Open Source Property

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This build edited by Charles Duan

December 11, 2024

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About This Book

Open Source Property is a free casebook for the first-year Property Law course at American law schools, and anyone else with an interest in the subject. The contents of the book are available at *link*.

Copyright

This build of the book was prepared and typeset by Charles Duan, with various additions and revisions to the content of the original modules.

Typeface and Editing Conventions

To help make different parts of the book easier to identify, two fonts are used throughout. Text in this serif font is used for cases, law review articles, and other readings drawn from other sources and included in this book. In these readings, not all alterations will necessarily be noted. In particular, citations will often be removed for ease of reading. To quote the policy of one of the casebook's authors:

> My editorial technique is borrowed from Sweeney Todd: extensive and shocking cuts. These are pedagogical materials, not a legal brief. I have not put words in anyone else's mouth, but I have been unconcerned with the usual editorial apparatus of ellipses and brackets. I drop words from sentences, sentences from paragraphs, paragraphs from opinions – all with no indication that anything is gone. I also reorder paragraphs and sometimes sentences as needed to improve the readability of a passage. My goal is to make it easy for the reader. If it matters to you what the original said, consult the original.

James Grimmelmann, Patterns of Information Law 32 (version 1.1 2017), *link*. Note the font used in this quote, since it is drawn from an external source.

Text in this sans serif font is "editorial content," namely introductory or narrative material written by the authors and editors of the book. In some cases, this material is intended to elucidate the readings and provoke thoughts and questions. In other cases, the text summarizes key doctrinal or legal concepts, in order to be more efficient (i.e., so you have to read less).

The font convention is followed as rigorously as possible. In particular, some of the readings will include footnotes from the original text, as well as footnotes added by the editors. These footnotes can be distinguished by the font being used (as well as the notation "—Eds." at the end of the footnote).

Part I

Possession

Chapter 1

Possession of Personal Property

Property ownership is distinct from physical **possession**. Someone other than the owner of land may be standing on it, occupying space and preventing the owner from using the land; someone other than the owner of personal property may be holding it, preventing the owner from accessing and using it. This other person may possess the property with permission from the owner, against the owner's will, or without the owner's knowledge.

Physical possession may seem irrelevant for property law—after all, isn't the whole point of the rule of law that legal rights, not physical might, are determinative? And yet possession alone can, in some situations, give rise to legal rights over things, rights that can properly be deemed "property rights." With respect to land, as we will learn, physical possession in the right conditions can turn into actual ownership by the doctrine of adverse possession.[1] And the story for personal property is even more interesting, because of the number of ways in which movable items can come into someone else's possession. They can be lost, found, borrowed, stored, stolen, mixed up with other things, and more.

This chapter will consider three ways in which possession can give rise to property rights in personalty: finding lost items, improvements, and bailment arrangements such as lending. In each of these situations, identify the circumstances that give the physical possessor rights, what rights the possessor has, and against whom those rights apply. What legal relationship does the possessor have with respect to the true owner, and what rights does the possessor have against third parties?

[1] Adverse possession of personal property is also possible, though somewhat more complicated. *See O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980).

1.1 Finders

Finders keepers, losers weepers?

Armory v. Delamirie

(1722) 1 Strange 505, 93 Eng. Rep. 664 (K.B.)

The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

Notes and Questions

1.1. One way of describing the holding of *Armory* is that it sets out the rights of finders. Suppose that the "rightful owner" of the jewel, Lord Hobnob, had shown up in the shop while the chimney-sweep and the apprentice were arguing over the jewel. Who would have been entitled to the jewel? If the chimney-sweep is not the "rightful owner," why does he still win the case? What kind of interest does he have in the jewel?

1.2. A second way of describing of describing the holding of *Armory* is that it illustrates "relativity of title." As between the plaintiff and the defendant, the party

with the relatively better claim to title wins, even if their title is in some sense defective in an absolute sense. Relativity of title is intimately connected to the idea of "chains of title": competing claimants to a piece of property each do their best to trace their claims back to a rightful source. What is the source of the chimney-sweep's claim to the jewel? And the jeweler's? Does this explain the outcome of the case? What result if the jeweler had proven that he had signed a contract to purchase the jewel from Lord Hobnob but that Lord Hobnob had lost the jewel before delivering it?

1.3. A third way of describing the holding of *Armory* is that it rejects the jeweler's attempt to assert a *jus tertii* (Latin for "right of a third party") defense. The defendant cannot defeat the plaintiff's otherwise-valid claim to the jewel by arguing that a third party – Lord Hobnob – has an even better claim. Put differently, we might say that "as against a wrongdoer, possession is title." *Jeffries v. Great W. Ry. Co.*, (1856) 119 Eng. Rep. 680, 681 (Q.B.). Does this narrowing of focus to the parties before the court make sense?

Here is one way to think about it. Suppose that Lord Hobnob shows up in court while *Armory* is being argued and explains that the jewel slipped from his finger while he was strolling in Lincoln's Inn Fields. Who is entitled to the jewel? What if Lord Hobnob shows up and explains that he tossed the jewel aside in the mud, saying "I have become tired of this bauble; it bores me and I no longer wish to have it." What if he explains that he handed it to the chimney-sweep, saying "I wish you to have this jewel; may it serve you better than it has me." But recall that in the actual case, Lord Hobnob was nowhere to be found; no one even knew his identity. Does it matter to the outcome of *Armory v. Delamirie* how the jewel passed from Lord Hobnob's hands to the chimney-sweep's?

If you are still not convinced, consider this. If the jeweler could set up Lord Hobnob's title to show that the chimney-sweep's title was defective, would the chimney-sweep be entitled to present evidence that Lord Hobnob's title was defective, say because Lord Hobnob stole the jewel from a visiting Frenchman in 1693? Cutting off inquiry into third parties' claims also helps cut off inquiry into old claims. Can you see why this might be an appealing choice for a system of property law?

1.4. We are not quite done with Lord Hobnob. Consider the remedy the plaintiff obtains: an award of the value of the jewel, rather than the jewel itself. This is in effect a forced sale of the jewel, which the defendant can keep after paying the plaintiff's damage award. *Now* who owns the jewel? What if Lord Hobnob shows up now? Can he also bring trover, and if so, will the jeweler be forced to pay out a second time? In fact, why is Paul de Lamerie, the goldsmith whose name the court

mangles, on the hook for his apprentice's wrongdoing? What if the apprentice pocketed the jewel and never turned it over to the master?

1.5. About that damage award. Why is the jury instructed to presume that the jewel was "of the finest water?" (i.e. highest quality)?

Other Variations on *Armory*

Just how far does the holding of *Armory v. Delamirie* ("That the finder of [property], though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner") go? Consider three nineteenth-century cases about lost lumber. Are they required by *Armory*? Consistent with *Armory*? Consistent with each other? Which is most persuasive?

In *Clark v. Maloney*, 3 Del. 68 (1840), the plaintiff found ten logs floating in a bay after a storm. He tied them up in the mouth of a creek, but they (apparently) got free again and the defendants (apparently) found them floating up the creek. *Held*, the plaintiffs were entitled to the logs:

> Possession is certainly prima facie evidence of property. It is called *prima facie* evidence because it may be rebutted by evidence of better title, but in the absence of better title it is as effective a support of title as the most conclusive evidence could be. It is for this reason, that *the finder of a chattel, though he does not acquire an absolute property in it, yet has such a property, as will enable him to keep it against all but the rightful owner.* The defence consists, not in showing that the defendants are the rightful owners, or claim under the rightful owner; but that the logs were found by them adrift in Mispillion creek, having been loosened from their fastening either by accident or design, and they insist that their title is as good as that of the plaintiff. But it is a well settled rule of law that the loss of a chattel does not change the right of property; and for the same reason that the original loss of these logs by the rightful owner, did not change his absolute property in them, but he might have maintained trover against the plaintiff upon refusal to deliver them, so the subsequent loss did not divest the *special* property of the plaintiff. It follows, therefore, that as the plaintiff has shown a special property in

> these logs, which he never abandoned, and which enabled him to keep them against all the world but the rightful owner, he is entitled to a verdict.

In *Anderson v. Gouldberg*, 53 N.W. 636 (Minn. 1892), the defendants took ninety-three logs from the plaintiff's mill. The defendants claimed that the plaintiff had cut the logs on their land, but the plaintiff replied (and a jury agreed) that he had actually cut the logs by trespassing on the land of a third party. *Held*: the plaintiff was entitled to the logs:

> Therefore the only question is whether bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger, who takes it from him. We had supposed that this was settled in the affirmative as long ago, at least, as the early case of *Armory v. Delamirie*, so often cited on that point. When it is said that to maintain replevin the plaintiff's possession must have been lawful, it means merely that it must have been lawful as against the person who deprived him of it; and possession is good title against all the world except those having a better title. Counsel says that possession only raises a presumption of title, which, however, may be rebutted. Rightly understood, this is correct; but counsel misapplies it. One who takes property from the possession of another can only rebut this presumption by showing a superior title in himself, or in some way connecting himself with one who has. One who has acquired the possession of property, whether by finding, bailment, or by mere tort, has a right to retain that possession as against a mere wrongdoer who is a stranger to the property. Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner.

Anderson states what is overwhelmingly the majority rule. Seven years after *Anderson*, North Carolina took the opposite course. In *Russell v. Hill*, 34 S.E. 640 (N.C. 1899), two different people held what appeared to be state grants to the same tract of land, and the plaintiff cut timber on the land with the wrong one's permission. While the logs were floating in a river, the defendants—unconnected with either of

the purported landowners—took them away and sold them. *Held*: the defendants were entitled to the logs (internal quotation marks omitted):

> In some of the English books, and in some of the Reports of our sister states, cases might be found to the contrary, but that those cases were all founded upon a misapprehension of the principle laid down in the case of *Armory v. Delamirie*. There a chimney sweep found a lost jewel. He took it into his possession, as he had a right to do, and was the owner, because of having it in possession, unless the true owner should become known. That owner was not known, and it was properly decided that trover would lie in favor of the finder against the defendant, to whom he had handed it for inspection, and who refused to restore it. But the court said the case would have been very different if the owner had been known.

Is this an accurate reading of *Armory*? The court also expressed concern about the defendant's potential liability to the true owner:

> It is true that, as possession is the strongest evidence of the ownership, property may be presumed from possession. . . . But if it appears on the trial that the plaintiff, although in possession, is not in fact the owner, the presumption of title inferred from the possession is rebutted, and it would be manifestly wrong to allow the plaintiff to recover the value of the property; for the real owner may forthwith bring trover against the defendant, and force him to pay the value the second time, and the fact that he paid it in a former suit would be no defense. Consequently trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant.

Is the fear of double liability sufficient reason to allow the defendant to escape liability entirely? Based on a review of the court records in the case, John V. Orth writes that the true owner in *Russell v. Hill* was "no bodiless abstraction but had in fact a name and identity: [Fabius Haywood] Busbee, one of the state's leading lawyers, a man well known to every member of the supreme court that decided the case." John V. Orth, Russell v. Hill *(N.C. 1899): Misunderstood Lessons*, 73 N.C. L. REV. 2031, 2034 (1995). Does this help explain *Russell*?

Professor Orth, arguing for a middle ground between *Anderson* and *Russell*, argues that *Armory* should protect only prior possessors who took the property in good faith: "A technical wrongdoing, such as an innocent trespass, as the source of possession should not disable the possessor from securing judicial protection against an unauthorized taking, but a willful trespass at the root of title should. Plaintiff in *Russell*, in other words, deserved a new trial at which to show, not his title, but his *bona fides*." *Id.* at 2060. Is this a better rule?

McAvoy v. Medina

93 Mass. (11 Allen) 548 (1866)

Tort to recover a sum of money found by the plaintiff in the shop of the defendant.

[I]t appeared that the defendant was a barber, and the plaintiff, being a customer in the defendant's shop, saw and took up a pocket-book which was lying upon a table there, and said, "See what I have found." The defendant came to the table and asked where he found it. The plaintiff laid it back in the same place and said, "I found it right there." The defendant then took it and counted the money, and the plaintiff told him to keep it, and if the owner should come to give it to him; and otherwise to advertise it; which the defendant promised to do. Subsequently the plaintiff made three demands for the money, and the defendant never claimed to hold the same till the last demand. It was agreed that the pocket-book was placed upon the table by a transient customer of the defendant and accidentally left there, and was first seen and taken up by the plaintiff, and that the owner had not been found. . . .

Dewey, J.

It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the

shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe keeping of the same until the owner should call for it. In the case of *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. R. 424, the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of *Lawrence v. The State*, 1 Humph. (Tenn.) 228, and is indeed very similar in its facts. The court there take a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that "to place a pocket-book upon a table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property."

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner.

In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant's subsequent acts in receiving and holding the property in the manner he did does not create any.

Notes and Questions

1.6. In *Lawrence v. State*, on which *McAvoy* relies, the customer did come back for his lost pocketbook containing $480 in bank notes, which he had left on a table while the barber went out to make change. To quote the court: "The barber left the shop to get the bill changed, and, a fight occurring in the streets, the [customer's] attention was arrested thereat and he left the shop, his pocket-book lying on the table." When he returned, the barber "denied all knowledge of the pocket-book" but then "expended [the bank notes] in the purchase of confections, etc." A criminal prosecution for grand larceny followed, and the barber argued that the pocketbook had been lost because larceny only applies when the defendant takes property from the possession of the victim. The court held that because the pocketbook on a table was merely *mislaid*, rather than "lost," it was still within the customer's "constructive possession." First of all, is this plausible? And second, is this a good fit for the facts of *McAvoy*?

1.7. By way of contrast, in *Bridges v. Hawkesworth*, which *McAvoy* distinguishes, the plaintiff found a small parcel on the floor of the defendant's shop and immediately showed it to the defendant's employee. The parcel contained bank notes; the

plaintiff "requested the defendant to deliver them to the owner." Three years later, with no owner having returned, the court held the plaintiff as finder was entitled to the notes. "If the notes had been accidentally kicked into the street, and then found by someone passing by, could it be contended that the defendant was entitled to them, from the mere fact of their having been dropped in his shop? . . . Certainly not. The notes were never in the custody of the defendant, nor within the protection of his house before they were found, as they would have had they been intentionally deposited there, and the defendant has come under no responsibility." First, what do you make of the *Bridges* court's argument that the shopkeeper's entitlement to the notes should turn on whether he would have been held responsible to the true owner for losing them? And second, is this any better a fit for the facts of *McAvoy*?

1.8. What do you make of the argument that awarding the pocket-book to the shopkeeper is "one better adapted to secure the rights of the true owner?"

1.9. In addition to lost and mislaid property, there is also abandoned property: property which the owner has voluntarily relinquished with no intent to reclaim. Since abandoned property is again unowned, the usual rules of first possession apply. (These rules themselves are not as simple as "first possessor wins."). How easy is it to tell the three apart? Why?

1.10. In *Benjamin v. Lindner Aviation*, 534 N.W.2d 400 (Iowa 1995) in which an airplane inspector found $18,000 in cash inside the wing of an airplane in 1992 while the plane was parked in his employer's hangar for maintenance. The money, which consisted primarily of $20 bills dating to the 1950s and 1960s, was in two four-inch packets wrapped in handkerchiefs and tied with string and then wrapped again in aluminum foil. The packets were inserted behind a panel on the underside of the plane's wing; the panel was secured with rusty screws that had not been removed in several years. The inspector, the employer, and the bank that owned the plane (after repossessing it from a prior owner who had defaulted on a loan) all made claims to the money. Was it lost, mislaid, or abandoned, and who was entitled to it?

1.11. Another category sometimes mentioned in the found-property caselaw is treasure trove: money, gold, or silver intentionally placed underground, which is found long enough later that it is likely the owner is dead or will never return for it. At common law in England, treasure trove belonged to the King. Most American states now treat treasure trove like any other found property. Is this a sensible rejection of an archaic and pointless quirk of the common-law, or was there something to the doctrine?

1.12. In *Hannah v. Peel*, [1945] K.B. 509, the British government requisitioned Gwernhaylod House in 1940 for use during World War II and paid the owner, Major

Hugh Edward Ethelston Peel £250 per year. The house had been conveyed to Major Peel in 1938 but it was unoccupied from then until when it was requisitioned. Duncan Hannah, a lance-corporal with the Royal Artillery, was stationed in the house and was adjusting a blackout curtain in August 1940 when he found something loose in a crevice on top of the window-frame. It turned out to be a brooch covered in cobwebs and dirt; he informed his commanding officer and then turned it over to the police. Two years later, the police gave it to Major Peel, who sold it for £66. Lance-Corporal Hannah sued and was awarded the value of the brooch. The court discussed numerous cases, including *Bridges v. Hawkesworth* and *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44, which awarded two rings found by a workman embedded in the mud at the bottom of a pool to the company that owned the land. From them, it extracted a rule that "a man possesses everything which is attached to or under his land." Since Major Peel "was never physically in possession of these premises" and hence had no "prior possession" of the brooch, Lance-Corporal Hannah was entitled to it as a finder. Is this possession-based approach a better way of analyzing found-property cases than the categorical lost-vs-mislaid American approach exemplified by *McAvoy*? Or is *Hannah* an oddball outlier driven by the court's desire to do right by a wartime serviceman "whose conduct was commendable and meritorious," especially as against an absentee landlord from the local gentry?

1.2 Improvers

A chimney-sweep finds a jewel. He gives it to his friend, a jeweler, who designs and crafts a gold ring around the jewel's unique shape. One day, Jeremiah Hobnob recognizes the jewel he lost last month and demands it back. As against the chimney-sweep, this is an easy case; nowhere near enough time has passed to satisfy the statute of limitations, even in a jurisdiction that imposes a stringent duty of diligent search on owners. But the question is more difficult with respect to the jeweler, who has invested gold and labor to turn the jewel into a ring. If Hobnob is entitled to the now-improved jewel, the jeweler will end up poorer, while Hobnob will receive a windfall.

The common law mitigated the harshness of this result with the rule of *accession*, which provides that someone who sufficiently improves another person's property is allowed to keep it. Importantly, the hornbook rule is that accession only operates in favor of *good-faith* improvers; someone who knows the property is not hers acts at her own peril when she combines it with her own property or labor. The

jeweler is potentially protected by accession. Also, observe that while ownership of the property may be the primary question in these cases, it is often not the only issue. Once ownership is allocated, courts often require restitutionary payments to shift losses from more innocent to more culpable parties.

Wetherbee v. Green

22 Mich. 311 (1871)

This was an action of replevin, brought by George Green, Charles H. Camp and George Brooks, in the circuit court for the county of Bay, against George Wetherbee, for one hundred and fifty-eight thousand black ash barrel-hoops, alleged to be of the value of eight hundred dollars. . . .

Cooley, J.:

The defendants in error replevied of Wetherbee a quantity of hoops, which he had made from timber cut upon their land. Wetherbee defended the replevin suit on two grounds. First, he claimed to have cut the timber under a license from one Sumner, who was formerly tenant in common of the land with Green, and had been authorized by Green to give such license. [This defense failed; Sumner was not authorized to let Wetherbee cut timber on the land.]

But if the court should be against him on this branch of the case, Wetherbee claimed further that replevin could not be maintained for the hoops, because he had cut the timber in good faith, relying upon a permission which he supposed proceeded from the parties having lawful right to give it, and had, by the expenditure of his labor and money, converted the trees into chattels immensely more valuable than they were as they stood in the forest, and thereby he had made such chattels his own. And he offered to show that the standing timber was worth twenty-five dollars only, while the hoops replevied were shown by the evidence to be worth near seven hundred dollars; also [facts tending to show Wetherbee's lack of knowledge of Sumner's duplicity]. The evidence offered to establish these facts was rejected by the court, and the plaintiffs obtained judgment.

The principal question which, from this statement, appears to be presented by the record, may be stated thus: Has a party who has taken the property of another in good faith, and in reliance upon a supposed right, without intention to commit wrong, and by the expenditure of his money or labor, worked upon it so great a transformation as that which this timber

underwent in being transformed from standing trees into hoops, acquired such a property therein that it cannot be followed into his hands and reclaimed by the owner of the trees in its improved condition?

The objections to allowing the owner of the trees to reclaim the property under such circumstances are, that it visits the involuntary wrongdoer too severely for his unintentional trespass, and at the same time compensates the owner beyond all reason for the injury he has sustained. In the redress of private injuries the law aims not so much to punish the wrongdoer as to compensate the sufferer for his injuries; and the cases in which it goes farther and inflicts punitory or vindictive penalties are those in which the wrong-doer has committed the wrong recklessly, willfully, or maliciously, and under circumstances presenting elements of aggravation. Where vicious motive or reckless disregard of right are not involved, to inflict upon a person who has taken the property of another, a penalty equal to twenty or thirty times its value, and to compensate the owner in a proportion equally enormous, is so opposed to all legal idea of justice and right and to the rules which regulate the recovery of damages generally, that if permitted by the law at all, it must stand out as an anomaly and must rest upon peculiar reasons.

As a general rule, one whose property has been appropriated by another without authority has a right to follow it and recover the possession from any one who may have received it; and if, in the mean time, it has been increased in value by the addition of labor or money, the owner may, nevertheless, reclaim it, provided there has been no destruction of substantial identity. So far the authorities are agreed. A man cannot generally be deprived of his property except by his own voluntary act or by operation of law; and if unauthorized parties have bestowed expense or labor upon it, that fact cannot constitute a bar to his reclaiming it, so long as identification is not impracticable. But there must, nevertheless, in reason be some limit to the right to follow and reclaim materials which have undergone a process of manufacture. Mr. Justice Blackstone lays down the rule very broadly, that if a thing is changed into a different species, as by making wine out of another's grapes, oil from his olives, or bread from his wheat, the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted: 2 Bl. Com., 404. We do not understand this to be disputed as a general proposition, though there are some authorities which hold that, in the case of a willful

appropriation, no extent of conversion can give to the willful trespasser a title to the property so long as the original materials can be traced in the improved article. The distinction thus made between the case of an appropriation in good faith and one based on intentional wrong, appears to have come from the civil law, which would not suffer a party to acquire a title by accession, founded on his own act, unless he had taken the materials in ignorance of the true owner, and given them a form which precluded their being restored to their original condition: 2 Kent, 363. While many cases have followed the rule as broadly stated by Blackstone, others have adopted the severe rule of the civil law where the conversion was in willful disregard of right. The New York cases of *Betts v. Lee*, 5 Johns., 348; *Curtis v. Groat*, 6 Johns., 168, and *Chandler v. Edson*, 9 Johns., 362, were all cases where the willful trespasser was held to have acquired no property by a very radical conversion, and in *Silsbury v. McCoon*, 3 N. Y., 378, 385, the whole subject is very fully examined . . . . [In *Silsbury*, a thief who turned the plaintiff's corn into whiskey did not thereby acquire ownership of it.] But we are not called upon in this case to express any opinion regarding the rule applicable in the case of a willful trespasser, since the authorities agree in holding that, when the wrong had been involuntary, the owner of the original materials is precluded, by the civil law and common law alike, from following and reclaiming the property after it has undergone a transformation which converts it into an article substantially different.

The cases of confusion of goods are closely analogous. It has always been held that he who, without fraud, intentional wrong, or reckless disregard of the rights of others, mingled his goods with those of another person, in such manner that they could not be distinguished, should, nevertheless, be protected in his ownership so far as the circumstances would permit. The question of motive here becomes of the highest importance; for, as Chancellor Kent says, if the commingling of property "was willfully made without mutual consent, * * the common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed: Popham's Rep. 38, Pl. 2. If A will willfully intermix his corn or hay with that of B, or casts his gold into another's crucible, so that it becomes impossible to distinguish what belonged to A from what belonged to B, the whole belongs to B. But this rule only applies to wrongful or fraudulent intermixtures. There may be an intentional intermingling, and yet no wrong intended, as where a man mixes two parcels

together, supposing both to be his own; or, that he was about to mingle his with his neighbor's, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust that he should lose his own or be obliged to take and pay for his neighbor's, as he would have been under the civil law: In many cases there will be difficulty in determining precisely how he can be protected with due regard to the rights of the other party; but it is clear that the law will not forfeit his property in consequence of the accident or inadvertence, unless a just measure of redress to the other party renders it inevitable.

The important question on this branch of the case appears to us to be, whether standing trees, when cut and manufactured into hoops, are to be regarded as so far changed in character that their identity can be said to be destroyed within the meaning of the authorities. And as we enter upon a discussion of this question, it is evident at once that it is difficult, if not impossible, to discover any invariable and satisfactory test which can be applied to all the cases which arise in such infinite variety. "If grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held in the old English law that the property is so altered as to change the title:" 2 Kent, 363. But cloth made into garments, leather into shoes, trees hewn or sawed into timber, and iron made into bars, it is said may be reclaimed by the owner in their new and original shape: Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its identity could be made out by the senses. But this is obviously a very unsatisfactory test, and in many cases would wholly defeat the purpose which the law has in view in recognizing a change of title in any of these cases. That purpose is not to establish any arbitrary distinctions, based upon mere physical reasons, but to adjust the redress afforded to the one party and the penalty inflicted upon the other, as near as circumstances will permit, to the rules of substantial justice[.]

It may often happen that no difficulty will be experienced in determining the identity of a piece of timber which has been taken and built into a house; but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might, perhaps, be traced without trouble into a church organ, or other equally valuable article; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate

a musical instrument, a hundred or a thousand times the value of his original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt, is permitted to retain it, and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved article is the point in issue, the question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the man whose timber was used in making it—not because the timber cannot be identified, but because, in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials. The labor, in the case of the musical instrument, is just as much the principal thing as the house is in the other case instanced; the timber appropriated is in each case comparatively unimportant.

No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred-fold, is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it, nor adds materially to the value. There may be complete changes with so little improvement in value, that there could be no hardship in giving the owner of the original materials the improved article; but in the present case, where the defendant's labor—if he shall succeed in sustaining his offer of testimony—will appear to have given the timber in its present condition nearly all its value, all the grounds of equity exist which influence the courts in recognizing a change of title under any circumstances.

We are of opinion that the court erred in rejecting the testimony offered. The defendant, we think, had a right to show that he had manufactured the hoops in good faith, and in the belief that he had the proper authority to do so; and if he should succeed in making that showing, he was entitled to have the jury instructed that the title to the timber was changed

by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass. . . .

Notes and Questions

1.13. What factors matter most to the court's holding? Is this a case about the relative value contributed by the plaintiff and defendant, about the difficulty of identifying the plaintiff's original property, about the difficulty of separating it, or about the degree to which it has been physically altered? Consider *Atlas Assurance Co. v. Gibbs*, 183 A. 690 (Conn. 1936)**,** which involved the engine from a damaged car (the Hibben car) that had been properly sold and the body of a car (the Sherline car) that had been stolen. The defendant's predecessor in title combined the two to make one working car. In an action for replevin by the assignee of title to the Sherline car, who should get what?

1.14. How important is Wetherbee's good faith? What if he had been told by Green that Sumner lacked authority, but had examined Sumner's title in some detail and concluded that Green was wrong? What if Wetherbee steals a set of paints and uses it to create a portrait that sells for $500,000?

1.15. Note that Green retains "an action to recover damages for the unintentional trespass." What is the measure of those damages? Given that Wetherbee owns the hoops via accession, why does he need to pay? Or, to look at it another way, why *doesn't* an adverse possessor need to pay for the value of the property he retains after the statute of limitations has run?

1.16. Sometimes property transforms itself. A cow from Farmer Jones's herd wanders onto Farmer Smith's land, where it is impregnated by Farmer Smith's bull. Who owns the calf? Does it matter where the cow gives birth? Felix Cohen, in *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954), claimed that every legal system in human history appears to have resolved these cases in the same way. Compare the case in which Farmer Smith's bull kicks Farmer Jones's cow and badly injures it. What result then?

1.17. Another theme in confusion cases involves the distinction between unique and fungible property. If I mistakenly pour your 55-gallon drum of water into my storage tank, you are entitled to draw 55 gallons of water from the tank, even though it is astoundingly improbable that you will get back the same water molecules you started with. Water is water. If I mistakenly mix your your bottle of 1967 Chateau de Snoot wine with my bottle of 2015 Rotgut Red, I can't give you a bottle of the resulting mixture and call it even. (What *are* you entitled to?)

But note that uniqueness is something courts create as well as discover. At the start of the 19th century, wheat and other grains were stored and sold as though they were unique goods; each farmer's and merchant's sacks of grain were treated as distinct from each other's. Today, grain has been standardized and is sold as a commodity: a merchant could order 100 bushels of U.S. No. 1 Hard Red Spring Wheat without needing to specify or worry about what particular farms it came from. A key to this shift was courts' willingness to treat grain (and many other agricultural commodities) as fungible. A merchant whose sacks of wheat were dumped into a grain elevator without his consent would be entitled to the same quantity of wheat of the same standard class, not to his specific sacks or even to wheat with the same more specific characteristics. What was gained and what was lost in this shift?

1.3 Bailments

A **bailment** is an arrangement where the owner of personal property entrusts the property to another. The owner is called the **bailor**, while the recipient is called the **bailee**. Common bailees include delivery services, dry cleaners, and friends who borrow others' casebooks. These arrangements split full ownership from physical possession, and raise several issues regarding the parties' respective rights. What are the duties between the bailor and bailee? And what rights and duties do each of them have with respect to third parties?

Allen v. Hyatt Regency-Nashville Hotel

668 S.W.2d 286 (Tenn. 1984)

Harbison, Justice.

In this case the Court is asked to consider the nature and extent of the liability of the operator of a commercial parking garage for theft of a vehicle during the absence of the owner. Both courts below, on the basis of prior decisions from this state, held that a bailment was created when the owner parked and locked his vehicle in a modern, indoor, multi-story garage operated by appellant in conjunction with a large hotel in downtown Nashville. We affirm.

There is almost no dispute as to the relevant facts. Appellant is the owner and operator of a modern high-rise hotel in Nashville fronting on the south side of Union Street. Immediately to the rear, or south, of the main

hotel building there is a multi-story parking garage with a single entrance and a single exit to the west, on Seventh Avenue, North. As one enters the parking garage at the street level, there is a large sign reading "Welcome to Hyatt Regency-Nashville." There is another Hyatt Regency sign inside the garage at street level, together with a sign marked "Parking." The garage is available for parking by members of the general public as well as guests of the hotel, and the public are invited to utilize it.

On the morning of February 12, 1981, appellee's husband, Edwin Allen, accompanied by two passengers, drove appellee's new 1981 automobile into the parking garage. Neither Mr. Allen nor his passengers intended to register at the hotel as a guest. Mr. Allen had parked in this particular garage on several occasions, however, testifying that he felt that the vehicle would be safer in an attended garage than in an unattended outside lot on the street.

The single entrance was controlled by a ticket machine. The single exit was controlled by an attendant in a booth just opposite to the entrance and in full view thereof. Appellee's husband entered the garage at the street level and took a ticket which was automatically dispensed by the machine. The machine activated a barrier gate which rose and permitted Mr. Allen to enter the garage. He drove to the fourth floor level, parked the vehicle, locked it, retained the ignition key, descended by elevator to the street level and left the garage. When he returned several hours later, the car was gone, and it has never been recovered. Mr. Allen reported the theft to the attendant at the exit booth, who stated, "Well, it didn't come out here." The attendant did not testify at the trial.

Mr. Allen then reported the theft to security personnel employed by appellant, and subsequently reported the loss to the police. Appellant regularly employed a number of security guards, who were dressed in a distinctive uniform, two of whom were on duty most of the time. These guards patrolled the hotel grounds and building as well as the garage and were instructed to make rounds through the garage, although not necessarily at specified intervals. One of the security guards told appellee's husband that earlier in the day he had received the following report:

> He said, "It's a funny thing here. On my report here a lady called me somewhere around nine-thirty or after and said that there was someone messing with a car."

The guard told Mr. Allen that he closed his office and went up into the

garage to investigate, but reported that he did not find anything unusual or out of the ordinary.

Customers such as Mr. Allen, upon entering the garage, received a ticket from the dispensing machine. On one side of this ticket are instructions to overnight guests to present the ticket to the front desk of the hotel. The other side contains instructions to the parker to keep the ticket and that the ticket must be presented to the cashier upon leaving the parking area. The ticket states that charges are made for the use of parking space only and that appellant assumes no responsibility for loss through fire, theft, collision or otherwise to the car or its contents. The ticket states that cars are parked at the risk of the owner, and parkers are instructed to lock their vehicles. The record indicates that these tickets are given solely for the purpose of measuring the time during which a vehicle is parked in order that the attendant may collect the proper charge, and that they are not given for the purpose of identifying particular vehicles.

The question of the legal relationship between the operator of a vehicle which is being parked and the operator of parking establishments has been the subject of frequent litigation in this state and elsewhere. The authorities are in conflict, and the results of the cases are varied.

It is legally and theoretically possible, of course, for various legal relationships to be created by the parties, ranging from the traditional concepts of lessor-lessee, licensor-licensee, bailor-bailee, to that described in some jurisdictions as a "deposit." Several courts have found difficulty with the traditional criteria of bailment in analyzing park-and-lock cases. One of the leading cases is *McGlynn v. Parking Authority of City of Newark*, 432 A.2d 99 (N.J. 1981). There the Supreme Court of New Jersey reviewed numerous decisions from within its own state and from other jurisdictions, and it concluded that it was more "useful and straightforward" to consider the possession and control elements in defining the duty of care of a garage operator to its customers than to consider them in the context of bailment. That Court concluded that the "realities" of the relationship between the parties gave rise to a duty of reasonable care on the part of operators of parking garages and parking lots. It further found that a garage owner is usually better situated to protect a parked car and to distribute the cost of protection through parking fees. It also emphasized that owners usually expect to receive their vehicles back in the same condition in which they left them and that the imposition of a duty to protect parked vehicles

and their contents was consistent with that expectation. The Court went further and stated that since the owner is ordinarily absent when theft or damage occurs, the obligation to come forward with affirmative evidence of negligence could impose a difficult, if not insurmountable, burden upon him. After considering various policy considerations, which it acknowledged [to] be the same as those recognized by courts holding that a bailment is created, the New Jersey Court indulged or authorized a presumption of negligence from proof of damage to a car parked in an enclosed garage.

Although the New Jersey Court concluded that a more flexible and comprehensive approach could be achieved outside of traditional property concepts, Tennessee courts generally have analyzed cases such as this in terms of sufficiency of the evidence to create a bailment for hire by implication. We believe that this continues to be the majority view and the most satisfactory and realistic approach to the problem, unless the parties clearly by their conduct or by express contract create some other relationship.

The subject has been discussed in numerous previous decisions in this state. One of the leading cases is *Dispeker v. New Southern Hotel Co.*, 373 S.W.2d 904 (Tenn. 1963). In that case the guest at a hotel delivered his vehicle to a bellboy who took possession of it and parked it in a lot adjoining the hotel building. The owner kept the keys, but the car apparently was capable of being started without the ignition key. The owner apparently had told the attendant how to so operate it. Later the employee took the vehicle for his own purposes and damaged it. Under these circumstances the Court held that a bailment for hire had been created and that upon proof of misdelivery of the vehicle the bailee was liable to the customer.

In the subsequent case of *Scruggs v. Dennis*, 440 S.W.2d 20 (Tenn. 1969), upon facts practically identical to those of the instant case, the Court again held that an implied bailment contract had been created between a customer who parked and locked his vehicle in a garage. Upon entry he received a ticket dispensed by a machine, drove his automobile to the underground third level of the garage and parked. He retained his ignition key, but when he returned to retrieve the automobile in the afternoon it had disappeared. It was recovered more than two weeks later and returned to the owner in a damaged condition.

In that case the operator of the garage had several attendants on duty, but the attendants did not ordinarily operate the parked vehicles, as in the

instant case.

Although the Court recognized that there were some factual differences between the *Scruggs* case and that of *Dispeker v. New Southern Hotel Co.*, *supra*, it concluded that a bailment had been created when the owner parked his vehicle for custody and safe keeping in the parking garage, where there was limited access and where the patron had to present a ticket to an attendant upon leaving the premises.

A bailment relationship was also found in *Jackson v. Metropolitan Government of Nashville*, 483 S.W.2d 92 (Tenn. 1972), when faculty members of a high school conducted an automobile parking operation for profit upon the high school campus. A customer who parked his vehicle there was allowed recovery for theft, even though he had parked the vehicle himself after paying a fee, had locked the vehicle and had kept the keys.

On the contrary, in the case of *Rhodes v. Pioneer Parking Lot, Inc.*, 501 S.W.2d 569 (Tenn. 1973), a bailment was found not to exist when the owner left his vehicle in an open parking lot which was wholly unattended and where he simply inserted coins into a meter, received a ticket, then parked the vehicle himself and locked it.

Denying recovery, the Court said:

> In the case at bar, however, we find no evidence to justify a finding that the plaintiff delivered his car into the custody of the defendant, nor do we find any act or conduct upon the defendant's part which would justify a reasonable person believing that an obligation of bailment had been assumed by the defendant. 501 S.W.2d at 571.

In the instant case, appellee's vehicle was not driven into an unattended or open parking area. Rather it was driven into an enclosed, indoor, attended commercial garage which not only had an attendant controlling the exit but regular security personnel to patrol the premises for safety.

Under these facts we are of the opinion that the courts below correctly concluded that a bailment for hire had been created, and that upon proof of nondelivery appellee was entitled to the statutory presumption of negligence provided in T.C.A. § 24-5-111.

We recognize that there is always a question as to whether there has been sufficient delivery of possession and control to create a bailment when the owner locks a vehicle and keeps the keys. Nevertheless, the realities of

the situation are that the operator of the garage is, in circumstances like those shown in this record, expected to provide attendants and protection. In practicality the operator does assume control and custody of the vehicles parked, limiting access thereto and requiring the presentation of a ticket upon exit. As stated previously, the attendant employed by appellant did not testify, but he told appellee's husband that the vehicle did not come out of the garage through the exit which he controlled. This testimony was not amplified, but the attendant obviously must have been in error or else must have been inattentive or away from his station. The record clearly shows that there was no other exit from which the vehicle could have been driven.

Appellant made no effort to rebut the presumption created by statute in this state (which is similar to presumptions indulged by courts in some other jurisdictions not having such statutes). While the plaintiff did not prove positive acts of negligence on the part of appellant, the record does show that some improper activity or tampering with vehicles had been called to the attention of security personnel earlier in the day of the theft in question, and that appellee's new vehicle had been removed from the garage by some person or persons unknown, either driving past an inattentive attendant or one who had absented himself from his post, there being simply no other way in which the vehicle could have been driven out of the garage.

Under the facts and circumstances of this case, we are not inclined to depart from prior decisions or to place the risk of loss upon the consuming public as against the operators of commercial parking establishments such as that conducted by appellant. We recognize that park-and-lock situations arise under many and varied factual circumstances. It is difficult to lay down one rule of law which will apply to all cases. The expectations of the parties and their conduct can cause differing legal relationships to arise, with consequent different legal results. We do not find the facts of the present case, however, to be at variance with the legal requirements of the traditional concept of a bailment for hire. In our opinion it amounted to more than a mere license or hiring of a space to park a vehicle, unaccompanied by any expectation of protection or other obligation upon the operator of the establishment.

The judgment of the courts below is affirmed at the cost of appellant. The cause will be remanded to the trial court for any further proceedings which may be necessary.

Drowota, Justice, dissenting.

In this case we are asked to consider the nature and extent of liability of the operator of a commercial "park and lock" parking garage. In making this determination, we must look to the legal relationship between the operator of the vehicle and the operator of the parking facility. The majority opinion holds that a bailment contract has been created, and upon proof of non-delivery Plaintiff is entitled to the statutory presumption of negligence provided in T.C.A. § 24-5-111. I disagree, for I find no bailment existed and therefore the Plaintiff does not receive the benefit of the presumption. Consequently, the Plaintiff had the duty to prove affirmatively the negligence of the operator of the parking facility and this Plaintiff failed to do.

The majority opinion states that "courts have found difficulty with the traditional criteria of bailment in analyzing park and lock cases." The majority discusses the case of *McGlynn v. Parking Authority of City of Newark*, 86 N.J. 551, 432 A.2d 99 (1981), which suggests that bailment is an outmoded concept for analyzing parking lot and garage cases. In *Garlock v. Multiple Parking Services, Inc.*, 427 N.Y.S.2d 670, 677 (1980), the court stated that "the 'bailment theory' as a basis for recovery in parking lot cases is no longer appropriate." That court concluded that since the concept of bailment is no longer a viable theory in application to a very real modern problem that the proper standard to be followed in such cases is "reasonable care under the circumstances whereby foreseeability shall be a measure of liability." *Id.*, 427 N.Y.S.2d at 678.

