

SOME ISSUES RAISED BY ALASKA'S RECORDING ACT

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ABSTRACT

This Article examines Alaska's Recording Act. It details how Alaska is a Race-Notice state and the implications of this compared to being a Notice state. The Article then describes how the Race-Notice recording act operates in practice. It then proceeds with a detailed account of the scope of title searches required under Alaska's recording act. It calls into question the Supreme Court's decision in Sabo v. Horvath and suggests a different outcome today. The Article asks whether the digitization of recorded instruments will cause the Alaska Supreme Court to expand the scope of the title search required under the Recording Act. Finally, this Article examines the potential applications of the Rule of Shelter in Alaska, allowing a transferee with notice of a prior grant of property to take free of that interest.

INTRODUCTION

This article examines some of the many issues raised by Alaska's Recording Act. The Supreme Court of Alaska has addressed very few of these issues, requiring some "educated guessing" as to what that tribunal's future decisions under the Recording Act will be. This Article takes a special look at Recording Act issues the court might address from a new perspective in light of the digitizing of most conveyance records, so that title searches now can be done online across the state through records dating back to 1971.

I. ALASKA'S FIRST RECORDING ACT

Every conveyance of real property within this State hereafter made, which shall not be recorded, as provided in this title, within five days thereafter, shall be void against any

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subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded.¹

So read the law pursuant to which, with Juneau Deed Book 1, beginning October 21, 1884,² Alaska initiated the systematic recordation of conveyance instruments. It was an Oregon statute that came to Alaska via the Alaska Organic Act of 1884, by which Congress made applicable in Alaska the “general laws” of Oregon, not inconsistent with Alaska-specific federal legislation.³ The final clause – “whose conveyance shall be first duly recorded” – made this a Race-Notice type recording act, rather than the other common type, a pure Notice act.⁴

Congress enacted verbatim this statute for Alaska in 1900.⁵ The core language of the present Recording Act, section 40.17.080(b) of the Alaska Statutes, is essentially the same and retains the phrase “whose conveyance is first recorded.”⁶ Alaska’s method of indexing recorded

1. Board of Comm’rs v. Babcock, 5 Or. 472, 475–76 (1875) (citing Or. Misc. Laws § 26); see also *Fleshner v. Sumpter*, 6 P. 506, 510 (Or. 1885) (applying the statute).

2. RECORDER’S OFFICE, ALASKA DEP’T OF NATURAL RES., RECORDING DISTRICT HISTORY 3 (2008), available at http://dnr.alaska.gov/ssd/recoff/Rec_District_History.pdf.

3. An Act Providing a Civil Government for Alaska, § 7, 23 Stat. 24, 25–26 (1884) (“[T]he general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States.”). This incorporated by reference the Recording Act in effect in Oregon in 1884. RECORDER’S OFFICE, ALASKA DEP’T OF NATURAL RES., A BRIEF HISTORY AND ORGANIZATION OF THE ALASKA RECORDER’S OFFICE (1994), available at <http://www.alaskapls.org/docs/recorders.pdf> (“The beginning of recording activities in Alaska can be traced to the establishment of civil government for Alaska in 1884 when the Congress provided that Alaska should be governed by the laws of Oregon. Oregon statutes contained copious provisions for the recordation of instruments . . .”).

4. 4 AMERICAN LAW OF PROPERTY § 17.5 n.48, at 542 (A. James Casner ed., 1952).

5. An Act Making Further Provision for a Civil Government for Alaska, and for Other Purposes, ch. 786, § 98, 31 Stat. 321, 505 (1900). It was published locally as Carter’s Civil Code of 1900, § 98, and quoted in *Jones v. Nelson*, 90 F.2d 910, 917 (9th Cir. 1937). Identical or nearly identical language was carried forward as Alaska Compiled Laws of 1913, § 524; Alaska Compiled Laws of 1933, § 2837; and Alaska Compiled Laws of 1949, § 22-3-25.

6. “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. An unrecorded conveyance is valid as between the parties to it and as against one who has actual notice of it. In this subsection, ‘purchaser’ includes a holder of a consensual interest in real property that secures payment or performance of an obligation.” ALASKA STAT. § 40.17.080(b)

conveyance documents has always been by use of grantor and grantee indices rather than by tract indices.⁷

II. HOW RACE-NOTICE AND NOTICE STATUTES OPERATE DIFFERENTLY

Alaska's Recording Act is addressed to the claimant under the first-in-time among two (or more) instruments by which conflicting claims to real property are being made and lays out what conditions must be proved for the first-in-time instrument to be void as against claims made under a subsequent-in-time competing instrument.

If all grantees were to promptly record, Notice and Race-Notice statutes would not operate differently. But when both a prior grantee and subsequent grantee delay recording their instruments, the two types of statutes dictate significantly different results. Under a Notice-type statute, as soon as the second-in-time deed is delivered to a bona fide purchaser, the prior grantee who had yet to record is divested of his or her title that conflicts with the grant to the subsequent purchaser.⁸ But under a Race-Notice statute, title remains in the first grantee until the subsequent bona fide purchaser records. Thus, the prior grantee is only divested if the subsequent purchaser actually records. As stated by the Supreme Court of Pennsylvania, the state that was one of the first to enact a Race-Notice statute,⁹ among two unrecorded deeds, the first in time has priority.¹⁰

(2009). Specific mention that one with "actual notice" of the unrecorded claim cannot benefit under the statute was added in 1955. Alaska Sess. Laws 1955, ch. 9, § 3, 53-54. That clause might have been construed to preclude, by implication, charging a subsequent purchaser with inquiry (as opposed to actual) notice arising from an inspection of persons and things on the land that is the subject of the subsequent instrument. That interpretation was not considered in *Methonen v. Stone*, 941 P.2d 1248, 1252 (Alaska 1997) (buyer could see water pipes running from well on property he was buying to lands of neighbors, suggesting the existence of an unrecorded profit à prendre burdening the parcel being acquired). Thus a failure to investigate can result in a subsequent purchaser not getting the protection of the Recording Act and being subject to the common law's priority for prior-in-time instruments.

7. ALASKA STAT. § 40.17.040(a) (2009).

8. A typical Notice-type statute reads: "No such instrument in writing shall be valid, except as between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record." MO. REV. STAT. § 442.400 (2009). Like Alaska's Race-Notice statute, a Notice statute is addressed to the transferee in the first-in-time instrument and tells him or her that so long as the instrument is unrecorded, rights under it can be lost in favor of a bona fide purchaser, with no mention of an obligation on the part of that grantee to record his or her instrument.

9. 4 AMERICAN LAW OF PROPERTY, *supra* note 4, § 17.5, at 541-42.

10. *Collins v. Aaron*, 29 A. 724, 725 (Pa. 1894); *accord* *Temple v. Osburn*, 106

Therefore, in Alaska, where *A* has title and grants to *B*, who does not record, and *A* then grants the same land to a second grantee, bona fide purchaser *C*, who also does not record, the good-faith *C* enters the land as a trespasser.¹¹ If *B* wins the race to record, and *C* builds a structure on the property, *B* owns it and *B* cannot be divested of his now-more-valuable title.¹² If *C*, who paid full value and has no reason to think her title is not good, cuts and removes timber or mines and removes coal or other minerals, *C* does so as a good-faith trespasser and has to account to *B* for the profits. This is also true as to timber and minerals taken before *C* records and wins the race with *B*, as the race victory is not retroactive to the date when *C* took delivery of the deed to *C*.¹³

In Notice states like Massachusetts and Missouri¹⁴ *C* is not a trespasser, and *B* has no claims against *C* for cutting timber or mining coal. In these jurisdictions, *B* becomes a trespasser the moment the *A*-to-*C* deed is delivered. *B* will almost certainly know nothing about this event. If *B* starts building a house on the land *B* thinks he owns, it is *C*'s house.

Note, too, that under a Race-Notice statute like Alaska's, if *B* is on the land at issue at the time, *B* will become "a trespasser"¹⁵ when *C* records *C*'s deed, something *B* will almost certainly not be aware of, because if *B* were a frequent visitor at the office of the recorder of deeds *B* would have recorded *B*'s own prior deed from *A* and would have won the race. The problem of either *C* or *B* becoming an unknowing trespasser is inherent in any type of recording act.

P. 16, 18 (Or. 1910) ("[A]nd when not recorded the first conveyance executed will prevail."), *overruled on other grounds by* Partlow v. Clark, 671 P.2d 103 (Or. 1983); Crouse v. Mitchell, 90 N.W. 32, 36 (Mich. 1902) (holding that in a Race-Notice jurisdiction, "as between two unrecorded conveyances, the first one made has priority").

