the true consideration was invalid for that reason.

5. *Revenue Stamps*. Prior to 1966, ch. 34 of the I.R.C. required the imposition of documentary stamps on instruments of conveyance, and the funds derived from the purchase of these stamps was a source of revenue for the Federal Government. Failure to affix the stamps did not affect the validity of the instrument but subjected the maker to penalties. See I.R.C. § 7271 (1976). The stamp requirement was abolished as of Jan. 1, 1966, but the tax continued until Jan. 1, 1968. At this point most of the states got into the act and passed their own statutes requiring revenue stamps. Michigan's provision is typical. MICH. COMP. LAWS ANN. § 207.501–13 (West 1986 & Supp. 1991). A tax of $.55 to $.75 per $500 of total fair market value at transfer is imposed on the seller or grantor at the time of recording of any contract for the sale of land or any interest therein or of any deed conveying the same-but the tax need be paid only once for any given transaction. The tax is not imposed on gratuitous transactions, and the recording of an instrument without the stamps which evidence the payment of the tax is expressly made valid so far as notice is concerned. A deed may be recorded without the tax stamps and a separate affidavit stating the fair market value may be submitted to the recorder separate from the instrument itself, which will not to be disclosed to any person other than the auditors of the county fund (into which the tax is paid). [p*370]

## B. DELIVERY AND RECORDING

### *Notes on Delivery*

1. *The Delivery Requirement*. In order that a deed be effective all states require that it be delivered, but just what constitutes delivery is a matter of some ambiguity. In Parramore v. Parramore, 371 So. 2d 123, 125 (Fla. Dist. Ct. App. 1978), the decedent had executed a number of deeds conveying to his children remainder interests in his land after his life. He placed the deeds in a safe deposit box and instructed his children to pick up the deeds after his death. The court said, quoting from an earlier Florida case:

> Actual manual delivery and change of possession are not always required in order to constitute an effectual delivery. The intention of the grantor is the determining factor. . . . [D]elivery . . . may consist of a transfer of the conveyance without spoken words, or by spoken words without manual act. . . . [If] the grantor intended to reserve to himself the locus poenitentiae, . . . there is no delivery; but if he parts with the control of the deed, or evinces an intention to do so, and to pass it to the grantee, though he may retain the custody or turn it over to another, or place it upon record, the delivery is complete.

In *Parramore* the court held delivery good without relying "on the troublesome test suggested by the disjunctives" in the quoted passage. (Can you see what other issue was presented by the case? *See* Note on Wills, *infra*, p. S197.)

Thus, the ambiguity about what constitutes effective delivery is caused by the fact that in this area intention is allowed to predominate. An overt manifestation of the grantor's intent that title shall pass constitutes a delivery and marks that point in the transaction where the parties' respective interests have changed. Is it necessary to be so vague? Why not make manual transfer or some other formal act the precise definition? As we shall see in the cases below, the courts in this area vacillate between protecting the presumed intent of the grantor and protecting third parties who have relied on what they thought was the grantor's intent.

Consider the facts of Barker v. Nelson, 306 Ark. 204, 812 S.W.2d 477 (1991):

> According to . . . Robert and Daniel [Barker], they were called to their parents' home with their wives on the night of September 1, 1982, and presented with a warranty deed executed by [their parents] . . . deeding them four lots . . . with the parents retaining a life estate . . . . At

> the meeting, according to the sons' testimony, the original deed was passed around the table and shown to them, and each son paid consideration of $1.00 . . . . At the conclusion of the meeting, . . . [the parents] retained possession of the deed. . . . Within one or two days . . . [each son] received a photostatic copy of the warranty deed from their parents.

After the mother's death and father's remarriage, the father brought suit to void the conveyance his sons claimed to be complete. His ground was that there had been no delivery. How would you rule? The Arkansas Supreme Court upheld the trial court's determination that delivery had occurred, justifying in part with an especially tolerant delivery test for situations in which the grantor retains a present possessory estate: "We hold . . . that when a life estate is retained by the grantor under the deed and the grantee is shown the original deed by the grantor, possession of the original deed instrument need not be transferred to the grantee in order to effect a delivery." *Id*.

It has been held that the intent necessary to effectuate delivery must be the intent of both the grantor and the grantee; i.e., there must be acceptance. *See* [p*371] Underwood v. Gillespie, 594 S.W.2d 372 (Mo. Ct. App. 1980) (refusal by life tenant to accept invalidates remainder as well); Hood v. Hood, 384 A.2d 706 (Me. 1978) (deed invalid for lack of acceptance even though recorded). The adverse tax consequences which can result from having an asset in one's estate for which one has not planned have led to the promulgation of a Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act (1978). In *Hood* the son who refused to accept his mother's gift of a farm died shortly thereafter, predeceasing his mother.

