# THE LAW OF PROPERTY

*SUPPLEMENTAL READINGS*

**Class 20**

**Professor Robert T. Farley, JD/LLM**

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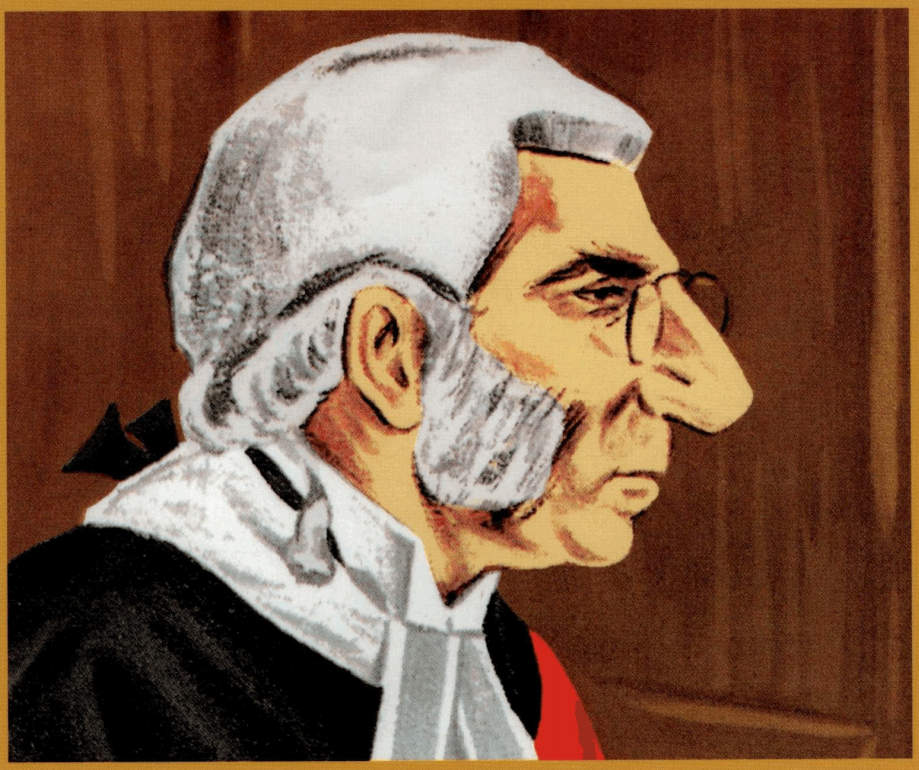
## law outlines



# PROPERTY

**Keyed to Dukeminier/Krier/Alexander/Schill, Sixth Edition**

**CALVIN MASSEY**

ASPEN
PUBLISHERS

CHAPTER 6

# TRANSFERS OF REAL PROPERTY

## *Chapter Scope*

This chapter examines transfers of real property, including the contract of sale, the deed by which title is transferred, and the financing devices that enable the sale to occur. Here are the most important points in this chapter.

- To be enforceable, a contract to convey real property must be in writing and signed by the party against whom it is sought to be enforced. Exceptions occur when there has been part performance and when equitable estoppel applies.
- Implied in any contract to sell real property is an obligation of good faith and timely performance, as well as an obligation to deliver marketable title. In order for a defect in title to make title unmarketable it must be substantial and likely to injure the buyer. Such defects include recorded encumbrances but not zoning restrictions unless the property actually violates them.
- Remedies for default of a contract of sale include specific performance, rescission, or damages.
- Sellers may not intentionally misrepresent the property, and they must disclose all seller-created conditions that materially impair value and which are not likely to be discovered by an ordinarily prudent buyer. The trend is to require sellers to disclose all latent defects known to the seller — defects that materially impair value and which could not be discovered by a reasonably prudent buyer. Builders are generally held to make an implied warranty of quality.
- Deeds must be in writing and signed by the grantor. To be recorded the grantor's signature must be acknowledged before a notary and that fact memorialized on the deed by a notarial seal and signature. A deed must contain an adequate description of the grantee and the property conveyed.
- Deeds may be a general warranty deed, a special warranty deed, or a quit claim deed. The difference inheres in the scope of the warranties of title made by the grantor.
  - A general warranty deed contains six warranties of title, three of which are promises about present conditions, and three of which are promises about future action. In substance, the present covenants are that the seller owns the property, has the right to convey it, and there are no encumbrances except those disclosed. The future covenants are that the seller will defend the buyer's title against lawful claims of superior title, the buyer will not be disturbed by such claims and the seller will do whatever is reasonably necessary to perfect title.
  - A special warranty deed contains the same six warranties, but only as to the time the seller owned the property.
  - A quit claim deed contains no warranties of title at all, but is effective to transfer whatever interest the seller happens to have in the subject property.
- To be effective a deed must be delivered to the grantee. This often becomes a problem when a grantor executes a deed with the intention that it become effective at his death.
- Purchase of real estate is usually financed in large part by a commercial loan of much of the purchase price to the buyer. The lender secures repayment of that loan by either a mortgage of

or deed of trust to the property. A mortgage is a lien on the property that can produce a transfer of title upon the borrower's default. A deed of trust is a transfer of title of the property to a trustee for the purpose of conveying it to the lender if the borrower defaults or back to the borrower if he does not default. In practice, both devices are treated as liens until title is transferred after borrower default.

- Sometimes sellers lend the buyer a portion of the purchase price by taking the buyer's note. Sellers may secure payment of the note by taking a mortgage or deed of trust, but sometimes they use an installment sale contract, under which title is not transferred until the buyer has paid the entire price. When a buyer defaults under such a contract, virtually every state treats the contract as functionally identical to a mortgage or deed of trust and requires the seller to act as would any other mortgage lender.
  - Mortgages usually involve a foreclosure sale, at which the property is sold to pay off the unpaid balance of the loan. Deeds of trust usually involve a private sale for the same purpose. Under either mechanism, the borrower usually has some statutorily defined period of time in which to redeem his property following sale, unless that right has been cut off by judicial decision. Some states impose on lenders the obligation to act in a commercially reasonable fashion when conducting a foreclosure sale or private sale, in order to realize fair value for the property.

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# I. CONTRACTS OF SALE

**A. Introduction:** All arm's length transfers for consideration will involve a contract for the sale of the land involved. Much of the law pertaining to that contract is the domain of your Contracts course. This discussion focuses on aspects of the contract for sale that are peculiar to the fact that land is the subject matter.

**1. Brokers:** Brokers are ubiquitous. Very few transfers of houses occur without the involvement of one or more brokers, and many transfers of commercial real estate involve a broker. In the typical arrangement, a seller hires a broker (the ***listing agent***) to sell the property on terms and for a commission specified in the ***listing agreement.*** In most states the commission is earned when the broker has produced a buyer ***ready, willing, and able*** to purchase on the terms of the listing agreement or other terms acceptable to the seller. Unless the listing agreement provides otherwise, most courts find that the broker is entitled to his commission if the deal fails regardless of seller's or buyer's default. The minority view is that if the deal falls through because the ***seller defaults*** or the ***seller refuses to sell on the terms of the listing agreement*** the broker is entitled to the commission anyway; but if the ***buyer defaults***, no commission is earned.

**a. Brokers' fiduciary duties:** A listing agent is the seller's agent and owes to the seller all of the fiduciary duties that come with an agency relationship. Reduced to the essentials, the broker must put his principal's interests ahead of his own and exercise diligence to obtain the best result.

★**Example:** Six siblings lacking knowledge of real estate transactions retained a broker to sell the Connecticut property they had inherited. The broker enlisted the services of another broker to assist in marketing the property. Less than 24 hours after a listing agreement was

signed in which the property was offered for sale for $125,000, the defendant broker offered to purchase the property for $115,000. The broker's offer was accepted. Six days after the closing the broker resold the property for $160,000, making a profit of $45,000 on a cash investment of $11,500. In ***Licari v. Blackwelder***, 539 A.2d 609 (Conn. App. 1988), a damage award of $45,000 against the broker was upheld. The broker had withheld from his client the fact that he was negotiating the sale of the property to a third party even before he purchased it; failed to exercise his best efforts to obtain the best price for his client; and misrepresented other facts.

Because the listing broker shares the commission with other brokers who are working with buyers, the ostensible buyer's broker is actually a subagent of the listing agent; thus, while the buyer may think "his" agent is representing him, in fact the broker is representing the seller. Some states require disclosure of this fact. Although true buyers' brokers have begun to exist, such brokers have no contractual right to share the listing agent's commission, thus presenting economic obstacles to the proliferation of buyers' brokers.

2. **Lawyers:** Most residential sale transactions are done via a standard, preprinted contract, with critical terms (e.g., price, financing, closing costs) to be supplied by the parties. Often brokers fill in these gaps and lawyers are not involved. Brokers must be careful not to do much more than "fill in the blanks" lest they be deemed to be practicing law. Of course, the choices made or advised by brokers have large legal consequences. Buyers and sellers are well-advised to consult lawyers in the making of the contract, but most don't. In some states, lawyers are engaged to prepare a ***title abstract*** — a history of the chain of title — and an opinion as to the state of title that would pass from seller to buyer. In other states, title insurance companies perform this chore and insure that the buyer receives good title. See Chapter 7. In more sophisticated transactions, lawyers will draft the sales contract, draft the deed, examine title or obtain title insurance, and oversee the closing.

3. **Mortgage lenders:** Very few people buy real property without borrowing a substantial portion of the purchase price. Key portions of any sales contract deal with the seller's existing and the buyer's proposed mortgage. The mortgage lender is usually a third party but sometimes the seller will become a mortgage lender by agreeing to receive a portion of the purchase price in the form of the buyer's promissory note secured by a mortgage to the property. See III. below.

4. **Closing:** Real estate sales are two-step transactions. The nature of a real estate sales transaction is that some time will elapse between execution of the sales contract and the closing — the actual exchange of title and purchase price. Time is needed for the buyer to arrange financing, for a proper examination of title, and for various inspections and other acts to occur as called for under the sale contract or as required by law. Closings are usually conducted through an independent ***escrow agent.*** The critical items are deposited into escrow — the executed deed, the purchase price, the mortgage (if any) executed by the buyer. The escrow agent makes various adjustments of the purchase price to reflect pro rata apportionment of taxes and other prepaid expenses, and then disburses a portion of the purchase price to extinguish the seller's old mortgage, records the deed and buyer's new mortgage, and finally delivers the balance of the purchase price to the seller.

**B. Statute of Frauds:** The Statute of Frauds, adopted in some form by every state, requires that, unless there is some exception available, a contract for the sale of land ***must be in writing*** and ***must be signed by the party against whom it is sought to be enforced.*** Because both parties wish to

enforce the agreement, if necessary, against the other, this means in practice that ***both parties must sign the contract for sale.***

1. **Formal contract not necessary:** A binding contract can be quite informal. So long as the key terms are present — price, description of the property, and the parties' signatures — an enforceable contract may exist. Parol evidence — evidence extrinsic to the document — is permissible to remove ambiguities.

   **Example:** George agrees to sell his beach house to Martha for $100,000. On a cocktail napkin, George writes "My Malibu beach house to Martha for $100,000 as soon as practical. [signed] George." Martha writes "OK. [signed] Martha." This contract is sufficient. As they part, George and Martha orally agree to close the transaction 90 days later. Parol evidence concerning this oral clarification of the closing date is admissible to clear up the contractual ambiguity of what is "as soon as practical."

2. **Single instrument not necessary:** The contract need not consist of a single document, so long as the multiple writings are consistent, embody the essential terms (price, parties, and property description), and are signed by the parties.

   **Example:** Martha sees her friend George in a bar and passes George a note, "George, will you sell me your Malibu beach house for $100,000 cash? Martha." George passes a separate note back to Martha: "Martha, I wouldn't sell my beach house to anybody but you and I'm happy to take $100,000 cash for it. George." The two notes, taken together, constitute an enforceable contract. See, e.g., *Ward v. Mattuschek*, 134 Mont. 307 (1958).

3. **Conditions:** Real estate sale contracts often make the buyer's obligation subject to financing conditions — that the buyer obtain loans in an amount sufficient to meet the purchase price and on terms acceptable to the buyer — or some other condition (e.g., the property is acceptable to the buyer's structural expert, or the issuance of a building permit to enable the buyer to build an intended structure). Financing conditions are usually spelled out carefully and precisely. If not, two problems can occur. If the financing conditions are vague, and there is no parol evidence to clarify the ambiguity, the contract may be void for want of an essential term. If the financing conditions are "to the buyer's satisfaction," an obligation is implied on the part of the buyer to use reasonable efforts to obtain the necessary financing on commercially reasonable terms. Failure to do so will result in buyer's default. The same obligation of good faith is implied with respect to other conditions that are "to the buyer's satisfaction."

4. **Electronic transactions:** The ubiquity of the Internet caused Congress to enact the "E-sign Act," which provides that an electronic contract is as fully enforceable as its paper equivalent. The E-sign Act defines an electronic signature as any electronic "sound, symbol, or process" that is "attached to, or logically associated with" the putative contract and which is created with "intent to sign." Some courts find an exchange of e-mails adequate to form a contract for the sale of realty, so long as their substance covers all the requisite points necessary to establish the contract. Other courts and some commentators are more wary. They fear that the cautionary and memorializing functions of traditional written contracts will be undermined by giving effect to electronic contracts. The virtue of the paper deal is that it takes longer, and that fact gives all sides more time to contemplate the significance of their actions. Also, the prospect of forged electronic contracts may be significantly greater. Are these objections weighty enough to reconsider E-sign?

5. **Exceptions to the Statute of Frauds:** There are two major exceptions to the Statute of Frauds — ***part performance*** and ***equitable estoppel.*** Each is an ***equitable doctrine*** and thus is generally available only when a buyer seeks ***specific performance*** of an otherwise unenforceable contract of sale.

   a. **Part performance:** The elements necessary to establish part performance vary among the states. Every state requires proof of an oral contract. The differences occur with respect to the additional elements.

      i. **Unequivocal evidence of contract:** Some states insist that the acts constituting part performance must be of the sort that would not occur but for the existence of a contract — often labeled as actions of ***unequivocal reference to a contract.*** These acts consist of ***payment of all or a part of the purchase price,*** taking ***possession,*** and making ***improvements.*** None of these things are likely to be done if there were not a contract. Some states require all of these elements to establish part performance, but others are satisfied if possession alone is proven.

      ii. **Reasonable reliance:** The modern trend is to require proof of (1) an ***oral contract*** and (2) ***reasonable reliance*** on the contract — enough reliance that it would be inequitable to deny specific performance.

      ★**Example — Reliance:** Mrs. Green orally agreed to sell Hickey a building lot for $15,000 and accepted but did not deposit Hickey's check for part payment. Hickey then sold his house, expecting to build a new house on the lot. Mrs. Green refused to complete the sale. In ***Hickey v. Green,*** 14 Mass. App. Ct. 671 (1982), the Massachusetts Appeals Court held that Hickey's reliance was reasonable and that equity required specific performance of the oral sale contract.

      **Example — No reliance:** Ireton orally agreed to sell his farm to Walker for $30,000. Although a written contract was discussed, none was prepared. When Walker asked for a written contract Ireton assured Walker he was honest and none was needed. Walker gave Ireton a $50 check as part payment and Ireton accepted but did not cash the check. Walker then sold his own farm without ever mentioning to Ireton his intention to do so. Ireton then refused to convey and, in *Walker v. Ireton,* 221 Kan. 314 (1977), the Kansas Supreme Court ruled for Ireton. Walker's sale of his own farm was not reasonable reliance on the oral contract because the parties had neither discussed that action nor was it foreseeable by Ireton.

      iii. **Enforceable by seller:** The part performance doctrine is a two-way street, available to both buyers and sellers. In most states a seller may invoke the part performance doctrine to compel specific performance by the buyer, if the buyer's acts are sufficient to constitute part performance and the buyer has acted to diminish the value of the property in the hands of the seller. A few states do not require any proof of diminished value. In those states the principle of mutuality reigns — if the buyer can compel specific performance, mutuality of remedies requires that the seller have the same opportunity.

   b. **Equitable estoppel:** The familiar doctrine of equitable estoppel may be used to enforce an oral sale contract if the seller has caused the buyer reasonably to rely significantly to his detriment upon the seller's oral agreement to sell. This is not much different from the reasonable reliance branch of part performance.

**Example:** Cities Service orally agreed to sell Newman two building lots and to convey title when "construction was well under way." Cities Service reaffirmed this promise to Newman's construction lender, inducing a $5,000 loan to Newman. After the foundation was constructed, Newman ran out of money and assigned his contract to Baliles. Cities Service refused to convey and the Tennessee Supreme Court ruled that Cities Service was equitably estopped from asserting the Statute of Frauds as a defense. *Baliles v. Cities Service Co.*, 578 S.W. 2d 621 (Tenn. 1979).

**Example:** Ireton orally agreed to sell his farm to Walker and, when Walker asked for a written contract to evidence the deal, Ireton told Walker that he was honest and that no written contract of sale for the farm was necessary. Should that statement, coupled with Walker's later sale of his own farm, be sufficient to trigger equitable estoppel? In *Walker v. Ireton*, 221 Kan. 314 (1977), the Kansas Supreme Court thought that Walker's reliance, in the form of selling his own farm, was "purely collateral" and thus found equitable estoppel inapplicable.

6. **Revocation of contracts:** Most states do not apply the Statute of Frauds to revocation of a contract for sale of realty. Thus, if both parties agree orally to revoke a contract, the oral agreement is sufficient to do so. A few states reason that the original contract vested equitable title in the buyer and that a revocation amounts to a transfer of title back to the seller. In those states, the Statute of Frauds applies to revocations.

C. **Implied obligations:** There are a number of obligations implicit in every contract for the sale of realty. The principal ones are considered here.

1. **Good faith:** Each party is required to act with good faith in discharging the express duties of the contract. This has particular force when the obligation to complete the transaction is expressly conditioned upon future events that are subject to influence by the parties. These conditions often refer to buyer's obtaining financing, or public approval of an intended use, or buyer's satisfaction with some unknown aspect of the property. A party must exert reasonable efforts to discharge such conditions. Failure to do so will result in default. See, e.g., *Bushmiller v. Schiller*, 35 Md. App. 1 (1977).

**Example:** Buyer agrees to purchase Blackacre "if Blackacre yields a well for potable water of at least 10 gallons per minute." Buyer makes no effort to determine whether Blackacre has any ground water. Buyer will be in default if he fails to complete the purchase. By contrast, if Buyer drills a well in the location recommended by a professional well driller, but it only yields 3 gallons per minute, Buyer has used reasonable efforts. Buyer need not drill in another location and may refuse to close without incurring liability.

2. **Time of closing:** Most contracts state a date for the closing — the completion of the transaction. But if the closing does not occur on the specified date, it still may be enforced in equity if full performance is tendered within a reasonable time after the closing date. Courts reason that a particular closing date is not an essential term on the contract. To avoid this lingering uncertainty, sale contracts often stipulate that ***time is of the essence*** of the agreement. By expressly making the time of performance an essential term of the agreement, a party able and willing to perform on the closing date is relieved of any future obligations under the sale contract if the other party fails to perform on the required closing date. On the other hand, if some unforeseen event occurs that makes timely closing impossible, such a clause may be more harmful than helpful.

3. **Marketable title:** Every contract for sale of realty contains an implied duty of the seller to deliver ***marketable title*** to the buyer. This obligation can be expressly disclaimed by agreement between buyer and seller. Marketable title is a title a prudent buyer would accept, one reasonably free of doubt that there is any other rival to title or any portion of it. Any defect in title must be ***substantial*** and likely to result in injury to the buyer.

   a. **Proof of marketable title:** A seller can deliver marketable title by either (1) producing ***good record title*** — a recorded chain of title, showing an unbroken transfer of title from some original root of title in the past to the seller, with no recorded encumbrances (e.g., mortgages, easements, or servitudes) — or (2) proving ***title by adverse possession*** — either through a successful quiet title action or evidence sufficient to establish that the rival claim to title would not succeed if asserted and "that there is no real likelihood that any claim will ever be asserted." A careful buyer may well insist on a contractual term obligating the seller to deliver ***good record title,*** thus depriving the seller of the ability to deliver marketable title by proof of adverse possession.

      i. **Root of title:** To deliver good record title it is usually ***not necessary*** to trace the chain of title back to the original possessor of the property. About 20 states have ***marketable title acts,*** which provide that a deed at some distance in the past (typically, older than 20, 30, or 40 years) is a ***root of title,*** and cuts off any claims to title founded on earlier instruments. See Chapter 7. Even in states without marketable title acts, good record title may be produced by a title search that goes back to the point that is deemed acceptable under local practice. The rationale is that a search of the records for the preceding 80 years, for example, is adequate to reveal virtually all present claims to title and, if there is any claim founded on some earlier instrument it is likely barred by the limitations statute. Even though this may not always be so, the risk of such claims is so low that the courts regard the record title thus produced as "marketable." This risk to the buyer may be even further reduced or eliminated by title insurance (see Chapter 7) or reliance on the seller's warranties of title in the deed (see section II.C, below).

   b. **Defective title:** To be unmarketable, the defect in title must be ***substantial*** and likely to injure the buyer. Defective title does not always prevent the transaction from taking place. Buyers can and often do waive certain defects (e.g., easements, or a mortgage that can be assumed by the buyer) and other defects can be removed prior to or at the closing (e.g., an existing mortgage may be paid off by the sale proceeds so that the buyer receives unencumbered marketable title). Common defects in title are discussed in this section.

      i. **Defective chain of title:** The chain of title may have a faulty or nonexistent link. If a deed describes the wrong land, for instance, it is a faulty link. If there is no record evidence of a deed from *B* to *C* in a chain of title purportedly from *A* to *B* to *C* to *D*, the nonexistent link makes *D*'s title unmarketable. Because a chain is only as good as its weakest link, such defects make title unmarketable unless there is adequate proof of adverse possession sufficient to create a new, valid, and marketable title. See e.g., *Conklin v. Davi*, 76 N.J. 468 (1978).

      ii. **Encumbrances:** Generally an encumbrance makes title unmarketable. An encumbrance is a burden on the title, such as mortgages, judgment liens, easements, or covenants.

      ★**Example:** Bower and Lohmeyer entered into a written agreement by which Bower agreed to sell and Lohmeyer agreed to purchase a one-story wood-frame house in

Emporia, Kansas. The lot was burdened by a covenant requiring all residences constructed on the land to be two stories tall. In ***Lohmeyer v. Bower,*** 170 Kan. 442 (1951), the Kansas Supreme Court opined that the mere *existence* of a covenant restricting use is an encumbrance making title unmarketable. Only because Lohmeyer had agreed to take title "subject to all encumbrances of record" did the mere existence of the covenant not make title unmarketable; however, Lohmeyer had not agreed to accept *existing* violations of the covenant. Those existing violations made title unmarketable. There are two exceptions to the general rule. (1) An easement that ***benefits the property*** (e.g., a utility easement) is regarded by some courts as ***not an encumbrance*** so long as the easement is ***known to the buyer*** before entry into the contract. (2) Covenants restricting use are encumbrances, but some courts treat them as not making title unmarketable ***if the sale contract specifies a particular use that is permitted by the restrictive covenants.*** The rationale for the second exception is that the buyer has bargained for a specific use, not all possible lawful uses.

iii. **Zoning restrictions:** Use limits imposed by public authority through zoning laws are not regarded as encumbrances upon title. The rationale is that all property is subject to the lawful regulation of public authority, and that all land titles implicitly incorporate such use limits. However, if the existing use of the property violates a zoning ordinance the title will be held unmarketable on the theory that the buyer could not possibly have intended to purchase a violation of law and consequent liability.

★**Example:** In the prior example, an Emporia zoning ordinance prohibited the location of any frame structure within 3 feet of any lot line. The house that Lohmeyer had agreed to buy from Bower was located 18 inches from one lot line. In ***Lohmeyer v. Bower,*** 170 Kan. 442 (1951), the Kansas Supreme Court held that the mere existence of the zoning law did not constitute an encumbrance making title unmarketable but that the present and continuing violation of the ordinance sufficiently exposed Lohmeyer "to the hazard of litigation" to make the title unmarketable.

**D. Default and remedies:** Default occurs when one party has tendered performance in time, demanded timely performance from the other party, and reciprocal performance is not forthcoming. Remedies for breach are ***damages, rescission,*** and ***specific performance.*** The plaintiff may choose the remedy.

1. **Specific performance:** Because land is unique damages are thought to be inadequate compensation for breach, but because specific performance is an equitable remedy the defendant may assert the usual equitable defenses (e.g., if specific performance would work an undue hardship upon the defendant it will be denied).

   a. **Sought by buyer:** Buyers are generally able to demand specific performance. If the seller's title is defective (e.g., an easement) and the buyer still wants the property, the buyer is entitled to an abatement of the price to reflect the diminution in value attributable to the defect.

   b. **Sought by seller:** Sellers have traditionally been able to demand specific performance from the buyer, but the emerging trend is to deny sellers specific performance if they are still able to sell the property at a commercially reasonable price. A seller entitled to specific performance will be required to reduce the price if there is an ***insubstantial defect in title.***

Of course, if the title defect is substantial, the title is not marketable and the seller would not be entitled to specific performance.

c. **Equitable conversion:** If a contract for the sale of realty is specifically enforceable, the doctrine of equitable conversion operates to treat the buyer as the equitable owner from the moment the contract becomes effective, even if title passes later, as it almost always will. Traditionally, this meant that the risk of casualty loss (e.g., fire, earthquake) was on the buyer from that moment forward. See, e.g., *Paine v. Meller*, 31 Eng. Rep. 1088 (Ch. 1801). The traditional view, while still probably the majority view, is being eroded. The Uniform Vendor and Purchaser Act puts the risk of loss on the party in possession until title has passed. Other states place the risk on the seller if the loss is substantial and central to the contract. Of course, the parties should explicitly agree who bears the risk of loss until title passes and express that agreement clearly in the sale contract. See section I.F. below, for a fuller discussion.

2. **Rescission:** The polar opposite of specific performance is rescission. If the seller breaches, the buyer may elect to rescind, recover his partial payments already made, and "walk away" from the deal. If the buyer breaches, the seller may elect to rescind the contract and sell the property to another party. The rescission right does not ripen until the closing date, however, because either party has until then to tender performance. An attempted rescission prior to the closing date is not only ineffective but is a breach of the contract.