Even though some courts now suggest that the theory of bailment is an archaic and inappropriate theory upon which to base liability in modern park and lock cases, the majority opinion states that "Tennessee courts generally have analyzed cases such as this in terms of sufficiency of the evidence to create a bailment for hire by implication," and concludes that this is "the most satisfactory and realistic approach to the problem." I do not disagree with the longstanding use of the bailment analysis in this type of case. I do disagree, however, with the majority's conclusion that a bailment for hire has been created in this case.

The record shows that upon entering this parking garage a ticket, showing time of entry, is automatically dispensed by a machine. The ticket states that charges are made for the use of a parking space only and that the garage assumes no responsibility for loss to the car or its contents. The

ticket further states that cars are parked at the risk of the owner, and parkers are instructed to lock their vehicles. The majority opinion points out that it is not insisted that this language on the ticket is sufficient to exonerate the garage, since the customer is not shown to have read it or to have had it called to his attention. *Savoy Hotel Corp. v. Sparks*, 421 S.W.2d 98 (Tenn. Ct. App. 1967). The ticket in no way identifies the vehicle, it is given solely for the purpose of measuring the length of time during which the vehicle is parked in order that a proper charge may be made.

In this case Mr. Allen, without any direction or supervision, parked his car, removed his keys, and locked the car and left the parking garage having retained his ignition key. The presentation of a ticket upon exit is for the sole purpose of allowing the cashier to collect the proper charge. The cashier is not required to be on duty at all times. When no cashier is present, the exit gate is opened and no payment is required.[1] As the majority opinion states, the ticket is "not given for the purpose of identifying particular vehicles." The ticket functioned solely as a source of fee computation, not of vehicle identification.

The majority opinion states: "[W]e do not find the facts of the present case to be at variance with the legal requirements of the concept of a bailment for hire." I must disagree, for I feel the facts of the present case are clearly at variance with what I consider to be the legal requirements of the traditional concept of a bailment for hire.

Bailment has been defined by this Court in the following manner:

> The creation of a bailment in the absence of an express contract requires that possession and control over the subject matter pass from the bailor to the bailee. In order to constitute a sufficient delivery of the subject matter there must be a full transfer, either actual or constructive, of the property to the bailee so as to exclude it from the possession of the owner and all other persons and give to the bailee, for the time being, the sole custody and control thereof.
>
> In parking lot and parking garage situations, a bailment is created where the operator of the lot or garage has knowingly and voluntarily assumed control, possession, or custody of the

[1]Between one or two in the morning and six or seven a.m., the garage is entirely open without a cashier to collect parking fees. During the day if the cashier leaves his or her post on a break, the exit gate is opened and the vehicle owner may exit without payment.

> motor vehicle; if he has not done so, there may be a mere license to park or a lease of parking space.

Rhodes v. Pioneer Parking Lot, Inc., 501 S.W.2d 569, 570 (Tenn. 1973).

From its earliest origins, the most distinguishing factor identifying a bailment has been delivery. Our earliest decisions also recognize acceptance as a necessary factor, requiring that possession and control of the property pass from bailor to bailee, to the exclusion of control by others. The test thus becomes whether the operator of the vehicle has made such a delivery to the operator of the parking facility as to amount to a relinquishment of his exclusive possession, control, and dominion over the vehicle so that the latter can exclude it from the possession of all others. If so, a bailment has been created.

When the automobile began replacing the horse and buggy, our courts allowed bailment law to carry over and govern the parking of vehicles. In cases such as *Old Hickory Parking Corp. v. Alloway*, 177 S.W.2d 23 (Tenn. Ct. App. 1943), and *Savoy Hotel v. Sparks*, 421 S.W.2d 98 (Tenn. Ct. App. 1967), where the operator of the vehicle left his vehicle with an attendant and left the keys for the attendant to move the vehicle as he wished, the bailment relationship was evident for we had a clear delivery, acceptance of possession, control, and exercise of dominion over the vehicle—all the traditional elements of a bailment. In *Dispeker v. New Southern Hotel Company*, 373 S.W.2d 904 (Tenn. 1963), a bellboy parked plaintiff's car, plaintiff retained the keys but explained to the bellboy that the car could be operated without the key, and apparently showed him how to operate it. The bellboy went off duty, then returned and stole the car. Once again, the traditional elements of delivery and control were present.

These cases involving parking attendants and personalized service have caused us no problems. The problem arises in this modern era of automated parking, when courts have attempted to expand the limits of existing areas of the law to encompass technological and commercial advances. Such is the case of *Scruggs v. Dennis*, 440 S.W.2d 20 (Tenn. 1969), relied upon in the majority opinion. In *Scruggs*, as in this case, the entire operation is automated, with the exception of payment upon departure. The operation bears little, if any, resemblance to the circumstances found in *Old Hickory Parking Corp.*, *Savoy Hotel*, and *Dispeker*. Yet the Court in Scruggs, in quoting extensively from the *Dispeker* opinion, states that "There are some minute differences of fact . . . " Id., 440 S.W.2d at 22. As pointed out above,

the differences of fact in *Dispeker* are not minute or so similar as the *Scruggs* court would suggest. Delivery, custody and control are clearly present in *Dispeker*. I fail to find such delivery, custody and control in *Scruggs* or in the case at bar. In *Dispeker*, the vehicle was actually taken from the owner by an attendant. I believe the *Scruggs* court and the majority opinion today attempt to apply bailment law in situations where there is not a true bailment relationship. . . .

The majority opinion, as did the *Scruggs* court, finds custody and control implied because of the limited access and because "the presentation of a ticket upon exit" is required. I cannot agree with this analysis as creating a bailment situation. I do not believe that based upon the fact that a ticket was required to be presented upon leaving, that this factor created a proper basis upon which to find a bailment relationship. The ticket did not identify the vehicle or the operator of the vehicle, as do most bailment receipts. The cashier was not performing the traditional bailee role or identifying and returning a particular article, but instead was merely computing the amount owed and accepting payment due for use of a parking space. I do not believe the Defendant exercised such possession and control over Plaintiff's automobile as is necessary in an implied bailment. . . .

The full transfer of possession and control, necessary to constitute delivery, should not be found to exist simply by the presentation of a ticket upon exit. In the case at bar, I find no such delivery and relinquishment of exclusive possession and control as to create a bailment. Plaintiff parked his car, locked it and retained the key. Certainly Defendant cannot be said to have sole custody of Plaintiff's vehicle, for Defendant could not move it, did not know to whom it belonged, and did not know when it would be reclaimed or by whom. Anyone who manually obtained a ticket from the dispenser could drive out with any vehicle he was capable of operating. Also, a cashier was not always on duty. When on duty, so long as the parking fee was paid—by what means could the Defendant reasonably exercise control? The necessary delivery and relinquishment of control by the Plaintiff, the very basis upon which the bailment theory was developed, is missing.

We should realize that the circumstances upon which the principles of bailment law were established and developed are not always applicable to the operation of the modern day automated parking facility. The element of delivery, of sole custody and control are lacking in this case.

Notes and Questions

1.18. Bailments raise interesting issues about the bailor's and bailee's relationships with third parties. Suppose Lord Hobnob takes a valuable jewel to a jewelry shop for repair. While it is there, a chimney-sweep smashes the window and runs off with it. Obviously Lord Hobnob can presently sue the chimney-sweep to recover the jewel or its value. (*Is* this so obvious?) But what about the jeweler? He's admittedly not the owner of the jewel. Should he nonetheless be allowed to sue the chimney-sweep? If the answer is yes, and he wins damages, can he keep the money? If the jeweler wins damages from the chimney-sweep, can the chimney-sweep be held liable in a subsequent suit by Lord Hobnob for the same amount?

1.19. Here's another variation. Suppose a chimney-sweep finds a jewel and gives it to a jeweler for safekeeping. Lord Hobnob, the true owner, shows up in a carriage and a huff, and demands the jewel from the jeweler. Can the jeweler turn it over? Must he? If he does, is he liable to his bailor, the chimney-sweep, for misdelivery? Consider *The Winkfield*, [1902] P. 42 (C.A. 1901), in which the *Winkfield*, a government ship carrying mail, was damaged in a collision with the *Mexican*. The government sued the owners of the *Mexican* and included a claim for mail lost as a result of the collision. The *Mexican*'s owners responded that the government was not liable to the parties whose mail was lost, and so had suffered no compensable damages. Is this a persuasive objection?

1.20. For time immemorial, potential bailees have attempted to limit their potential liability by contract. Why didn't the ticket in *Allen* suffice to protect the hotel from liability for the lost car?

1.21. A common concern of bailees is taking responsibility for unexpectedly valuable items. In *Peet v. Roth Hotel*, 253 N.W. 546 (Minn. 1934), the plaintiff left her engagement ring with a hotel employee with instructions to give it to a jeweler who paid regular visits to the hotel and was known to its employees. She testified:

> I had it [the ring] on my finger, and took it off my finger. The Cashier—I told the Cashier that it was for Mr. Ferdinand Hotz. She took out an envelope and wrote "Ferdinand Hotz." I remember spelling it to her, and then I left. . . . I handed the ring to the Cashier, and she wrote on the envelope. . . . The only instructions I remember are telling her that it was for Mr. Ferdinand Hotz who was stopping at the hotel.

The ring was stolen while in the hotel's possession and a jury awarded $2,140.66 in damages. The hotel objected, arguing that plaintiff "failed to divulge the unusual

value of her ring when she left it with [the cashier, who] testified that, at the moment, she did not realize its value." The court was unsympathetic, writing, "No decision has been cited and probably none can be found where the bailee of an article of jewelry, undeceived as to its identity, was relieved of liability because of his own erroneous underestimate of its value." Is this fair? Compare Minnesota's modern statute on innkeepers' liability, in Minn. Stat. § 327.71(1):

> No innkeeper who has in the establishment a fireproof, metal safe or vault, in good order and fit for the custody of valuables, and who keeps a copy of this subdivision clearly and conspicuously posted at or near the front desk and on the inside of the entrance door of every bedroom, shall be liable for the loss of or injury to the valuables of a guest unless: (1) the guest has offered to deliver the valuables to the innkeeper for custody in the safe or vault; and (2) the innkeeper has omitted or refused to take the valuables and deposit them in the safe or vault for custody and to give the guest a receipt for them. Except as otherwise provided in subdivision 6, the liability of an innkeeper for the loss of or injury to the valuables of a guest shall not exceed $1,000. No innkeeper shall be required to accept valuables for custody in the safe or vault if their value exceeds $1,000, unless the acceptance is in writing.

Would this statute have changed the result in *Peet*? How does it alter the relationship between hotels and guests? Does it explain why hotel rooms typically have a statement of this sort posted on the inside of their doors?

Here is part of the Uniform Commercial Code's take on the issue (in the context of carriers' liability for lost or damaged goods given to them for delivery):

> Damages may be limited by a term in the bill of lading or in a transportation agreement that the carrier's liability may not exceed a value stated in the bill or transportation agreement if the carrier's rates are dependent upon value and the consignor is afforded an opportunity to declare a higher value and the consignor is advised of the opportunity. However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use. . . .

UCC § 7-309(b). What do you think of this solution?

Chapter 2

Adverse Possession

Few doctrines taught in the first year of law school make a worse first impression than adverse possession. Adverse possession enables a non-owner to gain title to land (or personal property, but we will focus here on land) after the expiration of the statute of limitations for the owner to recover possession. That sounds bad, and the thought of "squatters" becoming owners gets its share of bad press. But historically the doctrine has performed, and continues to serve, important functions.

The basic requirements, if not their wording and application, are common from state to state. As one treatise summarizes, an adverse possessor must prove possession that is:

- hostile (perhaps under a claim of right);
- exclusive;
- open and notorious;
- actual; and
- continuous for the requisite statutory period.

16 POWELL ON REAL PROPERTY § 91.01. States routinely add to the list. California law, for example, requires that

> the claimant must prove: (1) possession under claim of right or color of title; (2) actual, open, and notorious occupation of the premises constituting reasonable notice to the true owner; (3) possession which is adverse and hostile to the true owner; (4)

> continuous possession for at least five years; and (5) payment of all taxes assessed against the property during the five-year period.

Main St. Plaza v. Cartwright & Main, LLC, 124 Cal. Rptr. 3d 170, 178 (Cal. App. 2011) (citations and quotations omitted).

2.1 Adverse Possession Rationales

But why allow adverse possession? One court summarized the doctrine's history and purposes as follows:

> . . . a brief history of adverse possession may be of assistance. After first using an amalgamation of Roman and Germanic doctrine, our English predecessors in common law later settled upon statutes of limitation to effect adverse possession. See Axel Teisen, *Contributions of the Comparative Law Bureau*, 3 A.B.A. J. 97, 126, 127, 134 (1917). In practice, the statutes eliminated a rightful owner's ability to regain possession after the passing of a certain number of years, thereby vesting de facto title in the adverse possessor. For example, a 1623 statute of King James I restricted the right of entry to recover possession of land to a period of twenty years. Essentially, in England, the "[o]riginal policy supporting the development of adverse possession reflected society's unwillingness to take away a 'right' which an adverse possessor thought he had. Similarly, society felt the loss of an unknown right by the title owner was minimal." William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 Land & Water L. Rev. 79, 83 (1996). . . .
>
> In the United States, although the 1623 statute of King James I "came some years after the settling of Jamestown (the usual date fixed as the crystalizing of the common law in America), its fiat is generally accepted as [our] common law. Hence 'adverse possession' for 20 years under the common law in this country passes title to the adverse possessor with certain stated qualifications." 10 *Thompson on Real Property* §

87.01 at 75. Today, all fifty states have some statutory form of adverse possession . . . .

. . . . Courts and commentators generally ascribe to "four traditional justifications or clusters of justifications which support transferring the entitlement to the [adverse possessor] after the statute of limitations runs: the problem of lost evidence, the desirability of quieting titles, the interest in discouraging sleeping owners, and the reliance interests of [adverse possessors] and interested third persons." Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 Nw. U. L. Rev. 1122, 1133 (1984). Effectively, our society has made a policy determination that "all things should be used according to their nature and purpose" and when an individual uses and preserves property "for a certain length of time, [he] has done a work beneficial to the community." Teisen, 3 A.B.A. J. at 127. For his efforts, "his reward is the conferring upon him of the title to the thing used." *Id.* Esteemed jurist Oliver Wendell Holmes, Jr. went a step further than Teisen, basing our society's tolerance of adverse possession on the ideal that "[a] thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it." *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1016 (10th Cir. 2004) (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 477 (1897)).

Regardless of how deeply the doctrine is engrained in our history, however, courts have questioned "whether the concept of adverse possession is as viable as it once was, or whether the concept always squares with modern ideals in a sophisticated, congested, peaceful society." *Finley*, 160 Cal. Rptr. at 427. Commentators have also opined that, along with the articulated benefits of adverse possession, numerous disadvantages exist including the "infringement of a landowner's rights, a decrease in value of the servient estate, and the encouraged [over]exploitation and [over]development of land. In addition, they . . . [include] the generation of animos-

> ity between neighbors, a source of damages to land or loss of land ownership, and the creation of uncertainty for the landowner."* Ackerman, 31 Land & Water L. Rev. at 92. In reality, "[a]dverse possession '[i]s nothing more than a person taking someone else's private property for his own private use.' It is hard to imagine a notion more in contravention of the ideals set forth in the U.S. Constitution protecting life, liberty and property." Ackerman, 31 Land & Water L. Rev. at 94-95 (quoting 2 C.J.S. Adverse Possession § 2 (1972)).
>
> Although this Court duly recognizes its role as the judicial arm of government tasked with applying the law, rather than making law, it is not without an eyebrow raised at the ancient roots and arcane rationale of adverse possession that we apply the doctrine to this modern property dispute.

Cahill v. Morrow, 11 A.3d 82, 86-88 (R.I. 2011). Do you share the court's skepticism? Consider the rationales discussed above against the following case.

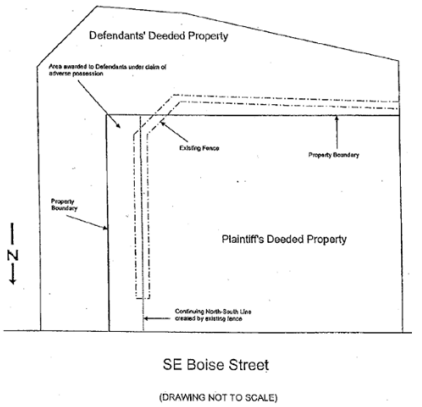
Tieu v. Morgan

265 P.3d 98 (Or. Ct. App. 2011)

HADLOCK, J.

The parties dispute ownership of a strip of land that runs parallel to defendants' driveway. Plaintiff, who owns residential property adjoining that strip of land, filed suit seeking (1) a declaration that he owns the disputed strip and (2) an injunction prohibiting defendants from trespassing on that property. Defendants counterclaimed, asserting that they acquired the disputed strip through adverse possession, and subsequently moved for summary judgment on that counterclaim. The trial court granted defendants' motion and entered a judgment declaring that defendants had acquired the strip through adverse possession. Plaintiff appeals, and we affirm. . . .

*The modifications to the quotation from Ackerman are ours, not the court's. —Eds.



The two parcels subject to this appeal are adjoining residential tax lots in a Portland subdivision. Tax lot 3100 is rectangular, with its north side fronting Southeast Boise Street. Tax lot 3200 is a flag lot that is situated largely south of lot 3100; its driveway (the "flagpole") runs north from the main portion of the lot (the "flag") to Southeast Boise Street, parallel to the eastern edge of lot 3100. The disputed three-foot-wide strip lies between lot 3200's driveway and lot 3100. Defendants own lot 3200. Plaintiff owns lot 3100 and also is the record owner of the disputed strip.

A north-south stretch of fence on plaintiff's property runs along the western boundary of the disputed strip, parallel to defendants' driveway. The fence starts roughly halfway down the driveway from Southeast Boise Street, running south, then turns 45 degrees to the southwest, cutting off the southeast corner of lot 3100, then makes another 45-degree turn before continuing west, roughly following the east-west boundary between lots 3100 and 3200. The diagonal portion of the fence that cuts the corner of lot 3100 includes a gate wide enough to accommodate a boat trailer. As noted, the disputed three-foot-wide strip lies between defendants' driveway and the north-south fence on lot 3100; its practical effect is to widen the "flagpole" portion of lot 3200.

The fencing that separates the two properties has existed for decades. As of 1984, the two lots were owned by Robert Stevens, who installed most of the fencing that year, including about half of the north-south stretch located west of lot 3200's driveway. In 1994, Robert Stevens sold lot 3200 to his son, James Stevens, believing that the deed he conveyed to James included all property on the east side of a north-south line defined by that

portion of the fence, *i.e.*, the disputed strip. Although he never specifically discussed the issue with his father, James also believed that his purchase of the flag lot included the disputed strip along his driveway. James explained that he had "no reason to know—to think [that the fence] would be in the wrong location."

During the four years that James owned the flag lot, he granted Robert permission to occasionally use James's driveway and the disputed strip, so that Robert could drive a large vehicle and boat trailer through the diagonal gate into Robert's back yard. In 1996, James installed a sewer line in the center of the disputed strip, running all the way from Southeast Boise Street to the house on lot 3200. When James later put lot 3200 on the market, he advertised it as having a "fully fenced yard," based on his belief that his ownership included the disputed strip.

James sold lot 3200 to defendants in 1998. The lot was not surveyed in conjunction with that sale; nor did the parties to the sale discuss the lot's recorded boundaries, review paperwork or maps, or perform any investigation specifically related to that subject.

Defendants have made use of the disputed strip since they purchased lot 3200. Defendant Francine Morgan runs a daycare business from her home, and parents regularly use the disputed strip when dropping off and picking up their children. In 1999, defendants extended the fence paralleling the strip north by roughly 40 feet, choosing not to extend the fence all the way to Southeast Boise Street after Robert suggested that they leave that area unfenced to accommodate maneuvering large vehicles in and out of their driveways. Defendants have laid gravel and bark dust on the disputed strip a number of times and have maintained the fence by replacing posts and fence boards. While Robert still owned lot 3100, he specifically asked defendants' permission each time he wanted to use the disputed strip to access or move his boat, and defendants granted that permission.

Plaintiff bought lot 3100 from Robert in early 2006. Before purchasing the property, plaintiff had it surveyed and learned that the north-south fence was not located on the deeded boundary between lots 3100 and 3200. A survey pin marking the recorded boundary was placed at that time. Plaintiff claims that he told defendant Francine Morgan soon after the survey was completed that he planned to move the fence to the deeded property line within two years. According to plaintiff, Francine neither disputed plaintiff's right to move the fence nor claimed ownership of land between

the survey marker and the fence. Defendants deny that such a conversation occurred.

In 2008, plaintiff attempted to remove the north-south portion of the fence. After defendants protested, plaintiff initiated this action, seeking a declaration that he owned the disputed strip. As noted, defendants asserted in a counterclaim that they had acquired the strip through adverse possession. The trial court ultimately granted summary judgment to defendants, ruling that the undisputed facts established that defendants had acquired the disputed strip through adverse possession. . . .

ORS 105.620 codifies the common-law elements of adverse possession, requiring a claimant to prove by clear and convincing evidence that the claimant or the claimant's predecessors in interest maintained actual, open, notorious, exclusive, hostile, and continuous possession of the property for ten years. In addition to those common-law elements, the statute also requires the claimant to have had an honest belief of actual ownership when he or she entered into possession of the property.

Plaintiff makes arguments related to each of the statutory elements, first claiming that defendants did not establish actual, open, notorious, exclusive, or continuous possession of the entire disputed strip. We recently summarized what proof is required to satisfy those elements of an adverse-possession claim:

> "The element of actual use is satisfied if a claimant established a use of the land that would be made by an owner of the same type of land, taking into account the uses for which the land is suited. To establish a use that is open and notorious, plaintiffs must prove that their possession is of such a character as to afford the owner the means of knowing it, and of the claim. The exclusivity of the use also depends on how a reasonable owner would or would not share the property with others in like circumstances. A use is continuous if it is constant and not intermittent. The required constancy of use, again, is determined by the kind of use that would be expected of such land."

Stiles v. Godsey, 233 Or. App. 119, 126, 225 P.3d 81 (2009) (internal quotations and citations omitted).

Here, the land in question is a three-foot-wide strip, covered mostly with gravel or bark dust, adjacent to a narrow driveway. Defendants and

their predecessor have used the strip as an extension of that driveway since 1994, both to accommodate wide vehicles and to provide additional loading room for defendant Francine Morgan's daycare clients. That use is consistent with ownership and with the land's character. Moreover, that use was "open" and "notorious," particularly when considered together with James's act of locating his sewer line on the strip and, later, defendants' maintenance of and improvements to the fence. Finally, defendants and their predecessor used the strip continuously from 1994 (when James bought the lot) to at least 2006 (when plaintiff bought lot 3100 from Robert), *i.e.*, for longer than the statutory 10-year adverse-possession period. Thus, the undisputed facts establish defendants' actual, open, notorious, exclusive, and continuous use of the property.

Plaintiff's contrary argument rests on the fact that the disputed strip is not completely separated from his residential lot by a fence; he emphasizes that the fence at issue does not extend all the way to Southeast Boise Street, but starts partway down the driveway. . . . Here, even though the fence does not extend to the street, it adequately defines the entire disputed strip, indicating that it is separate from the land that abuts it to the west.

Plaintiff also contends that defendants' use of the disputed strip was not "exclusive" because Robert sometimes used the property even after the fence was built. But adverse-possession claimants are allowed the freedom to allow others to occasionally use their property, in the manner that neighbors are wont to do, without thereby abandoning their claim. In this case, Robert asked permission of defendants and their predecessors each time that he used the disputed strip; that permissive use was consistent with defendants' ownership of the land and does not defeat their claim to it.

We also reject plaintiff's argument that defendants' use of the disputed strip was not "hostile" because, he claims, defendants had a conscious doubt regarding the property line. Under ORS 105.620(2)(a), a claimant "maintains 'hostile possession' of property if the possession is under claim of right or with color of title." A "claim of right" may be established through proof of an honest but mistaken belief of ownership, resulting, for example, from a mistake as to the correct location of a boundary. The mistaken belief must be a "pure" mistake, however, and not one based upon "conscious doubt" about the true boundary. Furthermore, ORS 105.620(1)(b) requires that the claimants (or their predecessors) have had an "honest belief" of actual ownership that (1) continued through the vesting period, (2) had an

objective basis, and (3) was reasonable under the circumstances.

In *Mid-Valley Resources, Inc. v. Engelson*, 170 Or. App. 255 (2000), we concluded that the defendants had failed to establish pure mistake about the location of a boundary line because one of the defendants had a conscious doubt on that subject. That *Mid-Valley* defendant had testified that she had not known where the property line was when she was a child, and she still did not know at the time of trial whether a particular fence was located on that boundary. That defendant's uncertainty about the property line's location defeated the defendants' adverse-possession claim.

Here, by contrast, the undisputed evidence clearly establishes that defendants and their predecessor, James, always believed that the fence marked the north-south line between lots 3200 and 3100. James assumed when he bought lot 3200 in 1994 that the fence was on the property line, and he perpetuated that belief in defendants by telling them, when they bought the property, that it was "fully fenced." Robert, then the record owner of the disputed strip, confirmed those mistaken beliefs when he did not object to installation of the sewer line, to defendants' use of the strip, or to defendants' extension of the fence. No evidence in the record supports plaintiff's assertion that defendants had a "conscious doubt" about whether the fence was actually located on the line separating their property from plaintiff's. Defendants did suggest in their depositions that they had not given much thought to the property line's location until the dispute arose with plaintiff. Read in context, however, those statements simply confirm defendants' *certainty* that the property line was the same as the fence line; the statements do not indicate that defendants had any conscious doubt as to the boundary's location.

Moreover, no evidence calls into question the reasonableness of defendants' belief that they owned the disputed strip. That strip of land is small in relation to the size of lots 3200 and 3100, it regularly has been used as an extension to the width of an existing driveway, it is well suited to that purpose, and it is partly fenced off from plaintiff's property. Under the circumstances, defendants' belief that they owned the disputed strip was reasonable.

In sum, the undisputed evidence establishes clearly and convincingly that defendants and their predecessor, James, had an "honest belief" that the disputed strip was part of lot 3200 and that they continuously maintained actual, open, notorious, exclusive, and hostile possession of that

strip for well over 10 years, from 1994 at least until plaintiff bought lot 3100 in 2006.[6] We conclude that defendants' adverse-possession claim to the disputed strip vested in 2004, giving them title and extinguishing any claim that plaintiff might otherwise have had to that land.

Notes and Questions

2.1. Does the result in *Tieu* jibe with the rationales for adverse possession recited in the note preceding it? Which ones? *Cahill* suggests that these rationales are less relevant today than in the past. Do you agree? Should the defendants in *Tieu* have been without recourse?

2.2. *Tieu* involves an error in a conveyance. The parties' predecessors in interest thought they had bargained to transfer land that they didn't. This is a common source of adverse possession litigation. Other recurring fact patterns include mistaken deed descriptions, surveying errors, and accidental encroachments by neighbors. Adverse possession claims may also follow the souring of relationships, perhaps between cotenants or one involving permissive land use. None of these cases necessarily involve bad faith actors; although the doctrine may indeed be applied in favor of the mere trespasser, depending on the jurisdiction's interpretation of the state of mind required to satisfy the "hostility" element. We will discuss this issue further below.

2.3. Title based on adverse possession is as good as any. To think through the implications of that observation, imagine the following facts. Neighbor A mistakenly builds a fence on her neighbor's land and gains title to the enclosed land by adverse possession. Neighbor B then notices the encroachment and demands that A move the fence. She agrees, but changes her mind two years later and rebuilds it. B sues for trespass. Who wins?

2.4. **Open and notorious possession**. Whatever its merits, adverse possession is strong medicine. The doctrine therefore provides safeguards to prevent a title owner from losing her property without adequate notice by, for example, requir-

[6] We reject plaintiff's argument that defendants cannot satisfy the 10-year adverse-possession period by tacking their possession to that of James. An adverse-possession claimant may tack his possessory interests to those of a predecessor "if there is evidence that the predecessor intended to transfer whatever adverse possessory rights he or she may have acquired." *Fitts v. Case*, 243 Or. App. 543, 549, 267 P3d 160 (2011). Here, James clearly intended his transfer of lot 3200 to defendants to include the disputed strip, given his belief that the fence marked the boundary line and his advertisement of lot 3200 as "fully fenced."

ing that the possession be open and notorious—it has to be the kind of act that an owner would notice.

But even overt acts may not be obvious threats to ownership rights. A fence on someone else's property certainly seems open and notorious, but what if it is just an inch or two over the border? What about the three-foot incursion at issue in *Tieu*? What if it had been built while the plaintiff was in occupation of his lot? Do we expect owners to commission surveys anytime a neighbor builds near the property line?

For some courts, the answer is no. *Mannillo v. Gorski*, 255 A.2d 258, 264 (N.J. 1969), for example, holds that minor encroachments are not open and notorious without actual knowledge on the part of the title owner. But where would that leave an innocent encroacher, whose trespass may be costly to remedy? In *Mannillo*, the court balked at placing the trespasser, whose steps and concrete walk extended 15 inches into the plaintiffs' property, at her neighbor's mercy.

> It is conceivable that the application of the foregoing rule may in some cases result in undue hardship to the adverse possessor who under an innocent and mistaken belief of title has undertaken an extensive improvement which to some extent encroaches on an adjoining property. In that event . . . equity may furnish relief. Then, if the innocent trespasser of a small portion of land adjoining a boundary line cannot without great expense remove or eliminate the encroachment, or such removal or elimination is impractical or could be accomplished only with great hardship, the true owner may be forced to convey the land so occupied upon payment of the fair value thereof without regard to whether the true owner had notice of the encroachment at its inception. Of course, such a result should eventuate only under appropriate circumstances and where no serious damage would be done to the remaining land as, for instance, by rendering the balance of the parcel unusable or no longer capable of being built upon by reason of zoning or other restrictions.

Id.[1] Is this result—a forced transaction in which the innocent trespasser becomes

[1]As *Manillo*'s resort to equity shows, adverse possession is not the only way to address boundary disputes. Other options include the equitable doctrine of acquiescence, *see, e.g.*, *Hamlin v. Niedner*, 955 A.2d 251, 254 (Me. 2008) ("To prove that title or a boundary line is established by acquiescence, a plaintiff must prove four elements by clear and convincing evidence: (1) possession up to a visible line marked clearly by monuments, fences or the like; (2) actual or constructive notice of the possession to the adjoining landowner; (3) conduct by the adjoining landowner from which recognition and

the owner, but must pay—the best accommodation of the relevant interests? If the true owner wasn't on notice of the incursion, why can she be forced to surrender her land, even for payment?

2.5. **Adverse possession and the property owner**. State-to-state variation about whether encroachments need to be obvious may reflect a deeper question about the purpose of adverse possession. Some authorities view the doctrine as having an object of punishing inattentive owners who sleep on their rights. If so, then perhaps it makes sense to require an incursion to be sufficiently obvious that a property owner would not need to conduct a survey to determine the existence of a violation.

But should sleeping owners be the target of the doctrine? Are property owners who fail to assert their rights also less likely to develop their property (or sell it to someone who will)? And if that is the underlying end, are there any problems with using adverse possession doctrine as a means to it?

2.6. **Adverse possession as reward**. The reciprocal view—that adverse possession exists to reward the possessors—has two flavors. One is externally focused. The possessor, by putting the land to productive use, "has done a work beneficial to the community." Axel Teisen, 3 A.B.A. J. 97, 127 (1917). The other is more internal:

> A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your

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acquiescence, not induced by fraud or mistake, may be fairly inferred; and (4) acquiescence for a long period of years[.]"); the doctrine of agreed boundaries, *Finley v. Yuba Cnty. Water Dist.*, 160 Cal. Rptr. 423, 428 (Cal. App. 1979); estoppel, *see, e.g.*, *Douglas v. Rowland*, 540 S.W.2d 252 (Tenn. App. 1976), and laches. *See generally* L. C. Warden, *Mandatory injunction to compel removal of encroachments by adjoining landowner*, 28 A.L.R.2d 679 (Originally published in 1953) (discussing factors influencing issuance of an injunction).

Laches raises a conceptual difficulty, as it seems to cover some of the same ground as adverse possession. Laches is an equitable defense analogous to the legal defense provided by a statute of limitations: if a plaintiff unreasonably delays in bringing suit and the defendant is prejudiced by the delay, laches will bar the suit as a matter of equity. But if an owner tries to recover land within the limitations period, doesn't that imply that there has been no unreasonable delay? *Clanton v. Hathorn*, 600 So. 2d 963, 966 (Miss. 1992) (observing that the adverse possession statute "would seem to occupy the field"); *Kelly v. Valparaiso Realty Co.*, 197 So. 2d 35, 36 (Fla. Dist. Ct. App. 1967) (where adverse possession was unavilable due to failure to pay taxes on the land "we do not feel that equity can be invoked to circumvent the statutory law of adverse possession"); *see generally* 27A AM. JUR. 2D EQUITY § 163 ("Only rarely should laches bar a case before the statute of limitations has run."). *But see Pufahl v. White*, No. 2050-S, 2002 WL 31357850, at *1 (Del. Ch. Oct. 9, 2002) (although laches claim cannot lead to title, the "laches defense may, however, be applicable to the plaintiffs' request to enjoin the defendants to remove the encroachment").

> being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another.

Oliver Wendell Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 477 (1897). Do either of these views resonate? What does this rationale tell you about what the state of mind of the adverse possessor should be?

2.7. **Third-party interests**.

> The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.

Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918) (footnotes omitted). By providing stability to existing property arrangements after the passage of time, adverse possession simplifies transactions by relieving purchasers and mortgagees of the risk that they are dealing with title founded on a long-ago mistake or trespass. The doctrine is a healing mechanism that realigns possession and paperwork when they've gotten too badly out of sync. The benefit extends to the legal system as well by relieving courts of the need to delve into the details of long-forgotten events.

2.8. **Adverse possession's information function**. Adverse possession also enables rights that exist as a matter of custom (e.g., "the Smiths always farm that strip of land") to receive legal status. A banker in a distant city may not understand (or trust) allocations based on local understandings, but that doesn't matter if the claims are translated into recordable title.[2] The land may now serve as the object of a sale or collateral for a loan for an expanded audience, enhancing its value. Ad-

[2] "Quiet title" suits perform this function. They are actions that establish the claimant's title to land and foreclose the ability of others to contest it. Although quiet title suits are not necessary to gain rights under adverse possession doctrine, they are very important to adverse possessors. Do you see why? If you cannot answer the question, ask yourself whether you would ever buy property from an adverse possessor.

verse possession's role in converting informal understandings into formal rights illustrates law's ability to facilitate the aggregation and dissemination of information across society. Can you think of others?

2.9. **Tacking**. What happens if a series of possessors occupy a property, but none of them are present long enough for the limitations period to run? *Tieu* notes in passing the concept of tacking, which enables a succession of adverse possessors to collectively satisfy the statutory period. The usual approach is to allow tacking so long as the successive possessors are in "privity": a relationship in which the prior possessor knowingly and intentionally transfers whatever interest she holds to the subsequent possessor. *See, e.g.*, *Stump v. Whibco*, 715 A.2d 1006 (N.J. Super. Ct. App. 1998) ("Tacking is generally permitted "unless it is shown that the claimant's predecessor in title did not intend to convey the disputed parcel.") (citations and quotation omitted). So the clock continues to run if one possessor sells or leases the occupied land, but there is no privity if one trespasser wanders onto the lot after another leaves (or worse, dispossesses the earlier trespasser by force).

Recall the question of whether adverse possession doctrine is more properly focused on rewarding deserving possessors or punishing inattentive owners. Does the U.S. approach to tacking shed light on our answer? The English view is to allow tacking without privity. *Cf.* James Ames, LECTURES ON LEGAL HISTORY 197 (1913) ("English lawyers regard not the merit of the possessor, but the demerit of the one out of possession. The statutes of limitation provide . . . not that the adverse possessor shall acquire title, but that the one who neglects for a given time to assert his right shall thereafter not enforce it.").

2.10. **Adverse possession and the environment**. An underlying premise of the rationales discussed above is that land should be used. For an argument that this tilt makes adverse possession doctrine environmentally harmful, *see* John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 840 (1994) (arguing that "American adverse possession law is fundamentally hostile to the private preservation of wild lands" and proposing exemption to doctrine for privately held wild lands).

2.2 "Hostility" and Intent

Adverse possession requires possession that is "hostile" and, often, "under a claim of right." Hostility is not animosity. "Hostile possession can be understood as possession that is opposed and antagonistic to all other claims, and that conveys the clear message that the possessor intends to possess the land as his or her own."

16 POWELL ON REAL PROPERTY § 91.01[2]. The requirement thus prevents permissive occupancy from ripening into ownership; a lessor need not worry that the tenant will claim title by adverse possession. *See, e.g.*, Rise v. Steckel, 652 P.2d 364, 372 (1982) ("[T]he ten-year statutory period for adverse possession did not begin to run until defendant asserted to plaintiff that he was possessing the property in his own right, rather than as a tenant at sufferance."). A "claim of right," sometimes called claim of title,[3] means that the possessor is holding the property as an owner would. This could be seen as synonymous with the hostility requirement, but not all jurisdictions treat the concept this way. The Powell treatise states that the predominant view in the United States is that good faith is not required for adverse possession, 16 POWELL § 91.01[2], but as you may have already noticed in the *Tieu* case above, intent often matters.

Cahill v. Morrow

11 A.3d 82 (R.I. 2011)

INDEGLIA, J.

The property in dispute is located on Gooseberry Road in the Snug Harbor section of South Kingstown, Rhode Island. Identified as lot 19 on assessor's plat 88-1, the land is sandwiched between lot 20, currently owned by Cahill, and lot 18, formerly coowned by members of the Morrow family. Morrow is the record owner of the subject property, lot 19.

In 1969, Morrow's husband, George Morrow, purchased lot 19, and the same year George and his brothers jointly purchased lot 18. At the time of lot 19's purchase, it was largely undeveloped, marked only by a preexisting clothesline, grass, and trees. Since that time, the Morrows have not improved or maintained lot 19, but have paid all property taxes assessed to it. As such, instead of vacationing on their lot 19, the Morrows annually spent two weeks in the summer at the cottages on the adjacent lot 18. During these vacations, the Morrow children and their cousins played on lot 19's grassy area. Around 1985, the Morrows ceased summering on Gooseberry Road,[3] but continued to return at least once a year to view the lot. Morrow stopped visiting lot 19 in October 2002, after her husband became ill, and she did not return again until July 2006.

In 1971, two years after George Morrow purchased lot 19, Cahill's

[3] Which is not the same thing as "color of title," as discussed below.

[3]In 1991, George Morrow and his joint-owner brothers sold lot 18.

mother bought the land and house designated as lot 20 as a summer residence. Between 1971 and 1975, Cahill and her brother did some work on lot 19. They occasionally cut the grass, placed furniture, and planted trees and flowers on it.

Cahill's mother passed away in 1975, and in 1977, after purchasing her siblings' shares, Cahill became the sole record owner of the lot 20 property. Once she became lot 20's owner, Cahill began living in the house year-round. From that time through 1991, she and her boyfriend, James M. Cronin, testified that they continued to mow lot 19's grass on occasion. In addition, she hung clothing on the clothesline, attached flags to the clothesline pole, used the picnic table, positioned a bird bath and feeder, and planted more flowers and trees. Cahill placed Adirondack chairs on lot 19 and eventually replaced the clothesline and picnic table. In 1987, Cahill held the first annual "cousins' party" allowing her relatives free rein with respect to her property and lot 19 for playing, sitting, and car parking. She also entertained friends and family on lot 19 during other summer days. Mary Frances McGinn, Cahill's cousin, likewise recalled that lot 19 was occupied by Cahill kindred during various family functions throughout this time period. Cahill admitted that she never objected to neighborhood children using lot 19, however.