2. *Delivery on Condition, Escrow and "Relation Back."* Despite the fact that delivery is a matter of intent, it is generally held that it is not possible for the grantor to make a delivery to a grantee subject to a condition. Once the delivery is made the condition is deemed to have been waived, even though it is quite clear that it has not been. *See, e.g.*, Sweeney v. Sweeney, 126 Conn. 391, 11 A.2d 806 (1940) (delivery to grantee subject to condition that grantee survive grantor; grantee predeceased grantor, but title held to have passed to grantee); *but see* Chillemi v. Chillemi, 197 Md. 257, 78 A.2d 750 (1951). It is, however, possible to make a delivery to a third person, subject to a condition. This is known as delivery in escrow:

Where a sale of real estate between vendor and purchaser is to be closed by means of an escrow, with final delivery of the deed by the escrowee dependent upon the performance of some uncertain future condition, the general rule is that the escrow will have no effect as a conveyance, and no estate will pass until the event has happened and the second delivery has been made, or at least until the grantee has become absolutely entitled to such a delivery.[2]

> This general rule is, however, subject to the important qualification that where the condition has been fully performed, and the deed delivered by the escrowee, it will under certain circumstances be treated as relating back to and taking effect at the time of its original deposit as an escrow.[3] Thus the Illinois Supreme Court has said that "the instrument will be treated as relating back to and taking effect at the time of its original deposit in escrow, where

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[2] . . . The sound view appears to be that upon full performance of the condition, title will be regarded as having vested in the grantee notwithstanding a want of formal delivery of the deed by the escrowee. . . .

[3] In general the doctrine of "relation back" does not come into play unless the condition upon which the instrument was deposited as an escrow has been fully performed. . . . Thus where both parties abandon the escrow agreement, a subsequent delivery of the deed will not relate back. . . . And where the grantee wrongfully obtains possession of the instrument held as an escrow, the doctrine of "relation back" will not be applied even though the grantor afterward ratifies the delivery. . . .

a resort to this fiction is necessary to give the deed effect to prevent injustice, or to effectuate the intention of the parties."[4] . . .

The operation of this doctrine of "relation back" can be best illustrated by reference to certain concrete situations.

*Death of grantor*. Where the grantor dies before the condition is performed, his death would, if the doctrine of "relation back" were not employed, operate as a revocation of the escrowee's authority to make a valid delivery to the grantee upon subsequent performance. Accordingly in such a case, the rule is universal that the transaction will be effectuated by holding the conveyance operative as of the time when the deed was originally deposited as an escrow, and the grantee's title will for such purpose relate back to that date.

J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 225–26 (3d ed. 1986). [p*372]

Cribbet goes on to report that "relation back" has also been used to protect grantees in situations where the grantor dies before the fulfillment of the escrow conditions and his widow claims dower, in situations where the grantor has become incompetent, where the grantee dies and his heirs fulfill the conditions, where the grantor subsequently conveys to a non-bona fide purchaser, and where the grantee seeks the benefit of the Statute of Limitations. In each case, of course, the event in question must occur after the deposit in escrow, and the conditions of escrow must have ultimately been fulfilled. "Relation back" will not normally be applied to invalidate the grantee's title where the grantor perfects his title only after the establishment of the escrow, nor where the grantor could otherwise recover from his insurance company for a loss occurring after the establishment of the escrow, nor where the grantee would otherwise have to pay real estate taxes for the escrow period. The authorities are in conflict as to whether "relation back" will protect a grantee against liens obtained by the grantor's creditors after deposit of the deed in escrow. Finally the fact that "relation back" is applied for one purpose does not mean that it will be applied for another even in the same transaction. *Id*. at 226–27.

In some parts of the country, particularly in the far West, most commercial sales of real estate are consummated through professional escrow agents who keep track of all the documents and deliver the deed to the grantee when he has paid in the purchase price and all the documents are in order. *See id*. at 213–29.

3. *Delivery of Deeds and Delivery of Gifts of Personal Property*. The doctrine of delivery of deeds is analogous to that of delivery of gifts of personal property, although the differences are probably more important than the similarities. In the case of delivery of gifts of personal property the courts are more likely to require manual delivery of some physical thing. While it is possible in some jurisdictions to convey a future interest in a piece of personal property, the number of cases striking down such attempted gifts for want of delivery is much larger than the number of cases in which any conveyance by deed is struck down for want of delivery. Further, the distinction between agent for the donor and trustee for the donee that is sometimes observed in cases of gifts of personal property is not found in cases of delivery of deeds to escrow agents. The escrow agent is regarded as the agent of both the grantor and the grantee. These differences are rooted deep in history. Whether the law should continue to maintain these distinctions is another question. To the extent that they are based on the distinction between real and personal property, one would have thought that they should go out with livery of seisin. One might ask, however, whether the functions of the delivery requirement in the case of gifts of personal property are the same as in the case of deeds of realty.

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[4] Clodfelter v. Van Fossan, 394 Ill. 29, 37, 67 N.E.2d 182, 186 (1946).

