends that the state appointed surveyor Byron L. Simpson has located by following the footsteps of the original surveys from the calls contained in the original field notes of 1767. * * * Insofar as a determination of the boundary lines of Porcion 72 is concerned, appellant argues and the appellees agree, that the only legal relevant inquiry is the location of such grant as surveyed by the Spanish surveyors in 1767. Surveyor Simpson has attempted to locate Porcion 72 by course and distance from where he contends the beginning point was in the original survey in the year 1767, and by such construction he locates Porcion 72 in such a manner as to create a vacancy between Porcion 72 and Los Torritos Grant to the east.

Strong v. Delhi-Taylor Oil Corp., 405 S.W.2d 351, 354 (Tex. Civ. App. 1966). In urban areas the existence of well-surveyed streets makes life easier, as in this description of a parcel in Buffalo:

All that certain piece or parcel of land, situate in the city of Buffalo, county of Erie and state of New York, being part of lot no. 121 of the Stevens Survey, bounded and described as follows:

Beginning at a point in the westerly line of Parkdale Avenue (formerly Tryon Place), 273 feet south of its intersection with the southerly line of Delevan Avenue; thence westerly parallel with the southerly line of West Delevan Avenue 136.62 feet; thence southerly parallel with Parkdale Avenue 30 feet; thence easterly parallel with West Delevan Avenue 136.62 feet to the said westerly line of Parkdale Avenue; thence northerly along the westerly line of Parkdale Avenue 30 feet to the point of beginning.

Mary L. Cataudella & Lawrence P. Heffernan, Real Estate Title Practice in Massachusetts ch. 3 (2010).

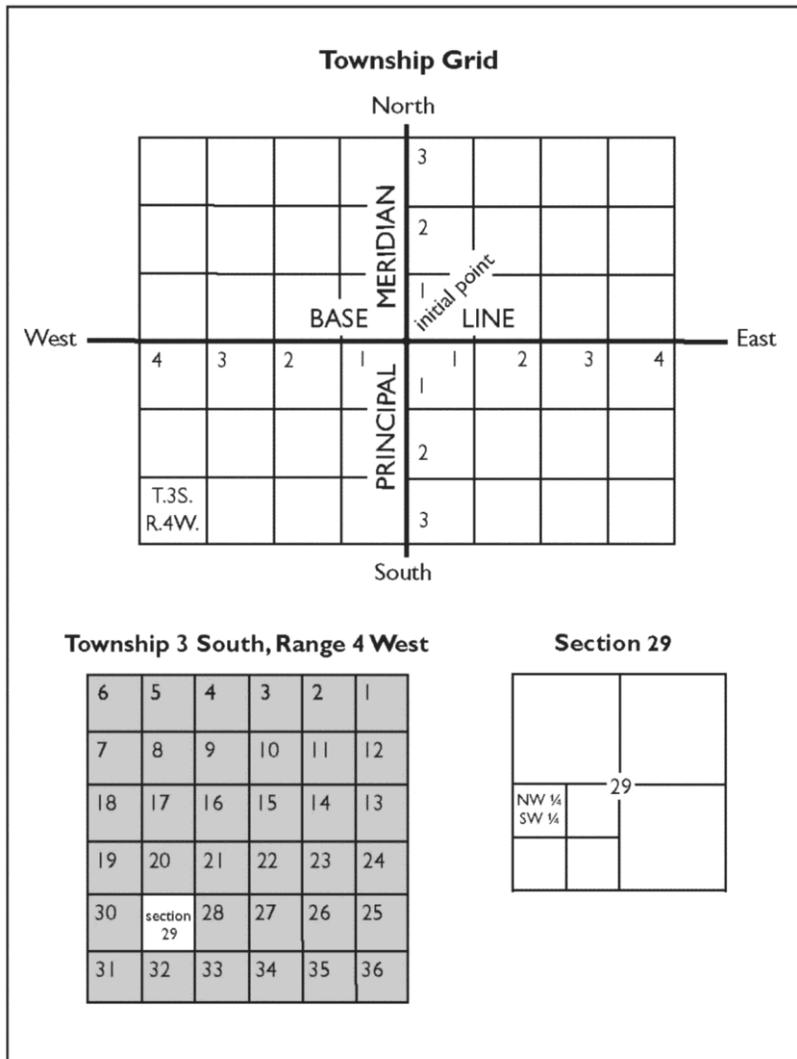
The other type of system is the rectangular survey. Rectangles have many advantages because of their shape, in terms of how they come together, and for their easy divisibility. From the Second Century B.C., the Romans famously used large squares of 710 meters on a side divided into 100 plots. The large squares were not uniformly oriented but fitted to the local landscape. In the United States, a rectangular survey system, which originated with the Land Ordinance of 1785, defines rectangular plots of any size, employing a systematic survey with references to latitude and longitude. Starting from the point where the Ohio River crosses the Pennsylvania border, “a north-south line—a principal meridian—was to be run and a base line westward—the geographer’s line—was to be surveyed; parallel lines of longitude and latitude were to be surveyed, each to be 6 miles apart, making for townships of 36 square miles or 23,040 acres. Seven rows or ranges of townships running south from the base line and west of the principal meridian were to be surveyed. Each township was to be divided into lots of one mile square containing 640 acres.” Paul W. Gates, *History of Public Land Law Development* 65 (1968); see also Andro Linklater, *Measuring America* (2002). Nearly all the land in the federal public domain—the vast preponderance of the physical space of America—was eventually surveyed and disposed of using this system. This is why rural roads in most parts of the country run along straight lines (section lines), why most farms are square in shape, and why most lots in cities are rectangular.

The diagram in Figure 8–1 illustrates the system of surveying established by the Land Ordinance of 1785. It shows how you would identify a tract of property with the following legal description: “the Northwest quarter of the Southwest quarter of Section 29, Township 3 South, Range 4 West, ___ Base and Meridian.” Note that every section contains 640 acres, a quarter section 160 acres, and a quarter-quarter section (such as described here) 40 acres.

Which system is better? The rectangular survey is more expensive to set up but leads to more certain descriptions and is easier to use on an ongoing basis. Metes and bounds can be tailored to rugged terrain. For recent work suggesting that the rectangular survey adds greatly to land value, see Gary D. Libecap & Dean Lueck, *Land Demarcation Systems*, in *Research Handbook on the Economics of Property Law* 257 (Kenneth Ayotte & Henry E. Smith eds., 2011). Libecap and Lueck report on a natural experiment involving the Virginia Military District, an area of Ohio that was allocated through scrip to Revolutionary war veterans under the old Virginia system of metes and bounds. In an econometric study of counties on either side of the boundary between the VMD and the rest of Ohio (which is on the rectangular survey), they show that the rectangular survey is associated with fewer disputes, more roads, 50 percent more land transactions, and substantially greater land values persisting over more than a century. Gary D. Libecap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 *J. Pol. Econ.* 426 (2011). What about the rectangular system is so advantageous? Is it simply a matter of reduced surveying costs? Are there other explanations for why rectangular plots of

land might prove to be more productive over time? For some relevant thoughts concerning the advantages and disadvantages of laying out city streets in a grid, see Robert C. Ellickson, *The Law and Economics of Street Layouts: How a Grid Pattern Benefits a Downtown*, 64 *Ala. L. Rev.* 463 (2013).

Figure 8-1
System of Land Description Established
by the Land Ordinance of 1785



Historically, metes and bounds and rectangular survey systems have bundled various features together. The two systems differ not just in how land is described but also how it is allocated. For example, metes and bounds, at least in the American context, gave settlers more choice about which land to claim: They could claim around rocky or marshy patches, often leaving these lower valued lands isolated and unclaimed. The rectangular system, in contrast, tended to force settlers to take quarter sections of land on an all-or-

nothing basis, the bad along with the good. Also, the accuracy afforded by surveys using the rectangular system can now be replicated in a metes and bounds system using GPS technology. Does this development lead to the prediction that the differences in value identified by Libecap and Lueck will disappear in the future? If not, why not?

C. *NEMO DAT*

The baseline principle of our system of property regarding transfers of ownership is *nemo dat quod non habet*—“one cannot give that which one does not have.” The phrase, in a closely related variant, traces back at least as far as the Digest of Justinian (Digest 50.54), which credits it to the Roman jurist Ulpian (Ad Edictum 46). In other words, if I own something because someone transferred it to me—by sale, gift, bequest, etc.—I normally have only that which the previous owner had and nothing more. This is sometimes called the “derivation” principle: The transferee’s rights derive from those of the transferor. See Douglas G. Baird & Thomas H. Jackson, *Cases, Problems, and Materials on Security Interests in Personal Property* 3–8 (2d ed. 1987). Willingness to buy the Brooklyn Bridge is considered a symbol of gullibility because we assume everyone knows about the principle of *nemo dat* and would have to be out of their mind to think that the offeror actually has the rights to sell it. Jeanne L. Schroeder, *Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending On Wall Street*, 1994 Colum. Bus. L. Rev. 291, 296 & n.6.

Nemo dat is also related to the principle of “prior in time is prior in right.” Here the classic problem is someone, A, who transfers his or her interest to B and then turns around, and out of mistake or deceit, transfers to C. Who owns the property? According to the *nemo dat* principle, it would be B, because A had rights to transfer when A transferred to B. Now B has the rights. When A later transfers to C, A has no rights to transfer and hence by *nemo dat* C gets nothing. Of course C could sue A, but A in such situations will often (not coincidentally) have fled the jurisdiction or be judgment-proof. There are, as we will see, situations in which C could prevail over B, but *nemo dat* and its first-in-time implications are the baseline.

Nemo dat appears to reflect an understanding that property rights are always exclusive, in the sense that two persons cannot hold the same property right at the same time. See James Y. Stern, *The Essential Structure of Property Law*, Mich. L. Rev. (forthcoming). Thus, if a used car dealer, perhaps out of confusion, sells the same car to three different persons, only one will end up owning the car, although the other two may have a breach of contract action against the dealer. Of course, to say that property rights are exclusive in this sense does not mean that property cannot be shared, as in a tenancy in common or joint tenancy. If A, B, and C are tenants in common, each has an interest that is exclusive against strangers, but not as against each other. But A’s interest in

tenancy in common cannot be held simultaneously with someone who is not a tenant in common, such as D. Is the understanding that property rights are exclusive, in this sense, another fundamental feature of property? Or can exclusivity—and *nemo dat*—be derived from the role separate legal things and associated exclusion strategies play in property law?

The *nemo dat* principle rests on a vision of a chain of transactions. Current owners must be able to trace their ownership back in time through a series of legitimate transfers (ideally) to an act of legitimate original acquisition. Later we consider ways in which the law cuts off the need for this tracing to an ultimate root of title. But the tracing itself can prove to be quite complicated, as illustrated by the following case.

Kunstsammlungen zu Weimar v. Elicofon

United States District Court, Eastern District of New York, 1981.

536 F.Supp. 829, affirmed, 678 F.2d 1150 (2d Cir. 1982).

■ MISHLER, DISTRICT JUDGE. This action was commenced in 1969 by the Federal Republic of Germany, as the representative of the people of Germany, to recover possession from defendant Elicofon of two portraits painted by the renowned fifteenth century German artist Albrecht Durer. The paintings disappeared from their place of safekeeping in Germany during the occupation of Germany by the Allied Forces in the summer of 1945. In 1966 the paintings were discovered in the possession of Elicofon, who had purchased them in Brooklyn, New York from an American serviceman in 1946.

By order dated March 25, 1969, this court granted the Grand Duchess of Saxony-Weimar leave to intervene as plaintiff. The Grand Duchess asserted ownership to the paintings by assignment from her husband, Grand Duke Carl August. And by order dated February 24, 1975, six years later, the Kunstsammlungen zu Weimar, a museum located in what is now the German Democratic Republic, the predecessor of which had possession of the paintings before their disappearance, and which claims to be entitled to recover them from Elicofon, was granted the right to intervene as plaintiff in this action.

Thereafter, on December 9, 1975, the original plaintiff, the Federal Republic of Germany, discontinued its claim with prejudice. And in a Memorandum of Decision and Order, dated August 24, 1978, this court dismissed the intervenor-complaint and cross-complaint of the Grand Duchess of Saxony-Weimar. Thus, the only parties remaining in the action are the plaintiff-intervenor Kunstsammlungen and the defendant Elicofon.

Presently before the court are the motions of plaintiff-intervenor Kunstsammlungen zu Weimar for summary judgment and the cross-motion of defendant Elicofon for summary judgment.

HISTORICAL SETTING & FACTS

Until 1927, the Duerer portraits which are the subject of this suit formed part of the private art collection of the Grand Duke of Saxe-Weimar-Eisenach. Under the terms of a Settlement Agreement of 1927 between the Land of Thuringia and the widow of Wilhelm Ernst, the then owner of the private collection, title to the Grand Ducal Art Collection had been transferred to the Land of Thuringia. Thuringia was created by

Figure 8-2
Albrecht Dürer, Portraits of Hans Tucher and
Felicitas Tucher, Née Rieter, 1499
 (These are the portraits involved in
Kunstsammlungen zu Weimar v. Elicofon.)



Weimar, Grossherzogl. Museum

Auf Holz, H. 6,28, B. 6,24



Weimar, Grossherzogl. Museum

Auf Holz, H. 6,28, B. 6,24

Each portrait: Oil on panel, 28 × 24 cm, Schlossmuseum, Weimar.

Federal German Law of April 20, 1920 and was the legal successor to the territory of Weimar, which included as one of its seven subdivisions Saxe-Weimar-Eisenach, the territory over which the Grand Dukes formerly had presided before being ousted from power.

In 1933, Hitler assumed power in Germany. Throughout much of the period of the Third Reich, until 1943, the Duerer paintings remained on exhibit in a museum in Weimar, Thuringia, known as the Staatliche Kunstsammlungen zu Weimar, the predecessor to the Kunstsammlungen zu Weimar. But in 1943, after the commencement of World War II, Dr. Walter Scheidig, the then Director of the Staatliche, according to his account, anticipated the bombardment of Weimar and had the Duerers and other valuable items of the museum transferred to a storeroom in a wing of a nearby castle, the Schloss Schwarzburg, located in the District of Rudolstadt in the Land of Thuringia, where they remained until their disappearance in the summer of 1945.

On May 8, 1945, the Hitler Government surrendered. On June 5, 1945, the Allied Powers—the United Kingdom, the United States, the U.S.S.R. and the French Republic—issued a Declaration stating that the Allied Governments assumed supreme authority with respect to Germany, including all the powers possessed by the German Government. For the purposes of occupation, Germany was divided into four zones with one of the Four Powers assuming military authority over each zone to effect its own policy in regard to local matters and the policy of the Allied Control Council in regard to matters affecting Germany as a whole.

Under the June 1945 Declaration the Land of Thuringia was designated to be part of the Soviet Zone of Occupation. However, the American Military Forces had occupied Thuringia, with a regiment stationed at Schwarzburg Castle, since the defeat of Germany or some time before the official surrender in April or May of 1945. In accordance with the Allied plan, on July 1, 1945, the United States turned over control of Thuringia to the Soviet Armed Forces. According to Dr. Scheidig's account, the disappearance of the Duerer portraits from Schwarzburg Castle coincided in time with the departure of the American troops from the Castle.

Political differences and disagreement over the future of Germany developed between the Western Allies and the Soviet Union. Irreconcilable divisions prompted the Soviet Union's Commander in Chief to resign from the Allied Control Council on March 7, 1948 and the Council thereafter ceased meeting as the combined governing body of occupied Germany. On September 21, 1949, the Federal Republic of Germany was established in the former French, British and United States Zones; and on October 7, 1949, the German Democratic Republic was established in the former Soviet Zone.

On April 14, 1969, retroactive to January 1, 1969, the Minister of Culture of the German Democratic Republic, issued an order conferring juridical personality upon the former Staatliche Kunstsammlungen, which thereafter became known as the Kunstsammlungen zu Weimar, a status which under East German Law entitled the Kunstsammlungen to maintain suit for return of the Duerers. The Kunstsammlungen moved to intervene as a plaintiff in this action for return of the Duerer portraits in April 1969. In a Memorandum of Decision and Order dated September 25, 1972, we denied the motion to intervene on the ground that the Kunstsammlungen was an arm and instrumentality of the German Democratic Republic, a country not recognized by the United States at the time. On September 4, 1974, the United States extended formal recognition to the German Democratic Republic. Accordingly, by order of February 24, 1975, upon motion, we vacated our prior order and permitted the Kunstsammlungen to file its complaint. In its complaint, the Kunstsammlungen alleges that the Duerer paintings were stolen in 1945 from the Staatliche Kunstsammlungen zu Weimar and that

Elicofon acquired them from the thief or his transferee and, therefore, has no right to them; and that as successor to the rights of the former Territory of Weimar and Land of Thuringia, the Kunstsammlungen is entitled to immediate possession. In his answer Elicofon denies that he holds the paintings wrongfully and on the basis of certain affirmative defenses, which are asserted in support of its motion for summary judgment, denies that the Kunstsammlungen is entitled to recover the paintings.