During the period of 1991 through 1997, Cahill testified that she planted more flowers and trees, in addition to cutting the grass occasionally. Cahill also stored her gas grill and yard furniture on the lot and had her brother stack lobster pots for decorative purposes. In 1991 or 1992, she began hosting the annual "Cane Berry Blossom Festival," another outdoor event that used both her lot and lot 19 as the party venue. Like the other gatherings, the festival always took place on a day during a warm-weather month. In 1997 or 1998, she installed a wooden border around the flower beds.

On July 22, 1997, Cahill wrote to George Morrow expressing an interest in obtaining title to lot 19. In the 1997 letter, Cahill stated: "I am interested in learning if your narrow strip of property is available for sale. If so, I would be interested in discussing purchasing it from you." Cahill continued: "If there is a possibility that you would like to sell it, could you please either call me or send me a note?" Cahill did not receive a response.

In the "late 1990s," though Cahill is unclear whether this occurred before or after the 1997 letter, a nearby marina sought permission to construct and elevate its property. Cahill attended the related zoning board

hearings and expressed her concerns about increased flooding on lot 19 due to the marina elevation. She succeeded in having the marina developer grade part of lot 19 to alleviate flooding. Additionally, Cahill instituted her own trench and culvert drainage measures to divert water off of lot 19 and then reseeded the graded area. By Cahill's own admission, however, her trenching and reseeding work occurred in 1999 or 2000.

Subsequent to 2001, the new owners of lot 18[5] stored their boat on lot 19 and planted their own flowers and small trees on the property. In 2002, when the town (with approval from George Morrow) erected a stone wall and laid a sidewalk on the Gooseberry Road border of lot 19, Cahill loamed and planted grass on that portion of the lot. Also in 2002, Cahill asked Morrow's two sisters on separate occasions whether George Morrow would be interested in selling lot 19. The Morrows gave no response to her 2002 inquiries. In 2003, George Morrow passed away.

After making her third inquiry concerning the purchase of lot 19 in 2002, Cahill testified, she continued using the property in a fashion similar to her prior practice until December 2005, when she noticed heavy-machinery tire marks and test pits on the land. Thereafter, she retained counsel and authorized her attorney to send a letter on January 10, 2006 to Morrow indicating her adverse possession claim to a "20-foot strip of land on the northerly boundary" of lot 19. According to a survey of the disputed property, however, the width of lot 19 from the northerly boundary (adjacent to Cahill's property) to lot 18 is 49.97 feet and therefore, more than double what Cahill originally claimed in this letter. Nonetheless, on April 25, 2006, Cahill instituted a civil action requesting a declaration that based on her "uninterrupted, quiet, peaceful and actual seisin and possession" "for a period greater than 10 years," she was the true owner of lot 19 in its entirety. On July 25, 2007, the trial justice agreed that Cahill had proved adverse possession under G.L. 1956 § 34-7-1 and vested in her the fee simple title to lot 19. . . .

In Rhode Island, obtaining title by adverse possession requires actual, open, notorious, hostile, continuous, and exclusive use of property under a claim of right for at least a period of ten years.

Here, the trial justice recited the proper standard of proof for adverse possession and then found that Cahill had

[5]In approximately 2001, new owners purchased lot 18 from the Morrow brothers' successor.

> "met her burden of establishing all of the elements of an adverse possession claim to lot 19 by her and her mother's continuous and uninterrupted use of the parcel for well in excess of ten years. She maintained the property, planted and improved the property with shrubs, trees, and other plantings, sought drainage control measures, and used the property as if it were her own since 1971. She established that use not only by her own testimony, but as corroborated by other witnesses, photographs, and expert testimony relative to the interpretation of aerial photographs."

At trial, as here on appeal, Morrow argued that Cahill's offers to purchase the property invalidated her claim of right and the element of hostile possession. To dispose of that issue, the trial justice determined that "even assuming that [Cahill's] inquiry is circumstantial evidence of her knowledge that George Morrow, and subsequently Margaret [Morrow], were the legal title holders of [lot] 19, that does not destroy the viability of this adverse possession claim." The trial justice relied upon our opinion in *Tavares*, 814 A.2d at 350, to support his conclusion. Recalling that this Court stated in *Tavares* that "even when the claimants know they are nothing more than black-hearted trespassers, they can still adversely possess the property in question under a claim [of] right to do so if they use it openly, notoriously, and in a manner that is adverse to the true owner's rights for the requisite ten-year period," the trial justice found that Cahill's outward acknowledgement of Morrow's record title did not alone "negate her claim of right." He further found that "even if somehow the expression of interest in purchasing lot 19, made initially in 1997, stopped the running of the ten[-]year period under . . . § 34-7-1, the evidence was overwhelming that [Cahill] and her predecessor in title had commenced the requisite ten-year period beginning in 1971."

C.

On appeal, Morrow challenges the trial justice's legal conclusion that Cahill's offers to purchase lot 19 did not extinguish her claim of right, hostile possession, and ultimately, the vesting of her title by adverse possession. Morrow also contends that the trial justice erred in finding that Cahill's testimonial and demonstrative evidence was sufficient to prove adverse possession under the clear and convincing burden of proof stan-

dard. We agree that as a matter of law the trial justice failed to consider the impact of Cahill's offers to purchase on the prior twenty-six years of her lot 19 use. As a result, we hold that this failure also affects his factual determinations.

1. 1997 Offer-to-Purchase Letter

In *Tavares*, this Court explained that "requir[ing] adverse possession under a claim of right is the same as requiring hostility, in that both terms simply indicate that the claimant is holding the property with an intent that is adverse to the interests of the true owner." *Tavares*, 814 A.2d at 351 (quoting 16 Powell on Real Property, § 91.05[1] at 91-28 (2000)). "Thus, [we said] a claim of right may be proven through evidence of open, visible acts or declarations, accompanied by use of the property in an objectively observable manner that is inconsistent with the rights of the record owner." Here, the first issue on appeal is how an offer to purchase has an impact on these elements. . . .

. . . . [I]n *Tavares*, 814 A.2d at 351, with regard to "establishing hostility and possession under a claim of right," we explained that "the pertinent inquiry centers on the claimants' *objective manifestations* of adverse use rather than on the claimants' *knowledge* that they lacked colorable legal title." (Emphases added.) Essentially, *Tavares* turned on the difference between the adverse possession claimant's "knowledge" regarding the owner's title and his "objective manifestations" thereof. In that case, the adverse-possession claimant surveyed his land and discovered "that he did not hold title to the parcels in question." After such enlightenment, however, the claimant objectively manifested his claim of ownership to the parcels by "posting no-trespass signs, constructing stone walls, improving drainage, and wood cutting." This Court explained that simply having knowledge that he was not the title owner of the parcels was not enough to destroy his claim of right given his objective, adverse manifestations otherwise. In fact, we went so far as to state that "even when claimants know that they are nothing more than black-hearted trespassers, they can still adversely possess the property in question under a claim of right to do so if they use it openly, notoriously, and in a manner that is adverse to the true owner's rights for the requisite ten-year period." This statement is legally correct considering that adverse possession does not require the claimant to make "a good faith mistake that he or she had legal title to the

land." 16 Powell on Real Property § 91.05[2] at 91-23. However, to the extent that *Tavares*'s reference to "black-hearted trespassers" suggests that this Court endorses an invade-and-conquer mentality in modern property law, we dutifully excise that sentiment from our jurisprudence.

In the case before this Court, Cahill went beyond mere knowledge that she was not the record owner by sending the offer-to-purchase letter. As distinguished from the *Tavares* claimant who did not communicate his survey findings with anyone, Cahill's letter objectively declared the superiority of George Morrow's title to the record owner himself. *See also* Shanks v. Collins, 1989 OK 115, 782 P.2d 1352, 1355 (Okla. 1989) ("A recognition by an adverse possessor that legal title lies in another serves to break the essential element of continuity of possession.").

In the face of this precedent, Cahill contends that the trial justice accurately applied the law by finding that an offer to purchase does not automatically negate a claim of right in the property. While we agree that this proposition is correct with respect to offers made in an effort to make peace in an ongoing dispute, we disagree that this proposition applies in situations, as here, where no preexisting ownership dispute is evident. . . . Her offer was not an olive branch meant to put an end to pending litigation with the Morrows. Rather, it was a clear declaration that Cahill "wanted title to the property" from the record owner. By doing so, she necessarily acknowledged that her interest in lot 19 was subservient to George Morrow's. . . .

Accordingly, the trial justice erred by considering any incidents of ownership exhibited by Cahill after the 1997 letter to George Morrow interrupted her claim. . . .

2. The Impact of Cahill's Offer to Purchase on her Pre-1997 Adverse-Possession Claim

Furthermore, we also conclude that the trial justice should not have assumed that even if Cahill's "inquiry is circumstantial evidence of her knowledge that George Morrow, and subsequently [Morrow], were the legal title holders of [lot] 19, that does not destroy the viability of this adverse possession claim." We agree that an offer to purchase does not automatically invalidate a claim already vested by statute, but we nonetheless hold that the objective manifestations that another has superior title, made after the statutory period and not made to settle an ongoing dispute, are

poignantly relevant to the ultimate determination of claim of right and hostile possession during the statutory period. . . .

3. Questions of Fact Remain

Despite the significant deference afforded to the trial justice's findings of fact, such findings are not unassailable. Here, we find clear error in the trial justice's conclusion that "even if somehow the expression of interest in purchasing [lot] 19, made initially in 1997, stopped the running of the ten[-]year period . . . the evidence was overwhelming that [Cahill] and her predecessor in title had commenced the requisite ten-year period beginning in 1971." Given our opinion that some of Cahill's lot 19 activities cannot be considered because of the time frame of their occurrence, we disagree that the trial record can be classified as presenting "overwhelming" evidence of adverse possession.

. . . . On remand, the trial justice is directed to limit his consideration to pre-1997 events and make specific determinations whether Cahill's intermittent flower and tree planting, flag flying, clothesline replacing, lawn chair and beach-paraphernalia storing, and annual party hosting are adequate. Furthermore, given our ruling today, the trial court must evaluate the nature of Cahill's and her predecessor's twenty-six-year acts of possession in the harsh light of the fact that Cahill openly manifested the existence of George Morrow's superior title on three occasions. . . .

Flaherty, J., dissenting.

. . . . Simply put, I do not agree that the correspondence between plaintiff and defendant in which plaintiff offers to purchase defendant's interest in lot 19 is the smoking gun the majority perceives it to be. As is clear from a fair reading of plaintiff's testimony, she believed that she owned the property as a result of her longtime use of and dominion over it. But her testimony also demonstrates that she drew a crisp distinction between whatever ownership rights she may have acquired and record title, which she recognized continued to reside in the Morrows . . . . Even if that letter were as significant as the majority contends, there is no doubt that it was sent after the statutory period had run. It is beyond dispute that plaintiff's correspondence could not serve to divest her of title if she had already acquired it by adverse possession . . . . There certainly was credible evidence for the trial justice to find that plaintiff had used the property as her own for well over twenty years before she corresponded with Mr. Morrow in

1997. . . .

Notes and Questions

2.11. **Doctrine v. practice**. Richard Helmholz has argued that though adverse possession doctrine generally does not require the adverse possessor to plead good faith, judicial practice is to disfavor those who know they are trespassing compared to those acting out of a good faith mistake. Richard H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 332 (1983). Is *Cahill* an example of this dynamic?

In recent decades, state legislatures have increasingly demanded good faith on the part of the possessor (the Oregon statute in *Tieu* requiring honest belief in ownership, for example, was passed in 1989). *See* 16 POWELL ON REAL PROPERTY § 91.05 (collecting examples).

2.12. Should good faith be required? And if so, what is good faith? Is it an honest belief about the facts on the ground (e.g., whether the fence builder is correct that his fence is on the right side of the boundary line)? Or is it an attitude about one's potential adversary (a willingness to move the fence if wrong)? Either view creates evidentiary difficulties.

Even when good faith is not part of the analysis as a formal matter, Helmholz argues that judges and juries often cannot help but "prefer the claims of an honest man over those of a dishonest man." Helmholz, *supra*, at 358. Might this be a satisfactory middle ground? Are there advantages to having courts officially ignore intent while applying a de facto bar to the bad faith possessor when there is evidence of dishonesty? Or is it problematic to have legal practice depart from official doctrine?

Perhaps another way to reconcile the benefits of adverse possession with the distaste for bad faith possessors would be to allow dishonest possessors to keep the land, but pay for the privilege. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1126 (1984) (suggesting "requiring indemnification only in those cases where the [true owner] can show that the [adverse possessor] acted in bad faith."). As Merrill notes, a California appellate court required such payment in a case concerning a prescriptive easement (which is similar to adverse possession except that it concerns the *right to use* someone else's land rather than its ownership), only to be overturned by the state supreme court. *Id.* (discussing *Warsaw v. Chicago Metallic Ceilings, Inc.*, 676 P.2d 584 (Cal. 1984)). The proposal may remind you of the *Manillo* case discussed above. How does it dif-

fer?

2.13. A minority of states, as *Dombkowski* indicates, require adverse possessors to prove their subjective intent to take the land without regard to the existence of other ownership interests. This is sometimes referred to as the "aggressive trespass" standard: "I thought I did not own it [and intended to take it]." Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 746 (1986) (brackets in the original). Is there a reason to prefer it? Lee Anne Fennell argues for a knowing trespass requirement that requires the adverse possessor to document her knowledge:

> [A] documented knowledge requirement facilitates rather than punishes efforts at consensual dealmaking. One of the most definitive ways of establishing that a possessor knew she was not the owner of the disputed land is to produce evidence of her purchase offer to the record owner. Currently, such an offer often destroys one's chance at adverse possession because it shows one is acting in bad faith if one later trespasses; one does far better to remain in ignorance (or pretend to) and never broach the matter with the record owner. Under my proposal, such offers would go from being fatal in a later adverse possession action to being practically a prerequisite. As a result, it would be much more likely that any resulting adverse possession claim will occur only where a market transaction is unavailable. A documented knowledge requirement would also reduce litigation costs and increase the certainty of land holdings. Actions or records establishing that the trespass was known at the time of entry, necessary if the possessor ever wishes to gain title under my approach, would serve to streamline trespass actions that occur before the statute has run. Moreover, an approach that refuses to reward innocent mistakes would be expected to reduce mistake-making.

Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1041-44 (2006) (footnotes omitted). One's position on these matters may depend on which scenarios one believes are most common in adverse possession cases and adjust the state of mind required to include or exclude them accordingly. Should the state of mind required depend on the context? A state might, for example, require good faith for encroachments, but bad faith or color of title if the possessor seeks to own the parcel as a whole. Is this a good idea?

2.3 Finer Points of Adverse Possession Law

Actual and Continuous Possession. Adverse possessors are not required to live on the occupied property, what matters is acting like a true owner would. That use, however, must be continuous, not sporadic. *Compare, e.g.*, *Lobdell v. Smith*, 690 N.Y.S.2d 171, 173 (N.Y. App. Div. 3d Dep't 1999) (although undeveloped land "does not require the same quality of possession as residential or arable land," no adverse possession where claimant "seldom visited the parcel except to occasionally pick berries or hunt small game"), *with Nome 2000 v. Fagerstrom*, 799 P.2d 304, 310 (Alaska 1990) (claimants of a rural parcel suitable for recreational and subsistence activities "visited the property several times during the warmer season to fish, gather berries, clean the premises, and play. . . . That others were free to pick berries and fish is consistent with the conduct of a hospitable landowner, and undermines neither the continuity nor exclusivity of their possession."). Regular use of a summer home may constitute continuous use. *See, e.g.*, *Nechow v. Brown*, 120 N.W.2d 251, 252 (Mich. 1963).

Color of title. Claim of title, an intent to use land as one's own, is distinct from color of title, which describes taking possession under a defective instrument (like a deed based on a mistaken land survey). States often apply more lenient adverse possession standards to claims made under color of title. *Compare, e.g.*, FL. ST. § 95.16, *with id.* § 95.18. Why do you think that is?

Entry under color of title may also affect the scope of the land treated as occupied by the adverse possessor. 2 C.J.S. *Adverse Possession* § 252 ("Adverse possession under color of title ordinarily extends to the whole tract described in the instrument constituting color of title."). *But see Wentworth v. Forne*, 137 So. 2d 166, 169 (Miss. 1962) ("In brief, when the land involved is, in part, occupied by the real owner, the adverse possession, even when this possessor has color of title, is confined to the area actually possessed.").

Adverse possession by and against the government. Although government agencies may acquire title by adverse possession, the general rule is that public property held for public use is not subject to the doctrine. Why do you think that is?

Disabilities. The title owner of land may be subject to a disability (e.g., status as a minor, mental incapacity) that may extend the time to bring an ejectment action against an unlawful occupant. States generally spell out such exceptions by statute.

A Moving Target. States vary their adverse possession rules to take into account a variety of factors (e.g., claim under color of title, payment of property taxes,

FLORIDA
DEPARTMENT OF REVENUE

RETURN OF REAL PROPERTY IN ATTEMPT TO ESTABLISH ADVERSE POSSESSION WITHOUT COLOR OF TITLE
Section 95.18, Florida Statutes

DR-452
R. 07/13
Provisional
Effective 01/14

THIS RETURN DOES NOT CREATE ANY INTEREST ENFORCEABLE BY LAW IN THE DESCRIBED PROPERTY

For residential structures, a person who occupies or attempts to occupy a residential structure solely by claim of adverse possession prior to making a return, commits trespass under s. 810.08, F.S. A person who occupies or attempts to occupy a residential structure solely by claim of adverse possession and offers the property for lease to another commits theft under s. 812.014, F.S.

COMPLETED BY ADVERSE POSSESSION CLAIMANT

The person claiming adverse possession (claimant) must file this return with the property appraiser in the county where the property is located as required in s. 95.18(1), F.S.

Name of claimant(s)			
Mailing address		Phone	
		Parcel ID, if available	
		☐ the property claimed is only a portion of this parcel ID	
Date of filing		Date claimant entered into possession of property	

Legal description of property claimed — Fields will expand online, or you may add pages.
Must be full and complete. If the property appraiser cannot identify the property from the legal description, you may be required to obtain a survey.

This property has been: (Check all that apply.)	☐ protected by substantial enclosure	☐ cultivated, maintained, or improved in a usual manner

Describe your use of the property, in detail below.

Dates of payments of any outstanding taxes or liens levied by the state, county or municipality:

Under penalty of perjury, I declare that I have read the foregoing return and that the facts stated in it are true and correct. I further acknowledge that the return does not create any interest enforceable by law in the described property.

Signature of claimant(s) _____

_____

State of Florida
County of _____
This instrument was sworn to and subscribed before me on _____ by _____,
personally known to me or who produced _____ as identification.

_____
Signature and seal, notary public

COMPLETED BY PROPERTY APPRAISER

Received in the office of the property appraiser of _____ County, Florida, on _____.
A signed copy of this return has been delivered to the claimant(s). A copy will be sent to the owner of record.

_____ _____
Signature, property appraiser or deputy — Date

TO THE OWNER OF RECORD

A tax payment made by the owner of record before April 1 the year after the taxes were assessed will have priority over a payment made by the claimant. An adverse possession claim will be removed if the owner of record or tax collector furnishes a receipt to the property appraiser showing payment of taxes by the owner of record during the period of the claim. (S. 95.18, F.S.)

This return is a public record and may be inspected by any person under s. 119.01, F.S.

Figure 2.1: Florida's adverse possession form.

enclosure or cultivation of land, etc.). These factors may change with the times. In the aftermath of the financial crisis, for example, reports of trespassers occupying foreclosed, vacant properties with the goal of acquiring title via adverse possession prompted renewed attention to the doctrine. Florida enacted legislation that requires those seeking adverse possession without color of title to pay all outstanding taxes on the property within one year of taking possession and disclose in writing the possessor's identity, date of possession, and a description of the property sufficient to enable the identification of the property in the public records. Local officials are then required to make efforts to contact the record owner of the property. FL. ST. § 95.18. The form created under the statute is reprinted in Figure 2.1. Are measures like these useful? Consider the problem of "zombie foreclosures." A property may be vacant because the owners received a notice of foreclosure and left. Sometimes the lenders never complete the foreclosure process, perhaps to avoid the costs that come with ownership of the property. Title therefore remains with the out-of-possession owners, who remain responsible for taxes, association fees, and the like. What outcome should adverse possession law seek to promote in such cases?

2.4 Adversely Possessing Trademarks?

Freecycle Network v. Oey

505 F.3d 898 (9th Cir. 2007)

HAWKINS, Circuit Judge:

Tim Oey appeals a preliminary injunction preventing him from making any comments that could be construed as to disparage upon The Freecycle Network's possible trademark and logo and requiring that he remove all postings from the Internet and any other public forums that he has previously made that disparage The Freecycle Network's possible trademark and logo. We have jurisdiction under 28 U.S.C. § 1291 and, for the following reasons, vacate the injunction and remand.

I.

The Freecycle Network ("TFN") is a nonprofit Arizona corporation "dedicated to encouraging and coordinating the reusing, recycling, and gifting of goods." Through its website, http://www.freecycle.org, TFN coordinates the efforts of over 3,700 Freecycle groups worldwide. Via the local

groups' webpages, individuals can post goods they no longer want. If another member wants the item offered, an exchange is arranged between the parties and the item thus avoids the landfill.

Although TFN claims to have consistently used the marks FREECYCLE and THE FREECYCLE NETWORK, and "The Freecycle Network" logo since May 2003 to refer to TFN, it also admits that it initially used the term "freecycle" and its various derivations (e.g., freecycling, freecycler) to refer more generally to the act of recycling goods for free via the Internet. In 2004, based on the advice of then-member Oey, TFN decided to more actively police its use of the term "freecycle" and to formally pursue trademark protection for it, filing a trademark registration application on August 27, 2004. Shortly thereafter, TFN instituted a strict usage policy, drafted by Oey, preventing use of the term "freecycle" in any sense other than to refer to TFN or TFN's services. On January 17, 2006, TFN's proposed mark was published for opposition in the Official Gazette. An opposition was filed the next day and the mark currently remains unregistered.

A member of TFN since February 2004 and active in the corporation's early development, Oey initially supported TFN's claim to the FREECYCLE mark. Experiencing a change of heart and convinced that the term should remain in the public domain, Oey later urged TFN to abandon its efforts to secure the mark, conveying his feelings in an August 8, 2005, email to fellow TFN group moderators.[3] In the following weeks, Oey made various statements on the Internet that TFN lacked trademark rights in "freecycle" because it was a generic term, and he encouraged others to use the term in its generic sense and to write letters to the United States Patent and Trademark Office ("PTO") opposing TFN's pending registration.

Not surprisingly, TFN took issue with Oey's views and, on September 16, 2005, asked him to sever ties with the company. . . .

[The Ninth Circuit held that Oey's actions were not likely to constitute trademark infringement.]

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[3]In this email, Oey urged abandonment of TFN's trademark pursuit, contending that forcing the term "freecycle" into the public domain "fits well with a 'viral' marketing approach to freecycle . . . which will lead back to [TFN] . . . [and] generate lots of goodwill." He also recommended that TFN "maintain the trademark on the full name 'The Freecycle Network' . . . [and] take credit for birthing[the] freecycle [concept]."

C) Genericide

Although we do not reach the question of the validity of TFN's claimed mark, the crux of TFN's complaint is that Oey should be prevented from using (or encouraging the use of) TFN's claimed mark FREECYCLE in its generic sense. However, TFN's asserted mark—like all marks—is always at risk of becoming generic and thereby losing its ability to identify the trademark holder's goods or services. *See, e.g.*, *Mattel, Inc.,* 296 F.3d at 900 ("Some trademarks enter our public discourse and become an integral part of our vocabulary."); 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 12:1 (2007) (hereinafter "McCarthy"). Where the majority of the relevant public appropriates a trademark term as the name of a product (or service), the mark is a victim of "genericide" and trademark rights generally cease. McCarthy § 12:1.

Such genericide can occur "as a result of a trademark owner's failure to police the mark, resulting in widespread usage by competitors leading to a perception of genericness among the public, who sees many sellers using the same term." *Id.* (footnotes omitted). Alternatively, "a term intended by the seller to be a trademark for a new product[can be] taken by the public as a generic name because customers have no other word to use to name this new thing." *Id.* Genericide has spelled the end for countless formerly trademarked terms, including "aspirin," "escalator," "brassiere," and "cellophane." *See id.* § 12:18 (list of terms held to be generic).

"Although there is a social cost when a mark becomes generic—the trademark owner has to invest in a new trademark to identify his brand—there is also a social benefit, namely the addition to ordinary language." *Ty Inc. v. Perryman*, 306 F.3d 509, 514 (7th Cir.2002). Furthermore, when a trademark becomes generic, "it reduces the cost of communication by making it cheaper for competitors to inform consumers that they are selling the same kind of product" or providing the same kind of service. McCarthy § 12:2; *see also Mattel, Inc.*, 296 F.3d at 900 ("Trademarks often fill in gaps in our vocabulary and add a contemporary flavor to our expressions. Once imbued with such expressive value, the trademark becomes a word in our language and assumes a role outside the bounds of trademark law.").

Of course, trademark owners are free (and perhaps wise) to take action to prevent their marks from becoming generic and entering the public domain—e.g., through a public relations campaign or active policing of the mark's use. The Lanham Act itself, however, contains no provision pre-

venting the use of a trademarked term in its generic sense. *Cf. Ty Inc.*, 306 F.3d at 513-14 (rejecting an attempt to extend the Lanham Act's antidilution provisions "to enjoin uses of their mark that, while not confusing, threaten to render the mark generic").

Nor does the Act prevent an individual from expressing an opinion that a mark should be considered generic or from encouraging others to use the mark in its generic sense. Rather, the use of a mark in its generic sense is actionable under the Lanham Act only when such use also satisfies the elements of a specified cause of action—e.g., infringement, false designation of origin, false advertising, or dilution. TFN's mere disagreement with Oey's opinion and frustration with his activities cannot render Oey liable under the Lanham Act.

Notes and Questions

2.14. How many genericized trademarks can you think of? Why don't you google it? Maybe you can make a powerpoint of the ones you find, even with some cleverly photoshopped graphics. If you do, zoom me so I can see it, or you can write a few examples onto post-its and rollerblade over to my office with them.

2.15. The author of these notes is unaware of any other property textbook that identifies trademark genericide as related to adverse possession, although the idea is not unknown. Laura A. Heymann, *The Grammar of Trademarks*, 14 Lewis & Clark L. Rev. 1313, 1318 (2010); *cf.* Jake Linford, *Trademark Owner as Adverse Possessor: Productive Use and Property Acquisition*, 63 Case W. L. Rev. 703 (2013). How do the two doctrines compare? Look at the list of elements for adverse possession, and see if you can find an analogue (or lack thereof) for trademarks.

2.16. Quoting Judge Posner's opinion in *Ty Inc. v. Perryman*, 306 F.3d 509 (7th Cir. 2002), Judge Hawkins observes that genericide has both a "social cost" and "a social benefit, namely the addition to ordinary language." Can you find a "social benefit" in adverse possession of real property? Which doctrine do you find more socially justified, and why?

2.17. The risk that a trademark will become generic leads some trademark holders to campaign vigorously to protect their trademarks. Some, like Xerox, run advertisements like the one shown in Figure 2.2. Others litigate even the most minor uses of their trademarks, in order to show that they are actively defending their rights—or, perhaps, using the risk of genericide as a pretext for vigorous enforcement. Is this a desirable outcome? Would it be better if it were harder for trademarks

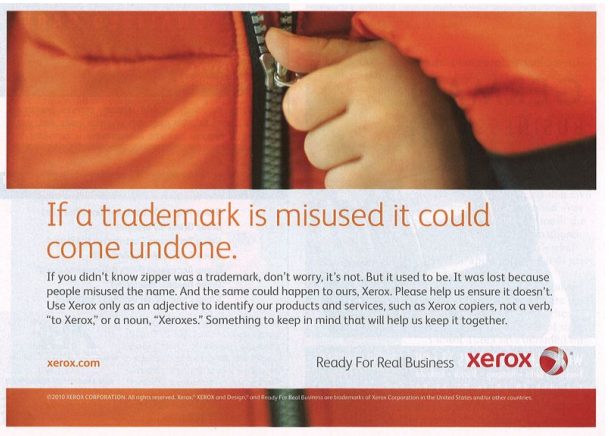

Figure 2.2: An advertisement by Xerox, run in the ABA Journal. Via Eric E. Johnson, *Please Help, if You Can*, PRAWFSBLAWG (June 29, 2010), *link*.

to become genericized?

Part II

Transfers

Chapter 3

Formalities

Arguably the most quintessential feature of property is **alienability**: the ability of ownership to change hands. Most obviously, property can be sold. A property owner can also dispose of property by donative transfer: giving it away as a gift, or by leaving the property to friends or relatives, either through a written will or in accordance with state intestacy laws.

Just because a property owner has a right to alienate, however, does not mean that the property owner's wishes control. An effective transfer of property rights must follow rules created by law. There are only certain ways people can rearrange property relations. Some rearrangements happen even if the people involved don't want them, and some don't happen even if the people involved do want them. Knowing the rules is a way to understand which transfers work and why.

The next two chapters will explore the rules that govern voluntary transfers of property. This chapter will consider several types of **formalities**, namely technical and procedural requirements that must be complied with for a property transfer to be effective. The next chapter will consider ways in which a buyer may question, or even invalidate, a property transfer.

Consider why these rules are necessary—why shouldn't the property owner's intentions always control? One way of answering this question is by considering the interests at stake:

- Buyers, who perhaps deserve protection from shady sellers who misrepresent the property being sold—or who don't even own the property at all.
- Third parties, who might benefit from public records or evidence of transactions in property.

- Sellers, who might be deceived into unwittingly selling or giving away their property.

As you read, pay close attention to the type of transfer (sale, gift, will) and the type of property involved (real, personal). The problems that courts and lawmakers are grappling with are often universal and cross-cutting, but the legal doctrines are specific: Rules about gifts do not necessarily apply to wills, and rules for recordation of real estate titles do not necessarily apply to personal property, for example. When you observe a discrepancy, ask yourself whether there is a good justification for the difference.

3.1 Deeds

In 1250, to transfer ownership of land, the grantor and grantee would physically go to the land. The grantor would physically (or perhaps metaphysically) put the grantee in possession by handing over a clod of dirt. The grantee would swear homage to the grantor, and the grantor would swear to defend the grantee's title. This was a public ceremony, performed in front of witnesses who could later be called on to recall what had happened if necessary. In contrast, written conveyances—called "charters"—were treated with skepticism; they were considered an inferior form of evidence because of the risk of forgery.

In the seven and a half centuries since, this attitude has completely flipped. Now, land transactions are paper transactions: the Statute of Frauds almost always requires a written conveyance—now called a "deed"—to transfer an interest in real property. Transfers by operation of law (primarily through adverse possession and intestacy) are very much the exception. In addition, land transactions are influenced by the common law's attitude that land is of distinctive importance, so that parties dealing with it need especial clarity about their rights, and by the fact that land transactions are often high-stakes, with hundreds of thousands, millions, or sometimes even billions of dollars at issue. This section focuses on the written instruments at the heart of land transactions. It considers when a deed is required, when a deed is effective, how deeds are interpreted, and what they promise about the property and the interest being conveyed.

Indiana Code

§ 32-21-1-1—Requirement of written agreement; agreements or promises covered

(a) This section does not apply to a lease for a term of not more than three (3) years.

(b) A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party's authorized agent: . . .

(4) An action involving any contract for the sale of land.

§32-21-1-13—Conveyance of land; written deed required

Except for a bona fide lease for a term not exceeding three (3) years, a conveyance of land or of any interest in land shall be made by a deed that is:

(1) written; and

(2) subscribed, sealed, and acknowledged by the grantor . . . or by the grantor's attorney.

Notes and Questions

3.1. What is the difference between these two sections? Why are both necessary?

3.2. Consider the following sequence of text messages:

- **A**: still want apt 4C @ 321 sesame st?
- **B**: $450,000 ok?
- **A**: deal. :-) -A
- **B**: yay! kthx bai

Can either of the parties treat this as an enforceable contract for the sale of land?

Loughran v. Kummer

146 A. 534 (Pa. 1929)

KEPHART, J.

Appellee, a bachelor 67 years of age, conveyed, for $1, land in Pittsburgh to Mrs. Kummer, appellant, who was one of his tenants. A bill was filed to set aside this deed; the grounds laid were confidential relationship, undue influence, and impaired mentality. Inasmuch as the facts must again be considered, we will mention only such as raise the legal question on which the case was decided; we venture no opinion on the other facts.

The court below found from the evidence that a deed absolute on its face had been executed, acknowledged, and delivered to appellant by appellee, on condition that it should not be recorded until the latter's death; that undoubtedly in his mind this meant that the deed was not to take effect until after his death; and that he, demanding the return of the deed within a very few days after the delivery, thus revoked it and with that revocation revoked the gift. Appellant deceived appellee when she stated the deed had been destroyed. The excuse given was appellee was worried and she wanted to ease his mind by making him believe that it had been destroyed. . . .

The question we are asked to consider is whether a deed absolute on its face, acknowledged, executed, and delivered under circumstances as here indicated, vested such title in the grantee as could be revoked for the above reasons. It amounts in substance to this, that the grantor said the deed should not be recorded until after his death, and the grantee in accepting the deed took it on that condition. The evidence on which this finding was based was all oral, and the scrivener and defendant denied any such condition was imposed when the deed was delivered. All control over the deed was relinquished when it was handed appellant. The presumption must be that at that time it was the intention to pass title. "The general principle of law is that the formal act of signing, sealing and delivering is the consummation of the deed, and it lies with the grantor to prove clearly that appearances are not consistent with truth. The presumption stands against him, and the burden is on him to destroy it by clear and positive proof that there was no delivery and that it was so understood at the time. . . . Where we have, as here, a deed, absolute and complete in itself, attacked as being in fact otherwise intended, . . . there is a further presumption that the title is in conformity with the deed, and it should not be dislodged except by

clear, precise, convincing and satisfactory evidence to the contrary." *Cragin's Estate*, 117 A. 445 (Pa. 1922).

The gift here was executed, and that defendant was not to record it was not of the slightest consequence when viewed as against these major actions, delivery and passing of title. It was merely a promise the keeping of which lay in good faith, the breach of which entailed no legal consequences. To have effected the grantor's purpose, the intervention of a third party was absolutely essential. There are circumstances where acknowledgment, together with physical possession of the deed in the grantee, does not conclusively establish an intention to deliver, and the presumption arising from signing, sealing, and acknowledging, accompanied by manual possession of the deed by the grantee, is not irrebuttable, but this presumption can be overcome only by evidence that no delivery was in fact intended and none made. Such evidence is not present in this case. Here the grantor by his own testimony intended the grantee to get the land. The only question was when it was to take effect.

Here is one of the instances in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object. Therefore the legal effect of such delivery is not altered by the fact that both parties suppose the deed will not take effect until recorded, and that it may be revoked at any time before record, or by contemporaneous agreements looking to the reconveyance of the property to the grantor or to the third party upon the happening of certain contingent events or the nonperformance of certain conditions.

The reason for these rules is obvious. It is quite possible to prove in most deliveries that some parol injunction was attached to the formal delivery of the deed; if they are to be given the effect her[e] contended, there would be no safety in accepting a deed under most circumstances. It opens the door to the fabrication of evidence that would inevitably be appalling and go far toward violating the security of written instruments. We have so held in matters of less import than the conveyance of land. The rule must not be relaxed as to realty. Such conveyances are vastly more important, as they involve instruments of title and ownership which are used as a means of extending credit. Title to land ought not to be exposed to the peril of successful attack except where the right is clear and undoubted, and whatever may be our desire to recognize circumstances argued as unfortunate,

we cannot go to the extent of overthrowing principles of law governing conveyances of real estate that have stood the test of ages.

In *Cragin's Estate*, supra, the deeds were in a tin box for more than 23 years in an envelope indorsed with the words: "To be recorded upon Mrs. Cragin's death, if before me." The deed was in grantee's possession, and it was urged the delivery was conditional. We said that indorsement may have been placed on the envelope for other reasons than to defer the transfer of title. In the present case it was evident appellee did not want his relatives to learn of the conveyance. Recording would be necessary to pass a title examiner's inspection, but nonrecording did not prevent the title from passing. It has been quite generally held that an oral understanding on the delivery of a deed that it should not be recorded will not affect the absolute character of the conveyance if free of other conditions. An agreement to deliver a deed in escrow to the person in whose favor it is made, and who is likewise a party to it, will not make the delivery conditional. If delivered under such an agreement, it will be deemed an absolute delivery and a consummation of the execution of the deed. . . .

Notes and Questions

3.3. The old phrase is that a deed was effective when it was "signed, sealed, and delivered." But the seal is obsolete, so the principal elements are that it be a sufficient writing (discussed above), that it be signed, and that it be delivered. Delivery of deeds has much in common with delivery in the law of gifts; it too can be a subtle question. In a famous passage of his landmark 17th-century treatise, *Institutes of the Lawes of England*, Edward Coke wrote, "As a deed may be delivered to a party without words, so may a deed be delivered by words without any act of delivery." That sounds paradoxical, but Coke continued, "as if the writing sealed lies upon the table, and the [grantor] says to the [grantee], 'Go and take up that writing, it is sufficient for you;' or 'it will serve your turn;' or 'Take it as my deed;' or the like words; either is a sufficient delivery." Is that better?

3.4. In *Wiggill v. Cheney*, 597 P.2d 1351 (Utah 1979), Lillian Cheney executed a deed to Flora Cheney and put it in a safety deposit box in the names of Lillian Cheney and Francis E. Wiggill. Lillian told Francis that his name was on the box, that on her death he would be granted access to the box, and that "in that box is an envelope addressed to all those concerned. All you have to do is give them that envelope and that's all." On her death, he gained access to the box, took the deed, and gave it to

Flora. Delivery?

3.5. There are at least two ways to do delivery "right." One is to sign and hand over a deed at closing, when all of the necessary parties are in the same room and can execute all of the appropriate documents effectively simultaneously. Another is to use an escrow: a third party who receives custody of the signed deed along with instructions to deliver it to the grantee when appropriate events have taken place. What if the escrow agent disregards her instructions and hands over the deed early? Can a grantor who is concerned the transaction will fall through demand the deed back from the escrow agent?

3.6. *Loughran* is more complicated because the parties intended a conditional gift that would take effect at Loughran's death, rather than immediately. Grantors often try to put other kinds of conditions on transfers. In *Martinez v. Martinez*, 678 P.2d 1163 (N.M. 1984), Delfino and Eleanor Martinez gave their son Carlos and his wife Sennie a deed to a property in exchange for assuming a mortgage in it. Delfino and Eleanor instructed Carlos and Sennie to take the deed to the bank to be held in escrow until Carlos and Sennie had paid off the mortgage, but they recorded it first. Carlos and Sennie had marital difficulties and fell behind on the mortgage; eventually Delfino and Eleanor paid off the balance. Who owns the property?

3.7. The *Loughran* court says the parties "have not adopted the proper legal means of accomplishing their object." What does it mean? Is there anything they could have done differently that would avoided this mess?

3.2 Wills and Intestacy

Because property in the material world is probably not of much use after death, the law has rules for the disposal of property of the deceased. Generally, those rules seek to effect the desires and intentions of the now-deceased owner, either expressed in a written document called a **will** or according to statutory rules in the absence of a will.

The following is a brief summary of the concepts and terminology used in the law of wills and estates. It is not intended to be comprehensive; a more advanced law school course is required for that. But it should provide a general sense for the questions and issues that need to be dealt with in the process of managing property after death.

A **grant** or **conveyance** is a transfer of an interest in property. The person making the grant is the **grantor** (or **transferor**); the person receiving the grant is the **grantee** (or **transferee**). If the grant is made during the life of the grantor, it is said

to be an **inter vivos** conveyance (literally, "between the living"). If in a will, it is said to be a **testamentary** conveyance. A testamentary conveyance of real property is called a **devise**. A testamentary conveyance of personal property is called a **bequest** (or sometimes a **legacy**).

When a person dies, they will either have left a valid will or not. A person who dies with a valid will dies **testate**; one who dies without a valid will dies **intestate**. Either way, the dead person can be referred to as a **decedent**. If the decedent did leave a valid will, they may also be referred to as a **testator** if male, or a **testatrix** if female.