11. In this and all following hypothetical situations, one is to assume that the land at issue is vacant, unless otherwise stated.

12. This fact pattern sometimes creates an equitable claim in the good-faith *C* to recoup for *B*'s unjust enrichment. *See* Madrid v. Spears, 250 F.2d 51, 53-54 (10th Cir. 1957) (New Mexico law); Somerville v. Jacobs, 170 S.E.2d 805 (W.Va. 1969).

13. *See generally* ALASKA STAT. § 40.17.040 (2009).

14. *See* MASS. GEN. LAWS ch. 183, § 4 (2010); MO. REV. STAT. § 442.400 (2009), quoted in note 8.

15. Nordling v. Carlson, 265 F.2d 507, 509 (9th Cir. 1958) (Alaska law). The apparent facts of this case are laid out in text accompanying notes 99-100, *infra*.

III. WHO CAN RACE?

Although most reported cases from Race-Notice jurisdictions have involved a race between two grantees (using the term broadly to include mortgagees) claiming under instruments executed by the same grantor, theoretically there can be a large number of racers.

The original owner, *O*, may execute more than two title instruments dealing with the same parcel of land that are unrecorded. *O*'s grantee, *A*, may in turn execute more than two or more such instruments. The fact that the grantor *A* had not recorded *O*'s deed to *A* is not a basis for holding that *A*'s grantees, mortgagees, etc. lack the status of bona fide purchasers – at least it is not in the case of a grantee who is aware that *A* has an unrecorded deed that would hook *A* up to the chain of title.¹⁶

A grantee from one who has recorded but was not a race winner due to either having notice of a prior unrecorded grant or because the grantee was a donee rather than a purchaser can also enter the race. Suppose *O* has title and grants to *A* (who, as a first-in-time claimant can be a donee as well as a purchaser), who does not record. *O* then grants to *B* a larger parcel that includes some of the land granted to *A*, but *B* has notice of *A*'s deed. *B* records. Title remains in *A*, but to a bona fide purchaser¹⁷ who does a title search, *B* appears to be the owner of part of the land granted to *A*.¹⁸

IV. HOW IS THE RACE WON?

A. A Bona Fide Purchaser's First Recordation Does Not Always Win the Race

On the face of the statute, section 40.17.080(b), the race winner must satisfy three conditions: (1) be bona fide, i.e., without notice of the

16. See *Fallass v. Pierce*, 30 Wis. 443, 468–69 (1872) (grantee was bona fide purchaser when his grantor handed to him an unrecorded quitclaim deed that on its face eliminated a mortgage on the property). If the grantor is asked to display unrecorded instruments that would connect him to the chain of title and refuses to do so, the buyer may be on inquiry notice that there is a title defect. 5 HERBERT THORNDIKE TIFFANY, *THE LAW OF REAL PROPERTY* § 1284, at 51 (3d ed. 1939).

17. If this purchaser knew that *B* had notice of *A*'s deed, this purchaser would not qualify as “bona fide” and thus could not race with *A*.

18. *Plant v. Schrock*, 227 P. 439, 441–42. (Okla. 1924); 4 *AMERICAN LAW OF PROPERTY*, *supra* note 4, § 17.11, at 567.

unrecorded claims of other racers;¹⁹ (2) be a purchaser rather than donee;²⁰ and (3) first record.

I predict that the courts will recognize that in one situation a grantee who technically satisfies all three requirements cannot win a race. Suppose *O* sells to *A*, who does not record, and then *O* sells to *B*, a bona fide purchaser, who also does not record. *B* sells to bona fide purchaser *C* by warranty deed, and *C* does not record. Now *B* records. My suggestion is that by selling to *C*, *B* turned over his status as a racer to *C*. Title must remain in *A* despite *B*'s recording. If *A* were divested of title, at common law, it would pass to *C* by estoppel by deed (under the after-acquired-title doctrine²¹). But the statute bars recognizing *C* as having title, as *C* has not recorded. The race has not been won, and *A* and *C* remain in it.

If *B* had quitclaimed to *C*, *B*'s recordation before recordation by *A* and *C* (i.e., before *C* records *O*-to-*B* as well as *B*-to-*C* in order to hook up to the chain of title) would vest title in *B*, and the race would be over. That is so because *B*'s quitclaim to *C* would not be a basis for feeding the estoppel.

B. The Race Also Can Be Won By Filing a *Lis Pendens*

Although the Alaska Recording Act specifically refers to first-to-record status as a requirement that a grantee must satisfy to be a race winner, the Alaska Supreme Court very likely will recognize a substitute for such recording when due to acts of another person it is impossible for a racer to record in a manner that imparts constructive notice. Suppose *O* grants to *A* who does not record. *O* grants to *B*, who has notice of the deed to *A*, and *B* records. *B* now grants to *C*. It would seem that *A* and *C* ought to be in a race to get an indefeasible title. But *A* cannot effectively record because, as explained below,²² a deed out of *O* recorded after the recording of the *O*-to-*B* deed is off the chain of title (the deed can be found only by doing a "search forward" in time). If *A* has no process available to win the race with *C* other than recording,

19. Acquisition by the buyer of notice of an unrecorded interest after the buyer has paid for the land and taken a deed but before the buyer has recorded does not render the buyer non-bona fide. 4 AMERICAN LAW OF PROPERTY, *supra* note 4, § 17.11, at 574.

20. But consider this scenario: *O* conveys to *A*, who does not record. *O* sells to bona fide purchaser *B*, who does not record. *B* donates the land to *C* charity, which records the *O*-to-*B* deed and the *B*-to-*C* deed. *C* is the race winner, the party that gets the title. While *C* itself is a donee, it can assert its donor's status as a purchaser.

21. See *infra* note 99.

22. See *infra* notes 49-50 and accompanying text.

there is no actual race: *C* can take as long as he or she wants to record and divest *A* of title.²³

But *A* can give notice to the world of his or her claim by filing a quiet title suit against *B* and recording a *lis pendens* that states the claim being pursued in litigation (i.e., that *B* had notice of the deed to *A*).²⁴ Section 09.45.940 of the Alaska Statutes states that “[f]rom the time of recording the [*lis pendens*] notice, a purchaser, holder of a contract or option to purchase, or encumbrancer of the property affected has constructive notice of the pendency of the action.”²⁵

But the Alaska Supreme Court does not consider this statute to be the sole source of *lis pendens* law in the state. Rather, the common law’s “ancient doctrine of *lis pendens*” supplements the statute so that every “successor in interest” to the property (not just the three categories of parties listed in the statute) are bound by the *lis pendens* and also take subject to the judgment ultimately rendered in the quiet title action.²⁶ The Alaska Supreme Court has the power to determine that the filing of a *lis pendens* has other effects not referred to in section 09.45.940.

To retain the intended “race” feature of the state’s recording act in the face of the recording by a party (*B*) with notice of an unrecorded claim, the Alaska Supreme Court should follow precedent elsewhere that *A*’s filing of a *lis pendens* (advising the public of his winnable theory for quieting title to the land at issue) is the equivalent of getting his “conveyance first recorded.”²⁷

In a case from Wisconsin,²⁸ a Race-Notice jurisdiction, *O* conveyed land to *A*, who did not record, and *O* then conveyed adjacent land to *B*, who recorded. But *B* also had an unrecordable claim that *O*’s deed to him was erroneously drafted and should be reformed to include a strip

23. Suppose *O* grants to *A*, who does not record, and then *O* grants to *B* who does not record. Next *O* grants to *C*, who has notice that the unrecorded deeds to *A* and *B* purport to grant a portion of the land embraced in the deed to *C*. *C* records. Here both *A* and *B* are supposed to be in a race, but neither can record in a manner that imparts constructive notice. Title remains in *A* until some bona fide purchaser from *C* records, thereby divesting *A*, unless *A* and *B* may win the race by some method other than being first to record, such as a *lis pendens* action or by *A* physically occupying the property, which would preclude subsequent grantees from becoming bona fide purchasers.

24. It should be indexed as if it were a document that impaired title executed by the apparent record-owner, *B*. In other words, it should name *B* as grantor.

25. ALASKA STAT. § 09.45.940.

26. *Leisnoi, Inc. v. Stratman*, 835 P.2d 1202, 1208–09 (Alaska 1992); see also *Watega v. Watega*, 143 P.3d 658, 665 (Alaska 2006) (would-be purchaser aware of divorce action involving co-owner had constructive notice of real property claims asserted by that co-owner in documents in the court file).