3. **Damages:** If the plaintiff does not want (or cannot obtain) specific performance she may obtain money damages. The measure of damages is usually the ***benefit of the bargain***, but a frequently employed alternative for the buyer's breach is ***retention of the buyer's deposit***. Under some circumstances damages are limited to recovery of ***money out of pocket***, and damages may be defined by the contract's ***liquidated damages*** provisions.

   a. **Benefit of the bargain:** This measure of damages gives the aggrieved party the difference between the contract price and the fair market value of the property at the time of breach.

      **Example (seller's breach):** Seller agrees to sell Blackacre for $50,000, but refuses to convey at the closing date because she is aware that in the interim the value of Blackacre has risen to $90,000. Buyer is entitled to $40,000 damages — the value of which she is deprived by Seller's breach. Buyer thus gets the benefit of the bargain as of the date of breach. It would not reduce the damages if Seller were to sell the property later to another party for $80,000. The value of the bargain to Buyer on the date Buyer was entitled to it was $40,000.

      ★**Example (buyer's breach):** Mr. and Mrs. Lee entered into a contract to purchase Jones's home for $610,000, and then unjustifiably refused to perform. Jones later sold the house for $540,000 and sought to collect the $70,000 difference from the Lees. The trial court awarded Jones that amount as damages, together with another $87,000 in punitive damages and special damages for certain out-of-pocket expenses made by Jones in reliance upon the pending sale. In ***Jones v. Lee***, 971 P.2d 858 (N.M. App. 1998), the award of special and punitive damages was upheld, but the award of compensatory damages was vacated and the case remanded to determine whether the fair market value of the house on the date of the Lees' breach had declined to $540,000. The New Mexico appellate court instructed the trial court that, in making that determination, the later sale for a lesser price "may be considered evidence of the market value at the time of breach" and should be considered with all other

relevant evidence on that point. Note that even if no compensatory damages were proven, the Lees remained liable for the out-of-pocket losses incurred by Jones and for punitive damages because of the Lees' "wanton, utterly reckless" actions "in utter disregard of their contractual obligations."

b. **Deposit retention:** The venerable common law rule is that a seller may elect to retain the entire deposit made by the buyer in the event of buyer's breach, even if the deposit exceeds the actual damages to the seller. This rule has been criticized as unfair and inefficient. It is unfair because it gives the seller a windfall. It is inefficient because it deters efficient breaches — those that would be more economically beneficial than performance — by making the cost of the breach to the breaching party greater than the loss to the victim. See Richard Posner, Economic Analysis of the Law §4.10. Accordingly, a minority of courts limit retention of the buyer's deposit to the actual damages incurred by the seller, unless the parties have agreed to retention as liquidated damages.

★**Example:** Mr. and Mrs. Pirnie agreed to purchase the Kutzins' house and deposited $36,000 toward the purchase price. The contract contained no liquidated damages provision. After the Pirnies unjustifiably failed to perform the Kutzins sought to retain the entire deposit. A trial court ordered the Kutzins to return about half the deposit, but a New Jersey appellate court reversed that decision, applying the common law rule. In ***Kutzin v. Pirnie***, 591 A.2d 932 (N.J. 1991), the New Jersey Supreme Court abandoned the common law rule and adopted the rule in Restatement (2d) Contracts §374(1) that the party in breach is entitled to restitution of any portion of his deposit that is "in excess of the loss he has caused by his own breach." Principles of unjust enrichment and economic efficiency dictated the result. The court placed the burden of proof upon the party in breach and stressed that the rule was limited to realty sale contracts that did not dispose of the deposit as liquidated damages.

c. **Out of pocket:** This rule is primarily designed to limit the exposure of the seller who breaches innocently — whose breach is in good faith. About half the states limit damages awarded against a seller who has breached in good faith to the actual money that the buyer has expended in reliance on the contract, which means that the buyer is able to recover any part payments, expenditures on experts (e.g., engineers, lawyers, title insurers), and interest and fees incurred with respect to loans obtained in connection with the prospective purchase. The other half of the states make the good faith seller in breach liable for the entire benefit of the bargain.

**Example:** Seller agrees to sell Blackacre for $50,000 but cannot deliver marketable title due to a title defect previously unknown to Seller. At the closing date, Blackacre is worth $90,000. Buyer has paid $5,000 to Seller, and has incurred another $5,000 in lawyers' fees, appraisals, loan fees, and title examination costs. Seller's default is not the product of bad faith. In an ***out of pocket*** state Buyer is entitled to $10,000 damages. In a full ***benefit of the bargain*** state Buyer will be able to recover $40,000 damages.

d. **Liquidated damages:** Sellers typically protect themselves against a buyer's breach by stipulating in the contract that the buyer's deposit may be retained as ***liquidated damages*** in the event of buyer's breach. Such provisions are enforceable so long as there is some ***reasonable relationship*** between the deposit amount and the actual damages suffered by the seller.

**Example:** Seller and Buyer agree to transfer Blackacre for $50,000, and Buyer gives Seller a deposit of $5,000 which the contract recites may be retained by Seller as liquidated damages if Buyer should breach. Buyer breaches. Seller will assert that his actual damages consist of (1) the added cost of reselling the property (e.g., advertising and promotion), (2) the delay in consummating another sale and consequent reduction in the present value of a later sale at the same price (or, phrased differently, the loss of interest on the sale proceeds until the later sale is completed), (3) the uncertainty that any replacement sale will actually be for that price or better, (4) the loss of other prospective buyers, and (5) any expenditures made in reasonable reliance on Buyer's performance. Seller will probably be able to keep the $5,000 deposit as liquidated damages.

**Example:** Seller and Buyer enter into an ***installment sale contract*** for Blackacre, under which Buyer takes possession and pays Seller monthly installments of the $50,000 purchase price. Seller promises to deliver title after the entire purchase price has been paid. The contract recites that Seller may keep all payments as liquidated damages in the event of Buyer's breach. Buyer pays a total of $49,000 and then breaches. Almost no state will permit Seller to keep the $49,000 as liquidated damages. The installment sale contract will be treated as a mortgage (see section III, below) or the Seller will be required to refund to Buyer all payments in excess of Seller's actual damages. Otherwise, Seller gets $49,000 from Buyer and continued ownership of Blackacre.

**E. Duties of disclosure and implied warranties:** This section deals with the duties imposed by law on sellers to disclose known defects and the warranty, implied by operation of law, of quality in the construction of buildings. Warranties of title, which may be contained in the deed, are covered in section II, below.

**1. Duties of disclosure:** The traditional common law rule is that, absent a fiduciary relationship, a seller has no duty to disclose known defects in the property. The seller's duty was to refrain from ***intentional misrepresentation*** — the outright lie about the property's condition (e.g., the seller says "the roof is watertight" when he knows it leaks like a sieve) or ***active concealment*** of a known defect (e.g., the construction of a fake heating system to conceal the building's lack of a furnace). This rule of *caveat emptor* was justified on the theory that buyers ought to use diligence and care to examine the property for themselves. *Caveat emptor* has been largely abandoned today.

**a. Fiduciary relationships:** Even under *caveat emptor*, if the parties were in a fiduciary relationship — a relationship in which one party is dependent upon and reposes special trust in the other — the fiduciary was obligated to reveal all defects known to him. This duty arises from the fiduciary's obligation to place the other party's interests ahead of his own.

**b. Disclosure of seller-created conditions:** The narrowest departure from *caveat emptor* is the rule that a seller is obligated to disclose conditions that (1) are ***created by the seller,*** (2) ***materially impair property value,*** and (3) are ***not likely to be discovered by a reasonably prudent buyer using due care.***

★**Example:** Ackley owned a home in Nyack, New York, and repeatedly publicized various abnormal phenomena ("spectral apparitions") that had occurred in the house, encouraging the reputation of the house as haunted by ghosts. Stambovsky agreed to buy the house and

then learned "to his horror" that the house "was widely reputed to be possessed by poltergeists." He promptly sought to rescind the contract. In ***Stambovsky v. Ackley,*** 169 App. Div. 2d 254 (N.Y. 1991), a New York appellate court concluded that *caveat emptor* did not apply: The seller had promoted the property's reputation as haunted, and that reputation was not likely to be discovered by a reasonably prudent buyer ("the most meticulous inspection . . . would not reveal the presence of poltergeists . . . or unearth the property's ghoulish reputation . . ."). The court concluded, without discussion of the evidence, that the haunted reputation of the house "materially impair[ed] the value of the contract."

c. **Disclosure of latent material defects:** The emerging majority rule today is that a seller must reveal all ***latent material defects.*** A latent material defect is a defect that (1) ***materially affects the value or desirability*** of the property, (2) is ***known to the seller*** (or only accessible to the seller), and (3) is ***neither known to or "within the reach of the diligent attention and observations of the buyer."***

★**Example:** The Davises purchased Johnson's house, moved in, and learned within a few days that water leaked in around the windows and from the ceiling in two rooms. The Davises sued to rescind. In ***Johnson v. Davis,*** 480 So. 2d 625 (Fla. 1985), the Florida Supreme Court ruled for the Davises on two separate grounds. First, because Johnson had told the Davises that "the roof was sound" Johnson was liable for his fraud. Second, and quite apart from the fraud, the court concluded that Johnson was obligated to disclose any facts known to him or accessible only by him that materially affects the value or desirability of the property and which are either unknown to the buyer or cannot be learned by a diligent search.

See also *Lingsch v. Savage,* 213 Cal. App. 2d 729 (1963) and *Posner v. Davis,* 76 Ill. App. 3d 638 (1979). While courts may differ as to whether the test of materiality is ***objective*** (would the ***reasonable person*** think the defect was important?) or ***subjective*** (did the defect affect value or desirability to ***this particular buyer?***), a seller who fails to disclose all latent material defects has committed fraudulent concealment. The buyer may elect either damages or rescission. *Nystrom v. Cabada,* 652 So. 2d 1266 (Fla. App. 1995). The range of latent defects is quite broad. See *Reed v. King,* 145 Cal. App. 3d 261 (1983) (seller's failure to reveal the fact that the house had been the site of a decade-old multiple murder was actionable). Note particularly that in some statutes a seller is obligated to reveal the existence of environmental toxins known to be located on nearby property. See, e.g., *Strawn v. Canuso,* 140 N.J. 43 (1995); *Haberstick v. Gundaker Real Estate, Inc.,* 921 S.W. 2d 104 (Mo. App. 1966).

d. **Statutory disclosure obligations:** Some states have enacted statutes that require sellers to disclose a number of specified conditions. See, e.g., Cal. Civil Code §1102.6, which obligates sellers to reveal structural or soil defects, hazardous materials, underground tanks, alterations made without permits, encroachments, or neighborhood noise problems or other nuisances. This extensive disclosure obligation requires sellers to reveal the presence of annoying neighbors and possibly even barking dogs or crying infants. See, e.g., *Shapiro v. Sutherland,* 64 Cal. App. 4th 1534 (1998). California has gone from "buyer beware" to "seller tell all."

e. **Broker's disclosure obligations:** Some states impose upon the seller's broker the same disclosure duties that are imposed upon the seller. See, e.g., *McEneaney v. Chestnut Hill Realty Corp.,* 38 Mass. App. Ct. 573 (1995); *Easton v. Strassburger,* 152 Cal. App. 3d 90 (1984); Cal. Civ. Code, §2079.16.

f. **Post-closing survival of causes of action for nondisclosure:** The common law doctrine of merger held that upon passage of title all warranties in the sale contract were merged into the deed, and the buyer could then sue only on the warranties contained in the deed, if any. (On deed warranties, see section II, below.) This doctrine is now riddled with exceptions, the principal ones being that claims for fraud and actions based on promises collateral to the contract survive. The concept of a promise collateral to the contract can be expansive. See, e.g., *Davis v. Tazewell Place Associates*, 254 Va. 257 (1997) (promise to construct residence in "good and workmanlike manner" found to be collateral to sale of the land on which the construction was to occur).

2. **Implied warranty of quality:** The traditional rule was that a builder had no liability to anyone for his poor workmanship unless he had given an ***express warranty*** of quality. In time, a builder's warranty of quality was implied into the contract between builder and owner but the builder's liability for economic loss resulting from breach of this warranty was limited to those with whom he was in ***privity of contract*** -- the ***immediate purchaser*** of the structure from the builder or the owner with whom the builder contracted. Recovery in tort for the builder's negligence was generally unavailable because the loss was wholly economic -- neither damage to property or person. See, e.g., *Sensenbrenner v. Rust, Orling & Neale*, 236 Va. 419 (1988). In recent years, most jurisdictions have abandoned the traditional rules and now imply a warranty of quality by the builder of a new home that may be enforced by subsequent purchasers of the structure.

★**Example:** Dagenais built a garage for owners of property who then sold the property to the Lempkes. Shortly after the Lempkes took possession they noticed severe structural problems with the roof of the garage. After some fruitless attempts to persuade Dagenais to repair the garage the Lempkes sued Dagenais for negligence and breach of an implied warranty of quality. The trial court dismissed the complaint but the New Hampshire Supreme Court, in ***Lempke v. Dagenais,*** 130 N.H. 782 (1988), reversed as to the implied warranty claim. The court concluded that when a builder sells his structures a warranty of workmanlike quality is implied by law and runs for the benefit of subsequent purchasers with respect to *latent* defects that become apparent after the remote purchaser has acquired title and which could not have been discovered prior to the remote purchaser's acquisition. The court thought that abandonment of privity of contract was appropriate because in our mobile society defects often manifest themselves after a structure has changed hands, remote buyers are entitled to rely on a builder's skill even if they have not contracted with him, and because the builder already owes this duty to his immediate vendee an extension of this duty to others for a reasonable time does not unduly enlarge his liability.

a. **No disclaimer:** Courts generally agree that the implied warranty of quality in favor of subsequent purchasers may not be disclaimed but are divided about the rationale for that result. Some say it is grounded in tort law's implementation of public policies -- protecting innocent buyers of houses from shoddy work, imposing the risk of loss on the builder (the party most able to avoid the loss by building with care), and encouraging the creation of a sound housing stock. See, e.g., *LaSara Grain v. First Nat. Bank of Mercedes*, 673 S.W. 2d 558 (Tex. 1984). Other courts contend that the warranty is based on contract, but because the builder has created a defective product that will inevitably harm others beyond the initial buyer, have ignored privity of contract as a barrier to its enforcement. See, e.g., *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171 (1982). In theory, if the implied warranty is rooted

in tort it should be incapable of disclaimer but if founded upon contract its scope and existence ought to be limited by the bargain struck. Courts, however, pay no attention to theory here and generally are reluctant to permit disclaimer, perhaps because they have begun to agree that the warranty of workmanlike quality is implied by law to effect the public policies of placing the loss on the party best able to avoid it and to protect consumers from shoddy work they are illequipped to detect. See ***Lempke v. Dagenais,*** 130 N.H. 782 (1988).

**b. Limitations period:** Courts permit subsequent purchasers to bring suit against the original builder for a ***"reasonable time"*** — usually a period long enough for latent defects of the original construction to become apparent. Some states have enacted statutory limitations periods. See, e.g., Cal. Code Civ. Proc., §337.15 (10 years). The Uniform Land Transactions Act, §2-521, provides for a 6-year limitations period commencing with the initial sale, but that Act has not been adopted by any state.

**c. Subsequent owner's liability:** The owner of a home who is not the builder has no liability based on the implied warranty of quality. Only the original builder is liable on that theory, but a seller may be liable for breach of a duty to disclose a known defect.

**F. Risk of loss and equitable title:** During the time between making of the contract for sale and the closing various bad things can happen — the property can be destroyed or damaged, or one or both of the parties may die. The common law reacted to these possibilities by creating the notion of ***equitable title*** (or ***equitable conversion,*** as it is often called).

**1. Equitable title:** This doctrine holds that equitable ownership of the subject property passes to the buyer at the moment the contract of sale is made. Of course, the seller remains the legal owner until the closing, but for purposes of equity the buyer is treated as the owner. The seller's legal title is analogous to the legal title held by mortgage lenders in states that treat the mortgage as a transfer of legal title: It is retained as security for the buyer's payment of the purchase price. Because the doctrine is equitable, courts apply it in order to deliver fair results. The touchstone for its application is often whether it is necessary to carry out the parties' intentions or to avoid a palpable injustice. Note that only equitable title is passed to the buyer; unless the contract of sale permits the buyer to take possession prior to the closing, the buyer, as equitable owner, has no right to possession. If the contract does permit the buyer to take possession the buyer is obligated to avoid waste of the property, for that would impair the value of the seller's retained legal title. Equitable title does not apply to contracts giving the buyer an option to purchase until and unless the option is exercised.

**a. Application to death of a party:** An important effect of equitable title is that, for purposes of the seller's or buyer's death before closing, the parties are treated as having transferred the real property by entry into the contract. This means that a seller who dies after contracting but before closing leaves an estate that owns personal property — a contract right — and not real property. If the buyer dies before closing, the buyer's estate includes the real property.

**Example:** Opus, owner of Blackacre, enters into a valid contract to sell Blackacre to Baggins for $100,000. Before the closing, Opus dies. His will devises his real property to Bertha and his personal property to Camellia. At his death, Opus's interest in Blackacre is deemed to be personal property, which passes to Camellia. If Baggins performs, Camellia will receive the sale proceeds. If Baggins should default and equitable title should return

to Opus's estate Camellia will still receive Blackacre. At Opus's death, his interest in Blackacre was personal property; the later conversion of that interest into real property occurred after Opus's death so Blackacre represents the proceeds of the personal property. The character of Opus's property at his death is what matters. Similarly, if Baggins died before the closing his interest in Blackacre passes under his will as real property. Of course, Baggins's estate must perform at the closing for that real property to become tangible.

**b. Application to risk of loss of the property:** English law used the doctrine of equitable title to place on the buyer the risk of loss of the property from causes not attributable to either buyer or seller (e.g., fire, earthquake, storm damage). See *Paine v. Meller*, 6 Ves. 349, 31 Eng. Rep. 1088 (Ch. 1801). Most American states follow this rule, which requires the buyer to perform at the closing despite the loss. Of course, the seller must tender timely performance to perfect his choice of seeking either damages (measured by the diminution of value produced by the loss) or specific performance should the buyer default.

**i. Entitlement to insurance proceeds:** The old English rule was that the seller was entitled to insurance proceeds, even though the buyer had the risk of loss, because the insurance policy was regarded as a personal contract right of the seller. If the buyer wanted insurance protection, he would have to secure his own. Most American states reject this rule and require the seller to credit the insurance proceeds against the purchase price in an action for specific performance or, in an action for damages, reduce the damage award by the insurance proceeds. The rationale is that the seller is maintaining insurance as much for the benefit of the buyer as himself, and thus holds the proceeds in ***constructive trust*** for the buyer. See, e.g., *Bryant v. Willison Real Estate Co.*, 350 S.E. 2d 748 (W.Va. 1986); *Heinzman v. Howard*, 366 N.W. 2d 500 (S.D. 1985). It is always a good idea, however, for the buyer either to (1) procure his own insurance or (2) insert a provision in the sale contract requiring the seller to keep the property insured for the benefit of the buyer. A buyer who procures his own insurance keeps the proceeds even if risk of loss is on the seller, because it is quite clear that the buyer's insurance is obtained solely to protect the buyer's interest. No constructive trust is created.

**ii. Minority rule:** The minority of American courts place the risk of loss on the seller, despite the doctrine of equitable title, on the theory that an intact structure was an essential part of the bargain. See, e.g., *Caulfield v. Improved Risk Mutuals, Inc.*, 66 N.Y. 2d 793 (1985). Thus, if the loss is substantial, it falls entirely on the seller and the buyer may not be forced to perform. If the loss is insignificant, the buyer may still be forced to perform but is entitled to an abatement of the purchase price to reflect the lost value, usually measured by the insurance proceeds received by the seller. The minority rule is thus effectively the same as the majority rule in cases of ***insubstantial insured loss.*** The minority rule is different only in cases of ***substantial loss.*** In minority jurisdictions the buyer may ***not be forced to perform;*** in the majority of states the buyer ***must perform or incur liability,*** though the buyer will receive ***credit for the seller's insurance proceeds.***

**2. Risk of loss goes with possession:** Many states have enacted statutes that make the risk of loss go with possession. See, e.g., Cal. Civ. Code, §1662. Thus, despite equitable title, if the seller

remains in possession he assumes risk of loss. Buyers in these jurisdictions acquire risk of loss prior to closing only if they take possession or assume that risk under the sale contract.

# II. DEEDS

**A. Formal requirements and component parts:** A deed is the usual method by which title to realty is transferred. This section addresses the formal requirements for a valid deed and the elements of the instrument.

1. **Writing required:** The Statute of Frauds requires a writing signed by the grantor in order to transfer an interest in land. A deed signed by the grantor is the usual method of compliance, but other writings will suffice. Because the grantor is the only party bound by the deed (as distinguished from the contract of sale) only the grantor needs to sign the deed.

2. **Notarial acknowledgment:** A notarial acknowledgment is the act of a notary public attesting to the fact of the grantor's signature and to the identity of the grantor. A deed is valid without acknowledgment but virtually all deeds are acknowledged because notarial acknowledgment is almost universally required for recording the deed in the public land records.

3. **The grant:** The first clause in a deed is the ***granting clause,*** which recites the parties, the words effecting the grant, the consideration, and the description of the property.

   a. **Words effecting the grant:** Any expression of an intent to effect a transfer of realty will accomplish the grant. No "magic words" are required.

   b. **Description of the grantee:** Ordinarily the grantee is described clearly and specifically, but a grantee can be described without reference to a specific person, so long as the description is sufficient to identify an actual person. Otherwise the deed may not be valid, either because of uncertainty as to ownership or inability to deliver the deed to a nonexistent grantee.

      **Example:** A deed to the "first born son of Diana, Princess of Wales" is sufficient to describe William. A deed to the "eldest daughter of Diana, Princess of Wales" is invalid because no such person exists or ever will exist.

      i. **No grantee named:** While the traditional rule has been that a deed that mentions no grantee is void, most American states today hold that the ***intended grantee*** has ***implicit authority,*** as the ***agent of the grantor,*** to fill in the intended grantee's name at ***any later time.*** Without a grantee the deed is a legal cipher, but once the intended grantee's name is inserted it becomes effective. See, e.g., *Board of Education v. Hughes*, 118 Minn. 404 (1912).

   c. **Consideration:** While consideration is ***not necessary*** to convey land, deeds often recite the ***fact of consideration*** rather than the actual amount of the consideration. Thus, the granting clause often states "for ten dollars and other good and valuable consideration" in order to establish that the buyer is a bona fide purchaser for value (which gives the grantee the protection of the recording acts; see Chapter 7) and simultaneously keeps the actual purchase price out of the public records.

   d. **Description of the land:** The property conveyed may be described in any fashion that clearly and precisely identifies the parcel. Common forms of description include ***metes and***

***bounds*** (a surveyor's description of the length and direction of the boundaries), reference to a ***recorded survey map*** or other survey, and ***street and number.*** So long as the description contains enough to identify the land, an ambiguous description will suffice if extrinsic evidence will clarify the ambiguity. If there is no ambiguity in the description extrinsic evidence is not permitted to contradict the deed except to establish a mutual mistake in the description.

i. **Rules of construction:** If a property description is internally inconsistent, plainly mistaken, or incomplete, courts strive to ***determine the intentions of the parties.*** If there are no better clues to intent, courts employ a hierarchy of rules to sort out these problems. In descending order of preference and reliability, these are as follows: (1) ***original survey markers,*** (2) ***natural monuments*** (e.g., trees), (3) ***artificial monuments*** (e.g., structures), (4) ***maps,*** (5) ***courses of direction*** (e.g., "a line running ENE" or "a line 90 degrees to the left of the baseline"), (6) ***distances,*** (7) ***common names*** (e.g., "McDonald's Farm"), and (8) ***quantity*** (e.g., 140 acres).

**Example:** The deed description reads as follows: "Brigham's Farm, being that tract of 40 acres encompassed by a line beginning at an iron survey marker topped with a brass ball, located 10 feet due north of Highway 1, going east 1,000 feet to an old fir tree with a circumference of 25 feet, turning northerly 82 degrees and running for 1,220 feet to a wood rail fence marked on the USGS topographical map for the region, following the rail fence in a westerly direction for 1,750 feet to Bishop's Creek, then southerly along the bank of Bishop's Creek for 1,072 feet to the intersection with an undeveloped road platted on county survey map No. 872, as recorded in the county records, then southeasterly 420 feet to the point of origin." In trying to make sense of this description, we would first prefer the original iron survey marker even if it was not 10 feet due north of Highway 1, then we would prefer the old fir tree (even if it is more or less than 1,000 feet from the survey stake), then we would prefer the 82 degree course change to the 1,220 foot distance in order to reach the rail fence. If the fence is located in some place different from that marked on the USGS topographical map we would prefer its actual location to its mapped location. Again, we will prefer the meandering fence line to Bishop's Creek rather than the described distance and the natural course of the creek to the described distance along the creek. We will also prefer the mapped location of the undeveloped road to the asserted distance to it. Finally, as a last recourse, we would prefer "Brigham's Farm" over the described quantity of 40 acres. See, e.g., *Riley v. Griffin,* 16 Ga. 141 (1854).

**B. Warranties of title:** A seller's warranties concerning the state of the title conveyed are expressly contained, if at all, in the deed. No warranties are implied. There are three types of deeds: the ***general warranty*** deed, the ***special warranty*** deed, and the ***quitclaim*** deed. The general and special warranty deeds contain covenants that warrant the state of title; the quitclaim deed does not.

1. **General warranty deed:** The general warranty deed usually contains six covenants concerning title. Each covenant is a promise that the title is absolutely free of the warranted defect, regardless of whether the defect arose before or during the time the grantor had title. Occasionally, a general warranty deed will contain less than these six covenants. Some states have enacted statutes that provide that use of terms of conveyance in a deed (e.g., grant, sell, convey) carries with them the six general warranties of title. Such deeds are sometimes referred to as ***statutory warranty*** deeds; they are simply a statutory form of a general warranty deed.

a. **Covenant of seisin:** The grantor promises that he owns what he is conveying by deed.

b. **Covenant of right to convey:** The grantor warrants that he has the power or authority to convey the property.

c. **Covenant against encumbrances:** The grantor warrants that there are no liens, mortgages, easements, covenants restricting use, or other encumbrances upon title to the property other than those specifically excepted in the deed.

d. **Covenant of general warranty:** The grantor warrants that he will defend against ***lawful claims*** of a ***superior title*** and will compensate the grantee for any loss suffered by the successful assertion of a superior title.

e. **Covenant of quiet enjoyment:** The grantor warrants that the grantee will not be disturbed in his possession or enjoyment of the property by someone's successful assertion of a superior title to the property. This covenant is functionally identical to the covenant of general warranty and, for that reason, is frequently omitted from general warranty deeds.

f. **Covenant of further assurances:** The grantor promises to do whatever else is reasonably necessary to perfect the conveyed title, if it turns out to be imperfect. This covenant is also frequently dropped from general warranty deeds, perhaps because of the open-ended obligation imposed on the seller, or because it adds little to the first four covenants, or because the doctrine of after-acquired title (see section II.B.6, below) has made this covenant redundant.

