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The Concept of Possession in Commercial Transactions: Chasing The Quick-Brown Fox

JAMES S. CURTIN*

INTRODUCTION

First year law students have traditionally struggled to understand the concepts of possession and relativity of title. In attempting to understand or explain these concepts both student and teacher must recognize their significance as the foundation of property law. Such a recognition is essential to dealing with the underlying problem of property law: reconciling the tension between the "true owner"¹ of property and the buyer in the chain of commerce.

Cases, typical to first year property courses,² will be discussed in a narrative fashion that presents an overview in contrast to isolated points of law. The cases all involve questions of title to tangible personal property.³ The article begins with a theoretical discussion of the acquisition and transfer of title and proceeds to an analysis of the derivative concept of relativity of title as a means for resolving conflicting claims of ownership. Finally, some basic principles are considered as devices designed to inject commercial reality into the static concepts of possession and relativity of title.

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1. The "true owner" may be only a person with a claim more legitimate than the current possessor of the item. As developed more fully herein, the legitimacy of his title arises from an earlier possession. The real true owner, the person who has an unassailable right to the item, may never appear. In describing the theoretical basis for dealing with claims arising at or between any points on a chain of title, the person claiming the oldest legitimate title has been designated by the author as the "true owner."

2. The cases discussed in this article are taken primarily from J. CRIBBET & C. JOHNSON, *CASES AND MATERIALS ON PROPERTY* (4th ed. 1978). The order in which the cases are presented, however, differs from the sequence in the book.

3. Such staples of the basic property course as estates in land and future interests, having been discussed superbly elsewhere, are not discussed here. *See, e.g.*, C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* (1962); T. BERGIN & P. HASKELL, *PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS* (1966); L. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* (2d ed. 1966).

Title to intangible personal property is not discussed here, for by virtue of historical accident, the intangibles most important today—stocks, bonds, and negotiable instruments—were not matters of concern during the era in which basic property law took its shape.

THE CONCEPT OF POSSESSION

Prior Possession as the Genesis of Title

Property courses have traditionally begun with a discussion of the "wild animal" cases.⁴ Since questions regarding the ownership of freshly-captured wild animals infrequently arise in the commercial context, the rationale for studying these old cases is sometimes questioned. The concept of possession as the basis of ownership is clearly demonstrated by these cases; therefore, their study is necessary even though the limits of their commercial utility are recognized.

The most famous wild animal case is *Pierson v. Post*,⁵ a dispute over the ownership of a dead fox. Post and his hounds, chasing a fox, were on the verge of killing it, when Pierson burst upon the scene, slew the fox, and ran off with the body. In the ensuing litigation, both Pierson and Post argued that he had first possession and, consequently, ownership. Both lawyers and judges, assuming that one of the claimants was the owner, haggled over a fact question: how much possession of the fox was "real" possession sufficient to make one or the other party the owner. It takes no legal training to realize that if possession can be established other than by actually holding the fox by the scruff of the neck, as the *Pierson* court assumed, there are virtually no standards to guide judicial decision.

From a teaching standpoint, *Pierson* is remarkable for its two-dimensional fact situation. The fox had no prior owner.⁶ The issue of ownership was limited to a determination of title between two people, both with an arguable claim to original possession. Post based his claim on his pursuit of the fox; however, Pierson, as the first to have the fox in hand, won. Having neither deprived the fox of its natural liberty nor prevented Pierson's capture of the fox, Post could not establish that he had possession prior to Pierson.

Post had an arguable possession in the actual case. Assume, however, a variation where Post is not in pursuit of the fox when Pierson catches it. Post claims no prior contact with the fox but sues to acquire it. He claims ownership but has no semblance of possession, either prior to or at the time of suit. A reading of *Pierson* convinces

4. *Pierson v. Post*, 3 Caines 175, 2 Am. Dec. 264 (N.Y. 1805), and *Young v. Hichens*, 115 Eng. Rep. 228 (Q.B. 1844), are two such cases which can be considered as staple to the introductory property course.

5. 3 Caines 175, 2 Am. Dec. 264 (N.Y. 1805).

6. As the *Pierson* court noted, the fox was an animal *ferae naturae* and belonged to no one. *Id.* at 175, 2 Am. Dec. at 264. Most things in nature "belong" to the ground on which they are attached and, therefore, are owned by the person owning the land. Animals, moving across the land, have no such true owner.

us that Post now has neither a winning case nor an arguable claim. A semblance of possession, however arguable, must be present to support any claim of title.