27. ALASKA STAT. § 40.17.080(b) (2009).

28. *Cutler v. James*, 24 N.W. 874 (Wis. 1885).

of land embraced in the prior deed to A.²⁹ B filed a reformation suit and recorded a *lis pendens* that embraced his claim to the strip of land. B ultimately won the reformation action.³⁰ The holding of the Wisconsin Supreme Court was that B's reformed deed prevailed over the deed to A under the state's Race-Notice recording act.³¹

The Wisconsin court cited a leading Race-Notice precedent from that state, *Fallass v. Pierce*,³² which discusses the following hypothetical case: A makes an enforceable oral contract to sell land to B. A then sells to C, who records and who has notice of the oral contract. A now delivers a deed to B, who records. But,

such record of B's deed will operate as no obstruction or impediment in the way of C's afterwards conveying and giving valid title to a purchaser for value from him who has not actual notice of B's claim, and who causes his conveyance to be duly recorded. This statement is of course made on the supposition that no action has been commenced by B against C to avoid C's deed, and no *lis pendens* filed which may operate as notice to the purchaser from C.³³

V. THE SCOPE OF THE TITLE SEARCH ANTICIPATED BY THE RECORDING ACT

Not all instruments that end up being recorded impart constructive notice. Those that do not are called "wild deeds";³⁴ they are instruments that are treated as not in the chain of title of the parcel of land at issue. The Recording Act imposes no obligation on a purchaser to try to find wild deeds when doing a title search.³⁵ There are four categories of wild deeds.

29. *Id.* at 874.

30. *Id.*

31. *Id.* at 876; see also *Shepler v. Whalen*, 119 P.3d 1084, 1090 (Colo. 2005) (judgment creditor seeking to establish lien on land via unrecordable claim that there had been fraudulent conveyance established priority by filing suit and recording *lis pendens*); *Mavco, Inc. v. Eggink*, 739 N.W.2d 148, 157-58 (Minn. 2007) (party asserting rights under mechanic's lien won race versus mortgagee of land at issue by recording *lis pendens* two months before the mortgagee recorded the mortgage executed prior to the *lis pendens*).

32. 30 Wis. 443 (1872).

33. *Id.* at 470.

34. *Sabo v. Horvath*, 559 P.2d 1038, 1039 (Alaska 1976).

35. *Id.* at 1044.

A. The Instrument That Is Not Hooked Up to the Chain of Title

O, having record title, conveys to *A* who does not record. *A* conveys to *B*, a bona fide purchaser aware of the *O*-to-*A* deed, who records the *A*-to-*B* deed but not the *O*-to-*A* deed. Now *O* conveys to *C*, a bona fide purchaser who records. Although *B* had his deed placed on record before *C* did, *B* is not a race winner versus *C*, because *B* did not record in a manner that enabled innocent buyers like *C* to find *B*'s deed under a recording system based on grantor-grantee indices. Checking the grantor index to see how, if at all, *O* impaired his title before conveying to *C*, one finds nothing referring to the conveyance to *A* that connects *B* to the property.

Every decision in a jurisdiction using grantor-grantee indices as opposed to a tract index will hold the "recorded" *A*-to-*B* instrument to be a wild deed off the chain of title that does not impart constructive notice. A recording without hooking up to the chain of title will not support a holding that the grantee who so recorded is a race winner under a Race-Notice statute.³⁶

Unless the digitalization of the recorded instruments changes the approach taken by the Alaska Supreme Court to defining wild deeds (discussed below), that court is certain to join the unanimous line of holdings that *B*'s deed does not impart constructive notice.

B. The Deed that Can Be Found only by a "Search Backward"

The Alaska Supreme Court has addressed only one of the four wild deed scenarios—that arising where a grantor executes and delivers a deed before actually obtaining title to the land, with his or her grantee invoking the after-acquired title doctrine. In this scenario, the grantor's deed to his first grantee is recorded before the date on the deed originally giving the land to the grantor.³⁷ Then, when the grantor

36. *E.g.*, *Bd. of Educ. v. Hughes*, 136 N.W. 1095, 1097-98 (Minn. 1912); 1 JOYCE PALOMAR, PATTON & PALOMAR ON LAND TITLES § 8, at 39-40 (3d ed. 2003) (stating that courts in Race-Notice states "have reasoned that the first instrument does not 'count' as being of record, even for purposes of winning the race to the courthouse, unless and until it is recorded in such a way that a subsequent purchaser may find it in a standard chain-of-title search. . . . [T]o be 'recorded' within the chain of title even under statutes that include priority of recording as a prerequisite for protection, a purchaser is obliged to have recorded not only the final instrument to her, but also mesne transfers connecting her instrument with the common grantor."); *see also* Clyde L. Colson, *Limits of Title Search Under the West Virginia Recording Act*, 56 W. VA. L. REV. 20, 27 (1954).

37. The rule that there is no duty to search backward does not authorize the title searcher to cease looking for instruments recorded prior to recordation of the deed conveying title to the owner who may have made a conveyance

attempts to sell the same land a second time, the next purchaser will not find the prior grant unless the purchaser searches the grantor index for transactions that could impair the title that were made before the would-be grantor got title. However, the next purchaser is held to have a duty to search back only to his seller's acquisition of title.³⁸

In 1976, in *Sabo v. Horvath*, the Alaska Supreme Court adopted the rule that commands a substantial majority nationwide³⁹ among states using grantor-grantee indices to access recorded documents. In that case, Lowery had applied for a federal patent on a parcel in Alaska and had an inchoate title when in January 1970 he purported to deed the parcel to Horvath, who promptly recorded.⁴⁰ Lowery got record title from the U.S. government on August 10, 1973, and quitclaimed⁴¹ the same parcel to the Sabos in October 1973. The Sabos soon recorded their deed. If the 1970 deed imparted constructive notice to the Sabos, title would be in Horvath, but the Alaska Supreme Court held the Sabos had no obligation "to check beyond the chain of title," as requiring a search backward "could add a significant burden . . . to real estate purchases."⁴²

Most persons making conveyances are honest and are not likely to make grants of land they do not own unless they are in the process of acquiring the title and believe, mistakenly, that title has passed. For example, the grantee—who ends up being the grantor on a premature deed to a third party—sees a deed to him signed by his grantor but does not appreciate that title will not pass until manual delivery has been made. Not surprisingly then, in many of the search-backward cases, the premature deed that is claimed to have become effective under the after-acquired-title doctrine is made just a day or two or three before title

impairing the title. Rather the title examiner may cease the search in the grantor index as of the date of execution (or acknowledgment) of the deed, which can be considerably earlier in time than the date of recordation. See *Higgins v. Dennis*, 74 N.W. 9, 10-11 (Iowa 1898); 4 AMERICAN LAW OF PROPERTY, *supra* note 4, § 17.20, at 596. The law presumes delivery was made on that date. *Wickwire v. City of Juneau*, 557 P.2d 783, 786 n.9 (Alaska 1976); *McMillen v. Chamberland*, 298 N.W. 767, 769 (N.D. 1941).

38. *Sabo*, 559 P.2d at 1044.

39. See 1 PALOMAR, *supra* note 36, § 70, at 235.

40. *Sabo*, 559 P.2d at 1039.

41. *Sabo* adopts for Alaska the "majority rule" reflecting "the clear weight of authority" that a purchaser who takes a quitclaim deed can still be a bona fide purchaser and obtain the protection of the recording act. *Id.* at 1043.

42. *Id.* at 1044 ("The records as to each grantor in the chain of title would theoretically have to be checked back to the later of the grantor's date of birth or the date when records were first retained.").

actually does vest in the grantor.⁴³ Often the premature transfer is a purchase money mortgage arising out of the same acquisition process by which the title passes to the mortgagor, again making it likely that there is very little time between the delivery of the premature instrument and delivery of the deed which passes the title to the premature conveyor.⁴⁴

Suppose a title searcher buying land from Mary Moss knows Mary got title on July 9, 1998. The title searcher does not know that Mary mortgaged the property on July 7, 1998, the instrument being recorded that day. The title searcher, in order to determine how Mary might have impaired her title during her ownership, goes to the "MO" grantor index covering the year 1998. Under the rule that no search backward need be made, the title searcher need not look at entries to this index made before July 9, but the title searcher does not know where July 9 entries begin on the page and will likely scan it from top to bottom. It is also likely that this scan of the page will pass over July 7 entries and the name Mary Moss as a conveyor. It seems to me unlikely that the title searcher could resist the impulse to stop at the entry indexing Mary Moss's July 7 conveyance and look at the words in the column found on most grantor indices where the person doing the indexing briefly describes the location of (or gives a brief legal description of) the land subject to the indexed conveyance. This location/description will correspond to the parcel the title searcher is addressing. The title searcher and his or her client will be on inquiry notice⁴⁵ that would-be grantor Mary Moss had made a conveyance that might be effective under the after-acquired title doctrine.