2. **Special warranty deed:** A special warranty deed contains the same six (or fewer) covenants of the general warranty deed. The only difference is that the grantor warrants against defects of title that arose ***during the grantor's time of holding title.*** Defects arising ***before the grantor's ownership*** are not covered. The grantor warrants, in essence, only that the grantor has not created or suffered a defect to occur during his ownership period.

3. **Quitclaim deed:** A quitclaim deed contains no warranties of title whatever, but operates to convey to the grantee whatever interest in the property the grantor may own. If the grantor owns the Brooklyn Bridge, a quitclaim deed is sufficient to transfer ownership; but if the grantor owns no interest whatever in the Brooklyn Bridge, nothing is transferred by a quitclaim deed, nor is the grantor liable for breach of any covenants of title because none were made. The usual function of a quitclaim deed is to remove apparent and uncontested defects in title without resort to litigation.

4. **Merger doctrine:** The traditional rule is that any promises in the contract of sale ***with respect to title*** are "merged" into the deed once the buyer accepts the deed. This means that the buyer can only sue for breach of the deed covenants of title and may not rely on the contract of sale's provisions with respect to title. The justification for this rule is that buyer's acceptance of the deed is conclusive evidence that the buyer was satisfied that the deed fully conformed to the seller's obligations under the sale contract with respect to title. If the buyer was not satisfied that the deed conformed to the contract he should not have accepted the deed. The merger doctrine does not extinguish those portions of the sales contract that are ***independent of or collateral to the transfer of title,*** such as seller's promise to remove all rubbish from the premises. The merger doctrine is under attack and courts are apt to find a great many provisions of the sales contract to be independent of or collateral to transfer of title. The Uniform Land Transactions Act, §1-309, eliminates the merger doctrine and permits

all provisions of the sales contract to remain alive and enforceable by the buyer after acceptance of a deed.

5. **Breach of covenants of title:** Covenants of title may be divided into ***present covenants*** and ***future covenants.*** A present covenant is breached, if at all, at the moment the deed is delivered. A future covenant is breached when the grantee is actually or constructively evicted at some time in the future.

   a. **Present covenants — Seisin, right to convey, and encumbrances:** These are representations of presently existing facts. Either the grantor owns the property or he does not; he has the right to convey or he does not; title is burdened by an encumbrance or it is not. The covenant is either breached when made (because it was not true) or can never be breached (because the facts were as promised at that moment in time).

      i. **Breach of covenant of seisin:** This covenant is broken if the grantor doesn't own what he purports to convey, regardless of whether he is aware of the defect or not. The covenant is broken even if the grantee knows that the grantor does not own the interest purportedly conveyed. If title is totally defective (or so defective that the grantee is left with good title only to an unusable parcel) the grantee is entitled to a return of his purchase price but must reconvey the right to possession to the grantor. If title partially fails the grantee is entitled to recover that portion of the purchase price that is equal to the value of the failed title and must reconvey his possessory right.

      ii. **Breach of covenant of right to convey:** This covenant is broken if the grantor lacks the power or authority to convey the interest (e.g., grantor is a trustee who is barred by the trust instrument from transferring title), whether or not he is aware of the limits on his authority to convey. Grantee's knowledge of the grantor's lack of authority to convey is not usually a defense to suit on this covenant. The measure of damages for breach is the same as for breach of the covenant of seisin.

      iii. **Breach of covenant against encumbrances:** This covenant is breached if the title is encumbered (other than as expressly excepted in the deed) at the time of delivery of the deed, whether or not the grantor is aware of the encumbrance. In most states, the grantee's knowledge of the encumbrance does not excuse or obviate breach, but a minority of states hold that the grantee's knowledge (actual or constructive) of an ***open and visible*** encumbrance (such as an easement) prevents breach. See, e.g., *Leach v. Gunnarson*, 290 Ore. 31 (1980). The prevailing rule is that violations of governmental land use regulations that are not known to the seller and which have not become the subject of government enforcement are not encumbrances.

      ★**Example:** DiLoreto owned property abutting a tidal marsh. He contructed a bulkhead, filled a portion of the marsh, built a house, and sold it to Anzellotti by quitclaim deed. Two years later Anzellotti conveyed the property to Frimberger under a general warranty deed. When Frimberger sought to repair the bulkhead he learned that a significant portion of the lot unlawfully encroached on protected wetlands. Rather than seeking a variance from the use regulation Frimberger sued Anzellotti on the covenant against encumbrances. In ***Frimberger v. Anzellotti***, 25 Conn. App. 401 (1991), the Connecticut intermediate appeals court held that "latent violations of [governmental] land use regulations that do not appear on the land records, that are unknown to the seller . . . as to which . . . no official action to compel compliance [has been taken] at the time the deed

was executed, and that have not ripened into an interest that can be recorded . . . do not constitute an encumbrance." Recall that in ***Lohmeyer v. Bower*** the Kansas courts held that a present violation of zoning laws made title unmarketable and entitled the buyer to rescind the sale contract. The different result here is arguably justified by difference between an executory agreement and a fully executed one. In the executory agreement (e.g., ***Lohmeyer***) permitting the buyer to rescind enables the seller to minimize loss by finding another buyer willing to take the defective title (perhaps at a reduced price), but in the fully executed contract (e.g., ***Frimberger***) the damages imposed on the seller are under the buyer's control (perhaps Frimberger would conform to the use regulations in a particularly expensive way, calculated to enhance value to Frimberger). The ***Frimberger*** rule is not universally applied. See *Bianchi v. Lorenz*, 166 Vt. 555 (1997), in which the Vermont Supreme Court held that any significant violation of a government land use regulation, the existence of which could be determined by inspecting government records, constituted an encumbrance.

The measure of damages for breach depends on whether the encumbrance is removable by the grantee. If the ***grantee can remove the encumbrance*** (e.g., by paying off a mortgage or lien) the grantee is entitled to recover what he expended to remove the encumbrance. If a grantee fails to remove a removable encumbrance he will not receive damages unless he proves actual damage by selling the property for less than its unencumbered market value. If the encumbrance is ***not removable unilaterally by the grantee*** (e.g., an easement or use covenant) damages are measured by the difference between the unencumbered and encumbered fair market value at the time of the conveyance.

iv. **Statute of limitations:** Because breach of present covenants occurs, if at all, at the moment the covenant is given the statute of limitations begins to run at that moment. The length of these statutes varies, but is usually 3 to 6 years. Of course, the buyer ought to know about breach almost immediately.

v. **Assignment of present covenants:** The still-prevailing majority rule in America is that a present covenant is for the benefit of the immediate grantee and that, if breached when made, the grantee has a ***chose in action*** — the claim against the grantor — that is ***not impliedly assigned*** if the grantee conveys to a remote grantee. This rule is rooted in the now outmoded view that choses in action are not assignable. But because we permit assignment of choses in action today, there is no good reason to bar implicit assignment of the chose in action to the remote purchaser — the person who needs the benefit. Some states recognize this logic and hold, as do English courts, that a transfer to a remote grantee implicitly operates to assign the grantee's chose in action to the remote grantee.

★**Example:** Connelly acquired title to 80 acres at a foreclosure sale, then conveyed the property by general warranty deed to Dixon, who in turn conveyed by special warranty deed to Hansen & Gregerson. The foreclosure sale was invalid so Connelly never owned the 80 acres and thus breached the covenant of seisin given to Dixon, but because Dixon had conveyed by special warranty deed he had not breached the covenant of seisin he gave to Hansen & Gregerson. H&G sued Connelly on the covenant of seisin he had given Dixon, H&G's vendor. In ***Rockafellor v. Gray***, 194 Iowa 1280 (1922), the Iowa Supreme Court ruled that Dixon's chose in action was impliedly assigned to H&G by the conveyance to H&G.

**b. Future covenants — General warranty, quiet enjoyment, and further assurances:** These are representations as to future events, guaranteeing the grantee's security of title in the future. They are breached only when the grantee is actually or constructively evicted, which always occurs some time after the transfer. Actual eviction is, of course, actual dispossession from title or possession. Constructive eviction occurs whenever the grantee's possession is interfered with in any way by someone holding a superior title.

★**Example:** Bost conveyed 80 acres to Brown under a general warranty deed containing no exceptions, even though Bost only owned one-third of the mineral rights. After the statute of limitations on the present covenants had expired, Brown agreed to sell the mineral rights to Consolidated Coal for $6,000, but was forced to accept only $2,000 once it was learned that Brown owned only a third of the mineral rights. In ***Brown v. Lober***, 75 Ill. 2d 547 (1979), the Illinois Supreme Court ruled that Brown had not been constructively evicted because "the mere existence of a paramount title does not constitute a breach of the covenant" of quiet enjoyment. If the owner of the other two-thirds of the mineral rights were to start mining coal under Brown's land, Brown would be actually evicted. If, in order to prevent a real and manifest threat of such mining, Brown purchased the other two-thirds of the mineral rights from the owner, Brown would be constructively evicted, but if Brown purchased the other two-thirds of the mineral rights without such a threat it would probably not constitute constructive eviction.

**i. Breach of future covenants:** The future covenants are breached only when the grantee's possession has been disturbed by someone holding superior title. That can occur years after the original transfer and, as in ***Brown v. Lober***, after the statute of limitations has barred suit on the present covenants.

**ii. Benefit runs with the estate:** If there is ***privity of estate*** between the ***original grantor*** and the ***remote grantee*** the benefit of a future covenant given to the original grantee runs with the estate conveyed to the remote grantee. For this purpose, privity of estate means that the original grantor conveyed ***either*** **title** ***or*** **possession** and the same interest was conveyed to the remote grantee. If the original grantor had **neither** ***title nor possession*** (e.g., the original grantor was a brazen fraud with no interest in the subject property) there is no estate created with which the covenant can run. This rule, though logical, insulates wrongdoers from liability to remote grantees; thus it is not surprising that some courts have invented an "estate" held by the original grantor and passed on to the remote grantee, usually the mere possibility that the original grantor might later acquire an interest that would be passed on to the remote grantee under the doctrine of after-acquired title.

**iii. Extent of the obligation to defend:** The covenant of general warranty obliges the grantor to defend against **lawful** ***superior claims of title***, but imposes no obligation to defend against the spurious claim of paramount title. Because it is impossible to know one from the other with certainty prior to litigation, the effect is to require the ***grantee*** to defend. In the event the third party's claim of paramount title is lawful, the grantee will be able to recover the costs of defense plus damages. But if the third party's claim is defeated, the costs of the victory are borne entirely by the grantee, because the claim was not lawful. If the grantor is notified of the claim and asked to defend, the grantor will be bound by the result whether or not he defends.

Otherwise, the litigation between the grantee and the third party does not bind the grantor.

c. **General limit on damages for breach:** The overwhelming majority rule is that the grantee may not recover more than what the grantor-in-breach received for the property. This is problematic under several circumstances.

i. **Suit by original grantee:** When the original grantee has expended considerable sums to improve the property, or the property value has increased markedly due to extrinsic factors, the grantee will not be able to obtain the benefit of the bargain, but is limited to a return of his purchase price. On the other hand, without the basic damage limitation, grantors would face the specter of potentially ruinous open-ended liability. Prejudgment interest on the damages is often awarded but courts split over whether the interest should accrue from the date of the promise or the date of eviction. Courts holding to the former view argue that, because the grantee might be liable to the paramount for the grantee's wrongful occupation, interest is fair compensation for that potential liability. Courts holding to the latter view argue that, unless such a claim for rent is actually made, it would be a windfall to the grantee to award interest for the time the grantee is in possession. Some courts refuse to award damages to the grantee if the transfer was a gift.

ii. **Suit by remote grantee:** Nearly all courts agree that if the remote grantee has paid ***more*** for the property than the original grantor received, the remote grantee is subject to the general damage limit and will only recover what the original grantor received. See, e.g., ***Rockafellor v. Gray,*** 194 Iowa 1280 (1922). But if the remote grantee paid ***less*** for the property, courts differ on whether the remote grantee should recover (1) what the original grantor received, (2) what the remote grantee paid, or (3) actual damages up to the amount received by the original grantor.

6. **After-acquired title (estoppel by deed):** If a grantor conveys an interest in property that he does not own, and later acquires the unowned interest, this doctrine operates to send that after-acquired title directly and immediately to the grantee or his successors in interest. The grantor is estopped from denying the scope of the original deed. Put another way, the grantor's original deed carries an implied promise that he will convey the missing pieces of title should he later acquire them. Though originally limited to warranty deeds this doctrine now applies to quit-claim deeds conveying fee simple absolute, on the theory that the doctrine operates to effectuate the parties' probable intent.

**Example:** Schwenn gave her mineral rights to oil-producing property to her daughter. Then she conveyed the property (with no exception or reservation of the mineral rights) to Kaye. Once litigation threatened, Schwenn asked her daughter to reconvey the mineral rights to her and the daughter did so. At that moment, Schwenn's after-acquired title to the mineral rights was vested in Kaye. Schwenn was estopped from denying the validity and scope of her original deed to Kaye. *Schwenn v. Kaye,* 155 Cal. App. 3d 949 (1984).

C. **Delivery:** A deed must be delivered by the grantor in order to be effective to transfer an interest in land. ***Delivery*** means that the grantor has said or done things that demonstrate the ***grantor's*** **intent to transfer immediately** ***an interest in land to the grantee.*** Delivery does ***not necessarily require*** the physical act of handing over the paper deed to the grantee. The key is the ***grantor's intent.*** If a grantor hands a deed to the purported grantee and says, "You are to hold on to this until I'm dead,

and only then will it be effective," there has been no delivery. If the grantor executes and records a deed to the grantee, vacates the property, tells others that he has "given the farm" to the grantee, but neither informs grantee nor physically hands the deed to grantee, delivery has nevertheless occurred. Delivery problems do not usually occur in commercial transfers; usually delivery problems crop up when gifts are involved.

1. **Presumed delivery:** Courts employ a ***rebuttable presumption*** that delivery has occurred under any of the following circumstances: (1) ***physical transfer to the grantee,*** (2) ***notarial acknowledgment*** of the deed, or (3) ***recording*** of the deed. Courts also employ a ***rebuttable presumption*** that no delivery has occurred if the grantor retains physical custody of the deed.

★**Example:** Maurice Sweeney, estranged from his wife Maria, wished to ensure that upon his death his brother John would take Maurice's farm and tavern, rather than Maria. Maurice executed and recorded a deed of the property to John, and John executed a deed of the property to Maurice, which was not recorded. Both deeds were prepared at the same time by the town clerk, who gave the originals to Maurice. Later, Maurice gave both deeds to John. When Maurice died, Maria contended that the unrecorded but fully executed deed from John to Maurice had been delivered to Maurice and operated to vest title in Maurice. Accordingly, she claimed her elective share in Maurice's estate, including the farm and tavern. John asserted that there had been no delivery because he had never intended to deliver the deed to Maurice or, in the alternative, that there was an oral condition attached to the delivery — that the deed be effective only in the event John died before Maurice. In ***Sweeney v. Sweeney,*** 126 Conn. 391 (1940), the Connecticut Supreme Court of Errors ruled that because the John-to-Maurice deed had been manually delivered to Maurice there arose a presumption of delivery, which presumption was not rebutted by the fact that the motivation of John and Maurice was to defeat Maria's elective share by ensuring that title to the farm was in John at Maurice's death, but to cause title to return to Maurice if and only if John died before Maurice.

2. **Attempted delivery at death:** An attempt to deliver a deed at the death of the grantor is almost always ineffective. If the grantor intends that the deed become effective only upon his death, the deed is void unless it can be admitted as a will, and this is not usually the case because the formalities required for making a will are often lacking in the execution of a deed. If the grantor intended the deed to be effective during his life, the grantor's death does not destroy the delivery already accomplished by that intent.

★**Example:** Harold and Mildred Rosengrant, a childless elderly couple in failing health, owned a farm in Oklahoma which they wished to convey to their nephew, Jay Rosengrant, effective at their death. Harold and Mildred went to a local bank, where they executed a deed of the farm to Jay, which they handed to Jay, and Jay then handed the deed to the banker for safekeeping. Harold instructed the banker to keep the deed until he and Mildred had died, then to give it to Jay so that he could record the deed. The banker put the deed in an envelope marked J.W. Rosengrant or Harold H. Rosengrant and kept it in the bank's vault. After Harold and Mildred's deaths Jay Rosengrant retrieved the deed from the bank and recorded it. An Oklahoma trial court canceled the deed and in ***Rosengrant v. Rosengrant,*** 629 P. 2d 800 (Okla. App. 1981) the Oklahoma court of appeals affirmed, reasoning that the deed was never delivered during Harold and Mildred's lifetime because there was never any intent to give "outright ownership at the time of the delivery." The court made much of the fact that under the bank's policies the deed could have been taken at any time by Harold, but the court found the parties' extraordinarily clear intentions to be of lesser moment.

a. **Exception — Irrevocable escrow:** If a grantor executes a deed in favor of grantor and hands it over to an escrow agent with ***irrevocable*** instructions (either ***written*** or ***oral***) to hold it until the grantor's death, delivery has occurred. The rationale is that the escrow agent is the agent of ***both the grantor and the*** **grantee.** Delivery to the grantee's agent is delivery to the grantee. But if the escrow is ***revocable*** the escrow agent is deemed to be only the grantor's agent, so no delivery has occurred. It is sometimes said that delivery has not occurred because the deed is not yet out of the grantor's control. This rule is often criticized on the ground that a grantor can validly accomplish the same end by simply transferring the property into a revocable trust, with the grantor as both trustee and beneficiary for life, and the grantee as beneficiary upon the grantor's death.

b. **Uncertain exception — Express conditions:** A deed may contain an express provision that makes transfer of possession conditional upon the grantor's death (e.g., "to *A*, effective upon my death" or "to *A* if *A* survives me"). These conditional grants can be interpreted to mean either that the deed has passed a ***springing executory interest*** to the grantee or that ***no delivery has occurred*** — the deed is a nullity until the subsequent condition (the grantor's death) occurs. By the latter construction the deed would be of no effect unless it could qualify as a will. By the former construction the grantee received a valid springing executory interest which became possessory upon grantor's death. Courts are badly divided on this issue, and there is no safe general answer. The academic answer is that the deed should be given effect as making a transfer of a springing executory interest, because the deed is adequate by itself to indicate the grantor's intentions at death. There is little reason to be worried that, by giving effect to the deed, the grantor's wishes concerning disposition of his property upon death are not being carried out. Presumably the grantor appreciated the significance of the deed when he signed it and there is no need to rely on evidence other than the deed itself to carry out the grantor's wishes.

i. **Grant of life estate distinguished:** Of course, a grantor can convey by deed a life estate to himself and a remainder in another grantee. Such grants are valid and not problematic, so long as they are clear. The effect of a grant from *O* "to *A*, effective on my death" and a grant from *O* "to *O* for life, then to *A*" may be functionally identical, but only the latter clearly creates a life estate. The former style is uncertain. While it may be valid as a springing executory interest many courts will conclude that it is void for want of delivery — the present intention to transfer an interest in the subject land.

3. **Delivery subject to oral condition:** The usual response to delivery of a deed subject to an oral condition is to disregard the oral condition and treat the delivery as complete and unqualified, but this rule is not invariable.

★**Example — Unenforceable condition:** Refer back to *Sweeney v. Sweeney*, 126 Conn. 391 (1940), section II.C.1, above. John Sweeney claimed that the John-to-Maurice deed was delivered to Maurice subject to an oral condition — that delivery be effective only if John predeceased Maurice — and that because that condition had not occurred there was no valid delivery. Connecticut's highest court rejected this contention, noting that because the delivery had been made directly to the grantee (Maurice) rather than to a neutral escrow agent the condition was unenforceable.

★**Example — Enforceable condition:** Facing the prospect of hazardous military duty, Husband delivered a deed to Wife with oral instructions that if he were killed she should record the

deed, but if he returned she must return the deed to him for destruction. Husband returned from the mission but Wife refused to return the deed, perhaps due to other marital difficulties. In *Chillemi v. Chillemi*, 197 Md. 257 (1951), Maryland's highest court enforced the oral condition and voided the deed. The court styled as "primitive formalism" the "ancient rule" that physical transfer of a deed to the grantee subject to an oral condition of later effectiveness is a completed delivery. In the Maryland court's view, "conditional delivery is purely a question of intention, and it is immaterial whether the [deed], pending satisfaction of the condition, is in the hands of the grantor, the grantee, or a third person."

4. **Commercial escrows:** Most real estate transfers involve a commercial escrow. Usually, the seller gives the escrow holder specific written instructions that define the escrow agent's authority to hand over the deed to the buyer. The transfer of a deed into escrow along with written instructions is a completed delivery. Delivery is also completed when the deed is given to the escrow holder under oral instructions ***if there is a written sale contract.*** But without a written sales contract, an escrow agent holding a deed under oral instructions is deemed to be the seller's agent only, and the seller is empowered to revoke the escrow at any time. The power to revoke undermines the claim that the seller had an intention to pass title at the moment the deed was placed into the escrow agent's hands. Also, the oral instructions may well be silent on the essential issue of price. Despite these objections, a few states regard delivery as completed when the deed is placed in escrow under oral instructions.

   a. **Equitable title:** Although legal title passes only when the deed is handed over to the grantee out of escrow, equitable title passes to the grantee once delivery is completed to the escrow agent. This is more usually called the ***relation-back doctrine*** — the essential idea is that the buyer's title, once acquired out of the escrow, will "relate back" to the moment the deed was delivered into escrow. This fiction enables courts to ignore the effect of the grantor's death or incapacity after deposit into escrow, or a creditor's attempted seizure of the property after the deed is delivered into escrow. From that moment on, the buyer has equitable title.

      i. **Exception — Bona fide purchasers:** If a seller double-crosses his buyer after depositing a deed into escrow, by conveying a deed to a ***bona fide purchaser*** (a person who pays real consideration and has no knowledge of the pending escrow), the bona fide purchaser (holder of legal title) prevails over the first grantee's equitable title. As between two innocents, the loser is the one who has yet to rely completely upon the seller's duplicity.

5. **Delivery by estoppel:** Even if a grantor does not intend to deliver a deed, he will be estopped from denying delivery in two principal circumstances.

   a. **Entrustment to a deceitful grantee:** If the grantor gives a deed to a grantee with no intent to transfer title, but the grantee uses the deed to convey to a third party bona fide purchaser, the grantor will be estopped from denying delivery.

      **Example:** Damian gives Agnes a deed to Blackacre, telling her, "Look it over and think about it, for this is what I propose to do if you will marry my son, Mordred." Instead of marrying Mordred, Agnes records the deed and promptly sells Blackacre to Myrtle, who pays good value and is utterly ignorant of the circumstances under which Agnes obtained the deed from Damian. Damian will be estopped from denying delivery to Agnes. Damian had more opportunity than Myrtle to avoid the problem (he could have simply told Agnes of

his planned marital gift), so the loss should fall on him. Of course, he may have recourse against Agnes.

b. **Entrustment to a negligent escrow agent:** If the grantor gives a deed to an escrow agent but the grantee obtains it wrongfully, using it to sell the property to a bona fide purchaser, courts are split on whether the grantor is estopped from denying delivery.

i. **Rationale for estoppel:** The grantor chose his escrow agent so he ought to shoulder the consequences of a poor choice. The grantor could have picked a more careful or honest agent. The grantor is more culpable than the bona fide purchaser so the grantor should lose.

ii. **Rationale for no estoppel:** The grantor didn't intend delivery so he ought not be prevented from denying delivery. The problem with this view is that it does not really address the underlying issue — of two innocents, which should bear the loss? The usual answer to this question is that it should fall on the party who had the better ability to prevent the loss in the first place. To say that the grantor didn't intend delivery does not address this problem. However, courts holding to this view will estop the grantor if the grantor knew about the grantee's wrongful possession and did nothing about it. In a sense, these courts are saying that they will not hold the grantor's agent's conduct against him, but will hold the grantor responsible for his own conduct.

# III. FINANCING DEVICES: MORTGAGES, DEEDS OF TRUST, AND INSTALLMENT CONTRACTS

A. **Mortgages:** Loans secured by mortgages are the principal device enabling people to acquire real property. Very few people are able or willing to pay the entire purchase price in cash. Instead, they borrow a significant portion of the purchase price from a lender on terms that require them to repay the loan with interest via monthly payments made over an extended period of time (frequently 30 years). To secure repayment of the loan, the lender will require the borrower to give the lender a mortgage on the property. The mortgage empowers the lender to sell the property in the event of the borrower's default on the loan, and to apply the sale proceeds to repayment of the loan. Any proceeds left over go to the borrower. Generally, if the sale proceeds do not eliminate the loan the borrower remains liable for the deficiency. This discussion of mortgages is only the tip of the mortgage law iceberg; there are a great many state variations on the general principles outlined here, but this outline will enable you to understand mortgages in the context of a first-year Property course.

1. **The mortgage transaction:** The term "mortgage" is often used loosely to refer to the entire transaction, which consists of two distinct elements: the ***loan*** and the ***mortgage.*** The loan is evidenced by a ***promissory note,*** a personal promise to repay the loan on the terms contained in the note. The mortgage is evidenced by a document called a ***mortgage;*** it is a ***security agreement*** between the parties, by which the borrower gives the lender the right to sell the property if the borrower defaults on the loan and to apply the sale proceeds toward reduction of the loan. The mortgage is usually recorded in the public land records, thus giving notice of the lender's security interest in the property. In some places the note and the mortgage are combined into a single instrument, but they still perform separate functions. The borrower is often called the ***mortgagor;*** the lender is the ***mortgagee.***

**a. Development of the mortgage:** The mortgage began as a conveyance. Lenders would require the borrower to convey the property to the lender in fee simple subject to a condition subsequent (e.g., "Borrower conveys Blackacre to Lender, but if Borrower pays £1,000 to Lender on Christmas Day, 1643, Lender will reconvey Blackacre to Borrower"). The law courts rigidly enforced this provision. If Borrower tendered £1,000 on Boxing Day (Dec. 26), 1643, it was too late; Blackacre was irrevocably Lender's.