When *Pierson* was argued, the fundamental importance of possession in the law of property was not a variable; it is not a variable now. But what facts must coincide to support one's assertion of possession is the subject of constant debate. Possession, as each party in *Pierson* conceded, is of utmost importance. It is the starting point of those rights which are called title.

What is important about *Pierson* is easily overlooked. There is an almost unspoken assumption among the parties and the judges that whoever had first possession of the fox was its owner and was entitled to continue that possession for as long as he saw fit. Another variation on the two-dimensional hypothetical confirms that the right of title belongs to the earlier possessor and is not defeated by his relinquishing actual possession for a limited purpose.

Assume that Pierson captured the fox but did not kill it. Having defeated Post's claim in the litigation, Pierson takes the fox to Brown, the veterinarian, for treatment. Brown takes the fox but refuses to return it to Pierson. Pierson clearly had possession prior to Brown but Brown has possession now. This hypothetical eliminates the fact situation upon which the original case turned; in this variant, both claimants had actual possession at some point. As a matter of law, will earlier or later possession prevail? Is Pierson's conditional relinquishment a decisive factor?

These were precisely the issues in *Armory v. Delamirie*.⁷ A chimney sweep there found a piece of jewelry which he took to a goldsmith for appraisal. The smith removed and retained gemstones from the jewelry and refused to return them to the sweep. The latter then brought suit to recover their value. As between a prior and subsequent possessor, *Armory* makes clear what *Pierson* suggests: where both parties have actual possession at some time, it is prior possession that gives a right of ownership.

Armory also establishes that the right of the prior possessor includes the right to retain possession until freely and unconditionally transferred. The right to voluntarily surrender possession for a limited purpose and later enforce the limitation in a court of law is implicitly recognized.⁸ In the *Armory* case, the sweep prevailed over

7. 93 Eng. Rep. 664 (K.B. 1722).

8. Possession for a limited time and purpose which is consistent with the rights of the true owner is the substance of the law of bailments. Generally a consensual or contractual arrangement, some cases which deviate from the possession and relativity theory to award possession to the owner of the place where the item was found do so on a theory of constructive bailment.

the goldsmith; similarly, Pierson would recover the fox from Brown. In determining ownership between two claimants, it is possession, but more particularly prior possession not voluntarily or completely relinquished, that determines the rights of parties before the court.

Relativity of Title

Prior possession and the conditions of its loss are important factors in determining title between successive possessors. An evaluation of the possession theory as a commercial proposition must recognize that trade in commerce frequently involves sequential transfer of possession throughout the life of the goods. Therefore, the determination of rights between non-successive possessors must be as predictable as that between successive possessors.

Assume that the fox in *Pierson* was really the pet⁹ of Quick. Pierson captured the fox and took him to Brown for treatment. When Brown refused to return the fox, Pierson sought to recover the animal by filing suit. Quick, like the loser of the jewels in *Armory*, was not made a party to the proceeding because his identity was not known. It is implicit from *Pierson* and *Armory* that Quick may have title to the fox based on his earlier possession. If any person had possession of the fox prior to Quick, he could also claim ownership.¹⁰ Requiring a determination of the rights of all possible claimants would present innumerable obstacles to the person seeking to establish his own right to possession. The elimination of this problem is achieved in the doctrine of relativity of title.

If the first basic concept of property is the primacy of possession, the second concept, by which the courts deal with myriad claimants, is relativity of title. Whether perceived as a doctrine of judicial restraint or as an independent principle for determining rights, the same result is achieved. The concept of relativity of title holds that the court need only determine the merit of claims of parties before it. This can easily be done by applying the first concept; prior possession wins unless relinquished unconditionally. In *Armory*, the court did not have to determine true ownership. The sweep prevails over the smith even though it is clear that the former is a mere

See, e.g., Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex. Civ. App. 1972), *McAvoy v. Medina*, 11 Allen 548, 87 Am. Dec. 733 (Mass. 1866). For a discussion of the result of holding property in a manner which is inconsistent with the true owner's rights, *see* text accompanying notes 32 through 35 *infra*.