The assets that a decedent owned at her death are collectively referred to as the decedent's **estate**. An estate can sometimes take on the qualities of a legal person—it is not uncommon to say that a certain asset is owned by "the estate of O." The property rights of this fictional legal person are managed by an actual person whose title depends on whether the decedent left a will. The instructions in a will are carried out by an **executor** (if male) or **executrix** (if female), designated as such in the will itself. An intestate estate is disposed of by a court-appointed **administrator** (if male) or **administratrix** (if female).

The authority of an administrator or executor to dispose of the estate's assets is conferred by a **probate court**. When a valid will is filed with the probate court and deemed valid, the court will **admit the will to probate** (or **probate the will**), and will issue **letters testamentary** to the executor authorizing him to take possession of the estate's assets and dispose of them according to the will's instructions. If the decedent died intestate, the court will issue **letters of administration** to an administrator authorizing him to take possession of the estate's assets and dispose of them according to the laws of intestate succession.

If the decedent did leave a valid will, it will typically contain instructions for transferring assets to various identified people or entities. The parties receiving the bequests are referred to as the will's **beneficiaries**, **devisees** (for real property), or **legatees** (for personal property). When a decedent passes property by will he or she is said to have **devised** that property. A property interest that the decedent has the power to transfer by will is said to be **devisable**.

Sometimes a will fails to provide instructions for all the assets owned by the testator at death; in this case the unallocated assets are said to create a **partial intestacy**. When this happens, assets designated in the will are distributed according to the will's terms, while the estate's remaining assets are distributed according to the laws of intestate succession. In order to avoid partial intestacy, it is good practice to include a **residuary clause** in a will, disposing of all the assets of the decedent

not devised through specific bequests. Such unenumerated assets are referred to as the **residuary estate**.

If the decedent did not leave a valid will, her property will pass to her **heirs** (sometimes referred to as **heirs at law**). Heirs are those who are designated by law as successors to property that passes by intestate succession rather than by will. When heirs take such property, they are said to **inherit** it. A property interest that can pass by intestate succession is said to be **descendible**.

Note that until the decedent actually dies, we don't know who her heirs are; rights of inheritance are allocated only to relatives of the decedent who **survive** her—who are still alive when the decedent dies. Thus, until a property owner dies, her relatives have no legally enforceable rights in her property under the laws of intestate succession. It is sometimes said that such relatives have a mere **expectancy**, and they are sometimes referred to as **heirs apparent**.

Heirs under intestacy laws are drawn from various categories of relatives. In addition to spouses, there are **issue**: the direct descendants of the decedent (children, grandchildren, great-grandchildren, etc.); **ancestors** (parents, grandparents, great-grandparents, etc.); and **collaterals**: relatives who are not direct ancestors or descendants (siblings, aunts, uncles, nieces, nephews, cousins).

If a person dies without a will and without any heirs at law, any property in their estate **escheats** to the state, which becomes its owner.

Lon L. Fuller, *Consideration and Form*

41 Colum. L. Rev. 799 (1941)

§ 2. *The Evidentiary Function.*—The most obvious function of a legal formality is, to use Austin's words, that of providing "evidence of the existence and purport of the contract, in case of controversy." The need for evidentiary security may be satisfied in a variety of ways: by requiring a writing, or attestation, or the certification of a notary. It may even be satisfied, to some extent, by such a device as the Roman stipulatio, which compelled an oral spelling out of the promise in a manner sufficiently ceremonious to impress its terms on participants and possible bystanders.

§ 3. *The Cautionary Function.*—A formality may also perform a cautionary or deterrent function by acting as a check against inconsiderate action. The seal in its original form fulfilled this purpose remarkably well. The affixing and impressing of a wax wafer-symbol in the popular mind of legalism and weightiness-was an excellent device for inducing the circum-

spective frame of mind appropriate in one pledging his future. To a less extent any requirement of a writing, of course, serves the same purpose, as do requirements of attestation, notarization, etc.

§ 4. *The Channeling Function.*— . . . That a legal formality may perform a function not yet described can be shown by the seal. The seal not only insures a satisfactory memorial of the promise and induces deliberation in the making of it. It serves also to mark or signalize the enforceable promise; it furnishes a simple and external test of enforceability. . . . The thing which characterizes the law of contracts and conveyances is that in this field forms are deliberately used, and are intended to be so used, by the parties whose acts are to be judged by the law. To the business man who wishes to make his own or another's promise binding, the seal was at common law available as a device for the accomplishment of his objective. In this aspect form offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention.

John H. Langbein, *Substantial Compliance with the Wills Act*

88 HARV. L. REV. 489 (1975)

4. *The Protective Function.*—Courts have traditionally attributed to the Wills Act the object "of protecting the testator against imposition at the time of execution." The requirement that attestation be made in the presence of the testator is meant "to prevent the substitution of a surreptitious will." Another common protective requirement is the rule that the witnesses should be disinterested, hence not motivated to coerce or deceive the testator.

Stevens v. Casdorph

203 W. Va. 450 (1988)

PER CURIAM: . . .

On May 28, 1996, [Patricia Eileen Casdorph and Paul Douglas Casdorph] took Mr. Homer Haskell Miller to Shawnee Bank in Dunbar, West Virginia, so that he could execute his will. Once at the bank, Mr. Miller asked Debra Pauley, a bank employee and public notary, to witness the

execution of his will. After Mr. Miller signed the will, Ms. Pauley took the will to two other bank employees, Judith Waldron and Reba McGinn, for the purpose of having each of them sign the will as witnesses. Both Ms. Waldron and Ms. McGinn signed the will. However, Ms. Waldron and Ms. McGinn testified during their depositions that they did not actually see Mr. Miller place his signature on the will. Further, it is undisputed that Mr. Miller did not accompany Ms. Pauley to the separate work areas of Ms. Waldron and Ms. McGinn.

Mr. Miller died on July 28, 1996. The last will and testament of Mr. Miller, which named Mr. Paul Casdorph as executor, left the bulk of his estate to the Casdorphs. The Stevenses, nieces of Mr. Miller, filed the instant action to set aside the will. . . .[4]

The Stevenses' contention is simple. They argue that all evidence indicates that Mr. Miller's will was not properly executed. Therefore, the will should be voided. The procedural requirements at issue are contained in W.Va. Code § 41-1-3 (1997). The statute reads:

> No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, *the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, and of each other*, but no form of attestation shall be necessary. (Emphasis added.)

The relevant requirements of the above statute calls for a testator to sign his/her will or acknowledge such will in the presence of at least two witnesses at the same time, and such witnesses must sign the will in the presence of the testator and each other. In the instant proceeding the Stevenses assert, and the evidence supports, that Ms. McGinn and Ms. Waldron did not actually witness Mr. Miller signing his will. Mr. Miller made no acknowledgment of his signature on the will to either Ms. McGinn or Ms.

[4]As heirs, the Stevenses would be entitled to recover from Mr. Miller's estate under the intestate laws if his will is set aside as invalidly executed. . . .

Waldron. Likewise, Mr. Miller did not observe Ms. McGinn and Ms. Waldron sign his will as witnesses. Additionally, neither Ms. McGinn nor Ms. Waldron acknowledged to Mr. Miller that their signatures were on the will. It is also undisputed that Ms. McGinn and Ms. Waldron did not actually witness each other sign the will, nor did they acknowledge to each other that they had signed Mr. Miller's will. . . .

Our analysis begins by noting that "the law favors testacy over intestacy." However, we clearly held in syllabus point 1 of *Black v. Maxwell,* 131 W. Va. 247, 46 S.E.2d 804 (1948), that "testamentary intent and a written instrument, executed in the manner provided by [W.Va. Code § 41-1-3], existing concurrently, are essential to the creation of a valid will." *Black* establishes that mere intent by a testator to execute a written will is insufficient. The actual execution of a written will must also comply with the dictates of W.Va. Code § 41-1-3. The Casdorphs seek to have this Court establish an exception to the technical requirements of the statute. In *Wade v. Wade*, 119 W. Va. 596 (1938), this Court permitted a narrow exception to the stringent requirements of the W.Va. Code § 41-1-3. This narrow exception is embodied in syllabus point 1 of *Wade*:

> Where a testator acknowledges a will and his signature thereto in the presence of two competent witnesses, one of whom then subscribes his name, the other or first witness, having already subscribed the will in the presence of the testator but out of the presence of the second witness, may acknowledge his signature in the presence of the testator and the second witness, and such acknowledgment, if there be no indicia of fraud or misunderstanding in the proceeding, will be deemed a signing by the first witness within the requirement of Code, 41-1-3, that the witnesses must subscribe their names in the presence of the testator and of each other. . . .

Wade stands for the proposition that if a witness acknowledges his/her signature on a will in the physical presence of the other subscribing witness *and the testator*, then the will is properly witnessed within the terms of W.Va. Code § 41-1-3. In this case, none of the parties signed or acknowledged their signatures in the presence of each other. This case meets neither the narrow exception of *Wade* nor the specific provisions of W.Va. Code § 41-1-3.

Workman, J., dissenting:

The majority once more takes a very technocratic approach to the law, slavishly worshiping form over substance. In so doing, they not only create a harsh and inequitable result wholly contrary to the indisputable intent of Mr. Homer Haskell Miller, but also a rule of law that is against the spirit and intent of our whole body of law relating to the making of wills.

There is absolutely no claim of incapacity or fraud or undue influence, nor any allegation by any party that Mr. Miller did not consciously, intentionally, and with full legal capacity convey his property as specified in his will. The challenge to the will is based solely upon the allegation that Mr. Miller did not comply with the requirement of West Virginia Code 41-1-3 that the signature shall be made or the will acknowledged by the testator in the presence of at least two competent witnesses, present at the same time. The lower court, in its very thorough findings of fact, indicated that Mr. Miller had been transported to the bank by his nephew Mr. Casdorph and the nephew's wife. Mr. Miller, disabled and confined to a wheelchair, was a shareholder in the Shawnee Bank in Dunbar, West Virginia, with whom all those present were personally familiar. When Mr. Miller executed his will in the bank lobby, the typed will was placed on Ms. Pauley's desk, and Mr. Miller instructed Ms. Pauley that he wished to have his will signed, witnessed, and acknowledged. After Mr. Miller's signature had been placed upon the will with Ms. Pauley watching, Ms. Pauley walked the will over to the tellers' area in the same small lobby of the bank. Ms. Pauley explained that Mr. Miller wanted Ms. Waldron to sign the will as a witness. The same process was used to obtain the signature of Ms. McGinn. Sitting in his wheelchair, Mr. Miller did not move from Ms. Pauley's desk during the process of obtaining the witness signatures. The lower court concluded that the will was valid and that Ms. Waldron and Ms. McGinn signed and acknowledged the will "in the presence" of Mr. Miller. . . .

The majority embraces the line of least resistance. The easy, most convenient answer is to say that the formal, technical requirements have not been met and that the will is therefore invalid. End of inquiry. Yet that result is patently absurd. That manner of statutory application is inconsistent with the underlying purposes of the statute. Where a statute is enacted to protect and sanctify the execution of a will to prevent substitution or fraud, this Court's application of that statute should further such underlying policy, not impede it. When, in our efforts to strictly apply legislative

language, we abandon common sense and reason in favor of technicalities, we are the ones committing the injustice.

Notes and Questions

3.8. **Wills Act Formalities**. The requirements to make a valid will vary from state to state, but in general a will must be in writing, signed by the testator, and attested by two witnesses. How well do these formalities serve the various purposes identified by Fuller and Langbein? Which of them failed in *Stevens v. Casdorph*? How? Why is the court so stringent about enforcing the formalities?

3.9. **Informal Wills**. Whether out of ignorance about the law, skittishness in thinking about their own death, or bad advice, people do all kinds of things that blatantly fail to qualify as wills under the traditional test. They write chatty emails to family members explaining what they want to happen to their property after their death; they scrawl marginalia on old wills, crossing out specific bequests and adding new ones; they leave behind multiple conflicting undated "last" wills. What should courts do in such cases? In one memorably tragic case, Cecil George Harris used his pocketknife to scratch the words, "In case I die in this mess, I leave all to the wife. Cecil Geo Harris" into the fender of a tractor he was fatally pinned under. It was upheld as a valid *holographic will*: a will that has been handwritten and signed by the testator. A majority of states recognize holographic wills, although their specific requirements vary and an estates attorney should never rely on the validity of one. (For example, Maryland recognizes holographic wills only by testators serving in the armed services abroad. MD. CODE ESTATES & TRUSTS § 4-103(a)).

3.10. **Interpretive Problems**. The general interpretive rule for wills is the "intent of the testator." Is there any reason this might be a harder problem for wills than for other types of legal instruments? Consider:

- T's will leaves "all my property to my daughters A and B." Five years after making the will but ten years before his death, T and his wife have another child, C.
- T's will leaves "my red Toyota to my nephew A." After making the will, T wrecks the red Toyota and buys a blue Toyota to replace it.
- T's will leaves $10,000 to A, $10,000 to B, and his antique writing desk to C. After expenses, T's estate consists of $5,000 in cash and the writing desk.
- T's will leaves his estate equally to his sisters A and B. A dies in the same car accident as T. She leaves behind two children, C and D. T has one child of his own, E, from whom he is estranged.

Maryland Code, Estates and Trusts

§3-101. Order of distribution of net intestate estate

Any part of the net estate of a decedent not effectively disposed of by his will shall be distributed by the personal representative to the heirs of the decedent in the order prescribed in this subtitle.

§3-102. Share of surviving spouse

(a) In general.—The share of a surviving spouse shall be as provided in this section.

(b) Surviving minor child.—If there is a surviving minor child, the share shall be one-half.

(c) No surviving minor child, but surviving issue.—If there is no surviving minor child, but there is surviving issue, the share shall be the first $ 15,000 plus one-half of the residue.

(d) No surviving issue, but surviving parent.—If there is no surviving issue but a surviving parent, the share shall be the first $ 15,000 plus one-half of the residue.

(e) No surviving issue or parent.—If there is no surviving issue or parent, the share shall be the whole estate. . . .

§3-103. Division among surviving issue

The net estate, exclusive of the share of the surviving spouse, or the entire net estate if there is no surviving spouse, shall be divided equally among the surviving issue. . . .

§3-104. Distribution when there is no surviving issue

. . . .

(b) Parents and their issue.— . . . it shall be distributed to the surviving parents equally, or if only one parent survives, to the survivor; or if neither parent survives, to the issue of the parents, by representation.

(c) Grandparents and their issue.— . . .

(d) Great-grandparents and their issue.— . . .

(e) No surviving blood relative.—If there is no surviving blood relative entitled to inherit under this section, it shall be divided into as many equal shares as there are stepchildren of the decedent . . . .

Notes and Questions

3.11. If you don't make a will, the state will make one for you. This portion of the Maryland Code describes the default inheritance rules for people who die domiciled in Maryland without a will. How well do you think they track people's expectations about what will happen to their property after they die? In addition to *total intestacy*—dying without a will—the intestacy statute also applies in cases of *partial intestacy*—dying with a will that fails to dispose of all of one's property. How might that happen?

3.3 Gifts

In order for a valid gift to occur, three elements must be present: (1) the donor must *intend* to give the property as a gift; (2) the donor must *deliver* the property to the donee; and (3) the donee must *accept* the gift. We won't spend much time on the third element, because when the property has some value, acceptance will generally be presumed in the absence of an explicit rejection.

Unlike a sale or a contract, a gift does not require consideration. This leads to concerns that often shape judicial doctrine. First, without tangible consideration, we need to keep people from lying about what was given to them. Because gift issues often arise after the alleged donor died, courts have been concerned to protect the donor's heirs from having the donor's estate stripped by people who claim to be donees.

Second and relatedly, we desire to protect the system of written wills and to encourage its use. A standard will must be signed and witnessed. A system that easily allows pre-mortem gifts might undermine people's incentives to take the time to write a will—they might think they can always just give their property away when death approaches—and also harm the legitimate expectations of those who are named in a will. If the person who writes a will, known as the testator, identifies specific property in her will, but sells it or gives it away before she dies, the devise in the will is nullified; it's no longer her property to give away when she dies. Although people named as devisees in a will have no *legal* rights to the property before the testator dies, they might nonetheless have practically and morally compelling expectations—especially if we worry about the people surrounding a dying person exercising undue influence and extracting gifts that the dying person wouldn't give if she were thinking more clearly. Thus, by making it more difficult to give gifts, we may protect the overall system of property transfers. This concern

can lead courts to find that no gift has been made even when the would-be donor very clearly wanted to give the property away. Consider as you read whether this overall structural concern is justified.

In re Estate of Evans

356 A.2d 778 (Pa. 1976)

Nix, Justice.

Appellant, Vivian Kellow, objected to the inventory, proposed schedule of distribution and final accounting of the executor of the estate of Arthur Evans. After appellant finished the presentation of her case, the lower court granted appellees' motion to dismiss appellant's objections. . . . The thrust of her appeal to this Court is that certain contents of a safe deposit box were the subject of an *inter vivos* gift to her from Arthur Evans, the deceased, and, consequently, should not have been included in his estate.

Appellant, the niece of Arthur Evans' deceased wife, began working for the Evans family when she was 16. For several years she took care of Mrs. Evans who for some years prior to death was an invalid. Appellant cooked meals for the Evanses, cleaned their house, did their laundry and generally cared for Mrs. Evans. She received adequate compensation for performing these needed services. When Mrs. Evans died, appellant continued to cook at least one hot meal a day for Mr. Evans, do his laundry and make sure his house was tidy. After appellant was married, she continued to perform these same services and visited Mr. Evans once a day. In May of 1971, following one of his four hospitalizations, the deceased moved into appellant's home.

Although at times Mr. Evans was confined to his bed because of water in his legs, he frequently took walks, had visits with his lawyers and made trips to his bank. On October 22, 1971, appellant's husband drove Mr. Evans and a friend of his, Mr. Turley, to town so that Mr. Evans might go to the bank. Turley testified that Mr. Evans spent about one hour going through the contents of his safe deposit box. Before leaving the bank, the deceased obtained both keys to the box.

Various witnesses presented by appellant testified to seeing the keys to the safe deposit box beneath appellant's mattress and to statements by Mr. Evans to the effect that the contents of the safe deposit box had been given to appellant. Mr. Evans entered the hospital for the last time on November

5, 1971. During this last hospital stay, Reverend Cunnings visited with him and was told that Mr. Evans was giving the Reverend's church $10,000.00 and that he had given the rest of his possessions and the keys to his safe deposit box to appellant. Mr. Evans expired on November 23, 1971.

Appellant relinquished the keys to the safe deposit box to a bank officer, but not without protesting that the contents of the box were hers. The box revealed a holographic will of Mr. Evans dated September 16, 1965, and approximately $800,000.00 in bonds, preferred and common stock and several miscellaneous items.[1]

The lower court correctly noted that the requirements for a valid *inter vivos* gift were donative intent and delivery, actual or constructive. With respect to donative intent, the court found:

> Turning to the facts of this case, certainly no one can reasonably argue that Arthur Evans lacked sufficient motive to make a gift to Vivian. The record clearly manifests, both by his conduct and his statements, donative intent, the first prerequisite.

Nevertheless, the court ruled that no delivery had been made. This result was predicated upon a finding that the deceased had not divested himself of complete dominion and control over the safe deposit box. After properly noting that constructive delivery is sufficient when manual delivery is impractical or inconvenient, the court reasoned:

> The record contains no evidence of circumstances which were such that it was impractical or inconvenient to deliver the contents of this box into the actual possession or control of Vivian.

Arthur Evans, although suffering physical infirmities and apprehensive of death, was nonetheless ambulatory. On October 22, 1971, he appeared at the Nanticoke National Bank in the company of Harold Turley and Leroy Kellow and spent approximately one hour going over the contents of his safe deposit box in a cubicle provided in the bank for that purpose. He left the bank after redepositing the contents and took with him only the keys which independent testimony indicates he delivered to Vivian the next day. There was no manual delivery of the contents. The contents of the box

[1]The will was uncontested and under its terms provided for a $1,000.00 bequest to appellant.

remained undisturbed. The box, and its contents, were registered in the name of the decedent at the date of his death. The objects of the gift were not placed in the hands of Vivian, nor was there placed within her power the means of obtaining the contents. . . .

> A claim of a gift *inter vivos* against the estate of the dead must be supported by clear and convincing evidence. In order to effectuate an *inter vivos* gift there must be evidence of an intention to make a gift and a delivery, actual or constructive, of a nature sufficient not only to divest the donor of all dominion over the property but also invest the donee with complete control over the subject-matter of the gift.

[*Tomayko v. Carson*, 368 Pa. 379, 385 (1951).]

In the instant case, the controversy focuses on whether there was an adequate delivery. . . . :

> "If there remains something for the donor to do before the title of the donee is complete, the donor may decline the further performance and resume his own." . . . "[I]t is not possible that a chancellor would compel an executor or administrator to complete a gift by the doing of any act which the alleged donor if living might have refused to do, and thereby revoked his purpose to give." . . . "Though every other step be taken that is essential to the validity of the gift, if there is no delivery, the gift must fail. Intention cannot supply it; words cannot supply it; actions cannot supply it. It is an indispensable requisite, without which the gift fails, regardless of consequence." The consequence is that no matter how often or how emphatically the desire or intention of the donor to make the gift has been expressed, upon his death before delivery has been completed, the promise or purpose to give is revoked.

We have recognized that in some cases due to the form of the subject matter of the gift or due to the immobility of the donor actual, manual delivery may be dispensed with and constructive or symbolic delivery will suffice. In *Ream Estate*, 413 Pa. 489, 198 A.2d 556 (1964), for example, the Court found there had been a valid constructive delivery of an automobile

where the donor gave the keys to the alleged donee and also gave him the title to the car after executing an assignment of it leaving the designation of the assignee blank. The assignment was executed in the presence of a justice of the peace and the evidence was overwhelming that the name of the donee was to be inserted upon the death of the decedent. . . .

Appellant relies heavily on *Leadenham's Estate*, 289 Pa. 216, 137 A. 247 (1927), and *Leitch v. Diamond National Bank*, 234 Pa. 557, 83 A. 416 (1912). These decisions, however, support the Court's finding that there was no delivery in the instant case. In *Leadenham's Estate*, *supra*, the donor had rented a separate safe deposit box in the name of the intended donee, put the contents of his box into the newly rented one and delivered the keys to it to the donee. On those facts we held that the constructive delivery of the keys was sufficient to sustain the *inter vivos* gift because the donor had divested himself of dominion and control and invested the donee with complete dominion and control.

In *Leitch v. Diamond National Bank*, *supra*, the donor and donee were husband and wife and had lived together harmoniously for many years. The husband had three safe deposit boxes registered in his name and the name of his wife and he designated one of them as his wife's. He gave her the keys to that box. The Court found that she had complete control over that box and that he only entered it with her permission. Since she had complete control over the access to the box the Court found there was a valid delivery of the contents of the box to her.

In both of these cases, the determinative factor was that the donee had complete dominion and control over the box and its contents. In that posture we ruled that giving the keys to the box to the donee was a valid constructive delivery. In the instant case, appellant did not have dominion and control over the box even though she was given the keys to it. The box remained registered in Mr. Evans' name and she could not have gained access to it even with the keys. Mr. Evans never terminated his control over the box, consequently he never made a delivery, constructive or otherwise.

Although appellant suggests that it was impractical and inconvenient for Mr. Evans to manually deliver the contents of his box to her because of his physical condition and the hazards of taking such a large sum of money out of the bank to her home, we need only note that the deceased was obviously a shrewd investor, familiar with banking practices, and could have made delivery in a number of simple, convenient ways. First, he was

not on his deathbed. He was ambulatory and not only went to the bank on October 22, 1971, but took walks thereafter and did not enter the hospital until November 5, 1971. On the day he went to the bank he could have rented a second safe deposit box in appellant's name, delivered the contents of his box to it and then given the keys to appellant. He could have assigned the contents of his box to appellant. For that matter, he could have written a codicil to his will.

The lower court noted that the deceased was an enigmatic figure. It is not for us to guess why people perform as they do. On the record before us it is clear that regardless of Mr. Evans' intention to make a gift to appellant, he never executed that intention and we will not do it for him. On these facts, we are constrained to hold that there was not an *inter vivos* gift to appellant and that the contents of the safe deposit box were properly included in the inventory of Mr. Evans' estate . . . .

Roberts, Justice (dissenting).

I dissent. The central issue in this case is whether donor made an adequate delivery of the gift to donee. The majority finds that adequate delivery was not made because the safe deposit box was leased solely in donor's name and supports this conclusion by pointing out that there were several alternative means of delivering the gift which would have been adequate. I believe that the inquiry should not be what form of delivery would have been clearly sufficient, but rather whether the delivery made by donor was adequate. I believe that it was.

In *Rynier Estate*, 349 Pa. 471, 32 A.2d 736 (1943), we said that delivery is determined on the facts of each case, with reference to the donor's intent.

> As the chief factor in the determination of the question whether a legal delivery has been effected is the intention of the donor to transfer title to the donee, as manifested by his words and actions and by the circumstances surrounding the transaction, it is evident that each case must depend largely upon its own facts.

The majority suggests that donor was "obviously a shrewd investor, familiar with banking practices. . . . " From this "familiar(ity) with banking practices," which is nowhere shown on the record, and the absence of a joint lease for the box, it apparently concludes that donor did not intend a gift. There are two reasons why this result is not correct.

First, there is no doubt in this case that donor intended a gift. He told many people that he had given the contents of the box to appellant. In fact, there is competent testimony that donor directed donee to display the keys, hidden under her mattress, to several witnesses.

Second, it is apparent from the record that donor believed undisputed and unconditional delivery of the keys to be sufficient to complete the gift. Most of this Court's cases dealing with *inter vivos* gifts of the contents of safe deposit boxes turn on the delivery or nondelivery of the keys to the box to the donee. If the key was delivered, the gift was normally upheld; if the key was not delivered, the gift was set aside, whether or not the box was jointly leased. I have found no case which turned on the presence or absence of a joint lease. Given this line of authority, and accepting the majority's conclusion that donor was sophisticated in these matters, it must be concluded that donor believed delivery of the keys to the box completed the gift. If this were not so, why would donor cause donee to take several witnesses into her bedroom to show them that she had the keys and why would he speak in terms that indicated a completed gift—"I *gave* to Vivian . . . the keys and the contents *are* hers." Because it is donor's intention to transfer title which is crucial to a valid delivery, and because this donor intended to transfer title, I dissent from the majority's conclusion . . . .

Notes and Questions

3.12. The majority writes, "regardless of Mr. Evans' intention to make a gift to appellant, he never executed that intention and we will not do it for him." But it also quotes approvingly the lower court's statement that "[t]he record clearly manifests, both by his conduct and his statements, [Mr. Evans'] donative intent." Has the court contradicted itself, or can these statements be squared?

3.13. Why does the court note that Vivian Kellow "received adequate compensation" for the services she provided to Arthur Evans? What were his motivations for the attempted gift, and why are the appellees contesting it? Does the family setting shed any light on the positions of the majority and dissent?

3.14. The common law required manual delivery of personal property for a valid gift unless the object was too big to move. *See, e.g.*, *Newman v. Bost*, 20 S.E. 848 (N.C. 1898) (symbolic delivery insufficient where objects were small items that could easily have been physically delivered, even though would-be donor was ill in bed). If the object was too big to move, substitutes for physical delivery were accept-

able. Keys are a classic example: handing over car keys is "constructive" or "symbolic" delivery of the car. The keys symbolize the car (symbolic delivery) and provide the means for exercising dominion and control over it (constructive delivery). Today, because all states require car owners to register the title to their cars, many states require that a gift of a car is not complete unless the donor also hands over the title documents. Why would the law require delivery of the title documents? What happens when someone who doesn't know this rule hands over only the keys, and then a year later changes her mind and demands the car back? (You should see here how a title system can both make it easier to determine who owns property and easier for legally unsophisticated people to make significant mistakes.)

Why isn't saying "I give you this car" without delivery enough to complete the gift? The keys could be handed over later, after all. If there's a present donative intent, what further purpose does a delivery requirement serve? Most answers focus on the evidentiary role played by delivery: possession of the property by the putative donee is strong evidence that the putative donor really did make a gift. This is especially important because most gift disputes arise after the putative donor's death. Notice to third parties who deal with the property and need to know who owns it is another common rationale. But when might a putative donee's possession not be particularly probative of whether a gift had occurred? Suppose a father allows his daughter to use his second car when she moves to town, and that this continues for six months. If, after they have a falling out, the father sought to retrieve the car, how would you figure out whether this was a loan or a gift?

3.15. Modern courts often relax the delivery requirement to allow constructive or symbolic delivery even of smaller, more portable items, but some delivery requirement remains. Suppose the would-be donor signed a document in front of two witnesses saying "I now give my daughter $100,000," and gave the document to his daughter. But the donor didn't actually deliver the money. Should we relax the delivery requirement because we are very confident that a gift was intended? Or does delivery still serve an important purpose? *See Devol v. Dye*, 24 N.E. 246 (Ind. 1890) ("The intention of a donor in peril of death, when clearly ascertained and fairly consummated within the meaning of well-established rules, is not to be thwarted by a narrow and illiberal construction of what may have been intended for and deemed by him a sufficient delivery."); *Ferrell v. Stinson*, 11 N.W.2d 701 (Iowa 1943) (deed made out to intended donee was kept in box in donor's house, and recorded after grantor's death; held: delivered given strong evidence of donor's intent and fact that seriously ill grantor was physically inable to access box after executing deed); *cf. Hocks v. Jeremiah*, 759 P.2d 312 (Or. App. 1988) (bonds and diamond ring placed

over a period of years in a safe deposit box held jointly with putative grantee were not properly delivered). What should have happened in the *Ferrell* case if the grantor had made out the deed, put it in the box, and then a week later, still in her sickbed, made out a deed to another person and handed *that* second deed to the intended grantee?

3.16. The RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 6.2, cmt. yy, takes the position that personal property can be validly given without delivery "if the donor's intent to make a gift is established by clear and convincing evidence." Is this the right rule?

Chapter 4

Protecting Buyers

Famed con artist George C. Parker specialized in selling the Brooklyn Bridge. Parker and other con artists working in New York around the start of the 20th century would convince victims that they stood to make a fortune charging tolls. Unfortunately, the buyers obtained nothing, no matter how fancy the paperwork Parker offered them, because Parker did not own the bridge. *Nemo dat quod non habet* was the Latin motto of the common law: "No man can give what he does not have." Parker, having no title, could give none to his buyers.

Today, "I've got a bridge to sell you" is a punchline: only an incredible rube, we like to believe, could be so gullible as to think that a man in the street with a "Bridge for Sale" sign is actually its owner. But the problem arises even in less dramatic cases. Suppose Dorothy Dupe is scheduled to buy Blackacre on Wednesday from Sadie Scamalot. What if on Tuesday Scamalot sells Blackacre to Charles Clueless first? Then on Wednesday before the "sale," Scamalot is no longer the owner of Blackacre, and under *nemo dat*, Dupe owns nothing after the "sale." Sometimes, equity would intervene to protect a second buyer who lacked notice of the prior sale—but such doctrines have serious risks for Clueless, who may have no idea that Scamalot is about to turn around and "sell" Blackacre again.

The heart of the problem here is that Clueless and Dupe don't know enough about potential conflicting claims to Blackacre. Dupe can't find Clueless to confirm that she should be dealing with him rather than with Scamalot, and Clueless can't find Dupe to warn her off from buying something Scamalot no longer owns.

Despite that other common law maxim *caveat emptor*—let the buyer beware—the law of property transfers offers buyers multiple protections against fraud and mistakes by sellers. This chapter considers several such protections.

First, there are rules protecting the so-called **good faith purchaser for value** of property, who buys from someone with less than perfect title to that property. For this doctrine, pay close attention to what makes a buyer a good faith purchaser, and also to the circumstances that allow a good faith purchaser to take title. It is hornbook law that "a thief takes no title and can give none," so can a good faith purchaser receive title from a thief? A forger? A fraudster?

Second, real property title deeds can include **warranties of title** that provide buyers with protection against defects in ownership. Here, consider carefully what defects are covered, and what recourse the buyer will have in case a problem arises.

Third, we will look at **recordation** of property ownership of real estate. Having a public record of who owns what can be immensely helpful to buyers, but it can also raise difficult questions if records conflict with each other.

4.1 Good Faith Purchasers

Uniform Commercial Code

§ 2-312. Warranty of title

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

(a) The title conveyed shall be good, and its transfer rightful; and

(b) The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have. . . .

§ 2-403. Power to transfer; good faith purchase of goods; "entrusting"

(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.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

Notes and Questions

4.1. What do these two provisions have to do with each other? *Hint*: think about circumstances in which the warranty of § 2-312 would be violated and consider whether § 2-403 comes into play, and vice-versa.

Kotis v. Nowlin Jewelry, Inc.

844 S.W.2d 920 (Tex. Ct. App. 1992)

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 [which was identical in relevant part to the UCC excerpt quoted above]. . . .

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 (Md. Ct. App. 1985). On the other hand, a swindler who fraudulently induces the victim to deliver the goods voluntarily is a purchaser under the code.

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. 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. 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." 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. 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. 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. . . .

We affirm the trial court's judgment.

Notes and Questions

4.2. The common-law baseline is *nemo dat quod non habet*: no man can give what he does not have. If I "give" you a car I don't own, you don't own it either. If I sell you a tract of land encumbered by a mortgage and an easement, you receive only as much as I owned, so you take the land subject to the mortgage and the easement. This *nemo dat* baseline is the source of the maxim that a thief cannot give good title. So if Sitton had held up Nowlin's at gunpoint, how would the case have come out, and on what reasoning?

§ 2-403(1), as applied in *Kotis*, distinguishes the thief's "void" title from merely "voidable" title: the quality of title obtained by the buyer in a transaction that is for some reason defective. If the seller in that defective transaction discovers the problem, she has a right to unwind the transaction (and get her stuff back). But until she does, the buyer has the power to convey not just his own, voidable title, but something even better. A good-faith purchaser for value receives good title, *even as against the original seller*. Her right to unwind the transaction has been cut off. This is a harsh way to treat an innocent victim of fraud or mistake. Why would property law do something like that?

4.3. How did the parties get into this mess? Obviously Sitton is most to blame, but is there anything Kotis or Nowlin could have done? Who is left holding the bag and why? Is there anything Kotis can do to recover his $3,550.00?

4.4. § 2-403 provides for two tests that the buyer must meet to be protected (in addition to the threshold question of whether his seller had voidable title): he must act in good faith and he must give "value." Which of these tripped up Kotis? And what is the reason for not protecting donees along with buyers?

Note on Negotiability

Another version of the good-faith purchaser doctrine developed in the law of intangible property called "negotiable instruments." In the centuries before the development of good national and international banking systems, merchants commonly did business by passing around various promises or instructions to pay. So, for example, Abel might buy a cartload of barrels of wine from Baker on March 1 by giving Baker a signed promise to pay £200 on June 1. Baker could in theory sit on this *promissory note* until June 1 and then demand payment from Abel. But instead, Baker was more likely to use the note to pay his own debts: he might, for example, give it to Crumleigh on April 1 to buy a gold chain. Baker would sign, or *indorse*, the note, making Crumleigh an assignee of Baker's right to collect from Abel, so that come June 1, Crumleigh could present the note to Abel and demand payment. Of course, there was no need to stop there: Crumleigh could indorse the note over to Daniels, and so on. In such a way, credit became a kind of currency, with the note (collecting indorsements as it went) functioning as a token to indicate who currently held the right to collect when the debt came due on June 1.

Another kind of signed promise, the *bill of exchange*, functioned similarly. The difference was where Abel's note was a promise by Abel to pay, a bill of exchange would be an instruction from Abel to a third party to pay. Perhaps the bill would be "drawn on" Abel's business partner Absalom, or perhaps more usefully it would be drawn on another merchant who had agreed to extend Abel credit or make payments against amounts Abel had deposited with him. If this sounds a bit like banking, it is not a coincidence; the modern check is a direct descendent of the medieval bill of exchange.

Now back to our story. Suppose that Abel discovers that the wine Baker sold him was rotten, good only as vinegar. Abel chases down Baker, only to learn that Baker has already indorsed the note over to Crumleigh, who has already done the same to Daniels. Come June 1, Daniels demands payment, but Abel refuses, pointing to the worthless vinegar. Baker didn't hold up his side of the deal; why should Abel have to do the same? In *Miller v Race*, (1758) 97 Eng. Rep. 398 (K.B.), the great commercial jurist Lord Mansfield gave an answer:

> After stating the case at large, he declared that at the trial, he had no sort of doubt, but this action was well brought, and would lie against the defendant in the present case; upon the general course of business, and from the consequences to trade and commerce: which would be much incommoded by a con-

> trary determination. . . . A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received, as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured.

The point is that if Daniels needs to check the details of the Abel-Baker transaction—including inspecting the wine—to determine whether he will be paid on Abel's note, he will refuse. He doesn't know Abel; he doesn't even know Baker. The doctrine of *Miller v. Race* is a good-faith-purchaser doctrine for negotiable instruments; it lets Daniels rely on the note itself, rather than inspecting the details over the underlying transaction. That in turn lets the note circulate as money, enabling other transactions that otherwise would have frozen up for lack of financing.

The doctrine of negotiability—"negotiation" being the act of assigning the promise to pay from one recipient to another, typically by indorsing the note and/or physically handing it over—took root in the United States. Indeed, *Swift v. Tyson*—famous for being the case overruled in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law.")—was a case about negotiability. Norton and Keith convinced Tyson to sign a bill of exchange for $540.30, made payable to Norton, who then negotiated it to Swift to pay off a preexisting debt. But when Swift demanded payment from Tyson, Tyson replied that he had given it to Norton and Keith "as part consideration for the purchase of certain lands in the state of Maine, which Norton and Keith represented themselves to be the owners of" but were not. The case turned on whether Swift was a "bona fide holder for a valuable consideration, without notice," in which case he was entitled to collect from Tyson regardless of the land fraud Norton and Keith had perpetrated on Tyson. The only issue there was whether cancellation of the preexisting debt to Swift meant that Swift had given "valuable consideration" for the note, and again Justice Story's reasoning was pragmatic:

> And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. . . . It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for

> pre-existing debts. . . . But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts. . . . Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

Today, negotiability shows up in many areas of commercial law. One good illustration comes from Article 3 of the Uniform Commercial Code. A person is a "holder in due course" of a negotiable instrument (and here, think "check" or "promissory note") if

> (1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
>
> (2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument [either to recover the instrument after a theft or to rescind the transaction in which it was transferred], and (vi) without notice that any party has a defense or claim in recoupment . . .

UCC § 3-302(a). That's a long list of circumstances, but they're what you'd expect. In addition to the usual requirement that the holder in due course give value (and hence have a reliance interest in being paid), these are all issues that either affect the authenticity of the instrument itself (paragraph (1)) or go to the the holder's notice that something sketchy is afoot. But if a person qualifies as a holder in due course, she receives extensive protections:

> (a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:
>
> (1) A defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;
>
> (2) A defense of the obligor stated in another section of this title or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and
>
> (3) A claim in recoupment of the obligor against the original payee of the instrument . . . .
>
> (b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) against a person other than the holder.

UCC § 3-305. Notice the difference between the unconditional defenses in (a)(1) and the "personal" defenses in (a)(2) and (a)(3). Only a few of the contract defenses—infancy, incapacity, fraud in the factum, and bankruptcy – are available against a holder in due course. Something like Baker's delivery of spoiled wine, even though it would give Abel a right to refuse payment against Baker, will not be effective against a holder in due course like Daniels. The effect is to turn a promise to pay into something stronger. It is freely transferrable and it is no longer subject to the individual defenses of the original promisor. In other words, assignability plus negotiability turn an *in personam* contract right into something that looks much more like an *in rem* property right. (Does this remind you at all of how the courts turned unique things into fungible commodities in note 1.17 after *Wetherbee*? It should.)