**i. Equity of redemption:** The equity courts began to rule that the borrower had an equitable right to redeem the property at any time after the due date. This ***equity of redemption***, unlimited in time, was a constant cloud on title that made the property effectively inalienable. To remove the blot, lenders then brought suit in the law courts to ***foreclose equity of redemption*** — by obtaining a court order to extinguish the equitable right of redemption and sell the property free of that cloud to a new purchaser. Today's mortgage foreclosure is similar — the equity of redemption is extinguished, the property is ordered sold, the sale proceeds are applied to the loan and any excess is given to the borrower. Note carefully that the foreclosure sale cuts off ***only*** this ***judicially created equity of redemption.***

**ii. Statutory right of redemption:** About 20 states have created a separate, independent ***statutory right of redemption,*** which gives the borrower a defined period of time (anywhere from a few months to a year or two) ***after the foreclosure sale*** in which the borrower can redeem the property from the purchaser at the foreclosure sale.

**b. Types of mortgages:** Although all mortgages have the same general characteristics there are some terms of art used to describe mortgages with different features. The principal types follow.

**i. First and second mortgages:** The same property can be used to secure more than one loan. The first mortgage is the mortgage that is given first in time. The second mortgage is given next in time. Sometimes these are referred to as senior mortgages or junior mortgages. The second mortgage is taken subject to the rights of the senior mortgage. Upon foreclosure, the holder of a second mortgage is entitled to share in the sale proceeds only after the first mortgage has been fully satisfied.

**ii. Fully amortized mortgage:** A fully amortized mortgage loan is one in which the principal is retired over the life of the loan so that the monthly payments are constant (if the interest rate is fixed for the life of the loan) or vary with interest rates (if the interest rate is adjustable by formula during the life of the loan). Most residential mortgage loans in the United States are fully amortized.

**iii. Balloon payment mortgage:** Some mortgage loans provide for very small payments of principal during the life of the loan (or none at all). While such loans reduce the monthly payment, they require payment of the entire principal balance on the due date. Because few borrowers are likely to have cash on hand to make that payment, a balloon payment mortgage has the practical effect of forcing the borrower to obtain a new mortgage loan to retire the old one.

**iv. Purchase money mortgage:** A mortgage loan made for a portion of the purchase price is a purchase money mortgage.

2. **Title or lien?** States take different views of whether the mortgagee (the lender) has ***title*** to the mortgaged property or only a ***lien*** upon that property. The title theory predominates in the east and the lien theory is favored by western states. The difference is no longer of much practical consequence, because title theory states treat the lender's title as for security purposes only, thus making it virtually indistinguishable from a lien. The only difference lies in who is entitled to possession. In some title theory states the mortgagee is entitled to possession; in other title theory states the mortgagor is entitled to possession until default and the mortgagee is entitled to possession thereafter. In lien theory states the mortgagor is entitled to possession until foreclosure. In title theory states a lender has enhanced ability to recover possession after default fairly quickly (by suit for ejectment or judicial appointment of a receiver).

3. **Sale or transfer by the mortgagor:** A mortgagor is always free to transfer his ***"equity"*** — his interest in the property. *Equity* is the term used to describe the value of the borrower's interest in the property — the difference between market value and the principal balance of the loan secured by the mortgage. The term originated as a shorthand expression for the interest protected by the equity courts in the early days of mortgages. A buyer of the mortgagor's interest can acquire the interest ***subject to the mortgage*** or can ***assume the mortgage.***

   a. **Acquisition subject to the mortgage:** By taking title subject to the mortgage the buyer incurs ***no personal liability on the mortgage.*** In the event of default the mortgagee can foreclose and sell the property, but if the foreclosure sale proceeds do not extinguish the debt the lender has no further recourse against the owner who has acquired title subject to the mortgage. The lender can, however, obtain a personal judgment against the original mortgagor for the deficiency, except to the extent states prohibit deficiency judgments.

   b. **Assumption of the mortgage:** If a new buyer assumes an existing mortgage he becomes ***personally liable for the mortgage loan.*** The lender can obtain a deficiency judgment against the assuming buyer as well as the original mortgagee (unless the lender has released the original mortgagee).

   c. **Due-on-sale clauses:** Lenders dislike transfer of the mortgagor's interest, whether by assumption or by taking subject to the mortgage, because it is against their financial interest. In periods of declining interest rates, buyers will not likely assume or take subject to an existing fixed-rate mortgage, because they can obtain a new mortgage at lower rates. But in periods of rising interest rates, buyers will be anxious to assume or take subject to an existing fixed-rate mortgage at a lower-than-current-market rate. Lenders, of course, would prefer that the buyer obtain a new mortgage at a higher rate. Lenders also say they are concerned that the new buyer might be less creditworthy, but that argument is mostly bogus because the original mortgagor remains personally liable and the property is the principal security for the loan. To prevent assumption of or a sale subject to a mortgage lenders insert a ***due-on-sale clause*** into the mortgage and loan. This provision permits the lender to demand immediate payment of the outstanding principal balance of the loan in the event the mortgagor sells his interest. In the 1970s some states, particularly California, invalidated due-on-sale clauses. Lenders reacted by obtaining federal law, which preempts state law, making due-on-sale clauses enforceable. See, e.g., *Fidelity Fed. Sav. & Loan Assn. v. De La Cuesta*, 458 U.S. 141 (1982).

4. **Default by mortgagor:** In most states the lender has the option of a suit to collect the debt or to foreclose and effect a sale of the property to satisfy the debt. A few states require the lender first to foreclose and sell before seeking to enforce the debt personally by obtaining a deficiency judgment. The availability and utility of deficiency judgments are often limited by statute.

   a. **Anti-deficiency statutes:** Some states prohibit deficiency judgments on purchase money mortgage loans for residences. These statutes reflect a legislative bias in favor of homeowners. A variation is to permit a deficiency judgment only for the amount by which the debt exceeds a judicially determined fair market value for the property.

   b. **Statutory right of redemption:** The statutory right of redemption after foreclosure typically permits redemption by paying the ***foreclosure sale price*** rather than the ***mortgage debt.*** This is a strong inducement to the mortgagee, who is often the only bidder at a foreclosure sale, to bid the amount of the mortgage debt. Otherwise, the mortgagee might buy the property for a trifling fraction of the mortgage debt and seek to collect the remainder through a deficiency judgment. In some states the mortgagor in default may stay in possession until the expiration of the statutory redemption period.

   c. **Inadequate sale price at foreclosure:** The fact that the sale price at foreclosure is inadequate, in the sense that it is less than fair market value, will not by itself void the foreclosure sale. The usual rule is that the sale price will stand unless it is so far below market value that it "shocks the conscience" or fraud or other overbearing unfairness is present. Some states go further, however, and impose on the mortgagee a fiduciary duty to act in a commercially reasonable manner in conducting a foreclosure, such that reasonable efforts are made to realize a fair price.

   ★**Example:** The Murphys refinanced their home in 1980, executing a promissory note secured by a first mortgage in favor of Financial Development Corp. FDC then sold the mortgage to Colonial Deposit. By September of 1981 the Murphys were 7 months in arrears on their mortgage payments and the lender gave notice of its intent to foreclose. Although the Murphys then paid the overdue mortgage payments they failed to pay additional costs which had come due as a result of the foreclosure notice. The lenders scheduled a foreclosure sale for December 15, 1981, which occurred on that day. Present at the foreclosure sale were the Murphys, a lawyer retained by the lender to conduct the sale, and a representative of the lender. The lender made the only bid, $27,000, which was roughly the amount owed to the lender by the Murphys. Two days later the lender sold the Murphys' home to a realtor for $38,000. The Murphys sued to set aside the foreclosure sale; a trial court refused to set aside the subsequent sale to the realtor because he was a bona fide purchaser for value but did award the Murphys $27,000 damages, an amount equal to the difference between the foreclosure sale price and the market value of the home, and legal fees due to the lender's bad faith. In ***Murphy v. Financial Development Corp.***, 126 N.H. 536 (1985), the New Hampshire Supreme Court ruled that the lender was a fiduciary in conducting a foreclosure sale, and thus owed a duty of good faith and due diligence to exert commercially reasonable efforts to obtain a fair and reasonable price, but the court ruled that the lender did not act in bad faith. The lender did not advertise or use any other commercially reasonable methods to generate interest in the property. The New Hampshire Supreme Court also ruled that the trial court erred in its determination of damages: Rather than finding damages to be the difference between foreclosure price and *fair market value* damages are the difference between foreclosure price and a *fair price*. A fair price may

be less than fair market value because fair market value can be expected to be realized in a voluntary exchange with plenty of opportunity to shop for buyers; in a forced sale some diminution in price is reasonable. But the key point is that the lender must act diligently to generate a fair price.

**B. Deeds of trust:** The deed of trust is used in many states as the form of mortgage.

1. **How it works:** The borrower conveys the real property to a third party as ***trustee*** for the lender, for the limited purpose of securing repayment of the debt. The trustee is often a nominee of the lender (e.g., the lender's lawyer, employee, or affiliated corporation). The deed of trust gives the trustee the power to sell the property upon default (the ***power of sale***), to use the proceeds to pay off the debt, and return any excess to the borrower.

2. **Difference from the mortgage:** Traditionally, judicial foreclosure was required to enforce a mortgage, which meant bringing suit and conducting a judicially supervised sale, a time-consuming and costly process. A power of sale vested in a trustee, by contrast, is relatively quick and cheap. In some states, the mortgagee may not be given a power of sale; in other states, a mortgagee may exercise the power of sale if the mortgage gives the mortgagee that power. Under a deed of trust the sale is conducted by the third party trustee at the lender's request, which is virtually identical to the procedure under a mortgage with power of sale vested in the mortgagee. Some states treat deficiency judgments or redemption differently, depending on whether a deed of trust or mortgage is the security instrument.

**C. Installment sale contracts:** The installment sale contract is, in form, merely a contract of sale for real property obligating the purchaser to pay the purchase price in installments and obligating the seller to deliver title to the buyer after the purchase price has been paid in full. Economically, the transaction is indistinguishable from delivery of a deed to the buyer in exchange for a note and purchase money mortgage to secure the purchase price.

**Example:** Vendor, owner of Blackacre, agrees to sell Blackacre to Vendee for $133,333, under an installment sale contract by which Vendee takes possession and agrees to pay the purchase price at the rate of $1,111 per month for 10 years, and Vendor agrees to deliver a deed to Vendee when the purchase price is fully paid. This is economically identical to a transaction by which Vendor deeds Blackacre to Vendee now, and receives from Vendee a note for $100,000, bearing interest at 6 percent per year, requiring Vendee to make monthly payments of $1,111 for 10 years (at which time the debt will be extinguished), secured by a mortgage.

1. **Treated as contract of sale:** The original reason for the installment sale contract was the seller's desire to avoid the procedural difficulties of extinguishing a mortgagor's equity of redemption. If a buyer under an installment sale contract defaulted, the seller could summarily evict the buyer upon default and, perhaps, keep all or a large part of the partially paid purchase price as damages. See, e.g., *Jensen v. Schreck*, 275 N.W. 2d 374 (Iowa 1979). Because the seller retained legal title until the buyer had fully performed, buyer's default served to excuse any further performance on the seller's part. This result was very much like the old ***"strict foreclosure,"*** by which the equity of redemption was irrevocably cut off. See, e.g., *Harris v. Griffin*, 109 Ore. App. 253 (1991).

2. **Treatment as a security device:** The modern trend of courts is to treat installment sale contracts as security devices. There are two good reasons for this view: (1) the installment sale contract is economically indistinguishable from a mortgage, and (2) it is inequitable to

permit a buyer to lose his equity of redemption under circumstances where an identically situated mortgagor would not. Nowadays a court is likely to require judicial foreclosure of an installment sale contract, permit the seller to retain payments only to the extent of the reasonable rental value of the property, and perhaps give the buyer an equitable right to cure his default and resume payments (analogous to the mortgagor's equity of redemption).

★**Example:** Buyer agreed to purchase Seller's home under an installment sale contract for $15,000. The contract required Buyer to pay the $15,000 over 15 years at 5 percent interest on the unpaid balance, in monthly installments of $118.62, for a total of payments of about $21,350. The contract provided that if Buyer defaulted and failed to cure the default for 30 days Seller could terminate the contract, take possession, and retain all payments paid. Eight years into the contract Buyer defaulted, having paid about half the purchase price. Seller sought to eject Buyer and a New York trial court granted summary judgment to Seller. In ***Bean v. Walker***, 95 App. Div. 2d 70 (1983), a New York intermediate appeals court reversed, holding that the principle of equitable title or equitable conversion applied, causing title to vest in the buyer at the moment the contract was executed, placing the buyer in the same position as a mortgagor. See also *Parise v. Citizens Natl. Bank*, 438 So. 2d 1020 (Fla. App. 1983); *Skendzel v. Marshall*, 301 N.E. 2d 641 (Ind. 1973); *Union Bond & Trust Co. v. Blue Creek Redwood Co.*, 128 F. Supp. 709 (N.D. Cal. 1955).

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## *Exam Tips on* TRANSFERS OF REAL PROPERTY

- Note your professor's interests and inclinations. A lot of this area is contract law imported into Property. If your professor is fond of this material it is more likely to be tested. If your professor treats it in cursory fashion, don't ignore it, but it may be of lesser importance in his or her pedagogical calculation.
- Contracts of sale involve issues of enforcement and choice of remedies. Remember the implied duties imposed on sellers here; watch out for facts suggesting a lack of marketable title, or breach of a duty to disclose.
- Deed warranties are fruitful areas of testing. Pay attention to the type of deed and the facts that will indicate which, if any, covenants may be violated. Make sure you have a good understanding of the method by which damages for violation of deed covenants are determined.
- The law pertinent to real estate finance is a bit of a speciality, but if your professor covers this material, watch out for an exam question. Good candidates include an installment sale contract in which the buyer has defaulted, and foreclosure or private sale at which the lender arguably fails to act in a commercially reasonable manner.

CHAPTER 7

# ASSURING GOOD TITLE TO LAND

*ChapterScope*

- This chapter examines the problem of how current owners can obtain assurance that they actually have good title to the land they purchase. Included is discussion of how problems occur, often by multiple purchasers of the same land from the same seller, and the mechanisms of resolving these competing claims — recording acts, marketable title acts, title insurance, and registered title. Here are the most important points in this chapter.
- In cases of conflicting claims to the same property, the common law preferred the earliest claimant in time. That rule has been largely displaced by recording acts, which operate to give priority to those claimants who comply with the terms of the act.
  - Recording acts are based on the fact that every county in America maintains a public record of title transactions in real estate, usually organized and indexed alphabetically by grantors and grantees, in which any title transaction may be recorded. There are three types of recording acts: Race, Notice, and Race-Notice.
    - Race statutes give priority to the title claimant who first records his deed.
    - Notice statutes give priority to the bona fide purchaser who lacks notice of a prior unrecorded claim.
    - Race-Notice statutes give priority to the bona fide purchaser who lacks notice of a prior unrecorded claim only if the bona fide purchaser records first.
- Marketable title acts function as a statute of limitations to cut off old claims of title. The acts bar assertion of title claims that are not in the chain of title within some specified period of time prior to the present, but there are many exceptions to the limitations bar of marketable title acts.
- Registered title substitutes a registration system for the prevailing notice system. Under registered title, the title is exactly what is registered in the registry, and nothing can impeach that title. It delivers certainty but if the registered title is in error, the results can be devastating. Registered title is not popular in the United States.
- Title insurance is the most widely used method of providing meaningful assurances of good title. A well-funded title insurer issues a policy of title insurance to the owner, promising to insure that title is as stated in the policy, and stands ready to reimburse the insured for any title defects, up to the policy limits.

## I. INTRODUCTION

A. **The problem:** To paraphrase James Madison, if men were angels there would be no need for methods to assure good title to land. But humans are often rogues, and sometimes they convey the

same property more than once. The rogue grantor may be universally condemned, but the remaining problem is to decide which purchaser from the rogue is to prevail.

**Example:** Rogue, owner of Blackacre, conveys it to Angel on January 1 for $50,000. On January 10, before Angel has taken possession, Rogue conveys Blackacre to Beatrice for $50,000. Beatrice is ignorant of the prior conveyance to Angel. Rogue is, of course, a scoundrel, but let us suppose he has disappeared with his $100,000 and so cannot be forced to disgorge his ill-gotten gain. As to the innocents — Angel or Beatrice — who should prevail?

1. **The common law answer:** The common law used the ***first-in-time*** principle to award title to Angel. She was the first grantee and, at that moment, Rogue conveyed his interest in Blackacre. Rogue had no interest in Blackacre to convey to Beatrice, so she was the loser. To protect grantees, the common law relied heavily on the warranties of title contained in a general or special warranty deed (see Chapter 6, section II.B), but these were of little use if Rogue had skipped off with his loot.

2. **Modern answers:** Because the common law method was crude, uncertain, and harsh, Americans quickly devised better methods of assuring good title. A brief summary of these methods follows.

   a. **Recording:** The first innovation was ***recording.*** A recording act creates a system for placing conveyances in a public record, and then stipulates who has priority in the event of conflict. A deed is valid without recording, but an unrecorded deed is likely to lose out to a recorded deed if both deeds are from the same grantor to the same property. In the example, neither Angel nor Beatrice have recorded, so the recording act does not apply until one or both records. There are three different types of recording acts, and the answer may vary. See section II, below.

   b. **Registration:** A later method, and one not much used in the United States, is to create an official registry of land titles. This system is different from recording of conveyances in that the ***registry is the title,*** and the public records simply contain ***evidence of title.*** From the example above, Rogue's registered title, in a registry system, would be replaced by a new registration in Angel. Beatrice would probably never part with the purchase price because of the inability to register title in her name. See section III, below.

   c. **Title insurance:** A ubiquitous method for obtaining practical assurance of good title is to obtain ***title insurance.*** For a fee, a title insurer agrees to ***defend title*** and to ***compensate for the loss of the insured title to the claim of a paramount owner.*** So long as the title insurer remains solvent, this is good enough for most buyers. The title insurer, of course, carefully examines title before issuing its title insurance policy, and will refuse to insure if it finds any defects in title. But a title insurer will not generally insure title unless the purchaser's deed is recorded and the insurer is satisfied that no rival claimant can have a better title. In the example, because neither Angel nor Beatrice have recorded, it is not likely that either could find an insurer willing to provide title insurance without specifically excepting from its coverage any unrecorded prior conveyances.

## II. RECORDING ACTS AND CHAIN OF TITLE PROBLEMS

A. **The recording system:** A public official in each county, often called the county recorder, maintains a record of the transactions affecting real estate located in the county, but that record is only as

complete as what is presented to the recorder for filing. Any instrument affecting realty may be filed and recorded so long as it meets the formal requirements for recording (usually notarial acknowledgment). The most common instruments that are recorded are deeds and mortgages, but such things as judgment liens, tax liens, installment sale contracts, and leases can and often are recorded.

1. **What the recorder does:** The recorder's job is mostly ministerial. The recorder accepts instruments for filing by stamping the date and time of filing on them, then photocopying them and placing the copy in an official record. The original is returned to the person who presented it for filing. Then the recorder ***indexes the instrument*** by noting a description of the instrument in an index maintained to facilitate location of the instrument. Just as a searcher for a library book must consult a catalog of books by author, or subject, or title, the searcher of title records must consult the recorder's index. There are two types of indexes.

   a. **Grantor-grantee index:** By far the most common type of index is the grantor-grantee index. An alphabetical record of all grantors and all grantees, by surname, is maintained in separate volumes. The typical entry will contain the date, the name of the grantor (or grantee, as appropriate), the other party to the transaction, a brief description of the property and the instrument, and a citation to the precise location in the public records of a complete copy of the instrument.

      **Example:** On July 2, 1988, Harry Simpson conveyed 123 Elm Street to Agnes Darby. Here is how that transaction might appear in the grantor index of the county:

      > SIMPSON, Harry to Darby, Agnes, 7/2/88, General warranty deed to 123 Elm Street, recorded in Book 484, Page 1186.

      And here is how that transaction might appear in the grantee index of the county:

      > DARBY, Agnes from Simpson, Harry, 7/2/88, General warranty deed to 123 Elm Street, recorded in Book 484, Page 1186.

   b. **Tract index:** A few jurisdictions maintain a tract index, in which every transaction pertaining to a particular parcel is entered in one location, instead of chronologically by grantor and grantee. Tract indexes are most common where property has been platted by map into various blocks and lots within blocks.

      **Example:** Here is how the transaction in the last example might be indexed in a tract index:

      > TRACT: BLOCK 39, Lot 2 (123 Elm Street), 7/2/88, General warranty deed from Harry Simpson to Agnes Darby, recorded in Book 484, Page 1186.

2. **What the title searcher does:** A title searcher's objective is to identify all the ***past*** title transactions pertinent to a particular parcel, in order to determine the ***present*** state of title. This is a simple job if the jurisdiction maintains a tract index; the title searcher finds the page describing all title transactions pertinent to the parcel. The process is more complicated if a grantor-grantee index is involved. The searcher begins by looking back in time through the grantee index to find the transaction by which the present owner acquired title, then searches the grantee index further back to find the transaction by which the present owner's grantor acquired title. This process continues until an adequate root of title has been found (usually a title transaction far enough back in time to cut off any prior claims by a statute of limitations)

Then the searcher will turn to the grantor index and search forward in time, beginning with the initial grantor, to see if any owner ever conveyed her interest prior to the grant that appears to make up the chain of title traced backward in time. In most jurisdictions the searcher need only search forward from the time the grantor acquired title to the point when the grantor transferred title to the next owner in the chain. But in a few jurisdictions it is necessary to search forward to the present for every grantor.

**Example:** In 1890, Arthur conveyed Blackacre to Smith. In 1910, Smith granted Wilson an appurtenant easement for right of way over Blackacre. In 1920, Smith conveyed Blackacre to Rogers. Rogers conveyed Blackacre to Candiotti in 1950. Candiotti conveyed to Alvarez in 1980. In 1990 Alvarez granted Trustco a mortgage upon Blackacre. Your client, Barker, wishes to purchase Blackacre. To determine the state of title you would search the grantee index, under Alvarez, from the present time back to 1980, when you would find the deed from Candiotti to Alvarez. Then you would search the grantee index under Candiotti back to 1950, when you would find the deed from Rogers. Then you would search the grantee index under Rogers back to 1920, when you would find the Smith conveyance. Ditto back to 1890 when you would find the Arthur conveyance. Assume that a conveyance more than 80 years old is an adequate root of title; that makes the Arthur to Smith conveyance of 1890 the root of title. Then you search forward from 1890 in the grantor index under Smith. You will first find the 1910 easement grant to Wilson, then the 1920 conveyance to Rogers. You will search the grantor index under Rogers until you find the 1950 conveyance to Candiotti. You will then search under Candiotti from 1950 until 1980, when you find the conveyance to Alvarez. A final search forward under Alvarez from 1980 will reveal the mortgage to Trustco in 1990. You now know that Alvarez has good title to Blackacre, subject to an easement for right of way in favor of the present owner of Wilson's property and a mortgage to Trustco.

a. **Legal obligations of the title searcher:** Any title searcher is obligated to exercise reasonable diligence in performing the search. A searcher is liable for a negligent search that results in damage to the buyer if the search results are provided to the buyer. This is true even if the search is performed for the seller, because the buyer is universally treated as the third party beneficiary of the search and it is obviously foreseeable that a buyer might rely on any such search.

B. **Race acts:** A race act provides that, as between two grantees to the same property, the ***earliest to record*** prevails. Hence there is a race to record first. Under a race act, it does not matter that the first person to record had notice of a prior unrecorded conveyance. The reason for ignoring such notice is that making the record dispositive obviates the need to rely on extrinsic evidence about notice, which may be controverted and unreliable. But most jurisdictions regard the equitable cost of the race statute as too high, because it permits a later grantee to prevail over a known earlier grantee so long as the later grantee is quicker to record.

**Example:** On January 15 Rogue, owner of Blackacre, conveys for value to Prof. Scatterbrain, who absent-mindedly leaves the deed on his desk for a month, before recording it on February 15. Prof. Sly, Scatterbrain's colleague, sees the deed on Scatterbrain's desk, reads it, and observes that it is not yet recorded. On January 30, Prof. Sly pays value to Rogue for Blackacre and receives a deed from Rogue, which Prof. Sly records on February 1. As between Sly and Scatterbrain, Sly prevails because he recorded first. Sly's knowledge of Scatterbrain's prior purchase is irrelevant.

C. **Notice acts:** Notice acts address the inequity of permitting a later purchaser to prevail over an earlier purchaser when the later purchaser knows of the prior purchase. They do so by providing that a ***subsequent bona fide purchaser*** **without notice of a prior unrecorded transfer** prevails over the prior purchaser who has failed to record. And this is true ***even if the subsequent purchaser has not recorded.*** Here is a simplified example of a notice statute: "No conveyance is valid against a subsequent bona fide purchaser who has no notice of the conveyance, unless the conveyance is recorded." About half of American states have notice acts.

**Example:** On January 15, Able conveys Blackacre to Hector, who fails to record the deed. On February 15, Able conveys Blackacre to Artemis for $100,000. Artemis is ignorant of the January conveyance to Hector. Artemis prevails over Hector, regardless of who might first record his deed. The critical facts are that, at the moment Able conveyed to Artemis for value, (1) Artemis lacked notice of the prior conveyance to Hector, and (2) Hector had not recorded his deed (which would have given constructive notice to Artemis).

D. **Race-notice acts:** A race-notice act protects a more limited class of subsequent bona fide purchasers who lack notice of the prior conveyance: It protects only those subsequent bona fide purchasers who lack notice and who ***record before the prior purchaser.*** Here is a simplified example of a race-notice statute: "No conveyance is valid against a subsequent bona fide purchaser who has no notice of the conveyance and who has recorded his conveyance first." The supposed virtues of a race-notice act, as compared to a notice act, are (1) encouraging recording, and (2) eliminating disputes over which of two conveyances was first delivered. The first rationale is probably true but weak, and the second addresses a largely imaginary problem. Even so, these arguments are persuasive enough to cause about half of American states to have enacted race-notice acts.