9. An escaped wild animal returns to its unowned status. Assume for discussion purposes, however, that Quick is still the true owner of the fox in spite of its momentary escape from captivity.

10. Although not factually present here, this person would stand as true owner in relation to Brown, Pierson or even Quick. *See* note 1 *supra*.

“finder” and that a prior possessor whose claim predates all others looms somewhere. Similarly, Pierson would still prevail over Brown.¹¹

By logical extension of the relativity concept, Pierson should prevail over Brown even though Quick is identified as a prior possessor so long as Quick is not a party before the court. The idea is logically correct if somewhat disconcerting. *Anderson v. Gouldberg*¹² demonstrates the operation of the concept of relativity of title in this context. Defendant Gouldberg took and sold logs which plaintiff Anderson had cut and brought to a mill for processing. Because Anderson had not consented to Gouldberg's action, he brought a suit to recover possession of the logs. In defense, Gouldberg argued that the logs were wrongfully taken by Anderson from an identifiable and unconsenting true owner. Gouldberg asserted that Anderson's claim, being defective against a known true owner, must also be defective against the subsequent possessor. The logic of *Armory* compelled the court to reject this contention and find for the plaintiff. Anderson's possession established “good title against all the world except those having better title.”¹³

Pierson, *Armory*, and *Anderson* demonstrate the operation of the principles of possession and relative title as the basis of property rights. *Pierson* demonstrates that the prior possessor prevails when only a single adverse claimant exists. *Armory* holds that prior possession is superior until voluntarily and completely relinquished even though an unidentified third party has rights superior to those of either litigant. Finally, *Anderson* announces that the prior possessor prevails even in the face of better rights of a known third person, not in court to assert his title.

11. Not all courts award possession to the relatively earlier possessor who is before them. In *McAvoy v Medina*, 11 Allen 548, 87 Am. Dec. 733 (Mass. 1866), the barber in whose shop a purse was found prevailed over the customer who had found and had first possession of it. The barber had been given the purse by the customer for the purpose of advertising for the true owner. Since the true owner failed to reclaim it, the customer sought to recover the purse from the barber.

If abandoning the relativity of title concept, the court ventures from the relatively objective chore of determining earlier possession among the claimants before it to the more subjective task of determining the true owner's mental state when he relinquished possession. While true to the possession theory in its concern for the true owner, the court must first presume the actual existence of this stranger whose rights should prevail over those of the parties. Even assuming this person's existence, the reliability of this approach is complicated by the absence of the very party who could shed the most light on the subject of the inquiry.

12. 51 Minn. 294, 53 N.W. 636 (1892).

13. *Id.* at 296, 53 N.W. at 637.

Enter the "True Owner"

The difficulty in applying the concept of possession and relativity of title to commercial transactions arises when a prior possessor with a legitimate claim¹⁴ to the property, such as Quick, seeks to recover the goods. Explicit in *Armory* and implicit in *Anderson* is the idea that Pierson, although he defeated Brown, would have to return the fox to Quick should the latter decide to file suit. Such a result would be totally consistent with the logic of possession and relativity.

Another variation on this theme might involve a suit by Quick against Brown. Assume that Brown still had the fox in his clinic when Quick spotted his pet. Having papers to prove ownership,¹⁵ Quick demanded the return of his pet. Brown refused and Quick filed suit.¹⁶ It is consistent with the theory of possession and relative title that Quick wins even though there is an intermediate possessor.

*Goddard v. Winchell*¹⁷ illustrates the logical extension of the possession theory to cases where the true owner asserts his rights under such circumstances. The court there was called upon to determine the rights of Goddard, the owner of land upon which a meteorite fell, and Winchell, the person who bought the meteorite from Hoagland, who dug it up with Goddard's consent. Upon determining that the meteorite was part of the land, and therefore originally in the landowner's possession, the court quickly found for Goddard.

The resolution in *Goddard* is an elaboration on the theme in *Anderson*. *Anderson* affirms that a prior possessor's rights are good against all the world except those having better title in themselves. Each claim rests on its own merit, not on the weakness of the competing claim. *Goddard* adds a corollary—that the possessor's rights rise no higher than the rights of his transferor. The possessor inherits the weaknesses of his transferor's claim. Just as Goddard recovered from Winchell, Quick would recover from Brown. The true owner in *Anderson* could recover possession from whomever had the logs—Anderson or Gouldberg. The existence of intervening possessors in the chain of title is not significant to the theoretical application of these doctrines in this context. The hierarchical system of ownership based on prior possession and the recognition of the rela-

14. See note 1 *supra*. The source of this legitimate claim is, of course, the absence of voluntary and complete relinquishment of his right to possession.