## JOHNSON, PURPOSE AND SCOPE OF RECORDING STATUTES.

47 IOWA L. REV. 231, 231–34, 237–44 (1962).

The general purpose of the land recording acts is quite clear: It is to provide a public record of transactions affecting title to land. More specific objectives are also readily discernible: (1) to enable interested persons, including public officials such as tax collectors, to ascertain apparent ownership of land; (2) to furnish admissible evidence of title for litigants in a nation where landowners did not adopt the English practice of keeping all [p*373] former deeds and transferring them with the land; (3) to enable owners of equitable interests to protect such interests by giving notice to subsequent purchasers of the legal title; and (4) to modify the traditional case-law doctrine that purchasers and other transferees, no matter how bona fide, get no better title than the transferor owned. It is no doubt safe to make these generalizations about all of the land recordation statutes in force in the United States, but deeper probing renders generalization hazardous. This is especially true of item four on the above list. The first-in-time rule of priorities is quite logical, but it is of doubtful justice and is utterly incompatible with an economy in which commercial transfers of land occur frequently. But, despite widespread agreement that this doctrine should be changed, the recording acts of the various states and court decisions applying them reflect significant divergence of policy.

A basic policy question is whether emphasis should be upon penalizing those who fail to record or upon protecting those who deserve protection. Conceivably, strict adherence to the penalty approach could lead to requiring recordation as essential to the validity of a deed, even as to the grantor, in addition to the requirements of delivery and writing. On the other hand, it would be consistent with the protection approach to regard unrecorded deeds void only as to those who actually examine the records and who substantially change their positions in reliance thereon. No modern recording act (excluding Torrens acts)[1] goes to either of these extremes. Rather, the impact of both policies-penalty and protection-may be observed in the acts now in force. How these seemingly inconsistent policies have been accommodated is a major question to be considered in this review of the salient features of land recording acts.

### I. BASIC TYPES OF STATUTES

Recording acts typically are classified as (1) race, (2) notice, or (3) race-notice. If conveyees are allowed a specified period of time within which to record-a feature which may be added to any of the above types of acts but which is not common today-the statute is also categorized as a "period of grace" act. A recent survey placed the recording acts of only two states, Louisiana and North Carolina, in the race category generally, and those of three other states in that category as to some instruments—mortgages in Arkansas, Ohio, and Pennsylvania (except for purchase money) and oil and gas leases in Ohio.[2] Most States have acts either of the notice or race-notice type, each type having about an equal following.

Of these types, the race statute is most consistent with the penalty principle. The North Carolina act provides: "No conveyance of land . . . shall be valid to pass any property, as against lien creditors or purchasers for a valuable consideration . . . but from the time of registration thereof . . . ."[3] Under this act, as construed, an unrecorded conveyance is void even as to a subsequent purchaser who knew of its existence, and a subsequent bona fide purchaser gains no priority over the earlier unrecorded instrument unless he records first. Thus, priority is determined by a race to the records. Of course, an unrecorded conveyance would be valid as to the grantor, his heirs, devisees, donees, and anyone else other than "lien creditors or purchasers for a valuable

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[1] [On Torrens registration, see DKM3, pp. 641–46. Ed.]

[2] 4 American Law of Property § 17.5, at 545 n. 63 (Casner ed. 1952).

[3] N.C. Gen. Stat. § 47–18 (Supp. 1959).

consideration." The North Carolina act is very similar to the Colonial prototypes. While there are many factors which may have shaped [p*374] the early acts, it has been asserted that the most significant was a desire to provide a substitute for the publicity afforded by livery of seisin, which had been discarded as a mode of conveyance.[4] In this context there would be a tendency to look upon recording acts as an additional conveyancing formality and to emphasize what was to be required of the grantor rather than what should be the qualifications of those to be protected. Subsequently, probably as a result of experience with actual cases, attention shifted to the latter and to "the view generally accepted in America today that the Recording Acts are an extension of the equitable doctrine of notice."[5]

In some of its applications the race statute seems unfair and out of harmony with the stated objectives of recordation. But instances in which bad faith purchasers are benefited and good faith purchasers are harmed are probably infrequent, and can be almost eliminated by prompt recording. Indeed, the threat of such dire consequences may provide added incentive to prompt recordation. The best argument in favor of the race statute, however, is that it enables the title searcher to rely upon the records without the substantial risk under other types of acts that one will have constructive notice of unrecorded instruments.

A representative "notice" type act is the Iowa statute, which provides: "No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless filed in the office of the recorder of the county in which the same lies, as hereinafter provided."[6] California's act is an example of the "race-notice" type: "Every conveyance of real property . . . is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded . . . ."[7] Both acts give priority over unrecorded instruments to subsequent purchasers only if they are without notice, and the California act also requires the bona fide purchaser to record first. The latter is an obvious compromise of the objectives of penalizing non-recordation and protecting those who are likely to rely upon the records. By withholding protection from one who has not himself obeyed the statutory mandate to record, the race-notice act may be thought to have the merit of fairness and to encourage recording to a greater extent than would the notice act. But the seeming fairness of putting beyond the pale of the act both non-recorders is quite superficial, since only one has caused harm. It is also extremely doubtful that recording is actually stimulated by acts of the race-notice type, since even in a state having a notice type statute failure to record makes those protected by the act vulnerable to subsequent claims.