**Example:** On June 1, Bilbo conveys Blackacre to Jane, who does not record. On July 1, Bilbo conveys Blackacre to Sally for $100,000. Sally is ignorant of the prior conveyance to Jane. On July 15 Jane records her deed. On July 20 Sally records her deed. Jane prevails over Sally because, even though Sally lacked notice of the conveyance to Jane, Jane recorded before Sally.

E. **The consequences of recording:** Recording provides constructive notice to the world of a conveyance. Even if a later purchaser fails to consult the record he is charged with knowledge of its contents. In a race or race-notice jurisdiction recordation cuts off the possibility that either a prior unrecorded purchaser or a later purchaser could prevail. In a notice jurisdiction recordation provides constructive notice, thus preventing later purchasers from prevailing.

1. **The consequences of not recording:** There are two important consequences to failure to record.

   a. **Common law rule applies:** If nobody has recorded the common law principle of "first-in-time" continues to apply, except in a notice jurisdiction when the subsequent bona fide purchaser lacks notice.

   b. **Grantor can convey good title to a later purchaser:** More ominous to purchasers is the fact that, without recordation, the grantor is left with the power to convey good title to a later purchaser. Of course, the grantor who does this is often a scoundrel, and may well be liable to the losing first purchaser for the proceeds received from the second purchaser.

   **Example:** Olivia, the record owner of Blackacre, conveys Blackacre to Brewster, who fails to record. Then Olivia conveys Blackacre to Abigail for $100,000. Abigail, who is ignorant

of the conveyance to Brewster, then records. In all three types of jurisdictions Abigail will prevail. Had Brewster recorded before the sale to Abigail, Brewster would have prevailed everywhere. Brewster may be able to recover from Olivia the $100,000 she received from Abigail, on the theory that Olivia holds those proceeds in a constructive trust for Brewster, but Brewster could have avoided the whole mess by prompt recordation. Always record promptly.

**F. When is an instrument recorded?** To be recorded, an instrument must be eligible for recording and be entered in the records in a manner that complies with the jurisdiction's requirements. Virtually anything that affects title to or an interest in real property may be recorded. Most states require that an instrument may not be recorded without a notarial acknowledgment. To obtain a notarial acknowledgment, the grantor must prove his identity to a notary and sign the document with the notary as witness. Some states require or permit witnesses to perform the function of the notary. The problem is that recorders, being human, are not infallible. The following are the common instances of instruments appearing in the record that are wholly are partially unrecorded.

1. **Instrument not indexed:** This recorder's error is to fail to index an instrument or to index it so improperly that it cannot be found by a diligent searcher using the standard search methods. Jurisdictions split on the proper resolution of this problem. The older rule is that "a purchaser is charged with constructive notice of a record even though there is no official index which will direct him to [the particular instrument]." 4 Amer. Law of Prop. §17.25 (1952). On this theory, the purchaser has done all he can do by tendering an eligible instrument to the recorder for recording. See, e.g., *Haner v. Bruce,* 146 Vt. 262 (1985). However, the diligent searcher cannot find the unindexed instrument. Because constructive notice from the record is founded on the assumption that a searcher can find it if he looks, the newer rule is that the unindexed or improperly indexed instrument ought not provide constructive notice. See, e.g., *Hochstein v. Romero,* 219 Cal. App. 3d 447 (1990).

2. **"Omnibus" or "Mother Hubbard" clauses:** A variation on the improperly indexed instrument is an instrument that accurately describes one parcel, Blackacre, and also includes "all other land owned by the grantor in the county." These omnibus clauses are sometimes called "Mother Hubbard" clauses, because they "sweep the cupboard bare." The recorder can only record this instrument by reference to Blackacre, because it is an unreasonable burden on the recorder to search the records to identify all the other property owned by the grantor. Omnibus clauses are void as against later purchasers of the grantor's property (other than Blackacre) because a diligent searcher of the index (with respect to a parcel other than Blackacre) will never locate any reference to the omnibus clause.

★**Example:** Grace Owens owned interests in eight oil and gas leases in Coffey County, Kansas. She assigned to International Tours her interest in those leases under an assignment that specifically described each of the seven different parcels and included an omnibus clause that assigned to Tours Owens's interest "in all oil and gas leases in Coffey County, Kansas" owned by Owens, "whether or not [such leases] are specifically enumerated" in the assignment. The Kufahl lease, in which Owens had an interest, was not specifically described. Four years after Tours recorded the assignment Owens assigned her interest in the Kufahl lease to Burris, who had checked the public records and had obtained an abstract of title from a professional title searcher. Neither search revealed the existence of the omnibus clause in the Owens-to-Tours assignment. Kansas has a notice statute. In ***Luthi v. Evans,*** 223 Kan. 622 (1978), the Kansas Supreme Court held that the omnibus clause in the Owens-to-Tours assignment did not

give constructive notice to later purchasers of Owens's interest in the Kufahl lease. Burris prevailed, taking the Kufahl lease free of Tours's interest because it was not reasonable to expect a title searcher to locate and read every other conveyance ever made to Owens at any time conferring an interest in an oil and gas lease in Coffey County, Kansas. That would be a monumental task, greatly increasing the time and expense of title searches, which Kansas's recording act did not contemplate.

3. **Misspelled names:** Jurisdictions divide over whether a misspelled name in a recorded instrument gives constructive notice. All jurisdictions agree that if the misspelling is so significant that it does not even sound like the correct name, there is no constructive notice. Thus, "Kirk" for "Church" is inadequate, even though both names refer to a house of worship. The problem that divides jurisdictions is whether the misspelling that sounds like the correct name supplies constructive notice. The doctrine of *idem sonans* holds that a misspelling that sounds substantially identical to the correct name gives constructive notice. See 4 Amer. Law of Prop. §17.18, which adopts *idem sonans* so long as the misspelling begins with the same letter as the correct spelling. However useful *idem sonans* may be to establishing identity in other contexts, it is ***not*** *the prevailing rule* with respect to the issue of constructive notice from the real estate records.

★**Example:** Orr obtained a judgment against Elliott, but Orr's lawyer prepared the judgment by spelling Elliott's name as "Elliot." An abstract of the judgment, listing the judgment debtor as "Elliot" or "Eliot" was recorded in Orange County, California and indexed under those two names only. Elliott later conveyed property subject to the judgment lien to Byers and Orr sought to foreclose his lien against the parcel acquired by Byers from Elliott. In ***Orr v. Byers,*** 198 Cal. App. 3d 666 (1988), the California intermediate appeals court held that *idem sonans* did not apply in California, and thus that the recorded abstract did not give constructive notice of Orr's lien. Byers prevailed, but if he had had *actual notice* of Orr's lien he would have lost. The court reasoned that *idem sonans* would place an unreasonable burden on title searchers, especially given the uncertain contours of the doctrine in a highly multicultural society. Also, the problem can be more easily avoided by those who prepare instruments for recording.

4. **Ineligible instrument:** The usual ineligible instrument is an unacknowledged instrument that nevertheless appears on the record through the recorder's oversight. Because such an instrument is not eligible for recording, it is treated as unrecorded and thus does ***not give constructive notice*** of its contents. A subsequent purchaser will prevail unless she has ***actual notice*** of the prior conveyance or is under a duty to inquire and that inquiry would reveal the prior conveyance.

   a. **Defect not apparent on the face of the instrument:** Jurisdictions split on whether constructive notice is imparted by an apparently recorded instrument that is ineligible for recording due to some defect ***not apparent*** from the instrument itself. The majority rule is that an instrument with a defect on its face does ***not*** give constructive notice but an instrument with a hidden defect ***does impart*** constructive notice. See, e.g., *Metropolitan Natl. Bank v. United States,* 901 F. 2d 1297 (5th Cir. 1990); *Mills v. Damson Oil Co.,* 437 So. 2d 1005 (Miss. 1983). Because even the most diligent searcher of the records could not possibly have any inkling of a hidden defect, it makes little sense to rule that the instrument is not recorded and thus imparts no constructive notice, but some states do just that.

   ★**Example:** Caroline Messersmith and her nephew Frederick owned land in North Dakota as equal tenants in common. Caroline conveyed to Frederick her interest under a deed that

Frederick did not record, probably because the parties intended the deed to be a will substitute. Caroline, still in possession, conveyed a half interest in the mineral rights to Smith under a deed that Smith then took to a notary, who then spoke to Caroline by phone to ask whether the signature on the deed in front of the notary was hers. Upon being assured that the signature was Caroline's the notary affixed his notarial seal and acknowledgment, but this notarial acknowledgment was void because Caroline was not physically present to be certain that the document in front of the notary was in fact the deed she signed and not some other instrument. (It's possible that Smith could have forged her signature to a different deed which he then presented to the notary.) Smith then conveyed his mineral interest to Seale, who claimed to have no notice of Frederick's interest in the land. Only then did Smith record the Caroline-to-Smith deed; on the same day the Smith-to-Seale deed was recorded. Six weeks later Frederick recorded his Caroline-to-Frederick deed, and then brought suit to quiet title in his name. A trial court ruled that because Seale was a bona fide purchaser who lacked notice of the Caroline-to-Frederick deed and who recorded his deed from Smith and the Caroline-to-Smith deed before Frederick recorded, Seale should prevail under North Dakota's race-notice statute. On appeal the North Dakota Supreme Court, in ***Messersmith v. Smith,*** 60 N.W. 2d 276 (N.D. 1953), reversed, holding that no subsequent instrument in the chain of title passing through the secretly defective instrument is validly recorded. Given that the defect could not possibly be known to anyone carefully scrutinizing the record, it is hard to see what purpose was served by the ruling. Notarial acknowledgments are intended to prevent forgery, but there was no allegation of forgery and, absent that, the record should speak for itself.

**G. Scope of protection afforded by recording acts:** The protection afforded by a recording act is defined by the statute, as interpreted by the courts of the jurisdiction. Read the recording act carefully!

1. **Invalid conveyance:** Although recordation creates a presumption of validity, if in fact the instrument was invalid (e.g., it was forged or never delivered) recordation does not make it valid.

2. **Interests in land created by operation of law:** Recording acts only apply to ***conveyances*** (e.g., deeds, mortgages, grants, contracts) and ***liens*** created by operation of law (e.g., judgments). They do ***not apply to*** **interests *created by operation of law,*** such as adverse possession, prescriptive easements, or implied easements. Even though such interests are not of record, they are still valid and enforceable against subsequent purchasers.

3. **Bona fide purchasers:** Notice and race-notice recording acts are intended to protect the ***bona fide purchaser*** of property. A bona fide purchaser is one who gives ***valuable consideration*** to purchase the property and is ***without notice*** of a prior unrecorded conveyance. Race acts protect bona fide purchasers only to the extent they are the first to record. Obviously, a ***donee does*** **not receive protection** because a donee has not given value.

   a. **Shelter rule:** The protection given a bona fide purchaser under a recording act extends to all takers from the bona fide purchaser, even if such a taker knows of a prior unrecorded conveyance. This "shelter rule" is necessary to give the bona fide purchaser the full value of his purchase in reliance on the records. Part of that value is the ability to transfer good title to others.

**Example:** Ovid conveys to Alan, who does not record. Ovid then conveys to Barbara, a bona fide purchaser (BFP), who does record. Barbara then conveys to Charles, who knows all about the Ovid-to-Alan deed. Barbara will prevail over Alan in all three types of jurisdictions. In a notice or race-notice jurisdiction, Charles's knowledge of Alan's deed is irrelevant only because he is a taker from Barbara, a bona fide purchaser. Charles is "sheltered" by his vendor's status as a BFP.

4. **Mortgagees:** Mortgagees are generally treated as bona fide purchasers, either because the statute specifically includes them or because courts have interpreted the phrase *bona fide purchaser* to include them. But this only applies to the mortgagee who actually gives value (e.g., the loan proceeds) in return for the mortgage. In most states a mortgagee who receives a mortgage to secure a ***pre-existing debt*** without some detrimental change in its position (e.g., a reduction in the interest rate) has not acquired the mortgage for value and so is not a bona fide purchaser. See, e.g., *Gabel v. Drewrys Ltd., U.S.A., Inc.*, 68 So. 2d 372 (Fla. 1953). The contrary view is taken by the Uniform Simplification of Land Transfers Act, §§1-201(31) and 3-202.

5. **Creditors:** The status of creditors depends on the language of the act.

   a. **No protection:** If a recording act protects only "purchasers," a creditor is protected only if he should purchase the owner's interest at a judicial sale resulting from a successful lawsuit to collect the debt.

   b. **Specific protection:** If a recording act specifically protects "creditors" or "all persons" a creditor will receive protection without the necessity of a purchase at a judicial sale, but the scope of that protection is often limited by courts to ***judgment creditors*** or ***lien creditors.*** The rationale is that creditors do not generally rely on the state of the public land records in extending unsecured credit, but a creditor who has reduced a claim to judgment or lien intends to seize and sell the debtor's property. The judgment or lien creditor has an interest in the state of the record in order to know what his priority is with respect to the debtor's property.

**H. Notice:** To be protected under a notice or race-notice statute, a purchaser must be without ***actual or constructive notice*** of any prior unrecorded interests at the time the purchaser pays the consideration.

1. **Actual notice:** Actual notice is real, actual knowledge of the prior unrecorded transaction. Evidence beyond the record is necessary to prove actual notice.

2. **Constructive notice:** There are two forms of constructive notice: ***record notice*** and ***inquiry notice.***

   a. **Record notice:** The entire world, specifically including a subsequent grantee, is charged with constructive notice of the contents of the record. If an instrument is validly recorded, every subsequent grantee has constructive notice of it, and so cannot be a bona fide purchaser. However there can be argument over what constitutes the record, thus supplying constructive notice to subsequent purchasers.

      i. **"Wild deeds" — Outside the chain of title:** If a complete stranger to the record chain of title records a conveyance (a "wild deed"), the conveyance does not give constructive notice because it is not within the chain of title.

★**Example:** In Minnesota, a race-notice state, Hoerger conveyed a lot to Duryea & Wilson (D&W), who did not record. D&W then conveyed the lot to Board of Education, who did record, after which Hoerger conveyed the same lot to Hughes, who lacked notice of the conveyance from Hoerger to D&W. Hughes recorded. In ***Board of Education of Minneapolis v. Hughes***, 118 Minn. 404 (1912), the Minnesota Supreme Court decided that Hughes prevailed over the Board of Education because the conveyance from D&W to the Board of Education was outside the chain of title and did not impart constructive notice. At the time Hughes purchased from Hoerger, a diligent title search would reveal Hoerger to be the record owner. Even though the deed from D&W to the Board of Education was recorded first, it would appear to be a deed made by a complete stranger to the chain of title. Because the Hoerger-to-D&W link in the chain was not recorded a diligent searcher would never find the D&W-to-Board conveyance. See also ***Zimmer v. Sundell***, 237 Wis. 270 (1941).

ii. **Expanded chain of title — Deeds from common grantor:** Reciprocal implied covenants restricting land use may be implied by a developer's conveyance of property subject to express covenants burdening the developer's retained land (see Chapter 9), but such a covenant does not appear in the chain of title of the retained land, if it is conveyed without the implied covenant being made express. Does a deed by a developer to Lot 1, which imposes a use restriction on Lot 1 and all other lots retained by the developer (including Lot 2), impart constructive notice of the covenant to a later purchaser of Lot 2 from the developer? Note that the use restriction does not appear in the developer's deed to Lot 2. Jurisdictions split on this issue. Most conclude that the burden on title searchers to locate and read all deeds out from a common grantor is unreasonable. See, e.g., *Buffalo Academy of the Sacred Heart v. Boehm Bros., Inc.*, 267 N.Y. 242 (1935). A few states conclude that purchasers of property from a common grantor have constructive notice of the contents of all deeds out from a common grantor, thus imposing the practical burden of searching all deeds out from a common grantor.

★**Example:** Gilmore, a developer and subdivider, conveyed a lot to Guillette under a recorded deed that restricted the lot's use to a single-family residence, and recited that "the same restrictions are hereby imposed on each of [the] lots now owned by seller." This was effective to impose the single-family residence use restriction on all of Gilmore's remaining lots. Later, Gilmore conveyed a restricted lot to Daly under a recorded deed that made no mention of any restrictions. Daly obtained a building permit to construct 36 apartment units on the lot. Other owners of lots in the development (all of whom obtained title from Gilmore) sought to enjoin Daly from violating the single-family residence use restriction. In ***Guillette v. Daly Dry Wall, Inc.***, 367 Mass. 355 (1975), the Massachusetts Supreme Judicial Court held that Daly acquired the lot with constructive notice of the restriction even though the restriction was not in the chain of title from Gilmore to Daly. The *Guillette* rule requires a purchaser to expand his search of title to include all conveyances made by the grantor of other adjacent property he owned, in order to be certain that the grantor did not burden his remaining property with a use restriction contained in a deed to a third party. Jurisdictions rejecting this rule reason that this search burden is not reasonable.

iii. **After-acquired title:** Suppose a grantor conveys title without having title, but then later acquires title. Under the after-acquired title doctrine (see Chapter 6) the title "shoots

through" the grantor to the grantee. But suppose the grantor conveys title twice, once before acquiring it and once afterward to a person without actual notice of the prior conveyance, and both conveyances are immediately recorded. Does the first conveyance, made at a time when the grantor has never been a grantee (and thus will not be found in the usual backwards-in-time search by grantees) impart constructive notice? Or should a title searcher be obligated to search a period earlier in time than the grantor acquired title, on the possibility that the grantor conveyed away his title before he ever got it? The majority rule is that the first conveyance does ***not impart constructive notice*** because it is not reasonable to expect title searchers to search the records for the time period prior to the grantor's acquisition of title on the off chance that the grantor might have conveyed his title before he received title.

**Example:** The United States owned a tract of land that Lowery occupied under a statutory right of temporary possession, a latter-day version of the Homestead Act under which Lowery could ultimately acquire title if he performed certain acts of improvement over a specified time period. While Lowery was in possession but before he had any title to the land Lowery conveyed his interest in the tract to Horvath, who recorded the deed. Later, after the United States had conveyed its title in the land to Lowery (and Lowery had recorded the deed from the United States), Lowery conveyed the same property to Sabo, who recorded his deed. In *Sabo v. Horvath*, 559 P. 2d 1038 (Alaska 1976), it was held that Sabo prevailed over Horvath, because Horvath's deed was outside the chain of title. A diligent title searcher would go back in time until he found the conveyance from the United States to Lowery in the grantee index, and would then search the grantor index (under Lowery) forward in time to see if Lowery had made any other conveyances, but could not reasonably be expected to search the grantor index ***before Lowery had title.***

A few old cases apply after-acquired title doctrine uncritically and hold that title searchers must examine the grantor index before the time each record owner acquired title in order to see whether the owner conveyed title before he acquired it. See, e.g., *Tefft v. Munson*, 57 N.Y. 97 (1874); *Ayer v. Philadelphia & Boston Face Brick Co.*, 159 Mass. 84 (1893). By requiring a more extensive search these cases expand the scope of the chain of title and such expanded searches are expensive, especially if the chain of title is long.

iv. **Deed recorded after grantor has parted with record title:** Must a title searcher search the grantor index forward past the point that the record discloses he has already parted with title? If the first recorded conveyance is to a bona fide purchaser (BFP) and the shelter rule applies there will be no need to do so, but if the first recorded conveyance is ***not*** to a BFP (perhaps it is to a donee or a purchaser with actual notice of a prior unrecorded conveyance) the question becomes more complicated. Jurisdictions split on this issue.

**Example:** Ovoid, owner of Blackacre, conveys to Alice, who fails to record. Then Ovoid conveys Blackacre to Ben, who knows of the Ovoid-to-Alice conveyance. Ben records his deed. Alice then records her deed from Ovoid. As between Alice and Ben, Alice will prevail because Ben is not a BFP without notice. But then Ben conveys to Charles, who pays value and is ignorant of the Ovoid-to-Alice conveyance. Charles records. Who prevails, Alice or Charles? The answer depends on whether the Ovoid-to-Alice deed

although recorded later than the Ovoid-to-Ben deed, gives constructive notice to Charles, a later BFP. About half the states rule in favor of Alice, holding that the chain of title includes all instruments of record up to the moment the subsequent purchaser acquires title, even though they may be recorded after a grantor has first parted with record title. In these jurisdictions, a diligent title searcher must shoulder the huge burden of searching the grantor index forward to the present for each person who ever owned the property. See, e.g., *Woods v. Garnett*, 72 Miss. 78 (1894); *Westbrook v. Gleason*, 79 N.Y. 23 (1879); *Mahoney v. Middleton*, 41 Cal. 41 (1871); *Angle v. Slayton*, 102 N.M. 521 (1985). The other half of the states rule in favor of Charles, reasoning that a title searcher should be excused from further search forward in time after he finds a recorded conveyance of title from the grantor to another person. Thus, once a searcher has found the Ovoid-to-Ben deed, he need not search any further forward in time. In these jurisdictions the Ovoid-to-Alice deed is outside the chain of title and provides no constructive notice. See, e.g., *Morse v. Curtis*, 140 Mass. 112 (1885); *Day v. Clark*, 25 Vt. 397(1853).

v. **Prior deed recorded after partial payment by later purchaser:** Courts are much vexed over the following problem: Owner conveys to Prior Purchaser, who fails to record the deed; Owner then conveys to Later Buyer (who lacks notice of the prior conveyance) under a contract calling for a down payment and subsequent payments; Later Buyer records his deed but before making the final payment learns of the prior conveyance. Who should prevail: Prior Purchaser because Later Buyer was on notice of the prior claim before he fully paid (depriving Later Buyer of BFP status) or Later Buyer because he lacked notice at the time he entered into the transaction? The traditional answer is to prefer Prior Purchaser and employ ***restitution*** as the remedy: Give the property to Prior Purchaser on condition that he reimburse Later Buyer for the payments made by him. The alternative answer is to give Later Buyer the ***benefit of the bargain:*** Award the property to Later Buyer but require that the remaining payments be made to Prior Purchaser rather than Owner.

★**Example — Restitution:** Jacula conveyed a lot to Daniels and in the contract of sale gave Daniels a right of first refusal to purchase another parcel contiguous to the first lot (the "Contiguous Parcel"). The contract was not recorded. Later, Jacula conveyed the Contiguous Parcel to Zografos for $60,000, under an installment sale contract calling for a $10,000 down payment and later installments. Zagrofos paid Jacula another $30,000 before learning of Daniels's prior claim, made the final payment of $20,000, and then received and recorded a deed. Daniels sought and received specific performance of his purchase option. In ***Daniels v. Anderson***, 162 Ill. 2d 47 (1994), the Illinois Supreme Court affirmed, reasoning that Zografos was protected by his lack of notice only for the payments made before he received notice, and concluding that an award of the property to Daniels with a requirement that Daniels reimburse Zografos for the total of his payments to Jacula was the best method to deal with the mischief caused by Jacula.

★**Example — Restitution:** Thomas and his son Charles owned a house as equal tenants in common. Thomas then conveyed his interest in the house to Mary, his daughter. A week later Thomas conveyed the same interest to Charles in return for $1,000 and Charles's promise to care for Thomas for the remainder of his life. Charles, who was unaware of the prior deed to Mary, recorded his deed. A few months later Mary recorded

her deed. Charles cared for Thomas until Thomas's death. Mary claimed a half interest based on her prior deed; Charles claimed to be a subsequent purchaser without notice of Mary's prior claim. In ***Alexander v. Andrews***, 135 W. Va. 403 (1951), the West Virginia Supreme Court held that Charles was protected only to the extent of the $1,000 he paid before Mary recorded. The value of his care of Thomas after Mary's recording was expended with constructive notice of Mary's claim.

★**Example — Benefit of the bargain:** The Lewises agreed to purchase a house from Shipley for $2.3 million. Before the closing Fontana Films filed for recording a *lis pendens* on the house. A *lis pendens* is a notice of pending litigation in which the plaintiff claims an ownership interest in the subject property; once duly recorded it is a lien on title and any subsequent purchaser takes subject to the plaintiff's claim. On February 28, 1992 the Lewises paid Shipley $350,000 down, gave Shipley their note for $1,950,000, and received and recorded a deed. On February 29, 1992 the *lis pendens* was indexed, the magic moment of recording in California; from then on it constituted constructive notice. (Note that because California is a race-notice state Fontana lost its priority to the Lewises because they recorded first without notice.) In March 1992 the Lewises paid Shipley the balance due on their note and then spent another $1 million or so on renovations. (This is Southern California.) Only in September 1993, when Fontana Films served them with summons and complaint, did the Lewises acquire *actual notice* of Fontana's claim but, of course, they had *constructive notice* of Fontana's claim since February 29, 1992. The Lewises sued to remove the *lis pendens* and quiet title in their names. A trial court denied this relief but, in ***Lewis v. Superior Court***, 30 Cal. App. 4th 1850 (1994), the California intermediate appeals court reversed. Limiting an 1895 California Supreme Court opinion applying the traditional rule to its specific facts, the court of appeal thought that the Lewises should get the benefit of their bargain for four reasons: (1) the traditional rule is inconsistent with modern expectations of a buyer who makes part payment and binds himself irrevocably to pay the rest of the purchase price; (2) the Lewises lacked actual notice throughout the saga and application of the traditional rule to constructive notice "penalizes a completely innocent purchaser for simply living up to his payment obligations"; (3) equity requires that the wrongdoer's interests be sacrificed first and, although the court did not say so, as between the trio involved in ***Lewis***, inasmuch as Shipley had been paid, the loss should fall on the party best able to avoid it — Fontana, because it could have recorded its *lis pendens* in timely fashion so that it would have been of record when the Lewises closed their deal with Shipley; and (4) the traditional rule provides an anomalous and unwarranted benefit to cash buyers (or those who finance their purchase with third party lenders rather than by installment sale or purchase money mortgages from the seller).

**b. Inquiry notice:** In most states a subsequent purchaser has an obligation to make reasonable inquiries, and is charged with knowledge of what those reasonable inquiries would reveal. The following subsections explore some of the circumstances that trigger a duty to inquire.

**i. Record reference to an unrecorded instrument:** If a recorded instrument refers expressly to an unrecorded instrument, a purchaser is under an obligation in many states to inquire about the substance of the unrecorded instrument to which the record refers.