15. Papers are not necessary to the proof of ownership but are merely evidence of the owner's title.

16. For purposes of illustrating a cause of action between non-successive possessors, Pierson is not joined as a party. In applying the doctrine of relativity of title, his joinder is not necessary to the resolution of the suit. If he were joined, he too would lose to Quick.

17. 86 Iowa 71, 52 N.W. 1124 (1892).

tively better titles of the parties before the court has been carried to its logical extreme.

COMMERCIAL LIMITS TO POSSESSION THEORY

The result in *Goddard* pinpoints the problem with actualizing the possession theory. Winchell *bought* the meteorite from Hoagland, yet he had to relinquish his possession to the rightful claimant Goddard. This is, in the hypothetical, the same problem that Brown would have had if, instead of merely taking the fox for treatment, he had purchased it from Pierson. If the true owner can reclaim the goods from subsequent possessors, including those who purchase the goods from their transferor, as the extension of the possession theory allows, then the rule of law is "buyer beware" indeed. Strict application of the possession theory deprives a buyer of absolute security of title. This lack of security permeates relations between both successive and non-successive possessors. Protection of a buyer against superior claims is the essence of the commercial issue.

Predictability of title is obviously a necessity in the commercial arena. A buyer's receipt of an unfettered title facilitates commercial transactions.¹⁸ The concept of prior possession and relativity of title, reasonable in the abstract, precludes this result under some circumstances. On the other hand, if the buyer can prevail over the true owner, a new theoretical basis for title must be found. The only justification for a rule favoring the buyer is commercial expediency.

At one time, the English courts, dealing with sales of personal property, favored the concept of market overt; the buyer in regular channels of commerce obtained absolute title. The United States tends to adhere to the possession theory more closely, despite its anti-commercial characteristics. The buyer, however, is not without some protection. The doctrines of adverse possession, *bona fide* purchaser, and warranty mitigate the harshness flowing from strict application of the possession theory¹⁹ and approximate the market overt concept.

Self-Protection—Getting All The Title Your Seller Has

The buyer of personal property can protect himself against later claims of his immediate transferor. If a buyer's rights rise no higher

18. At the least, the buyer should not pay for more title than he is actually receiving.

19. All of the doctrines to be discussed herein protect the buyer from true owner claims. One of the protective devices, adverse possession, does not depend on the exchange of consideration. Donees, takers, and defrauders can acquire a title superior to the true owner through adverse possession. See text accompanying notes 28 through 35 *infra*.

than those of his seller, it is important to get whatever rights his seller has to give.²⁰ If the transferor is the true owner, the sufficiency of the buyer's title against all claimants is established. If his transferor is not the true owner, it is necessary to take adequate steps to defeat the transferor's possible claims although title sufficient to defeat all other possible claimants cannot be had from the transferor. The possession theory supports the implication that complete and voluntary relinquishment of possession will extinguish the rights of a prior possessor. This is the case. It is apparent that the relinquishment must be in favor of the subsequent possessor if the latter is to establish that he has what the former had. The means for accomplishing this transfer developed in the law of gifts. By analyzing the requirement for an effective transfer in the gift context, one can also understand the mechanics of a transfer for sale.²¹

Delivery of the goods coupled with the intention of the owner that the transferee become the owner is the major prerequisite for an effective gift.²² Just as possession is established in the ownership cases, the issues of delivery and intent are resolved as fact questions.

Possession of the item is strong evidence that the donor intended to part with the property; however, possession alone is not sufficient to establish an effective transfer. By requiring that delivery and intent coincide, the law precludes a transfer of title where the transferor did not intend the taker to have a present interest in the property.²³ Delivery must also be as complete as possible under the circumstances. When the goods and circumstances indicate that an actual transfer from one party to another is reasonably convenient, the law will require such an act. The donor's intent, in such circumstances, will not control even though clearly proved. From an objec-

20. The buyer may not be able to ascertain what the seller's title actually is but the importance of getting all of it should be clear. The best means of avoiding the risk to which the buyer is exposed if the seller is not the true owner (or the owner of what he is purporting to sell) is to get the seller's warranty. If his title later proves defective, the buyer has an enforceable promise by which he can recover. See text accompanying notes 46 through 48 *infra*.