## II. GROUPS PROTECTED

Although not always referred to specifically in the statutes, the subsequent purchaser for a valuable consideration is the major beneficiary of the recording system. It would be a mistake, however, to assume that this category includes all purchasers, and only those purchasers, who part with value in reliance upon the records.

Despite occasional references in court opinions to estoppel, one does not have to examine the record before buying in order to be protected. It is sufficient that he is within a class of persons who would ordinarily be [p*375] expected to rely upon the records. The foolish are protected along with the prudent as long as there is nothing in the record or outside it which gives notice. To this extent, emphasis is upon penalizing the failure to record rather than upon protecting the

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[4] Philbrick, Limits of Record Search and Therefore of Notice, 93 U. Pa. L. Rev. 125, 137 (1944).

[5] Bordwell, Recording of Instruments Affecting Land, 2 Iowa L. Bull. 51, 52 (1916).

[6] Iowa Code § 558.41 (1958).

[7] Cal. Civ. Code § 1214.

deserving. Whether the protective mantle of the recording acts should be this broad would seem to be debatable,[8] but the statutes and cases uniformly support the general proposition stated.

According to one view, the recording acts benefit as purchasers those who have parted with only nominal consideration, but most courts appear to require something more substantial. The latter position is obviously sound if there is to be any real distinction between purchasers and donees. . . .

The measure of protection actually afforded by the recording system in operation is significantly affected by location of the burden of proof[9] on the issues of notice and valuable consideration. If possible, this question should be resolved by reference to the underlying purposes of recordation. It would be reasonable to say that if the dominant purpose of the recording system is to encourage recording by penalizing failure to record, the burden of proof should be upon the one who did not record. On the other hand, if protection of designated groups is the aim, it might follow that the burden should be upon those seeking to bring themselves within the favored categories. An analysis in terms of policy produced the conclusion by one authority that the burden should be placed "squarely in all cases on the holder of the prior unrecorded instrument."[10] Unfortunately, the decided cases in the main are not characterized by a purpose-oriented approach to the problem. Authority can be found for almost every conceivable position: burden on one who failed to record; burden on one claiming to be a subsequent purchaser without notice; burden on one who failed to record if his interest was equitable rather than legal; burden on purchasers but not on creditors; and burden on purchasers as to consideration but not as to notice.

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[8] In justification of the preference of the second careless person over the first, it might be said that (1) a record search by the subsequent purchaser would have been futile and (2) that the injection of the issue of the subsequent purchaser's prudence would make administration of the recording act too complicated, possibly even unworkable. But it is fully as compelling to argue that (1) recording would have been futile as to subsequent purchasers who would not look for the instrument and (2) that the issue of the subsequent purchaser's prudence is no more difficult to resolve than determining whether he had notice.

[9] The term "burden of proof" as used here is meant to refer to the burden of persuasion rather than to the burden of going forward with the evidence. See McCormick, Evidence § 306–07 (1954).

[10] Osborne, Mortgages § 208, at 531 (1951).

### *Note and Questions*

The recording system and its uses is considered in more detail in DKM3, Chapter 5, § 3B(1), where there are some fairly sophisticated problems on priorities at common law and under the various types of recording statutes. Here we will consider a single problem (with variations):

On January 2, O conveys Blackacre to A, who does not record his deed until January 5. On January 3, O conveys Blackacre to B and departs for the Bahamas. As between A and B who has the better right to Blackacre? Consider the following factual variations: (1)(a) B was a purchaser of Blackacre for valuable consideration. (b) B took Blackacre by gift. (2)(a) At the time he took delivery of his deed B had no actual or inquiry notice of the deed to A. (b) B had [p*376] actual or inquiry notice of the deed to A. (3)(a) B recorded his deed before A recorded his. (b) B recorded his deed after A recorded his. As to which of the factual variations does it matter whether the jurisdiction in question has: (1) no recording statute, (2) a race statute, (3) a notice statute, or (4) a race-notice statute.

## MICKLETHWAIT V. FULTON

Supreme Court of Ohio.
129 Ohio St. 488, 196 N.E. 166 (1935).

This is an action to set aside a deed of conveyance given by plaintiff in error, Abigail Micklethwait, to her daughter, Louise M. Marshall. On September 5, 1928, Abigail Micklethwait, a woman seventy-eight years of age, signed a warranty deed prepared by her son, Joseph Micklethwait, an attorney, now deceased, conveying to her married daughter, Louise M. Marshall, the real property which was then and thereafter used and occupied jointly by mother and daughter. The deed was absolute and regular in form, properly witnessed and acknowledged. The warranty clause contained the following provision: "Excepting taxes due and payable in December, 1928, and street and municipal assessments, which the grantee assumes and agrees to pay."

Sometime after its execution, said deed came into the possession of Leon G. Marshall, husband of grantee, and was recorded by him on July 23, 1930. The grantor claims that the deed was to have been held in escrow by her son, Doctor O.R. Micklethwait, until her decease, and that her son-in-law wrongfully filed the deed of record.