Negotiability is a powerful doctrine, and it can be a dangerous one. It can be hard on promisors, particularly when they are the victims of fraud that doesn't ap-

pear on the face of the negotiable instrument itself. In particular, negotiability can be highly dangerous for consumers. If the promissory notes for their debts have been sold by the initial creditor to another financial institution, that institution may be able to collect on the debt even if the initial transaction was fraudulent, unconscionable, or even criminal. For that reason, the Federal Trade Commission's Holder in Due Course Rule, 16 C.F.R. pt. 433, requires consumer credit contracts to include language specifically disclaiming negotiability. But the rule does not apply to mortgage loans, *see, e.g.*, Johnson v. Long Beach Mortg. Loan Trust 2001-4, 451 F. Supp. 2d 16, 54-55 (D.D.C. 2006). We will see some of the mischief and misdeeds that resulted from the serial negotiation of residential mortgages in the section on the mortgage crisis. For a sustained argument that the doctrine of negotiability has long outlived its original purpose and does more harm than good in an age of robust financial infrastructure, see James Steven Rogers: The End of Negotiable Instruments: Bringing Payment Systems Law Out of the Past (2011).

4.2 Theft and Fraud

Harding v. Ja Laur

315 A.2d 132 (Md. Ct. Spec. App. 1974)

Gilbert, Judge: . . .

The bill alleged that a deed had been obtained from the appellant through fraud practiced upon her by the agent of Ja Laur Corporation. The bill further averred that the paper upon which the appellant had affixed her signature was "falsely and fraudulently attached to the first page of a deed identified as the same deed" through which the appellee, Ja Laur Corporation, and its assigns, the other appellees, claim title. . . .

There is no dispute that the appellant signed some type of paper. Her claim is not that her signature was forged in the normal sense, i.e., someone copied or wrote it, but rather that the forgery is the result of an alteration. Mrs. Harding alleges that at the time that she signed a blank paper she was told that her signature was necessary in order to straighten out a boundary line. She represents that she did not know that she was conveying away her interest in and to a certain 1517 acres of land in Montgomery County.

The parcel of land that was conveyed by the allegedly forged deed is contiguous to a large tract of real estate in which Ja Laur and others had "a substantial interest." It appears from the bill that Mrs. Harding's land pro-

vided the access from the larger tract to a public road, so that its value to the appellees is obvious. Mrs. Harding excuses herself for signing the "blank paper" by averring that she did so at the instigation of an attorney, an agent of Ja Laur, who had "been a friend of her deceased husband, and . . . represented her deceased husband in prior business and legal matters, and that under [the] circumstances [she] did place her complete trust and reliance in the representations made to her . . . " by the attorney. The "blank paper" was signed "on or about April 2, 1970." Mrs. Harding states that she did not learn of the fraud until the "summer of 1972." At that time an audit, by the Internal Revenue Service, of her deceased husband's business revealed the deed to Ja Laur, and its subsequent conveyance to the other appellees.

In *Smith v. State*, 256 A.2d 357, 360 (1970), we said that:

> Forgery has been defined as a false making or material alteration, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. More succinctly, forgery is the fraudulent making of a false writing having apparent legal significance. It is thus clear that one of the essential elements of forgery is a writing in such form as to be apparently of some legal efficacy and hence capable of defrauding or deceiving.

Perkins, *Criminal Law* ch. 4, § 8 (2d ed. 1969) states, at 351:

> A material alteration may be in the form of (1) an addition to the writing, (2) a substitution of something different in the place of what originally appeared, or (3) the removal of part of the original. The removal may be by erasure or in some other manner, such as by cutting off a qualifying clause appearing after the signature.

A multitude of cases hold that forgery includes the alteration of or addition to any instrument in order to defraud. That a deed may be the subject of a forgery is beyond question.

The Bill of Complaint alleges that the signature of Mrs. Harding was obtained through fraud. More important, however, to the issue is whether or not the bill alleges forgery. In our view the charge that appellant's signature was written upon a paper, which paper was thereafter unbeknown

to her made a part of a deed, if true, demonstrates that there has been a material alteration and hence a forgery. . . .

We turn now to the discussion of whether *vel non* the demurrers of Macro Housing, Inc. and Montgomery County, the other appellees, should have been sustained. There was no allegation in the bill that their agent had perpetrated the fraud upon Mrs. Harding. If they are to be held in the case, it must be on the basis that they are not *bona fide* purchasers without notice. The title of a *bona fide* purchaser, without notice, is not vitiated even though a fraud was perpetrated by his vendor upon a prior title holder. A deed obtained through fraud, deceit or trickery is voidable as between the parties thereto, but not as to a *bona fide* purchaser. A forged deed, on the other hand, is void *ab initio*. . . .

[T]he common law rule that a forger can pass no better title than he has is in full force and effect in this State. A forger, having no title can pass none to his vendee. Consequently, there can be no *bona fide* holder of title under a forged deed. A forged deed, unlike one procured by fraud, deceit or trickery is void from its inception. The distinction between a deed obtained by fraud and one that has been forged is readily apparent. In a fraudulent deed an innocent purchaser is protected because the fraud practiced upon the signatory to such a deed is brought into play, at least in part, by some act or omission on the part of the person upon whom the fraud is perpetrated. He has helped in some degree to set into motion the very fraud about which he later complains. A forged deed, on the other hand, does not necessarily involve any action on the part of the person against whom the forgery is committed. So that if a person has two deeds presented to him, and he thinks he is signing one but in actuality, because of fraud, deceit or trickery he signs the other, a bona fide purchaser, without notice, is protected. On the other hand, if a person is presented with a deed, and he signs that deed but the deed is thereafter altered e.g. through a change in the description or affixing the signature page to another deed, that is forgery and a subsequent purchaser takes no title.

In the instant case, the Bill of Complaint, for the reasons above stated, alleged a forgery of the deed by which Ja Laur took title from Mrs. Harding. This allegation, if true, renders that deed a nullity. Ja Laur could not have passed title to the other appellees, Macro Housing, Inc. and Montgomery County. Those two appellees would therefore have no title to the land of Mrs. Harding. . . .

Notes and Questions

4.5. What is the point of the distinction between forging a deed (sometimes called "fraud in the factum") and tricking someone into signing it ("fraud in the inducement")? As between the fraudster and the victim, is there a significant difference? What about once third parties get involved?

4.6. Mrs. Harding signs a blank piece of paper, which Ja Laur then staples to a deed. Forgery? What if she signs the same piece of paper *after* it is stapled to the deed? Do the policy reasons for distinguishing forgery from fraud provide a convincing reason to treat these cases differently?

4.3 Warranties of Title

New York Real Property Law

§258—Short forms of deeds and mortgages.

The use of the following forms of instruments for the conveyance and mortgage of real property is lawful, but this section does not prevent or invalidate the use of other forms:

Statutory Form A (Individual)

DEED WITH FULL COVENANTS.

This indenture, made the _____ day of _____ nineteen hundred and _____ , between _____ (insert residence) party of the first part, and _____ (insert residence) party of the second part,

Witnesseth, that the party of the first part, in consideration of _____ dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, _____ and assigns forever, all _____ (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

To have and to hold the premises herein granted unto the party of the second part, _____ and assigns forever. And said _____ covenants as follows:

First. That said _____ is seized of said premises in fee simple, and has good right to convey the same;

Second. That the party of the second part shall quietly enjoy the said premises;

Third. That the said premises are free from incumbrances;

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises;

Fifth. That said _____ will forever warrant the title to said premises.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of:

Statutory Form D. (Individual)

QUITCLAIM DEED.

This indenture, made the _____ day of _____ nineteen hundred and _____ between _____ (insert residence), party of the first part, and _____ (insert residence), party of the second part:

Witnesseth, that the party of the first part, in consideration of _____ dollars, lawful money of the United States, paid by the party of the second part, does hereby remise, release, and quitclaim unto the party of the second part, _____ and assigns forever, all (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the premises herein granted unto the party of the second part, _____ and assigns forever.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of:

Notes and Questions

4.7. What is the difference between these two deed forms? Why would a grantee ever accept a quitclaim deed?

McMurray v. Housworth

638 S.E.2d 421 (Ga. Ct. App. 2006)

PHIPPS, Judge:

Michael and Deborah Housworth sold a 24-acre tract of land which the purchasers—Lance and Melanie McMurray, and James and Alberta McMurray— subdivided into two tracts. A lake created by a dam is situated on the property. The McMurrays brought this suit against the Housworths for breach of their general warranty of title upon discovering after purchasing the property that the owner and operator of the dam holds a floodwater detention easement that burdens the tract. The superior court awarded summary judgment to the Housworths on the ground that this easement is not such an encumbrance on the property as breaches the title warranty. We disagree and reverse.

Lance and Melanie McMurray purchased one of the twelve-acre parcels from the Housworths for $120,000 in 2004. On the same date, James and Alberta McMurray purchased the other parcel for the same price. The parcels were conveyed by warranty deeds that contained general warranties of title without any limitations applicable here. The McMurrays informed the Housworths that they were buying the property to build single-family residences on each parcel.

Apparently, however, the McMurrays failed to discover that recorded within the chain of title to their property in 1962 was a "floodwater retarding structure" easement which had been granted to the Oconee River Soil Conservation District. This easement is for construction, operation, and maintenance of a floodwater retarding structure or dam; for the flowage of waters in, over, upon, or through the dam; and for the permanent storage and temporary detention of any waters that are impounded, stored, or detained by the dam. It also reserved in the grantor and his successors the right to use the easement area for any purpose not inconsistent with full use and enjoyment of the grantee's rights and privileges, i.e., it is nonexclusive. After learning of the easement following their purchase of the property, the McMurrays demanded that the Housworths compensate them for the damages they would suffer as a result of the restrictions thereby placed on their usage.

Because the Housworths failed to comply with these demands, the McMurrays brought this suit against them seeking damages for breach of their warranties of title. ...

1. The McMurrays contend that the superior court erred in analogizing the floodwater detention easement to a public roadway easement or zoning regulation and in thereby concluding that a floodwater detention easement is not the type of easement that breaches a general warranty of title.

(a) Each of the deeds in this case contained a general warranty of title in which the grantors agreed to "defend the right and title to the above described property, unto [the grantees], their heirs, assigns, and successors in title, against the claims of all persons." Under OCGA § 44-5-62, "[a] general warranty of title against the claims of all persons includes covenants of a right to sell, of quiet enjoyment, and of freedom from encumbrances." "An incumbrance has been defined as 'Any right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee,' and this definition . . . encompasses an easement or right of way." OCGA § 44-5-63 provides that "[i]n a deed, a general warranty of title against the claims of all persons covers defects in the title even if they are known to the purchaser at the time he takes the deed."

(b) The rule in Georgia, as established in the early case of *Desvergers v. Willis*, 56 Ga. 515 (1876), is that the existence of a public road on land, of which the purchaser knew or should have known at the time of the purchase, is not such an encumbrance as would constitute a breach of a general warranty of title. The *Desvergers* rule is thus an exception to the general rule stated in OCGA § 44-5-63 that a general warranty of title by deed covers even defects known to the purchaser at the time he takes the deed.

Although the *Desvergers* rule is not uniform throughout the country, it is the majority rule. In adopting the rule, the court in *Desvergers* concluded that a contrary holding would produce a "crop of litigation" that would be "almost interminable." The reason, as later explained by the Supreme Court of Iowa in *Harrison v. The Des Moines & Ft. Dodge R. Co.,* was that the immense number of warranty deeds then in existence rarely contained exceptions as to public roadways because of the universal belief that roadway access was a benefit rather than a burden to land. Therefore, a determination that public roadway easements were warranty-breaching encumbrances would have created innumerable liabilities where none had been thought to exist.

Courts in other states have also based their adoption of the *Desvergers* rule on the broader ground that where easements are open, notorious,

and presumably known to the purchaser at the time of the purchase, that knowledge will exclude the easement from operation of a title warranty. These courts have reasoned that where the encumbrance involves an open and obvious physical condition of the property, the purchaser is presumed to have seen it and fixed his price with reference to it. In view, however, of the Georgia rule that knowledge of a title defect will not exclude it from operation of a general warranty of title, creation of an exception for easements for public roadways or other purposes must be based on other grounds. And courts in other states have ultimately concluded that public roadway easements should not be regarded as encumbrances on the additional ground that "public highways are not depreciative, but, on the contrary, they are highly appreciative, of the value of the lands on which they constitute an easement, and are a means without which such lands are not available for use, nor sought after in the markets."

For a number of reasons, we do not find the floodwater detention easement in this case analogous to a public roadway easement. (1) We do not anticipate that we would open the litigation floodgates, so to speak, by holding that a floodwater detention easement breaches a general title warranty. (2) Moreover, a floodwater detention easement does not benefit the land to which it is subject. Although the property is benefitted by the lake or other body of water that creates the need for the easement (to the extent that the one enhances the value or enjoyment of the other), the easement burdens the property by permitting the impoundment of water on it to prevent flooding or increased water runoff on other property located downstream. (3) The McMurrays brought this action for damages because of the easement, not the lake. And even though the lake is certainly open and obvious, the same cannot necessarily be said of the easement. Although the superior court found that the dam is visible on the McMurrays' property, the McMurrays correctly point out that there is no evidence of record to support this finding. As argued by the McMurrays, not every lake is created by a dam or burdened by a floodwater detention easement. (4) And although the McMurrays' constructive notice of the easement by reason of its recordation within their chains of title would provide a compelling reason for exempting the easement from operation of the warranty deed, OCGA § 44-5-63 provides otherwise. (5) The recording of the easement certainly renders it binding on the McMurrays insofar as concerns the rights of the easement holder; but the question here is whether the existence of the

easement gives rise to a claim against the grantor for breach of the warranty against encumbrances. For these reasons, the superior court erred in concluding that the floodwater detention easement should be excepted from the rule of OCGA § 44-5-63 in view of the exception for public roadways.

(c) The McMurrays also contend that the superior court erred in equating floodwater detention easements with zoning regulations, which have been held not to breach a general warranty of title. Because the floodwater detention easement does not function in the same manner as a zoning regulation in all respects, we agree with this contention.

The floodwater detention easement does more than impose zoning-type restrictions on development activities on the property. It also grants the county soil and water conservation district rights for the storage and detention of impounded waters on the property. And it grants the district a right of ingress and egress upon the property. Easement rights such as these constitute an interest in property that must be acquired either by agreement of the property owner or by condemnation. And although the easement does impose limitations on the McMurrays' use of their property that duplicate restrictions imposed under zoning-type regulations applicable to the property, the two do not appear to be coextensive. ...

Where an encumbrance is a servitude or easement which can not be removed at the option of either the grantor or grantee, damages will be awarded for the injury proximately caused by the existence and continuance of the encumbrance, the measure of which is deemed to be the difference between the value of the land as it would be without the easement and its value as it is with the easement.

Notes and Questions

4.8. Even the general warranty given by the Housworths is subject to significant exceptions, including one for public roadways and one for zoning regulations. What is the point of these exceptions? Did the court correctly interpret those underlying policies as not covering the floodwater detention easement?

4.9. The exception for zoning regulations can be tricky. Suppose that the property is a vacant lot and that local zoning laws restrict houses to 15 feet in height? Is this an encumbrance? What if the property contains a house 30 feet high? Would it make a difference in either case if the restriction came from a private neighborhood

covenant rather than a public zoning law?

4.10. What should the Housworths (or rather, their attorney) have done? Presumably, the Oconee River Soil Conservation District is not interested in terminating its easement. Are the Housworths stuck with an unsaleable tract of land?

4.11. Warranties of *title* are distinct from warranties on the safety or quality of the underlying resource. One can convey perfectly good title to a house with a crumbling foundation. A way of thinking of the difference is that warranties of title guarantee the right to exclude; the latter would be warranties on the right to possess or use the property.

Traditionally, the rule was that property was sold as-is and it was the buyer's responsibility to inspect before buying—hence the phrase *caveat emptor*, or "buyer beware." Today, many states impose mandatory disclosures on real property sellers, or require new homebuilders to give a non-waivable "warranty of habitability." For more information on this, see the original Land Transactions module of *Open Source Property*, which discusses *Engelhart v. Kramer*.

Which do you think is the better rule? To what extent can private insurance solve the problems of disclosure?

4.12. Typically, there is a period of time between execution of a contract for property sale and the "closing" in which the deed is actually conveyed. What happens if the property is damaged during that interim "executory period"? Absent agreements otherwise, the doctrine of equitable conversion holds that the contract renders the buyer the equitable owner of the land, such that the buyer must pay for and take the property. This rule is very much in question across the states. *See Brush Grocery Kart, Inc. v. Sure Fine Mkt., Inc.*, 47 P.3d 680 (Colo. 2002).

Who do you think should bear liability during the executory period? Should it depend on whether the buyer has possession during that period, as some courts (including *Brush Grocery Kart*) have held? What role does private insurance play here as well?

4.4 Recordation

Recall the messy situation between Dorothy Dupe and Charles Clueless from the beginning of this chapter, in which Sadie Scamalot purportedly sells the same real estate to both of them. Recording systems try to prevent some of these messes by making available better information about who owns what. If Clueless *recorded* his interest in Blackacre by making it a matter of public record, then it becomes reasonable to treat Dupe as having *constructive notice* of Clueless's claim of ownership:

even if she didn't check the records, she should have. Conversely, if Clueless fails to record, there is much less Dupe can do to protect herself, so it becomes reasonable to let Dupe take title free and clear of Clueless's claim. Thus, the system gives Clueless a strong incentive to record and gives Dupe a strong incentive to check the records. As a result, there are good records of people's property claims. Clueless and Dupe never get into this mess in the first place, and Scamalot's scheme fails.

Recording systems are useful even in the absence of fraud; they create the trust and certainty needed to make land transactions common and reliable. Most home sales today happen between people who do not otherwise know each other and don't otherwise expect to transact again. How can the buyer be sure the seller is really the owner? A recording system provides the answer. Perhaps more importantly, a recording system gives *lenders* sufficient assurance that they'll be able to recover something in case of a loan default; with that security, they are willing to loan more and at lower rates.

For this and other reasons, a recording system can be a vital part of a large-scale, modern economy. According to the *New York Times*, for example, the absence of a functioning recording system in Greece "scares off foreign investors; makes it hard for the state to privatize its assets, as it has promised to do in exchange for bailout money; and makes it virtually impossible to collect property taxes." Suzanne Daley, *Who Owns This Land? In Greece, Who Knows?*, New York Times, May 26, 2013. Clear title is often important for access to government services and even water and electricity connections: otherwise it's not clear where the checks and bills should go.

Argent Mortgage Co. v. Wachovia Bank N.A.

52 So. 3d 796 (Dist. Ct. App. 2010)

Griffin, J.

Argent Mortgage Company, LLC ["Argent"] appeals the trial court's entry of judgment in favor of Wachovia Bank National Association, as Trustee Under Pooling and Servicing Agreement Dated as of November 1, 2004, Asset Backed Pass–Through Certificates Series 2004–WWF1 ["Wachovia"]. Argent argues that the trial court erred by finding that the mortgage now owned by Wachovia has priority over Argent's mortgage. We reverse.

On August 31, 2004, Gene M. Burkes and Ann Burkes ["the Burkes"] as borrower/mortgagor and Olympus Mortgage Company as

lender/mortgagee executed a mortgage ["the Olympus Mortgage"] on real property as security for a $90,000.00 loan. The Olympus Mortgage was recorded on January 5, 2005. Subsequently, the Olympus Mortgage was assigned to Wachovia. As a result of default, Wachovia filed a complaint to foreclose the Olympus Mortgage and to enforce lost loan documents. Wachovia joined Argent as a defendant, alleging that Argent might claim some interest in or lien upon the subject property by virtue of a recorded mortgage.

On December 10, 2004, the Burkes as borrower/mortgagor and Argent as lender/mortgagee executed a mortgage ["the Argent Mortgage"] as security for a $65,000.00 loan on the same real property that is the subject of the Olympus Mortgage. The Argent Mortgage was recorded on January 31, 2005. Subsequently, Wells Fargo Bank became the owner of the Argent Mortgage. An action to foreclose the Argent Mortgage was initiated as a result of default.

[Argent and Wachovia filed cross motions for summary judgment.] Ultimately, the trial court deemed "the Florida statutes on recordation," namely sections 695.01 and 695.11, Florida Statutes, "to be of the race-notice variety," found that the Olympus Mortgage should have priority over the Argent Mortgage, and entered a partial final judgment in favor of Wachovia.

On appeal, . . . Argent asserts that section 695.01, Florida Statutes, alone determines which mortgage has priority, that section 695.01 is, and, for over a century, has been recognized to be a "notice" statute, not a "race-notice" statute and that, under section 695.01, the Argent Mortgage has priority over the Olympus Mortgage.

Wachovia acknowledges that section 695.01, Florida Statutes, is a "notice" type of recording statute. However, Wachovia contends that amendments made to section 695.11, Florida Statutes, have converted Florida into a "race-notice" state.

As an initial matter, it bears explaining that recording statutes are classified into three categories: race, notice, and race-notice. These can generally be described as follows:

- Under a *race* recording statute, a subsequent mortgagee of real property will prevail against a prior mortgagee of the said real property if the subsequent mortgage is recorded before the prior mortgage.

- Under a *notice* recording statute, a subsequent mortgagee of real property for value and without notice (actual and constructive) of a prior mortgage of the said real property will prevail against the prior mortgagee.

- Under a *race-notice* recording statute, a subsequent mortgagee of real property for value and without notice (actual and constructive) of a prior mortgage of the said real property will prevail against the prior mortgagee if the subsequent mortgage is recorded before the prior mortgage.

Importantly, under either a notice or a race-notice recording statute, the subsequent mortgagee cannot be without constructive notice if the prior mortgage has been recorded as of the time of execution of the subsequent mortgage.

Application of each type of recording statute to the undisputed facts here yields the following results:

- Wachovia prevails under a race recording statute because the Olympus Mortgage was recorded before the Argent Mortgage;

- Argent prevails under a notice recording statute because it is a subsequent mortgagee for value and did not have notice of the Olympus Mortgage at the time of execution of the Argent Mortgage; and

- Wachovia prevails under a race-notice recording statute because, although Argent is a subsequent mortgagee for value and did not have notice of the Olympus Mortgage at the time of execution of the Argent Mortgage, the Olympus Mortgage was recorded before the Argent Mortgage.

Commentators appear uniformly to categorize section 695.01 as a "notice" type of recording statute. *See* 2–26 Ralph E. Boyer, Florida Real Estate Transactions §26.02 (Matthew Bender & Co., Inc. 2010) ("Florida has a notice type recording statute, the primary function of which is to protect subsequent purchasers (which for purposes of this discussion includes mortgagees and creditors who are within the statute's protection) against claims arising from prior unrecorded instruments . . . .").

Florida courts over time have described and applied Florida's recording statute in a manner that is consistent with a "notice" type of recording statute. [citing cases] Florida's approach to the problem was succinctly described by the Florida Supreme Court in *Van Eepoel Real Estate Co. v. Sarasota Milk Co.*, 100 Fla. 438, 129 So. 892, 895 (1930):

> [I]t is generally held, in states having recording statutes similar to ours, that if A conveys lands to B, a bona fide purchaser for value, who does not go into possession and who failed to record his deed until after A conveys the same land to C, a second bona fide purchaser for value without notice of B's interest, and B then records his deed before C records his, the title of C shall nevertheless prevail as between C and B, because it is the fault of B that he did not immediately record his deed, thereby permitting C to deal with the property and part with his consideration without knowledge of B's interest. So B is estopped and the equities are with C.

Section 695.01, notwithstanding, the trial court accepted Wachovia's argument that a 1967 amendment to a different statute, section 695.11, Florida Statutes, entitled, "Instruments deemed to be recorded from time of filing" converted Florida from a "notice" to a "race-notice" jurisdiction.* The earliest version of section 695.11 dates back to 1885. Examination of the language of the 1906, 1920, and 1935 iterations of section 695.11, make clear that this statute was intended to provide a mechanism for determining the time at which an instrument was deemed to be recorded. Nothing in the case law suggests that section 695.11 modifies section 695.01. . . .[3]

*Section 695.11 reads, "All instruments which are authorized or required to be recorded in the office of the clerk of the circuit court of any county in the State of Florida, . . . and which are filed for recording on or after the effective date of this act, shall be deemed to have been officially accepted by the said officer, and officially recorded, at the time she or he affixed thereon the consecutive official register numbers . . . and at such time shall be notice to all persons. The sequence of such official numbers shall determine the priority of recordation. An instrument bearing the lower number in the then-current series of numbers shall have priority over any instrument bearing a higher number in the same series." —Eds.

[3]Case law confirms that the purpose of section 695.11 is to determine the time at which an instrument is deemed to be recorded and to serve as notice. [citing cases] Section 695.11 has an important purpose to determine the priority between judgment liens. [citing cases] Because a certified copy of a judgment must be recorded in order to create a lien on real

Wachovia relies on an earlier opinion of this Court, *Rice v. Greene*, 941 So.2d 1230 (Fla. 5th DCA 2006), in support of its contention that Florida has a race-notice type of recording statute. In *Rice*, this Court . . . found:

> In other words, an unrecorded deed is not good or effectual in law or equity against creditors or subsequent purchasers for valuable consideration who are without notice of the transaction. Therefore, *because Mr. Greene had no notice* of the earlier warranty deed between Mr. Rice and Mrs. Schwartz *and paid valuable consideration* for the property, *Mr. Greene's recording of his warranty deed before Mr. Rice gives Mr. Greene priority to the property.*

Id. at 1232 (emphasis added). According to Wachovia, this language proves that priority in recording is key. Notably, however, *Rice* does not mention section 695.11 and recording was not an issue. The subsequent purchaser in *Rice* (Mr. Greene) had priority to the property under a notice type of recording statute because he paid value for the property and did not have notice (actual or constructive) of the earlier warranty deed at the time of the conveyance. The fact that Mr. Greene's deed was recorded before Mr. Rice's does not affect the outcome under a notice type of recording statute. Although a portion of the sentence in *Rice*, on which Wachovia relies, mentions recording, in that case, it was superfluous.

We conclude that Florida is, and remains, a "notice" jurisdiction, and notice controls the issue of priority. Since Argent is a subsequent mortgagee for value and did not have notice of the Olympus Mortgage at the time of execution of the Argent Mortgage, the Argent Mortgage has priority over the Olympus Mortgage. As such, the trial court erred by entering partial summary final judgment in favor of Wachovia on the issue of priority.

Recordation Statutes

Fla. Stat. § 695.01

No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and

property, a judgment that is recorded earlier in time, namely one that bears a lower official register number, will win priority.

effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law . . . .

N.C. Stat. §47-18

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, bargainer or lesser but from the time of registration thereof in the county where the land lies . . . .

Alaska Stat. §40.17.080

. . . A conveyance of real property in the state, other than a lease for a term of less than one year, is void as against a subsequent innocent purchaser in good faith for valuable consideration of the property or a part of the property whose conveyance is first recorded. . . .

Notes and Questions

4.13. What kind of recording acts are the three state statutes listed above? Explain how the categorization – race, notice, or race-notice – follows from the text of the statute.

4.14. Who would have won in *Argent* if Argent had recorded on January 3 instead of on January 31? What about in a race jurisdiction? In a race-notice jurisdiction?

4.15. Who would have won in *Argent* if the Burkes had disclosed the existence of the Olympus Mortgage to Argent on December 6? On December 16? What about in a race jurisdiction? In a race-notice jurisdiction?

Part III

Operation of Law

Chapter 5

Estates and Future Interests

All land under the dominion of the English crown is held "mediately or immediately, of the king"—that is, the crown has "radical title" to all land under its political dominion. William the Conqueror declared that all land in England was literally the king's property; everyone else had to settle for the privilege of holding it for him—the privilege of *tenure* (from the Norman French word "tenir"—to hold). Tenurial rights were intensely personal in early feudal society: the right to hold land was a privilege granted by the crown in exchange for an oath of allegiance and a promise of military service by the tenant—the oath of homage. The word homage derives from the French word *homme*—literally "man"—precisely because the ceremony surrounding the oath created not only the right of tenure, but a political and military relationship between "lord and man."[1] In exchange for the tenant's loyal sup-

[1] The ceremony of homage, recorded by the 13th-century jurist and ecclesiastic Henry de Bracton, required the tenant to come to the lord in a public place, and there

> to place both his hands between the two hands of his lord, by which there is symbolized protection, defense and warranty on the part of the lord and subjection and reverence on that of the tenant, and say these words: "I become your man with respect to the tenement which I hold of you . . . and I will bear you fealty in life and limb and earthly honour . . . and I will bear you fealty against all men . . . saving the faith owed the lord king and his heirs." And immediately after this [to] swear an oath of fealty to his lord in these words: "Hear this, lord N., that I will bear you fealty in life and limb, in body, goods, and earthly honour, so help me God and these sacred relics."

2 Henry Bracton, On the Laws and Customs of England 232 (Samuel E. Thorne trans., 1968) (c. 1230). The Anglo-Saxon Chronicle contains a remarkable and much-debated passage in which William the Conqueror is said to have held court at Salisbury twenty years into his reign, and there

Figure 5.1: Homage Ceremony. From JAMES HENRY BREASTED & JAMES HARVEY ROBINSON, 1 OUTLINES OF EUROPEAN HISTORY 399 (1914).

port, or *fealty*, the lord warranted the tenant's right to hold a plot of land, called a fief, or *fee*.

Acceptance of this form of military tenure obligated the tenant to provide a certain number of knights when called on by the king, and the land held by the tenant was supposed to provide sufficient material support to enable him to meet this military obligation. Sometimes, by the process of *subinfeudation*, the King's direct tenants (or "tenants-in-chief") could spread this burden around by in turn accepting homage from other, lesser nobles and freemen, each of whom would be responsible to the tenant-in-chief for a portion of the tenant-in-chief's obligation to provide knight-service. The tenants-in-chief thereby became "mesne lords" in their own right ("mesne" being Norman French for "middle" or "intermediate"). There could be several layers of mesne lords (i.e., "land lords") in the feudal hierarchy, at the bottom of which were "tenants in demesne" ("demesne" being Norman French for "domain" or "dominion")—who actually held the land rather than subinfeudating it further. Of course, holding land did not mean one actually worked it; a tenant in demesne often left the cultivation and productive use of land to those of lower social status. These could be "villeins"—serfs legally bound to the land by birth—or "leasehold" tenants—a leasehold being a right to hold land for a term of years

summoned and taken direct oaths of homage and fealty from every landowner "of any account" in the whole of England. *See* H. A. Cronne, *The Salisbury Oath*, 19 HISTORY 248 (1934); J.C. Holt, *1086*, in COLONIAL ENGLAND, 1066-1215, at 31 (1997).

in exchange for payment of rent in cash or (more often) kind, and of lesser status than the "freehold" estate held by feudal tenants tracing their rights up the feudal pyramid to the crown.

Because a feudal tenant's land rights were intimately connected to this web of personal, political, and military relationships, there was no logical reason why the tenant ought to be free to transfer those rights to anyone else—and good reason for the lords to resist such alienation of the fee by their tenants. Indeed, fees could be forfeited to the lord for the tenant's breach of the homage relationship or commission of some other "felony," and on the tenant's death it was not clear that his family members had the right to inherit the fee. The king was assumed to have the right to retake the fee and re-grant it to a preferable new tenant upon his displeasure with or the death of the old tenant (it was his land, after all). Within a century, however, the dynastic ambitions of the baronage compelled King Henry I to concede (in his Coronation Charter of 1100) that a recently deceased baron's heir could redeem his fee upon payment of "a just and lawful relief"—i.e., a payment of money to the crown, as a kind of inheritance tax. Under the principle of primogeniture that took hold in England around this time, the lord's heir was his eldest son; landowners were not free to choose who would take over their tenancy after their death. Thus, subject to the payment of a relief, the fee became *descendible*—capable of being inherited from one generation to the next—and the grant of a descendible tenancy by the crown was now made not "to Lord Hobnob," but "to Lord Hobnob *and his heirs*." To this day, the latter phrase remains the classic common-law formula for creating the broadest interest in land that the law will recognize: the *fee simple absolute*.

Descendibility of the fee simple having been settled early in the history of English land law, the broader question of full alienability took several more centuries to work out. The history of medieval English land law is a history of tenants trying to secure their families' wealth and power by expanding alienability and evading tenurial obligations to their lords and the crown, while the crown and higher nobility tried to adapt the law to preserve their status and prevent such evasions. There is a dialectical quality to this history. For example: for complicated reasons subinfeudation quickly came to present a greater threat to the economic interests of the higher ranks of the feudal hierarchy than simple substitution of one tenant for another. Thus, in 1290 the Statute of Quia Emptores banned subinfeudation. But in doing so it validated substitution, and with it the practice of selling an entire fee in exchange for money during the life of the tenant. Similarly, in 1536, at the insistence of King Henry VIII, the Statute of Uses abolished many clever schemes adopted by tenants to use intermediaries to direct the disposition of real property interests af-

ter death and to put those interests outside the reach of the law courts (and of the crown's feudal authority). But in doing so, the statute validated one type of flexible property arrangement we have come to know as a *trust*. Moreover, the removal of the primary mechanism lawyers had developed to meet tenants' demand for intergenerational planning was sufficiently unpopular that Henry felt compelled to consent to the enactment of the Statute of Wills in 1540—finally permitting tenants to pass their legal estates in land by will rather than being at the whim of the rule of primogeniture. Finally, since the 16th century, primogeniture has given way to a more complex system of default inheritance rights for various relatives of the deceased who leaves no will; these rights are designed to try to approximate what legislatures think the *decedent* would have wanted, not necessarily what is best for the government. This set of default rights comprises the law of *intestate succession*, which we will discuss in a separate unit (or which you may study in a separate course on trust and estates law).

Various other statutes and common-law developments over the centuries culminated in the system of possessory estates and future interests that were imported into the North American English colonies, and thus into the independent American states (excluding Louisiana). Underlying them all is a fundamental distinction that traces back to the "radical title" asserted by William the Conqueror in 1066: **there is a conceptual difference between the ownership *of land* and the ownership of *a legal interest in that land***. This distinction remains important to modern property law, and this unit will introduce you to the types of legal interests in land that American law will recognize. In particular, it examines how the common law divides up legal interests in land among successive owners over time.

Before delving into this material, we should warn you that the estates system has limited relevance even for the practicing real estate lawyer of today. The study of estates and future interests remains in property courses for three primary reasons: (1) the estates are still legally valid property interests, and their complexity can therefore can be a danger to lawyers who encounter them and are unfamiliar with them; (2) some of the legal estates and future interests in real property can be usefully extended to *equitable* interests in property held in trust; and (3) the bar examiners are fond of testing aspirant attorneys on future interests—perhaps simply because they are fairly mechanical and therefore highly testable. To be sure, mastering the system of estates and future interests requires considerable exercise of the lawyerly skills of close reading, logical reasoning, and breaking down a big problem into lots of smaller problems. But there are other ways of learning those things, and a contemporary lawyer whose client wanted to divide up interests in property

would be courting malpractice by relying on legal estates and future interests in land (which makes the bar examiners' continued affection for them even more baffling). Instead, the modern lawyer should look to the much more flexible law of trusts and to the various forms of business associations—such as corporations—that can own property in their capacity as fictional legal "persons."

5.1 Concepts, Vocabulary, and Conventions

To begin understanding how the law divides up interests in land over time, we begin with the fundamental distinction between possessory estates and future interests. A **possessory estate** is a legal interest that confers on its owner *the right to present possession* of some thing. A **future interest** is a legal interest *that exists in the present*, but does not entitle the owner to possession until some point *in the future*.

This may sound confusing, but you are probably already familiar with an arrangement that follows this pattern: a lease. A lease is a transaction in which the landlord gives the tenant a possessory estate (a leasehold estate), and *retains* a future interest—the right to retake possession after the lease term ends. This retained future interest—an unqualified right to future possession retained by the party who created the possessory interest that precedes it—is called a **reversion**. (Landlord-tenant relationships are obviously more complicated than this—they entail a number of contractual rights and obligations and are heavily regulated by statutory and decisional law and, in many cases, administrative codes.)

The idea that both landlord and tenant can have legal interests in the same parcel of land at the same time, even though only one of them has the right to *possess* the land at any given time, is a good introduction to the concept of future interests. If you think about it, you will probably recognize that the basic idea of a lease implies certain rights and powers of a landlord in the leased premises even *during* the term of the lease. The most important one is the reversionary right itself: the right to take possession at some point in the future. That's a right the tenant can't take away, even while the tenant has the right to possession. The landlord might be interested in selling (or mortgaging) this reversionary right, even before the lease ends. And if she does sell or mortgage her interest (which she may, subject to the tenant's interest), the thing sold is not "the property"; it is *the landlord's reversion*: a legal interest in real property *that exists in the present* but will not entitle its holder to *possession* of that real property until some point *in the future*.

When learning about estates and future interests, we will follow some conven-

tions that will simplify our discussion as much as possible. Most of our problems will involve an owner of land transferring some interest in that land to one or more other parties. Following longstanding tradition in the study of Anglo-American property law, we will refer to the parcel of land in question as "Blackacre" (or "Whiteacre," "Greenacre," "Ochreacre," etc. if more than one parcel is at issue). We will refer to the original owner as O, and the other parties as A, B, C, etc.

5.2 Basic Estates and Future Interests

We will begin by examining two possessory estates—the fee simple absolute and the life estate—and two future interests (one of which you have already encountered)—the reversion and the remainder.

5.2.1 The Fee Simple Absolute

The **fee simple absolute** is the most complete interest in land that the law will recognize. When we say that "O owns Blackacre" without any further qualification, what we actually mean is that O owns a *presently possessory fee simple absolute* in Blackacre. The key distinguishing characteristic of the fee simple absolute is that it has no inherent end—it is an estate of *indefinite duration*. It is descendible, devisable, and alienable *inter vivos*; so it can be *transferred* to a new owner, but it cannot be destroyed. At most, it can be carved up into lesser estates and interests for a while, and we will spend most of the rest of this chapter understanding how that happens.

At common law, as previously noted, the fee simple absolute was created by the formula: "to A and his heirs." That formula still works, but in modern usage it is sufficient to simply say "to A," and the use of such language in a conveyance from the owner of a fee simple absolute will be presumed to create a fee simple absolute in A.

5.2.2 The Life Estate

The **life estate** is just what it sounds like: an estate that confers a right to possession for the life of its owner. The owner of a life estate is referred to as a **life tenant**. The life estate terminates by operation of law upon the owner's death (i.e., it ceases to exist). It is created by the formula: "to A for life." Because it must by definition end—we all have to die sometime—any land held by a life tenant must also

be subject to a *future interest* in some other person. We'll explore what those future interests might be shortly.

Recall the legal principle of *nemo dat quod non habet* (or *nemo dat* for short), which we encountered in our discussion of good faith purchasers: a grantor cannot convey title to something she doesn't herself own. Following this principle, life estates are alienable *inter vivos* during the life of the life tenant, but obviously not devisable or descendible by the life tenant: they cease to exist upon the death of their owner, so the life tenant's estate has nothing to convey.[2] *Nemo dat* also implies that the owner of an interest in real property cannot convey *more* than their interest; a life tenant cannot convey a fee simple absolute, for example. More to the point, if a life tenant A transfers their life estate to a grantee B, B cannot receive anything more than what A owns: a possessory estate that will terminate by operation of law *when A dies*. Because such an interest is measured by the life of someone other than its owner, it is called a **life estate pur autre vie** (literally, in Law French, "for another life"). A life estate *pur autre vie* can also be created explicitly, as by a grant "to A for the life of B."

We'll hold off on any further illustrative problems at this point, because we still need some exposition of what happens *after* a life tenant dies. The answer, as we've already noted, involves *future interests*.

5.2.3 The Reversion

We encountered the reversion once before, when discussing leases as an introduction to the concept of a future interest. But reversions often arise in non-leasehold contexts too. Consider what happens when A, owning a life estate in Blackacre, dies. A's life estate terminates by operation of law; it simply ceases to exist and disappears. Who "owns" Blackacre now? It seems obvious that *somebody* must have a right to possession of the land, but it seems equally obvious that whoever that somebody is, they had *no right to possession* before A died. Whoever they are, during the term of A's life estate they must have held an interest that would entitle them to take possession at *some point in the future* (that is, a *future interest*).

There are two candidates for such an interest. We will begin with the most basic: the **reversion**. Suppose that O, owning a fee simple absolute in Blackacre, conveys Blackacre "to A for life," and says nothing more? What is the legal effect of this grant?

[2] A life estate can theoretically be devised or inherited in the (perhaps contrived) situation where the life tenant conveys to a third party, who dies before the life tenant; the third party's heirs or devisees would receive the estate insofar as the original life tenant is still alive.