SUMMARY OF ARGUMENTS

In support of its motion for summary judgment, Kunstsammlungen argues:

There exists no genuine issue of material fact as to whether Elicofon could have acquired good title. The uncontradicted account of Dr. Scheidig, Director of the Kunstsammlungen at the time the paintings disappeared, creates the irrefutable inference that the paintings were stolen in 1945 from Schwarzburg Castle. Thus, Elicofon could not have acquired good title to the Duerers even if he purchased them without knowledge of their source. * * *

A. The Kunstsammlungen's Motion for Summary Judgment

In moving for summary judgment the movant bears the burden of showing the absence of a genuine issue as to any material fact. The Kunstsammlungen argues that the irrefutable facts in this case indicate that Elicofon could not have acquired good title to the Duerers.

According to Elicofon, he acquired the Duerer portraits in 1946 when he bought them for \$450 from a young American ex-serviceman, about 25 to 30 years old, who appeared at Elicofon's Brooklyn home with about eight paintings and who told Elicofon that he had purchased the paintings in Germany. Although Elicofon learned the name of the person he has since forgotten it. Elicofon had the paintings framed and hung them on a wall in his home with others. They remained there until 1966 when a friend, Stern, having seen a pamphlet containing lists of stolen artworks, informed Elicofon of their identity. At that time Elicofon made public his possession of the Duerers which precipitated a demand by the Kunstsammlungen for their return. Elicofon maintains that he purchased the paintings in good faith, without knowledge of their source or identity.

For the purpose of its motion for summary judgment, the Kunstsammlungen accepts the truth of Elicofon's version of the manner in which he acquired the Duerers. The Kunstsammlungen argues that good faith is irrelevant.

It is a fundamental rule of law in New York that a thief or someone who acquires possession of stolen property after a theft "cannot transfer a good title even to a bona fide purchaser for value [because] [o]nly the true owner's own conduct, or the operation of law . . . can act to divest that true owner of title in his property. . . ." 3 Williston, Sales § 23-12.

The Kunstsammlungen contends that the circumstances surrounding the disappearance of the Duerers leave no question that the paintings were stolen from Schwarzburg Castle where they had been stored, and that consequently Elicofon could not have acquired title to the paintings. Elicofon claims that there does exist a question as to those facts on which the Kunstsammlungen relies to establish a theft; alternatively, he claims, such a theft does not preclude a finding that Elicofon's transferor acquired good title to the paintings in Germany. Thus, the question on this motion is whether the facts about which there is no genuine dispute indicate that Elicofon bought the paintings from one who was incapable of conveying title.

1. The Occurrence of a Theft

On a motion for summary judgment, the moving party has the initial burden of presenting "evidence on which, taken by itself, it would be entitled to a directed verdict." *Donnelly v. Guion*, 467 F.2d 290, 293 (2d Cir. 1972). The facts about which the Kunstsammlungen contends there is no dispute were related by Dr. Walter Scheidig. Until 1940 Dr. Scheidig was the Deputy Director of the Kunstsammlungen zu Weimar, and from 1940 to 1967 was the Director of the museum. The facts were told by Dr. Scheidig at a deposition conducted by counsel for all parties to this action in May, 1971; in addition, various documents and letters are submitted as exhibits in support thereof. Dr. Scheidig died in 1974. [The court reviews the deposition testimony of Dr. Scheidig and concludes that there is no genuine issue of material fact as to the theft. The court then goes on to decide other issues of German law and of statutes of limitations and standing in favor of the East German art museum.] * * *

Plaintiff's motion for summary judgment is granted and defendant's cross motion for summary judgment denied. Defendant is directed to deliver the Duerers to plaintiff, the Kunstsammlungen.

NOTES AND QUESTIONS

1. In its opinion affirming the district court, the Second Circuit remarked: "The search for an answer to the deceptively simple question, 'Who owns the paintings?,' involves a labyrinthian journey through 19th century German dynastic law, contemporary German property law, Allied Military Law during the post-War occupation of Germany, New York State law, and intricate conceptions of succession and sovereignty in international law." 678 F.2d at 1153. Other aspects of the dispute centered on whether the Grand Duchess of Saxony-Weimar had a claim to the paintings as being part of her ancestral private collection or whether the paintings were held as crown property. Because the court held them to be crown property, successor governments acquired all the rights of the predecessor governments; in other words, when old governments fell or one administrative unit was replaced by another, title passed from government to government under *nemo dat* as well. How does the *nemo dat* principle figure in Justice Marshall's opinion in *Johnson v. M'Intosh*, excerpted in Chapter II?

2. This case also illustrates that the *nemo dat* baseline forms the backdrop not only to the common law but also to German civil law. In German law, however, the good faith purchaser exception to *nemo dat* is wider than in American law, and in Germany a good faith purchaser could acquire good title from a thief. New York's choice of law provided that the law of the state where the transfer occurred should govern its validity. When the works left the castle in Thuringia, the person living in the castle (who had been refurbishing it as a summer retreat for Hitler, and whom Dr. Scheidig suspected might have also been involved in the theft) did not have sufficient possession to be able to transfer title to a good faith purchaser under German law. And, in the alternative, if Allied Military Law applied, any such transfer was likewise void. So Elicofon's predecessor could not have achieved good title at that point. The transfer was therefore deemed to have occurred in Brooklyn, requiring the application of New York law. As stated in the case, the general rule in the United States, including New York, is that one cannot acquire good title from someone who has obtained the property other than by operation of law, such as by good faith purchase or adverse possession. Which means one cannot acquire a valid title from a thief. As we shall see, good faith purchase and adverse possession are the main exceptions to *nemo dat*.

3. Does the adoption of *nemo dat* as the baseline rule for determining the quantum of rights obtained by transfer serve to promote the free alienation of property? If so, how?

D. THE GOOD FAITH PURCHASER

The good faith purchaser doctrine represents an important exception to *nemo dat*, one that plays a central role in all the remaining materials that will be considered in this Chapter. Suppose A sells goods to B but for some reason the transaction is flawed. Let us suppose B paid for the goods with a check that bounces. B then turns around and sells the same goods to C. As long as C purchases the goods in good faith, that is, without knowledge of the flaw in the A-to-B transaction, and as long as C gives value—that is, the B-to-C transaction is not a gift—then the law will generally give C title to the goods as a good faith purchaser. The Uniform Commercial Code (UCC) recognizes both the *nemo dat* principle and the good faith purchaser exception in the following provision:

§ 2-403.

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a “cash sale”, or
- (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

Notice that the UCC limits the good faith purchaser doctrine to circumstances in which the transferor (B in our hypothetical) has “voidable” title. This is to be distinguished from “void” title. Property acquired by theft is a primary example of void title. Void title gives no power to create rights in another (*nemo dat* continues to apply). But voidable title gives a power to transfer to a good faith purchaser for value. Subdivisions (a) through (d) of § 2–403 describe circumstances that the UCC considers to create “voidable” title. For example, acquiring goods with a check that bounces or by means of fraud creates “voidable” title. The UCC defines “purchase” broadly to mean “taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.” § 1–201(29). Nevertheless, those who take by gift usually cannot claim the protections of the good faith purchaser rule, because they have not purchased “for value.”

Kotis v. Nowlin Jewelry, Inc.

Court of Appeals of Texas, 1992.

[844 S.W.2d 920.](#)

■ DRAUGHN, JUSTICE. Eddie Kotis appeals from a judgment declaring appellee, Nowlin Jewelry, Inc., the sole owner of a Rolex watch, and awarding appellee attorney’s fees. Kotis raises fourteen points of error. We affirm.

On June 11, 1990, Steve Sitton acquired a gold ladies Rolex watch, President model, with a diamond bezel from Nowlin Jewelry by forging a check belonging to his brother and misrepresenting to Nowlin that he had his brother’s authorization for the purchase. The purchase price of the watch, and the amount of the forged check, was \$9,438.50. The next day, Sitton telephoned Eddie Kotis, the owner of a used car dealership, and asked Kotis if he was interested in buying a Rolex watch. Kotis indicated interest and Sitton came to the car lot. Kotis purchased the watch for \$3,550.00. Kotis also called Nowlin’s Jewelry that same day and spoke with Cherie Nowlin.

Ms. Nowlin told Kotis that Sitton had purchased the watch the day before. Ms. Nowlin testified that Kotis would not immediately identify himself. Because she did not have the payment information available, Ms. Nowlin asked if she could call him back. Kotis then gave his name and number. Ms. Nowlin testified that she called Kotis and told him the amount of the check and that it had not yet cleared. Kotis told Ms. Nowlin

that he did not have the watch and that he did not want the watch. Ms. Nowlin also testified that Kotis would not tell her how much Sitton was asking for the watch.

John Nowlin, the president of Nowlin's Jewelry, testified that, after this call from Kotis, Nowlin's bookkeeper began attempting to confirm whether the check had cleared. When they learned the check would not be honored by the bank, Nowlin called Kotis, but Kotis refused to talk to Nowlin. Kotis referred Nowlin to his attorney. On June 25, 1990, Kotis' attorney called Nowlin and suggested that Nowlin hire an attorney and allegedly indicated that Nowlin could buy the watch back from Kotis. Nowlin refused to repurchase the watch.

After Sitton was indicted for forgery and theft, the district court ordered Nowlin's Jewelry to hold the watch until there was an adjudication of the ownership of the watch. Nowlin then filed suit seeking a declaratory judgment that Nowlin was the sole owner of the watch. Kotis filed a counterclaim for a declaration that Kotis was a good faith purchaser of the watch and was entitled to possession and title of the watch. After a bench trial, the trial court rendered judgment declaring Nowlin the sole owner of the watch. The trial court also filed Findings of Fact and Conclusions of Law.

In point of error one, Kotis claims the trial court erred in concluding that Sitton did not receive the watch through a transaction of purchase with Nowlin, within the meaning of Tex.Bus. & Com.Code Ann. § 2.403(a). Where a party challenges a trial court's conclusions of law, we may sustain the judgment on any legal theory supported by the evidence. Incorrect conclusions of law will not require reversal if the controlling findings of facts will support a correct legal theory.

Kotis contends there is evidence that the watch is a "good" under the UCC, there was a voluntary transfer of the watch, and there was physical delivery of the watch. Thus, Kotis maintains that the transaction between Sitton and Nowlin was a transaction of purchase such that Sitton acquired the ability to transfer good title to a good faith purchaser under § 2.403.

Section 2.403 provides:

A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (1) the transferor was deceived as to the identity of the purchaser, or
- (2) the delivery was in exchange for a check which is later dishonored, or

- (3) it was agreed that the transaction was to be a “cash sale”,
or
(4) the delivery was procured through fraud punishable as
larcenous under the criminal law.

Tex.Bus. & Com.Code Ann. § 2.403(a) (Vernon 1968).

Neither the code nor case law defines the phrase “transaction of purchase.” “Purchase” is defined by the code as a “taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property.” Tex.Bus. & Com.Code Ann. § 1.201(32) (Vernon 1968). Thus, only voluntary transactions can constitute transactions of purchase.

Having found no Texas case law concerning what constitutes a transaction of purchase under § 2.403(a), we have looked to case law from other states. Based on the code definition of a purchase as a voluntary transaction, these cases reason that a thief who wrongfully takes the goods against the will of the owner is not a purchaser. See *Suburban Motors, Inc. v. State Farm Mut. Automobile Ins. Co.*, 268 Cal.Rptr. 16, 18 (Cal. Ct. App. 1990); *Charles Evans BMW, Inc. v. Williams*, 395 S.E.2d 650, 651–52 (Ga. Ct. App. 1990); *Inmi-Etti v. Aluisi*, 492 A.2d 917, 922 (Md. Ct. Spec. App. 1985). On the other hand, a swindler who fraudulently induces the victim to deliver the goods voluntarily is a purchaser under the code. *Inmi-Etti*, 492 A.2d at 922; *Williams*, 395 S.E.2d at 652.

In this case, Nowlin’s Jewelry voluntarily delivered the watch to Sitton in return for payment by check that was later discovered to be forged. Sitton did not obtain the watch against the will of the owner. Rather, Sitton fraudulently induced Nowlin’s Jewelry to deliver the watch voluntarily. Thus, we agree with appellant that the trial court erred in concluding that Sitton did not receive the watch through a transaction of purchase under § 2.403(a). We sustain point of error one.

In point of error two, Kotis contends the trial court erred in concluding that, at the time Sitton sold the watch to Kotis, Sitton did not have at least voidable title to the watch. In point of error nine, Kotis challenges the trial court’s conclusion that Nowlin’s Jewelry had legal and equitable title at all times relevant to the lawsuit. The lack of Texas case law addressing such issues under the code again requires us to look to case law from other states to assist in our analysis.

In *Suburban Motors, Inc. v. State Farm Mut. Automobile Ins. Co.*, the California court noted that § 2.403 provides for the creation of voidable title where there is a voluntary transfer of goods. 268 Cal.Rptr. at 18. Section 2.403(a)(1)–(4) set forth the types of voluntary transactions that can give the purchaser voidable title. Where goods are stolen such that there is no voluntary transfer, only void title results. *Id.* at 19; *Inmi-Etti*, 492 A.2d at 921. Subsection (4) provides that a purchaser can obtain voidable title to the goods even if “delivery was procured through fraud

punishable as larcenous under the criminal law.” Tex.Bus. & Com.Code Ann. § 2.403(a)(4) (Vernon 1968). This subsection applies to cases involving acts fraudulent to the seller such as where the seller delivers the goods in return for a forged check. See *Inmi-Etti*, 492 A.2d at 921. Although Sitton paid Nowlin’s Jewelry with a forged check, he obtained possession of the watch through a voluntary transaction of purchase and received voidable, rather than void, title to the watch. Thus, the trial court erred in concluding that Sitton received no title to the watch and in concluding that Nowlin’s retained title at all relevant times. We sustain points of error two and nine.

In point of error three, Kotis claims the trial court erred in concluding that Kotis did not give sufficient value for the watch to receive protection under § 2.403, that Kotis did not take good title to the watch as a good faith purchaser, that Kotis did not receive good title to the watch, and that Kotis is not entitled to the watch under § 2.403. In points of error four through eight, Kotis challenges the trial court’s findings regarding his good faith, his honesty in fact, and his actual belief, and the reasonableness of the belief, that the watch had been received unlawfully.

Under § 2.403(a), a transferor with voidable title can transfer good title to a good faith purchaser. Tex.Bus. & Com.Code Ann. § 2.403(a) (Vernon 1968). Good faith means “honesty in fact in the conduct or transaction concerned.” Tex.Bus. & Com.Code Ann. § 1.201(19) (Vernon 1968). The test for good faith is the actual belief of the party and not the reasonableness of that belief. *La Sara Grain v. First Nat’l Bank*, 673 S.W.2d 558, 563 (Tex. 1984).

Kotis was a dealer in used cars and testified that he had bought several cars from Sitton in the past and had no reason not to trust Sitton. He also testified that on June 12, 1990, Sitton called and asked Kotis if he was interested in buying a Ladies Rolex. Once Kotis indicated his interest in the watch, Sitton came to Kotis’s place of business. According to Kotis, Sitton said that he had received \$18,000.00 upon the sale of his house and that he had used this to purchase the watch for his girlfriend several months before. Kotis paid \$3,550.00 for the watch. Kotis further testified that he then spoke to a friend, Gary Neal Martin, who also knew Sitton. Martin sagely advised Kotis to contact Nowlin’s to check whether Sitton had financed the watch. Kotis testified that he called Nowlin’s after buying the watch.

Cherie Nowlin testified that she received a phone call from Kotis on June 12, 1990, although Kotis did not immediately identify himself. Kotis asked if Nowlin’s had sold a gold President model Rolex watch with a diamond bezel about a month before. When asked, Kotis told Ms. Nowlin that Sitton had come to Kotis’ car lot and was trying to sell the watch. Ms. Nowlin testified that Kotis told her he did not want the watch because he already owned a Rolex. Ms. Nowlin told Kotis that Sitton had purchased the watch the day before. Kotis asked about the method of

payment. Because Ms. Nowlin did not know, she agreed to check and call Kotis back. She called Kotis back and advised him that Sitton had paid for the watch with a check that had not yet cleared. When Ms. Nowlin asked if Kotis had the watch, Kotis said no and would not tell her how much Sitton was asking for the watch. Ms. Nowlin did advise Kotis of the amount of the check.