About eight days after the deed was recorded, a financial statement, purporting to be signed by Louise M. Marshall and Leon G. Marshall, was presented to the Ohio Valley Bank, listing said property as that of Louise M. Marshall. On the strength of said financial statement, credit was renewed and extended to them by the bank, and promissory notes for the amount thus loaned were executed by them. About a year later, Leon G. Marshall disappeared, and subsequently the superintendent of banks in charge of liquidation of said bank procured judgment on the notes and levied execution against the property described in said deed. Plaintiff in error, Abigail Micklethwait, claimed title to said property, free from the judgment lien of defendant in error, and prayed that the conveyance from her to Louise be ordered canceled of record, contending that title thereto never passed to her said daughter, and that there was no effective delivery of the deed, first, because the conditions of the escrow had not been performed and, second, because there was no acceptance of the conveyance by the grantee; grantee having had no knowledge of the execution or recording of said deed.

Defendant in error contends that the bank was an innocent party and, in equity, should not be made to suffer even if there were no delivery; that the bank relied upon the record ownership of the property and upon the financial statement furnished by grantee and husband wherein grantee represented herself to be the owner of the property in question.

Plaintiff in error recovered a judgment in the court of common pleas, which was reversed by the Court of Appeals of Scioto county, and the matter is now in this court on the allowance of a motion to certify. . . .

DAY, J. The dominant question presented for our determination is whether an escrow deed, which was wrongfully delivered and recorded before performance of the conditions of the escrow, is a valid deed of [p*377] conveyance as to third persons who innocently renew or extend credit to the grantee on the strength of and in reliance upon his record ownership of the property therein described.

A third person, extending credit to a record owner of real estate in reliance upon the latter's record title thereto, and without any notice or knowledge of any defect in the conveyance, occupies the position of an innocent purchaser for value, and if such third person reduces his claim to judgment during the former's record ownership of the property, he acquires a valid judgment lien thereon.

Where an owner of real estate executes a deed of conveyance, complete and absolute in form, and deposits same with a person of his own choice for delivery to grantee upon the death of the

grantor, such deposit will be deemed to have been made at the grantor's own risk, as to innocent purchasers for value without notice, and as to subsequent judgment creditors of grantee who have extended credit in reliance upon the latter's record title to the property, if such deed is thereafter wrongfully recorded, and conveyance will be deemed valid and absolute. For wrongful delivery, grantor's remedy is against his escrow agent and against the grantee. As between the grantor and a subsequent innocent judgment creditor of grantee, the latter has the superior equity. This is especially so where such deed is wrongfully recorded by reason of culpable negligence of grantor and agents to whom custody of the deed was intrusted. We are satisfied from the testimony in the record that plaintiff in error, Abigail Micklethwait, exercised no reasonable precautions to prevent the deed from falling into the wrong hands. Though Doctor O.R. Micklethwait is said to have been designated as the escrow agent, or depositary, the grantor nevertheless at no time so informed him, and from the date of the execution of the deed to the date of the disappearance of Leon G. Marshall the two had not discussed the execution, custody, delivery, or recording of the deed. To permit grantor, under such circumstances, to relieve herself of the consequences of her own negligence at the expense of defendant in error, who was an innocent judgment creditor of grantee, would be the height of injustice.

"It is a general and just rule, that when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune." Somes v. Brewer, 2 Pick. (19 Mass.) 184, 202, 13 Am. Dec., 406, 418.

Conditions of escrow are, in their nature, private communications between grantor and escrow agent and are not matters of public record. To hold an innocent subsequent judgment creditor of grantee, or an innocent purchaser for value, bound by such instructions, of which he has neither notice nor knowledge, would give legal sanction to fraud and unfair dealings.

The record of the deed in the instant case imports every appearance of validity. It purports to be a conveyance in praesenti. Nothing appears anywhere in the deed to indicate a contrary intention. The words of conveyance are in the present tense. The warranty clause of the deed contains a provision for the assumption of taxes by the grantee, due at the time of its execution and thereafter. Innocent third parties dealing with the record owner of such property have a right to be guided by the terms and provisions of the recorded deed. For they have a right to presume "that the records of the county are not intended to mislead but to speak the truth; [p*378] that the acts and declarations of the grantor are such as they purport to be." 4 Thompson on Real Property, 1039, Section 3954.

Violation of confidences reposed by grantors in their escrow agents are not things usually manifested in the records of deeds. Those who deal with the property and extend credit to the apparent owner thereof on the faith of record ownership, without knowledge or notice of any defects in the conveyance, are by law protected.

Holding as we do, the judgment of the Court of Appeals, is hereby affirmed.

Judgment affirmed.

### *Notes and Questions*

1. Don't ignore the family situation or the date of this case. They may help to explain the result. What would have happened if Mrs. Micklethwait had won? Who's Fulton? Where's Leon G. Marshall?