In the *Sabo* case itself, under the rule that no search backward is required, a title searcher would look for instruments out of Grover Lowery made no earlier than August 10, 1973, when Lowery got title. The title searcher would look at the Chitna (now referred to as Chitina)

43. See, e.g., *Donovan v. Twist*, 93 N.Y.S. 990 (App. Div. 1905) (mortgage made four days before mortgagor got title); see also *Bartos v. Czerwinski*, 34 N.W.2d 566 (Mich. 1948) (quitclaim deed made one day before grantor got title).

44. See *Schoch v. Birdsall*, 51 N.W. 382 (Minn. 1892) (purchase money mortgage executed two days before mortgagor got title); *Montgomery v. Keppel*, 19 P. 178 (Cal. 1888) (purchase money mortgage executed two days before delivery of deed conveying title to mortgagor); *Heffron v. Flanigan*, 37 Mich. 274 (1877) (purchase money mortgage executed, delivered and recorded one day before deed to mortgagor was delivered, and recorded—no duty to search backward).

45. Concerning the operation of this well-established doctrine in Alaska's recording act jurisprudence, see *Methonen v. Stone*, 941 P.2d 1248, 1251-52 (Alaska 1997), and *First National Bank of Anchorage v. Dent*, 683 P.2d 722, 724 (Alaska 1984). See also *Burnett, Waldock & Padgett Invs. v. C.B.S. Realty*, 668 P.2d 819, 822 (Alaska 1983); *Modrock v. Marshall*, 523 P.2d 172, 174 (Alaska 1975).

Recording District's grantor index for grantors whose last name began with "L" that included conveyances made in 1973. A copy of that page of the grantor index is attached as Exhibit A to this article. A title searcher for the Sabos would scan this page looking for the name Lowery. The indexing of the premature deed out of Lowery in 1970, almost four full years before he got title, appears two-thirds of the way down this very page, only thirteen lines above the first entry of a transaction after August 10, 1973. In my view, most title searchers would have seen the indexing of the 1970 grant from Lowery to Horvath.⁴⁶ Moreover, in Alaska most title search work is done by title insurance companies that maintain private tract indices,⁴⁷ use of which would unquestionably have resulted in the title examiner learning about the 1970 grant to Horvath.⁴⁸

The conclusion I draw is that the *Sabo* rule of no duty to search backward operates primarily as a reward for slack grantees who buy land without doing a title search.

46. Because, contrary to general practice in the United States, the grantor index page that is Exhibit A has no column in which to enter location or brief-legal-description information, a court might (but might not) hold that a title searcher's learning that a conveyance of land somewhere in the Chitna Recording District was made by Grover Lowery four years before he got title to the parcel subject to the title search would not put the potential buyer on inquiry notice due to no reference connecting the 1970 conveyance to the parcel subject to the title search. As of July 1996, parcel location information became an official component of Alaska's indexing system. Act of July 1, 1996, 1996 Alaska Sess. Laws ch. 119, § 5 (codified at ALASKA STAT § 40.17.040 (2009)); Alaska Dep't of Natural Res., *Recorder Terminology*, RECORDER'S OFFICE, <http://dnr.alaska.gov/ssd/recoff/terminology.cfm> (last visited Oct. 24, 2010). Prior to 1996, the recorder for the Anchorage Recording District, as a courtesy to title searchers, in the indices "maintained extensive location records using the plat names, lot, block, section-township-range, etc Most of the other districts did not maintain the same type of index" Email from Jeff Blake, Vice Pres., Fid. Title Agency of Alaska, to author (Aug. 6, 2010, 05:15 AKST) (on file with author).

47. Email from Donald W. McClintock III, Esq., head of the property law department of the Anchorage law firm of Ashburn & Mason, to author (July 23, 2010, 05:20 AKST) (on file with author). Section 21.66.200 of the Alaska Statutes requires a title insurance company to maintain a "title plant" covering title instruments going back at least 25 years in each recording district in which the title company does business. "Title plant" is understood to refer to a tract index. Email from Jeff Blake to author, *supra* note 46.

48. See *Balch v. Arnold*, 59 P. 434, 438-39 (Wyo. 1899) (in jurisdictions where a tract index is maintained, a title searcher has a duty to examine deeds that could be found only by a search backward in states using the grantor-grantee index system). For similar holdings with respect to instruments not connected up to the chain of title, see *Miller v. Hennen*, 438 N.W.2d 366, 371 (Minn. 1989), and *Fullerton Lumber Co. v. Tinker*, 118 N.W. 700, 702-03 (S.D. 1908).

C. The Deed that Can Be Found Only by a "Search Forward"

The third type of wild deed arises in this situation: *O*, who has title, conveys an interest – say a life estate – to *A*, who does not record. *O* then purports to convey the full fee simple to *B*, who has notice of the unrecorded deed to *A*. *B* records. *A* now records. *B* then agrees to convey the fee simple to *C*, a purchaser without actual or inquiry notice of *A*'s interest. Does *C* have constructive notice of the *O*-to-*A* deed recorded after *B* recorded? The majority rule is that *C*, in doing a title search, is entitled to cease looking for recorded instruments executed by *O* that might impair title as of the date of recordation of the *O*-to-*B* deed that appears to end *O*'s ownership.⁴⁹ Only a small minority of Race-Notice states require *C* to search forward in time for instruments executed by *O* that were recorded after the record apparent title shifted away from *O*.

Since the Alaska Supreme Court in *Sabo* adopted the majority rule of no duty to search backward in order to relieve a title examiner of inconvenience, we can predict that the court will also hold, when the issue comes to it, that there is no duty to search forward and that *A*'s belatedly recorded deed does not impart constructive notice,⁵⁰ unless the current availability of computerized searches leads the court to reconsider *Sabo*.

D. The "Double Duty" Deed

Suppose *A* owns contiguous lots 1 and 2 in Diving Osprey Estates, each consisting of 20 acres, and on May 1 *A* conveys to *B* lot 1, which fronts on a gravel road. On May 2, *A* grants *B* an easement across lot 2 to a paved road, an easement *B* has never used and that is not visible upon an inspection of lot 2. Both deeds are recorded. Later, *A* sells lot 2 to *C*. Everyone would agree that *C* has constructive notice that lot 2 is burdened by an easement. Surprisingly, however, if *A* had included the grant of the easement over lot 2 in his May 1 deed to *B*, a substantial number of states hold that *C* does not have constructive notice of the easement on the theory that the May 1 deed is not in the chain of deeds

49. See 4 AMERICAN LAW OF PROPERTY, *supra* note 4, § 17.22; 1 PALOMAR, *supra* note 36, § 71.

50. See Francis S. Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. PA. L. REV. 125, 180 (1944) (if a court has decided there is no duty to search backward, a fortiori it will hold there is no duty to search forward, as the policy question raised by the search-forward is the same as that raised by the search-backward issue).

affecting the title to lot 2.⁵¹ This issue has not been considered in a reported Alaska decision since statehood.

The leading case holding that the deed granting to *B* both the fee to lot 1 and an easement across lot 2 would not impart constructive notice to *C* of the easement is *Glorieux v. Lighthipe*.⁵² Decided in New Jersey in 1915, *Glorieux* involved not a right-of-way easement but a covenant imposing building restrictions on the grantor's retained land (e.g., on lot 2 in the above hypothetical case).⁵³ The court stressed that the buyer in the position of *C* in the hypothetical case was not a subsequent purchaser of the land granted (lot 1 in the hypothetical) in the deed creating the encumbrance at issue but was a purchaser of lot 2.⁵⁴ The practical reason given by the *Glorieux* court for holding that the deed did not impart constructive notice of the encumbrance imposed by it on the grantor's retained land was this: "A purchaser may well be held bound to examine or neglect at his peril, the record of the conveyances under which he claims; but it would pose an intolerable burden to compel him to examine all conveyances made by everyone in its chain of title."⁵⁵

Glorieux overlooked the fact that the purchaser cannot know that a deed that begins by granting lot 1 is not also part of the chain of title of lot 2, which he or she is buying. The lot 1 deed could go on to grant, for example, a life estate in lot 2 rather than imposing an encumbrance on lot 2, and surely New Jersey would charge the buyer of lot 2 with constructive notice of the granted life estate had such a deed been recorded.

Amongst the states that have addressed this so-called chain of title issue, about an equal number disagree with *Glorieux* and hold that *C* does have constructive notice of an encumbrance on lot 2 created in the deed of lot 1.⁵⁶ A leading case is *Finley v. Glenn*,⁵⁷ decided by the

51. 1 PALOMAR, *supra* note 36, § 72.