After these calls, the owner of Nowlin's asked his bookkeeper to call the bank regarding Sitton's check. They learned on June 15, 1990 that the check would be dishonored. John Nowlin called Kotis the next day and advised him about the dishonored check. Kotis refused to talk to Nowlin and told Nowlin to contact his attorney. Nowlin also testified that a reasonable amount to pay for a Ladies President Rolex watch with a diamond bezel in mint condition was \$7,000.00–\$8,000.00. Nowlin maintained that \$3,500.00 was an exorbitantly low price for a watch like this.

The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Kotis testified that he lied when he spoke with Cherie Nowlin and that he had already purchased the watch before he learned that Sitton's story was false. The judge, as the trier of fact, may not have believed Kotis when he said that he had already purchased the watch. If the judge disbelieved this part of Kotis' testimony, other facts tend to show that Kotis did not believe the transaction was lawful. For example, when Kotis spoke with Nowlin's, he initially refused to identify himself, he said that he did not have the watch and that he did not want the watch, he refused to divulge Sitton's asking price, and he later refused to talk with Nowlin and advised Nowlin to contact Kotis' attorney. Thus, there is evidence supporting the trial court's finding that Kotis did not act in good faith.

There are sufficient facts to uphold the trial court's findings even if the judge had accepted as true Kotis' testimony that, despite his statements to Nowlin's, he had already purchased the watch when he called Nowlin's. The testimony indicated that Kotis was familiar with the price of Rolex watches and that \$3,550.00 was an extremely low price for a mint condition watch of this type. An unreasonably low price is evidence the buyer knows the goods are stolen. Although the test is what Kotis actually believed, we agree with appellee that we need not let this standard sanction willful disregard of suspicious facts that would lead a reasonable person to believe the transaction was unlawful. Thus, we find sufficient evidence to uphold the trial court's findings regarding Kotis' lack of status as a good faith purchaser. We overrule points of error three through eight. * * *

NOTES AND QUESTIONS

1. If Sitton had broken into the Nowlins' shop and taken the watch or ripped it out of their hands and ran off with it, he would have been a thief. In such a case he would have no title at all in the watch (void title). But

because he paid with a forged check, he had voidable title, meaning that he had the power to give good title to a good faith purchaser for value. From the point of view of someone like Kotis, why does it matter whether Sitton is a thief or a fraudster? Or is the difference what we expect of the Nowlins in terms of guarding against theft versus fraud?

2. In this case the appellate court was called upon to review the factual determination that Kotis did not satisfy the good faith requirement. It is likely that all the judges strongly suspected Kotis knew his seller's rights to the watch were problematic. However, precisely because no one can get inside Kotis's head, and Kotis adamantly claims to be a good faith purchaser, the question becomes in part what kind of notice Kotis had of the flaw in Sitton's title. Sometimes varieties of notice are distinguished. Someone with *actual notice* knows of the relevant fact, here the fraud in the prior sale. One can lack actual notice but have *inquiry notice*, which means that a reasonable person knowing what one does know would have engaged in further inquiry, and this further inquiry would likely have led to actual knowledge of the relevant fact. A registry, as in the case of land and a few types of personal property, is said to give *record notice* of the relevant fact. One who has a duty to search title records will be deemed to know relevant facts disclosed by the records even if that person does not in fact inspect the records. (Inquiry notice and record notice are sometimes called *constructive notice*.) What kind of notice, if any, did Kotis have?

3. The proper scope of the good faith purchaser exception to *nemo dat* is a matter of controversy. The crux of the problem is that three parties are involved—the original owner, the bad actor who gains possession from the original owner in a wrongful fashion, and the innocent purchaser. Everyone agrees that the optimal solution is to force the bad actor to make everyone whole. But the problem is that the bad actor is usually gone or judgment-proof, and so we have to decide as between two comparatively innocent parties—the original owner and the innocent purchaser—who should bear the loss. One way to frame the question is to ask who as a general matter is in a better position to avoid the loss: the original owner or the potential good faith purchaser? Does the answer change depending on the situation, such that theft is covered by one rule, fraud by another, and purchases from an open street market by a third? Saul Levmore surveys a range of answers to these questions, in legal systems both ancient and modern. He hypothesizes that this is a case in which the question whether to impose the loss on the original owner or the innocent purchaser is a close one and evidence about who ought to bear the loss in any given case is hard to come by; hence we see a variety of approaches across time and space to the good faith purchaser. Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 *J. Legal Stud.* 43 (1987). For example, U.S. law is less favorable to the good faith purchaser than is civil law. See also Giuseppe Dari-Mattiacci & Carmine Guerriero, *Law and Culture: A Theory of Comparative Variation in Bona Fide Purchase Rules*, 35 *Oxford J. Legal Stud.* 543 (2015) (arguing that the variation in good faith purchaser rules can be traced to deep cultural differences and, in particular, different assumptions about individual self-reliance).

Hauck v. Crawford

Supreme Court of South Dakota, 1953.

62 N.W.2d 92.

■ RUDOLPH, JUDGE. Although in form an action to quiet title, the real purpose of this action is to cancel and set aside a certain mineral deed admittedly signed by plaintiff and certain other deeds transferring the mineral rights by the grantee named in the original deed. No one has questioned the form of the action. The trial court entered judgment cancelling the deeds and defendants have appealed.

Cancellation was asked because of alleged fraud, and it was upon this basis that the trial court entered its judgment. The defendants contend, first, that there was no fraud and second, that the mineral rights were transferred to a bona fide purchaser for value and are not, therefore, subject to cancellation even though obtained by fraud in the first instance.

The facts most favorable in support of the judgment of the trial court are as follows: Plaintiff is a farmer owning and operating a farm located partly in South Dakota and partly in North Dakota. He lives on that part of the farm located in South Dakota in McPherson County. Plaintiff is 44 years old, has an 8th grade education, married and has a family. His farm consists of two sections of land which he purchased at three different times.

On May 23, 1951, while plaintiff was at a neighbor's place, three men approached him and discussed leasing plaintiff's land for oil and gas. A Mr. Crawford was the principal spokesman. Plaintiff testified that after some discussion Crawford offered 25¢ an acre for a lease. Plaintiff agreed, and one of the men apparently prepared the necessary papers on a typewriter while sitting in the back seat of the car. When the papers were prepared they were clamped to a board or pad and presented to plaintiff while in the car for signing. Printed forms were used which contained much fine print. The man who prepared the papers indicated where plaintiff should sign, and after signing in one place, partially turned the signed sheet and asked plaintiff to sign again, stating that this second sheet was a part of the lease, which plaintiff believed. Plaintiff testified that no mention was ever made of a mineral deed and to this extent is corroborated by Crawford who in response to the question, "Did you ever describe to Mr. Hauck one of the instruments as a mineral deed?", answered, "No, sir." Separate instruments were required for the land in each state. Plaintiff never received a copy of any of the instruments he signed.

It now appears that somehow plaintiff had signed a mineral deed conveying one-half the minerals in his land to D. W. Crawford. This deed was filed for record June 1, 1951, but on May 29, 1951, Crawford, the grantee, conveyed such mineral rights to the defendants White and Duncan at [Gainesville], Texas. The trial court made no finding relating

to the knowledge of White and Duncan concerning the conditions under which Duncan obtained the deed, but decided the case on the basis that they were in fact bona fide purchasers for value. This statement of the facts is sufficient for our present purpose.

We are concerned with a type of fraud which the trial court, texts and decided cases refer to as “fraud in the factum” or “fraud in the execution” as distinguished from “fraud in the inducement.” This type of fraud relates to misrepresentation of the contents of a document by which one is induced to sign a paper thinking that it is other than it really is. It was this type of fraud with which this court was dealing in the case of *Federal Land Bank v. Houck*, 4 N.W.2d 213, 218 (S.D. 1942). In this cited case we held that, as between the original parties, when a person is fraudulently induced to sign a paper believing that it is something other than it really is “the contractual knot was never tied” and such paper or instrument is not only voidable but actually void. In that case it was further held in conformity with prior holdings that “neither reason nor policy justifies the reception of a showing of negligence on the part of him who is overreached, as a countervailing or neutralizer of fraud.” In other words, the perpetrator of the fraud cannot avoid his acts by a showing that the person upon whom the fraud was committed was negligent.

The *Houck* case, we are convinced, settles the issue of fraud. Accepting as a verity testimony of the plaintiff the misrepresentation and trickery of Crawford was complete. Crawford not only misrepresented the effect of the papers plaintiff signed, but by “manipulation of the papers” as found by the trial court tricked plaintiff into signing the deed thinking it was the lease. Under the rule of the *Houck* case plaintiff’s negligence, if any, does not neutralize this fraud. As stated in the *Houck* case there was “no intention to do the act or say the words which manifest a volition to assent.” It must therefore be held that as between Hauck, the grantor, and Crawford, the grantee, the deed was void.

The deed being void as distinguished from voidable it had no effect whatsoever, conveyed nothing to Crawford, and he in turn had nothing to convey to White and Duncan. As stated by Judge McCoy in the case of *Higrock v. Gavin*, 179 N.W. 12, 23 (S.D. 1920),

The grantee under this void deed was as powerless to transmit title as would be the thief of stolen property. Said deed had no more force or effect than a forged deed, and, in principle, was legally analogous to a forged deed. The recording statutes furnish no protection to those who claim as innocent purchasers under a forged or otherwise void deed, where the true owner has been guilty of no negligence or acts sufficient to create an estoppel.

Throughout these proceedings appellant has contended that plaintiff is an intelligent farmer, operating a large farm, and that if he failed to detect the fact that he signed a deed such failure was due to his negligence and therefore he should not be permitted to prevail in these

proceedings. We have pointed out above that plaintiff's negligence will not neutralize the fraud, or give validity to the deed, but we are convinced that this holding is not decisive as against a purchaser for value without notice. As indicated in the Highrock-Gavin case, *supra*, even though the deed is void if plaintiff were negligent or committed acts sufficient to create an estoppel he should bear the brunt of such negligence, rather than a bona fide purchaser.

An "estoppel" arises when, by his conduct or acts, a party intentionally or through culpable neglect induces another to believe certain facts to exist, and such other party rightfully relies and acts on such belief so that he will be prejudiced if the former is permitted to deny the existence of such facts.

Lambert v. Bradley, 42 N.W.2d 606, 607 (S.D. 1950).

As applied to civil actions the words "culpable negligence" mean the same as actionable negligence. The action being in form an action to quiet title there was no opportunity for appellants to plead an estoppel. There being no opportunity to plead it, the defense is not waived.

As we view this case, therefore, we must revert to the issue of whether plaintiff was negligent when he affixed his signature to this deed not knowing that it was a deed he signed. On this issue the trial court made no specific determination. Whether plaintiff was negligent under all the facts and circumstances presented by this record we believe to be a question of fact which should be determined by the trial court. The question is, did plaintiff act as a person of reasonable and ordinary care, endowed with plaintiff's capacity and intelligence, would usually act under like circumstances?

We are not inclined to accept the trial court's holding that the manner in which plaintiff's signature was obtained constituted a forgery. As disclosed by the notes in 14 A.L.R. 316 and 56 A.L.R. 582, such holding is a minority view, and seems to us unsound. We believe the rule we have announced in *Federal Land Bank v. Houck*, *supra*, and in this opinion will better sustain the ends of justice. Our holding, we believe, recognizes actualities. The signature was the real signature of the plaintiff. True, plaintiff was induced to sign by a false representation, but to hold a signature thus obtained a forgery seems artificial and out of harmony with the actual facts.

The judgment appealed from is reversed.

NOTES AND QUESTIONS

1. This case illustrates the doctrinal variability that enters into good faith purchaser doctrine, especially in the context of real property, where the UCC does not apply. How would the case be analyzed if it were a purchase of goods covered by the UCC? Real property transactions tainted by "fraud in the factum" are often held to be void whereas transactions tainted by "fraud in the inducement" are voidable, opening up the possibility that a good

faith purchaser can acquire good title. Does this approach to “void” and “voidable” make sense? Do you agree with the court’s conclusion in *Hauck* that the question of Hauck’s negligence is critical to whether the Texas transferees (White and Duncan) should be able to keep the mineral rights as good faith purchasers? Why should the application of the doctrine turn on Hauck’s behavior, rather than Crawford’s? For a proposal to make owner negligence a factor in applying good faith purchaser rules, see Alan Schwartz & Robert Scott, *Rethinking the Laws of Good Faith Purchase*, 111 Colum. L. Rev. 1332 (2011).

2. In the “eternal triangle” of original owner, wrongdoer, and good faith purchaser for value, the dilemma usually is that the wrongdoer is absent or judgment-proof, leaving two innocent parties as potential bearers of the loss. (This would have been the situation in the *Kotis* case if *Kotis* had been an innocent party; Sitton’s check bounced and he was presumably not good for the damages.) Here Hauck managed to drag Crawford into court. Do you think Crawford’s availability had an impact on the result? Assuming Crawford still has the proceeds from the sale and is not insolvent, how should Hauck’s claim against Crawford for damages come out? How adequate are damages to farmer Hauck? Note that Crawford could be sued under a constructive trust theory, under which Crawford would be deemed to hold the proceeds in trust for Hauck. Under the approach of the new *Restatement Third, Restitution and Unjust Enrichment*, Crawford, as a conscious wrongdoer, would be liable not just to return the proceeds he fraudulently acquired from Hauck but also any traceable further proceeds (say, race track winnings) he derived from them. *Id.* § 59.

3. How is a subsequent purchaser supposed to know that a deed like that from Hauck to Crawford was void? Crawford and his sons apparently were on a fraud spree along the border between the Dakotas. In another case involving the Crawfords and some of the same third-party grantees (but another farming couple as victims), the North Dakota Supreme Court, after expressing some skepticism about whether there was fraud (as the trial court had found), held that the deed in question was voidable, thus allowing the good faith purchasers to acquire good title. *Hoffer v. Crawford*, 65 N.W.2d 625 (N.D. 1954). The North Dakota court, acknowledging the approach in the South Dakota case, endorsed a standard highly protective of good faith purchasers under which “the innocent purchaser should be protected unless the fraud is *clear, unequivocal, and its force undiminished by lack of care on the part of a mentally competent, defrauded grantor.*” *Id.* at 631 (quoting *Dixon v. Kaufman*, 58 N.W.2d 797, 805 (N.D. 1953), emphasis supplied by the court in *Hoffer*). Is such a rule protecting good faith purchasers where original owners have shown lack of care in the face of fraud better than applying more discretionary notions of estoppel to owners like Hauck? Keep this question in mind when we take up land records later in this Chapter. Forgeries and frauds are but some of the “off-record risks” in the land records.

4. Another application of “estoppel” involves the doctrine of estoppel by deed. Say A, who does not own Blackacre, gives B a deed for Blackacre. Then A acquires Blackacre. Can A prevail over B by claiming under *nemo*

dat not to have conveyed anything to B? No: Under estoppel by deed, A is prevented from claiming superior title to his grantee. Under another version of the doctrine, title automatically passes to B when A finally acquires Blackacre.

E. PROVING OWNERSHIP

In this Part we consider the system of records for a variety of types of property. Even under *nemo dat* apart from its exceptions, a purchaser would like to know if the title she is being offered is valid—whether the transferor really has the rights to transfer. To the extent we move away from *nemo dat* and allow good faith purchasers to establish title by routes other than the *nemo dat* principle, we also face the question of what constitutes notice and how to provide notice in a way that is generally cost-effective. In any event, for various resources the issue is what combination of possession, markings on the asset, and records (and of what type) is most cost-effective. Moreover, when things go wrong, courts will often be faced ex post with potential unfairness in the operation of some of these systems.

Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*

13 J. LEGAL STUD. 299, 302–04 (1984).

Anglo-American law assumes for the most part that an individual's interest in enjoying property that is acquired, in good faith, from someone else who appears to be the owner is not as important as recognizing the rights of the person who first owned it or who last owned it by wholly consensual transfers. Nevertheless, we shall want to ensure, even in a legal regime that conditions ownership on consensual transfer, that legal rules make it easy for prospective purchasers to investigate their chain of title. Consent, although usually a necessary condition, is rarely a sufficient one.

At one time, taking physical possession of real or tangible personal property was necessary before a person could be relatively certain that his claim was, and would remain, superior to that of others. This principle was affirmed in the case of personal property in 1601 in *Twyne's Case*. A person had purported to sell some sheep, but he had continued to take care of them, shear them, and treat them as his own. The court struck the transaction down as fraudulent, essentially on the ground that there was something wrong with selling goods but keeping possession of them. Since the transaction would have been valid had the property been physically transferred at the time of the sale, the sale itself was not at issue. Rather, the sticking point was the retention of possession. The problem with retention of possession—ostensible ownership—ultimately seems to return to a legal rule governing information as a means of reducing uncertainty. * * *

The system illustrated in *Twyne's Case* depended on a very simple legal rule and hence on minimal government intervention: to obtain priority in an asset over third-party claimants, an individual needed, in addition to the consent of the prior owner, to take physical possession of the asset. Under such a system, both *obtaining* information regarding prior claims and *disseminating* information regarding one's own claim were simple—one took possession. Between the parties to a transaction, such as a lender and the true owner, their private contract governed. But against most of the rest of the world, possession was also necessary.