★**Example:** In 1922 Susan Harper conveyed her Georgia farm to Maude Harper for life, remainder to Maude's children. The deed was mislaid and thus not recorded. In 1928, Susan having died, Susan's children executed and delivered a quitclaim deed to Maude by which they conveyed any interest they might have in the farm to Maude. The 1928 deed, which contained a recital that it was "to take the place of the deed made and executed by Mrs. Susan Harper during her lifetime," was duly recorded. In 1933 Maude executed a deed of trust of the farm to Ella Thornton to secure a $50 loan. Thornton foreclosed after default and received a sheriff's deed, recorded in 1936. Through a succession of recorded conveyances from Thornton title to the farm was vested in 1955 in the Paradises. In 1957 the mislaid 1922 deed was found and recorded. Upon Maude's death in 1972 her children sued to recover possession. A trial court ruled for the Paradises but in ***Harper v. Paradise,*** 233 Ga. 194 (1974), the Georgia Supreme Court reversed. Paradise could not rely on a Georgia statute protecting the title of innocent purchasers from heirs or apparent heirs who lack actual notice of prior claims because the recitals in the 1928 deed made specific reference to an unrecorded 1922 deed, thus negating the inference that otherwise would exist that the makers of the 1928 deed were conveying their inherited interest. Adverse possession was unavailing for Paradise because their entry was against Maude and all Maude owned was a life estate; thus the limitations period did not begin to run until Maude's death in 1972. Although the 1928 deed, upon which the Paradises' title was founded was recorded before the 1922 deed, upon which Maude's children based their claim, Georgia is a race-notice state and the court concluded that the recitals in the 1928 deed placed a duty upon subsequent purchasers to inquire of Maude to determine the details of the unrecorded deed referred to in the 1928 deed. Thus, the Paradises had constructive notice of the prior claim when they acquired title and so lost.

This rule is not universally followed, especially when the issue is whether a subsequent taker should be charged with inquiry notice by a recorded memorandum of a lease that does not set forth the specifics of the lease. Compare *Mister Donut of America, Inc. v. Kemp,* 368 Mass. 220 (1975) (inquiry notice, subsequent taker charged with constructive notice of lease contents), with *Howard D. Johnson Co. v. Parkside Dev. Corp.,* 169 Ind. App. 379 (1976) (no inquiry notice and thus no constructive notice of the lease contents).

**ii. Possession:** Most states impose a duty to inquire of whoever is in possession of the subject property.

★**Example:** Choctaw Partnership, a developer, built a condominium complex financed by construction loans secured by a recorded mortgage, later assigned to Eglin National Bank. Then Choctaw sold Unit 111 to Waldorff under a contract of sale that was unrecorded, but sufficient to vest in Waldorff equitable title to Unit 111. Waldorff moved in and occupied Unit 111 for 11/2 years, then moved out but kept furnishings in the unit and asserted exclusive possessory rights to the unit. Choctaw borrowed additional money from Eglin secured by a recorded mortgage to a number of condominium units, including Unit 111. Then Choctaw, which owed Waldorff money, executed and delivered a deed to Unit 111 in return for Waldorff's cancellation of the debt. Waldorff recorded the deed. Choctaw then defaulted on its notes to Eglin and Eglin sought to foreclose on Unit 111. The trial court ruled that Eglin's prior recorded mortgage liens had priority over Waldorff's interest, but in ***Waldorff Insurance & Bonding, Inc. v. Eglin Natl. Bank,*** 453 So. 2d 1383 (Fla. App. 1984), the Florida intermediate

appeals court reversed. Because Waldorff was in possession Eglin was on inquiry notice that Waldorff might have a prior unrecorded claim. Even though Waldorff, as the party in possession, in theory might be the party who could avoid the problem by recording it is unlikely that the contract of sale was notarized and capable of recording. Sellers under installment sale contracts dislike making such contracts recordable because they wish to avoid any clouds on title until the purchase price is fully paid.

If inquiry would reveal that the possessor occupies under an unrecorded conveyance from the record owner the subsequent purchaser has constructive notice of the claim by virtue of this doctrine of inquiry notice. See, e.g., *Miller v. Green*, 264 Wis. 159 (1953) (inquiry notice of a prior unrecorded contract of sale to a farm predicated upon the later buyer's knowledge of the prior purchaser's acts of fertilizing and plowing the farm in November, time when only owners are apt to be working their land). There are various permutations on the inquiry notice theme: Some states limit the obligation to inquire to instances where the possession is by a stranger to the record title; others limit inquiry to instances where the later purchaser has actual knowledge of the existence of a possessor.

iii. **Character of neighborhood:** As discussed in Chapter 9, reciprocal implied covenants restricting land use may also be implied by a uniform development scheme undertaken by a common owner/developer of property. In states that recognize implied reciprocal covenants from a common scheme, a purchaser is under a duty to inquire about the deeds out from a common grantor, deeds which may establish the common scheme, if the character of the neighborhood suggests such a common scheme. The leading case is ***Sanborn v. McLean***, 233 Mich. 227 (1925).

iv. **Immediate grantee of a quitclaim deed:** A few jurisdictions hold that a conveyance by quitclaim deed is inherently suspicious because it raises doubts about the grantor's belief in the validity of his own title. Thus, the immediate grantee of a quitclaim deed is obligated to inquire into the actual state of the grantor's title, and cannot simply rely on the public records. But this is ***not the majority rule;*** in most states, the mere fact that a conveyance is by quitclaim deed does not trigger inquiry notice. See 6A Powell, The Law of Real Property ¶905[1][B] (rev. ed. 1992).

3. **Tract index: A solution to chain of title problems?** Grantor-grantee indexes, which are by far the most common form of index to public land records in the United States, spawn a variety of problems with the chain of title which have been discussed above. Many of these problems will not occur with a tract index, but most jurisdictions do not maintain tract indexes, and it would be very expensive to find and index, by tract, all of the prior transactions presently indexed by grantor and grantee.

I. **Marketable title acts:** Marketable title acts are the principal legislative response to the fact that, like all human systems, the recording system is imperfect. Eighteen states have adopted marketable title acts, which are designed to limit the relevant chain of title to some specified period of recent history -- from 22 to 50 years in the past. If a chain of title can be traced back to a root of title older than the period prescribed by the marketable title act (say 40 years) most claims based on some older instrument are barred by the statute, unless they are incorporated into a later instrument recorded during the marketable title period.

**Example:** Blackacre is located in a state with a 40-year marketable title act. In 1953 Elvis, the record owner of Blackacre, conveyed to Frank an easement for parking on Blackacre, which

Frank recorded. George purchased Blackacre from Elvis, via a deed recorded in 1955. In 1964 George conveyed and recorded an easement for cable television access to Cablecorp. The present record owner is Lottie, who purchased from George, via a deed recorded in 1970. The deed from Elvis to George is the root of title, because it is more than 40 years old. If the state's act makes no exception for older claims, the easement in Frank is extinguished by the marketable title act but the easement in favor of Cablecorp is valid because it is of record within the past 40 years. Note that in 2010 the root of title will be updated to the George-to-Lottie deed in 1970, and that will eliminate the easement in favor of Cablecorp, which dates from 1964. This presumes also that none of the post-1953 deeds refer to Frank's parking easement and that none of the post-1964 deeds refer to the Cablecorp easement.

1. **Validity of pre-root interests:** Unless the act makes a specific exception for pre-root interests pre-root interests are invalid unless (1) they are referred to in the root of title itself or some post-root recorded instrument, or (2) they are recorded anew during the marketable title act period. In the preceding example, Frank and Cablecorp could keep their easements alive by re-recording them every 40 years.

   a. **Statutory exceptions:** The interests excepted from marketable title acts vary. Most statutes except most easements, claims of the current possessor, restrictive covenants, and, sometimes, mineral rights. These exceptions undercut the utility of marketable title acts.

# III. TITLE REGISTRATION — THE TORRENS SYSTEM

A. **Introduction:** Title registration is a substitute for recording. Instead of recording evidence of title, which is what a recording system does, a registration system makes a certificate of title the exclusive and definitive title. Title registration was invented in Australia in 1858 by Sir Richard Torrens, whose name is commonly used to describe the system. For a registration system to work there must first be a final and conclusive determination of ownership, binding on all the world. This requires a court proceeding to cut off all rival claims. Then the definitive title is registered and indexed in a tract index. When ownership changes, the certificate of title is canceled and a new one issued. The Torrens system is widely used in the United Kingdom, Canada, Australia, and New Zealand. Title registration is an option in 11 American states but is not much used.

B. **Adjudication of title:** To implement title registration it is necessary to adjudicate title, in order to cut off all possible rival claims. The owner must bring an *in rem* action that is functionally identical to a quiet title action. Notice must be given to all persons who might have any conceivable claim to title or an interest in the property. At the conclusion of this proceeding, the court will issue a certificate of title that declares the definitive title to the property. It will state the owner and itemize as "memorials" all encumbrances upon the property (e.g., mortgages, easements, covenants, liens, etc.).

   1. **Scope of the certificate of title:** The certificate of title ***is title.*** It is binding on the entire world and cuts off all interests not included as memorials on the certificate, except for those discussed in this section. Otherwise, the certificate as registered in the public records is conclusive title. It is thus not possible to acquire title by adverse possession against a registered title. However, the exceptions which follow are significant and undercut the utility of title registration.

      a. **Federal government claims:** States lack the power to adjudicate claims of the federal government unless the federal government consents to such adjudication. Thus, a certificate

of title does not eliminate federal tax liens or any other interest that might be claimed by the federal government.

b. **Statutory exceptions:** Most of the American Torrens statutes except from the certificate of title any interests or claims held by persons in actual possession, mineral claims, visible easements, utility or railroad easements, public thoroughfares or other claims of state or local governments. These exceptions make the certificate of title a lot less definitive and conclusive than it purports to be.

c. **Defective notice in initial adjudication:** If a person with an interest in the property does not receive constitutionally acceptable notice of the initial title adjudication proceeding the certificate of title that results is not effective to bar the person's interest. The due process clause of the Fourteenth Amendment requires that governments give people adequate notice and opportunity to be heard before taking their property away.

d. **Fraud:** If fraud or deceit is employed to procure the initial certificate of title it can be set aside by the true owner or, alternatively, the registered owner will be held to hold in constructive trust for the true owner. It is not clear whether the true owner could obtain the same remedies against a bona fide purchaser of registered title from the initial and deceitful "owner." If the initial certificate of title is validly obtained, subsequent fraud that results in a new certificate upon which a bona fide purchaser relies is not sufficient to cancel the title held by the BFP.

**Example:** Arnold adjudicates title to Blackacre and obtains a certificate of title. Then Arnold gives his copy of his certificate to his brother, Bill, who forges Arnold's signature to obtain a new registered title in Bill's name. Then Bill sells Blackacre for value to Jane, who knows nothing of Bill's forgery. Jane has a valid registered title that cannot be upset by Arnold.

e. **Not bona fide purchaser:** Courts in many Torrens jurisdictions have preserved the rule that a person who takes with notice of some off-record claim or interest takes subject to that claim. Thus, a purchaser of registered title who actually knows of some interest not included as a memorial on the registered title is often held to take subject to that interest. See, e.g., *Butler v. Haley Greystone Corp.*, 347 Mass. 478 (1964).

## C. Public records and title transfers in the Torrens system

1. **Public records:** Once a registered title has been adjudicated the official certificate of title is given to the recorder for preservation and a copy given to the owner. The recorder will then maintain a tract index of registered titles and will enter in the tract index the certificate of title. A title searcher simply finds the property in the tract index and reads the certificate of title. If any memorials are noted on the certificate (e.g., mortgages) the searcher will then look up the mortgage instrument to read it fully.

2. **Title transfers:** The holder of registered title may transfer title by surrendering his certificate, together with a deed or other instrument conveying title, to the recorder. The recorder will then cancel the old registered title and issue a new one in the name of the purchaser. If a holder of registered title mortgages the property, the mortgage is simply added as a memorial. If the mortgage is then paid off, the memorial is removed.

3. **Errors by the recorder:** Because the registered title *is title*, errors by the recorder are especially significant. If, for example, the recorder fails to include a mortgage as a memorial on the certificate of title the mortgage is extinguished. Or, if the recorder means to register title to Blackacre in Jones but actually registers title to Blackacre in Smith, Blackacre is owned by Smith, not Jones. This is a serious flaw; Torrens systems deal with this by providing for compensation to those who lose their interests due to recorder error, but the funds provided for compensation "are often absurdly small in comparison to . . . potential liability." Nelson, Stoebuck, and Whitman, Contemporary Property 1004 (1996). Moreover, governments use their sovereign immunity to avoid liability except to the extent of these meager compensation funds. Understandably, this glaring flaw has been a strong inhibition to acceptance of Torrens registration.

D. **The practical realities of Torrens registration:** Torrens registration has not caught on in the United States for three good reasons: initial cost, lack of comprehensiveness, and the risk of uncompensated recorder error.

1. **Cost:** The initial cost of title adjudication is high and most of its benefits are reaped in the form of lower costs of transferring title. There is little incentive for the first owner to incur costs for the benefit of later owners. A developer, however, might find it advantageous to register title for an entire subdivision, in order to minimize the title transfer costs as the subdivided lots are sold, and because the initial cost can be spread over the entire subdivision.

2. **Lack of comprehensiveness:** The exceptions that riddle the purported global effect of a certificate of title further dampen the incentive to incur the cost of obtaining a certificate that is not as conclusive as it is supposed to be.

3. **Risk of uncompensated error:** This problem could be corrected by governmental assumption of liability for all recorder errors, but it is probably politically and practically impossible for financially hard-pressed state and local governments to do so.

E. **Economic theory and Torrens registration:** Under Torrens registration the possessor of the registered title prevails as against a claimant to title however meritorious the claim might be in the absence of Torrens registration. Under the recording system, a meritorious claimant prevails against the possessor. This is of consequence if possessors attach a subjective value to their property, such that they value continued possession more than its market value to prospective purchasers. Many possessors (especially of residences) do attach subjective value to their homes. Under these conditions Torrens is better at accomplishing "exchange efficiency" — ensuring the property ends up in the hands of the party who values it more highly — *if transaction costs of reassigning the right are high.*

**Example:** Arthur owns Blackacre and would not part with title for less than $100,000. Nobody else would pay more than $70,000 for Blackacre. Arthur's subjective value of Blackacre is $30,000. Bertha, a meritorious claimant to Blackacre, would happily sell Blackacre for $70,000 (its market value) once she secures possession. Under the recording system, Bertha would prevail and Arthur would appear to lose his subjective value. Because Arthur values Blackacre more highly than Bertha, he would presumably pay Bertha a price somewhere between $70,000 and $100,000 to retain possession. Only if transaction costs exceed $30,000 (the total potential gains from trade) would the reassignment of the right back to Arthur not occur. Under the Torrens system, Arthur would prevail and reap the full subjective value of $30,000. If transactions costs are higher than the subjective value, Torrens produces an

"exchange-efficient" outcome. If not, Torrens simply ensures that possessors of registered title reap all the gains, thus essentially distributing income to Torrens holders from meritorious claimants.

Another measure of efficiency is "development efficiency," or the maximization of incentives for socially productive use of land. In theory, because Torrens ensures that there will no claimants, the risk of development is lowered and "development efficiency" is increased under the Torrens system. This conclusion, however, is undercut by the fact that title insurance to indemnify against claims under the recording system is readily available at a reasonable cost, and because the exceptions to Torrens registration are large enough to make it a practical necessity to obtain title insurance for a development even if the developer possesses Torrens title.

**F. Possessory title registration:** An innovative variant on the Torrens system is to permit landowners to register their title for a nominal fee, but receive a certificate of title that is good only from that day forward. Any claims or interests affecting the property that predate the issuance of the certificate of title are fully preserved. The certificate is not initially of much value but, over time, old claims or interests might disappear. When coupled with a statute of limitations as to old claims (patterned after the marketable title acts) the certificate of title issued under a possessory title registration system would become conclusive after the elapse of the limitations period. This would eliminate the initial cost objection to Torrens registration but, by itself, does nothing to eliminate the problems of lack of comprehensiveness or risk of uncompensated recorder error. Minnesota is the only state to have adopted possessory title registration as a voluntary option.

# IV. TITLE INSURANCE

**A. Introduction:** Title insurance is the most common form of title assurance in the United States. Title insurance involves the issuance of an insurance policy to a person — usually either a mortgage lender or a purchaser of property — by which the insurer warrants that title is as stated in the policy. The policy is a personal contract between the insurer and the person who buys the policy. Title insurers perform their own examination of the public land records in order to issue an insurance policy. They either employ lawyers to search the public records or they maintain their own duplicate set of records, identical to that found in the recorder's office, but often supplemented by a tract index of their own creation.

**B. Coverage:** The scope of coverage is determined by the contract of insurance. The usual policy insures only that the title stated in the policy is a good record title. The policy does not insure against claims or interests that are not part of the record. Essentially, the insured has a claim under the policy only if someone else asserts a claim based on the public records inconsistent with the record title as stated in the policy.

1. **Duty to disclose defects in title:** Courts are beginning to impose on title insurers a duty to disclose anything they know about the parcel in question that is material or important, breach of which is actionable in tort.

★**Example:** Kosa acquired a parcel of land from Aiello under a deed that stated the total acreage of the tract was 12.486 acres, based on a survey done by Schilling. Walker Rogge agreed to purchase the tract from Kosa, after Kosa had shown Rogge a survey done by Price Walker that stated the tract consisted of 18.33 acres. The Kosa-to-Rogge contract stated that the acreage was

19 acres, more or less, and stipulated that the purchase price was to be reduced by $16,000 per acre if the tract was in fact smaller in area. The Kosa-to-Rogge deed referred to the Price Walker survey but did not state the acreage. Rogge hired Chelsea Title to examine and insure title. Chelsea did so, issuing an insurance policy that excepted from its coverage "matters which could be disclosed by an accurate survey." At the time Chelsea issued the policy it had in its files a copy of the Aiello-to-Kosa deed, stating the tracts's area to be 12.486 acres. In fact, the tract's acreage was 12.43 acres, close to the Schilling survey of 12.486 acres but significantly less than the Price Walker survey of 18.33 acres. Rogge sued Chelsea for damages on the title insurance policy and also for Chelsea's negligence in failing to disclose the acreage figure stated in the Aiello-to-Kosa deed. A trial court held that Chelsea was liable on its insurance contract because the quoted exception was too vague to apply to these facts and that Chelsea had no liability in tort because it had not assumed a duty to search title and disclose the results of its title search. In ***Walker Rogge, Inc. v. Chelsea Title & Guaranty Co.,*** 116 N.J. 517 (1989), the New Jersey Supreme Court reversed on the first point, upheld the second finding, but remanded for consideration of a different tort issue. First, the contract exception was clear enough to exempt Chelsea from contractual liability for an acreage shortfall that an accurate survey would reveal. Second, there was substantial evidence to support the trial court's finding that Chelsea had undertaken a duty only to ***insure*** title, and that any ***search*** of title was for its own benefit and ancillary to its duty to insure. However, the court remanded for a determination of whether Chelsea had assumed a duty to assure Rogge of the correct acreage of the tract. Facts suggestive of that duty included the following: (1) Chelsea had twice before insured title to the tract and had in its files a copy of the Aiello-to-Kosa deed stating the area at 12.486 acres, and (2) Chelsea handled the closing at which the purchase price was based on the tract's acreage. Under these circumstances, perhaps Chelsea had a duty to reveal to Rogge what it knew (or should have known).

About half the states impose a duty on title insurers to disclose all defects uncovered by the insurer's title search. Thus, if a title insurer issues an insurance policy excluding "encroachments not of record" but discovers an actual, unrecorded encroachment, it has insured only good record title but still has an obligation to reveal the actual encroachment it has discovered.

2. **Marketable title and encumbrances:** Although title insurance policies typically insure against any loss caused by ***defects in title,*** or ***liens*** or ***encubrances upon title,*** or ***unmarketability of title,*** courts limit the scope of this coverage to ***title*** rather than extending it to cover palpable diminutions of ***value*** that affect marketability but have no bearing on the clarity or certainty of ownership.

★**Example:** Lick Mill Apartments purchased and developed a portion of a 30-acre tract that had formerly been the site of chemical processing plants and warehouses. Chicago Title insured title against defects, liens, encumbrances, and unmarketability. Prior to insuring title Chicago Title hired Carroll to inspect the site and Carroll reported the "presence of certain pipes, tanks, [and] pumps." When title was insured the records of various government agencies disclosed the "presence of hazardous substances" on the property, but it was not clear whether those records were inspected by or known to either Lick Mill or Chicago Title. After Lick Mill took title it was required to expend considerable sums to remove and clean up the toxins on the site. Lick Mill then sought to recover those costs from Chicago Title, alleging that the toxins made title unmarketable and constituted an encumbrance on title. In ***Lick Mill Creek Apartments v. Chicago Title Insurance Co.,*** 231 Cal. App. 3d 1654 (1991), the California intermediate appeals court rejected these contentions. The court distinguished ***unmarketable title*** and

***unmarketable land:*** the former consists of a serious problem with the claim to ownership, the latter consists of a serious problem with the physical condition or location of the property. Lick Mill's *title* was impeccable but the toxic wastes present on the land made the property unsaleable. As to encumbrances, while the toxic wastes did produce continuing liability of any owner to clean up the mess that fact was rooted in the property's physical condition, not some continuing defect of the claim to ownership that is title. Note that in ***Lohmeyer v. Bower*** (Chapter 6) a present violation of a zoning law constituted unmarketable title sufficient to enable a buyer to rescind his purchase contract, but in ***Frimberger v. Anzellotti*** (Chapter 6) a present violation of a zoning law did not constitute unmarketable title for purposes of breach of the covenant of general warranty. As with ***Frimberger,*** the difference in result is due to the *ex post* or *ex ante* posture of the problem. When the deal is still inchoate (***Lohmeyer***) it makes sense to allow it to unravel, for that permits avoidance of damage before it hardens, but when it is done (***Frimberger*** and ***Lick Mill***) a finding of unmarketable title shifts costs, perhaps unfairly. Diligent investigation on Lick Mills's part would have enabled it to avoid the loss; shifting the loss to Chicago Title would greatly increase the scope of liability for title insurers, thus raising the cost of title insurance generally and probably imperiling the continuing existence of some insurers.

3. **Exclusions:** Policies typically contain specific exclusions from coverage, including such items as ***liens not on the record*** (e.g., mechanics' liens), ***off-record interests asserted by persons in possession*** (e.g., adverse possession), ***boundary disputes*** (e.g., encroachments or other boundary disputes not of record but which might be revealed by a survey), ***off-record easements or servitudes*** (e.g., implied easements or covenants or prescriptive easements), and ***government land use regulations.***

4. **Measure of damages:** A title insurer is generally liable for the difference in value of the property with and without the insured-against defect, up to the maximum liability specified in the policy. This is true regardless of the amount paid for the property.

   **Example:** Jonah purchased Blackacre for $50,000 and obtained Titleco's insurance policy for $20,000 insuring good record title. It turns out that Watts, an adjacent landowner, has a record easement over Blackacre for access. If the value of Blackacre without the easement is $65,000 and the value of Blackacre with the easement is $40,000, Jonah has suffered $25,000 in damages, but can only recover $20,000 (the policy limits), even though the diminution in value from Jonah's purchase price is only $10,000. This rule makes sense because Jonah is entitled to the full benefits of his excellent bargain.

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## *Exam Tips on* ASSURING GOOD TITLE TO LAND

- Recording acts provide ample opportunity for creating a complicated exam question. First, be certain you understand how each of the types of acts works and recognize which is which — your professor may simply quote a statute and not tell you what it is. Second, be sure you understand

what constitutes notice. Actual notice is easy; the problems arise with constructive and inquiry notice. Constructive notice is supplied by the chain of title from the record, and that raises the question of what constitutes the chain of title and what is in the record. States differ on these points; you need to be certain that you understand the policy arguments that surround these differences. Third, be sure you understand the scope of protection afforded by the acts. Note the shelter rule, which protects transferees from bona fide purchasers who are protected, even if the transferee might independently lack protection.

- A marketable title act problem can easily be combined with a recording act problem. The two types of acts perform different functions.
- Title insurance issues typically revolve around the scope of the insurance contract. While your professor may test on this, typically neither this nor registered title is likely to be a significant examination issue.

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# Chapter 6

# CONSTRUCTION OF DEEDS AND WILLS CONCERNING PRESENT POSSESSORY FREEHOLD ESTATES

*Table of Sections*



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**SUMMARY**

## § 6.1 Rules of Construction Generally

1. The purpose of construing a conveyance or will when its terms are ambiguous is to determine the intention of the parties. All rules of construction are subservient to this purpose. In other words, the first rule of construction is to give effect to the parties' intent.

2. In construing an instrument every part of it should, if possible, be given a meaning in considering the meaning of the instrument as a whole. This rule might be characterized as the "four corners doctrine," meaning that everything within the four corners of the instrument should be considered in its construction.

3. If possible, parts of an instrument should be construed as consistent with each other.

4. A deed is always construed most strongly against the grantor who has used the language.

5. If an instrument contains two clauses which are contradictory, the former governs over the latter. This is part of the old

maxim, "the first deed and the last will shall operate." In a deed, this may take the form of the granting clause and the habendum clause being repugnant to the other. In this case, the granting clause governs. This "rule of repugnant clauses" in modern times will normally not be applied in an arbitrary manner, and it frequently will be rejected in favor of the "four corners doctrine."

6. A deed will be construed to grant a fee simple absolute rather than a fee simple determinable or a fee simple on condition subsequent if the language of the whole instrument makes this interpretation reasonably possible.

7. A provision in a deed or will directing that the transferee of property cannot dispose of the property is void as a disabling restraint on alienation.[1]

## § 6.2 Fee Simple[2]

1. Estates in fee simple are:
   a. fee simple absolute
   b. fee simple defeasible
2. Estates in fee simple defeasible include:
   a. fee simple determinable
   b. fee simple subject to condition subsequent
   c. fee simple subject to executory interest including:
      (1) springing executory interest
      (2) shifting executory interest

3. The only way a fee simple estate could be created at common law was by the use of the words of limitation "and his heirs" or "and their heirs." These magic words were indispensable. Under modern statutes these words of limitation are not necessary to create a fee simple estate. It is presumed that the named grantee takes the entire estate the grantor had unless a lesser estate is described in the governing instrument.

4. Under many modern statutes the fee tail estate is deemed a fee simple estate. In jurisdictions where this is the case there is but one inheritable freehold estate, the fee simple.

5. A fee simple determinable comes to an end automatically upon the occurrence of some specified event or act expressed in the words of limitation. A fee simple subject to a condition subsequent requires both a breach of the specified condition and an affirmative act by the grantor or the grantor's heirs to terminate the estate.