21. It may be that at one time every transfer of title was, legally, a gift. Because the donative transfer lacks consideration, upholding a transfer where none was intended would clearly leave the true owner uncompensated. The requirements for an effective transfer are therefore most stringent in the area of gifts.

22. The donee must also accept the gift.

23. See *In re Estate of Evans*, 467 Pa. 36, 356 A.2d 778 (1976). The true owner gave the donee keys to his safe-deposit box with the understanding that the donee could have the contents. After the donor's death, his heirs claimed the \$800,000 found in the box. The court did not uphold the gift. Transfer of the keys alone was not sufficient. In spite of a clearly expressed donative intention, the lack of actual delivery with a present intent to relinquish title defeated the donee's claim. The gift of the keys was insufficient, the court intimated, because without an alternation of the bank's signature card, the keys would not enable their possessor to get access to the contents of the box.

tive point of view, the item must pass from the owner's possession—from his management, use, and control—with the clearly shown intention that he relinquishes title completely, before the law will recognize an effective transfer by gift.

In our hypothetical, a transfer of rights in the fox would not occur by gift if Pierson said, "I'll give you the fox next week, Brown," and immediately transferred possession. It would not be effective if Pierson were to say, "The fox is yours, Brown," but fail to relinquish his possession. By failing to prove that the necessary elements coincided, Brown could not prove ownership transferred by gift from Pierson. He could not legitimately claim that he acquired all the rights that Pierson had in the fox.

The passage of title in the sale of goods does not follow the strict requirement that delivery and intent coincide. This reflects a commercial consideration equal in importance to obtaining title from the seller: the allocation of the risk of loss between the time of contracting and delivery. As a general rule, passage of title, and hence passage of the risk of loss, depends upon the intention of the parties.²⁴ The contract of sale may transfer title to the goods even though delivery has not yet occurred. This flexibility, however, does not imply an abandonment of the delivery concept.

Article 2 of the Uniform Commercial Code can control rights, obligations, and remedies in relation to the sale of goods irrespective of the title of goods.²⁵ Yet, when title does become a material issue, "title passes to the buyer at the time and place at which the seller completes his performance with reference to the *physical delivery* of the goods,"²⁶ unless the parties explicitly agree otherwise. In absence of mutual agreement, the common law requirement of delivery remains as the standard.

Judicial Intervention

If the seller delivers goods with the intention of completely transferring his rights, clearly the purchaser acquires all the title which his transferor had.²⁷ The seller's rights may be deficient; there may be a prior possessor whose rights are paramount to the seller's and,

24. U.C.C. § 2-401(1).

25. *Id.*, comment.

26. U.C.C. § 2-401(2) (emphasis added). This is true even though the seller reserves a security interest or the document of title is to be delivered elsewhere.

27. The U.C.C. codifies the common law *bona fide* purchaser concept, U.C.C. § 2-403(1). The U.C.C. further codifies a related concept by estopping a true owner from asserting his title against a purchaser who in the ordinary course of business bought the goods from a merchant in whose possession the true owner allowed them to remain. U.C.C. § 2-403(2), U.C.C. § 2-403(3).

therefore, to the buyer's. This possibility presents a real threat to the security of the purchaser's title yet he is powerless to do anymore on his own to ascertain the quality of his claim. It is at this point that the judicial system tempers the basic possession theory in the name of protecting a buyer of goods from a hidden true owner.

Adverse Possession

A prior possessor preserves the right to recover possession from a subsequent holder by conditioning his relinquishment of possession. The concept of adverse possession introduces the requirement that the prior possessor who has involuntarily relinquished possession must take reasonably prompt steps to reacquire the property.

*Chapin v. Freeland*²⁸ involved an action by plaintiff to recover possession of two shop counters from defendant, who had repossessed them without the plaintiff's consent. Defendant's claim originated from an earlier and apparently rightful ownership predating that of the persons from whom the plaintiff had acquired the counters. Since defendant's possession had preceded that of the persons on whom plaintiff's claim depended, and as defendant's prior relinquishment was involuntary, defendant should have prevailed had the possession theory been applied.