Establishing ownership rights from possession, however, brings costs. A possession-based rule, for example, impedes temporal divisions of ownership of property. Under such a rule, one who acquires a remainder interest cannot easily take possession of the underlying property and ensure that his rights are superior to the rights of anyone else to whom his transferor might also try to convey the remainder interest. Moreover, a possession-based rule of title makes the tracing of claims for more than one generation difficult and hence increases the risks of a thief in the chain of title—a risk that one or the other party must bear. Certain attributes of particular kinds of property, in addition, may make such property more suitable to a system of filing claims to provide the relevant information.

Filing systems have evolved as the principal alternative to transfer rules based on possession. Public recording of interests in property may reduce the uncertainty concerning the transfer of property, because they contain virtually all relevant information, apart from that imparted by possession itself. Filing systems may also aid in the tracing of transfers over time and hence, compared to a possession-based system, reduce the risk of non-consensual transfers at the same time that they provide assurance to subsequent purchasers that they can in fact acquire good title. In short, rules of transfer that require public recordation can reduce the risks that a subsequent purchaser will not acquire good title without increasing the risk that a present owner will lose his property by theft.

Filing systems can be mixed in a variety of ways with possessory systems for determining rights to assets. * * *

Filing systems are not, however, equally suited to all kinds of property. The desirability of a particular kind of filing system turns on the type of property it is to cover. Filing systems are comparatively better than possessory systems when the property is valuable, when the property is not transferred often, and when it is important to share ownership of the property among several individuals, such as by creating a future interest or a security interest. Filing systems, moreover, are comparatively better when the property's physical use is important or when the underlying property right is abstract and unembodied. In such cases, requiring a transfer of possession as a condition of acquiring paramount rights to the asset brings with it substantial costs that do not outweigh the significant benefits of allowing one party to remain in

possession despite his holding less than full ownership of the property. Filing systems, finally, will more easily accommodate *title* claims to an asset, and not just security claims, when describing the property identifies it more precisely than possessing it, when the asset has a long life, and when the property (or perhaps the debtor) is not likely to move. When these conditions hold, finding the property files and using them are comparatively easy and cost effective.

Some types of property seem better suited for one set of transfer rules than another. Real property is the paradigm of property for which a filing system of title claims is superior. One acquires ownership of Blackacre by engaging in certain public acts. This permits others who come later to discover the true owner easily, and hence facilitates consensual transfers by holders along the chain of title. As a first approximation, one has exclusive ownership of Blackacre to the extent that no one else, outside the chain of title, has engaged in those acts before, and one can learn about all such earlier acts, because notations in a filing system are both permanent and publicly accessible. * * *

The provisions requiring the recording of transfers of title to real property deal successfully with the need of potential purchasers of property for reliable information about who owns the land they wish to acquire. The recording system has the effect of reducing the uncertainty surrounding a transfer of real property without undermining the consensual nature of those transfers. And the more effective the set of rules governing the transfer of property is in increasing acquisitional certainty *and* dispositional certainty, the more valuable it is to own property in the first instance.

But not all types of property are equally suited to an informational system based on files. Money is the polar opposite of real property in that it is the best example of property that is *not* suitable for a filing system * * *

Other kinds of personal property provide intermediate cases. Recording systems that establish *title* of personal property are rare, at least when the owner is in possession of the property. The informational advantages that such a system provides do not, as a general matter, seem worth their costs. A piece of personal property is often less valuable than a piece of real property and is likely to be more frequently transferred. Moreover, a title-based recording system is much harder to organize for grain in a silo than it is for land. One has no easy way of knowing that this was the grain grown on Blackacre in one jurisdiction or on Whiteacre in another. Possession is often more reliable than description in sorting personal property. One also has no easy way of knowing in fact that the grain in the silo today was the grain that was there yesterday. Grain or its owner can easily move from one jurisdiction to another, and prospective purchasers may not know which file to check. * * *

NOTES AND QUESTIONS

1. How critical is the practice of secured lending (see Chapter VII) to the development of filing systems for property rights? Most of the types of property that are covered by filing systems are also used as security for loans. This includes land and associated real property interests, major forms of personal property like airplanes and automobiles, and patents. Indeed, many types of personal property (such as machinery) are the subject of recording only if they are used as security for loans. On the other hand, property interests that are not often used as security for loans, like works of art, have been slower to develop registries. Does the fact that security interests are invisible help explain why registration or recording is necessary in order for secured lending to flourish? How important is taxation in explaining the development of systematic title records for property rights? If the government were to rely heavily on personal property taxes on works of fine art, would you expect a system of registration to emerge for these works? How important is it that property be difficult to alter in the development of a registration system? See Abraham Bell & Gideon Parchomovsky, *Of Property and Information*, 116 *Colum. L. Rev.* 237, 280–81 (2016).

2. Possession and title records are meant to serve as notice to “all the world,” but among that large class of persons some will need more information than others. Potential purchasers often need the most, and the title records are designed for their use—or for the experts they hire. How accessible do title records need to be? Does a potential trespasser need to look up the state of title? See, e.g., *Mountain States Tel. & Tel. Co. v. Kelton*, 285 P.2d 168, 170–71 (Ariz. 1955) (holding that contractor is not deemed to have constructive notice of buried cable that was subject of recorded right of way because those with no interest in the title are not bound to search title to land); *Statler Mfg., Inc. v. Brown*, 691 S.W.2d 445, 449–50 (Mo. Ct. App. 1985) (holding no constructive notice to contractor from properly recorded easement for aircraft right-of-way).

3. As you read the materials in the balance of this Chapter, ask yourself whether Baird and Jackson are too optimistic about the effectiveness of the recording system for property in land. See, e.g., D. Barlow Burke, Jr., *American Conveyancing Patterns: Past Improvements and Current Debates* 103–04 & n.2 (1978) (noting the many risks that American recording systems give rise to and how little protection a title search provides, and citing literature); Francis S. Philbrick, *Limits of Record Search and Therefore of Notice: Part I*, 93 *U. Pa. L. Rev.* 125 (1944).

1. LAND

The keeping of land records is a practice both old and new. In the ancient Near East, records of land transactions and ownership were sometimes kept in the household—as, for example, attested by the story of Jeremiah’s purchase in 587 B.C. of a field at Anathoth from his cousin Hanamel (Jer. 32:9–15)—and sometimes in central registries. In ancient Mesopotamia and Egypt, the centralized records were probably kept for purposes like tax collection rather than to bar the claims of third parties.

Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 *Chi.-Kent L. Rev.* 321, 373, 380–81, 384–85 (1995).

Land records designed to cut off the contrary claims of third parties are a more recent development, which came earlier to the United States than to England. The first American recording act was the 1640 Massachusetts Bay recording statute, whose preamble states the act's purpose as "[f]or avoyding fraudulent conveyances, and that every man may know what estate or interest other men have." 6 *Powell on Real Property* ¶ 912 (1949) (quoting 1 *Massachusetts Records* at 306). In England, deeds were kept by owners and later by lawyers; concerns with privacy are thought to have delayed large-scale recording until the twentieth century. Even the major overhaul of English property in the English Land Registration Act of 1925 contained provisions for secrecy. C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem*, 63 *Ind. L.J.* 55, 75–76 99–100 (1987) (arguing against these secrecy provisions for the United States).

Land records make notice by publicizing transactions—a method in evidence in the Hebrew Bible, the Middle Assyrian Laws, and medieval English sources—less necessary and increasingly vestigial. (Recall livery of seisin and the handing over of the twig or clod of dirt in the sale of a freehold estate, see Chapter V.) Nevertheless, notice by possession has not completely died out. Consider in the following materials the role of possession in furnishing notice to third-party potential purchasers.

Benito Arruñada, Institutional Foundations of Impersonal Exchange: Theory and Policy of Contractual Registries

45–47, 51–52, 55–58 (2012).

Private Titling: Privacy of Claims as the Starting Point

Under the Roman Law tradition of private conveyance that was dominant in Europe until the nineteenth century, private contracts on land had *in rem* effects on third parties, even if they were kept secret. The baseline legal principle was that no one could deliver what they did not have (*nemo dat quod non habet*), which was closely related to the principle “first in time, first in right.” So, in a double sale * * * in which an owner *O* sells first to buyer *B*₁ and later to *B*₂, the land belongs to *B*₁ because when *O* sold to *B*₂, *O* was not the owner. In cases of conflict, the judge will allocate property and contract rights between both claimants (*B*₁ and *B*₂)—that is, will “establish title”—on the basis of evidence on possession and past transactions, whether or not these transactions had remained hidden.

This potential enforcement of adverse hidden rights made gathering all relevant consents close to impossible, hindering trade and specialization. Most transactions in land therefore gave rise, totally or

partially, to contract rights and the enforcement advantage of property rights remained unfulfilled, especially with respect to abstract rights, such as mortgages. These difficulties are clear in the functioning of the two sources of evidence traditionally used to establish title under privacy: possession and the “chain of title deeds.”

Reliance on Possession

First, the use of possession—that is, the fact of controlling the asset—as the basis for establishing property rights is a poor solution for durable assets, because for such assets it is often valuable to define multiple rights, at least separating ownership and possession. However, relying on possession to establish ownership makes it possible for possessors to fraudulently use their position to acquire ownership for themselves or to convey owners’ rights to third parties. In such cases, owners will often end up holding a mere contract right, an *in personam* right, against the possessor committing the fraud. Understandably, under such conditions, owners will be reluctant to cede possession impersonally, for fear of losing their property. * * *

Documentary Formalization Through the Chain of Deeds

Second, some of the problems posed by possession are solved by embodying abstract rights, such as ownership and liens, and even complementary consents in the conveying contracts, which then form a series or “chain” of title documents or deeds (“chain of deeds,” for brevity) that is based on what I have been calling “documentary formalization.” This evidencing of rights with the chain of deeds facilitates some degree of separation of ownership and control because it is the content and possession of deeds that provide evidence of ownership. Therefore, title experts can examine the history of transactions going back to a “root of title” which is proof of ownership in itself—either because it is an original grant from the State or, more often, because of the time that has lapsed beyond the period of prescription or the statute of limitations.

This solution has also been used for a long time. For example, in the Demotic titles used in Ptolemaic Egypt between 650 and 30 BCE, the consent of affected rightholders (usually the wife and coheirs of the vendor) was stated in a specific clause (Manning 1995, 254–55). But relying on the chain of deeds also creates problems. Above all, new possibilities for error and fraudulent conveyance appear, giving rise to multiple chains of title, which leave acquirers with contract rights against the fraudulent grantor and the professionals involved in the transaction. Moreover, titles are less effective than possession in reducing the asymmetry of acquirers, as possession is observable but adverse chains of title remain private to the acquirer. Furthermore, acquirers remain fully unprotected against those hidden charges that are not voluntarily contracted, such as judgment and property tax liens. * * *

Traditional Conveyancing in England: Solicitors and the Chain of Deeds. Despite these difficulties, transactions on unregistered land in

England heavily relied on the chain of deeds up until the last decades of the twentieth century. Typically, ownership was proved by possession and the whole series of deeds, which was often kept by the owner's solicitor. And mortgages were formalized by pledging the deeds with the lender. This privacy system was able to survive, despite its shortcomings, because agricultural land ownership was relatively concentrated in a few hands, which made personal transactions easier (Pottage 1998). In addition, the flaws of privacy were palliated in England by parliamentary interventions that reorganized obsolete and overly fragmented property rights (Bogart and Richardson 2009), an example of large-scale public reallocation of rights.

The English case also illustrates a constant feature of privacy regimes: to contain fraud, private conveyancing services provided by solicitors and notaries tend to develop into professional monopoly. * * *

Public Reallocation of Rights Through Judicial Purging of Titles. In a situation of systematically unclear title, of the sort that may be fostered by a privacy regime, many individuals demand that the legal system afford them greater security for their rights, especially owners who plan to make additional investments or to sell land to third parties who may be unsatisfied by personal guarantees. To fulfill this demand for greater security, legal systems often provide summary judicial procedures that aim to call on all possible claimants and solve any possible contradiction in their claims, proceeding to what * * * is a public reallocation of rights. For example, before the consolidation of recordation and registration systems, many countries in Europe resorted to special judicial procedures for clarifying title, such as the French *purge* (Cabrillac and Mouly 1997, 732) and the Spanish *purga* (Pardo Núñez 1993).

Unsatisfied demand for greater security is also behind the fake lawsuits that parties resort to with the objective of clarifying title when the law does not provide for specific summary procedures. A famous example was the English "fine," a simulated lawsuit that allowed the transaction to be entered in the books of the court and made it binding on everybody after a short period of limitation. It was used from the twelfth century until 1833 (Kolbert and Mackay 1977, 241). This type of fictitious and amicable lawsuit is found in different historical contexts, from the Bible (Ellickson and Thorland 1995, 385) to colonial Massachusetts (Konig 1974, 160–61). Unfortunately, however, both specific purges and fake lawsuits are insecure under a privacy regime, because judges must rely on proclamations to identify all claims, given that many rights remain hidden. Therefore, their effects in many jurisdictions are not general but are limited to any identified claims.

Publicity of Claims

Whatever the palliatives applied, the costs of contracting true property *in rem* rights under a regime of pure privacy are so high that modern systems of property law have abandoned privacy in an effort to lower them. At a minimum, the law induces or requires the independent

publicity of contracts, which makes them verifiable, as a prerequisite for them to attain *in rem* effects—that is, to convey property rights and not mere contract rights. If they keep their claims private, rightholders lose or risk losing *in rem* effects. Private contracts may create obligations among the conveying parties but do not bind third parties—all other rightholders and, especially, potential future buyers and lenders. Independent publicity therefore facilitates finding out which property rights are alive and which will be affected, thus making it possible to gather consents, purge titles, and reduce information asymmetries between the conveying parties. * * *

Recordation of Deeds

The next logical step in the provision of publicity is to deposit private transaction documents (“title deeds”) in a public registry so that this evidence on property claims can then be used by the courts to verify them and allocate property, *in rem*, rights in case of litigation. Moreover, by making the register publicly accessible to potential acquirers, these can ascertain the quality of the sellers’ title, thus reducing their information asymmetry.

After many failed attempts, such as the Statute of Enrollments issued by Henry VIII in 1535 but never enforced, and the Massachusetts 1640 Recording Act, recordation eventually started to succeed in the nineteenth century and has been used in most of the United States, part of Canada, France, and some other countries, mostly those with a French legal background. The key for its success was to switch the priority rule, because other incentives failed in convincing people to record. Historically, recordation systems thus became effective only when, in deciding on a conflict with third parties, courts determined the priority of claims from the date of recording in the public office and not from the date of the deed. This means that, instead of the conventional “first in time, first in right” rule, courts adjudicated according to the rule “first to record, first in right.” For instance, in terms of a double sale * * *, the judge would give the land not to the first buyer, B_1 , but to the first buyer to record the purchase.

This change in the priority rule not only protects acquirers but also avoids incomplete recording, which hampered many of the first recordation systems. The reason is that the switch in the priority rule effectively motivates acquirers such as B_1 to record from fear of losing title through a second double sale or any other granting of rights (e.g., a mortgage) by the former owner to an innocent acquirer such as B_2 (e.g., a lender) who might record his claim first. Consequently, all relevant evidence on property rights is available in the public records. From the point of view of third parties, the record, in principle, is complete * * *. Other claims may not be recorded and may well be binding for the parties

who have conveyed them, but these hidden claims have no effect on third parties.¹⁸

Moreover, as under the privacy regime, both contractual and judicial procedures are used to remove title defects. Compared to privacy, deed recordation provides more possibilities for contracting the removal of defects, because defects are better known to buyers and insurers. The identification of rightholders also gives greater security to the summary judicial hearings that serve to identify possible adverse claims and publicly reallocate *in rem* rights. These summary hearings continue to exist today in, e.g., the French judicial *purge* and the US “quiet title” suit. In addition to purging titles directly, the existence of such a court-ordered purging possibility also reduces bargaining costs indirectly by encouraging recalcitrant claimants to reach private agreements (Cabrillac and Mouly 1997, 732–40).

However, the recording office accepts all deeds respecting certain formal requirements (mainly, the date of the contract and the names of the conveying parties), whatever their legality and their collision with preexisting property rights. In fact, the recording office is often obliged by law to file all documents fulfilling a set of formal requirements, regardless of their legal status. For example, according to Article 27201 of the California Government Code, “the county recorder shall not refuse to record any instrument, paper, or notice that is authorized or required by statute or court order to be recorded on the basis of its lack of legal sufficiency.” The public record may therefore contain three kinds of deed. First, those resulting from private transactions made without previous examination. Second, those granted after an examination but without having all defects removed. Finally, those that define purged and non-contradictory property rights.