Based on the formula we just learned, it should be clear that A receives a life estate in Blackacre. But what other effects does the grant have on the legal rights of the parties? Think about the interest O held prior to the conveyance: the fee simple absolute. Remember that a fee simple absolute is an interest of *infinite duration*—it never ends. So when O starts with a possessory interest of infinite duration, and then gives away a life estate—whose duration is limited by a human lifespan—to A, *something was left over*. Specifically, O never gave away the right to possession of Blackacre from the day of A's death to the end of time. Whether meaning to or not, O gave away less of an interest in Blackacre than what he owned, meaning *he still holds some interest*. We call this type of interest—the residual interest left over when a grantor gives away less than they have—a *retained* interest.

This retained interest can't entitle O to possession during A's life—A has the exclusive right to possession as the life tenant. So O's interest must be a *future interest* during the term of A's life estate: an interest that will entitle O to possession *after the natural termination of the life estate*. As we discussed in the example of the lease, we call this kind of future interest a **reversion**. It is a *retained interest in the grantor*—created when a grantor conveys less than his entire interest—that will become possessory by operation of law upon the *natural termination* of the preceding estate. Colloquially, we say that Blackacre "reverts" to O. In some opinions, you will see the holder of a reversion referred to as a "reversioner."

A reversion can of course also be created explicitly, for example, if O conveys Blackacre "to A for life, then to O." In this case, O has explicitly created a life estate in A followed by a reversion in O.

5.2.4 The Remainder

A **remainder** is a type of future interest created in someone *other than* the grantor. The distinguishing characteristic of the remainder is that—like a reversion—it *cannot cut short or divest any possessory estate*. (We will later encounter other future interests that can.) A remainder simply "remains," sitting around and waiting for the natural termination of the preceding possessory estate (be it a life estate or a lease), at which point the remainder will become possessory by operation of law. Suppose that O, owning a fee simple absolute in Blackacre, conveys Blackacre "to A for life, *and then to B.*" Again, A would have a life estate, but now O has also affirmatively created a future interest in B. Because the future interest is created in someone *other than* the grantor, it isn't a reversion. And because it cannot cut short A's life estate (note the "and then" language), it must therefore

be a **remainder**. Due to the persistence of dated gendered terms in legal discourse, you will often see the holder of a remainder referred to as a "remainderman," even today, regardless of that person's gender.

Future interests get a lot more complicated than this, but you now have enough to begin examining some problems that can arise from even this limited set of interests.

Notes and Questions

5.1. O, owner of a fee simple absolute in Blackacre, conveys Blackacre "to A for life, then to B for life." (Assume that both A and B are alive at the time of the grant.) What is the state of title in Blackacre?

- What will be the state of title if A dies, survived by B and O?
- What will be the state of title if B dies, survived by A and O?
- What will be the state of title if O dies, then A dies, then B dies?

5.2. What will be the state of title if, while O, A, and B are still alive, B conveys her interest to C?

- What will be the state of title if, after B conveys her interest to C, A dies, survived by B, C, and O?
- What will be the state of title if, after B conveys her interest to C, C dies, leaving D as his heir, and is survived by A, B, and O?
- What will be the state of title if, after B conveys her interest to C, B dies, survived by A, C, and O?

5.3 Working Out Problems

To grasp how they system of estates works, **you must work out problems on your own**. It is not enough to read the text passively here. (That's why you have so few pages to read for this chapter.) You should do all the problems given above, and also try to construct some hypothetical scenarios of your own.

The reason you need to work out problems on your own is that you need to develop a method for notating the property interests involved in any given problem. I will show you one way of keeping track of the interests; you are free to come up with your own if it works better for you. Whatever you choose, though, must be

precise enough to track each interest by name, holder, and relationship with other interests.

Consider, for example, a situation where O conveys Blackacre "to A for life, then to B." You might say that A holds a life estate and B has a remainder, but that description has plenty of ambiguity. Whose life does A's life estate depend upon? What does B's remainder follow? And when B's future interest converts to a possessory estate, which one does it become? In this simple example the answers might be obvious, but throw in a more complicated conveyance and several property transfers, and the exact nature of the interests can easily become lost.

A more complete description of the interests is:

- A has a life estate in Blackacre for the life of A.
- B has a remainder, following the life estate in Blackacre for the life of A, which will become fee simple absolute in Blackacre.

This is complete and unambiguous, but also pretty wordy for purposes of notetaking and working out problems. We can omit "Blackacre" given that only one property is involved (but don't omit it if there are more!). We'll give the interests identifiers (interest #1, interest #2) to make them easier to talk about. Let's also introduce some abbreviations.

FSA	Fee simple absolute
LE(P)	Life estate for the life of person P
Rem(#I, E)	Remainder following interest #I, which will become estate E
Rev(#I, E)	Reversion following interest #I, which will become estate E

Now we can fully characterize the interests in Blackacre as follows:

- A has interest #1: LE(A)
- B has interest #2: Rem(#1, FSA)

Even better, let's put it in tabular form:

Event	A	B
Grant from O	#1: LE(A)	#2: Rem(#1, FSA)

At this point, the table and abbreviations may seem unnecessarily cryptic. Again, feel free to choose abbreviations that work best for you. But the value of this structure comes when the interests start moving around. Say that A decides to move to Hawaii, and gifts Blackacre to her sister C. What does C have? All we need to do is to copy A's property interest over to a new column for C:

Event	A	B	C
Grant from O	#1: LE(A)	#2: Rem(#1, FSA)	
A to C		#2: Rem(#1, FSA)	#1: LE(A)

The notation makes clear that C's interest is based on A's life, not C's; that is, C has a life estate pur autre vie for the life of A. If C dies, leaving all her property to D:

Event	A	B	C	D
Grant from O	#1: LE(A)	#2: Rem(#1, FSA)		
A to C		#2: Rem(#1, FSA)	#1: LE(A)	
C dies		#2: Rem(#1, FSA)		#1: LE(A)

The table thus makes clear that C's death only causes a transfer of the life estate, but does not change the interest or any other interests.

What happens when A dies? We just follow two rules:

- When person P dies, LE(P) terminates.
- When interest #I terminates, then Rem(#I, E) or Rev(#I, E) turns into E.

Applied to the table, that means that when A dies, the life estate disappears, and the remainder converts as follows:

Event	A	B	C	D
Grant from O	#1: LE(A)	#2: Rem(#1, FSA)		
A to C		#2: Rem(#1, FSA)	#1: LE(A)	
C dies		#2: Rem(#1, FSA)		#1: LE(A)
A dies		#2: FSA		[terminated]

Let's now work out a more complex problem, the third question in note 5.1. (Try to work it out yourself first.) Initially, we need to translate the conveyance "O to A for life, then to B for life" into our notation. A has a life estate for the life of A, which we will call #1: LE(A). B's interest follows A's, so it is a remainder that will become a life estate for the life of B, which we notate #2: Rem(#1, LE(B)). This gives the following table:

Event	A	B
Grant from O	#1: LE(A)	#2: Rem(#1, LE(B))

Are we done? A good check, which works for any row of these tables, is to start with the possessory estate and follow the chain of interests. The last one must be, or be convertible to, fee simple absolute—otherwise the property might have no one entitled to possess it at some point. Here, we start with A's interest #1, which is followed by B's interest #2 that can convert into a life estate, and then what? Since the grant from O specifies nothing else, we infer a reversion following the last interest in the chain:

Event	A	B	O
Grant from O	#1: LE(A)	#2: Rem(#1, LE(B))	#3: Rev(#2, FSA)

Now there is a complete chain of future interests, ending with someone receiving fee simple absolute ownership.

Next in the problem, O dies. None of the life estates are based on O's life, so no interests need to be converted. But O does own something, because O has an entry in the table. That entry needs to go to someone else now, since O, being dead, can't own property. We'll call this recipient of O's property "O's heir":

Event	A	B	O	O's heir
Grant	#1: LE(A)	#2: Rem(#1, LE(B))	#3: Rev(#2, FSA)	
O dies	#1: LE(A)	#2: Rem(#1, LE(B))		#3: Rev(#2, FSA)

(Challenge question: What happens if A is O's heir?)

Next, the problem says that A dies. There is a life estate for the life of A, so we apply the conversion rules to interests #1 and #2:

Event	A	B	O	O's heir
Grant	#1: LE(A)	#2: Rem(#1, LE(B))	#3: Rev(#2, FSA)	
O dies	#1: LE(A)	#2: Rem(#1, LE(B))		#3: Rev(#2, FSA)
A dies	[term.]	#2: LE(B)		#3: Rev(#2, FSA)

Finally, B dies. Again, since a life estate depends on B's life, we apply the conversion rules, now to interests #2 and #3:

Event	A	B	O	O's heir
Grant	#1: LE(A)	#2: Rem(#1, LE(B))	#3: Rev(#2, FSA)	
O dies	#1: LE(A)	#2: Rem(#1, LE(B))		#3: Rev(#2, FSA)
A dies	[term.]	#2: LE(B)		#3: Rev(#2, FSA)
B dies		[term.]		FSA

The result, as the table makes clear, is that O's heir takes Blackacre in fee simple absolute.

5.4 Stepping Back

Whew! It's easy to get bogged down in the intricacies of the system of estates, which is full of odd terminology, tricky mechanics, and a generally archaic objective of family property management. It is necessary that you become familiar with the terms and the mechanics. In part this is because it's on the bar exam, and in part it is because the procedural rule-based thinking required to work out estates problems is generally useful in the practice of law.

But there is something deeper at work here. Strip away the particulars and the medieval phrasing from life estates and future interests, and a general framework appears. For a single piece of land or other property, there can be a someone with a current possessory interest, and others with future interests in the property that are *also property rights*—their interests can be transferred to others, and the future interest holders have rights over the property against the world. A key event occurs, such as the death of a relevant person for a life estate. Upon that event occurring, a cascade of legal consequences follow, which can change the nature of those property interests automatically, perhaps even without the intervention of a court.

This pattern—a key event causes automatic conversion of property rights—is what is meant by "operation of law." It is the basic pattern for the more exotic possessory estates and future interests that were not presented in this chapter, and it is the pattern for far more of property law too. A tenant who leases an apartment has a possessory estate, with the landlord holding a future interest; the key events might include expiration of the lease or nonpayment of rent. We will study other property arrangements that fit this pattern, including mortgages, security interests, and joint tenancies.

All this is to say that this material is no doubt some of the most difficult to conceptualize. But if you can grasp the concepts here, that work will pay off as you start to see similar patterns arise everywhere else.

Chapter 6

Issues with Estates

6.1 Construing Ambiguous Grants

We've recited a few formulas for creating the small number of common-law interests you've encountered. For example, "to A and his heirs" creates a fee simple absolute in A; "to B for life, then to C" creates a life estate in B and a remainder in C. But the actual language of documents conveying legal interests in real property don't always stick to the formula—especially (but unfortunately not exclusively) when they are drafted without the assistance of counsel. Consider the following case.

In the Estate of Dalton Edward Craigen

305 S.W.3d 825 (Ct. App. Tex. 2010)

Hollis Horton, Justice.

We are asked to determine whether the trial court properly interpreted the dispository language in a holographic will. If the will is ambiguous, the applicable rules of will construction yield one result. If the will is unambiguous, the trial court was required to give effect to the express language of the will, and arguably should have reached a different result.

The trial court, in construing the testator's intentions under the will, found "[t]hat it was the intent of the [t]estator to leave his entire estate to his surviving wife in full." The trial court further found "[t]hat there was no intention to leave a life estate to her." In a single issue on appeal, the testator's adult children contend the testator intended to leave a life estate

to his wife, and they argue that the remainder of the estate passed to them through the laws of descent and distribution. We find the will is ambiguous and hold that under the appropriate rules of will construction, the trial court properly construed the will. Accordingly, we affirm the judgment.

The Will

Dalton Edward Craigen left a holographic will that in its entirety stated:

> Last Will & testament
>
> Debbie gets everything till
>
> she dies.
>
> Being of sound mind & this
>
> is my w. last will & testament.
>
> I leave to my Wife Daphne
>
> Craigen all p. real & personal property.
>
> 12–17–99 Dalton Craigen

Contentions of the Parties

The parties stipulated "[t]hat Debbie and Daphne named in Dalton Craigen's will are one and the same person." Brian Craigen and Sabrina Brumley, Craigen's adult children, argue that the testator's intent under the will is "crystal clear—the testator left everything (all of his real and personal property, his definition of 'everything') to his wife for as long as she lived." According to Brian and Sabrina, the dominant provision of the will (the first sentence) creates a life estate, and the will's third sentence can be harmonized with the will's first sentence by construing the third sentence to define the property that Craigen intended to include in his wife's life estate. Brian and Sabrina ask that we render a judgment in their favor by holding that Daphne received only a life estate under Craigen's will.

Daphne died on January 17, 2009. Yvonne Christian, the independent administratrix of Daphne's estate, argues we should affirm the trial court's judgment. According to Christian, the will is not ambiguous as it reflects Craigen's intent to leave his entire estate to Daphne.

Rules of Construction

The rules involved in construing wills are well settled. "The primary

object of inquiry in interpreting a will is determining the intent of the testator." *Gee v. Read*, 606 S.W.2d 677, 680 (Tex.1980). "The [testator's] intent must be drawn from the will, not the will from the intent." *Id.* We ascertain intent from the language found within the four corners of the will. "In construing the will, all its provisions should be looked to, for the purpose of ascertaining what the real intention of the [testator] was; and, if this can be ascertained from the language of the instrument, then any particular paragraph of the will which, considered alone, would indicate a contrary intent, must yield to the intention manifested by the whole instrument." *McMurray v. Stanley*, 69 Tex. 227, 6 S.W. 412, 413 (1887).

When a will has been drafted by a layperson who is not shown to be familiar with the technical meanings of certain words, courts do not place "'too great emphasis on the precise meaning of the language used where the will is the product of one not familiar with legal terms, or not trained in their use.'" *Gilkey v. Chambers*, 146 Tex. 355, 207 S.W.2d 70, 71 (1947) (quoting 69 C.J. Wills § 1120 (1934)). Instead, in arriving at the meaning intended by the layman-testator, courts refer to the popular meaning of the words the testator chose to use. In summary, the testator's intent, as gathered from the will as a whole, prevails against a technical meaning that might be given to certain words or phrases, unless the testator intended to use the word or phrase in the technical sense.

With respect to the creation of a life estate, no particular words are needed to create a life estate, but the words used must clearly express the testator's intent to create a life estate. A very strong presumption arises that when a person makes a will, the testator intended a complete disposition of his property. "[T]he very purpose of a will is to make such provisions that the testator will not die intestate." *Gilkey*, 207 S.W.2d at 73. When faced with ambiguity, and in applying that presumption, courts generally interpret wills to avoid creating an intestacy.

. . . In reconciling different parts of a will, the Texas Supreme Court has explained:

> Where, however, the language of one part of a will is not easily reconciled with that used in another, the principal and subordinate provisions should be construed in their due relation to each other, and the intent which is disclosed in the express clause ought to prevail over the language used in subsidiary provisions, unless modified or controlled by the latter. And a

> clearly expressed intention in one portion of the will will not yield to a doubtful construction in any other portion of the instrument.

Heller v. Heller, 114 Tex. 401, 269 S.W. 771, 774 (1925).

Analysis

A will is ambiguous if it is capable of more than one meaning. Because Debbie and Daphne are in fact the same person, the ambiguity in Craigen's will becomes apparent. Why would Craigen in the first sentence grant his wife a life estate, but then in the concluding sentences bestow upon her all of his property? The resolution of that question by Craigen's children seems reasonable, as the last sentence could be construed to merely describe the property that Craigen intended to include in Daphne's life estate.

On the other hand, Craigen did not mention his children in his will and he made no provisions to expressly benefit them. Moreover, Brian and Sabrina's construction of Craigen's will would, if adopted, allow all of Craigen's property to pass under the laws of intestacy at Daphne's death. Brian and Sabrina's construction assumes that Craigen, when writing his will, did not intend to completely dispose of his estate. The rule that Craigen did not likely intend to create an intestacy favors the construction of the will that the trial court adopted.

Brian and Sabrina contend that the will gave Daphne a life estate, but Craigen did not utilize those exact words in his will. Although no particular words are needed to create a life estate, the words used must clearly express the testator's intent to create one. In the absence of a remainderman clause, we are skeptical that Craigen used the phrase "till she dies" in a technical sense to create a life estate. Instead, Craigen likely intended to limit Daphne's use of his property; nevertheless, the will manifests an intent that she have his property in fee simple absolute. Consequently, although the first sentence in the will is susceptible to the interpretation that Craigen created a life estate, the will becomes ambiguous when, in the will's third sentence, Craigen expressly names Daphne as the beneficiary of all of his property and he makes no further provision for his estate upon her death.

We conclude that the will is reasonably capable of more than one meaning; therefore, we resort to the rules of construction that apply to ambigu-

ous wills . . . . Craigen's will can be interpreted to avoid the intestacy certain to result under Brian and Sabrina's construction of the will. The potential intestacy is avoided if the phrase "till she dies" is interpreted as a conditional bequest. The third sentence then functions as intended to give Daphne all of Craigen's property in fee simple. The immediate vesting construction favors Daphne, the sole beneficiary named in Craigen's will. It also affords the phrase "till she dies" a nontechnical meaning.

We decline to apply the presumption that Craigen did not intend to disinherit his children when the will expressly states that Craigen gave all of his real and personal property to Daphne and when Brian and Sabrina offered no evidence regarding Craigen's situation and the circumstances surrounding the execution of the will. Taking the will as a whole, the dominant gift is all of Craigen's real and personal property, and he made that gift to his wife. As this is the dominant clause, Craigen's expressed intention prevails.

We hold that under the appropriate rules of will construction, the trial court correctly construed the will. We overrule the issue and affirm the judgment.

AFFIRMED.

Notes and Questions

6.1. **Holographic Wills.** A holographic will—a will handwritten by the testator—often presents a particular challenge for courts attempting to interpret it. Indeed, they are thought to be so problematic that about half of American jurisdictions refuse to recognize them as valid wills at all. *See* Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, REAL PROPERTY, TRUST AND ESTATE LAW JOURNAL 27 (2008) (arguing that the defects of holographic wills, though real, are overstated). Lay testators attempting to settle their affairs without assistance of counsel often make legal or technical errors of various kinds, including errors of ambiguity such as the one that generated the litigation in *Craigen*.

6.2. **Presumptions and Rules of Construction.** The court reviews a number of rules of construction applied by courts in construing ambiguous grants. Most jurisdictions have similar rules of construction—sometimes promulgated by statute, other times judge-made. In *Craigen*, two rules in particular do considerable work: the presumption against intestacy and the clear-statement rule for creation of a life

estate. The latter rule is sometimes expressed in other jurisdictions as a presumption in favor of the largest estate the grantor could convey. *See, e.g.*, *White v. Brown*, 559 S.W.2d 938, 939 (Tenn. 1977) (quoting Tenn. C. Ann. § 32-301) ("Every grant or devise of real estate, or any interest therein, shall pass all the estate or interest of the grantor or devisor, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of the instrument.").

What justification is there for presuming that an ambiguous grant conveys a fee simple absolute rather than a life estate? Is it any different for the justification underlying the presumption against intestacy? Was *Craigen* an appropriate case for the application of these presumptions?

6.3. **Finding Ambiguity.** Are you convinced by the court's arguments that the language "till she dies" does not "clearly express the testator's will to create a life estate"? What do you think Dalton Craigen meant by this phrase?

6.4. **Dueling Presumptions.** The court mentions another rule of construction—the presumption against disinheritance—but declines to apply it. Why? Is its reason for following the presumption against intestacy but declining to follow the presumption against disinheritance persuasive? How is a court to decide when a presumption or other rule of construction applies and when it doesn't?

6.2 Present vs. Future: The Doctrine of Waste

Even if we are very clear on the nature and allocation of possessory and future interests in a parcel of land, we soon run into a practical problem: it can be difficult to protect the value of a future interest while someone else is in possession of the land, acting for most purposes as its owner. What if a life tenant burns down the structures on the parcel? Or decides to undertake a remodeling project that would make the parcel less desirable to future renters? Or fails to do anything about a leaky pipe, leading to a costly mold infestation? What if the possessor uses the property in such a way as to maximize its current value at the expense of its future value—depleting natural resources, wearing out buildings and fixtures without repairing or maintaining them—in ways that can't be recovered? Can it be wrongful—as a matter of property law—for a lawful possessor to use the possessed premises however they wish, for good or for ill?

The common law recognized that it *could* be wrongful for a present lawful possessor to take (or fail to take) certain acts with respect to land in their possession—if those acts affected the ability of a *future* possessor to enjoy their interest when their turn came around. To vindicate the rights of these future interest holders, the com-

mon law gave them a private right of action to enjoin, and obtain damages for, the acts and omissions of possessors that permanently decrease the value of the future interest. This was the action for waste.

Jackson v. Brownson

7 Johns. 227 (N.Y. Sup. Ct. 1810)

. . . This was an action of ejectment for a farm in Whitestown. The cause was tried at the Oneida circuit, the 5th June, 1809, before Mr. Justice Yates.

At the trial, the plaintiff gave in evidence the counterpart of a lease, dated the 3d September, 1790, from Philip Schuyler,* of Albany, to the defendant, for the premises in question, for the lives of the defendant, his wife, and Samuel Shaw, respectively. The farm contained 133 acres and a half. The lease contained various covenants, reservations and conditions, among which was the following: . . . "And it is further conditioned on the part of the said lessee, that neither the said lessee, his executors, &c., . . . shall, at any time hereafter, commit any waste."

"And in case the said lessee, his, &c., shall not perform, fulfil, abide by, and keep all and every of the covenants and conditions herein covenanted and conditioned, &c., then in each of the said cases, it shall thenceforth be lawful for the lessor, his, &c., into the whole of the said premises, or into any part thereof, in the name of the whole, to reënter, and the same to have again, repossess and enjoy, as his or their former estate," &c.

The lessors were the heirs of Philip Schuyler; this action was brought to recover the possession of the south half of the premises, on the ground of forfeiture by a breach of the covenant; the lessee or his assigns having committed waste thereon by clearing and draining off the land more than a reasonable and due proportion of the wood. It was admitted that, at the date of the lease, the premises were wild and uncultivated, and covered throughout with a forest of heavy timber.

The plaintiff proved that the defendant occupied the south half of the premises, which were entirely cleared of wood, before the commencement of the suit; and that on the north half occupied by Shaw, the whole was cleared except about six or eight acres, on which more than half the wood and timber had been cut down and removed, before the commencement of

*Yes, *that* Philip Schuyler. *See The Schuyler Sisters*, *in* Lin Manuel-Miranda, *Hamilton* (2015). — Eds.

the suit.

It was also proved, that a permanent supply of fuel, timber for buildings, and wood for fences, for the use of the demised premises, would require that, at least, thirty acres should have been preserved in wood.

. . . It was also proved, that about 12 years since, there were 35 acres of land covered with wood and timber on the premises, and about 12 acres of woodland, on that part in the possession of the defendant, only half of which was good for timber, . . . that the defendant had cut no wood or timber on the part in his possession, except for fuel, fences, and building for the use of the farm, and which had been gradually cut, . . . [that] the defendant had built a house on the premises, which was completed about four years since; and had used the farm in a husbandlike manner, and had carried on more materials for fences than he had taken off; that . . . cleared land was of much greater value than land covered with wood and timber; and that good farms in the vicinity of the premises had not reserved more than 12 acres of woodland out of 100 acres . . . .

The judge was of opinion, . . . that the gradual clearing of that part in possession of the defendant, . . . did not, in law, amount to waste; and he directed the jury to find a verdict for the defendant; and the jury found accordingly.

A motion was made to set aside the verdict and for a new trial, for the misdirection of the judge. . . .

VAN NESS, J.

. . . It is a general principle, that the law considers every thing to be waste which does a permanent injury to the inheritance. Now, to say that cutting down the wood on almost every acre of the demised premises is not waste, within the spirit and meaning of the covenant in the case, is to say that no waste, by the destruction of wood, can be committed at all. We are bound to give effect to this covenant if we can, but to decide that the facts stated in the case do not constitute waste, would be destroying it almost altogether. That the destruction of the timber is a lasting injury to the reversion cannot be disputed. For this injury the lessors of the plaintiff may, at their election, bring covenant, or enter as for condition broken.

. . . It is true, that what would in England be waste, is not always so here. The covenant must be construed with reference to the state of the property at the time of the demise. The lessee undoubtedly had a right to fell part of the timber, so as to fit the land for cultivation; but it does not follow that

he may, with impunity, destroy all the timber, and thereby essentially and permanently diminish the value of the inheritance. Good sense and sound policy, as well as the rules of good husbandry, require that the lessee should preserve so much of the timber as is indispensably necessary to keep the fences and other erections upon the farm in proper repair. The counsel for the defendant is mistaken when he says that lessees in England are prohibited from cutting wood upon the demised premises altogether; the prohibition, in principle, extends no further, in this respect, there than it does here. In England, that species of wood which is denominated timber shall not be cut down, because felling it is considered as an injury done to the inheritance, and therefore waste. Here, from the different state of many parts of our country, timber may, and must be cut down to a certain extent, but not so as to cause an irreparable injury to the reversioner. To what extent wood may be cut before the tenant is guilty of waste, must be left to the sound discretion of a jury, under the direction of the court, as in other cases. . . . The principle upon which all these cases were decided is that which I have before stated, namely, that whenever wood has been cut in such a manner as materially to prejudice the inheritance, it is waste; and that is the principle upon which I place the decision of this cause.

. . . My opinion, therefore, is, that the motion for setting aside the nonsuit, and granting a new trial, ought to be granted.

KENT, Ch. J., and THOMPSON, J., were of the same opinion.

SPENCER, J.

. . . The land was covered with heavy timber; and, for the use of it, the lessee was to pay a rent. The parties must, therefore, have intended that the lessee should be at liberty to fell the timber to a certain extent, at least, for agricultural purposes.

If the restriction to commit waste would operate to restrain the lessee from the use of the premises, it would be void, as repugnant to the grant. I shall have no difficulty in maintaining that, according to the common law of England, the lessee could not enjoy the land, nor derive any benefit from it, without the commission of waste; and should that point be established, this covenant must be rejected. The general definition of waste is, that it is a destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him in remainder or reversion. It is not every injury to lands that the law considers as waste, nor every act which injures the remainder-man, or the reversioner. To test this supposed waste, by con-

sidering the reversioner injured by the acts done, is not warranted by law; and, in point of fact, when the premises were cleared of the timber, cleared land was more valuable than wood land. . . . I insist that, according to the common law of England, no tenant can cut down timber, &c., or clear land for agricultural purposes; and that the quantity of timber cut down never enters into the consideration whether waste has or has not been committed; but that it is always tested by the fact of cutting timber, without the justifiable excuse of having done it . . . . A single tree cut down, without such justifiable cause, is waste as effectually as if a thousand had been cut down; and the reason is this, that such trees belong to the owner of the inheritance, and the tenant has only a qualified property in them for shade and shelter.

The doctrine of waste, as understood in England, is inapplicable to a new, unsettled country. . . . The rule furnished by the common law is fixed and certain; and the lessor knows what wood he may cut, and for what purposes; but if a covenant not to commit waste is hereafter to be considered as a covenant to leave a sufficient quantity of land in wood, no lessee is safe. If the act of cutting timber on the premises, without the justifiable excuse already stated, was not waste, cutting more or less was immaterial. Under the covenant not to commit waste, we have no right to say some waste might be committed, and other waste might not; the covenant is inapt to the case, and if any remedy exists, it must lie in covenant. I am, therefore, against granting a new trial.

YATES, J., was of the same opinion.

Rule granted.

Notes and Questions

6.5. What exactly is the dispute between the majority and the dissent? Do they agree on the existence of a remedy for waste under New York law? On the definition of waste? On the applicability of waste doctrine to the lease before the court? On the remedy for waste?

6.6. Although this case deals with a lease for life—a peculiar hybrid estate that is not recognized in many jurisdictions—the doctrine of waste applies between freehold possessory estate holders and future interest holders just as it applies between leasehold tenants and landlords. Thus, even in the absence of a lease contract, Brownson could have been held liable for damages, or enjoined from felling any

further timber, in an action for waste by the reversioners (if the jury concluded that it would indeed be waste for a possessor in Brownson's position to fell such timber).

6.7. **Forms of Waste.** Waste can be either *voluntary* or *permissive*. Voluntary waste (sometimes called *affirmative* waste) refers to *acts* of the holder of the possessory estate, such as erecting or demolishing a structure, or extracting non-replenishing natural resources. Permissive waste refers to *omissions* of the holder of the possessory estate, such as failing to pay property taxes, or failure to make needed repairs. Either can support a claim for waste by the owner of a future interest whose rights are permanently devalued as a result. Which form of waste was at issue in *Jackson*?

6.8. **Theories of Waste.** One commentator argues that *Jackson* was the starting point for a peculiarly American departure from the English doctrine of waste deplored by the dissenters. In this view, "courts created the American law of waste for several reasons: to promote efficient use of resources that the English rule would have inhibited; to advance an idea of American landholding as a republican enterprise, free of feudal hierarchy; and perhaps to advance a belief that a natural duty to cultivate wild land underlay the Anglo-American claim to North America." Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 Cornell L. Rev. 653, 661 (2006). And indeed, the sensitivity of both opinions in *Jackson* to local conditions, the desirability of converting wild lands to agricultural use, and the sustainability of yeoman farming tend to support this pluralist view.

6.9. Law-and-economics theorists, in contrast, identify waste doctrine solely with the criterion of efficiency, and particularly the internalization of externalities and mitigation of holdout problems. As Judge Posner puts it: "The incentive of a life tenant is to maximize not the value of the property—that is, the present value of the entire stream of future earnings obtainable from it—but only the present value of the earnings stream obtainable during his expected lifetime. So he will, for example, want to cut timber before it has attained its mature growth even though the present value of the timber would be greater if the cutting of some or all of it were postponed; for the added value from waiting would inure to the remainderman . . . . [Moreover,] since tenant and remainderman would have only each other to contract with, the situation would be one of bilateral monopoly and transaction costs might be high." To avoid these problems, "[t]he law of waste forbids the tenant to reduce the value of the property as a whole by considering only his own interest in it." Richard A. Posner, *Comment on Merrill on the Law of Waste*, 94 Marq. L. Rev. 1095-96 (2011).

Note on Ameliorative Waste

What if, instead of doing something that *decreases* the value of the future interest, the holder of the possessory estate does something that *increases* the market value of the land, but in doing so changes the premises in ways the future interest holder doesn't like? Such alterations—known as *ameliorative waste*—have generated two types of approaches in the courts.

The first approach, adopted in *Melms v. Pabst Brewing Co.*, 79 N.W. 738 (Wisc. 1899), looks to the effect of the life tenant's actions on the market value of the parcel and whether those actions were necessitated by a change in conditions surrounding the parcel. In *Melms*, the Pabst Brewing Company had torn down an old mansion abutting a brewery it owned, mistakenly believing it owned the lot in fee simple when in fact it owned only the life estate of the widow Melms (the remainder being owned by her children). At the time of the demolition, the neighborhood around the house had become heavily industrialized, and had been re-graded such that the house stood 20-30 feet above street level and was worthless as a residential property. In these circumstances, the court held, whether the act of destroying the mansion and re-grading the lot on which it stood to street level constitutes waste is a question of fact for the jury. The court suggested that such actions will not constitute waste "when it clearly appears that the change will be, in effect, a meliorating change, which rather improves the inheritance than injures it." *Id.* at 739.

The second approach—more consistent with the common-law roots of waste doctrine—holds that *any* material change to real property caused by a lawful possessor without the consent of the holder of the future interest is waste, full stop. This approach informed the decision of the New York Supreme Court in *Brokaw v. Fairchild*, 237 N.Y.S. 6 (Sup. Ct. N.Y. Cty. 1929). In that case, the court refused to allow the life tenant of a stately mansion on New York's Fifth Avenue at 79th Street to tear the mansion down over the objections of the holders of future interests in the lot, even though living in the mansion had become cost-prohibitive and the neighborhood had become a prime location for luxury apartment buildings, which could be built and operated on the site for a substantial profit. The theory underlying this result is that a life tenant has merely the rights of use, not full rights of ownership, and that the holder of the future interest is entitled to take possession of the parcel in substantially the same condition as it existed at the time the future interest was created: "The act of the tenant in changing the estate, and whether or not such act is lawful or unlawful, i.e., whether the estate is so changed as to be an injury to the inheritance, is the sole question involved." *Id.* at 15.

The opinion in *Brokaw* generated a backlash in New York's reform-minded leg-

islature, which enacted a statute redefining waste law along the lines set forth in *Melms*; that statute remains in force today. *See* N.Y. Real Prop. Acts. & Procs. L. § 803. But interestingly, the opinion in *Melms* itself seems to have arisen from a number of questionable factual and legal pronouncements from the Wisconsin courts. The full, fascinating story is recounted in Thomas W. Merrill, Melms v. Pabst Brewing Co. *and the Doctrine of Waste in American Property Law*, 94 Marq. L. Rev. 1055 (2011). As of 2009, the rule of *Melms* was followed in most U.S. jurisdictions, while a small number continued to follow the rule of *Brokaw*. *Id.* at 1083 (citing Gina Cora, *Want Not, Waste Not: Contracting Around the Law of Ameliorative Waste* (Apr. 1, 2009) (Yale Law School Student Prize Papers: Paper 47), *link*).

Which of these two rules do you think is most consistent with the pluralist justifications for waste doctrine described by Professor Purdy? Which do you think is most consistent with the law-and-economics approach? Do either of the rules require some other form of justification, and if so, what might that justification be?

6.3 Controlling Future Uses

As we saw in our discussion of estates and future interests, the common law gave property owners a fairly diverse and subtle array of tools to effectuate their intent regarding the use and disposition of their property. But this level of control raises serious potential for conflicts between the plans and wishes of the property owners of yesterday and the needs and desires of (actual and aspiring) property owners of today.

Consider that about 80 years before the Empire State Building was constructed, the land on which it now stands was a farm situated a mile beyond the northern edge of the urban quarters of New York City. *See* James Remington Mccarthy & John Rutherford, Peacock Alley: The Romance Of The Waldorf-Astoria 4-10 (1931). What if the first private owner of that farm—John Thompson, who purchased it in 1799 out of the common lands held by the city government for $2,400 (*id.*)—had executed a conveyance of the land that included a future interest in "the eldest of my great-great-great-great-great grandchildren"? What if he had devised the land to his eldest child "on condition that the family farm may never be sold"? Or "on condition that the land may be used for farming purposes only"? Could the Empire State Building ever have been built? If not, is that a result we would be happy with?

The common law recognized that some property owners might try to dictate the disposition of property much farther into the future than could be justified by any legitimate interest or expertise they might have. As one commentator put

it, writing in 1967: "[I]t would have been utterly impossible for any testator dying in 1866 to foresee the events that have taken place in the succeeding century, and . . . any prediction as to what may occur in the century following 1966 would be even more unlikely to conform to reality." W. BARTON LEACH, PROPERTY LAW INDICTED! 71 (1967). As years pass, new generations undertake stewardship of resources, and the economic, social, and cultural demands on those resources change with the times. Allowing long-dead property owners to dictate the disposition of those resources to the fourth, fifth, or sixth generation after they're gone significantly limits the ability of the possessors of today to flexibly direct resources to uses appropriate to the age.

The common law developed various doctrines designed to balance respect for property owners' wishes to provide for their families as they see fit with vigilance against the dangers of dead-hand control. One powerful tool for striking this balance is the infamous Rule Against Perpetuities. We will not be studying the Rule at any length here, but its classic formulation—that an interest in property is void unless it necessarily will vest within 21 years of the end of a life in being at the time the interest is created—essentially operates to limit a property owner's control to one generation beyond the end of his own life. For example, a grant to John Thompson's great-great-great-great-great grandchild would be clearly invalid under the Rule Against Perpetuities, but a grant by John Thompson to his living daughter's yet-unborn child would almost certainly be valid.[1]

Beyond limiting the *duration* of property owners' control, the common law developed additional rules regarding the *types* of restrictions grantors could place on otherwise valid interests in property that they conveyed. The following cases provide some examples. As you read them, consider how the principles they rely on relate to the aforementioned balance between respecting property owners' wishes and guarding against dead-hand control.

Ford v. Allen

526 S.W.2d 643 (Ct. Civ. App. Tex. 1975)

O'QUINN, Justice.

Chester Melvin Ford and Lola Mae Ford, the deceased persons whose wills are under review, were married in August of 1943, and Clyde M. Ford,

[1]We say "almost" only because if Thompson for some reason made the future interest in his unborn grandchild subject to the condition precedent of that grandchild attaining an age of more than 21 years, the interest would be void under the common-law Rule Against Perpetuities.

appellant here and plaintiff below, was the only child born to their marriage. Mr. [Chester] Ford had been married twice prior to his marriage to Mrs. Ford, but had no children from those marriages. Mrs. Ford also had been married earlier, and from that marriage she had a son, Otis Martin Allen, who died in April of 1958, leaving three sons, resulting from two marriages. The three surviving sons were defendants below and are appellees in this appeal.

The undisputed evidence supports the finding of the trial court that Chester Melvin Ford and his wife, Lola Mae Ford, each executed a holographic will on the same day in April of 1960, and each of them devised "all my property to my beloved" spouse, followed by certain additional identical language which is under dispute. Mr. Ford died November 25, 1972, and less than a month later Mrs. Ford died, on December 18, 1972.

It also appears undisputed that, as the court found, Mr. Ford at the time of his death owned approximately 450 acres of land in Bell County . . . .

The language of the wills giving rise to this suit, as contained in the will of Mr. Ford, follows:

> After the Payments of my Just Debts I devise all my property to my beloved wife Lola Mae Ford to do with as she See fit except that she is not to Sell, Morage (sic), or Lease any of our real Estate for more than Three (3) years without the written agreement of our son Clyde Melvin Ford.

Appellant contends that the language is ambiguous and requires construction, and that under a proper construction the language "created a life estate in real property in Lola Mae Ford with remainder to Clyde M. Ford in fee simple, or alternatively created a testamentary trust expressly or by implication for the use and benefit of Clyde M. Ford."

. . . The trial court concluded (1) that the language in the wills, providing that the devisee was not to sell, mortgage, or lease any of the realty for three years without written agreement of Clyde M. Ford, was "void as being a restraint on alienation and repugnant to the devise in fee;" and (2) the language of the wills . . . devised fee simple title to all property, since the wills contained no "language clearly showing a lesser estate than the fee was intended to be devised." We approve these conclusions as correct applications of the law to the language of the wills.

Appellant contends that by extrinsic evidence it may be demonstrated that the true intent of Mr. and Mrs. Ford was to devise their real property

to their only son, Clyde M. Ford, and that because of the ambiguity of the language in the wills, such evidence should have been considered . . . .

In brief, the evidence was that the real estate was the separate property of Mr. Ford, and that the three grandsons of Mrs. Ford were not kin to Mr. Ford; that Clyde M. Ford had helped to work the lands contained in the 450 acres, whereas the defendants had never worked any part of the land; that the grandsons were not close to their grandmother or to Mr. Ford, and none of them attended either the funeral of Mr. Ford or their grandmother; that Mrs. Ford set up a savings account for the grandsons and this alone was intended to take care of them; that Clyde M. Ford was close to his parents and was the natural object of the deceaseds' bounty, and the defendants were not; that during their life both Mr. and Mrs. Ford indicated orally that they wanted Clyde to have the land.

It is the established rule that an ambiguity arises only when the meaning which emanates from language used in the will admits of more than one interpretation. We find no ambiguity in the language of the Ford wills which in each writing clearly and plainly devises all property to the other spouse to do with as the other may see fit. The attempt, in language that follows, to place a restraint on alienation could not change or nullify the devise. It is not a function of the courts, nor is it a role the courts may assume, to revise or to make over the writing in a will to achieve results different from results which flow from the plain language used by the maker of the will. The courts may not speculate, from extrinsic evidence or otherwise, that some other result may have been intended.

. . . Appellant also urges that the trial court erred in refusing to make a determination of heirship, and under these points insists that if Mrs. Ford died intestate, appellant is entitled to one-half of her estate and defendants are entitled only to the remaining one-half. The trial court correctly declined to decide the matter of heirship since administration of the estates is still pending in Bell County, where the County Court has acquired jurisdiction to determine heirs of the deceased.

All of appellant's point of error have been carefully examined and considered, and all points are overruled.