1. This rule does not apply to so-called "spendthrift trusts."

2. See Ch. 5.

6. Any disabling restraint on the power to alienate a fee simple estate is void.

## § 6.3 Fee Simple Conditional and Fee Tail

1. The fee simple conditional estate was the forerunner of the fee tail estate and existed prior to the Statute De Donis Conditionalibus which was passed in 1285. This statute destroyed the fee simple conditional estate.

2. The fee simple conditional was an estate that terminated upon the transferee's death if the transferee had no child. Upon termination, the estate reverted to the grantor who retained a possibility of reverter. Upon birth of a child, however, the grantee had the power to convey a fee simple absolute. Absent a conveyance, the property descended under like terms to the grantee's heir of the body, or absent such a surviving heir, the property reverted to the grantor.

3. The Statute De Donis (1285) created the fee tail estate and made it a substitute for the fee simple conditional estate.

4. The typical words which created the fee simple conditional estate before 1285 and the fee tail estate after 1285 were, "to A and the heirs of his body."

5. The fee tail tenant owned an inheritable freehold estate but with limited powers over the estate. The tenant in tail could use it during his lifetime, but he could make no disposition thereof so as to prevent its descending to his bodily heirs, if any, or if no bodily heirs, he could not prevent its reverting to the grantor who retained a reversion. Each succeeding fee tail tenant had the same rights and limitations upon his estate.

6. Because the fee tail estate restricted the free alienability of land, the courts did not favor it. Fictitious legal proceedings were evolved to enlarge the powers of the fee tail tenant. The fine empowered him to cut off the rights of his bodily heirs. The common recovery[3] empowered him to cut off both the rights of his bodily heirs and the reversion of the donor.

7. A fee simple estate is a larger estate than a fee tail estate. Thus, when a fee simple owner conveys a fee tail estate, there is a reversion left in the donor.

8. Almost all states by statutes have abolished the fee tail estate by transforming it into a fee simple or into a life estate in the first taker with a remainder in fee simple to his issue or lineal descendants.

3. See chap. 5, note 17.

## § 6.4 Life Estates

1. Life estates include: (a) life estate for the life of the tenant, (b) life estate for the life of one other than the tenant (pur autre vie), (c) life estate resulting from a fee tail special tenancy after possibility of issue extinct, (d) life estate by dower, (e) life estate by curtesy, and (f) life estate by and during coverture.

2. A life estate is one in which the duration of the estate is measured by the life or lives of one or more human beings and is not otherwise terminable at a fixed or computable period of time.

3. If an estate may last for a lifetime, it is a life estate, even though it may be extinguished before it runs its natural course. However, if a limitation is made expressly subject to the will of the grantee or lessee, there is a conflict, and the interest created is either a life estate determinable or a tenancy at will depending upon the jurisdiction.

4. If a conveyance identifies the grantee but fails to describe effectively the estate which the grantee takes, then the grantee takes a life estate at common law. Today, the grantee is presumed to take whatever estate the grantor had to convey unless a contrary intent appears in the governing instrument.

5. A life tenant, in addition to his estate for life, may be given a power to convey, sell, appoint, or mortgage the fee. Upon the exercise of this power, the rights of the remaindermen or reversioners are affected accordingly.

6. Under the Rule in Shelley's Case, a conveyance of a remainder to the heirs or the heirs of the body of the life tenant, gives the remainder to the life tenant in fee or in fee tail, as the case may be. This Rule, which is a rule of property law at common law and does not give way (as a rule of construction would) to a contrary intent, defeats the intention of the grantor to create a life estate and a remainder in the life tenant's heirs.

7. A life estate may be measured by resort to a reasonable number of lives. Thus, a conveyance "to B for the lives of B, C, D and E" terminates upon the death of the survivor of the four named lives. On the other hand, a life estate to B to last for her life and for the lives of all the persons of a given state would give B a life estate for her life only.

8. Forfeiture restraints on the power to alienate a life estate, usually phrased so as to make the life estate defeasible on an attempted alienation, are valid. The reasons for upholding these restraints are: (1) life estates are not readily alienable in a commercial sense anyway; and (2) the restraint may have been imposed for the benefit of the reversioner or remainderman.

## § 6.5 Concurrent Estates

*a. Joint Tenancy*

1. Joint tenancy is always created by deed or by will, never by descent.

2. In joint tenancy there must always be two or more grantees or devisees.

3. O "to B and C and their heirs" are typical words for creating a joint tenancy at common law. Today in the absence of a clearly expressed intent to create a joint tenancy with the right of survivorship, this limitation creates a tenancy in common.

4. At common law a joint tenancy was preferred over a tenancy in common. Under modern statutes tenancy in common is preferred over joint tenancy.

5. At common law, every joint tenancy required the four unities of:

a. time—meaning all tenants take their interest in the premises at the same instant of time.

b. title—meaning all tenants take their interest from the same source, the same deed or the same will.

c. interest—meaning every tenant has the same identical interest in the property as every other tenant, such as fee simple, fee tail, life estate, etc.

d. possession—meaning the possession of one joint tenant is the possession of all the joint tenants and the possession of all the joint tenants is the possession of each joint tenant.

6. Every joint tenant owns the undivided whole of the property; co-tenants do not own a fractional interest.

7. The grand incident or characteristic of joint tenancy is that of survivorship. This means that upon the death of one joint tenant, the survivor or survivors own the whole of the property and nothing passes to the heirs of the decedent.

8. Upon the death of a joint tenant the survivors take nothing from the decedent but take the whole from the original conveyance which created the joint tenancy and which whole they have owned all the time.

9. A severance of the joint tenancy can be made by a conveyance, but not by will, because survivorship is prior to and defeats any purported disposition in the will.

10. If all joint tenants except one die without having severed their interests, the survivor owns the whole property.

11. Joint tenancy is destroyed by severance inter vivos, by partition, or by any act destroying any one of the four unities.

12. Except in those jurisdictions where the joint tenancy has been abolished, husband and wife may, by a clearly expressed intention in the conveyance, take and hold as joint tenants.

*b. Tenancy by the Entirety*

1. A tenancy by the entirety is a form of concurrent ownership based upon the common law concept of unity of husband and wife.

2. Tenancy by the entirety is a species of joint tenancy and as in joint tenancy each spouse owns the whole estate and not a fractional part thereof.

3. Tenancy by the entirety can exist only between husband and wife.

4. The doctrine of survivorship obtains in tenancy by the entirety—the survivor taking all and the heirs nothing.

5. Five unities are essential in tenancy by the entirety: (a) time, (b) title, (c) interest, (d) possession and (e) person. The first four are the same as in joint tenancy. The fifth involves the common law concept of unity of person in husband and wife.

6. Tenancy by the entirety is created only by deed or will, never by descent.

7. In most jurisdictions that recognize the estate by the entirety, neither spouse can dispose of any interest in the estate owned by the entirety; both must join in the conveyance.[4]

8. In most jurisdictions that recognize the estate by the entirety, a creditor of one spouse cannot levy upon the estate owned by the entirety, nor is a judgment against one spouse a lien against the estate held in the entirety.[5]

4. In some states in a tenancy by the entirety, the husband has the sole right to possession during the joint lives, and a fee simple absolute in all of the estate if he survives the wife. The wife, on the other hand, has no present estate but she does have a fee simple absolute in all of the estate if she survives her husband. The husband can convey his interests subject only to the right of the wife to absolute ownership if she survives; but the wife, during their joint lives, cannot convey her possibility of acquiring the estate. See Powell on Real Property ¶ 623. See D'Ercole v. D'Ercole, 407 F.Supp. 1377 (D.Mass.1976) (where an estranged wife brought suit claiming that the common-law concept of tenancy by the entirety deprived her of due process and equal protection in that it gave her husband the right of possession and control during his lifetime of their home, the court held that since tenancy by the entirety is but one option open to married persons seeking to take title to real estate, it is constitutionally permissible).

5. In those states that preserve the estate by the entirety in all its common law flavor, creditors of the husband can attach and sell under execution all of his interest in an estate by the entirety, but

9. Divorce eliminates the unity of person, destroys the tenancy by the entirety and the divorced persons become tenants in common of the property, or in some states, joint tenants.

10. Neither spouse has a right to partition a tenancy by the entirety, and neither has power, without the consent of the other, to destroy it.

*c. Tenancy in Common*

1. Tenancy in common may be created by deed, by will, or by operation of law.

2. Under modern statutes, tenancy in common is preferred over joint tenancy. Thus, a conveyance to two or more persons presumptively creates a tenancy in common.

3. Only one unity, that of possession, need be present in tenancy in common.

4. Each tenant owns an undivided fractional part of the property, none owns the whole as in joint tenancy.

5. Each tenant can dispose of his undivided fractional part or any portion thereof, either by deed or by will.

6. Upon the death intestate of a tenant in common her interest descends to her heirs. There is no right of survivorship.

7. Tenancy in common may be destroyed by partition or by merger when the entire title vests in one person, either by purchase or otherwise.

8. If one cotenant ousts the other from possession, the ousted tenant has a cause of action against the possessor to regain possession.

9. There is no real fiduciary relationship between cotenants merely because of the cotenancy, but good faith between cotenants prevents one cotenant from buying up an adverse title and asserting it against cotenants if the other cotenants offer to share their part of the expense of gaining the title. The buyer of the adverse title is made to hold in constructive trust for his cotenants.

separate creditors of the wife cannot reach her interest. See Licker v. Gluskin, 265 Mass. 403, 164 N.E. 613 (1929) (where a husband and wife were tenants by the entirety and a creditor of the wife attached her interest in the land and sought to sell it, the court held that under force of statute the attachment and levy were void because the creditor could not do what the wife could not do); West v. First Agricultural Bank, 382 Mass. 534, 419 N.E.2d 262 (1981) (suggesting that historical inequalities in tenancy by the entirety were now unconstitutional), Powell on Real Property ¶ 623.

## PROBLEMS, DISCUSSION AND ANALYSIS

### § 6.2 *Fee Simple*[6]

**PROBLEM 6.1:** O grants Blackacre[7] "to B." In the jurisdiction where the land is located a statute provides in substance that every grant or conveyance of an estate in land made to a person shall be deemed a fee simple unless a lesser estate is described in the instrument. (a) What estate would B take at common law? (b) What estate would B take under the statute?

**Applicable Law:** Words of limitation, "and his heirs," were indispensable to the creation of a fee simple estate at common law. Under modern statutes and some cases, the use of these words is usually not necessary and a fee simple estate may be created without the presence of these words.

#### Answer and Analysis

(a) At common law B took a life estate in Blackacre but under the statute B takes a fee simple estate. At common law no conveyance could pass a fee simple from the grantor to the grantee without the use of the magic words of limitation, "and his heirs." Thus, even a conveyance to "B in fee simple absolute" gave B only a life estate.

(b) Under the statute the named grantee takes a fee simple estate in every conveyance (assuming the grantor had a fee simple) unless by express words in the deed it is stated that the grantee takes an estate less than a fee simple. Thus, under the statute B takes a fee simple even though the phrase "and his heirs" was excluded from the terms of the conveyance. Some jurisdictions hold that B takes a fee simple in such case even without the aid of a statute.

The common law rule mandating the use of "and his heirs" was subject to some important exceptions. These were:

If O conveys to B corporation (whether sole, aggregate, or municipal), the corporation takes a fee simple absolute without the use of words of inheritance. Although corporations are legal "persons," they do not have heirs.

If O conveys to "B as trustee," B takes such estate as is necessary to carry out the trust, including a fee simple, even though the phrase "and his heirs" did not appear in the conveyance.

6. At this point those portions of chapter 5 describing the characteristics of the fee simple absolute and the fee simple subject to limitations should be carefully re-read. In each of the following problems, assume that O owns Blackacre in fee simple absolute unless the problem provides otherwise.

7. Unless the problem otherwise provides, O or T, when conveying or devising Blackacre, owns Blackacre in fee simple absolute.

If O conveyed to the heirs of B (a deceased person), that heir took a fee simple even though the phrase "and his heirs" did not appear in the conveyance. This resulted from the fact that at common law B had but one heir where primogeniture applied; thus, the use of the plural heirs was a substitute for "B's heir and his heirs." Similarly, if O conveys to B for life, remainder to the heirs of C while C is still living, C's heirs took as purchasers and as a class of heirs a contingent remainder in fee simple. If C dies before B, they then take a vested remainder in fee simple without words of inheritance being used in the deed.

Suppose O conveyed Blackacre to A and B and their heirs as joint tenants in fee simple. A releases her interest to B. B now is owner in fee simple in severalty without use of the words of inheritance in the deed. The reason is that B, as well as A, had previously owned the fee in the whole. By contrast, suppose O conveyed to A and B and their heirs as tenants in common. In this case each of them owns an undivided one half of Blackacre in fee simple. If A grants "to B" A's interest in Blackacre, B will only take a life estate in A's undivided half at the common law unless words of inheritance are used. This is because A's estate is wholly separate and distinct from B's fee simple, each having a different interest. Lastly suppose T devises Blackacre to B. B takes a fee simple without the use of words of inheritance if this is the testator's intention.[8]

**PROBLEM 6.2:** O conveys Blackacre "to my son-in-law, B, and his heirs to have and to hold for his lifetime, and at his death to be equally divided among his heirs, they being my grandchildren then living." What estate does B take under this deed?

**Applicable Law:** If two clauses in a deed are in conflict but the grantor's intention can be found by a reading of the entire instrument, this intention shall govern.

### Answer and Analysis

B has a life estate. There is an inconsistency between the granting clause which gives B a fee simple and the habendum clause which limits B's estate to a life estate. If the rule of construction is that if the granting clause is repugnant to or inconsistent with the habendum clause, the former governs, then, of course, B takes a fee simple estate. This rule, however, is resorted to only when the intention of the parties cannot be ascertained from the entire instrument. In this problem O's intent can be gleaned by reading the entire instrument.

8. See Restatement of Property §§ 29–37; Simes, 181–185.

In analyzing the entire instrument little emphasis should be placed on the order in which the words, phrases, or clauses appear. In the first place, the grantee, B, is the grantor's son-in-law. In the second place, the deed provides for another purchaser upon B's death, namely, B's heirs, who are the grantor's grandchildren. A is providing for a remainder among B's children, A's grandchildren. True, there can be no heirs of a living person and it cannot be foretold who B's heirs will be at the time of B's death. Nonetheless, there is reason to believe that O is using "B's heirs" as synonymous with "B's children." If this is the case, then it is clear that B takes a life estate and there is a contingent remainder to B's children living at B's death.

Furthermore, by taking this view, the words "and his heirs" used in the granting clause might well be read as "and his children." This construction would give effect to every part of the deed and reconcile the granting and the habendum clauses. Under this interpretation, B takes a life estate in Blackacre and his children living at his death take a contingent remainder. O, of course, retains a reversion. From a reading of the entire deed this seems to be O's intention.

**PROBLEM 6.3:** In State X a statute provides that a conveyance which prior to the enactment of the statute would create a fee tail estate should thereafter create a fee simple estate in the grantee. O is domiciled in State X. O conveys Blackacre "to B and the heirs of his body." What estate does B take under the instrument?

**Applicable Law:** Under many modern statutes a conveyance which would have created a fee tail estate at common law now creates a fee simple estate.

### Answer and Analysis

B takes a fee simple absolute. Prior to the statute and at common law the expression "to B and the heirs of his body" created a fee tail estate in B. This estate was limited to lineal heirs. Many states have statutes which provide that an estate which was at common law a fee tail shall be deemed a fee simple. Under this type of statute B would take a fee simple estate. Thus if B owned the property at the time of his death and died intestate, the property would pass to B's lineal descendants, or if none, among his collateral heirs.[9] This estate is also alienable and devisable.[10]

9. Depending upon state law, these heirs might be ancestors of B or collateral relatives of B.

10. See Restatement of Property § 42, Simes, 196–202.

**PROBLEM 6.4:** O conveys Blackacre to "B and his heirs so long as Blackacre is used for school purposes." What interest does B have in Blackacre?

**Applicable Law:** A grant to B and his heirs so long as the land is used for school purposes creates in B a fee simple determinable; the grantor retains an estate called a possibility of reverter.

**Answer and Analysis**

B has a fee simple determinable. B has a fee because words of inheritance, "and his heirs" were used following the grantee's name (words of purchase), which indicate the estate in B may last forever. However, additional words of limitation appear in the deed. These words tie up the use to which B may put the land. Because of these additional words of limitation, there is the possibility that B's estate will not last forever. If B ceases to use Blackacre for school purposes, then B's estate automatically terminates and Blackacre reverts to O because the very words of the conveyance state that B's estate shall last just that long. Thus, there is no forfeiture involved. Rather, B's estate ends naturally.

In this problem, the future interest retained by the grantor is called a possibility of reverter. This estate becomes possessory upon the natural termination of B's estate.

In some cases a limitation may be void as a matter of public policy. For example, suppose O transfers Blackacre to A so long as A remains single. If A marries, does Blackacre revert to O? In resolving this issue, the reasonableness of the restriction may be relevant. Generally, restraints on the marriage of a surviving spouse are upheld, while restraints on the marriage of the grantor's children or others are not.[11] Likewise, any restraint that violates some independent body of law, such as the law of race or gender discrimination, is invalid or unenforceable. For example, a grant "To A so long as the property is occupied exclusively by white persons" is not enforceable in a court.[12]

**PROBLEM 6.5:** Within X County O owned Blackacre which comprised an area of several blocks of land. The land was unimproved and undeveloped. O offered to convey one block of this land, Whiteacre, in the center of the tract to X County to be used for courthouse purposes. The proper county officers agreed to receive the property on behalf of the county and to locate the courthouse there. O executed a deed granting "to X

11. See, e.g, Lewis v. Searles, 452 S.W.2d 153 (Mo.1970) (upholding limitation regarding marriage as against a niece because court found testator only intended to provide for niece when she would have no other sources of support).

12. See Ch. 12.

County, all of my right, title, claim, interest and estate in and to Whiteacre, but upon this condition that Whiteacre shall be used forever as the site on which the courthouse of X County shall be erected." The courthouse was built on Whiteacre and remained there and was used as such for more than 100 years, when it was abandoned as a courthouse. When the structure ceased to be used for courthouse purposes, H was the sole heir of O then living. H sues X County for possession of Whiteacre contending that the above deed created in X County either a determinable fee simple or a fee simple on condition subsequent. May H succeed?

**Applicable Law:** This problem distinguishes a fee simple determinable from a fee simple subject to a condition subsequent. The provisions of a deed will be construed to create a fee simple absolute rather than a fee simple determinable or a fee simple subject to a condition subsequent, if this interpretation is reasonable.

**Answer and Analysis**

No. A determinable fee is a fee which is created by an instrument of conveyance which provides that such estate shall come to an end automatically upon the happening of some described event. A fee simple subject to a condition subsequent is a fee which is created in an instrument of conveyance which provides that, upon the happening of some certain event, the grantor or his successors in interest shall have the power to enter and terminate the estate of the grantee. The principal difference between the two is this: in the determinable fee the estate automatically comes to an end when the stated event happens, whereas in the fee subject to a condition subsequent the termination of the estate is not automatic but must be terminated by an entry or exercise of the reserved power by the grantor or his successor in interest. The former involves no forfeiture, the latter does. Whether a given deed conveys a fee simple absolute or a determinable fee or fee simple on condition subsequent is a matter of construction of the words used in the instrument.

In the construction of limitations the courts favor unconditional estates rather than conditional ones for the reason that estates once vested should not be uprooted after long periods of time unless it was the intention of the grantor expressed in the deed that this should occur. Applying this principle the deed should be construed in favor of the defendant county unless it is fairly clear that the grantor intended either a determinable fee or a fee simple upon condition subsequent. In the deed O grants to X County, a quasi-municipal corporation, "all of his right, title, claim, interest and estate in and to Whiteacre." Words of inheritance are not only not

required but are quite inappropriate where a public corporation is the grantee. Thus, it is clear that O intended to grant a fee simple estate to X County.

The words following, "but upon this condition that Whiteacre shall be used forever as the site" of the courthouse are the only words on which it can be contended there was either a determinable fee or fee simple upon condition subsequent. These words show no intention whatsoever that the fee simple in X County should automatically revert to O or his heirs. While they limit the use to which Whiteacre shall be put, they put no limit on the time during which the estate shall last. The typical words for creating a determinable fee are "so long as," "during," "until," or "while." None of these or similar expression was used but the use was to be "forever." Thus, it seems there is no expression of intention by O in the deed that there should be a determinable fee simple in X County.

Was there a fee simple on condition subsequent? A fee simple on condition subsequent is generally introduced by such phrases as "provided that," "on condition that," "subject to the condition that," or "but if." An express reverter clause giving the grantor the right to re-enter generally is appended. But these reverter clauses are not absolutely necessary. The fee simple subject to a condition subsequent always involves a forfeiture of a vested interest. The law abhors forfeitures and the courts will not construe the words of a deed to create this future estate unless the language is so clear as to admit of no other interpretation. In this case the deed did say, "upon the condition" that the tract be used "forever" as a courthouse site. But there is not one word in the deed expressing what should happen in case the site were not so used. There is no right of entry or power to terminate the estate reserved in O or O's successors in interest. Without any express reservation of this power, the court ought not to imply such, when the result of that implication would cause a forfeiture of an estate which has lasted for more than a century. Thus, there was no fee simple upon condition subsequent created in X County.[13]

There is a further economic argument in this case which should not be overlooked. It may be that O's grant of Whiteacre to X County was not wholly altruistic. If the county courthouse could be located in the middle of land owned by the grantor, such an institution might enhance the value of the lots surrounding the courthouse. Reading the language of the deed as a whole and considering the conditions under which it was executed, it seems

13. In Mahrenholz v. County Board of School Trustees, 93 Ill.App.3d 366, 48 Ill.Dec. 736, 417 N.E.2d 138 (1981) grantor conveyed to a local school board with the land to be used only for school purposes; "otherwise to revert to the" grantor. The court held this language created a fee simple determinable.

quite correct to conclude that X County took a fee simple absolute estate in Whiteacre and that no defeasible fee simple was intended. Thus, H should not succeed in his action.[14]

In many jurisdictions statutes require holders of retained future interests to periodically file a notice or claim to the effect they intend to enforce their rights if the limitation or condition occurs. If State X had a statute of this type and neither H nor H's predecessors timely filed this notice, then even if a fee simple determinable or a fee simple on condition subsequent were created, H would be barred from reclaiming possession of Whiteacre.

**PROBLEM 6.6:** O conveys Blackacre "to B and his heirs provided that, if intoxicating liquors are ever sold on the premises, then O reserves the right to enter and terminate B's estate." What estate does B take under this deed?

**Applicable Law:** A grant to B and his heirs provided that if a specified condition occurs or fails to occur the grantor or his heirs have the right to re-enter and terminate the estate creates in B a fee simple subject to a condition subsequent and leaves in the grantor a right of re-entry for condition broken which today is also called a power of termination.

### Answer and Analysis

B has a fee simple subject to a condition subsequent. The older cases used the expression "right of re-entry for condition broken" to describe O's right. The more recent cases describe O's right as a "power of termination." B has a fee simple because words of inheritance "and his heirs" are used to describe the quantum of B's estate. B's estate may last forever provided intoxicating liquors are not sold on the premises. It may also last forever although intoxicating liquors are sold on the premises provided O or his successors in interest do not terminate the estate of B by exercising their power of termination.

The usual words for creating a condition subsequent are, "on condition that," "but if," "on the express condition that," "provided that" or similar expression. The usual expressions for reserving the power to terminate are that the grantor may "re-enter and take the property," "enter and terminate the estate," "in such case cause the title to revert back to the grantor," or other words evincing an intention to take back the property. The power to terminate may even be implied from such expressions as "every

14. See Chouteau v. City of St. Louis, 331 Mo. 781, 55 S.W.2d 299 (1932) (where a deed conveyed all interest in realty on condition that it should be used forever as a courthouse site with no express provision for re-entry, the deed conveyed a fee and not an estate on condition subsequent and hence the grantor's heir had no right to the property after its abandonment as a courthouse site); Restatement of Property §§ 44, 45.

thing herein shall be null and void" or "this deed shall be null and void and the title shall revert to the grantor."

In this problem, both the condition subsequent and the power to terminate are provided for expressly in the deed. The phrase "provided that if intoxicating liquors are ever sold on the premises" describes the condition subsequent. The phrase "then I reserve the right to enter and terminate the estate hereby created" describes the power to terminate or right to make reentry for breach of the condition. It is clear then that O intended to create a fee simple in B and that if a certain event or condition happened, namely, the selling of intoxicating liquor on the premises, then O would have the right or power to enter and put an end to that fee simple. B's estate would not end automatically. It would end only if and when the condition happened and thereafter the grantor or his successors in interest performed the requisite affirmative act of reentry for terminating such estate.[15]

**PROBLEM 6.7:** O conveys Blackacre "to B and his heirs but upon the express condition that B shall not dispose of or alienate Blackacre for a period of five years after B receives the title." Ten days after the deed was delivered to B, B purports to convey Blackacre to C. What estate does C have in Blackacre?

**Applicable Law:** A restraint which disables a fee simple owner of land from alienating the property is void and the owner may dispose of the property in fee simple.

### Answer and Analysis

C owns Blackacre in fee simple absolute. O purported to convey a fee simple absolute to B and also to impose on B a restraint on B's power to alienate or dispose of the fee simple estate. Is this restraint valid? The answer is an unequivocal no.

The power to dispose of the fee simple estate is an integral part of the fee simple estate. This estate cannot exist apart from the power in its owner to dispose of it. This type of restraint or power to alienate is classified as a disabling restraint and is void in all cases except when connected with spendthrift trusts. Where this restraint appears in a deed, the grantee takes the property free of the restraint and with full power to dispose of the property.[16] This is true whether the restraint refers to real or personal property,

15. See Restatement of Property § 45; Simes, 30.

16. Accord, White v. Brown, 559 S.W.2d 938, 941 (Tenn.1977) (where the testatrix stated in her will that she wished a named person to have her home to live in and that it was not to be sold, the testatrix passed a fee simple absolute in the home to such person, and her attempted restraint on alienation was void as contrary to public policy).

whether it refers to legal or equitable interests (spendthrift trusts excepted), and whether the estate involved is a fee simple, fee tail, life estate, or an estate for years. In other words, there is no power on the part of a grantor or testator to convey a fee simple estate to a person *sui juris* and deny that person the power to dispose of the estate for five years, for one year, for one day or one minute. In this case then, O's attempted restraint on B's power to alienate the estate was void and B took the fee simple absolute in Blackacre. B's estate was alienable. B had both the right and power to convey the fee simple estate to anyone. Since B granted B's estate to C, C took from B the estate which B had which was a fee simple absolute.