Transactors who record clouded titles therefore produce a negative externality for all future transactors.²⁰ Experts examining the title of a parcel do not know a priori which kinds of deed are recorded concerning it. For each transaction, they will thus have to examine all relevant deeds dealing with that parcel in the past, even those which may have been perfectly purged in previous transactions.

¹⁸ Some important caveats are in order. First, this ideal completeness of the public record has often remained unfulfilled because of organizational and legal problems, as exemplified by the traditional problems of land records in the United States (Cross 1957; Straw 1967). Moreover, in most jurisdictions, the priority-of-recording rule applies only to innocent or good-faith acquirers for value, and judges infer that such good faith is lacking when the acquirer knew (had “notice”) of the previous transactions, an aspect that is also illustrated by the different systems being applied in different states in the United States (Dukeminier and Krier 1998, 675–77; and Merrill and Smith 2007, 919–23). Finally, acquirers must usually inspect the land to find out about physical possession, as this inspection provides actual notice as to the existence of a claim or right. * * *

²⁰ The rationale here is similar to the theory of the *numerus clausus* of property rights in Merrill and Smith (2000), who argue that the possibility that parties might invent idiosyncratic rights *in rem* would raise the information cost and thus the cost of contracting for all other participants (mainly, 26–34).

The cost of this repeated examining of deeds can be reduced with proper organization of the registry. In the short run, the easiest way to organize the information is by relying on indexes of grantors and grantees to locate the chain of transactions for a given parcel. However, this method is subject to errors, such as, for example, those caused by identical names and misspellings. * * *

Registration of Rights

Registration of rights (hereafter referred to as “registration,” and often confusingly called “title registration”) goes one crucial step further than recordation of deeds: instead of providing information about claims, it defines the rights. To do this, it performs a mandatory purge of claims before registering the rights. As in deed recordation, claims stemming from private transactions gain priority when transaction documents are first lodged with the registry. They are then subject, however, to substantive review by the registrar, in order to detect any potential conflict that might damage other property rights * * *. New and reallocated rights are registered only when the registrar determines that the intended transaction does not affect any other property right or that the holders of these affected rights have consented. When these conditions are met, the change in rights caused by the transaction is registered, antedating the effects of registration to the lodging date. (In a sense, any registry of rights thus contains a recording of deeds: its “lodgment” or “presentment” book is a temporary record of claims.) Otherwise, when the consent of an affected rightholder is lacking, registration is denied, and the conveying parties have to obtain the consents relevant to the originally intended transaction, restructure it to avoid damaging other rights, or desist.

NOTES AND QUESTIONS

1. One can perhaps summarize Arruñada’s discussion of the differences between registration and recordation as follows. Registration resolves potential disputes about title *ex ante*, at the time of the transfer; recordation leaves disputes about title to be resolved *ex post*, once they arise. Registration confers rights *in rem*, in that the certificate of title is binding on third parties as well as on the parties to the transfer. Recordation by itself has no binding effect on third parties; recordation does no more than make available for public inspection copies of *in personam* transactions (contracts, deed, liens, etc.). Under recordation, however, *ex post* litigation in the form of a quiet title action may draw upon records of past transactions to render judgments that have an *in rem* effect.

2. In a sense, the registrar of deeds under the registration system stands in for the public of *in rem* duty holders. The property rights are given *in rem* effect precisely because the registrar has put in the *ex ante* effort to determine that such an effect is appropriate. Does this help explain why, according to an econometric study reported by Arruñada elsewhere, a more definitive effect given to property rights by the registration system correlates

with a smaller number of forms of property the system will recognize (i.e., a stricter *numerus clausus* of property rights)? Benito Arruñada, Property Enforcement as Organized Consent, 19 J. L. Econ & Org. 401, 416–20 (2003). On one view, the *numerus clausus* is enforced in French law through the formalities required for recording interests in order to get in rem enforcement ex post. See Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle, 110 Yale L.J. 1, 5 & n.8 (2000). Something similar may be true in Louisiana. See Alejandro M. Garro, The Louisiana Public Records Doctrine and the Civil Law Tradition 110–18, 150–82, 195–98 (1989).

3. The registration system is thought to be more accurate than the recording system, but also more expensive. Among other things, it requires well-trained and non-corrupt officials to administer it. Debate about which system is better has raged for years. Compare Richard R. Powell, Registration of the Title to Land in the State of New York 69 (1938) (pro-recording); with Myres S. McDougal & John W. Brabner-Smith, Land Title Transfer: A Regression, 48 Yale L.J. 1125 (1939) (pro-registration). See also Matthew Baker, Thomas J. Miceli, C. F. Sirmans & Geoffrey K. Turnbull, Optimal Title Search, 31 J. Legal Stud. 139 (2002) (the optimal title search does not include the entire record, which implies residual uncertainty). The Arruñada book excerpted above explores the evidence on this question as well as the incentives of the various actors involved in a system of land records. Note that many countries setting up land records for the first time opt for registration, but advanced countries with recordation face a somewhat different choice: whether the extra benefits of a registration system are worth the switching costs. See Joseph T. Janczyk, Land Title Systems, Scale of Operations, and Operating and Conversion Costs, 8 J. Legal Stud. 569 (1979). The benefits are likely to be less to the extent that a title insurance industry has emerged to furnish additional security of title to owners.

4. Registration systems rely heavily on state officials and uniform administrative procedures to certify title to land. Although gross generalizations are perilous, given the many variations among registration systems, these features tend to make registration systems relatively inflexible, both in terms of how much effort officials put into any given title inquiry and in terms of the speed with which those officials generate registered deeds. Recording systems, which rely mostly on competing private actors (attorneys, title insurance companies) may be more flexible, in the sense that the resources devoted to title questions and the speed with which title issues are resolved can be varied according to the value of the property and the urgency of completing any given transaction. Does this suggest that recording acts may have certain efficiencies overlooked in the traditional literature on tradeoffs between ex ante and ex post title determination?

2. AIRPLANES

Since the Civil Aeronautics Act of 1938, aviation law has been almost entirely federal, and requires the registration of civil aircraft (which in turn requires proof of ownership) and the recordation of transfers of

aircraft ownership as well as instruments affecting title such as security interests and leases. 49 U.S.C. § 44102(a) (2004); *id.* § 44107 (2004); 14 C.F.R. § 11; *id.* § 47.31(a) (2004). Until the conveyance or encumbrance is recorded, it is good only against (1) the transferor, and (2) third parties with actual notice. *Id.* § 44108(a). After recordation, an interest is good against “all persons.” *Id.* § 44108(b). In *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 409–11 (1983), the Supreme Court interpreted this provision as creating something like a “race-notice” system (which we discuss further, *infra*), thereby preempting *nemo dat*-style state laws that would permit unrecorded transfers to be valid against innocent third persons. Interestingly, while the statute speaks of “actual notice,” this has been taken to include “not only knowledge that one’s seller lacks good title but also knowledge of facts that would lead a reasonable person to inquire further into the seller’s title.” *Shacket v. Philko Aviation, Inc.*, 841 F.2d 166, 170 (7th Cir. 1988) (Posner, J.).

Suppose that on December 1, 2004, A sells Blackcraft (the mythical prototypical airplane) to B, who then fails to file the bill of sale with the FAA. On January 15, 2005, A sells Blackcraft to C (who doesn’t have notice of the earlier sale to B), who *does* file his bill of sale with the FAA. The holding in *Philko Aviation* implies that C, because he recorded first and didn’t have notice, will own Blackcraft. C can rely on the lack of recordation at the time he bought Blackcraft, and the FAA registry does indeed function as a recording system from C’s point of view.

3. SHIPS

Starting with the Ship Mortgage Act of 1920, federal law has provided for enforcement of mortgages on documented vessels of greater than five tons. See 46 U.S.C. § 31301 *et seq.* (modified and recodified in 1988). Conveyances of ships, including mortgages, are given full in rem effect against third parties only if they have been filed with the Secretary of Transportation pursuant to 46 U.S.C. § 31321. Interests which have not been filed may still be enforced against the grantor/mortgagor or his heir or devisee, or against “a person having actual notice of the sale, conveyance, mortgage, assignment or related instrument.” *Id.* § 31321(a)(1)(C). Thus, the Ship Mortgage Act, like the FAA’s registration system for airplanes, operates in practice like a “race-notice” recording act (again, see *infra*). The Ship Mortgage Act was designed to bring greater certainty to ship ownership, because many liens on vessels are valid without filing or possession, leading one commentator, quoting a New Orleans attorney, to observe that “[l]iens on ships, i.e. maritime liens, are often hidden and ships acquire liens like dogs get fleas.” Matthew J. Bauer, *Marine Title Insurance*, 12 Conn. Ins. L.J. 17, 23 (2005); see also Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 586–89 (2d ed. 1975). Because of these problems, a maritime title insurance industry, roughly analogous to its land-based counterpart, has arisen. See Bauer, *supra*.

Smaller vessels are subject to state registration schemes that operate much like automobile registration. See, e.g., Fla. Stat. Ann. § 328; Md. Code, Nat. Res., § 8–701 et seq. State vessel registration schemes vary in a fashion similar to those for auto registration. See 2 Benedict on Admiralty § 68b (7th ed. 2006).

4. AUTOMOBILES

In a way reminiscent of the federal regime for airplanes, state law provides for registration and certification of title to automobiles. Auto registration is a system under which owners have to pay a fee for the privilege of using the state's highways. Certification of title acts were passed later, at first to prevent theft. But they developed into a system for establishing the validity of ownership and security interests. To obtain a certificate of title, the owner submits an application with information including a statement of the applicant's title and each security interest in the automobile. When ownership is transferred, the owner must endorse and deliver the certificate of title to the transferee, and the transferee must then apply at the Department of Motor Vehicles for a new certificate of title within the prescribed time by presenting the endorsed certificate of title from the transferor.

States vary in what effect they give to the certification system. There are three varieties of statutes. First, "excepting" statutes provide that, when the statutory provisions on transfers of title aren't complied with, the transfer of title is invalid, except as between the two parties to the transaction. Second, "invalidating" statutes nullify a noncompliant transfer of title even as between the two parties to the transaction. Third, "nondirective" statutes provide for some penalty for noncompliance but do not affect the validity of the transfer of title. See Pamela Trimble, *Rudiger Charolais Ranches v. Van De Graaf Ranches*, and the Impact of Other State Laws on the UCC Rights of a Good Faith Purchaser, 48 Consumer Fin. L.Q. Rep. 504, 507 (1994).

The last, nondirective type, is the easiest to integrate with the Uniform Commercial Code: The UCC applies in full. Interestingly, even excepting and invalidating statutes have been held to give way to the UCC in allowing good faith purchasers in a noncomplying transaction to prevail. See, e.g., *Island v. Warkenthien*, 287 N.W.2d 487 (S.D. 1980); *Heinrich v. Titus-Will Sales*, 868 P.2d 169 (Wash. Ct. App. 1994). The net effect is to make what sound like systems analogous to Torrens-style (registration) systems for land into something like the recording systems, more equitable and oriented to the good faith purchaser. One major problem with any attempt at a definitive automobile title record is that cars can easily be taken to other jurisdictions. And a potential purchaser of an automobile has to worry that the vehicle is validly registered in another state.

Most states rely on state certificate of title acts for purposes of recording security interests in automobiles under Article 9 of the UCC

(see Chapter VII). The lien is recorded on a state certificate of title, and potential transactors can ask the owner for a copy of the certificate in order to determine the status of the lien. The only potential problem arises before an application for a certificate of title is filed, but no actual case involving this gap seems to have come up. For details, see Lynn M. LoPucki & Elizabeth Warren, *Secured Credit: A Systems Approach* 417–32 (6th ed. 2009).

5. ART

Another type of personal property that might be considered a candidate for a registry is fine art. The ownership of art implicates two main legal problems—*theft and forgeries*. Owners of well-known works want to establish that they have the best rights in the work and that the work really is what it purports to be.

At present there is no central registry for title to art works. Some owners feel nervous about publicizing their ownership—at least before a theft has occurred. There are partial registries of stolen works. Julian Radcliffe, *The Work of the International Art and Antiques Loss Register*, in *The Recovery of Stolen Art: A Collection of Essays* 189, 190 (Norman Palmer ed., 1998).

To establish ownership of a work of art—and thereby avoid the hazards of other claims and the possibility of fakery—one has to establish the provenance of the work. Sources used include museum catalogs and records of past exhibitions. Owners and transactors often rely on *catalogues raisonnés*, which are usually compiled by an acknowledged expert and contain information on every known piece by an individual artist, including a physical description and illustration of the work, and its provenance and exhibition history. Other documentary evidence (letters, memoirs, etc.) can also be used as evidence.

Researching a provenance is not only costly, but often far less reliable than researching records in a central registry. A dramatic illustration of the problem is the famous recent forgery perpetrated by two Britons, John Drewe (*né* John Cockett) and John Myatt. Myatt forged over 200 paintings, many with acrylic paint and K-Y Jelly, and Drewe sold the works, mostly through London auction houses. But unlike most forgeries that rely on their resemblance to a master's style, Drewe forged the documents that would be used for the provenance of the works.

After getting friends to sign letters attesting to their ownership of the paintings and their authenticity, he then forged and altered correspondence and catalogs in museum libraries. (The plot was discovered only when Drewe's girlfriend called the police.) Peter Landesmann, *A 20th-Century Master Scam*, *N.Y. Times*, July 18, 1999, at SM32; Eamonn O'Neil, *The Art of Deception*, *Scotsman*, July 6, 2002, at 12. Provenance is thus like recording in being based on a history of transactions, but unlike recording, the evidence is not kept in a

systematic and secure fashion. It is plausible that establishing a registry for works of fine art would increase the value of such works, by making title more secure for purchasers. See Bell & Parchomovky, *supra*, 116 Colum. L. Rev. at 256–58. Why then have such registries been so slow in developing?

Figure 8-3
John Myatt in His Studio
(Motto: “In prison they called me Picasso”)



Photo: Jean-Philippe Defaut/The New York Times/Redux. Today Myatt runs a business that used to be called *Genuine Fakes*. See <http://www.johnmyatt.com>, the official website of John Myatt, the artist “involved in the ‘biggest art fraud of the 20th century.’”

Vintage violins, as aesthetically pleasing, valuable, and highly mobile objects, raise similar issues. Harvey Shapreau & Carla J. Shapreau, *Violin Fraud: Deception, Forgery, Theft, and Lawsuits in England and America* (2d ed. 1997).

6. INTELLECTUAL PROPERTY

Intellectual property is a form of personal property. But much of intellectual property law is federal law—unlike the law of personal property generally. We consider here the registration provisions for the major types of intellectual property: patent, trademark, and copyright.

In the case of patents, part of one section of the Patent Act deals with transfers and their effects against third parties:

An assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent

and Trademark Office within three months from its date or prior to the date of such subsequent purchase or mortgage.

35 U.S.C. § 261. This system is like a notice recording act with a grace period. (For an explanation of the types of recording acts, see *infra* Part F.) Some have argued that “assignment, grant, or conveyance” includes granting a security interest. See, e.g., Raymond T. Nimmer, Revised Article 9 and Intellectual Property Asset Financing, 53 *Me. L. Rev.* 287, 320–22, 335–37 (2001). The Ninth Circuit has held the opposite. In re *Cybernetic Services, Inc.*, 252 F.3d 1039, 1052 (9th Cir. 2001).

Notice that the records kept by the patent office are like registration in another respect: the Patent and Trademark Office (PTO) is called upon to evaluate the application for the patent, and those questioning its validity can under some circumstances challenge a patent’s validity at the PTO. In the early nineteenth century, a system of minimal examination prevailed, which relied more on the courts to sort out which patents were actually valid. Somewhat confusingly, this system of minimal examination is called “registration” (as opposed to “examination”) in the patent context. Compare F. Scott Kieff, *The Case for Registering Patents and the Law and Economics of Patent-Obtaining Rules*, 45 *B.C. L. Rev.* 55 (2003) (proposing “soft-look” registration) with Jay P. Kesan, *Carrots and Sticks to Create a Better Patent System*, 17 *Berkeley Tech. L.J.* 763, 775–76 (2002) (advocating tightened standard for granting patents at the PTO for applicants who do not elect the “enhanced prior art disclosure” option). Historically, the United States was unique in having a first-to-invent system, although this was recently changed in the Leahy-Smith America Invents Act of 2011, adopting a first-to-file system. This brings the U.S. into line with other countries and makes the patent system more like other registration regimes.