2. Ohio had a notice recording statute for deeds in fee and a race statute for mortgages at the time the principal case was decided. OHIO REV. CODE ANN. §§ 5301.23, 5301.25 (Page 1981). Is either statute involved in this case? In what way? In Hannah v. Martinson, 232 Mont. 469, 758

P.2d 276 (1988), the Montana Supreme Court was faced with a judgment creditor's claim against a real estate interest that had previously been transferred by an unrecorded deed. The court held: "A judgment lien can only attach to the actual interest of the judgment debtor. . . . It can not attach to an interest which does not exist, nor can a judgment lien claim superiority as against a valid prior transfer." In effect, it held the recording act inapplicable. *Id*.

3. The courts are divided on the issue posed by the principal case. *Compare* Quick v. Milligan, 108 Ind. 419, 9 N.E. 392 (1886) (bona fide purchaser protected despite depositary's delivery of deed to grantee in violation of grantor's instructions) *and* Prevot v. Courtney, 241 La. 313, 129 So. 2d 1 (1961) (bona fide purchaser protected despite knowledge of a prior outstanding interest, i.e., a bona fide purchaser in "bad faith," alternative holding) *with* Home-Stake Royalty Corp. v. McClish, 187 Okla. 352, 103 P.2d 72 (1940) (bona fide purchaser unprotected where grantor's instructions violated and depositary delivered deed to grantee) *and* Gould v. Wise, 97 Cal. 532, 32 P. 576 (1893) (bona fide purchaser (mortgagee) unprotected where grantee violated escrow by taking deed when grantor's back was turned). *See* 3 A.L.P. § 12.68; Roberts, *Wrongful Delivery of Deed in Escrow*, 17 KY. L.J. 31 (1928); Ballantine, *Delivery in Escrow and the Parol Evidence Rule*, 29 YALE L.J. 826 (1920). What policies underlie these opposing decisions? Which line of decisions supports the policies of the recording system? *See* UNIFORM SIMPLIFICATION OF LAND TRANSFERS ACT §§ 2–202, 3–201, 3–202 (1978), which adopts a rule like that of the principal case.

## HOOD V. WEBSTER

Court of Appeals of New York.
271 N.Y. 57, 2 N.E.2d 43 (1936).

LOUGHRAN, J. Florence F. Hood owned a parcel of farm land in the town of Phelps, Ontario county. This property had been devised to her by her husband, whose will said that, should she predecease him, he wanted his estate to go to his brother, the plaintiff here. In 1913 Mrs. Hood executed a deed of the farm to the plaintiff and delivered it to his attorney as an escrow [p*379] to take effect on her death. The Appellate Division has confirmed a finding of the Equity Term that this delivery was subject to no other condition. A majority of this court has come to the conclusion that the contrary of the fact so found may not be declared as matter of law on this record.

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

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

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

We think this question of burden of proof as fixed by the recording act is not for us an open one. The defendants were bound to make out by a fair preponderance of evidence the affirmative assertion of their status as purchasers in good faith and for a valuable consideration. [Citations omitted.] Brown v. Volkening (64 N.Y. 76) and Constant v. University of Rochester (111 N.Y.

604, 133 N.Y. 640) as read by us, are not authorities to the contrary. In those cases the court did say that the party who claimed under an unrecorded conveyance was required to prove that the subsequent record purchaser took with notice. But here, as elsewhere, it must be kept in mind that the phrase "burden of proof" may stand in one connection "for the never changing burden of establishing the proposition in issue," and in another "for the constantly changing burden of producing evidence." (Thayer, Preliminary Treatise on Evidence, 353–389.) In the Brown and Constant cases the controlling factor was that substantial value had been paid for the subsequent conveyance. That fact was more than evidence of consideration. It was further the basis for the auxiliary inference that there was also good faith in the transaction, and what was said respecting the burden of proof had reference to the duty of adducing evidence to repel that inference. For the same reason, the burden of proof (in the same sense) is upon the holder of an unrecorded conveyance when a subsequent deed first recorded acknowledges receipt by the grantor of a consideration sufficient to satisfy the statute. [Citations omitted.]

We have a different case here. Under their defense of purchase for value without notice the defendants offered no evidence of actual considerations given. The subsequent deed to them expressed their payment of "One Dollar and other good and valuable consideration." This recital was not enough to put them into the position of purchasers for a valuable consideration in the sense of the statute. [Citations omitted.]

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

The judgment should be affirmed, with costs. [p*380]

CRANE, C.J. (dissenting). I cannot agree with Brother Loughran's view of the law nor with his conclusion on the evidence in this case.

The Real Property Law, section 291, provides: "A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, . . . may be recorded in the office of the clerk of the county where such real property is situated, . . . Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded."