Plaintiff, however, recovered the counters even though defendant had actual possession and the appearance of a relatively better title. Plaintiff prevailed because she and her predecessor²⁹ had possession of the counters for 14 years prior to defendant's repossession. During all of that period, defendant had made no claim to recover his goods. Defendant's taking became wrongful conversion of the property since his action occurred after the expiration of the six-year statute of limitations.³⁰ Possession by a holder of goods³¹ will extinguish the claims of even "true owners" once a fixed statutory period has passed. Thus, plaintiff had an absolutely good title. Prior possessors

28. 142 Mass. 383, 8 N.E. 128 (1886).

29. "Tacking" permits subsequent adverse possessors to include the time of their predecessors in meeting the statutory limit. If Pierson held the fox for three years adversely to Quick and then sold it to Brown, Brown would need to hold the fox only three years to defeat Quick. If Pierson held the fox three years and then Brown acquired the fox under circumstances independent of or adverse to Pierson's claim, Brown must hold the fox six years in his own right to acquire title by adverse possession. See R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 4.3 (3d ed. 1975).

30. The period of limitation varies from state to state. The Massachusetts statute was a six year term; Illinois has a five year limit, ILL. REV. STAT. ch. 83, § 16 (1977).

31. As demonstrated in *Chapin*, adverse possession can also be claimed by a one-time possessor who held for a sufficiently long period at some point in time. In other words, completed adverse possession is good against the true owner should he physically regain possession at a later date.

have been defeated by the passage of time.

If mere possession over a particular period of time could always defeat the person with relatively better title, the ability to relinquish actual possession for any lengthy period of time would be severely curtailed. Suppose that Pierson, as possessor of the fox, takes it to Brown for boarding while he goes on an extended vacation. He states that he will pick up the fox in eight years. Suppose also that the statute of limitations perfected the title of an adverse possessor after six years. If Brown could extinguish Pierson's title after only six years, Pierson would be foolhardy to board the fox for a greater period, regardless of his reasons.

In requiring that the subsequent possessor's claim be "adverse" to the prior possessor's rights, the law has permitted the prior possessor to exercise his right of limited relinquishment without placing his title in jeopardy. A subsequent possession becomes adverse only when it becomes inconsistent with the prior possessor's relinquishment.³² Where the prior possessor relinquishes involuntarily, that period of adverse possession begins to run immediately. Where a temporal condition is placed on the relinquishment, possession after the stipulated time, without the owner's consent, is considered adverse. In the hypothetical, Brown could not perfect his title until 14 years had passed. If Pierson fails to reclaim the fox after eight years³³ and then takes no action to recover him within the next six years, Pierson loses his rights by operation of law.³⁴

Application of the adverse possession doctrine is complicated by instances in which the taker conceals his possession to thwart the prior possessor³⁵ and by cases, like *Chapin*, where a succession of adverse possessors are involved. The basic concept, however, is one which is consistent with and complementary to the possession theory of *Pierson* yet affords commercially expedient relief by defeating stale claims of prior possessors. Possession provides rights against those who have not had possession. Possession provides rights against those who have voluntarily and completely relinquished possession. Possession over a sufficient period of time will

32. See note 8 *supra*.

33. He could also extend the period. Brown's continued possession would be permissive rather than hostile so that the statute would not begin to run.

34. Brown would not need to take formal steps to perfect his title.

35. The statute normally begins to run when the right to bring an action accrues, which is when the property is found or taken. The inequity of rigorously applying such a rule is obvious where the taker's concealment prevents the owner from finding his property. Whether concealment is so serious as to necessitate suspending the running of the statute is a question without a general answer. As a fact issue, it is a question to be answered on a case by case basis. See R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 4.2 (3d ed. 1975).

provide rights against those who did not voluntarily relinquish their rights but failed to take prompt steps to locate the goods or assert their rights. In a properly constructed transaction, the buyer is safe from both his transferor's future claims and those of others who have let the statute run.

The Buyer as a *Bona Fide* Purchaser

The adverse possession rule, while protecting the transaction from stale claims, does nothing to protect the purchaser from claims of more recent³⁶ rightful prior possessors. The doctrine of the *bona fide* purchaser provides some protection to the buyer confronted by such a claimant.