For federal trademarks, the Lanham Act sets up a similar system for the “assignment” of trademarks:

An assignment shall be void against any subsequent purchaser for valuable consideration without notice, unless the prescribed information reporting the assignment is recorded in the United States Patent and Trademark Office within 3 months after the date of the assignment or prior to the subsequent purchase.

15 U.S.C. § 1060(a)(4). Again, this is comparable to the notice-plus-grace-period type of recording act. “Assignments” clearly include transfers of title but may not include security interests. For the complex interaction between federal intellectual property registration and (state law) Article 9, see, e.g., Nimmer, *supra*.

Copyrights are subject to a much looser regime. The history of copyright over the last century has been characterized by a move away from formalities. Registration is not required to claim copyright, but timely registration is advantageous for making statutory damages available when actual damages are hard to prove (and for being able to

file certain infringement actions, for evidentiary purposes, etc.). But failure to register does not invalidate a copyright. 17 U.S.C. § 409–412. To comply with the Berne Convention, Congress eliminated the requirement of registration prior to suit for copyright owners from other Berne member countries.

7. CASH AND NEGOTIABILITY

As mentioned by Baird and Jackson, cash illustrates the good faith purchaser rule at its widest. With cash there is no duty to inquire about where it came from and whether the holder has good title. This makes cash very liquid. A thief does not obtain title to stolen cash, but one can get good title to cash even from a thief. There is not only no registry of cash, but even an original owner who could prove by using serial numbers that certain cash was his cannot recover it from a present good-faith holder.

Cash is sometimes said to be the extreme of “negotiability.” A written instrument is “negotiable” when it is “capable of being transferred by delivery or indorsement when the transferee takes the instrument for value, in good faith, and without notice of conflicting title claims or defenses.” Black’s Law Dictionary (9th ed. 2009). Cashier’s checks and bearer bonds would be examples. Negotiability is useful where the issuer is more able to bear the risk of loss or there is some special value in avoiding inquiry on the part of transferees.

Negotiability takes the good faith purchaser exception to *nemo dat* the furthest. In U.S. law, an innocent holder can acquire good title to cash and negotiable instruments even with a thief in the chain back to the original owner.

F. RECORDING ACTS

As explored in the excerpt by Arruñada, land records can be divided into recordation and registration. Nearly all localities in the United States use recordation. The key attribute of recording is that it generates, as a matter of law, constructive notice to all subsequent purchasers in the chain of title. Thus, recording acts create a powerful incentive for purchasers to file their deeds (and mortgagees their mortgages, etc.) in order to block possible good faith purchaser claims by subsequent transferees. Those interested in the state of title can examine the records, or more likely hire an expert to examine them (or a duplicate set maintained privately by the title company) and produce an “abstract” or report. From time to time, various jurisdictions in the United States have experimented with registration statutes, called Torrens Acts after the Australian law that inspired them. Most of these experiments failed, and today Minneapolis-St. Paul is the only major area still covered by a Torrens title registration system. See Kimball Foster, *Certificates of Possessory Title: A Sensible Addition to Minnesota’s Successful Torrens*

System, 40 Wm. Mitchell L. Rev. 112 (2013). As Arruñada recounts, most of the rest of the world (including Germany, Great Britain, most of the other commonwealth countries, and most developing countries) uses registration.

The first recording acts were very simple and were what we would now call the “race” type, under which the first of two property claimants to file has the better claim. These acts in effect created an exception to *nemo dat* much broader than the good faith purchaser rule, allowing any subsequent purchaser to prevail over the holder of a prior unrecorded interest. (The race statute’s exception to *nemo dat* would be unavailable to anyone with respect to an interest that had been previously recorded.) This led to great unfairness in certain circumstances, as where someone knowing of a prior transaction would “purchase” the land from the grantor—who would have nothing to transfer under *nemo dat*—and then would record first. The prior purchaser was out of luck. To avoid this result, courts held that subsequent purchasers with notice of a prior conveyance would not get the protection of the statute. *Marshall v. Fisk*, 6 Mass. (5 Tyng) 24, 30 (1809); *Farnsworth v. Childs*, 4 Mass. (3 Tyng) 637, 639 (1808). Courts also developed robust doctrines of constructive notice based on possession (especially open and notorious possession), *M’Mechan v. Griffing*, 20 Mass. (3 Pick.) 149, 154 (1825), or even based on the publishing of the conveyance in the newspaper, *Curtis v. Mundy*, 44 Mass. (3 Met.) 405, 408 (1841).

In response to these developments, legislatures, with Massachusetts again in the lead, started to insert language in recording acts requiring good faith or lack of actual notice on the part of the subsequent purchaser. See 14 Powell on Real Property § 82.02[1][c][iii]. These “notice” statutes fundamentally altered the nature of the recording acts. Whereas a race statute in effect creates an exception to the good faith purchaser rule, a notice statute preserves the good faith purchaser rule in full force, with the modification that recordation provides constructive notice to subsequent purchasers. In a third variation, the race-notice statutes were adopted in the nineteenth century by several Middle Atlantic states (Maryland, New Jersey, New York, and Pennsylvania) in nearly identical language. These acts combined the features of the race statutes and the notice statutes, requiring in effect that persons be both good faith purchasers and be the first to record in order to prevail over other claimants. The Pennsylvania version spread to the Northwest Territory with the result that many of the states of the Old Northwest (e.g., Indiana, Ohio, Michigan, and Wisconsin, but not Illinois) have race-notice statutes.

Carol Rose has seen in the history of the recording acts a story of legislatures adopting “crystalline” rules followed by judicial decisions that soften the rules with various equitable defenses and qualifications, turning them into “mud.” Carol Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 585–90 (1988). (The portion of this article dealing

with mortgage foreclosures and redemptions is excerpted in Chapter VII.) The early history of recording acts certainly conforms to a pattern of crystals followed by mud. But it is less clear that any cycling between these poles has continued. Perhaps because the notice and race-notice statutes adopted in the nineteenth century had a built-in safety valve to prevent the worst abuses of the pure race statutes, courts were nowhere as aggressive in their construction of notice and race-notice statutes as they were of race statutes. Later in the nineteenth century, courts seem to have dropped the idea that possession by another (other than adverse possession) would itself cause subsequent purchasers to lose the protection of the recording act. To be sure, courts did make exceptions for situations of direct misrepresentation by the first purchaser to the second purchaser. See *Marling v. Milwaukee Realty Co.*, 106 N.W. 844 (Wis. 1906); *Guffey v. O'Reiley*, 88 Mo. 418 (1885). Overall, however, it may be that we have achieved something of a stable equilibrium with respect to the understanding and application of recording acts today. (Which is not to say that application of the statutes is easy!)

Before we turn in more detail to the various types of recording acts, it is important to know how a title search does—and sometimes does not—work.

TITLE SEARCH AND “CHAIN OF TITLE”

Recording acts require that public officials, such as the county clerk or recorder of deeds, maintain an office in which deeds and other documents affecting title may be recorded. Typically there will be a recorder's office in every county in a state. The employees who run these offices do little if any screening of the documents submitted for recordation. Thus, not only deeds and mortgages, but also judicial judgments, letters, and memoranda may be recorded. Every recording office has at least two indexes: a grantee index and a grantor index. As their names suggest, the grantee index includes, by name, all grantees referenced in the documents that have been submitted for recordation; the grantor index includes, by name, all grantors referenced in the documents that have been submitted for recordation. Grantors and grantees are arranged alphabetically, although there may be a separate index for each year. Some recorders' offices—but not all—also keep something called a tract index, in which all documents submitted for recordation are listed by the legal description of the property under the surveying system established by the Land Ordinance of 1785 (or an equivalent parcel indexing system developed for a metes and bounds state). This is extremely useful, either as a shortcut to doing a title search or as a check against the search results produced using the grantor and grantee indexes.

Performing a title search involves tracing the series of transactions from one's would-be transferor back to a “root of title” and then tracing forward. First one looks in the grantee index for one's transferor to find

the deed by which he took from his predecessor, the deed from the predecessor's predecessor, and so on. This ensures that the would-be transferor obtained his title through a chain of legitimate transfers. In many states, marketable title acts (see below) allow the search to stop at some date in the past—say 30 or 40 years ago—rather than needing to trace all the way to the sovereign or some other “root.” Second, once one has gone back far enough, one repeats the process going forward in time through the grantor index. Tracing forward involves investigating what each of the people discovered in the grantee index did with the title in the relevant period. One might think that this period is the time between execution of the deed to her and the date of execution of the deed from her to the next link in the chain, but this would be inadequate. Instead, for each of the people in the chain, one must look in the grantor index between (i) the date of execution of the deed to that person and (ii) the date that the deed from that person to the next person *was recorded*. One is responsible for knowing what each person might have granted from the time of execution of the deed to that person but before it is recorded, and one has to check for possible transactions after that person executed a deed to another but before that deed was recorded. Anything outside the period bounded by (i) and (ii)—the period before the execution of the deed to X and after the recording of the deed from X—is said to be outside the “chain of title” and as to such matters the land records do *not* furnish constructive notice. Consequently, if something is outside the chain of title (outside the legally defined reasonable search), the good faith purchaser exception to *nemo dat* applies.

The chain of title concept is a compromise between a more thorough but more expensive search and a less thorough but more manageable search. The mechanics are best appreciated though an example.

Example. On April 15, 2006 you are considering a purchase from D of a parcel known as Blackacre, located in the town of Springfield. You must perform a title search to ascertain the state of the title. Here is a sketch, assuming that the state only requires a title search going back 40 years. More might be required in other jurisdictions.

Running backwards in the Grantee Index:

1. Look up D in the Grantee Index and find his grantor, C. The index refers to a deed from C to D on April 1, 1995, recorded that day.
2. Search C backwards from April 1, 1995 until you find a reference to a deed from B, dated October 1, 1986 and recorded on April 15, 1991.
3. Search under B backwards from October 1, 1986 and find a deed from A on January 30, 1968 and recorded that day.
4. Search A backwards to 1966. A owned Blackacre on January 1, 1966.

Running forward in the Grantor Index:

1. Search A forward in the Grantor Index from January 1, 1966 to January 30, 1968 (deed to B).
2. Search B forward from January 30, 1968 until *April 15, 1991* (recordation of deed to C).
3. Search C forward from *October 1, 1986* (date of deed to C) until April 1, 1995 (deed to D).
4. Search D forward from April 1, 1995 until the present.

Chain of Title (from the minimal search):

January 1, 1966—January 30, 1968: A owns and then conveys to B.

January 30, 1968—October 1, 1986: B owns and then conveys to C, but the deed is not recorded until April 15, 1991.

October 1, 1986—April 1, 1995: C owns and then conveys to D.

April 1, 1995—April 15, 2006: D owns.

In a recording system, the official keeping the records has a duty to accept and file records of the proper form, but has no duty to investigate the state of title. In this example, we assumed that all the recorded deeds were legitimate. This is not always so.

TYPES OF RECORDING ACTS

Today in the United States, there are three types of recording acts:

1. **Race.** The winner of the race to record prevails. This was the original type of statute, but now at most two states have a simple race statute. So if O sells to A and then sells to B, but B records before A, then B has title; A has only a claim against O. Race statutes create an exception to the *nemo dat* principle and a partial exception to the good faith purchaser doctrine, insofar as the first party to record wins even if she has actual notice of a prior conveyance. An example of a race statute:

- (a) No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies * * *

N.C. Stat. § 47–18. See *Rowe v. Walker*, 441 S.E.2d 156 (N.C. Ct. App. 1994), *aff'd*, 455 S.E.2d 160 (N.C. 1995).

2. **Notice.** A subsequent bona fide purchaser wins unless he has notice (actual, constructive, or inquiry), and a recorded interest gives constructive, or “record,” notice. Note the incentive to record immediately in order to be protected from subsequent good faith purchasers. An example of a notice statute:

A conveyance of an estate in fee simple, fee tail or for life, or a lease for more than seven years from the making thereof, * * * shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it, unless it * * * is recorded in the registry of deeds for the county or district in which the land to which it relates lies.

Mass. Gen. Laws Ann. Ch. 183, § 4.

3. **Race-Notice.** A subsequent good faith purchaser wins only if he has no notice *and* records before the prior instrument is recorded. This is like the race statute but solves the problem of the unscrupulous subsequent buyer under the race approach. An example of a race-notice statute:

Every conveyance of real property or an estate for years therein, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded * * *

Cal. Civ. Code § 1214.

4. **Mixed regimes.** Some states apply a race regime to mortgages but another type of recording act to conveyances in general. Compare the following two Arkansas statutes:

Every mortgage of real estate shall be a lien on the mortgaged property from the time it is filed in the recorder's office for record, and not before. The filing shall be notice to all persons of the existence of the mortgage.

Ark. Code Ann. § 18-40-102.

(a) Every deed, bond, or instrument of writing affecting the title, in law or equity, to any real or personal property, within this state which is, or may be, required by law to be acknowledged or proved and recorded shall be constructive notice to all persons from the time the instrument is filed for record in the office of the recorder of the proper county.

(b) No deed, bond, or instrument of writing for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, made or executed after December 21, 1846, shall be good or valid against a subsequent purchaser of the real estate for a valuable consideration without actual notice thereof or against any creditor of the person executing such an instrument obtaining a judgment or decree which by law may be a lien upon the real estate unless the deed, bond, or instrument, duly executed and acknowledged or proved as required by law, is filed for record in the office of the clerk and ex officio recorder of the county where the real estate is situated.

Ark. Code Ann. § 14–15–404. See also Pa. Stat. Ann. tit. 21, § 351 (race-notice statute for conveyances other than mortgages); *id.* § 622 (race statute for mortgages).

Some states allow a “grace period” for filing such that the bona fide purchaser prevails over the prior grantee only if the prior grantee fails to record within the grace period. See, e.g., Del. Code Ann. tit. 25, § 153 (providing for 15-day grace period).

THE SHELTER RULE

Finally, courts have interpreted recording acts to create an exception for certain transferees who otherwise would be barred from obtaining title because they are not good faith purchasers for value. Suppose O conveys to A, who does not record. Then O conveys to B who gives value and has no notice of the prior conveyance to A. B then records. Under a race, notice, or race-notice recording act, B should prevail over A. But what happens if B then gifts the land to C (so C is not a bona fide purchaser *for value* under the recording act), or B sells to C, even though C was aware of the prior deed to A? A literal reading of the statutes might lead one to think that C should lose to A under these circumstances, since C is not a good faith purchaser. But under what has been called the Shelter Rule, courts have held that C prevails against A. See, e.g., *Jones v. Independent Title Co.*, 147 P.2d 542, 543 (Cal. 1944). Once B prevails against A, they have reasoned, B should be given all the attributes of ownership, including the right to make normal *nemo-dat* style transfers of the property. If the rule were otherwise, then B would have less than full ownership, because he could not give away the property or sell it to those with notice of the transfer to A.

The Shelter Rule has limits of its own: If B in our hypothetical seeks to transfer the property back to O, the original owner, the Shelter Rule does not apply; under the “original owner exception” to the Shelter Rule, O cannot shelter under B’s rights. See, e.g., *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522 (Minn. 1990). It is generally thought that the opportunities for collusion in such an arrangement are too great, and precluding B from conveying B’s full rights to O does not significantly curtail B’s market.

RECORDING DOCTRINES BASED ON CHAIN OF TITLE

The recording acts in conjunction with the notion of chain of title define a legally required search for one who wishes to take advantage of the protection afforded good faith purchasers under the act. If a deed or encumbrance would be revealed by the legally required search—putting it within the chain of title—then it affords constructive notice. But if the deed or encumbrance is outside that search (not in the chain of title), it does not afford constructive notice to a subsequent purchaser for value and so its holder loses out to the GFPV. As we will see, things are not so tidy in light of off-record matters that can affect the title of even a GFPV,

but even the notion of chain of title and legally reasonable search can be difficult to define around the edges. Consider some perennial problems.

The “Wild Deed.” If a grantee records before her grantor, the grantee’s deed is a “wild deed” because it is not connected up to the common grantor by a continuous chain of recording. Say O grants to A, who does not record. O then grants to B, who does not record. What if then B conveys to C, and then C, A, and B record in that order? Who would win in a notice or race-notice jurisdiction, A or C? C’s is a wild deed, and C is sometimes said to be a “stranger to the title.” Searchers of traditional records will not find the wild deed in a conventional chain of title search, because the name of the grantee, here B, would be unknown to searchers. Moreover, in the period between A’s recording and B’s recording, a purchaser from A would have no way of finding C’s deed. See *Board of Education of Minneapolis v. Hughes*, 136 N.W., 1095 (Minn. 1912). The majority of courts agree that one cannot benefit from the recording act’s exception to *nemo dat* if one traces one’s ownership to a wild deed. For recent examples, see *Salt Lake County v. Metro West Ready Mix, Inc.*, 89 P.3d 155 (Utah 2004); *Holland v. Hattaway*, 438 So.2d 456, 470 (Fla. Dist. Ct. App. 1983); see also *Zimmer v. Sundell*, 296 N.W. 589 (Wis. 1941). Some courts simply deny that the holder of a wild deed is a good faith purchaser, on the rationale that someone in C’s position has constructive notice and could relatively easily make sure that her grantor’s (B’s) deed is recorded before she records (or purchases, for that matter).