52. 96 A. 94 (N.J. 1915); *accord* *Krueger v. Oberto*, 724 N.E.2d 21, 29 (Ill. App. Ct. 1999) (restrictive covenant); *Nelson v. Barlow*, 179 P.3d 529 (Mont. 2008) (easement); *Witter v. Taggart*, 577 N.E.2d 146 (N.Y. 1991) (easement); *Spring Lakes, Ltd. v. O.F.M. Co.*, 467 N.E.2d 537, 539-40 (Ohio 1984) (easement).

53. *Glorieux*, 96 A. at 96. The chain of title issue presented is the same whether the encumbrance on the grantor's retained land is an easement or the burden of a covenant.

54. *Id.* at 95. The *Glorieux* opinion is internally inconsistent. It says the covenant at issue bound "lands subsequently conveyed," *id.* at 94, to the person in the position of the hypothetical *C*, which can only mean that that parcel was described in the deed. But the opinion also declares that constructive notice "applies only to the particular land described in the deed," *id.* at 95, which is to say the land *C* bought was not so described, since the holding was *C* did not have constructive notice of the covenant.

55. *Id.* at 96.

56. 1 PALOMAR, *supra* note 36, § 72.

Pennsylvania Supreme Court in 1931, which also dealt with a covenant imposing building restriction on land retained by the grantor. Purchasers in the position of the hypothetical C, held the court, had a

duty to read [the deed], not, as argued by appellant . . . , to read only the description of the property [initially conveyed in fee] to see what was conveyed, but to read the deed in its entirety, to note anything else which might be set forth in it. The deed was notice to them of all it contained; otherwise the purpose of the recording acts would be frustrated. If they had read all of it, they would have discovered that the lots which their vendors were about to convey to them had been subjected to building restrictions⁵⁸

The Tiffany treatise unqualifiedly endorses the *Finley* line of cases,⁵⁹ stating, “A purchaser is, it appears, ordinarily charged with notice of an incumbrance upon the property created by an instrument which is of record, although the primary purpose of such instrument is, not the creation of such incumbrance, but the conveyance of neighboring property.”⁶⁰

The treatise *American Law of Property* asserts that the cases holding that the purchaser does have constructive notice of the easement are correct because the deed had a “double effect” — it granted (in the case of our hypothetical) a fee estate to *B* in lot 1 and an easement across lot 2 and “should have been so indexed.”⁶¹

Another writer has pointed out that the *Glorieux* line of cases seems to be based on the assumption that the staff of the recorder of deeds office will not read the deed granting a fee and easement closely enough to realize that two parcels of land are affected by it and thus will fail to refer to both affected parcels in the “brief legal description” column of the grantor index.⁶²

57. 154 A. 299 (Pa. 1931); *accord* *Mansur v. Muskopf*, 977 A.2d 1041, 1046–48 (N.H. 2009) (easement); *Moore v. Center*, 204 A.2d 164, 166 (Vt. 1964) (parking easement).

58. *Finley*, 154 A. at 301.

59. *E.g.*, *King v. St. Louis Union Trust Co.*, 126 S.W. 415 (Mo. 1910); *Holt v. Fleischman*, 78 N.Y.S. 647 (App. Div. 1902); *Reed v. Elmore*, 98 S.E.2d 360 (N.C. 1957).

60. 5 TIFFANY, *supra* note 16, § 1266, at 23.

61. 4 AMERICAN LAW OF PROPERTY, *supra* note 4, § 17.24, at 602.

62. 3 BAXTER DUNAWAY, LAW OF DISTRESSED REAL ESTATE § 40.22 (Westlaw update 2010) (1985) (referring to the deed at issue as a “double coverage” deed).

In other words, the “intolerable burden”⁶³ on title searchers that the *Glorieux* court sought to eliminate in holding that constructive notice is not fully imparted by the recording of a double-effect deed is a burden created by an indexing error. That error is the failure to enter into the “brief legal description” box in the grantor index for the deed reference to the grantor’s retained parcel that is encumbered by the deed as well as the parcel granted in fee.

A 1952 decision by Judge Folta sitting on the District Court of the Territory of Alaska applied *Finley* in a case that was factually similar.⁶⁴ Somewhat ironically, a 1975 Alaska Supreme Court decision⁶⁵ that disagreed with another decision by Judge Folta concerning the operation of the Alaska Recording Act made in 1951⁶⁶ indicates that adoption of *Finley* is consistent with the court’s view of how the Alaska Recording Act operates. *Gregor v. City of Fairbanks* held that a deed has the status of an instrument that has been recorded when it has been filed for record even though the recording officer does not properly index it in the grantor index.⁶⁷ Such a deed imparts constructive notice even though a title searcher cannot find it. The recording staff error that *Glorieux* attempts to rectify is far less drastic: an incomplete mini-summary of the parcels affected by the deed. The theory of the 1975 Alaska Supreme Court decision imparting constructive notice despite an indexing error is inconsistent with *Glorieux*. I am confident that the more logical *Finley* holding is good law in Alaska after statehood.

63. See *supra* text accompanying note 55; see also *Guillette v. Daly Dry Wall, Inc.*, 325 N.E.2d 572, 575 (Mass. 1975) (addressing the contention that following the *Finley* line of cases rather than *Glorieux* would “put every title examiner to the almost impossible task of searching carefully each and every deed which a grantor deeds out of a common subdivision”). The task is an easy one if the recorder of deeds always makes reference in the location or brief legal description column of the grantor index to any parcel that is encumbered by a deed as well as to a parcel granted thereby. The Supreme Judicial Court of Massachusetts rejected *Glorieux* and the “impossible task” argument by holding in effect that a title examiner cannot rely on what appears in the “brief legal description” entry made when a deed is indexed in the grantor index: “[O]ur statutes provide for indexing the names of grantors and grantees, not lot numbers or tracts. . . . Lot numbers or other descriptive information, even though included in an index, do not change what is recorded.” *Guillette*, 325 N.E. 2d at 575.

64. *Hallet v. Sumpter*, 106 F. Supp. 996, 998–99 (D. Alaska 1952).

65. *Gregor v. City of Fairbanks*, 599 P.2d 743, 745–46 n.9 (Alaska 1975).

66. *Mortensen v. Lingo*, 99 F. Supp. 585 (D. Alaska 1951).

67. *Gregor*, 599 P.2d at 743.

E. Will Digitization of the Recorded Instruments Lead the Alaska Supreme Court to Expand the Scope of Title Search Expected of Buyers to Include Some Wild Deeds?

In all of Alaska's thirty-four recording districts, conveyance records have been digitized. Information contained in grantor and grantee indices can be searched online back through 1974. As of the summer of 2010, images of relevant deeds, mortgages, etc., can be examined online back through 1983 and can be searched online via computer.⁶⁸ State recorder Vicky Backus advises that grantor-grantee index data and images of all conveyance documents back through 1971⁶⁹ will likely be available online by mid 2011.⁷⁰ The title searcher via his or her own computer will not be able to do a text search of these deeds and mortgages, but computers at the various recording offices across the state can do that.

Information in the grantor-grantee indices, including parcel "location" information, can be sought online by searching the names of grantors and grantees and also by doing a tract search. Five different types of tract searches are available: "Plat Search," "Survey Search," "MTRS Search,"⁷¹ "Subdivision Name Search," and "No Plat Subdivision Search."⁷² In the great majority of situations in which a title search is being done, a tract-based search will be possible using one or more of these approaches.⁷³

Should the digitization of Alaska conveyance records for the last forty years nudge the Alaska Supreme Court to take a different approach than it has done to date (or what was above predicted that court would do) in deciding if instruments in one or more of the four categories of wild deeds should be held to impart constructive notice?

68. Email from Vicky Backus, State Recorder, Anchorage, to author (May 14, 2010, 08:06 AKST) (on file with author).

69. Email from Vicky Backus, State Recorder, Anchorage, to author (May 18, 2010, 16:58 AKST) (on file with author).

70. Email from Vicky Backus to author, *supra* note 68.

71. These initials stand for Meridian, Township, Range, Section: i.e., the search is based on what is popularly called the "Rectangular Survey System." JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 1105 (9th ed. 2008).

72. Alaska Dep't of Natural Res., *Recorder's Office Search*, RECORDER'S OFFICE, <http://dnr.alaska.gov/ssd/recoff/search.cfm> (last visited Sept. 11, 2010).