It is conceded that the holder of a prior unrecorded deed has the burden of proving the lack of good faith in the holder of a subsequent recorded deed. The burden is upon him to prove notice or such circumstances as would give notice to a reasonable man (Brown v. Volkening, 64 N.Y. 76; Constant v. University of Rochester, 133 N.Y. 640; Kirchhoff v. Gerli, 171 App. Div. 160.) I can see no reason for complicating this rule by shifting the burden of proof when it comes to valuable consideration. It is just as easy to prove lack of consideration in this day when parties may be witnesses and examined before trial as it is to prove notice or bad faith. We should not impair the force and efficacy of the recording statutes upon which it has become a habit and custom to rely in the transfer of real property. A deed or mortgage on record is good as against prior unrecorded deeds or incumbrances until notice or bad faith or a lack of consideration is proven. The burden of proof should rest with the person who asserts the invalidity. . . .

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

I go still further, however, and hold that the plaintiff is not entitled to recover on the evidence. Florence F. Hood was a widow of about fifty-five years of age, living alone on a small farm, which is the subject of this action. The plaintiff, William J. Hood, is her brother-in-law. She married his brother. The defendant Almon B. Farwell is her brother, and the defendant Howard A. Webster her nephew. Mrs. Hood was left by her husband with this farm and no money with

the exception of a mortgage of $1,200 upon property in Nebraska. She was desirous and anxious to get enough money to live on the farm and the plaintiff proposed to give it to her during her natural life in exchange for the farm. She was brought in January of 1913 to the office of the plaintiff's lawyer, at which time she executed a deed of the farm to the plaintiff and also an agreement, which was part and parcel of one transaction, wherein the plaintiff agreed to pay her $200 a year as long as she lived. The deed was not given to the plaintiff; it was given to the lawyer to hold in escrow for no other purpose that can be imagined except to insure the plaintiff's paying the $200 a year and keeping his agreement. The delivery of the deed in escrow and the promise of the plaintiff were all one and the same transaction, and the payment of the money by the plaintiff was clearly a condition precedent to be fulfilled before he was entitled to the deed. Florence Hood lived for twenty years thereafter and died on the 29th day of January, 1933. The plaintiff broke all his promises and agreements. He never paid her a dollar, so far as this record shows. He owed her at the time of her death $4,000, not counting simple interest, and the courts below, dealing in equity, have turned over to him the farm, without requiring the plaintiff to do equity and pay to the estate the money he owes. [p*381]

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

The plaintiff's lawyer became a witness and testified as to the transaction in his office when the deed and agreement were drawn up: "She also stated in substance, I can't give her exact words, "that she was not well off, financially,' and "that she wanted to be certain of some income during her life; that certain loans had been made by her, and her husband, to members of her own family, which had not turned out well, and that she felt that she could rely upon William J. Hood.' . . . During the conversation, as I say, Mrs. Hood said "that she wanted to be assured of some income during her life,' and it was stated that she had a mortgage on some property in Nebraska for $1,200, which she was going to turn over to William J. Hood, and that she was also going to agree to pay to William J. Hood at any time which he might demand it, an additional sum of $500, and that William J. Hood was going to pay her $200 per year during her lifetime . . . ."

Martha T. Hood, the wife of the plaintiff, became a witness for him and testified that Mrs. Hood said the following: "Why, she didn't know what she was going to do if she used her money. She would soon be out of money, and her agreement with Mr. Will Hood was that she would be assured of an income each year which would reduce her worries a great deal."

With this attitude and fear of poverty Mrs. Hood on January 22, 1913, executed a deed of the farm to William J. Hood, which was not delivered to him or given to him, but was put by his lawyer in the lawyer's safe and kept in escrow for no other purpose or reason that I can see except to bind and hold William to the fulfillment of his agreement executed at the same time. The instrument is dated January 22d, and William J. Hood of Rochester becomes party of the first part, and Florence Hood of the town of Phelps, Ontario county, party of the second part. It recites that "Whereas" a deed of even date has been delivered in escrow to be delivered to William J. Hood upon the death of Florence J. Hood, that "Now, therefore, for and in consideration of the

making and delivery in escrow of said deed, and of the covenants and agreements herein expressed, the said party of the first part in consideration thereof and a further sum to be agreed upon by the parties hereto, not to exceed however the sum of Five Hundred Dollars ($500.00) in addition to the property above transferred, to be paid to him by the said party of the second part, does hereby agree that he will pay or cause to be paid to the said party of the second part during the term of her natural life the sum of Two Hundred Dollars ($200.00) per year or more at his option, to be paid quarterly, the said sum to be paid in addition to any income derived by said party of the second part from the use of said farm. . . . [p*382]

"It is mutually agreed that the party of the second part shall pay all taxes, necessary repairs and operating expenses of said farm out of the income therefrom."

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

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

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

LEHMAN, O'BRIEN, CROUCH, and FINCH, JJ., concur with Loughran, J.; CRANE, C.J., dissents in an opinion in which HUBBS, J., concurs on the second ground stated.

Judgment affirmed.

### *Notes and Questions*

1. The statute at issue in the principal case is New York's recording act. Suppose, however, that the statute did not exist, how would the principal case come out? Can you see an argument against the majority's holding which the dissenting judge drives towards but perhaps does not fully articulate? Reconsider the Note on Escrows and "Relation Back," *supra*, p. S186, and the *primus in tempore* principle.