Late (and Early) Recorded Deeds. Problems can arise if someone records so late that another branch of title gets started in the meantime. Consider this scenario: O sells to A and then to B, who has actual notice of the O-to-A sale. B then records and then A records. Then B sells to C, who has no actual notice of the O-to-A sale. C then records. First, C cannot take advantage of the shelter rule. (Do you see why?) Under the majority approach to this question, the chain of title concept makes C the winner. When doing a search forward, C is supposed to search O as a grantor from the time O acquired the interest until the time that B recorded. At that latter point A has not recorded yet, but it would be burdensome for C to have to search O as grantor all the way down to the present. See *Morse v. Curtis*, 2 N.E. 929 (Mass. 1885). Yet some courts do go beyond the classic chain of title and require searches from each grantor in one’s chain of title down to the present, which would pick up A’s deed in our example. In such jurisdictions, C would have constructive notice of A’s deed, and A would prevail over C. See *Woods v. Garnett*, 16 So. 390, 392 (Miss. 1894).

Similarly, if someone conveys land before acquiring it, the earlier conveyance is outside the chain of title of a later purchaser and so would not, even if recorded, furnish constructive notice. Thus, if O conveys Blackacre to A, then acquires Blackacre and records, and conveys it to B, A might invoke estoppel by deed. Nevertheless, most courts would hold

that there being no reasonable way for B to know of A, B prevails over A. See, e.g., *Sabo v. Horvath*, 559 P.2d 1038, 1044 (Alaska 1976); *Wheeler v. Young*, 55 A. 670 (Conn. 1903). But, as with the late recorded deed, some courts do hold that a deed like A's if recorded furnishes constructive notice to B, thereby holding B to a more stringent search. See 11 Thompson on Real Property § 92.09(c)(2)(B)(i), at 181 (David A. Thomas ed., 2002).

“Mother Hubbard” Clauses. Sometimes deeds will use a general description of a collection of lands without specifically enumerating them. For example, a deed might convey “all interest of whatsoever nature in all working interests and overriding royalty interest in all Oil and Gas Leases in Coffey County, Kansas, owned by them whether or not the same are specifically enumerated above . . .” *Luthi v. Evans*, 576 P.2d 1064, 1067 (Kan. 1978). Such a deed is valid as between the parties, but such a deed does not impart constructive notice to subsequent purchasers. Such a description does not permit the deed to be indexed properly in a tract index, and even a subsequent purchaser who finds such a deed would have a lot of investigating to do to figure out which parcels the deed covered and what happened to them. Generally “Mother Hubbard” clauses do not on their own furnish constructive notice to subsequent purchasers. A grantee of a deed with such a clause should file in the land records an affidavit with a specific description of the lands conveyed or covered.

Restrictions on Adjacent Tracts. In a somewhat similar fashion, an owner may convey parcels while restricting retained land. This is particularly common in subdivisions. What if the developer sells Lot 1 with a reciprocal covenant that Lot 1 and adjacent Lot 2 (and perhaps other lots in the area) will be used for residential purposes only? The developer then sells Lot 2 without any such restriction. Some courts hew closely to the chain of title and emphasize the burden on the subsequent purchaser and hold that a purchaser of Lot 2 without actual notice is not bound. See, e.g., *Spring Lakes v. O.F.M. Co.*, 467 N.E.2d 537 (Ohio 1984); *Buffalo Academy of the Sacred Heart v. Boehm Bros., Inc.*, 196 N.E. 42 (N.Y. 1935). Other courts require searchers to look at the deeds for adjacent parcels and find constructive notice, especially if the parcels are part of the same subdivision. See *Guillette v. Daly Dry Wall*, 325 N.E.2d 572, 574 (Mass. 1975) (purchaser is required to look through other conveyances in the same subdivision by the same grantor); *Finley v. Glenn*, 154 A. 299, 301 (Pa. 1931) (purchaser is responsible for restrictions contained in conveyances from his grantor that affect the purchased parcel). See also *Sanborn v. McLean* on the “common plan doctrine” in Chapter IX. Also in that chapter we will see how easements can arise in ways other than by grant. Such easements (by implication, necessity, estoppel) constitute yet another source of off-record risks for the prospective purchaser.

Improper Indexing. Sometimes instruments will be improperly recorded. Somewhat surprisingly, a majority of courts have held that indexing is not part of recordation and so not essential to the giving of constructive notice. A minority of courts have held that a failure to index, or sometimes incorrect indexing, can prevent the giving of constructive notice. Variants of the same name may lead to difficulties in constructing a chain of title. As between the recorder of an improperly indexed interest and a later searcher, who can more easily deal with the problem?

All errors are not created equal. Traditionally, a reasonable searcher must search for very close variants of a name, especially if they sound alike and the differences are small, but not distant ones, especially if they begin with a different letter (“Cheffey” versus “Sheffey”). Similarly, errors in descriptions can deprive a deed of the constructive notice-giving effect, depending on how confusing they are. (The Mother Hubbard clause presents a related problem.)

PROBLEMS

In the following conveyances for value, what is the result under each type of statute? [Hint: In working through the problems, begin with the last conveyance, chronologically speaking, and then work back toward conveyances earlier in time. Once you find a party that prevails under the recording act, that party will generally prevail against all earlier claimants.]

1. O conveys to A. O then conveys to B, who is unaware of the conveyance to A. B records immediately. Then A records.
2. O conveys to A. O then conveys to B, who is aware of the conveyance to A. B records immediately. Then A records.
3. O conveys to A, who does not record. Then O conveys to B, who also does not record. Then O conveys to C, who does not record. First assume that B and C are each unaware of the previous grants from O. Then consider: What if each of them *is* aware?
4. O conveys to A. O then conveys to B, who has no knowledge of A’s deed. Then A records. B then records and sells to C.
5. O conveys to A. O then conveys to B, who has no knowledge of A’s deed. Then A records. B then records and sells to O. (This is the same situation as in Problem 4, except C is replaced by O).
6. O conveys to A. O then conveys to B who has actual notice of the deed from O to A. B records, and then A records. Then B sells to C.
7. O conveys to A before O has any title. A immediately records. O then acquires title from X and records. O then conveys to B.
8. O conveys to A. O then conveys to B, who does not record. B conveys to C who records immediately. A conveys to D. Then A and D both record, and finally B records.
9. O owns adjacent parcels and sells parcel 1 to A and includes in the deed a covenant to restrict parcel 2 to residential use. Then O sells parcel 2

to B without mentioning the restriction, but mentions a subdivision plan in the deed. Is B bound by the covenant?

10. O conveys a fee simple to A, who does not record. O then enters into a land sale contract with B, which obligates B to pay to O a down payment and make a series of payments; after the last payment is made, O will convey a deed to B in fee simple. B records the contract but finds out about the prior O-to-A deed before making the final payment. Assume O is judgment-proof.

At this point the attentive reader may be wondering whether there can be circular priorities. The answer is yes, especially in situations of mortgages and other liens, which present a classic brain-teaser. Consider the situation where O owns Blackacre and mortgages it to A for \$30,000. A does not record the mortgage. O then mortgages Blackacre to B for \$4000. B records but has notice of A's mortgage. O then mortgages to C for \$5000, and C records. The fund for distribution (say from a foreclosure) is insufficient to satisfy all three liens. For a variety of solutions and discussion of judicial approaches, see, e.g., 4 American Law of Property § 17.33; Carville D. Benson, Jr., *Circuitry of Lien—A Problem in Priorities*, 19 Minn. L. Rev. 139, 153 (1935); Albert Kocourek, Note, *Diversities De La Ley: A First-Rate Legal Puzzle—A Problem in Priorities*, 29 Ill. L. Rev. 952, 955 (1935); see also 2 Grant Gilmore, *Security Interests In Personal Property* 1020–46 (1965).

ELECTRONIC LAND RECORDS

Land records are increasingly computerized and even available on the Internet. The first step in migrating to electronic recordation is to scan paper title documents and organize them into a simple database, akin to a spreadsheet, with possibly the addition of a parcel identifier number. Statutes are needed in order to give electronic filing, online notice, and electronic searches legal effect, and legislatures are beginning to do so, with a majority having passed the Uniform Real Property Electronic Recording Act (URPERA). Further legal implications from computerization of land records may be on the horizon. As long as records can be searched electronically by grantor and grantee, the type of search that is cost-effective increases, which can be expected to create pressure to expand the notions of “chain of title” and constructive notice. Recall that chain of title is based on the limited search, described earlier, that is reasonable to expect a prospective purchaser to engage in. Electronic records can be expected to have an even greater impact if they allow search by tract or property location rather than just by grantor and grantee. The most advanced systems are beginning to use geographic information systems (GIS) that integrate a variety of information on an interactive map. The demand for electronic record keeping is reflected in the adoption by mortgage industry participants of the Mortgage Electronic Registrations Systems, Inc. (MERS), which is unlike the public records in not being transparent (a feature which has made it the subject of ongoing litigation, see Chapter VII). On the other hand, online land records raise issues about privacy, including the handling personal

information. See, e.g., *Ostergren v. Cuccinelli*, 615 F.3d 263, 267–68 (4th Cir. 2010) (imperfect redaction of social security numbers from recorded documents).

The legal status of electronic records is still being established but their principal advantage stems from their searchability. Consider again the concepts of constructive notice and chain of title in the light of electronic search of land records. The wild deed, the late (and early) recorded deed, the restriction on adjacent land, and misindexing are all easier for subsequent searchers to deal with in an electronic search, especially if search by tract is possible. Nonetheless, decisions will have to be made, most probably in passing statutes, to redraw the boundaries of the new broader notion of chain of title in some cases. Would a subsequent searcher be able to prove that, after a diligent search, she was still unable to find the earlier deed? For a thorough discussion of these issues, see Emily Bayer-Pacht, *The Computerization of Land Records: How Advances in Recording Systems Affect the Rationale Behind Some Existing Chain of Title Doctrines*, 32 *Cardozo L. Rev.* 337 (2010); see also Dale A. Whitman, *Are We There Yet? The Case for a Uniform Electronic Recording Act*, 24 *W. New Eng. L. Rev.* 245 (2002); Tanya D. Marsh, *Foreclosures and the Failure of the American Land Title Recording System*, 111 *Colum. L. Rev. Sidebar* 19 (2011).

How might this lowering of information costs affect the duty to search? Would you expect the availability of online records to lead to a tightening or loosening of the *numerus clausus* and related restrictions on property forms?

Ease of search improves the usability of a recording system: Electronic search makes the recording system better as a recording system and indirectly makes rights more secure. In general, those defects of the recording system stemming from practical limitations—the lack of a tract index, the difficulty of searching under multiple spellings, and the like—are amenable to a technological solution.

Still, electronic land records do nothing directly to cut off inconsistent rights, as a registration system does. Recall that the main difference between recordation and registration is that in the latter an official (the registrar of deeds) will not only receive the transactional documents but will examine them and purge invalid or nonconforming interests, with the result of a clean and indefeasible title. In a registration system there are two sets of records, the lodgment or presentation diary (the set of incoming and as yet unexamined documents with the time of filing for priority purposes) and the definitive titles themselves (the result of the examination and purge). The presentation diary is easiest to automate, along the lines discussed earlier. In a registration system there is the further question of how far to try to automate the process of creating definitive title. Generally, this part of the process is still handled by humans. New Zealand is attempting to automate all of its Torrens system. Automating registration is likely

to require even more standardization of legal interests in land, and, interestingly, New Zealand with its extreme automation of its Torrens registration system has made an effort to further standardize land transaction documents, see <http://www.landonline.govt.nz/edealing/elodgement/e-capable-instruments.asp>. (A recent article assessing the prospects of digitizing the Torrens Registration System used in Australia and New Zealand argues that this would make property less secure, by increasing the opportunities for fraud. Rod Thomas, *Australasian Torrens Automation, Its Integrity, and the Three Proof Requirements*, 2012 NZ Law Review 227 (2013).) If electronic registration causes delay, confusion, or increased incidents of fraud in the process of producing definitive title (the move from the presentation diary to clean title), a registration system can become in effect a recordation system (as it in effect is between presenting transaction documents and the issuance of clean title). For a discussion of the many issues raised by electronic registration, see Benito Arruñada, *Leaky Title Syndrome?*, New Zealand L.J. 115 (April 2010). How does the prospect of online land records affect the choice between registration and recordation?

* * *

Given that most modern recording acts are modifications of the good faith purchaser rule, elements of that rule continue to play an important role in the implementation of the recording acts. One important and recurring requirement that is drawn from good faith purchaser doctrine is that the recording acts only protect persons who are good faith purchasers “for value.” Consider the following case.

Hood v. Webster

Court of Appeals of New York, 1936.
[2 N.E.2d 43](#).

■ LOUGHRAN, JUDGE. Florence F. Hood owned a parcel of farm land in the town of Phelps, Ontario county. This property had been devised to her by her husband, whose will said that, should she predecease him, he wanted his estate to go to his brother, the plaintiff here. In 1913 Mrs. Hood executed a deed of the farm to the plaintiff and delivered it to his attorney as an escrow to take effect on her death. The Appellate Division has confirmed a finding of the Equity Term that this delivery was subject to no other condition. A majority of this court has come to the conclusion that the contrary of the fact so found may not be declared as matter of law on this record.

Having all along occupied the property, Mrs. Hood in 1928 granted it to the defendants (her brother and a nephew) by a deed then recorded. She died in 1933. The prior deed held as an escrow was thereupon delivered over to the plaintiff who had it recorded. In this action to annul the subsequent deed to the defendants, it has been held that on the foregoing facts the plaintiff was entitled to prevail.

On this appeal by the defendants, the parties concede that the case made by the findings depends for its solution upon the force and effect of section 291 of the Real Property Law (Consol.Laws, c. 50). It is thereby provided that every conveyance of real property not recorded "is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded."

Did the single circumstance that the subsequent deed to the defendants was first on record establish, in the absence of evidence to the contrary, the matters thus essential to avoid the prior deed to the plaintiff?

We think this question of burden of proof as fixed by the recording act is not for us an open one. The defendants were bound to make out by a fair preponderance of evidence the affirmative assertion of their status as purchasers in good faith and for a valuable consideration.

Brown v. Volkening, 64 N.Y. 76 (1876), and *Constant v. University of Rochester*, 19 N.E. 631 (N.Y. (1899)), *Id.*, 31 N.E. 26, as read by us, are not authorities to the contrary. In those cases the court did say that the party who claimed under an unrecorded conveyance was required to prove that the subsequent record purchaser took with notice. But here, as elsewhere, it must be kept in mind that the phrase "burden of proof" may stand in one connection "for the never changing burden of establishing the proposition in issue," and in another "for the constantly changing burden of producing evidence." Thayer, *Preliminary Treatise on Evidence*, 353-389. In the *Brown* and *Constant* Cases the controlling factor was that substantial value had been paid for the subsequent conveyance. That fact was more than evidence of consideration. It was further the basis for the auxiliary inference that there was also good faith in the transaction, and what was said respecting the burden of proof had reference to the duty of adducing evidence to repel that inference. For the same reason, the burden of proof (in the same sense) is upon the holder of an unrecorded conveyance when a subsequent deed first recorded acknowledges receipt by the grantor of a consideration sufficient to satisfy the statute.

We have a different case here. Under their defense of purchase for value without notice the defendants offered no evidence of actual considerations given. The subsequent deed to them expressed their payment of "One Dollar and other good and valuable consideration." This recital was not enough to put them into the position of purchasers for a valuable consideration in the sense of the statute. *Ten Eyck v. Whitbeck*, 31 N.E. 994 (N.Y. 1892); *Lehrenkrauss v. Bonnell*, 92 N.E. 637 (N.Y. 1910).

The duty of maintaining the affirmative of the issue, and in a primary sense the burden of proof, was cast upon the defendants by the recording act. They failed to discharge that burden.

The judgment should be affirmed, with costs.