73. If the parcel of land at issue is a lot in a subdivision platted in 2001 consisting of land granted in 1974 by deed using a government survey to describe the parcel, a search made in 2011 would use the Plat Search or Subdivision Name Search to cover the last ten years and a Survey Search to go back from 2001 through 1971.

F. The Instrument Not Hooked Up to the Chain of Title

The Patton and Palomar treatise states that the computerization of conveyance records will “cure the inability of the former grantor/grantee indices to uncover ‘wild’ or ‘stray’ instruments” – those not hooked up to the chain of title.⁷⁴ Recall the hypothetical above where *O* conveyed to *A* who did not record, and *A* conveyed to *B* who recorded his deed but not the *O*-to-*A* deed.⁷⁵ If a subsequent potential buyer of the same land from *O* does an online search based on the description of the land in the deed to *O*, this search will lead to *B*’s wild deed if the description of the land in that deed was the same as in the recorded deed to *O*. A computer search of the text of the deed based on *O*’s name will reveal the wild deed to *B* if – although far less likely – it refers to *O* by name. Suppose, however, the deed granting to *O* the larger parcel used a government survey to describe the land *O* acquired but subsequently *O* granted to *A* only part of *O*’s land, described in the deed to *A* by metes and bounds without reference to the government survey.⁷⁶ That same description was used in the wild *A*-to-*B* deed that was recorded. I do not think any of the available computer searches will turn up the *A*-to-*B* deed. Nor would it be found by searching the texts of deeds in the recorded chain of title via the computer at the pertinent state recording office.⁷⁷ The wild deed to *B* would, however, be readily found if a true tract index were maintained and used by the title examiner.

If I am right, the Alaska Supreme Court cannot adopt a new rule, founded on the digitalization of the conveyance records, that all deeds recorded after 1970 but not hooked up to the chain of title impart constructive notice. A possible new rule having the broadest reasonable application to these kind of wild deeds would be that a title examiner, in addition to searching for deeds and other conveyance instruments that

74. 1 PALOMAR, *supra* note 36, § 69, at 235.

75. See *supra* Part V.A.

76. A sufficient metes and bounds description of the parcel granted to *A* could be stated without mention of the government survey on which the deed to *O* was based if, for example, the starting point of the first call in the deed to *A* was the intersection of two public roads that bounded, in part, the larger parcel previously granted to *O*.

77. Even if the deed to *O* mentioned one or both of the public roads, the intersection of which is the starting point for the first metes-and-bounds calls in the deed to *A* (restated in the *A*-to-*B* recorded wild deed), the title examiner for a potential purchaser from *O* has no reason to believe a search of these road names should be made – that such a search might turn up a wild deed that impairs the title. The title searcher simply has no reason to think there might be a metes and bounds deed to be discovered, let alone that certain road names might be involved in the metes and bounds calls of such an instrument.

could impair a title by use of the names of the various persons who hold a spot on the chain of title, is expected to do a tract search that is most appropriate based on the description of the land at issue in the deed to each such grantee in the chain of title. If such tract-based searches online would lead to the deed or mortgage that is not hooked up to the chain of title, that recorded instrument will be held to impart constructive notice.

G. Instruments that Can Be Found Only By a Search Backward or Search Forward

The Palomar and Patton treatise also suggests that, to the extent a computerized search can be made, court holdings that there is no duty to search backward or search forward should be overruled.⁷⁸ With respect to the search backward issue, the treatise says that “when searching by *tract*, it is possible to uncover the ‘early-recorded’ instruments.”⁷⁹

If the *O-to-A* metes and bounds deed were the deed executed by *O* and—for purposes of discussion here—at once recorded by *A* before *O* got title by deed using a government survey to describe the land, the discussion immediately above of deeds not hooked up to the chain of title shows that a tract-based search (as recommended by Palomar and Patton) will not uncover the deed to *A*. However, a search based on *O*'s name will do so, and since it can be done online over a forty-year period, the burden on the title searcher, which was the basis for the *Sabo*⁸⁰ holding that no search backward is required, has been largely eliminated.

But not entirely. The first-in-time deed could be a pre-1971 instrument. In that case, the burden, as applied to the premature deed *O-to-A* used as a search backward illustration, would involve: (1) the need to find on and remove from (perhaps dusty) deed-room shelves numerous (perhaps musty) volumes of the grantor indices covering conveyances made by persons and entities whose controlling name begins with the letter *O* back to a point in time when it would be clear *O*, if a human being, had yet to be born; (2) the need to find by date the

78. 1 PALOMAR, *supra* note 36, § 70, at 237 (search backward); *id.* § 71, at 239 (search forward).

79. *Id.* § 70, at 237 (emphasis added).

80. The *Sabo* holding does not rest on any language in section 30.17.080(b) of the Alaska Statutes but on external factors that could change—and have changed—with advancements in the techniques for doing title searches. *Sabo v. Horvath*, 559 P.2d 1038, 1043–44 (Alaska 1976). Thus, the Alaska Supreme Court should not be of the view that it is up to the legislature, not the court, to overrule *Sabo*'s rule concerning the search backward issue.

appropriate page(s) in the grantor index volumes taken from the shelves where a premature deed out of *O* might be indexed; (3) the need to find on the deed-room shelves and remove therefrom deed books, mortgage books, miscellaneous records books, etc., referred to in grantor index entries in *O*'s name; and (4) the need to open these books to the appropriate page where copies of the instruments that need to be examined are located.

Under Alaska's computer-based search method on the other hand, a search in *O*'s name immediately brings to the screen all grantor index entries back to 1970 that contain his name. On the computer screen containing information found on each such grantor-index entry there will be a link one can click on to bring up instantaneously any deed or mortgage, etc., that should be read to determine if the land it refers to includes part or all of the parcel that is the subject of the title search. Since, as we have seen, the *Sabo* holding that there is no duty to search backward primarily benefits slack buyers who do not do a title search, and because the burden of doing a forty-year search backward is now minimal, it makes sense to overrule *Sabo* insofar as it would apply to an instrument recorded after 1970 that can be found only by a search backward.

The burden of doing a search forward of as much as forty years to locate deeds recorded after a deed of record indicates that a grantee had conveyed away an interest in the property at issue is no greater than that involved in a forty-year computer-based search backward. Thus, the Alaska Supreme Court can reasonably hold, when it first encounters the search-forward problem, that deeds recorded since 1970 do impart constructive notice when placed on record after the grantor in the instrument appears, by previously recorded deed, to have parted with title.

H. The Double-Duty Deed

It was predicted above that the Alaska Supreme Court would follow *Finley v. Glenn* to hold that a recorded deed that grants a fee interest in one parcel and also burdens land retained by the grantor by subjecting it to an easement or a restrictive covenant imparts constructive notice of the easement and covenant.⁸¹ The ability of a title examiner to do online searches back through 1971, including reading on his or her computer instruments that may or may not impair the title at issue, makes adoption of *Finley* all the more compelling. This is because

81. See *supra* text accompanying notes 57-67.

the servient tenement of an easement, or the parcel burdened by a covenant made by the grantor, will very likely be described in the double-duty deed in a manner that enables it to be found via a tract-based search online.

But not always. Consider a deed, promptly recorded, in which *O*, owner of contiguous lots 1 and 2 of White Bear Estates, grants lot 2 to *A* and then goes on to provide: “*O* also grants to *A* a 20-foot-wide appurtenant easement for right of way purposes running across the northerly edge of contiguous land retained by grantor *O* to a public road.” Since lot 1 is the only contiguous land owned by *O*, the description of the servient tenement in the deed surely is adequate, but lot 1 is not mentioned as such. If *B* subsequently contemplates buying lot 1 from *O* (or from a successor owner of lot 1) and does a tract-based title search, the deed making lot 1 the servient tenement of an easement will not be found.⁸²

If for some reason the Alaska Supreme Court were to be of the view that absent the digitalization of records *Glorieux v. Lighthipe* was a more logical precedent than *Finley*, the court could hold that *Finley* had become the general rule for double-duty deeds recorded after 1970 but that such a double-duty deed does not impart constructive notice of the easement or covenant affecting land retained by the grantor if that land was described in the deed in a manner that did not facilitate finding the deed by a tract-based online search of the grantor’s retained parcel.

VI. WHEN CAN A TRANSFEREE WITH NOTICE OF AN UNRECORDED INTEREST NEVERTHELESS TAKE FREE OF IT? THE RULE OF SHELTER

Suppose that *O*, having perfect title to land in Alaska, Greenacre, mortgages the parcel to his lender *A*, who does not record the mortgage. *O* then sells Greenacre to *B*, telling *B* about the mortgage. *B* records *B*’s deed. Because *B* had notice of the mortgage, she takes subject to it, but that does not appear of record. *B* now sells to *C*, who does a title search and concludes that he is buying an unencumbered title.⁸³ *C* records his

82. Assume the owner of lot 2 has never used the easement over lot 1 so that inquiry notice of it would not arise out of an inspection of lot 1 by potential buyer *B*.