The trial court in its judgment denied the request of Clyde M. Ford that attorney's fees, court costs, and other expenses incurred by this suit to construe the wills be paid out of the two estates as costs and expenses of administration, and ordered all such costs and expenses to be paid by Ford

individually.

The judgment of the trial court is in all things affirmed. It is ordered that costs of this appeal be taxed against appellant, Clyde M. Ford, individually.

Notes and Questions

6.10. Do you think Clyde is right that his parents wanted him to have the farm after both of them died? Or at least that they would rather Clyde have it than Lola Mae's estranged grandchildren from another marriage? If so, why do you think both Chester and Lola Mae executed wills without any explicit devise to Clyde? If not, why do you think the Fords' wills included a restriction on alienating the farm without Clyde's consent? (Incidentally, what is a "holographic" will?)

6.11. Why is the court unwilling to consider Clyde's evidence that his parents wanted him to have the farm? What's wrong with looking outside the four corners of the will itself to understand what the testator *really* wanted? Would we take a similar view of extrinsic evidence if the document being interpreted were, say, a contract for the sale of goods?

6.12. Justice O'Quinn says that the language of the Fords' wills "clearly and plainly devises all property to the other spouse to do with as the other may see fit." But this is at best disingenuous and at worst deliberately false: the wills also, *in the very next clause*, "clearly and plainly" purport to limit what the other spouse can do with the property in the absence of Clyde's consent. Why does the court enforce the former clause and render the latter clause void?

The reasoning of the trial court in this case may help explain things. Note that the trial court is said to have given two somewhat different reasons for invalidating Clyde's power to block any effort by his surviving parent to alienate the farm (and with it any future interest he might have claimed by implication from this right). We are told that an attempt to convey such a power to Clyde must be void, both "as a restraint on alienation," and as "repugnant to the . . . fee." These reasons invoke two long-standing common-law principles: a policy against restraints on alienation, and the doctrine of *numerus clausus*.

Courts have generally strongly disfavored overt restraints on a grantee's right to alienate their interest. Such restraints can make it quite difficult to move resources from lower-valued to higher-valued uses. A current owner of a resource might well be willing to sell it to a willing buyer who wants it more and can make more valuable use of it, but if we enforce a restraint on alienation imposed on the current owner by a past grantor, such a beneficial transaction cannot happen. The result would be

serious misallocation of resources, and the rule that restraints on alienation are void demonstrates the common law's willingness to defeat even the clearly expressed intent of a grantor where necessary to avoid such misallocation.

Numerus clausus (literally, "the number is closed") is a legal principle derived from civil law systems but invoked in Anglo-American property law to refuse recognition of any interest in land other than the traditional common-law estates. Under this principle property owners may not create any new "bundle of rights" other than those that are already represented by the common-law estates themselves. So, because a possessory estate subject to a veto on the right of alienation by someone other than the possessory estate's owner is not a "bundle of rights" that we can identify among our common-law estates, it must be outside the power of the Fords to create it. Courts have similarly rejected efforts by testators to, for example, give their surviving spouses unfettered control over devised property while also giving any property left over at the surviving spouse's death to another beneficiary. Such hybrid bequests are, like the devise in *Ford*, typically treated as a fee simple (rendering the putative future interest void). *See, e.g.*, *Sumner v. Borders*, 98 S.W.2d 918 (Ky. 1936).

Is the rule of *numerus clausus* motivated by the same rationales that give rise to the rule against restraints on alienation? Imagine if, rather than selecting from the fixed menu of common-law estates, property owners were free to build their own tailored bundles of property interests for grantees, with their own ad hoc collections of limitations and restrictions on the rights of those grantees, and that these idiosyncratic collections of rights and limitations became commonplace across society. Suppose you now want to buy a parcel of land in that society. Can you be sure what you're buying? How? How well would we expect a real estate market built on a potentially infinite variety of interests in real property to function? *See generally* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

6.13. Are there other principles underlying the rule against restraints on alienation or the *numerus clausus* principle other than ensuring a well-working market for property rights? Consider that the law of *intellectual property* has long included a so-called "first sale" doctrine, which provides that the first authorized purchaser of a good embodying an intellectual property right (for example, a book embodying a copyrighted work, or a machine embodying a patented invention) has the power to alienate *that particular article* free of any claim by the intellectual property right owner. *See, e.g.*, 17 U.S.C. § 109(a) (copyright); *Adams v. Burke*, 84 U.S. 453, 456 (1873) ("[W]hen the patentee, or the person having his rights, sells a machine or

instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use."). At least where the owners of the relevant intellectual property rights can be clearly identified, can this rule be justified by the same principle as the rule against restraints on alienation of *land*? If not, what is the rationale for the first-sale doctrine?

6.14. Consider the following excerpts from the September 6, 2012 Amazon Kindle Store Terms of Use Agreement,[2] which governs the downloading of electronic copies of copyrighted literary works from Amazon for viewing on electronic devices.

> "Kindle Content" means digitized electronic content obtained through the Kindle Store, such as books, newspapers, magazines, journals, blogs, RSS feeds, games, and other static and interactive electronic content.
>
> . . . .
>
> **Use of Kindle Content.** Upon your download of Kindle Content and payment of any applicable fees (including applicable taxes), the Content Provider grants you a non-exclusive right to view, use, and display such Kindle Content an unlimited number of times, solely on the Kindle or a Reading Application or as otherwise permitted as part of the Service, solely on the number of Kindles or Supported Devices specified in the Kindle Store, and solely for your personal, non-commercial use. Kindle Content is licensed, not sold, to you by the Content Provider . . . .
>
> **Limitations.** Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights to the Kindle Content or any portion of it to any third party, and you may not remove or modify any proprietary notices or labels on the Kindle Content. In addition, you may not bypass, modify, defeat, or circumvent security features that protect the Kindle Content.
>
> . . . .
>
> **Termination.** Your rights under this Agreement will automatically terminate if you fail to comply with any term of this Agreement. In case of such termination, you must cease all use of the Kindle Store and the Kindle Content, and Amazon may immediately revoke your access to the Kindle Store and the Kin-

[2] *Kindle Store Terms of Use*, AMAZON (Sept. 6, 2012), *link*.

> dle Content without refund of any fees. Amazon's failure to insist upon or enforce your strict compliance with this Agreement will not constitute a waiver of any of its rights.

Is this agreement consistent with the rules you've just learned? If not, is it enforceable? *See Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010).

6.15. Might a grantor impose restrictions on a grantee *other than* explicit limitations on the power to alienate that would raise the same concerns as those that motivate the rule against restraints on alienation? Consider the following cases:

Wills v. Pierce

208 Ga. 417 (1951)

. . . Mrs. Walter Tilley Pierce and others filed in Terrell Superior Court, against Mrs. J. C. Wills and others, a petition, which alleged substantially the following: On December 1, 1923, J. W. Tilley by warranty deed conveyed described realty known as the Aven Home to J. C. Wills. The deed contained the clause: "The above property is conveyed to J. C. Wills [the grantee] to be used as a home by himself, his family and his heirs, upon condition that the same be used by him or them as a home and a residence, and further that upon the failure of the said condition and the abandonment of said property as a residence by [the grantee], . . . his family or heirs, the same shall revert to [the grantor's] . . . estate and go as directed by [the grantor's] . . . will." The grantor died testate in 1924, and under the terms of his will the petitioners are the owners of the reversionary interest in the realty. The grantee died intestate in 1945, leaving as his sole surviving heirs his widow, Mrs. J. C. Wills, and two named children, who are the defendants. The condition under which the realty was conveyed has been violated, in that the defendants have abandoned the property as a home and residence, and are now residing elsewhere. . . . The petitioners prayed . . . that the interest of the defendants in the realty be declared forfeited, and the fee-simple title thereof be decreed to be in the petitioners; and that the petitioners have general equitable relief.

The defendants demurred to the petition on the ground that it failed to set forth any cause of action against them. The trial court overruled the demurrer, and the defendants excepted . . . .

ATKINSON, Presiding Justice (after stating the foregoing facts).

The granting clause in the deed under consideration was: "In consider-

ation of the sum of one dollar to me paid, I . . . do hereby sell and convey to [the grantee and] . . . his heirs, a tract or parcel of land and appurtenances in fee simple." Then followed a description of the land, after which the grantor inserted the provision that the property was to be used as a home by the grantee, his family, and his heirs, and that upon the abandonment of the property as a residence by the grantee, his family, or his heirs, the same should revert to the grantor's estate and go as provided in his will.

Standing alone, the first clause in the deed would have conveyed an unconditional fee-simple estate, and the sole question for determination is whether or not the condition subsequent under which the forfeiture is claimed is valid and enforceable.

A provision in a deed or will that a fee-simple estate may not be sold is void as being repugnant to the estate granted.

While no express language is used in the present deed inhibiting alienation of the property, nevertheless—the condition being that the property was to be used as a home by the grantee, his family, and his heirs—the requirement to use as a home and the right to sell are mutually exclusive, and whether or not the case falls within the rule against perpetuities, the conclusion is inescapable that since the grantee and his heirs must use the premises as a home they cannot sell it.

. . . A different question would have been presented if the condition subsequent had been that the premises should be used "as a home" or "for residential purposes" generally. See, in this connection, *City of Barnesville v. Stafford*, 161 Ga. 588(1), 131 S.E. 487, 43 A.L.R. 1045; *Taylor v. Bird*, 150 Ga. 626, 104 S.E. 502; *Rustin v. Butler*, 195 Ga. 389, 24 S.E.2d 318; *Williams v. Ramey*, 201 Ga. 737(1), 41 S.E.2d 159; *Tabor v. Gilmer County*, 205 Ga. 439(1), 53 S.E.2d 915; and similar cases, where conditions subsequent requiring use of property generally for park, school, religious, and courthouse purposes were held valid and enforceable.

Accordingly, the present petition, seeking to enforce a forfeiture for breach of a void condition subsequent, failed to set forth a cause of action, and the trial court erred in overruling the defendants' general demurrer.

Judgment reversed.

All the Justices concur.

Notes and Questions

6.16. A "fee simple subject to a condition subsequent" is another type of estate, in which the grantee's property rights may terminate if a condition that the grantor specified becomes true. Do grantors appear to have the power to set such conditions subsequent after *Wills*? If so, what are its limits?

6.17. Why does the court consider the enforcement of the condition that the property at issue "be used as a home by [the grantee], his family and his heirs" to present a "different question" than the enforcement of a condition "that the premises should be used 'as a home' or 'for residential purposes' generally"? What makes these questions different?

6.18. Is there any relationship between the holding of *Wills* and our previously discussed rule against restraints on alienation or the principle of *numerus clausus*? If so, what's the connection?

Smedley v. City of Waldron

739 F.2d 399 (8th Cir. 1984)

Per Curiam.

In 1940, the City of Waldron, lacking funds to acquire a reservoir site, asked Hannah Smedley to donate land for that purpose. The governing agreement provided in part that:

> 5. The City of Waldron shall never sell, transfer, convey, lease, rent or otherwise dispose of the lands herein above described to other persons, firms, groups and/or corporations, except successors and/or assigns of itself, and if it attempts to do so, the lands immediately revert to Hannah Smedley and her heirs[.]

In 1977, Harry Smedley (Hannah Smedley's sole heir and devisee) sued unsuccessfully for reconveyance, arguing that the city had abandoned the land. In dismissing the complaint, the district court found that the city had not abandoned the reservoir; rather, it continuously maintained and used it as a reserve water supply.

In 1981, the city leased the oil and gas rights of the deeded land to Texas Oil and Gas Corporation. As a result, Harry Smedley brought this case, alleging that the city's lease of the mineral rights subjacent to the

land violated paragraph 5 of the 1940 agreement. For relief, he demanded immediate reconveyance of the land and payment of all monies the city received under the lease. Both parties moved for summary judgment. The district court found that the agreement was an impermissible restraint on alienation and granted the city's motion for summary judgment. We reverse and remand for further proceedings.

Some Arkansas courts have disapproved restraints on alienation. *See, e.g., First National Bank of Fort Smith v. Graham*, 195 Ark. 586, 593, 113 S.W.2d 497 (1938); *Letzkus v. Nothwang*, 170 Ark. 403, 408, 279 S.W. 1006 (1926). . . . [But w]hen the grant is to a governmental unit for a public purpose, Arkansas courts have been reluctant to void the grant as impermissibly restraining alienation if doing so would flout the grantor's intent. One line of Arkansas cases, for example, approved disabling language in grants to localities where the land was to be used for school purposes. *McCrory School Dist. of Woodruff v. Brogden*, 231 Ark. 664, 333 S.W.2d 246, 249–50 (1960); *Vanndale Special School Dist. No. 6 v. Feltner*, 215 Ark. 252, 220 S.W.2d 131, 133 (1949); *Taylor v. School Dist. No. 45 of Searcy County*, 214 Ark. 434, 216 S.W.2d 789 (1949); *Coffelt v. Decatur School Dist. No. 17*, 212 Ark. 743, 208 S.W.2d 1, 2 (1948); *Milner v. New Edinburg School Dist.*, 211 Ark. 337, 200 S.W.2d 319, 322 (1947); *Williams v. Kirby School Dist.*, 207 Ark. 458, 181 S.W.2d 488, 490 (1944); *Steel v. Rural Special School Dist. No. 15*, 180 Ark. 36, 20 S.W.2d 316, 317 (1929). Because summary judgment in favor of the city ignores the public purpose of the grant and defeats the donor's intent, we reverse the district court's judgment.

Having decided that the restraint on alienation here is not impermissible, we remand the case to the district court to resolve the important remaining factual questions. The district court shall determine whether the mineral lease is a violation of the parties' agreement. Because Arkansas courts hold that if the restraint is valid the intent of the donor controls, *Gibson v. Pickett*, 256 Ark. 1035, 512 S.W.2d 532, 535 (1974), the district court shall determine whether the donor intended that the city would lose the land only if the land was not used for a reservoir. Finally, the district court should determine the best means of fulfilling the donor's intent: will her intentions be satisfied merely by awarding her heirs the revenues from the lease, or will the extreme remedy of forfeiture of the reservoir to the heirs be necessary?

Notes and Questions

6.19. **Wait . . . what?** How can Hannah Smedley's clearly expressed intent to absolutely forbid the City of Waldron from alienating the reservoir get around the common-law rule against restraints on alienation? And why can't Chester Ford's far more modest but no less clearly expressed intent to restrain Lola Mae's right to alienate do the same thing?

6.20. **Restraints on Alienation vs. Restrictions on Use.** In *Wills* the court seemed to be concerned that the condition subsequent restricting the grantee's use of the land conveyed was a sort of restraint on alienation in disguise. Could a naked restraint on alienation—such as the one in *Smedley*—really be a restriction on *use* in disguise? If so, would it be any less offensive to the principles underlying the rule against restraints on alienation?

6.21. Does *Smedley* reach the opposite result from *Ford* and *Wills* because the grantor's *motivation* is different in *Smedley* than in the other cases? (Is it?) Because the grantee is a public entity rather than a private individual? Because the restraint on the grantee is less onerous? (Is it?)

Chapter 7

Security Interests

Money and property always seem to go together. A common way of joining the two is the **security interest**, in which one person's property right is used as security to guarantee a debt.

Consider the following: Alice needs to borrow money to buy a printing press (to run her newspaper business), and Bob has cash to lend. In exchange for the loan, Alice promises to pay Bob in monthly installments, with interest. But Bob is worried—what if Alice skips town and stops making the payments? So Bob wants to use the printing press as collateral for the loan. If Alice fails to make a payment, that is, if she **defaults**, Bob gets to keep the printing press, which Bob can hopefully sell for enough money to recover the value of the loan.

Alice and Bob could make these arrangements purely by contract, of course. But what if Alice first sells the printing press to Charlie, and then skips town and stops making the payments? Bob cannot sue Charlie for breach of a contract to which Charlie was not a party. Bob's only option is to sue Alice for breach of contract and hope that Alice can pay (if Bob can even find her).

So what Bob really wants is a property right in the printing press. Not a current right to use it (that's what Alice needs), but a right to take it in the event of a default. Like a reversion or remainder to a life estate that converts into a possessory estate upon the life tenant's death, Bob's desired property interest should convert into a possessory right to the printing press upon the event of a default.

In other words, *a security interest is simply a type of future interest*, and all the mechanics of the system of estates will help to explain the mechanics of security interests. There will be complications, of course, which this chapter will explore. But the basic framework will be the same: there will be current possessory estates

and future interests, and certain events will change those interests by operation of law.

Security interests can arise in a variety of ways, either voluntarily (where a property owner uses the property as collateral for a loan) or involuntarily (for example, to collect on tax debts or tort judgments). A voluntary security interest on real property is typically called a "mortgage," and (somewhat confusingly) the phrase "secured transaction" in the United States generally refers to voluntary security interests in personal property under Article 9 of the Uniform Commercial Code. The term "lien" is typically used for involuntary security interests, though it is sometimes used interchangeably with "security interest."[1]

Our focus in this chapter will be less on the formation of these security interests, and more on how they work: what happens when a default occurs, if the underlying property is sold, and so on. Pay close attention to what interests everyone holds, who has possession when, what events affect the parties' property interests, and what legal procedures must be followed.

7.1 Liens

Williams v. Ford Motor Credit Co.

674 F.2d. 717 (8th Cir. 1982)

BENSON, Chief Judge.

In this diversity action brought by Cathy A. Williams to recover damages for conversion arising out of an alleged wrongful repossession of an automobile, Williams appeals from a judgment notwithstanding the verdict entered on motion of defendant Ford Motor Credit Company (FMCC). In the same case, FMCC appeals a directed verdict in favor of third party defendant S & S Recovery, Inc. (S & S) on FMCC's third party claim for indemnification. We affirm the judgment n.o.v. FMCC's appeal is thereby rendered moot.

In July, 1975, David Williams, husband of plaintiff Cathy Williams, purchased a Ford Mustang from an Oklahoma Ford dealer. Although David Williams executed the sales contract, security agreement, and loan papers, title to the car was in the name of both David and Cathy Williams. The car was financed through the Ford dealer, who in turn assigned the paper

[1] Unfortunately, this terminology is not standardized as a general matter, and different pockets of law may use these terms differently.

to FMCC. Cathy and David Williams were divorced in 1977. The divorce court granted Cathy title to the automobile and required David to continue to make payments to FMCC for eighteen months. David defaulted on the payments and signed a voluntary repossession authorization for FMCC. Cathy Williams was informed of the delinquency and responded that she was trying to get her former husband David to make the payments. There is no evidence of any agreement between her and FMCC. Pursuant to an agreement with FMCC, S & S was directed to repossess the automobile.

On December 1, 1977, at approximately 4:30 a.m., Cathy Williams was awakened by a noise outside her house trailer in Van Buren, Arkansas.[1] She saw that a wrecker truck with two men in it had hooked up to the Ford Mustang and started to tow it away. She went outside and hollered at them. The truck stopped. She then told them that the car was hers and asked them what they were doing. One of the men, later identified as Don Sappington, president of S & S Recovery, Inc., informed her that he was repossessing the vehicle on behalf of FMCC. Williams explained that she had been attempting to bring the past due payments up to date and informed Sappington that the car contained personal items which did not even belong to her. Sappington got out of the truck, retrieved the items from the car, and handed them to her. Without further complaint from Williams, Sappington returned to the truck and drove off, car in tow. At trial, Williams testified that Sappington was polite throughout their encounter and did not make any threats toward her or do anything which caused her to fear any physical harm. The automobile had been parked in an unenclosed driveway which plaintiff shared with a neighbor. The neighbor was awakened by the wrecker backing into the driveway, but did not come out. After the wrecker drove off, Williams returned to her house trailer and called the police, reporting her car as stolen. Later, Williams commenced this action.

The case was tried to a jury which awarded her $5,000.00 in damages. FMCC moved for judgment notwithstanding the verdict, but the district court, on Williams' motion, ordered a nonsuit without prejudice to refile in state court. On FMCC's appeal, this court reversed and remanded with directions to the district court to rule on the motion for judgment notwithstanding the verdict. The district court entered judgment notwithstanding the verdict for FMCC, and this appeal followed.

[1]Cathy Williams testified that the noise sounded like there was a car stuck in her yard.

Article 9 of the Uniform Commercial Code (UCC), which Arkansas has adopted and codified as Ark.Stat.Ann. § 85-9-503 (Supp.1981), provides in pertinent part:

> Unless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession, a secured party may proceed without judicial process if this can be done without breach of the peace . . . .[4]

In *Ford Motor Credit Co. v. Herring*, 589 S.W.2d 584, 586 (Ark. 1979), which involved an alleged conversion arising out of a repossession, the Supreme Court of Arkansas cited Section 85-9-503 and referred to its previous holdings as follows:

> In pre-code cases, we have sustained a finding of conversion only where force, or threats of force, or risk of invoking violence, accompanied the repossession.

The thrust of Williams' argument on appeal is that the repossession was accomplished by the risk of invoking violence. The district judge who presided at the trial commented on her theory in his memorandum opinion:

> Mrs. Williams herself admitted that the men who repossessed her automobile were very polite and complied with her requests. The evidence does not reveal that they performed any act which was oppressive, threatening or tended to cause physical violence. Unlike the situation presented in *Manhattan Credit Co. v. Brewer*, *supra*, it was not shown that Mrs. Williams would have been forced to resort to physical violence to stop the men from leaving with her automobile.

In the pre-Code case *Manhattan Credit Co. v. Brewer*, S.W.2d 765 (Ark. 1961), the court held that a breach of peace occurred when the debtor and her husband confronted the creditor's agent during the act of repossession

[4]It is generally considered that the objectives of this section are (1) to benefit creditors in permitting them to realize collateral without having to resort to judicial process; (2) to benefit debtors in general by making credit available at lower costs; and (3) to support a public policy discouraging extrajudicial acts by citizens when those acts are fraught with the likelihood of resulting violence.

and clearly objected to the repossession. In *Manhattan*, the court examined holdings of earlier cases in which repossessions were deemed to have been accomplished without any breach of the peace. In particular, the Supreme Court of Arkansas discussed the case of *Rutledge v. Universal C.I.T. Credit Corp*, 237 S.W.2d 469 (Ark. 1951). In *Rutledge*, the court found no breach of the peace when the repossessor acquired keys to the automobile, confronted the debtor and his wife, informed them he was going to take the car, and immediately proceeded to do so. As the *Rutledge* court explained and the *Manhattan* court reiterated, a breach of the peace did not occur when the "Appellant [debtor-possessor] did not give his permission but he did not object." *Manhattan*, *supra*, 341 S.W.2d at 767-68; *Rutledge*, *supra*, 237 S.W.2d at 470.

We have read the transcript of the trial. There is no material dispute in the evidence, and the district court has correctly summarized it. Cathy Williams did not raise an objection to the taking, and the repossession was accomplished without any incident which might tend to provoke violence.

Appellees deserve something less than commendation for the taking during the night time sleeping hours, but it is clear that viewing the facts in the light most favorable to Williams, the taking was a legal repossession under the laws of the State of Arkansas. The evidence does not support the verdict of the jury. FMCC is entitled to judgment notwithstanding the verdict.

Heaney, Circuit Judge, dissenting.

The only issue is whether the repossession of appellant's automobile constituted a breach of the peace by creating a "risk of invoking violence." *See Ford Motor Credit Co. v. Herring*, 589 S.W.2d 584, 586 (Ark. 1979). The trial jury found that it did and awarded $5,000 for conversion. Because that determination was in my view a reasonable one, I dissent from the Court's decision to overturn it.

Cathy Williams was a single parent living with her two small children in a trailer home in Van Buren, Arkansas. On December 1, 1977, at approximately 4:30 a.m., she was awakened by noises in her driveway. She went into the night to investigate and discovered a wrecker and its crew in the process of towing away her car. According to the trial court, "she ran outside to stop them . . . but she made no *strenuous* protests to their actions." (Emphasis added.) In fact, the wrecker crew stepped between her and the car when she sought to retrieve personal items from inside it, although the

men retrieved some of the items for her. The commotion created by the incident awakened neighbors in the vicinity.

Facing the wrecker crew in the dead of night, Cathy Williams did everything she could to stop them, short of introducing physical force to meet the presence of the crew. The confrontation did not result in violence only because Ms. Williams did not take such steps and was otherwise powerless to stop the crew.

The controlling law is the UCC, which authorizes self-help repossession only when such is done "without breach of the peace . . . ." Ark.Stat.Ann. § 85-9-503 (Supp.1981). The majority recognizes that one important policy consideration underlying this restriction is to discourage "extrajudicial acts by citizens when those acts are fraught with the likelihood of resulting violence." *Supra*, at 719. Despite this, the majority holds that no reasonable jury could find that the confrontation in Cathy Williams' driveway at 4:30 a.m. created a risk of violence. I cannot agree. At a minimum, the largely undisputed facts created a jury question. The jury found a breach of the peace and this Court has no sound, much less compelling, reason to overturn that determination.

Indeed, I would think that sound application of the self-help limitation might require a directed verdict in favor of Ms. Williams, but certainly not against her. If a "night raid" is conducted without detection and confrontation, then, of course, there could be no breach of the peace. But where the invasion is detected and a confrontation ensues, the repossessor should be under a duty to retreat and turn to judicial process. The alternative which the majority embraces is to allow a repossessor to proceed following confrontation unless and until violence results in fact. Such a rule invites tragic consequences which the law should seek to prevent, not to encourage. I would reverse the trial court and reinstate the jury's verdict.

Notes and Questions

7.1. True or false: Cathy Williams would have been better off if she had thrown a punch or two. What do you make of the UCC's purported policy of discouraging private extrajudicial violence? Where does *Williams* leave other single mothers facing towing crews at 4:30 AM?

7.2. Is the breach-of-the-peace test really about deterring violence, or is it a proxy for the other kinds of individual and social harms repossession can cause? If

so, how good a proxy is it? Are there better ways to avoid those harms?

7.3. Notice that FMCC's lien is a property interest. One key indicium of this fact—or perhaps a component of it—is that it is freely assignable. FMCC was not the original lender. Who was? How did FMCC end up owning the lien?

7.4. On the other side of the loan, Cathy Williams was not the original borrower; David Williams was. Why is his failure to pay her problem? Indeed, he was under a court order to continue making payments. Why doesn't that protect her from repossession? This aspect of liens—that they run with the property – is considered crucial to secured lending. Why? Would FMCC be willing to extend credit in the first place if its resulting security interest did not bind David's successors in title?

7.5. In *Williams* the lienholder is not in physical possession of the collateral. Why not? Would car loans work if the lender retained possession? This creates two distinctive problems. First, how and when the lender can retake possession? (Answer: with a tow truck in the middle of the night.) But what if Cathy Williams drives the car out of state and hides it? For that matter, what if she destroys it rather than let FMCC repossess it? So FMCC's property interest in the car provides some protection for its contract rights, but hardly perfect protection. Could FMCC insist that Cathy Williams install a GPS device on the car that continually broadcasts its location? *Cf. Am. Car Rental, Inc. v. Comm'r of Consumer Prot.*, 869 A.2d 1198 (Conn. 2005) (unfair consumer practice for car rental agency to charge customer $150 per instance of drivng over 79 miles per hour for more than two mintues, as revealed by GPS tracker in car). Are there privacy concerns with this type of close monitoring? Safety concerns? Are these more or less severe than if the lender sent employees to personally follow Cathy Williams around and keep tabs on the car? What about a kill-switch that automatically shuts down the car's engine if it is driven more than fifty miles from her house? If FMCC can shut down the car remotely, could someone else? *See* Andy Greenberg, *Hackers Remotely Kill a Jeep on the Highway—With Me In It*, WIRED (July 21, 2015), *link*.

7.6. The second distinctive problem when the lienholder is out of possession is notice to third parties. What happens if Cathy Williams sells the car without informing the buyer of the lien? Yes, this is yet another good-faith-purchaser problem; they are everywhere in property law. Consider the following case:

M&I Western State Bank v. Wilson

493 N.W.2d 387 (Wisc. Ct. App. 1992)

ANDERSON, Judge.

Darin Treleven appeals from a judgment of the trial court which awarded possession of a truck owned by Marilyn A. Wilson to the M & I Western State Bank (bank). Because the earlier release of the truck was a conditional release and the bank had notice of Treleven's lien through his possession of the truck, we reverse.

The bank holds a security interest in a 1978 Peterbilt truck owned by Wilson. Treleven repaired the truck seven times, each time releasing the vehicle to Wilson so she could earn the money to pay Treleven for the repairs. The repairs were invoiced between November 20, 1990 and April 23, 1991.

After Wilson defaulted on her payments to the bank, the bank commenced a replevin action. The parties made a repayment agreement; however, Wilson again defaulted and the bank obtained a judgment of replevin on April 9, 1990. The sheriff attempted to enforce the judgment but was unable to locate the truck. On May 12, 1991, employees of the bank saw the vehicle and followed it to Treleven's place of business, D.T. Truck Repair, Inc. The sheriff again tried to serve the writ of execution, but Treleven refused to release the vehicle, asserting that he held a mechanic's lien for services rendered.

After the attempted levy, the bank filed a second replevin action to determine who was entitled to possession of the truck and named Treleven as a third-party defendant. At the date of the hearing, Treleven still was owed $3497.26 for the repairs plus $1273.10 for interest and storage as of the date of the hearing, January 30, 1992. The bank's balance as of January 2, 1992 was $3032.16. The bank's estimate of the value of the truck is approximately $3000. If this estimate is correct, only the lien with first priority would be paid from the proceeds of the sale of the truck.

The trial court held that Treleven's release of the vehicle to Wilson constituted a waiver of Treleven's lien as to the bank and that the bank's lien had priority. The trial court ordered the bank to take possession and conduct a sale of the truck. On appeal, Treleven argues that the conditional release of the truck to the owner does not amount to a waiver of the lien and, alternatively, that he should be able to recover from the bank on the theory of unjust enrichment. Because we agree that the conditional re-

lease and regained possession do not waive Treleven's mechanic's lien or affect its priority over the prior secured interest, we do not have to address Treleven's unjust enrichment claim.

It is not disputed that before Treleven released possession of the truck, he had a mechanic's lien on Wilson's truck. Section 779.41(1), Stats., governs mechanic's liens and states in part:

> Every mechanic and every keeper of a garage or shop, and every employer of a mechanic who transports, makes, alters, repairs or does any work on personal property at the request of the owner or legal possessor of the personal property, has a *lien on the personal property* for the just and reasonable charges therefor, including any parts, accessories, materials or supplies furnished in connection therewith and *may retain possession of the personal property until the charges are paid.* [Emphasis added.]

It also is not disputed that before Treleven released the truck to Wilson, Treleven's mechanic's lien had priority over the bank's security interest. Section 409.310, Stats., states:

> When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, *a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest* unless the lien is statutory and the statute expressly provides otherwise. [Emphasis added.]

Section 409.310 gave Treleven's mechanic's lien priority over the security interest because Treleven was in possession of the truck, Treleven's lien was created by sec. 779.41(1), Stats., and sec. 779.41(1) does not expressly address the priority given to the lien created.

The issue in this case is whether the mechanic, by allowing the owner to use her vehicle on a temporary basis before paying the repair bill, lost the lien or its priority on that vehicle. The interpretation of statutes is a question of law which we review de novo. We first must examine the language of sec. 779.41(1), Stats., to see if the relinquishment and resumption of possession have any affect on the existence of Treleven's mechanic's

lien. Section 779.41(1) provides that a mechanic "may retain possession of the personal property until the charges are paid." This provision allows the mechanic to keep a customer's property until the mechanic has been paid, without a court order. However, once the mechanic has relinquished possession of the vehicle, this statute does not provide the mechanic with a remedy even if the bill has not been paid. The statute also does not tell us whether the mechanic must retain possession of the vehicle to retain the lien—it states only that the mechanic "may retain possession."

But the mechanic's lien statute may not be interpreted in a vacuum. "[M]echanic's lien laws provide *new and additional remedies* to those of the common law and are to be liberally construed to accomplish their equitable purpose of aiding materialmen and laborers to obtain compensation for material used and services bestowed upon property of another and thereby enhancing its value." *Wiedenbeck–Dobelin Co. v. Mahoney*, 152 N.W. 479, 481 (Wisc. 1915) (emphasis added). Accordingly, in addition to the statutory language of sec. 779.41(1), Stats., we may look to the common law of mechanic's liens and those Wisconsin decisions incorporating common law principles into the statutory mechanic's lien law to determine whether Treleven's lien survives.

Treleven argues that according to *Sensenbrenner v. Mathews*, 3 N.W. 599, 600 (Wis. 1879), the delivery of the vehicle to the owner must be both voluntary and unconditional in order to constitute a waiver of the lien. Treleven maintains that because he returned the vehicle to the owner so she could pay for the repairs and the allowed use was only on a temporary basis, the delivery of the vehicle was conditional and his lien survives. The bank also relies on *Sensenbrenner* for its argument that Treleven waived his lien by releasing the vehicle to Wilson. Alternatively, the bank asserts that even if the lien was not destroyed between Treleven and Wilson when the vehicle was conditionally released to Wilson, the lien was destroyed as to third persons.

Because *Sensenbrenner* is distinguishable on its facts from the present case, neither party's reliance on that case is warranted. The court in *Sensenbrenner* found that the delivery of a buggy by the mechanic to the owner was unconditional and held that this unconditional delivery operated as a waiver of the lien. In contrast, Treleven's release of the vehicle was conditional—*Sensenbrenner* says nothing of the effect of a conditional release to the owner. *Sensenbrenner* also does not explicitly hold that the only

way to waive a lien is through the voluntary and unconditional release of the property; *Sensenbrenner* merely states that this is one way to waive a lien. For these reasons, *Sensenbrenner* is not controlling precedent based on the facts of this case.

No Wisconsin court has decided whether the lien is lost once the mechanic conditionally releases the vehicle to the owner. The general and modern rule can be found in Restatement of Security § 80 (1941). This rule states that when the bailor (owner) is under an obligation to return the vehicle to the lienor (mechanic), the lien is revived upon the recovery of the vehicle, subject only to the interests of bona fide purchasers for value and attaching or levying creditors who do not have notice of the lienor's interest.

The bank would like a rule that upon a conditional release, the lien is lost as to all third parties. The Restatement reflects a more balanced view, recognizing that not all interests of third parties are affected by the conditional release. While the mechanic retains possession, third parties at least would have constructive notice of the mechanic's lien because they would be expected to examine the property in the mechanic's possession and be expected to know of the mechanic's lien statute. After a conditional release, those parties purchasing the vehicle, extending new credit, or levying on the vehicle would be vulnerable because even after examinations of the motor vehicle filings and the vehicle, there would be no way for them to know of the mechanic's prior interest. A creditor whose interest arose before the mechanic's lien would not have this concern. At the time the creditor extends credit, it is presumed to know the mechanic's lien statutes which could subordinate its interest to that of a mechanic making a later repair. This is a known risk to the creditor. A creditor also has the opportunity to protect itself by writing into the security agreement that all subsequent repairs must be approved by the creditor.

Once the mechanic's lien arises, in most circumstances, the later conditional release does no further damage to the prior creditor and actually can be advantageous to the creditor. For example, in a case such as this where the vehicle is necessary to the owner's business, the conditional release allows the owner to generate cash to pay off the mechanic's lien and make payments on the creditor's prior loan. If the mechanic were forced to keep possession of the vehicle, the owner would be unable to raise the cash to pay off either the mechanic or the creditor.

The circumstance where a prior creditor could be damaged by the conditional release also is covered by the Restatement. If a prior creditor does not have notice of the mechanic's lien and goes through the expense of levying upon the vehicle while it is in the owner's possession, then the levying creditor is accorded the same protection as the bona fide purchaser for value or the new attaching creditor. This rule gives the prior creditor a "window of opportunity" to levy, but the mechanic can protect the lien by notifying prior creditors of the conditional release arrangement.

For the reasons stated above, we reject the bank's argument that a conditional release of the vehicle destroys the lien as to all third parties. Instead, we adopt the Restatement's rule that upon a conditional release, the lien is enforceable against all parties except a bona fide purchaser for value or a subsequent attaching or levying creditor who has no notice of the mechanic's interest. Upon the resumption of possession, the lien is revived and retains its priority as before the release, except it is subordinate to the bona fide purchaser or attaching or levying creditor. Applying this rule to the facts of the case, it is apparent that the mechanic's lien is superior to the bank's security interest. The fact that the truck was found at the mechanic's place of business well after the repairs were made supports Treleven's claim that the release of the vehicle was conditional. Furthermore, the bank is not afforded the protection given to the levying creditor because the sheriff levied upon the vehicle while it was in Treleven's possession, and thus had notice of Treleven's interest.

Because Treleven's lien was not waived by the conditional release under sec. 779.41(1), Stats., we next must examine whether the conditional release destroyed the lien's priority under sec. 409.310, Stats. Neither party addressed this issue, but commentary and cases interpreting Uniform Commercial Code § 9-310, the model upon which sec. 409.310 is based, make clear that the possession requirement of this statute is separate from any possession requirement of the underlying mechanic's lien.

U.C.C. § 9-310 gives priority only to the mechanic in possession of the vehicle. It is uniformly held that if the mechanic voluntarily gives up possession of the vehicle, § 9-310 cannot be relied upon by the mechanic to give his lien priority over the prior secured interest. *See United States v. Crittenden*, 563 F.2d 678, 691 (5th Cir. 1977), *vacated and remanded*, 440 U.S. 715 (1979); *In re Glenn*, 20 B.R. 98, 99 (Bankr. E.D. Tenn. 1982); *Forrest Cate Ford, Inc. v. Fryar*, 465 S.W.2d 882, 884 (Tenn. Ct. App. 1970).

The question then becomes whether the resumption of possession will allow sec. 409.310, Stats., to be applied to give the mechanic's lien priority. The statute's language does not tell us whether continuous possession is required. When a statute is ambiguous we must look to other sources to determine legislative intent. Among the few courts that have decided this issue, the jurisdictions do not agree as to the effect of resuming possession under § 9-310. The three cases discussing this issue the most thoroughly are *Glenn*, *Crittenden* and *Thorp Commercial Corp. v. Mississippi Road Supply Co.*, 348 So. 2d 1016 (Miss. 1977).

The opinion of the Mississippi Supreme Court in *Thorp* held that the mechanic retained priority under the Mississippi equivalent to § 9-310 when he resumed possession of equipment. The court reasoned that the status or rights of the parties did not change between the date the mechanic lost possession of the equipment and the date it was restored to the possession of the mechanic. Furthermore, the court recognized that the secured party was not and could not be prejudiced by the restoration. Finally, the court concluded that because the Mississippi equivalent of § 9-310 did not clearly express an intention to reverse long-established principles of law, § 9-310 had to be read together with the older mechanic's lien statute and prior case law which established that mechanic's liens take priority over prior security interests. These justifications supported the court's opinion that priority status of the mechanic's lien was retained under § 9-310 when the mechanic regained possession.

Glenn and the dissenting opinion in *Thorp* stated that the priority of the mechanic's lien is lost under statutes based on § 9-310 when there is a lapse in the mechanic's possession. *Glenn* reasoned that a rule which allowed the reinstatement of priority "would create an ever-present dangerous uncertainty for parties, including prior secured parties, who deal with the debtor with respect to goods in his possession" because the prior secured party would have no notice of the mechanic's lien. *Glenn*, 20 B.R. at 99. Glenn also based its conclusion on the same concerns of the dissent in *Thorp*—a rule reinstating priority under the statute would permit the priority of the creditors to be determined by the debtor.

> If he chooses to return property once relinquished by a repairman, the repairman prevails, but if he chooses not to relinquish possession of the property the secured creditor prevails . . . . [A rule reinstating priority under the statute] invites competition

> for possession between a secured party and a repairman who has previously relinquished possession of the property.

Id. at 100–01.

The Fifth Circuit Court of Appeals held that a mechanic retained his priority over a prior security interest only to the extent that the mechanic continuously possessed the collateral. *Crittenden*, 563 F.2d at 691. The court analogized § 9-310 to 26 U.S.C. § 6323(b)(5), a provision of the Federal Tax Lien Act, which gives priority to the mechanic's lien only if the mechanic "is, and has been, continuously in possession of such property from the time such lien arose." 26 U.S.C. § 6323(b)(5). The court justified the continuous possession requirement by reasoning that while considerations of equity and fairness created the mechanic's lien exception to the normal priority rules, at some point when the mechanic gives up possession and the repairs were made in the more distant past the mechanic's interest becomes indistinguishable from the ordinary creditor.