Assume that Quick had entrusted his fox to Pierson with the understanding that Pierson would sell the fox and pay Quick some time later. Suppose further that Pierson had misrepresented his personal financial resources to induce such a sale on credit. If Pierson sold the fox to Brown and then disappeared without paying Quick, should Quick be allowed to recover possession of the fox from Brown?

In *Phelps v. McQuade*,³⁷ the court determined that the third person could not be successfully sued since the true owner did voluntarily and completely,³⁸ although misguidedly, surrender possession. In the absence of evidence showing that he did not intend to transfer his rights when he transferred possession, the true owner has no further claim against the property or its ultimate possessor. Such a conclusion is wholly consistent with the possession theory; such a conclusion is unabashedly pro-commercial in affording protection to the buyer. Applied relentlessly, however, it would also afford considerable financial gain to defrauders such as our hypothetical Pierson.³⁹

36. These are the people against whom the statute of limitations has not run.

37. 220 N.Y. 232, 115 N.E. 441 (1917).

38. Lack of payment to the true owner does not normally defeat the inference that he transferred his rights absolutely when he transferred possession. The law of security interests (and real estate mortgages) is a response to the trouble caused by such an inference. It is apparent from U.C.C. § 1-201(37) and U.C.C. § 9-107 that a seller on credit must "take" a security interest in the property in order to retain a recourse to the property itself when the buyer defaults. In the absence of a secured interest, the true owner must rely on an action in contract against the buyer. If the buyer has sold the goods, the judgment on the contract can only be satisfied by the buyer's assets; since the assets no longer include the goods, the true owner cannot recover the property.

39. This does not mean that the true owner has no cause of action against the deceiver. If the deceiver can be found, a tort action for conversion or deceit may be brought. A judgment for the true owner, however, would have to be satisfied from the deceiver's assets. These assets no longer include the goods in question and the proceeds of the sale may have long been dissipated.

The difficulty seems to be in applying the law to the facts. A true owner does not voluntarily relinquish his rights to a finder or a thief; therefore, the finder or thief can acquire no title superior to that of the original owner⁴⁰ to pass to a third party. Yet, one who obtains, through guile, rights and possession from the willing but deceived true owner acquires for himself and the subsequent possessor a claim superior to that of the party beguiled. In the former case, the true owner loses nothing; in the latter, he loses all even though his intention, the decisive factor, was wrongfully induced. Must the resolution involve such an "all or nothing" approach where fraud is at issue?

The court in *Phelps* found an equitable middle road in the *bona fide* purchaser doctrine. Where the transfer of possession was fraudulently induced, the immediate transferee's rights are inferior to that of the true owner. The transferee, along with anyone who subsequently takes from the transferee while knowing of the fraud, acquires only a "voidable" title.⁴¹ In the hypothetical, Pierson would have such a title; Brown would also have one if he knew of the fraud at the time he paid for and received the fox. In such circumstances, Quick would be able to recover his fox from the party with possession.

When the defrauder transfers the goods to one who, not knowing of the fraud, pays good value for the goods, the result changes. This *bona fide* purchaser acquires a good title; against this person, the victim of the deceit cannot assert true owner rights. Here is the instance where one can transfer rights superior to one's own. In having to choose between two innocent parties, equity follows the law. The possession theory is adhered to because the original owner transferred possession without clearly retaining rights in himself. Here Brown could, by being an innocent purchaser for value, defeat the claims of Quick. Similarly, those who took from Brown could also defeat Quick's attempt to recover possession.

40. See text accompanying note 42 *infra*.

41. The mechanics through which the doctrine works itself out are inextricably tied to the jurisdiction of the equity court. The law courts strictly apply the possession theory to bar recovery of the goods by the true owner. To the extent that such a result is "inequitable," the equity court modifies the outcome. In deciding between a deceived true owner and his deceiver (or one in cahoots with the deceiver), equity calls the latter claim voidable and demands a return of the goods to the true owner. In deciding between the deceived true owner and the *bona fide* purchaser, the legal position favoring the latter claim is fair and the equity courts have not interfered with the law.

