

The Benefits of Static Security: In Defense of Deferred Indefeasibility

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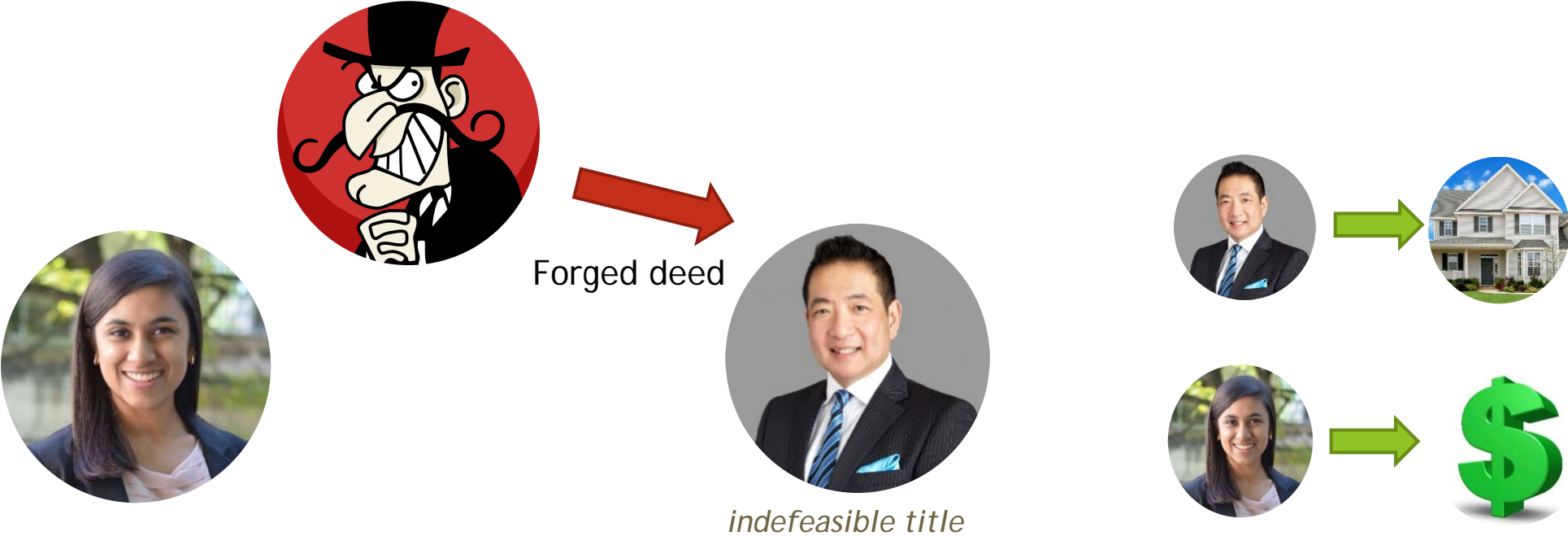
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Immediate Indefeasibility (Deeds)



Immediate Indefeasibility (Mortgages)