2. In consideration necessary for the validity of a deed? *See supra*, p. S184. Assume that New York is one of those states in which there is no question that a deed is valid without proof of consideration, why is consideration an issue in the principal case?

3. Examine the New York recording act, set out in the principal case, carefully. Which party, the plaintiff or the defendants, is seeking to benefit by the statute? Reconstruct that party's argument. How and why do the majority and the dissent differ on the application of the statute to the case? Which opinion is more compatible with the policies underlying the recording system?

4. Compare the principal case with Anderson v. Anderson, 435 N.W.2d 687 (N.D. 1989). Are the two consistent? On one side in *Anderson* were the children of George Anderson who claimed under an unrecorded 1934 deed from his sister Julia and, on the other, the heirs of Julia's children, Ida and William, who claimed under a quit claim deed from Julia to Ida and William, dated and recorded 1951. The 1934 deed was not recorded until 1983. The 1951 deed recited $10.00 and other good and valuable consideration. The North Dakota Supreme Court held that for the 1951 deed to prevail under the recording act the purchase must be for a "valuable and not a

nominal consideration" and that [p*383]"the party claiming to be a good faith purchaser has the burden of proof to establish valuable consideration from evidence other than the deed." The opinion concludes: "the consideration recited in the 1951 quit-claim deed was a nominal consideration and . . . [t]herefore, the defendants cannot claim priority over the plaintiff by virtue of the 1951 deed." *Id*.

5. The majority's holding that the one seeking to benefit from the recording act has the burden of showing his/her status as a bona fide purchaser is well within the mainstream, *e.g.*, Brown v. Mickelson, 220 S.W.3d 442 (Mo.App. 2007); Raposa v. Johnson, 693 S.W.2d 43 (Tex.App. 1985). Cases will also be found, however, where the court shifts the burden of producing evidence on the question of notice to the one opposing the claim, once the other party has claimed bona fide purchaser status. *E.g.*, Bill's Printing, Inc. v. Carder, 357 Ark. 242, 161 S.W.3d 803 (2004). No cases were found dealing specifically with the burden of proving the status of a purchaser, but perhaps that's because I didn't look far enough.

### *Note on Wills*

Examine James Abbott's deed once again. What difficulties do you see with the sentence "This deed is not to take effect and operate as a conveyance until my decease"? It should be clear by now that if the deed is a deed, it is probably valid. We will see (*infra*, p. S225) that this was true under the Maine statutes in effect at the time of the case, and it is true today. In Maine today a deed need only be signed by the grantor and delivered to the grantee to be a valid conveyance as between grantor and grantee. ME. REV. STAT. ANN. tit. 33, § 162, 201 (1988). Subsequent acknowledgement and recordation of the deed validates the conveyance as against third parties. ME. REV. STAT. ANN. tit. 33, § 201 (1988). If, on the other hand, the "deed" is in fact a will, there are considerable difficulties. Today in Maine the law requires that a valid will be signed by the testator and two (at the time Abbott wrote his "deed" it was three) competent witnesses in his presence and expressly provides that a will may be revoked by the testator. ME. REV. STAT. ANN. tit. 18–A, §§ 2–502, 2–505, 2–507 (1981). Had James Abbott's deed been held to be testamentary, it would have been void as a will on formal grounds, and Clarissa B. would have had to divide the farm with the other legal heirs of her husband.

The essential difference between deeds and wills, however, is not the formal one. It is necessary to determine what kind of interest, if any, is passed by the writing. It is sometimes said that if an instrument is to have no effect until the death of the grantor, it will be testamentary, whereas one which evidences the grantor's intention presently to convey an interest will operate as a deed. The distinction is a subtle one, particularly where an interest is to vest at a future time, such as the grantor's death. See Ballantine, *When Are Deeds Testamentary*, 18 MICH. L. REV. 470, 479 (1920); Browder, *Giving or Leaving—What is a Will*, 75 MICH. L. REV. 845 (1977) (includes discussion of representative cases).

Resolving the question necessarily demands an examination of the grantor's intent. In this regard, the revocability of the instrument may weigh in favor of its being a will, although a revocable grant may be sustained as an *inter vivos* conveyance, if the power of revocation is reserved on the face of the document. *See* 3 A.L.P. § 12.65 nn. 3–5. Can you see how such a holding can be reconciled with the law stated in the preceding paragraph? For a marvelously slithery attempt to do so, see St. Louis County Nat'l Bank v. Fielder, 364 Mo. 207, 260 S.W.2d 483 (1953).

Some states have tried to aid grantors like James Abbott by passing statutes like the following: "A person may make an *inter vivos* conveyance of an estate of freehold or inheritance that commences in the future, in the same manner as by a will." TEX. PROP. CODE ANN. § 5.041 (Vernon 1984); *see* Terrell v. Graham, 576 S.W.2d 610 (Tex. 1979). Does such a statute solve the problem? [p*384]