83. In the hypothetical case in the text, since *O* merely mortgaged Greenacre to *A*, *B* got a fee title from *O* that *B* could transfer to *C*. Suppose instead *O*’s unrecorded conveyance to *A* was of the full fee simple absolute. *B*, taking from *O* with notice of the prior conveyance to *A*, would have no interest in Greenacre at all. Nevertheless, because *B* appears of record to own Greenacre, he has the

deed, thereby winning the race with mortgagee *A* set up by Alaska's Race-Notice statute. As a result, *A*'s lien on Greenacre is extinguished, at least temporarily. Media reports about the *A*-to-*O* loan and *A*'s mortgage then circulate throughout the community, and most persons obtain actual or at least inquiry notice of *A*'s unrecorded mortgage.

If the requirement of the Recording Act that a buyer from *C* can take Greenacre free of the mortgage only if the buyer has no notice of it were to be strictly applied, *C* would find it very hard if not impossible to sell the land at its fair market value as an unencumbered parcel, since almost everyone has notice of the mortgage now. To protect *C*'s investment as bona fide purchaser who paid full value for the land because the title on the record was unencumbered, the courts created an exception to the requirement that the buyer from *C* have no notice of the mortgage in order to be able to invoke the Recording Act. Probably all states with Notice and Race-Notice jurisdictions have recognized such an exception,⁸⁴ which came to be called the Rule of Shelter.⁸⁵ If *D*, who knows of *A*'s mortgage, buys from *C*, *D* takes free of the mortgage. To accord to innocent buyer *C* "the full measure of protection to which he is entitled, that is, a free right of disposal,"⁸⁶ *C*'s transferee with notice of the mortgage should take free of it even if the transferee is an heir, donee, or devisee who provided no consideration, since part of *C*'s power of disposition is to make a gift of his lands.⁸⁷ The basic rule of

power to vest the fee in *C* if *C* is a bona fide purchaser for value who records before *A* does.

84. See R.P.D., Annotation, *Right of one who, with knowledge of outstanding equity, derived his interest in real property from or through a bona fide purchaser, to same protection as latter*, 63 A.L.R. 1362 (Westlaw cum. supp. 2010) (1929); see also 1 PALOMAR, *supra* note 36, § 13, at 78.

While the problem discussed in the text has a solution suggested by the policies of the Recording Act, a problem involving three mortgages that is similar to the one in text in that the first transferee does not record and the second transferee has notice invites a judicial weighing of equities with little grounding in statutory policy. Owner *O* mortgages to *A* who does not record. *O* then mortgages to *B*, who has notice of the mortgage to *A* and who records. *O* finally mortgages to *C*, who records. Alaska's Recording Act gives *C* priority over *A*, whose mortgage was unknown to *C*. The act gives *B* priority over *C*, who thought he was getting a second mortgage, having found *B*'s on record. And the statute gives *A* priority over *B*, due to *B*'s notice of *A*'s mortgage. Several possible solutions to this puzzler are discussed in 1 PALOMAR, *supra* note 36, § 17 at 97-105.

85. See *Strekal v. Espe*, 114 P.3d 67, 74 (Colo. App. 2004); 1 PALOMAR, *supra* note 36, § 13, at 77.

86. 8 GEORGE W. THOMPSON, REAL PROPERTY § 4315, at 380 (1963 repl.).

87. Suppose *C* paid \$1 million for a property. One day after *C* took title the community learned of *A*'s unrecorded mortgage in the amount of \$950,000. One day after that, *C* died with a will leaving all his realty to *C Jr.*, one of those who

recording act law is that an heir acquires the same powers of disposition that his ancestor had.⁸⁸

Jurisdictions with Notice-type statutes were the earliest to develop the Rule of Shelter.⁸⁹ But in Race-Notice jurisdictions a different theory is available to protect C: a possible rule that, when mortgagee A lost the race to bona fide purchaser C at the moment of C's recording, A's claim under his unrecorded instrument is *permanently* extinguished. Under this approach, when D's title search reveals that A lost the race to record to C,⁹⁰ it is for that reason, rather than sheltering under C, that D realizes he can buy from C free of the mortgage granted to A of which D has notice.

Despite the logic of this alternative basis for ruling in favor of D in Race-Notice jurisdictions, apparently no reported decision in a state with a Race-Notice statute has employed it—with the possible exception of a pre-statehood Alaska federal case discussed below.⁹¹ Instead, these courts employ the Shelter Rule, and the reason they do so may be to obtain the fair result produced by an exception to the Shelter Rule. Suppose that B, who had notice of A's mortgage, sold to bona fide purchaser C subject to a ten-year option to repurchase for a stipulated price,⁹² an option that B subsequently exercises. Jurisdictions recognizing the Rule of Shelter uniformly hold that B cannot manipulate the recording system in this way to “cleanse” his title of the encumbrance in favor of A as to which B had notice when first purchasing Greenacre.⁹³ These states apply an exception to the Rule of Shelter that provides that a party who previously purchased with notice of an unrecorded interest cannot take advantage of the shelter doctrine.

had learned about the mortgage. To protect C's investment, courts will hold C Jr. takes free of that encumbrance.

88. See *Farmer v. Fisher*, 46 A. 892, 893 (Pa. 1900) (Race-Notice state); *Burnett v. Holliday Bros.*, 305 S.E.2d 238, 240–41 (S.C. 1983) (Race-Notice state); Ralph W. Aigler, *The Operation of the Recording Acts*, 22 MICH. L. REV. 405, 416 (1924).

89. Massachusetts, home of the prototype Notice statute, applied the rule that allows C to sell to a grantee with notice of the unrecorded interest as early as 1820. See *Trull v. Bigelow*, 16 Mass. 406, 419 (1820); see also *Boynton v. Rees*, 25 Mass. 329, 333–34 (1829).

90. If C had not yet recorded, C would be subject to the mortgage and probably could lose the race to A were A to file a quiet title action together with a *lis pendens* and then proceed to judgment that established that the O-A mortgage was valid under the Recording Act. See *supra* text accompanying notes 24–27.

91. *Nordling v. Carlson*, 265 F.2d 507 (9th Cir. 1958). See text accompanying notes 98–100 *infra*.

92. The legal issue would be the same if B sold without the option and later prevailed on C—or for that matter C's heir, donee, grantee, or remote grantee—to sell the property back to B.

93. See Annotation, *supra* note 84.

If, on the other hand, *C*'s recordation permanently extinguished *A*'s right to assert a claim under the unrecorded mortgage, *B*'s gambit of selling to bona fide purchaser *C* with an option to repurchase which was later exercised would be successful. Several Race-Notice jurisdictions—including California,⁹⁴ New York,⁹⁵ Pennsylvania,⁹⁶ and South Dakota⁹⁷—have applied the Rule of Shelter, along with its exception, to a person in the position of *B*, subjecting *B* to *A*'s unrecorded interest of which *B* had notice when *B* re-acquires the title. It is predicted that the Alaska Supreme Court will follow these out-of-state precedents, which may or may not require the court to disagree with a 1958 Ninth Circuit decision applying Alaska's Race-Notice Recording Act.⁹⁸

In *Nordling v. Carlson*, title was in Sasse. Even so, Stoddard in 1948 quitclaimed the land to Nordling, who did not record. Later, in 1951, Sasse quitclaimed to Stoddard, and the court was willing to accept, *arguendo*, Nordling's claim that even though his deed was a quitclaim, the estoppel was fed⁹⁹ and he got title at this point. In 1949, Stoddard conveyed to McDowell, a bona fide purchaser. Later that year, Nordling moved on to the land. In 1951, McDowell recorded and later conveyed to Russell. In 1953, Russell conveyed to the plaintiffs, who failed to investigate who was living on the land. Rejecting Nordling's claim that the plaintiffs were not entitled to the protection of Alaska's Recording Act because they had inquiry notice of Nordling's deed due to his presence on the land, the Ninth Circuit panel concluded:

[T]he situation which Nordling cannot escape is the prior purchase of the real property by McDowell in good faith and for valuable consideration at a time when Nordling was not in actual occupancy of the property and at a time when his deeds were not of record. The recording of this deed cut off *all* claims in accordance with the plain language of the statute above

94. *Huling v. Abbot*, 25 P. 4, 5 (Cal. 1890).