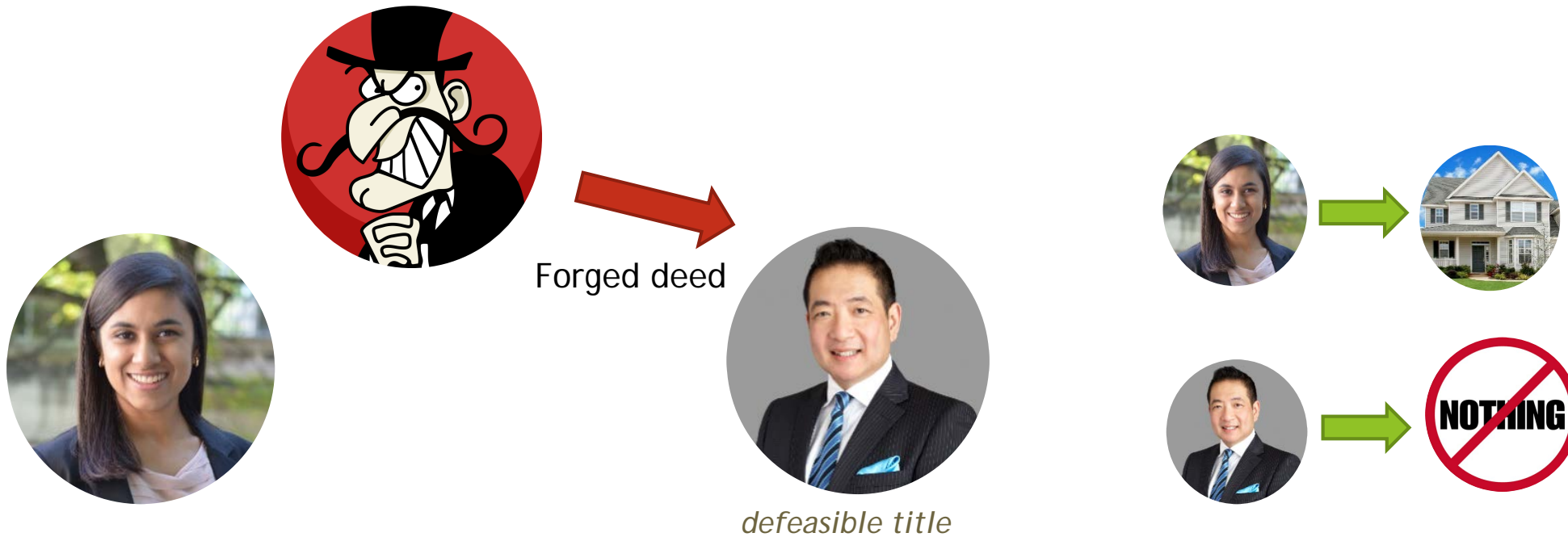
Forged mortgage



indefeasible title



Deferred Indefeasibility (Before Re-Transfer)



Deferred Indefeasibility (After Re-Transfer)



Forged deed



defeasible title

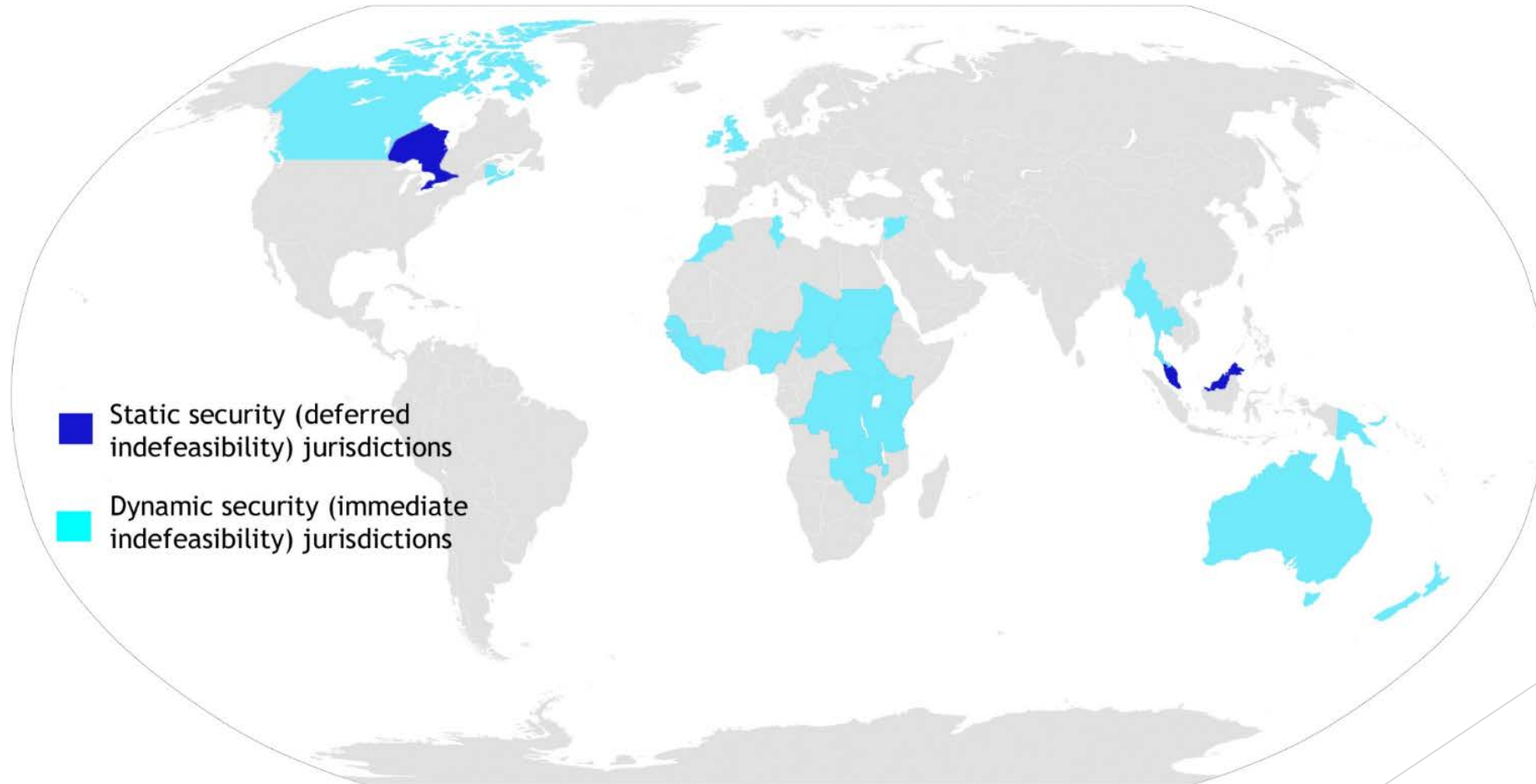
But if...