In light of the longstanding Wisconsin policy of protecting materialmen and laborers, we find the Mississippi court's opinion in *Thorp* to be the most persuasive. The bank has not presented any facts which would show how its rights were affected or its interest was prejudiced by the release of the property to Wilson and Treleven's subsequent repossession. If anything, the facts show that the bank was better off through the conditional release because it afforded Wilson the resources to pay off both debts.

Like Mississippi's law in *Thorp*, Wisconsin case law decided prior to the enactment of sec. 409.310, Stats., gave priority to a mechanic's lien over a prior security interest. *See Jesse A. Smith Auto Co. v. Kaestner*, 159 N.W. 738 (Wisc. 1916). Wisconsin's enactment of sec. 409.310 did not expressly state that its effect was to displace prior law in this area. Commentary to the Uniform Commercial Code reveals the drafter's view that § 9-310 was to reverse prior case law which subordinated the mechanic's lien to prior security interests, but it does not state how the rule was to affect prior decisions holding the mechanic's lien superior. See U.C.C. § 9-310 comment 2. Because Wisconsin's prior case law and sec. 409.310 can be read in a consistent manner, we decline to interpret the statute otherwise.

Finally, but not least importantly, the plain language of sec. 409.310, Stats., gives priority to the mechanic "in possession." It does not require "continuous possession" or "retained possession." We must construe laws

relating to mechanic's liens in a way to accomplish their equitable purpose of aiding mechanics in obtaining compensation.

The Fifth Circuit's opinion in *Crittenden* which read the continuous possession requirement into § 9-310 is not persuasive. In *Crittenden*, the Fifth Circuit was interested in formulating a federal standard to determine priorities under the Uniform Commercial Code. Thus, it looked to the Federal Tax Lien Act for guidance in its interpretation of the "possession" requirement of § 9-310. *Crittenden*, 563 F.2d at 691. On appeal the Supreme Court reversed, stating that the court should not be looking to federal standards to determine priorities, but should apply Georgia's statutes. *United States v. Kimbell Foods*, 440 U.S. 715, 740 (1979). On remand, the Fifth Circuit held that Georgia's priority statute was basically the same as model § 9-310 and, without discussion, applied the same interpretation of the statute to the facts in the case. *United States v. Crittenden*, 600 F.2d 478, 479–80 (5th Cir. 1979). Unlike the Fifth Circuit's first *Crittenden* opinion, we are not concerned with formulating a national standard and do not need to look at other federal laws interpreting "possession;" under Wisconsin law, we must interpret sec. 409.310, Stats., in a way that aids the mechanic in obtaining compensation. It is not in a mechanic's best interest to interpret "possession" in sec. 409.310 as "continuous possession," and we decline to do so. Therefore, because Treleven was in possession of the vehicle at the time the bank's lien was enforced, Treleven's mechanic's lien had priority over the bank's interest under sec. 409.310.

Notes and Questions

7.7. *In re Housecraft Industries*, 155 B.R. 79, 86–87 (Bankr. D. Vt. 1993) gives some background on the evolution of security interests in personal property:

> Until the early nineteenth century, the only way to create a valid interest in personal property was by physical pledge—the transfer of possession of the property (collateral) by a debtor (the pledgor) to the creditor or secured party (the pledgee). Possession provided public notice of a secured party's interest in collateral and prevented debtors from selling their pledged property to innocent purchasers or from obtaining credit based on encumbered assets. To further protect third parties against undisclosed interests in property, the common law presumed

> that nonpossessory interests were fraudulent and therefore unenforceable against third parties. *Twyne's Case*, 76 Eng. Rep. 809 (Star Chamber 1601).
>
> The increasing demands of the credit economy eventually created a need for collateral that remained in a debtor's possession. Limited only by their creativity, debtors, creditors, and their counsel formulated methods of perfection that provided both possession to debtors and security to creditors. The resulting rules varied from jurisdiction to jurisdiction, producing what one commentator has called a "labyrinthine melange" of personal property securities laws. Throughout this development toward modern commercial law, the common law pledge existed side by side with other forms of perfecting security interests in personal property.
>
> The Uniform Commercial Code . . . streamlined commercial law and preserved the pledge to complement a public filing system. Article 9 of the UCC, . . . governs security interests in most forms of personal property and fixtures. Article 9 recognizes three general ways to perfect a security interest: filing (public registration); possession of the collateral, either directly, constructively or through an agent; and third party notice, including notice given by the secured party to another holding the collateral.

7.8. Treleven, the mechanic, wins in *Wilson*. But why? Critique the following summaries of the holding:

- "Mechanics in possession have priority over other creditors."
- "Trevelen's lien arose before the bank's."
- "Trevelen put the bank on notice of his lien."

Each of these statements is misleading standing alone, but the holding draws on them all. What *is* the rule of the case?

7.9. Suppose Groucho takes his car to Harpo's Transmissions for repairs and parks it on Harpo's lot. That's a bailment; Harpo must turn over the car when Groucho demands it back. But now suppose that Harpo does $400 worth of repairs on the car at Groucho's request and Groucho fails to pay. Harpo now has a mechanic's lien on the car. Can Groucho get his car back? What remedies could Harpo obtain if he sued Groucho for breach of contract? Does having the car on his lot give him

any additional options? What if Groucho sells the car to Chico without telling Chico about Harpo's lien? What if Harpo lets Groucho drive the car off the lot to confirm that the transmission has been fixed and Groucho floors it as soon as he reaches the highway and never comes back? If Harpo finds the car in Groucho's driveway, can he tow it back to his lot?

7.10. What are Groucho and Harpo's respective rights and obligations if Zeppo steals the car while it's parked on Harpo's lot? If the police subsequently find the car abandoned on the side of the road, who is entitled to it? Conversely, if Zeppo totals the car by driving it into a tree and both Groucho and Harpo sue him for conversion, what result?

7.11. *Wilson* gives a glimpse at the perennial problem of *priority*, which arises whenever a debtor has multiple creditors and is unable to pay them all. The ultimate system for sorting out priority is federal bankruptcy law, but as *Wilson* illustrates, state commercial law (especially Article 9 of the UCC) plays a significant role too. Even a quick skim through Article 9 shows how extensively its rules are adapted to the particular characteristics of the class of property at issue (or perhaps, to the demands of special-interest lobbying and the successive encrustations of history). *See, e.g.*, UCC § 9-102, which distinguishes accounts; farm products; oil, gas, and minerals both in and out of the ground; tort claims; commodity futures; consumer goods; health-care debts; manufactured homes; software; and much, much, more.

7.12. Many states attempt to solve the core problem in *Wilson* by requiring that car liens be recorded with the state Department of Motor Vehicles and indicated on car owners' certificates of title. The Maryland system, for example, provides that a security interest in a vehicle is "perfected" by "Delivery to the [Motor Vehicle] Administration of every existing certificate of title of the vehicle and an application for certificate of title [including the necessary information about the security interest]" and that a security interest that has not been so perfected "is not valid against any creditor of the owner or any subsequent transferee or secured party." Md. Code Transp. § 13.202. The theory is that the buyer or lender can protect itself by demanding to see the title certificate—indeed, a buyer will need to turn in the old title certificate to register the car and a lender will need to turn it in to record its own security interest. Is this system fair to senior lenders? Fair to buyers and junior lenders? How might the system go wrong? How might a fraudster make it go wrong? All things considered, is this a better system than the Wisconsin one discussed in *Wilson*?

7.2 Real Estate Mortgages

A mortgage is an interest in land. It is not a possessory interest: the owner of a mortgage has no right to use the property, the way the owner of the fee or an easement owner would. Instead, mortgages exist to secure loans. A secured loan is backed, or secured, by a specific asset such as a house or a car, which the lender can seize in case of default. An unsecured loan is not secured by any specific asset—for example, credit card debt and student loans are unsecured. The borrower owes the money, and the lender can go after the borrower's unsecured assets in case of default, but if those assets are too small, the unsecured lender is out of luck. Secured loans are generally considered less risky than unsecured loans, for obvious reasons, and should bear lower interest rates (absent some foolery on the part of the lender or government intervention into the market, both of which do happen).

Most mortgages are residential mortgages. Usually, homebuyers in the United States can't afford to pay the entire purchase price of a house at the time they buy it. Instead, they take out a loan—a mortgage—to pay the bulk of the purchase price. They will sign a promissory note (the note) that creates personal liability for the borrowers if they fail to pay, and also sets out the terms of the mortgage such as the repayment period and the interest rate. They will also sign a mortgage, a written instrument that grants the lender an interest in their newly purchased land. Usually, this transaction occurs at the time the buyers buy the land, though mortgages can also be refinanced or taken out on already-owned property.

The homebuyers are the *mortgagors*. The lender is the *mortgagee*. Over time, the buyers pay off the loan. As they pay off the loan, they build "equity" in their homes. Equity is the difference between what a home is worth and what the homeowners owe on their mortgage.[2] As a result of deliberate policy choices, the model residential mortgage in the United States is for no more than 80% of the value of the house at time of purchase; has a fixed interest rate; and amortizes over a period of years, usually twenty or thirty. Amortization means that the payments are the same throughout the period of the mortgage: at the beginning, most of the payments go to interest on the loan, while over time more and more of the payments go to reduce the loan principal.

The mortgagors can transfer the land at will. However, any transfer will not free

[2]This terminology has a historical basis in the "equity of redemption," which was a means by which early chancellors protected early mortgagors from abuses by lenders. Over time, the equitable procedures created by courts gave way to legislation establishing rules for how foreclosures could occur.

the land from the mortgage (nor will a transfer free them from their contractual promise to pay the debt); the mortgage *runs with the land*. Thus, a sensible transferee will not be willing to pay full value for the land—the fair market value of the land is reduced by the amount of the mortgage. A transferee can either take "subject to the mortgage," which means that the original mortgagors still owe the debt and the transferee is at risk if they don't pay, or "assuming the mortgage," which means that the new owner agrees to pay the mortgage directly. When the purchaser assumes the mortgage, the seller still has a duty to pay the mortgage if the buyer doesn't, but the seller can pursue the buyer for reimbursement if that happens. However, this all risks some big messes; to avoid problems associated with transfers, many mortgages have "due on sale" clauses, which means that the full amount of the mortgage comes due ("accelerates") when the mortgagor sells the property. One important feature of a due on sale clause is that it enables lenders to reprice loans: if the interest rate has risen since the initial mortgage loan, the buyer can't just assume the existing loan and receive a lower interest rate than would otherwise be available to him.

Suppose Joan Watson wants to sell her house to Sherlock Holmes. She still owes $400,000 on her house; Holmes will be buying it for $500,000. But she doesn't have $400,000 in the bank to pay off her mortgage, which has a due on sale clause. How can she accomplish the sale? The answer is that a series of transactions take place together. The day of the sale, Holmes will give Watson a check for $500,000 (most of which will likely come from Holmes' own new mortgage on the property). Watson will then pay her lender $400,000 and keep $100,000. As you can see, there will be some time at which both Holmes and Watson are relying on the value of the underlying property—Holmes to get his mortgage and Watson to pay hers off. For this reason, real estate transactions regularly involve the use of multiple third parties, including escrow agents, to facilitate and guarantee the sale.

If the mortgagors default on the mortgage by failing to pay the appropriate amounts at the appropriate times, the mortgagee can foreclose. Foreclosure can be time-consuming and expensive, so in some circumstances the mortgagee may accept a "deed in lieu of foreclosure," by which the mortgagor surrenders the property to the mortgagee and the mortgagee accepts the deed. However, deeds in lieu of foreclosure are relatively rare; most of the time, if a default is not cured and the loan is not modified, the result will be a foreclosure.

Either by a private sale (nonjudicial foreclosure) or under judicial supervision (judicial foreclosure), the mortgagee can have the property sold and apply the proceeds of the sale to the amount due on the note. The foreclosure is so called because

it forecloses the mortgagee's ability to get the property back by paying off the mortgage debt; after the foreclosure, it is too late to become current.[3]

In a number of states, it is possible to avoid judicial foreclosure—which takes more time and money than nonjudicial foreclosure—through the use of a "deed of trust," which is recognized in most jurisdictions. Under a deed of trust, the borrower conveys title to the property to a person to hold in trust to secure the debt. If the borrower defaults, the trustee has the power of sale without needing to go to court. However, almost all states that allow this procedure do impose some procedural safeguards, such as notice and public sale. Other than the ability to avoid judicial foreclosure, you can expect a deed of trust to be treated like a mortgage.

In addition, there are two different types of secured loans: recourse and nonrecourse loans. For a nonrecourse loan, the only way the lender can get its money back in case of default is by seizing the asset, and if there's not enough money to satisfy the debt from the asset, too bad for the lender. The lender has no "recourse" against any of the borrower's other assets. A recourse loan is different: in case of default, the lender can seize and sell the asset, and if there's not enough money to satisfy the debt, the lender is now an unsecured creditor for the remaining balance (the deficiency) and can go after any of the borrower's other assets, such as her bank account. Foreclosure wipes out the lender's interest in the land, which means that the land can then be resold free of the lender's interest. However, with a recourse loan, foreclosure will not wipe out the borrower's debt, if it is greater than the foreclosure sale amount.

Obviously, lenders ordinarily prefer recourse loans, but will grant nonrecourse loans in various circumstances.[4] Many businesses can get nonrecourse loans based on their assets. Some states bar deficiency judgments for residential mortgages, which makes them nonrecourse loans. Other states bar deficiency judgments unless there is a judicial foreclosure, with its greater expense and greater procedural protections for the borrower. Still others limit the amount of any deficiency judg-

[3]At common law, the equity of redemption allowed the mortgagor to redeem the property from the mortgagee. This equity of redemption was extinguished by foreclosure sale. In about half of the states, there is also a statutory right to redeem the property from the *purchaser* at a foreclosure sale for a certain period of time. This right is rarely used, because most people would already have paid, if they could, before the sale.

[4]In fact, the basic idea of a corporation is a way of limiting a lender's recourse: before the corporate form, if a business owner went bust, creditors could go after the owner's personal assets until they were gone. The corporation allows shareholders/owners to limit their liability to the extent of the corporation's assets. If a person owned shares of Lehman Brothers, its creditors could make her shares worthless, but they couldn't make her pay Lehman Brothers' debts.

ment to the difference between the principal balance and the property's fair market value at the time of foreclosure—this limit recognizes that foreclosed properties often sell for below market value for a variety of reasons, including buyers' uncertainty about the true condition of the property and the limited number of potential buyers who bid at foreclosure sales. (Historically, the mortgagee is often the only bidder at a foreclosure sale. Why would this be true?)

Even states that allow deficiency judgments generally recognize an exception: if the sale price shocks the conscience, then a deficiency judgment may not be allowed. More generally, even in the absence of a potential deficiency judgment, the foreclosing entity has a limited duty of good faith to the mortgagor in seeking an acceptable price at the sale. However, mere inadequacy of price will not invalidate a sale in the absence of fraud, unfairness, or procedural problems that deterred bidding. As a result, very low sale prices are sometimes accepted by courts. *Compare Moeller v. Lien*, 30 Cal. Rptr. 2d 777 (Ct. App. 1994) (sale at 25% of market value was acceptable where sale was to bona fide purchaser and there was no irregularity in the sale procedure), *with Murphy v. Fin. Dev. Corp.*, 495 A.2d 1245 (N.H. 1985) (finding that mortgagee violated duty to mortgagor when (1) sale was rescheduled and poorly advertised, (2) sale price was so low that it wiped out substantial equity for homeowners, and (3) mortgagee quickly resold property at substantially higher price).

One final introductory point: it is possible to take out a second and even a third mortgage. The first mortgage has "priority" over the second mortgage: it will be paid first at foreclosure. Only if there is money remaining after the first mortgage is paid off will the holder of the second mortgage be paid. As a result of the greater risk involved in second mortgages, they generally bear higher interest rates than first mortgages.

Notes and Questions

7.13. As an initial matter, pay attention to the property interests involved. First, there is the promissory note itself, which gives the loan originator (the bank) has the right to receive monthly payments. But the note is typically alienable—the originator can sell it to another bank, or a loan servicer, or a financial institution. In that sense, the note itself is a kind of property right.

7.14. Second, there are the property interests relating to the real property. The mortgagor has a sort of possessory estate, insofar as the mortgagor gets to live on the mortgaged land. The mortgagee has a kind of future interest.

What events cause a change to the property interests of the mortgagor and mortgagee by operation of law? (There are several.) What happens after each, and what are the resulting property interests? If you can answer these questions, then you have grasped the basic operation of mortgages.

7.15. The original *Open Source Property* module on mortgages provides a more detailed explanation of the 2007–2010 mortgage and foreclosure crisis in the United States. But this overview of how mortgages work is enough to provide the seeds for understanding what happened. Consider the following.

7.16. Foreclosure sales are supposed to recover the fair market value of the mortgaged land, which ought to be enough to repay the mortgagor's debt and also return additional equity that the mortgagor has built up through payments. These sales are usually conducted by an auction. Do you believe that these auctions actually recover the fair market value? Who shows up to these auctions?

7.17. When a bank offers a mortgage to a homebuyer, presumably the bank hopes that the homebuyer will pay off the mortgage and not default. Foreclosure is a costly, messy process. That's why credit ratings and background checks are so important for getting mortgages. What might lead a bank to be willing to offer a mortgage to a homebuyer who is at higher risk of default—a "subprime mortgage"? Perhaps if housing prices are rising faster than expected, as they were between 2001 and 2006?

7.18. A real estate mortgage is a useful security interest against a mortgage debt because the real estate is presumably more valuable than the debt. (That's also why a down payment around 20% is required.) What happens if housing prices fall so much that the real estate is worth less than the debt? This is called an "underwater mortgage." What are the incentives of the mortgagor and the mortgagee?

7.19. If mortgages are property that can be bought and sold, they can be turned into investment vehicles. This process (described in detail in Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637 (2013)) is called "securitization." In the same way that stocks for multiple companies can be bundled together to make a mutual fund, where one can buy shares and receive a cut of all the companies' dividends, multiple mortgages can be bundled together in a "mortgage-backed security," where shareholders in the security are entitled to a cut of the profits (i.e., the interest payments) from the foreclosures. Typically, the mortgages themselves are held by a legal entity such as a trust, which pays out the interest payments as the trust proceeds.

Who might buy these mortgage-backed securities? Investment bankers? Pension and retirement funds? You? And what happens to these investments when the

mortgages go sour, for any of the reasons given above?

7.20. As we have seen, the current possessory estate holder can owe duties to future interest holders, under the doctrine of waste. What about the other way around—can a future interest holder owe a duty to the possessory estate holder? Consider the problem of mortgage servicing, described below.

7.3 Foreclosure Abuses

One ongoing problem is that the complicated structure of post-securitization mortgage lending left responsibility for problems diffuse, and even put incentives in precisely the wrong places. Because the trusts that own the mortgages and package them into mortgage-backed securities are passive legal vehicles with no employees or activities of their own, they contracted with mortgage servicers, often divisions of the same banks that initially sponsored the mortgage originators. The basic job is straightforward: servicers collect payments from homeowners and pass them along to the trust that represents the investors. Servicers are also responsible for handling foreclosures. In exchange, servicers typically get a small percentage of the value of the outstanding loans each year in fees. For a $200,000 loan to a borrower with good credit, a servicer might collect about $50 per month, with income decreasing as the balance of the loan drops. Servicers also make money from the "float"—interest earned during the short time the servicer holds the loan payment.

It is standard for servicers to be contractually required to keep paying the trust every month, even when there's a default, until there's a foreclosure. This would seem a strong incentive to do everything possible to help homeowners avoid a default, which is usually what investors want. The holder of a mortgage loses an average $60,000 on a foreclosure, according to figures announced by the federal government.

But the systems weren't set up that way. Among other things, servicers hired very few people with the ability to work with borrowers to find an affordable repayment; they were largely set up to take in money and pass it on. When the crisis hit, they were overwhelmed with troubled loans. Further, at the beginning of the foreclosure crisis, servicers often took the position that they were contractually prohibited from negotiating with borrowers by their agreements with the trusts, which allegedly did not allow them to reduce mortgagors' nominal obligations without the consent of the trust. (Recall that the trusts are not functioning companies with humans making day-to-day decisions, so the servicers' position meant that *no one* could agree to a renegotiation.)

Separately, servicers had incentives that conflicted with borrowers' and investors' interests. Servicers can charge fees for late payments, title searches, property upkeep, inspections, appraisals and legal fees that can total hundreds of dollars each month and can all be charged against a homeowner's account. Servicers have first dibs on recouping those fees when a foreclosed home is sold, meaning they usually collect unless the home is essentially worthless. Moreover, when homeowners tried to catch up or make partial payments as they sought a renegotiated loan, servicers applied their payments first to the servicers' own fees rather than to the underlying loan. These fees can be lucrative. In 2010, major servicer Ocwen reported $32.8 million in revenue from late fees alone, representing 9 percent of its total revenue. Professor Levitin, who has done extensive work on the legal and business structures resulting from securitization, concluded that a loan kept in default for a year or two could prove more profitable to a servicer than a typical healthy, performing loan.

The following case involves a trustee rather than a typical servicer, but otherwise it provides a sense of the problems that can arise when participants in the mortgage transaction are indifferent to the welfare of mortgagors.

Klem v. Washington Mutual Bank

176 Wash. 2d 771, 295 P.3d 1179 (Wash. 2013)

CHAMBERS, J.

Dorothy Halstien, an aging woman suffering from dementia, owned a home worth somewhere between $235,000 and $320,000. At about the time she developed dementia, she owed approximately $75,000 to Washington Mutual Bank (WaMu), secured by a deed of trust* on her home. Because of the cost of her care, her guardian did not have the funds to pay her mortgage, and Quality Loan Services (Quality), acting as the trustee of the deed of trust, foreclosed on her home. On the first day it could, Quality sold her home for $83,087.67, one dollar more than she owed, including fees and costs. A notary, employed by Quality, had falsely notarized the notice of sale by predating the notary acknowledgment. This falsification permitted the sale to take place earlier than it could have had the notice of sale been dated when it was actually signed.

Before the foreclosure sale, Halstien's court appointed guardian se-

*"Deed of trust" is defined in section I of the Analysis section below; it is a kind of mortgage. —Eds.

cured a signed purchase and sale agreement from a buyer willing to pay $235,000 for the house. Unfortunately, there was not enough time before the scheduled foreclosure sale to close the sale with that buyer. In Washington, the trustee has the discretion to postpone foreclosure sales. This trustee declined to consider exercising that discretion, and instead deferred the decision to the lender, WaMu. Despite numerous requests by the guardian, WaMu did not postpone the sale. A jury found that the trustee was negligent; that the trustee's acts or practices violated the Consumer Protection Act (CPA), chapter 19.86 RCW; and that the trustee breached its contractual obligations. The Court of Appeals reversed all but the negligence claim. We reverse the Court of Appeals in part and restore the award based upon the CPA. We award the guardian reasonable attorney fees and remand to the trial court to order appropriate injunctive relief.

Facts

The issues presented require a detailed discussion of the facts. In 1996, Halstien bought a house on Whidbey Island for $147,500. In 2004, she borrowed $73,000 from WaMu, secured by a deed of trust on her home. That loan was the only debt secured by the property, which otherwise Halstien owned free and clear. Unfortunately, by 2006, when Halstien was 74 years old, she developed dementia. At the time, Halstien's daughter and her daughter's boyfriend were living at the home with her.

Washington State's Adult Protective Services became concerned that Halstien was a vulnerable adult being neglected at home. After an investigation, protective services petitioned the court for the appointment of a professional guardian to protect Halstien. The court granted the petition and Dianne Klem, executive director of Puget Sound Guardians, was appointed Halstien's guardian in January 2007. Klem soon placed Halstien in the dementia unit of a skilled nursing facility in Snohomish County.

Halstien's care cost between $3,000 and $6,000 a month. At the time, Halstien received about $1,444 a month in income from Social Security and a Teamsters' pension. The State of Washington paid the balance of her care and is a creditor of her estate.

Halstien's only significant asset was her Whidbey Island home, which at the time was assessed by the county at $257,804. WaMu also had an appraisal indicating the home was worth $320,000, nearly four times the value of the outstanding debt. Klem testified that if she had been able to sell

the home, she could have improved Halstien's quality of life considerably by providing additional services the State did not pay for.

Selling the home was neither quick nor easy. Even after Halstien was placed in a skilled care facility, her daughter still lived in the home (without paying rent) and both the daughter and her brother strongly opposed any sale. The record suggests Halstien's children expected to inherit the home and, Klem testified, getting the daughter and her family to leave "was quite a battle." Ultimately, Puget Sound Guardians prevailed, but before it could sell the home, it had to obtain court permission (complicated, apparently, by the considerable notice that had to be given to various state agencies and to family members, and because some of those entitled to notice were difficult to find), remove abandoned animals and vehicles, and clean up the property.

During this process Halstien became delinquent on her mortgage. Quality, identifying itself as "the agent for Washington Mutual," posted a notice of default on Halstien's home on or around October 25, 2007. The notice demanded $1,372.20 to bring the note current. The record establishes that the guardianship did not have available funds to satisfy the demand.

A notice of trustee sale was executed shortly afterward by Seth Ott for Quality. The notice was dated and, according to the notary jurat of "R. Tassle," notarized on November 26, 2007. However, the notice of sale was not actually signed that day. The sale was set for February 29, 2008.

This notice of sale was one of apparently many foreclosure documents that were falsely notarized by Quality and its employees around that time. There was considerable evidence that falsifying notarizations was a common practice, and one that Quality employees had been trained to do. While Quality employees steadfastly refused to speculate under oath how or why this practice existed, the evidence suggests that documents were falsely dated and notarized to expedite foreclosures and thereby keep their clients, the lenders, beneficiaries, and other participants in the secondary market for mortgage debt happy with their work. Ott acknowledged on the stand that if the notice of sale had been correctly dated, the sale would not have taken place until at least one week later.

On January 10, 2008, Puget Sound Guardians asset manager David Greenfield called Ott in his capacity as trustee. Greenfield explained that Halstien was in a guardianship and that the guardianship intended to sell the property. Greenfield initially understood, incorrectly, that the trustee

would postpone the sale if Puget Sound Guardians presented WaMu with a signed purchase and sale agreement by February 19, 2008. Puget Sound Guardians sought, and on January 31, 2008, received, court permission to hire a real estate agent to help sell the house.

Unknown to Greenfield, Quality, as trustee, had an agreement with WaMu that it would not delay a trustee's sale except upon WaMu's express direction. This agreement was articulated in a confidential "attorney expectation document" that was given to the jury. This confidential document outlines how foreclosures were to be done and billed. It specifically states, "Your office is not authorized to postpone a sale without authorization from Fidelity or Washington Mutual." This agreement is, at least, in tension with Quality's fiduciary duty to both sides and its duty to act impartially. Cox v. Helenius, 103 Wash.2d 383, 389, 693 P.2d 683 (1985) (citing George E. Osborne, Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.21 (1979) ("[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.")).[1]

Regardless of what Washington law expected or required of trustees, David Owen, Quality's chief operations officer in San Diego, testified that Quality did what WaMu told it to do during foreclosures. Owen testified that there were two situations where Quality would postpone a sale without bank permission: if there was a bankruptcy or if the debt had been paid. Owen could not remember any time Quality had postponed a sale without the bank's permission.

By February 19, 2008, Puget Sound Guardians had a signed purchase and sale agreement, with the closing date set for on or about March 28, 2008. This was almost a month after the scheduled foreclosure sale, but well within the 120 day window a trustee has to hold the trustee's sale under RCW 61.24.040(6). Quality referred the guardians to the bank "to find out the process for making this happen." Klem testified Quality "told us on two occasions that they unequivocally could not assist us in that area, that only the bank could make the decision."

Puget Sound Guardians contacted WaMu, which instructed them to send copies of the guardianship documents and a completed purchase and

[1]Since then, the legislature has amended the deed of trust act to provide that the trustee owes a duty of good faith to both sides. Laws of 2008, ch. 153, § 1; RCW 61.24.010(4) (effective June 12, 2008).

sale agreement. Over the next few days, WaMu instructed the guardians to send the same documents to WaMu offices in Seattle, Washington, southern California, and Miami, Florida. Klem testified that Puget Sound Guardians called WaMu on "[m]any occasions," and that if the bank ever made a decision, it did not share what it was. The guardian also faxed a copy of the purchase and sale agreement to various WaMu offices on February 19, 21, 26, 27, and 28. In all, the guardian contacted Quality or WaMu over 20 times in the effort to get the sale postponed. Simply put, Quality deferred to WaMu and WaMu was unresponsive.

Accordingly, the trustee's sale was not delayed and took place on February 29, 2008. Quality, as trustee, sold the Halstien home to Randy and Gail Preston for $83,087.67, one dollar more than the amounts outstanding on the loan, plus fees and costs.[4] The Prestons resold the house for $235,000 shortly afterward.

Klem later testified it was "shocking when we found out that [the home] had actually been sold for $83,000 . . . . Because we trusted that they would sell it for the value of the home." In previous cases where a ward's home had gone into foreclosure, Klem testified, either the trustee had postponed the sale to allow Puget Sound Guardians to sell the property or had sold the property for a reasonable price. Klem testified that if they had just one more week, it was "very possible" that they could have closed the sale earlier.

In April 2008, represented by the Northwest Justice Project, Puget Sound Guardians sued Quality for damages on a variety of theories, including negligence, breach of contract, and violation of the CPA. Later, with permission of the court, Quality's California sister corporation was added as a defendant. Halstien died that December.

Quality defended itself vigorously on a variety of theories. Initially successfully, Quality argued that any cause of action based on the trustee's duties was barred by the fact Klem had not sought an injunction to enjoin the sale. The record suggests that it would have been impossible for the guardianship to get a presale injunction due to the time frame, the need for court approval, and the lack of assets in the guardianship estate. While Judge Monica Benton dismissed some claims based on the failure of the estate to seek an injunction, she specifically found that the negligence, breach of contract, and CPA claims could go forward.

[4]As of trial, Quality had not delivered that one dollar to the Halstien estate.

The case proceeded to a jury trial. The heart of the plaintiff's case was the theory that Quality's acts and practices of deferring to the lender and falsifying dates on notarized documents were unfair and deceptive and that the trustee was negligent in failing to delay the sale. David Leen, an expert on Washington's deed of trust act, chapter 61.24 RCW, testified that it was common for trustees to postpone the sale to allow the debtors to pay off the default. He testified that under the facts of this case, the trustee "would absolutely have to continue the sale."

By contrast, Ott, representing Quality as trustee in this case, testified that he did not take into account whether the house was worth more than the debt when conducting foreclosures. When asked why, Ott responded, "My job was to process the foreclosure . . . according to the state statutes." When pressed, Ott explained that he counted the days, prepared the forms, saw they were filed, and nothing more. He acknowledged that, prior to 2009, he would sometimes incorrectly date documents. He testified that he had been trained to do that. He also testified that Quality, as trustee, would not delay trustee sales without the lender's permission. And he testified that he had never actually read Washington's deed of trust statutes.[5]

The jury found for the plaintiff on three claims: negligence, CPA, and breach of contract. . . . The jury determined that the damages on all three claims were the same: $151,912.33 (the difference between the foreclosure sale price and $235,000) . . . .

Quality brought a blunderbuss of challenges to the trial court's decisions. . . . The Court of Appeals concluded . . . that the evidence was insufficient to uphold the breach of contract and CPA claims. . . .

Analysis

. . . .

I. CPA Claims

To prevail on a CPA action, the plaintiff must prove an "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*,

[5]This inspired a juror's question, "If you never read the statute, how did you know you were following it, following Washington law?" Ott responded that he relied on his training. . . .

105 Wash.2d 778, 780, 719 P.2d 531 (1986). The plaintiff argues that both Quality's historical practice of predating notarized foreclosure documents and Quality's practice of deferring to the lender on whether to postpone most sales, satisfies the first element of the CPA. Deciding whether the first element is satisfied requires us to examine the role of the trustee in nonjudicial foreclosure actions. A deed of trust is a form of a mortgage, an age-old mechanism for securing a loan. 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 17.1, at 253, § 20.1, at 403 (2d ed. 2004). In Washington, it is a statutorily blessed "three-party transaction in which land is conveyed by a borrower, the 'grantor,' to a 'trustee,' who holds title in trust for a lender, the 'beneficiary,' as security for credit or a loan the lender has given the borrower." If the deed of trust contains the power of sale, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision. *Id.* at 260–61; RCW 61.24.020; RCW 61.12. 090; RCW 7.28.230(1) . . . .

A. Unfair or Deceptive Acts or Practices

The legislature has specifically stated that certain violations of the deed of trust act are unfair or deceptive acts or practices for purposes of the CPA. [The Supreme Court found that this list was not exclusive; other violations could be unfair or deceptive as determined by a common-law, evolutionary process: " 'It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again' " (citation omitted).] . . .

B. Failure To Exercise Independent Discretion To Postpone Sale

Until the 1965 deed of trust act, there was no provision in Washington law for a nonjudicial foreclosure. In 1965, the legislature authorized nonjudicial foreclosure for the first time, subject to strict statutory requirements. Because of the very nature of nonjudicial foreclosures, Washington courts have not shied away from protecting the rights of the parties. . . .

The power to sell another person's property, often the family home itself, is a tremendous power to vest in anyone's hands. Our legislature has allowed that power to be placed in the hands of a private trustee, rather than a state officer, but common law and equity requires that trustee to be evenhanded to both sides and to strictly follow the law. This court has

frequently emphasized that the deed of trust act "must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales." We have invalidated trustee sales that do not comply with the act.

As a pragmatic matter, it is the lenders, servicers, and their affiliates who appoint trustees. Trustees have considerable financial incentive to keep those appointing them happy and very little financial incentive to show the homeowners the same solicitude. However, despite these pragmatic considerations and incentives

> under our statutory system, a trustee is not merely an agent for the lender or the lender's successors. Trustees have obligations to all of the parties to the deed, including the homeowner. RCW 61.24.010(4) ("The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor."); *Cox v. Helenius*, 103 Wash.2d 383, 389, 693 P.2d 683 (1985) ("[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.") (citing George E. Osborne, Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.21 (1979)).

In a judicial foreclosure action, an impartial judge of the superior court acts as the trustee and the debtor has a one year redemption period. In a nonjudicial foreclosure, the trustee undertakes the role of the judge as an impartial third party who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected. *Cox*, 103 Wash.2d at 389, 693 P.2d 683. While the legislature has established a mechanism for nonjudicial sales, neither due process nor equity will countenance a system that permits the theft of a person's property by a lender or its beneficiary under the guise of a statutory nonjudicial foreclosure.[10] An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the

[10]Washington courts have a long tradition of guarding property from being wrongfully appropriated through judicial process. When "a jury . . . returned a verdict which displeased [Territorial Judge J.E. Wyche] in a suit over 160 acres of land" he threatened to set aside their verdict and remarked, " 'While I am judge it takes thirteen men to steal a ranch.' "

debtor is a minimum to satisfy the statute, the constitution, and equity, at the risk of having the sale voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a CPA claim.[11]

The trustee argues that we "should not hold that it is unfair and deceptive either to honor a beneficiary's instructions not to postpone a sale without seeking its authorization, or to advise a grantor to contact her lender." We note that Quality contends that it did not have a practice of deferring to the lender but merely followed its "legally-mandated respect for its Beneficiary's instructions" and asserts that "[s]imply put, no competent Trustee would fail to respect its Beneficiary's instructions not to postpone a sale without first seeking the Beneficiary's permission." We disagree. The record supports the conclusion that Quality abdicated its duty to act impartially toward both sides.

Again, the trustee in a nonjudicial foreclosure action has been vested with incredible power. Concomitant with that power is an obligation to both sides to do more than merely follow an unread statute and the beneficiary's directions. If the trustee acts only at the direction of the beneficiary, then the trustee is a mere agent of the beneficiary and a deed of trust no longer embodies a three party transaction. If the trustee were truly a mere agent of the beneficiary there would be, in effect, only two parties with the beneficiary having tremendous power and no incentive to protect the statutory and constitutional property rights of the borrower.

We hold that the practice of a trustee in a nonjudicial foreclosure deferring to the lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent discretion as an impartial third party with duties to both parties is an unfair or deceptive act or practice and satisfies the first element of the CPA. Quality failed to act in good faith to exercise its fiduciary duty to both sides and merely honored an agency relationship with one.

C. Predating Notarizations

Klem submitted evidence that Quality had a practice of having a notary predate notices of sale. This is often a part of the practice known as "robo-signing." Specifically, in this case, it appears that at least from 2004–

[11]We have not had occasion to fully analyze whether the nonjudicial foreclosure act . . . violates article I, section 3 of our state constitution's command that "[n]o person shall be deprived of life, liberty, or property, without due process of law." . . .

2007, Quality notaries regularly falsified the date on which documents were signed.

Quality suggests these falsely notarized documents are immaterial because the owner received the minimum notice required by law. This no-harm, no-foul argument again reveals a misunderstanding of Washington law and the purpose and importance of the notary's acknowledgment under the law. A signed notarization is the ultimate assurance upon which the whole world is entitled to rely that the proper person signed a document on the stated day and place. Local, interstate, and international transactions involving individuals, banks, and corporations proceed smoothly because all may rely upon the sanctity of the notary's seal. This court does not take lightly the importance of a notary's obligation to verify the signor's identity and the date of signing by having the signature performed in the notary's presence. *Werner v. Werner*, 84 Wash.2d 360, 526 P.2d 370 (1974). As amicus Washington State Bar Association notes, "The proper functioning of the legal system depends on the honesty of notaries who are entrusted to verify the signing of legally significant documents." While the legislature has not yet declared that it is a per se unfair or deceptive act for the purposes of the CPA, it is a crime in both Washington and California for a notary to falsely notarize a document. . . . A notary jurat is a public trust and allowing them to be deployed to validate false information strikes at the bedrock of our system. . . .

. . . We hold that the act of false dating by a notary employee of the trustee in a nonjudicial foreclosure is an unfair or deceptive act or practice and satisfies the first three elements under the Washington CPA.

The trustee argues as a matter of law that the falsely notarized documents did not cause harm. The trustee is wrong; a false notarization is a crime and undermines the integrity of our institutions upon which all must rely upon the faithful fulfillment of the notary's oath. There remains, however, the factual issue of whether the false notarization was a cause of plaintiff's damages. That is, of course, a question for the jury. We note that the plaintiff submitted evidence that the purpose of predated notarizations was to expedite the date of sale to please the beneficiary. Given the evidence that if the documents had been properly dated, the earliest the sale could have taken place was one week later. [sic] The plaintiff also submitted evidence that with one more week, it was "very possible" Puget Sound Guardians could have closed the sale. This additional time would also have

provided the guardian more time to persuade WaMu to postpone the sale. But given the trustee's failure to fulfill its fiduciary duty to postpone the sale, there is sufficient evidence to support the jury's CPA violation verdict, and we need not reach whether this deceptive act was a cause of plaintiff's damages . . . .

Notes and Questions

7.21. What, if anything, is the relevance of the sale price of the home to the court's decision? Why would the bank bid a dollar more than what was owed on the loan?

7.22. *Klem* involves a variant on what is known as "robo-signing"—the creation of documents with important legal effects on foreclosure, without sufficient personal knowledge or even understanding by the person signing the document.

Jay Patterson, a forensic accountant who has examined hundreds of mortgage loans in bankruptcy or foreclosure, concluded that "95 percent of these loans contain some kind of mistake," from an unnecessary $15 late fee to thousands of dollars in fees and charges stemming from a single mistake that snowballed into a wrongful foreclosure. Most of these cases resulted in defaults, but when they were litigated, the facts could be telling. For example, one bankruptcy case, *In re Stewart*, involved a home in Jefferson Parish, New Orleans. Wells Fargo was the servicer. The debtor fell behind in her payments, and on September 12, 2005, Wells Fargo agents generated two opinions on the value of the home. Opinions require at least minimal inspection of the property. Stewart was charged $125 for each opinion. However, on September 12, 2005, Jefferson Parish was under an evacuation order due to the devastation then being wrought by Hurricane Katrina. These were only two of the numerous fees the bankruptcy judge found had been wrongly charged to Stewart.

What ought to be done to rein in servicer misbehavior of this sort?