95. *Clark v. McNeal*, 21 N.E. 405, 407 (N.Y. 1889).

96. *Church v. Ruland*, 64 Pa. 432, 444 (1870).

97. *Phillis v. Gross*, 143 N.W. 373, 379 (S.D. 1913).

98. *Nordling v. Carlson*, 265 F.2d 507 (9th Cir. 1958). The opinion is quite confusing, requiring some guessing by the reader concerning gaps in the statement of pertinent facts.

99. The general common law rule is that the doctrine of feeding the estoppel, also called the after-acquired-title doctrine, applies to benefit only a grantee under a warranty deed and cannot be invoked by the grantee under a quitclaim deed. *See Ellington v. State*, 979 P.2d 1000, 1006 (Alaska 1999); *North Star Terminal & Stevedore Co. v. State*, 857 P.2d 335, 340 (Alaska 1993); *Willis v. City of Valdez*, 546 P.2d 570, 575 n.8 (Alaska 1976).

quoted. The remote purchaser in the chain of title from McDowell received the protection of the record.¹⁰⁰

If Nordling truly was stripped of “all” rights upon losing the race to McDowell, the plaintiffs could sell to someone that Sasse might have deeded the land to in 1949 who had notice of Nordling’s claim, and that person would get good title. That is a benefit that the exception to the Rule of Shelter would deny to such a grantee. The Alaska Supreme Court could hold in the future that the result was correct in the Ninth Circuit case due to applicability of the Rule of Shelter as opposed to basing the decision on Nordling’s status as a race loser and that use of the word “all” was overly broad dictum.

Even if the Rule of Shelter is adopted in Alaska, those advising purchasers of land should note its limitations. In the hypothetical case under discussion, *D* takes a substantial risk if, knowing of *A*’s unrecorded interest, *D* buys from *C* in reliance on the Rule of Shelter, for *C* can provide shelter to *D* only if *C* in fact was a bona fide purchaser. *C* could be lying when asserting to his would-be purchaser, *D*, that *C* had no actual notice of the mortgage to *A*. Suppose the conveyance to *A* was not a mortgage but an unrecorded deed granting a life estate to *A*. *C* could be telling the truth about lacking any actual notice of that deed but still be subject to a judicial finding imputing to *C* knowledge of *A*’s life estate under the doctrine of inquiry notice, due to evidence existing on the land when *C* bought from *B* that suggested someone other than *B* claimed an interest in the property.¹⁰¹

A cautious *D* will advise *C* that *C* must either substantially reduce his sale price based on the risks *D* will take if he has to base his claim to clear title on applicability of the Rule of Shelter or get a quiet title judgment against *A* that holds that *C* was a bona fide purchaser and that *A*’s unrecorded interest is inferior to the rights of a transferee from *C* under the Shelter Rule.

CONCLUSION

The Alaska Supreme Court could address in the future the several Recording Act issues discussed above that that court has yet to

100. *Nordling*, 265 F.2d at 510 (emphasis added). The reference to the “plain language” of the Recording Act must be to its race feature, since no language of the statute even hints at the Rule of Shelter. *See id.*

101. *See Weinberg v. Moore*, 194 F. Supp. 12, 17 (N.D. Cal. 1961) (the holder of an unrecorded deed had posted a “No Trespassing” sign on the land with his name and address on it to provide inquiry notice), *aff’d*, 349 F.2d 685 (9th Cir. 1965).

encounter, as well as re-examine its *Sabo* holding on the search backward issue. Alaska's Recording Act also raises numerous other challenging issues discussed in the treatises and authorities cited herein that will challenge the Alaska Supreme Court in years to come.

EXHIBIT A

General Index to All Instruments—Direct

TIME OF RECEPTION		LOCATOR OR GRANTOR	NAME OF CLAIM OR GRANTEE	NATURE OF INSTRUMENT	RECORDED	
Mo.	Day Year				Book	Page
1	25 73	Lane's Builders, Inc.	ASHA	MS	6	171-172 <i>Misc</i>
1	25 73	Lane, Ralph/Virginia	U.S. Fidelity & Guar. Co.	MS	6	171-172 <i>Misc.</i>
9	6 73	Lloyd, William R., Jr.	North Rang Mines, Ltd.	MS	6	290-315 <i>Misc.</i>
11	7 73	Lee, Mons	Schwantes, Ethel L.	PA	6	393-394 <i>Misc.</i>
4	21 62	Lane, Ralph B.	Williams, Jewett	D	1	10 <i>Deeds</i>
11	13 62	Lepetch, Florece	Dias, Anthony R./Isabel M.	D	1	48-52 <i>Deeds</i>
5	17 63	Layland, Joseph F.	Clayton, Alfred T./Shirley M.	D	2	9-10 <i>Deeds</i>
4	28 64	Layland, Joe F.	Gurske, Bill Sr.	MS	3	158 <i>Deeds</i>
10	15 64	Laster, Edward	Laster, Fahy	D	4	2-3 <i>Deeds</i>
2	24 65	Lincoln, Nicholas/Ina V.	State of Alaska	D	4	77-78 <i>Deeds</i>
6	20 66	Lappi, Betty B.	State of Alaska	D	6	142-143 <i>Deeds</i>
3	15 68	Lane, Ralph B.	Budka, George R.	D	7	258 <i>Deeds</i>
3	18 68	Lappi, Fred F./Betty B.	Lappi, Fred F./Betty B. Hughes, Kenneth A., Jr./Althea R.	D	7	211-242 <i>Deeds</i>
3	18 68	Lappi, Fred F./Betty B.	Glenn-Rich, Inc.	D	7	243-244 <i>Deeds</i>
5	23 68	Lamier, Albert C.	Ryfkogel, Marguerite	D	7	261-261A <i>Deeds</i>
8	16 68	Luebke, Jerome George	Luebke, Jerome G./Sarah L.	D	7	338 <i>Deeds</i>
8	19 68	Lofflin, H. Evelyn	Lofflin, William G./H. Evelyn	D	7	352 <i>Deeds</i>
9	19 68	Lind, John A./Audrene M.	Bennett, Layton A./Agnes W.	MS	8	54 <i>Deeds</i>
5	15 69	Lyle, Alfred R.	Lyle, Alfred R./Madelaine A.	D	8	149 <i>Deeds</i>
9	17 69	Lyle, Alfred R./Madelaine A.	Major, William L./Martha	D	8	195 <i>Deeds</i>
1	5 70	Lowery, Grover C.	Horvath, Wm. A./Barbara J.	D	8	229 <i>Deeds</i>
3	27 70	Lappi, Fred F./Betty B.	Heinz, Fred E./Patricia M.	D	8	418-419 <i>Deeds</i>
6	15 70	LaFluer, Elmer L./Marie	Beatrice Lyle/Marcy Anderson, Richard H./Norma R.	D	8	460 <i>Deeds</i>
6	29 70	Lane, Ralph B.	Lane, Virginia J.	D	8	464 <i>Deeds</i>
7	13 70	Lighthood, Samuel F./Marion L.	Rowe, Ruth C.	D	9	3-4 <i>Deeds</i>
10	5 70	Lebow, William C./Odell	Collins, Clifford W./Jewel	D	9	26-27 <i>Deeds</i>
9	7 71	Lane Bldgs. Supply, Inc.	B.O.B. Corp.	D	9	190 <i>Deeds</i>
9	21 71	Lincoln, Nicholas	Lincoln, Ina Vera	D	9	196-197 <i>Deeds</i>
12	21 71	Lane, Ralph B.	Hansen, Carl L./Sandra J.	D	9	264 <i>Deeds</i>
5	26 72	Lyle, Alfred R. (Est. of)	Stallings, Jack B./Verla R.E.	D	9	387-388 <i>Deeds</i>
6	5 72	Lyle, Alfred R. (Est. of)	Stallings, Jack B./Verla R.E.	D	9	391-392 <i>Deeds</i>
12	7 72	Lewis, Paul V./Faye I.	Lewis, Paul V./Faye I.	D	10	36 <i>Deeds</i>
1	5 73	Lappi, Fred F./Betty B.	AS/DH	D	10	50-51 <i>Deeds</i>
7	19 73	Larsen, Horace Arthur	Alfonsi, John/Eleanor	D	10	159 <i>Deeds</i>
12	13 73	Lowery, Grover C.	Sabo, William/Barbara	D	10	247 <i>Deeds</i>
12	26 73	Lincoln, Nicholas/Ina V.	Winingham, George R./Dixie L.	D	10	249 <i>Deeds</i>
7	23 62	Lanni, Joseph D./Jacqueline M.	Moore, Morris W./Margaret B.	D	1	18-19 <i>Mts.</i>