Enforcing the Warranty—Help for the *Bona Fide*
Purchaser When the True Owner Wins

Adverse possession protects the possessor from earlier rights not asserted within a statutorily determined time. The *bona fide* purchaser doctrine protects the innocent purchaser against the true owner who intended, through fraudulent inducement, to transfer his rights. These doctrines afford much commercial security to the buyer, but the buyer's security is only the result of some implied acquiescence to the transfer of title⁴² or an actual but fraudulently induced transfer of title.⁴³ Where the court can find no transfer of title by the owner, the purchaser will not prevail. Where the true owner has not delivered his goods and title but rather has lost them, had them stolen or has had them taken as a result of fraud so fundamental as to amount to theft,⁴⁴ then the finder, thief or defrauder acquires no legal title. Consequently, the purchaser acquires no legal title because his seller had none to convey.

Such a result is consistent with the relationship between the true owner and the purchaser as thus far developed. The law favors the true owner. Where the true owner intended to transfer title, however misguidedly, the law will give effect to the transfer. Equity will intervene to restore the rights of the true owner when the choice is between a misled true owner and a transferee who participated in or knew of the fraud. Equity refuses to intervene where the choice is between a misled transferor and an innocent purchaser. While dealing with two innocents, the equity courts follow the law and protect the purchaser since the true owner was in a better position to prevent the fraud. Where the true owner had no intent to relinquish his rights, equity follows the law in protecting the true owner. Thus, within a wide range of cases where the true owner had no intent⁴⁵ to relinquish his rights, the *bona fides* of the purchaser will be irrelevant to settling the dispute. In these cases where the true owner can prevail, the buyer has only one place to look for redress.

42. This assumes that the true owner acquiesces to the loss of his title by failing to assert his rights against the possessor whom he knows is holding the goods adversely to his ownership.

43. Albeit that the transfer was wrongfully induced.

44. Fraud in the execution is an example. If the transfer involves circumstances where the true owner does not know he is relinquishing his rights, his title will not pass. *Cf.*, *Phelps v. McQuade*, 220 N.Y. 232, 115 N.E. 441 (1917) (explaining how such a transaction could occur).

45. U.C.C. §§ 2-403(2) and 2-403(3) contradict this in certain instances by giving effect to a transfer even though the true owner had no intent to relinquish his rights. Where the true owner entrusts to or acquiesces in the retention of his property by a merchant of goods of that kind, he is estopped from denying a buyer's title if the merchant sells the goods to the buyer in the ordinary course of business.

He must go to the transferor who foisted bad title on him.

The Uniform Commercial Code provides that every contract for the sale of goods⁴⁶ includes a warranty by the seller that he conveys good title.⁴⁷ Unless the warranty is modified or excluded by express agreement,⁴⁸ the buyer can, upon losing to the true owner, proceed against his transferor for money damages. In terms of the hypothetical purchase of the fox, Brown can proceed on Pierson's warranty and recover damages for his loss of possession. Pierson having no prior transferor, bears the ultimate loss. This burden is commercially reasonable for Pierson alone acquired more than he gave up in the series of transfers.⁴⁹ Having started with nothing, Pierson ends up with nothing; having started with a fox or its purchase price, Quick and Brown end up in the same position as they began. Such a result provides an equitable resolution to the commercial application of the possession theory.

CONCLUSION

The heart of the first year property course is the concept of ownership based on prior possession. This concept, if rigorously applied, makes the outcome of cases predictable within limits imposed by the ambiguity of such terms as possession and delivery. Rigorous adherence, however, creates uncertainty of ownership in some commercial situations by favoring the true owner over the innocent purchaser who paid valuable consideration for the goods. As a consequence, there has been an orderly, if limited, modification of the concept to facilitate the transfer of goods in commerce. For the first-year student, an understanding of the concept of possession and its pro-commercial modifications in the simple context of personal property is a necessary first step toward grasping the further elaborations which surround the law of real property.

46. A "contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. U.C.C. § 2-106(1).

47. U.C.C. § 2-312. Under the common law, there was no implied warranty of title. There has been a progression from that position to the present rule which implies a warranty of title unless such warranty is expressly excluded from a transaction. U.C.C. § 2-310; 2 A. SQUILLANTE & J. FONSECA, WILLISTON ON SALES §§ 15-12 to 15-18 (4th ed. 1974).

48. A modification or exclusion may also be proved by showing circumstances which give the buyer notice that the seller does not claim title or that he is only selling such rights as he has. U.C.C. § 2-312(2).

49. If Brown wins as a *bona fide* purchaser, Quick can go against Pierson. See note 39 *supra*. The burden remains on Pierson regardless of the outcome of the Quick-Brown dispute.