indefeasible title



Static and Dynamic Security Around the World



Theory of Static Security

- ▶ Static secured (deferred indefeasibility) favours existing owners (hence static)
- ▶ In contrast, dynamic security (immediate indefeasibility) favours incoming owners (i.e. buyers) and mortgage lenders
- ▶ Legal theory in support of static security (deferred indefeasibility) is that a buyer does not rely on the register, but rather is duped by a fraudster
- ▶ Legal theory is sophistry and unsatisfactory; the choice between static security (deferred indefeasibility) and dynamic security (immediate indefeasibility) is pure policy

Policy Reason #1 in favour of Static Security: Historically Intuitive

- ▶ In marketability of title jurisdictions, the initial buyer/mortgagee never gets indefeasible title; fraud is void
- ▶ In most marketability of title jurisdictions, this creates a state of “indefinite” indefeasibility” (or “no indefeasibility”) since the void deed/mortgage will always break the chain
- ▶ Static security (deferred indefeasibility) better resembles marketability of title regimes

Policy Reason #2 in favour of Static Security: Fraud Deterrence

- ▶ Static security (deferred indefeasibility) makes inbound buyers/mortgagees more diligent in detecting fraud since the inbound buyers/mortgagees are assured of no title if they take from a fraudster
- ▶ Dynamic security (immediate indefeasibility) creates “moral hazard” by encouraging inbound buyers/mortgagees to be less diligent and exacerbates the “race to register” in order to validate fraudulent instruments
- ▶ Although innocent, inbound buyers/mortgagees are incentivized to register quickly to ensure title indefeasibility



Policy Reason #3 in favour of Static Security: Political Victimology

- ▶ Static security (deferred indefeasibility) favours the rights of existing owners, which are often politically more “attractive” victims (e.g. seniors, families, etc.)
- ▶ Dynamic security (immediate indefeasibility), especially in cases of mortgages, favours the rights of inbound buyers and mortgagees, especially in jurisdictions which insure mortgage titles, mortgage lenders are often politically less “attractive” victims



Policy Reason #4 in favour of Static Security: Assurance Fund Payouts

- ▶ Static security (deferred infeasibility) tends to ameliorate assurance fund payouts because insurable frauds are scarcer
- ▶ Dynamic security (immediate infeasibility) tends to accelerate assurance fund payouts because insurable frauds are more common
- ▶ Assurance fund payouts are never good, and this is a pure transfer of risk to the party “closest to the fraud”