■ CRANE, CHIEF JUDGE (dissenting). I cannot agree with Brother LOUGHRAN'S view of the law nor with his conclusion on the evidence in this case. * * *

It is conceded that the holder of a prior unrecorded deed has the burden of proving the lack of good faith in the holder of a subsequent recorded deed. The burden is upon him to prove notice or such circumstances as would give notice to a reasonable man. I can see no reason for complicating this rule by shifting the burden of proof when it comes to valuable consideration. It is just as easy to prove lack of consideration in this day when parties may be witnesses and examined before trial as it is to prove notice or bad faith. We should not impair the force and efficacy of the recording statutes upon which it has become a habit and custom to rely in the transfer of real property. A deed or mortgage on record is good as against prior unrecorded deeds or incumbrances until notice or bad faith or a lack of consideration is proven. The burden of proof should rest with the person who asserts the invalidity. * * *

Naturally this burden of proof readily shifts and where fraud is shown or circumstances which cast suspicion upon the transactions the defendant—subsequent vendee—may be called upon to show or prove his good faith and the consideration. * * *

I go still further, however, and hold that the plaintiff is not entitled to recover on the evidence. Florence F. Hood was a widow of about fifty-five years of age, living alone on a small farm, which is the subject of this action. The plaintiff, William J. Hood, is her brother-in-law. She married his brother. The defendant Almon B. Farwell is her brother, and the defendant Howard A. Webster her nephew. Mrs. Hood was left by her husband with this farm and no money with the exception of a mortgage of \$1,200 upon property in Nebraska. She was desirous and anxious to get enough money to live on the farm and the plaintiff proposed to give it to her during her natural life in exchange for the farm. She was brought in January of 1913 to the office of the plaintiff's lawyer, at which time she executed a deed of the farm to the plaintiff and also an agreement, which was part and parcel of one transaction, wherein the plaintiff agreed to pay her \$200 a year as long as she lived. The deed was not given to the plaintiff; it was given to the lawyer to hold in escrow for no other purpose that can be imagined except to insure the plaintiff's paying the \$200 a year and keeping his agreement. The delivery of the deed in escrow and the promise of the plaintiff were all one and the same transaction, and the payment of the money by the plaintiff was clearly a condition precedent to be fulfilled before he was entitled to the deed. Florence Hood lived for twenty years thereafter and died on the 29th day of January, 1933. The plaintiff broke all his promises and agreements. He never paid her a dollar, so far as this record shows. He owed her at the time of her death \$4,000, not counting simple interest, and the courts

below, dealing in equity, have turned over to him the farm, without requiring the plaintiff to do equity and pay to the estate the money he owes.

The agreement drawn by the plaintiff's lawyer went so far as to require Florence Hood, during all the years that she lived, to work the farm and to pay out of its produce all the taxes and upkeep, and this she did. Florence Hood repudiated the plaintiff, no doubt because of his failure to pay her any money or to keep his agreement, and in 1928 executed and delivered a deed of the farm to Howard A. Webster, her nephew, who had come to live with her and help her on the farm. This deed has been recorded and is the one which the plaintiff seeks to set aside and which the courts below have set aside in the face of the plaintiff's default. In this I think the courts were clearly in error as there is no evidence to justify the conclusion that the farm was to be given or the deed to it turned over to the plaintiff without any consideration or regard whatever to his obligations, acts, or responsibilities. Even the \$1,200 mortgage on the Nebraska property was given to the plaintiff in 1913 on the understanding and agreement that he was to support and care for his sister-in-law by paying \$200 a year. This apparently he still keeps or has disposed of.

When we consider that this elderly widow had nothing but a farm which had to be worked, and was in fear and dread of financial distress, there is only one possible conclusion, in my judgment, to be drawn from the execution of these instruments. Florence Hood was to give the farm to William Hood at her death in consideration for his paying to her \$200 a year for her to live on; and that it was never her intention or any part of the transaction that he should have the farm for nothing or in default of his obligation. The courts below have given him the farm for nothing, so far as this record shows, instead of to the nephew who helped his aunt work the farm in order to meet taxes, upkeep, and a living.

The record is none too full, so that the conclusions which I have drawn are based entirely upon the evidence or lack of evidence which appeared on the trial. As a matter of law, therefore, on this evidence, the plaintiff failed to make out a case entitling him to equitable relief and the removal of the defendants' deed from the record.

The judgment should be reversed and the complaint dismissed, with costs in all courts. * * *

Judgment affirmed.

NOTES AND QUESTIONS

1. What kind of recording act does New York have? Who should have the burden of production on consideration and good faith? The burden of persuasion?

2. What should qualify as “consideration” in order to make someone a purchaser “for value”? Why doesn’t the nephew’s agreement to move onto the farm to help his widowed aunt count as “consideration”?

3. Is the majority expressing a preference for the *nemo dat* baseline? Does its decision undermine the policy of the recording act of allowing good faith purchasers to rely on the land records? As far as making the land records reliable here, who is the cheapest cost avoider? Does the fact that all of the parties here have some family connection influence the dissent? How about the majority?

THE LIMITS OF TITLE SEARCHES

Performing the prescribed title search and applying the recording act in effect in the jurisdiction do not necessarily resolve the question of who has title. A title search that turns up a clean title is not the end of the story. There are off-record matters that may still bind (or totally deprive) a subsequent bona fide purchaser. As we have seen, forgeries and frauds can lead to claims—especially if the fraud victim is wholly blameless—that a title search might not turn up. Similar problems can arise from the incapacity of a grantor, deficiencies in the formalities in the execution of an instrument, liens (such as those for taxes) that are not required to be recorded, and other matters. See Ralph L. Straw, Jr., *Off-Record Risks for Bona Fide Purchasers of Interests in Real Property*, 72 Dickinson L. Rev. 35 (1967). Sometimes officials at the records office accept documents (thereby making them recorded), but they fail to file or misfile them. Or multiple spellings of names can lead to confusion.

Sometimes the recording acts fail to apply on their own terms. As we saw, most of the time this means that the *nemo dat* principle applies. In a jurisdiction with a notice statute, if O sells to A and then to B, but B has notice, then A wins by *nemo dat*. Or in a race-notice jurisdiction, if O sells to A and then to B who has no notice, and A then records before B, B fails to benefit from the recording act and A is the *nemo dat* winner. But when we add equitable interests into the mix, things can get a little more complicated. A might have a beneficial interest in Blackacre under a trust, or A might have an equitable interest in property in B’s hands under a constructive trust theory (say, because B stole from A and invested the proceeds in Blackacre). Especially in the latter situation, A’s interest is not likely to be recorded. Generally where a recording act does not apply, *nemo dat* or a closely related principle *qui prior tempore potior est jure* (“prior in time is stronger in right”) will decide as between the competing interests (prior legal interest beats later legal interest; prior equitable interest beats later equitable interest; and prior legal interest beats later equitable interest). But where a prior equitable interest competes with a later legal interest, the legal interest only prevails if it was acquired for value and without notice. This interplay of two equitable principles (*prior tempore*, and good faith purchase for value) in this last scenario is indirectly the source of the notice element in the recording

acts themselves. See 14 Powell on Real Property § 82.02[3][c]; Ralph W. Aigler, *The Operation of the Recording Acts*, 22 Mich. L. Rev. 405 (1924).

As discussed earlier, the rise of electronic recording promises to ameliorate some of these problems. Despite the convenience of electronic records, problems such as forged deeds and other off-record defects remain. States differ as to whom to hold responsible in such situations. Title insurance helps manage some of these risks. Other risks, like adverse possession, are not covered by title insurance policies. When adverse possession occurs, a new chain of title is started in the adverse possessor. In the case of land, this can cause notice problems for those relying on land records, because adverse possession is not reflected in the land records, and no recording system cuts off adverse possession claims. This explains the need for surveying and physical inspection notwithstanding the cleanest of title chains as revealed by the recording system. Probably prospective owners are more able to detect such problems than are title companies, but before taking much comfort in this thought, consider the following case.

Mugaas v. Smith

Supreme Court of Washington, 1949.
[206 P.2d 332.](#)

■ HILL, JUSTICE. This is an action by Dora B. Mugaas, a widow, to quiet title to a strip of land 135 feet in length and with a maximum width of 3 1/2 feet which she claims by adverse possession, and to compel Delmar C. Smith and his wife to remove therefrom any and all buildings and encroachments. From a judgment quieting title to the strip in Mrs. Mugaas and directing the removal of any and all buildings and encroachments, the Smiths appeal.

The appellants contend that the respondent has failed to establish adverse possession of the tract in question. The character of the respondent's possession over the statutory period is one of fact, and the trial court's finding in that regard is to be given great weight and will not be overturned unless this court is convinced that the evidence preponderates against that finding. We are of the opinion that the evidence was sufficient to sustain the trial court's findings, and the conclusions based thereon, that the respondent had acquired title to the strip in question by adverse possession. The evidence would have warranted a finding that her adverse possession dated back to 1910.

The only serious questions raised by this appeal are attributable to the fact that the fence which between 1910 and 1928 clearly marked the boundary line for which respondent contends, disappeared by a process of disintegration in the years which followed, and, when appellants purchased the property in 1941 by a legal description and with a record title which included the disputed strip, there was no fence and nothing to mark the dividing line between the property of appellants and

respondent, or to indicate to the appellants that the respondent was claiming title to the strip in question.

We have on several occasions approved a statement which appears in *Towles v. Hamilton*, 143 N.W. 935, 936 (Neb. 1913), that:

* * * It is elementary that, where the title has become fully vested by disseisin so long continued as to bar an action, it cannot be divested by parol abandonment or relinquishment or by verbal declarations of the disseizor, nor by any other act short of what would be required in a case where his title was by deed.

The fact that the respondent had ceased to use the strip in question in such a way that her claim of adverse possession was apparent did not divest her of the title she had acquired.

Appellants' principal contention is that we have held, in a long line of cases, that a bona fide purchaser of real property may rely upon the record title. The cases cited by appellants construe our recording statute, Rem.Rev.Stat. §§ 10596-1, 10596-2, and involve contests between those relying upon the record title and those relying upon a prior unrecorded conveyance as conveyances are defined by Rem.Rev.Stat. § 10596-1. The holdings in the cases cited give effect to that provision of § 10596-2 which states that any unrecorded conveyance " * * * is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. * * * "

Appellants cite no cases, and we have found none, supporting their contention that, under a recording statute such as Rem.Rev.Stat. §§ 10596-1, 10596-2, a conveyance of the record title to a bona fide purchaser will extinguish a title acquired by adverse possession. The trial judge, in his admirable memorandum decision, quoted the following from the opinion in *Ridgeway v. Holliday*, 59 Mo. 444, 454 (1875):

* * * But it is contended by the defendant that he is a purchaser for value from VotEAU who appeared from the record to be the owner, and was in possession, without any notice of the prior adverse possession which passed the title to Ridgeway, or of any claim on his part to the premises; and that as against him, the defendant, Ridgeway, cannot assert his title; that to permit him to do so, would be giving to an adverse possession greater force and efficacy than is given to an unrecorded conveyance. These objections, it must be admitted, are very forcible. The registry act, however, cannot, in the nature of things, apply to a transfer of the legal title by adverse possession, and such title does not stand on the footing of one acquired and held by an unrecorded deed, and of such title, the purchaser may not expect to find any evidence in the records.

He quoted, also, the following from *Schall v. Williams Valley R. Co.*, 35 Pa. 191, 204 (1860):

An unrecorded paper title does not affect a purchaser without actual notice, and the learned judge pronounced a title by the statute of limitations, if unaccompanied by a continued possession, as no more than an unrecorded paper title. If this be sound doctrine, then the claimant under the statute, however he may have perfected his right, must keep his flag flying for ever, and the statute ceases to be a statute of *limitations*.

The first observation we have to make on his ruling is, that titles matured under the statute of limitations, are not within the recording acts. However expedient it might be to require some public record of such titles to be kept, and however inconvenient it may be to purchasers to ascertain what titles of that sort are outstanding, still we have not as yet any legislation on the subject, and it is not competent for judicial decision to force upon them consequences drawn from the recording acts. Those acts relate exclusively to written titles.

These cases seem to us to be directly in point, and to afford a complete answer to appellants' contention. However, appellants say that these and other cases are not applicable because legislation has been enacted, i.e., Rem.Rev.Stat. § 10577, to bring possessory titles within the recording act. That section reads as follows:

Whenever any person, married or single, having in his or her name the legal title of record to any real estate, shall sell or dispose of the same to an actual bona fide purchaser, a deed of such real estate from the person holding such legal record title to such actual bona fide purchaser shall be sufficient to convey to and vest in such purchaser the full legal and equitable title to such real estate free and clear of any and all claims of any and all persons whatsoever not appearing of record in the auditor's office of the county in which such real estate is situated.

The appellants contend that, under this section of the statute, the full legal and equitable title is vested in them as bona fide purchasers from the record title holder, and that the title acquired by adverse possession is thereby extinguished. We again quote a sentence from the Pennsylvania decision:

* * * If this be sound doctrine, then the claimant under the statute, however he may have perfected his right, must keep his flag flying for ever, and the statute ceases to be a statute of *limitations*.

If Rem.Rev.Stat. § 10577 has the effect claimed for it by the appellants, the only way in which a person who has acquired title by adverse possession could retain it against the purchaser of the record title is to make his possession and use of the property so continuous, so

open, and so notorious as to prevent anyone from becoming a bona fide purchaser.

Immediately following this section in Rem.Rev.Stat., this statement appears in italics: “This section relates to community property only.” It was § 1 of chapter 151 of the Laws of 1891, and the title of the act was “An Act to protect innocent purchasers of community real property.” The other three sections of that act appear in Rem.Rev.Stat. as §§ 10578, 10579, and 10580; and the act in its entirety, in accordance with its title, is for the protection of innocent purchasers against undisclosed community interests. It is too clear for argument that the act never was intended to have, and could not have, constitutionally, in view of its restricted title, any such application as that for which appellants contend. * * *

Appellants have placed too great a weight on too frail a reed. * * *

The judgment is affirmed.

NOTES AND QUESTIONS

1. We encountered adverse possession in Chapter II as a mode of acquisition of property. Adverse possession can be seen as an exception to the *nemo dat* principle, in that it allows shifts in title other than by a chain of voluntary transfers. Nevertheless, recall that an adverse possessor only holds adversely against the present possessor. Thus, for example, if the present possessor holds only a life estate, the adverse possessor acquires only a life estate at the end of the statutory period. This mimics *nemo dat* in that the forced transfer from the present title owner does not transfer rights greater than the owner had.

2. The court seems to think that if adverse possession claims are subject to the recording act, then the adverse possessor (AP) would have to maintain adverse possession forever, which would run counter to its being based on a statute of limitations and its function to wipe away stale claims. How true is this? Couldn't the AP file a quiet title action and record the judgment, thus starting a new record chain of title? Wouldn't it be desirable for the AP to do so? Does this case give the AP much incentive to give notice? The U.S. Supreme Court has upheld statutes requiring owners of dormant mineral rights periodically to re-record their interest, on pain of having the interest lapse. See *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). Would such a lapse statute be desirable for claims based on adverse possession?

3. If adverse possession claims were trumped by interests memorialized in recording acts, wouldn't this greatly simplify the process of ascertaining whether the transferor of any particular piece of property has good title? Or would it in fact make the process of ascertaining title even more complicated, if an adverse possessor is currently on the property and there have also been multiple transfers and recordings of title in the recent past?

4. Many states have adopted legislation that reflects something of a compromise between reliance on recording acts and allowing claims of title

outside the record based on adverse possession. So-called *marketable title acts* set a period, often 30 or 40 years, beyond which claims are deemed extinguished and searchers need not inquire further in the official records. See, e.g., Fla. Stat. Ann. §§ 712.01–.10; Mich. Comp. L. § 565.101; N.C. Gen. Stat. § 47B–2; Utah Code Ann. §§ 57–9–1 to 57–9–10. The National Conference of Commissioners on Uniform State Laws proposed a Uniform Marketable Title Act in 1977 as one section of the Uniform Simplification of Land Transfers Act, which was then made into a stand-alone model act in 1990. This act was based on an influential Michigan act, which was modeled on legislation adopted in 1950 in Ontario, Canada. See Walter E. Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 Cornell L. Rev. 45, 47, 52–60 (1967). Such a statute makes most interests unenforceable after the specified time period unless something is put in the record within that time window. The idea is to allow people to stop title searches at a given point and not have to go all the way back to the sovereign. There are exceptions (allowing continued enforcement) for interests in the nature of easements that give notice by their physical existence and for other easements that were excepted or reserved by a recorded instrument and evidenced by something physical.

5. Do marketable title acts represent a kind of adverse possession of claims based on adverse possession? Or do they have this function only for adverse possession claims that are no longer possessory? Suppose the statute of limitations for adverse possession is 20 years and the marketable title act prescribes a period of 40 years for title examinations. B enters A's land in 1960 and remains on the land openly, notoriously, continuously, exclusively, and adversely under a claim of right for the next 45 years. B has made no attempt to record the right to the land based on adverse possession. In 2005, A transfers to C. Can C rely on the marketable title act to extinguish B's claim of title by adverse possession? See William B. Stoebuck & Dale A. Whitman, *The Law of Property* 901 (3d ed. 2000) (noting that "a person who is occupying the land may, under some of the acts, have possession treated as the equivalent of notice of his or her claim").