Policy Reason #5 in favour of Static Security: No Additional Costs

- ▶ It has always been argued that dynamic security (immediate indefeasibility) lowers overall lending costs for society by reducing overall due diligence costs, even if only incrementally
- ▶ No evidence of such cost savings: most buyers and mortgagees doing some due diligence anyway
- ▶ British Columbia does not insure mortgages, yet their cost of lending/borrowing are in no way greater than the rest of Canada

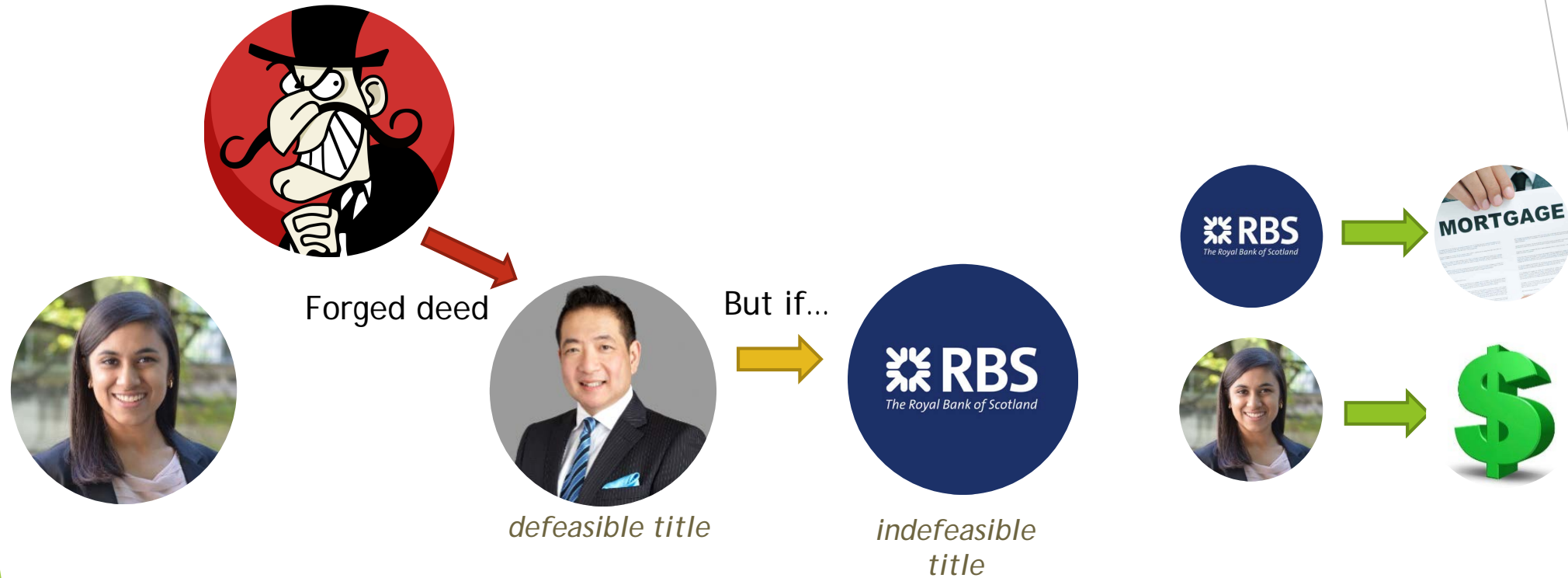
NO EXTRA COST

Policy Reason #6 in favour of Static Security: Title Insurance

- ▶ Title insurance operates in both static security (deferred indefeasibility) and dynamic security (immediate indefeasibility) regimes
- ▶ No premium pricing differentiation
- ▶ Must always prevent title insurers from subrogating to the rights of fraud victims



Double Deferred Indefeasibility



- ▶ In a Double Deferred Indefeasibility regime, the first victim and his mortgagee are consolidated to form a single first victim with indefeasible title

Conclusion

- ▶ The choice between static security and dynamic security is a matter of policy
- ▶ Deferred indefeasibility is the superior policy choice because it:
 - ▶ Aligns with the historically intuitive marketability of title jurisdictions
 - ▶ Eliminates the moral hazard associated with immediate indefeasibility
 - ▶ Protects the more vulnerable victims
 - ▶ Reduces the burden on the assurance fund
 - ▶ Is not more costly