The disabling restraint illustrated in this problem is a type of direct restraint on alienation. Other types of direct restraints are the promissory and forfeiture restraints. Unlike the disabling restraint which is generally held invalid except in the case of spendthrift trusts, promissory and forfeiture restraints are generally held valid when imposed on interests less than fees simple.

### *§ 6.3 Fee Simple Conditional and Fee Tail [Omitted]*

### *§ 6.4 Life Estates*[17]

**PROBLEM 6.12:** T's first wife died. Later T remarried W–1. T later dies and bequeaths Blackacre to "my second wife, W–1, so long as she remains a widow, and then to my child C and his heirs." W–1 later dies and bequeaths her entire estate to her brother X and his heirs. X enters Blackacre. C sues X in ejectment. Who wins?

**Applicable Law:** A grantor can create a determinable life estate as well as a fee simple determinable. Ordinarily distinguishing the two is easy. However, where the limitation is tied to an event that could only occur during the grantee's lifetime, ambiguities can arise whether the grantor intended to create a determinable life estate or a fee simple determinable.

#### Answer and Analysis

C probably wins. Whether C or X wins depends on whether W–1 had a determinable life estate or a fee simple determinable. It W–1 had a determinable life estate, then C would have a remainder which would become possessory at W–1's death. A determinable life estate is neither devisable nor descendible. If, on the other hand, W–1 had a fee simple determinable, then W's estate would be devisable and descendible and, given that the limitation could not occur after W–1's death, C's shifting executory interest[18] could never become possessory.

17. On life estates, see Ch. 5, Part I.

18. The fact that C would have a shifting executory interest is an excep-

The proper classification of W–1's interest depends on T's intent. A strong argument can be made that T wanted W–1 to have only personal enjoyment of the property during her widowhood and not a devisable or descendible estate. This argument is particularly strong where as here, C is a child of T's first marriage and construing W–1's estate as a fee simple determinable would permit her to devise the property to strangers.[19]

**PROBLEM 6.14:** H and W were husband and wife who had five minor children. H devised Blackacre "to my wife, W, for the term of her natural life, remainder to our children share and share alike, but if my wife, W, determines it to be for the welfare of the family to sell Blackacre, then she is hereby empowered to sell the land and pass a fee simple title thereto." W decided that it was for the family welfare to sell Blackacre so she conveyed it to "B and his heirs." W died and the five children sue B for possession of Blackacre. Should they succeed in their action?

**Applicable Law:** A life tenant can be granted a power to convey a fee simple even if by exercise of that power the interest of the remainderman is defeated.

### Answer and Analysis

No. Sometimes an estate is given with a power in someone to cut short or destroy it. Sometimes an estate is given with a power to enlarge it. This case involves both types—a life estate in W with a power to dispose of the fee simple and a remainder in fee simple in the children with power in W to destroy it. By W's conveyance to B in fee simple she exercised that power. This act both enlarged her life estate to a fee simple absolute in her grantee and destroyed the vested remainder in her children. But until the exercise of the power by W, she had only a life estate.

**PROBLEM 6.15:** O conveys Blackacre "to B for the lives of B, C, D and E and the survivor of them." B conveyed to X all of B's right, title and interest in Blackacre. B then died survived by C, D and E. O sues to eject X from Blackacre and argues that B's death terminated X's interest in the premises. May O succeed?

tion to the classification structure. Logically, C should have a vested remainder since, if it were to ever become possessory, it would do so following the natural termination of W's estate upon the happening of a limitation, not a condition. However, because of the early common law rule that a fee simple could not follow on the heels of a fee simple, C's interest was classified as a shifting executory interest and continues to be so classified today.

19. Compare Dickson v. Alexandria Hospital, Inc., 177 F.2d 876 (4th Cir. 1949)(fee simple determinable) with Mouser v. Srygler, 295 Ky. 490, 174 S.W.2d 756 (1943)(determinable life estate).

**Applicable Law:** O "to B for the lives of B, C, D and E and the survivor of them," is valid to create a life estate in B until the death of the survivor of the four named persons, B, C, D and E. O "to B for the joint lives of B, C, D and E" is valid and lasts as long as all four live and ends upon the death of the first of the four; O "to B for B's life and the lives of all the people who live in State X and the survivor" is a valid life estate for the life of B only, the provision for the other lives and survivor being void for impracticability of determining the death of the survivor.

### Answer and Analysis

No. It should be noted that the life tenant's name, B, is listed among the measuring lives so that this is not wholly an estate pur autre vie. B has a valid estate for the lives of B, C, D and E and the survivor of them. This phrase makes the life of the survivor of the four the maximum term of the estate which B had and which B assigned to X. Thus, O has no right to eject X until all of the four are dead. If B is not the survivor of them, B's estate passes to those persons who are the successors of his estate—his heirs if B dies intestate; the beneficiaries of the interest if B dies testate.

Had the conveyance read, "for the joint lives, of B, C, D and E," then the "joint lives" could only last until the first of the four died and when B died, O could have ejected X. But the deed did not so provide.

Had the measuring lives been "for the life of B and the lives of all the persons now living in the State of South Dakota and the survivor of them," the provision for the lives beyond that of tenant, B, would be void for the reason that it would be impracticable if not impossible to determine the time of death of the survivor, and B would take a life estate for his own life only.[20]

**PROBLEM 6.16:** T devised Blackacre to her daughter, D, for life. T's will directed that upon D's death Blackacre should be distributed to D's two children, X and Y, and their heirs. The will also provided that Blackacre should not be sold until X and Y reached 45 years of age. Is the provision against sale valid?

**Applicable Law:** (a) Disabling restraints on alienation (spendthrift trusts excepted)[21] generally are void regardless of the estate to which they are attached. (b) Forfeiture and promissory restraints on life estates and lesser interests generally are

20. See Restatement of Property § 107, illustrations 1, 4, 5.

21. A spendthrift trust is a trust which provides, among other things, that the equitable life estate (and remainder) while held by the trustee are not alienable nor reachable to the creditors of the income beneficiary or remainderman.

valid. (c) All unreasonable restraints on the alienation of fee simple estates are invalid. (d) Life estates are subject to termination by special limitations and powers of termination.

**Answer and Analysis**

In most states the restraint on alienation is invalid. The provision against sale is a restraint on alienation of the disabling type.

A disabling restraint is a direction in the creating instrument that the estate shall not be alienated. If this restraint were valid, it would create a non-transferable estate. If a disabling restraint were valid, the transferee subject to the restraint could not alienate the property and would not lose his interest in the property even though in violation of the restraint he purported to alienate the property.

The general rule, with the exception of a disabling restraint on the beneficial interest under a spendthrift trust, is that all disabling restraints on alienation are void. This rule applies whether the disabling restraint is attached to a fee simple, life estate, or lesser interest. It also applies whether the restraint is total or partial, limited or unlimited as to duration. The rule is based upon a public policy preference to eliminate impediments to the alienability of land. When tied to a life estate or other estate smaller than a fee simple absolute, the practical effect of the restraint is unclear. All future interests act as impediments to the alienability of land. Thus, in this problem, if the restraint were limited to the life of D, an empirical question arises whether the land would be any more alienable without the restraint as it would be with it since D's children have a future interest. If they do not join in a conveyance, no purchaser from D could acquire a fee simple estate.

When applicable, the rule of invalidity invalidates the illegal restraint on alienation and makes the estate freely alienable. Thus, in most jurisdictions D acquires a life estate which D can alienate, and X and Y can alienate their remainder interests during the lifetime of D. They also can alienate the fee simple after the death of D regardless of whether or not they reach the age of 45.

Forfeiture and promissory restraints on fee simple estates generally have been held invalid. Forfeiture and promissory restraints on life estates and lesser interests generally are held valid. A forfeiture restraint exists when the creating instrument provides that on an attempted alienation the estate created or transferred is forfeited or terminated with a further provision for the estate to pass to another.

A promissory restraint is in the form of a covenant (promise) that the grantee will not alienate the estate. Thus, in this problem,

if the will provided that should D transfer or alienate her life estate, then her estate should end and the entire estate vest in X and Y, the provision would be perfectly valid and enforceable.

Forfeiture restraints on life estates may be justified on two grounds: (1) they may be imposed for the benefit of the reversioner or remainderman; and (2) life estates are somewhat inalienable (at least in a commercial sense) anyway because of the uncertainties surrounding the life expectancy of the life tenant. Because the life tenant may die the next day, no one is willing to pay very much for a life estate. Forfeiture restraints on leaseholds are common and are valid. These restraints customarily take the form of affording the landlord the right to re-enter and terminate the estate if the leasehold is transferred without the landlord's consent. The interest of the landlord in protecting rental income and the reversionary estate are sufficient justification for upholding such restraints.

Life estates also are subject to termination by (1) special limitation, such as "to B for life so long as B does not sell liquor on the premises," or "to W for life for so long as W remains a widow (or until she remarries)," and (2) by the exercise of a power of termination, such as, "to B but if he does not keep the fences in repair, then I reserve the right to re-enter and take back the premises."[22]

The modern trend toward condominium and cluster housing has given rise to increased restrictions on the use and transfer of such housing units. The close interrelationships of the community members, whether controlled by a home owners' association, a condominium or a cooperative association, have resulted in the use of restrictions in order to achieve a community of compatible and financially responsible persons. The restrictions frequently involve not only restrictions on use, i.e., single family residence, no children under a certain age, or no pets, but also restrictions on sale or transfer.

A wholly disabling restraint on sale most likely would not be used, and even if it were, it would most likely be held invalid although limited as to duration. However, provisions are common

22. See McCray v. Caves, 211 Ga. 770, 88 S.E.2d 373 (1955) (where a husband's will devised a tract of land to his wife for life and at her death to the heirs of her body but should she cease "to be the wife or widow" of the husband "then in that event she forfeits her right to the life estate" to her children, the estate divested upon her remarriage); Restatement of Property § 18, Note 2.

that grant the condominium association a right of first refusal. In other words, when an owner wishes to sell, the association may either approve the prospective buyer and sale, or instead, may buy the unit on the terms and conditions offered by the prospective buyer. As long as the association does not have an unreasonably long period of time in which to exercise its purchase option, such provisions have been, and should be upheld as long as the particular terms do not violate the rule against perpetuities.[23]

One court expressed the opinion that a right of first refusal was not a restraint on alienation since the seller in effect had two purchasers instead of one.[24] This reasoning is questionable. If a right of first refusal exists, any prospective purchaser that the seller gets must be prepared and willing to wait until the association decides whether or not to exercise the option. If the association is given too long a period of time to decide, many prospective purchasers will refrain from making an offer because they will not want to be bound for a long time without an assurance that they will get the land. Thus, there will definitely be a restraint on alienation. Reasonable controls, however, are common and even desirable.

In view of these recent developments, statements about direct restraints on alienation should be phrased as follows: reasonable restraints on alienation are upheld, but unreasonable restraints on alienation are invalid.[25]

**23.** Options in gross may be subject to the common law Rule against Perpetuities, but options to renew or purchase attached to leases are not generally subject to the Rule, because they promote rather than hinder alienability. See Ch. 13. See generally, Ch. 8, §§ 8.4; 8.5.

**24.** Watergate Corp. v. Reagan, 321 So.2d 133 (Fla. 4th D.C.A. 1975) (action for declaratory judgment; an agreement granting a right of first refusal with respect to the sale of certain property did not violate the Rule against Perpetuities and enhanced alienability because the seller had two potential buyers instead of one).

**25.** See Coquina Club, Inc. v. Mantz, 342 So.2d 112 (Fla. 2d D.C.A.1977), holding that unit owner must tender a qualified purchaser (here, with no children under 12), before association has duty to purchase or provide another purchaser; Hoover & Morris Dev. Co., Inc. v. Mayfield, 233 Ga. 593, 212 S.E.2d 778 (1975), holding that owner did not comply with declaration requirements concerning notice to the association so as to require exercise of the option or consent, but that there was evidence of a waiver; and Ritchey v. Villa Nueva Condominium Ass'n, 81 Cal.App.3d 688, 146 Cal. Rptr. 695 (1978), holding that age restrictions on occupancy and sale were reasonable and valid, and that coupled with a right of first refusal as provided in the documents would impose on the association the duty within fifteen days to either provide a qualified purchaser, purchase itself, or waive the restriction. See Ch. 13.

## FREEHOLD ESTATES COMPARED WITH AND DISTINGUISHED FROM NON-FREEHOLD ESTATES

| Freehold estates illustrated | Non-freehold estates illustrated |
|---|---|
| Case 1. Fee simple<br>A *to B and his heirs*—this gives B a fee simple and leaves nothing in A. B's estate is inheritable by his heirs general, either lineal or collateral. | Case 1. Estate for years<br>A *to B for 10 years*—this gives B an estate for years and leaves a reversionary interest in A. If B dies during the 10-year period the balance of the term passes to B's personal representative, i. e. his executor or administrator, for purposes of administration. In many jurisdictions the rules as to the intestate transmission of real and personal property are the same. |
| Case 2. Fee tail<br>A *to B and the heirs of his body*—at common law this gave B a fee tail and left a reversion in A. B's estate was inheritable only by B's lineal heirs. Today the nature of the estate created by such a conveyance varies from state to state. | Case 2. Estate from year to year<br>A *to B from year to year*—this gives B an estate from year to year and leaves a reversionary interest in A. If B dies during the period of the lease the balance thereof passes to his personal representative. |
| Case 3. Life estate<br>A *to B for life*—this gives B an estate for B's life and leaves a reversion in A. B's estate is not inheritable. | Case 3. Tenancy at will<br>A *to B as long as A wishes* (or as long as both A and B agree)—this gives B an estate at will and leaves a reversionary interest in A. B's death (or A's death) during the tenancy terminates the tenancy and A has the right to immediate possession.<br>NOTE, HOWEVER, that if the limitation is from *A to B for as long as B wishes*, there is a conflict of authority and B has either a life estate determinable (believed to be the better view) or a tenancy at will depending upon the jurisdiction. |

| Freehold estates illustrated | Non-freehold estates illustrated |
|---|---|
| | Case. 4. Tenancy at sufferance<br>A leases to B for 2 years and after the expiration of the 2-year term, B remains in possession without A's permission—B has a tenancy at sufferance which is really no tenancy at all but is called such. A has the right to eject B. B has a mere naked possession without right. |
| SIMILARITIES | |
| 1. In each case B has possession of the land. | 1. In each case B has possession of the land. |
| 2. In each case B has an estate in the land. | 2. In cases 1 and 2 above B has an estate in the land but in cases 3 and 4 B does not have an estate but mere possession. |
| DISSIMILARITIES | |
| 1. The interest of B is *real property.* | 1. In cases 1, 2 and 3 B's interest is *personal property*—called a chattel real. In case 4, B has no interest. |
| 2. B's interest is *inheritable*—that is, passes to B's heir or heirs in cases 1 and 2 but this is *not true as to case* 3 for a life estate measured only by the life of the tenant is not inheritable. | 2. In cases 1 and 2 and 3 B's interest *is inheritable* but in cases 3 and 4 it is not. |
| 3. B's interest is of *indefinite* or uncertain duration. | 3. B's interest in case 1 is of *definite* duration, in cases 2 and 3 of indefinite duration. |
| 4. B is *seised* which means that he is possessed claiming a freehold interest in the land. | 4. B is *not seised* but only possessed—seisin exists only as to freehold estates. |
| | 5. A tenancy at will is a chattel interest in land, of the lowest nature but it is possession at the mutual wills of the land owner and the tenant, and will support trespass or ejectment; death terminates it. |

| Freehold estates illustrated | Non-freehold estates illustrated |
|---|---|
| | 6. A tenancy at sufferance is no tenancy at all; it is a mere wrongful, naked possession but neither an estate nor property. |

## § 6.5 *Concurrent Estates*

### *a. Joint Tenancy*

**PROBLEM 6.17:** O conveyed Blackacre "to B, C and D and their heirs as joint tenants with right of survivorship in the survivors, and not as tenants in common." Blackacre is located in State Z. State Z law provides that all concurrent tenancies shall be deemed tenancies in common and not joint tenancies unless it is expressly declared that the grantees or devisees shall take as joint tenants. B died testate devising all of his interest in Blackacre to X and his heirs. X immediately took possession of Blackacre. C and D sue X in ejectment. May they succeed?

**Applicable Law:** Joint tenancy must under many modern statutes be expressly declared to overcome the preference for tenancy in common. A joint tenant can convey his or her undivided interest by deed. A joint tenant cannot convey his or her interest by will.

**Answer and Analysis**

Yes. Under modern statutes the survivorship feature of co-tenancies is not popular. Many such statutes in express terms prefer tenancy in common over joint tenancy, which is the reverse of the common law. In order to create a joint tenancy under the type of statute given in the problem, there must be a clear expression of intention that the grantor intends the grantees to take as joint tenants. Any doubt is and should be resolved in favor of their taking as tenants in common.[26]

It would seem that O has succeeded in creating a joint tenancy in the grantees. O uses these words, "as joint tenants with right of survivorship and not as tenants in common." Three distinct ideas are expressed: (a) the grantees are called joint tenants; (b) they are to have the right of survivorship; and (c) they are not to be tenants in common. Any one of these expressions by itself may not overcome the preference for tenancy in common. But when all three are

26. In Oregon, common law joint tenancies have been abolished. Ore. Rev. Stat. § 93.180 (1973). However, a right of survivorship can be created in two or more persons without the right to sever that feature. This is accomplished by characterizing language which would have created a joint tenancy as creating a life estates in the grantees, and a contingent remainder in fee in the survivor. See Halleck v. Halleck, 216 Or. 23, 337 P.2d 330 (1959).

put in the conveyance, and it is expressly declared to be joint tenancy as the statute requires, then B, C and D would take as joint tenants. Accordingly, when B died testate or intestate, the survivors, C and D, continue as survivors to hold Blackacre in fee simple in joint tenancy. In order to destroy the joint tenancy by severance the joint tenant must convey his or her interest by deed.[27] A destruction of the joint tenancy occurs even by the conveyance of a lesser interest than the joint tenant has. The joint tenant's interest being in fee simple, a severance occurs by a conveyance of a fee tail, life estate or, according to some cases, by his transfer of a term of years. On the other hand, the will of a joint tenant is wholly ineffective to pass any interest in the jointly owned property; at the instant of death the right of survivorship takes effect and the attempted severance comes too late. Thus, B's devisee, X, takes nothing under the will, has no interest in Blackacre, and can be ejected from the premises by the owners and possessors, C and D.

Suppose during his life, B conveyed all of her interest to Y. That would create a tenancy in common in Y as between Y, and C and D. But the joint tenancy of C and D would not be severed by B's conveyance and upon C's death survived by Y and D, D would own 2/3 and Y 1/3 of Blackacre.

**PROBLEM 6.18:** T owned a regular section of land, Blackacre, in a given township and effectively devised it to A and B as joint tenants. Later, A executed a deed to X as follows, "I hereby convey all of my right, title and interest in the North East Quarter of Blackacre to X and his heirs." Thereafter, Y, a judgment creditor of A, levied upon and sold to M on execution sale, all of "A's right, title and interest in the South Half of Blackacre." A died intestate leaving W his widow and Z his sole heir at law. Who owns Blackacre?

**Applicable Law:** A joint tenant owns the whole of the jointly owned property, not a fractional part. The joint tenant can dispose of his or her entire interest and the grantee of that interest takes a fractional part as a tenant in common. A joint tenant may dispose of an interest in a specific part of the jointly owned property. The interest of a joint tenant can be levied upon and sold by his creditors. Upon the death of a joint tenant, the decedent's surviving spouse cannot claim dower and the decedent's heirs have no interest in the property.

27. Riddle v. Harmon, 102 Cal. App.3d 524, 162 Cal.Rptr. 530 (1980) (contrary to the common law, a joint tenant can sever a joint tenancy by conveying to himself as a tenant in common); Swartzbaugh v. Sampson, 11 Cal. App.2d 451, 54 P.2d 73 (1936) (lease by one joint tenant does not sever tenancy). See also, Tenhet v. Boswell, 18 Cal.3d 150, 554 P.2d 330, 133 Cal.Rptr. 10 (1976. As respects mortgages, see Harms v. Sprague, 105 Ill.2d 215, 85 Ill.Dec. 331, 473 N.E.2d 930 (1984); Brant v. Hargrove, 129 Ariz. 475, 632 P.2d 978 (1981); People v. Nogarr, 164 Cal.App.2d 591, 330 P.2d 858 (1958) (all holding that joint tenancy not severed where one joint tenant mortgages his interest where mortgage is not a transfer of title but merely the creation of a lien). In states following the title theory of mortgages, the execution of a mortgage by one joint tenant can sever the joint tenancy.

### Answer and Analysis

(1) B and X are tenants in common of the North East Quarter of Blackacre, (2) B and M are tenants in common of the South Half of Blackacre, and (3) B is the owner in severalty of the North West Quarter of Blackacre.

Every joint tenant owns the whole of the jointly owned property and does not own a share or a fractional part thereof. Furthermore, each joint tenant has the right and power to dispose of his or her undivided interest. This means that A and B as a unit owned Blackacre and that A owned Blackacre and B owned Blackacre. It also means that by a conveyance A had the right and power to dispose of an undivided one half interest in Blackacre. If A could dispose of this entire interest in Blackacre, then A could dispose of part of such interest by limiting the conveyance to the North East Quarter of Blackacre. Thus, A's deed to X carved out and vested in X an undivided one half interest in the North East Quarter of Blackacre. But as to that Quarter, X and B are tenants in common because the unities of time and title have been severed by A's deed. X takes title from a different source than did B and X takes title at a different time than did B. Thus, B and X cannot be joint tenants. B and X each own an undivided one half interest as tenants in common in the North East Quarter of Blackacre in fee simple.

Because a joint tenant has the right and power voluntarily to dispose of an interest in the jointly owned property, the joint tenant's creditors have the right and power to take that interest involuntarily. A's judgment creditor, Y, therefore, had the right to levy upon and sell A's interest in the south half of Blackacre. Having done so, when M purchased Blackacre at the execution sale, the unities of time and title were destroyed because M took this interest in Blackacre from a different source and at a different time than did B. The result is that M and B are tenants in common of the south half of Blackacre, each owning an undivided one half interest therein.

The North West Quarter of Blackacre remained unaffected by the conveyances to X and M. A and B remained joint tenants of that quarter until A's death. Survivorship defeats any right which a surviving spouse otherwise might have in the estate of a joint tenant. It also defeats the rights of the heirs of the deceased joint tenant. Therefore, A's widow, W, and his heir, Z, can claim no interest in the North West Quarter of Blackacre. That quarter belongs to B in severalty in fee simple by the doctrine of survivorship.[28]

28. See Klajbor v. Klajbor, 406 Ill. 513, 94 N.E.2d 502 (1950) (joint tenancy may be severed and the estate destroyed by the conveyance of interest of one of the joint tenants and the interest severed is changed into a tenancy at com-

**PROBLEM 6.19:** T devised Blackacre "to A and B as joint tenants." The property consisted of a 50 foot lot fronting on a very busy street in a city. One half of the 50 foot frontage was covered by a store building. The other half was vacant. The land was worth $16,000. The building was worth $5,000 but needed $1,000 worth of repairs on the roof as an absolute necessity to make it habitable for business purposes. The other half of the lot could be used for store purposes if a building costing $4,000 were built. A asked B to contribute $500 towards repairing the roof of the existing building and $2,000 towards the construction of another store building on the lot for rental purposes. B refused to do anything. A then repaired the roof for $1,000 and built another store building on the lot for $4,000 and, with B's approval, rented both buildings. A then asked B to repay to A one half of the sums A expended in repairs and in building the new store. B refused. A then sued B to partition Blackacre, it being conceded that it was not partitionable in kind but only by making a sale and dividing the proceeds. Under order of the court Blackacre was sold to X for $26,000. The court then ordered the $26,000 divided as follows: $10,500 to B and $15,500 to A. B objects to this division. Was the court correct?

**Applicable Law:** A joint tenant has no right of contribution against the other joint tenants for repairs or improvements he or she has made, but if a court orders that the property be partitioned, the court in making an equitable division of the proceeds will take into consideration the expenditures made by one tenant for repairs and improvements.

### Answer and Analysis

Yes. A partition suit is in equity and an equity court should do equity. At common law A might have had a cause of action to compel B, the other joint tenant, to contribute for the making of repairs which are absolutely necessary, provided he brought the action before the repairs were made. No such action would lie after the repairs were made. Furthermore, one joint tenant has no cause of action against the other joint tenants for contribution for improvements. Under these principles, it is plain that A had no right against B for contribution either for repairs or the improvement.

In a partition suit, however, each joint tenant has the right to have the jointly owned property partitioned. Under the circumstances, by A making and paying for repairs and improvements, A

mon, but severance of joint tenancy must take place before the death of the cotenant and before the other has become owner of the whole by virtue of the right of survivorship).

has enhanced the value of Blackacre by $5,000.[29] By returning to A the $5,000 which A expended in repairing and improving the property, A is made whole and B is not injured. Had there been no repairs or improvements the property would only have been worth $21,000. There is still that sum left after reimbursing A for A's expenditures for repairs and improvements. Thus, it seems the equity court made an equitable partition of the proceeds.[30]

**PROBLEM 6.20:** H conveys Blackacre to himself and his wife, W, in the following language, "I, H, hereby grant Blackacre to H and W, husband and wife and their heirs forever, in joint tenancy with right of survivorship, and not to them as tenants by the entirety or as tenants in common, it being my intention that all the rights and powers of joint tenants shall accrue to said H and W." H died intestate leaving S as his sole heir at law. In whom is the title to Blackacre?

**Applicable Law:** A husband and wife can hold real property in joint tenancy. A joint tenancy (or tenancy by the entirety) in most jurisdictions can be created by husband, H, making a grant "to H and W, husband and wife" with clearly expressed intention to that effect.

### Answer and Analysis

W owns Blackacre in fee simple absolute. There is no question concerning H's intention. In unmistakable language H expressed an intention that H and W hold Blackacre in joint tenancy. There is no question either (except in those jurisdictions that do not recognize all types of concurrent estates), that a husband and wife may hold real property either as tenants by the entirety, as joint tenants, or as tenants in common, depending on the intention expressed in the conveyance.

The only real question is this: can a grantor grant to himself and another and thereby create a joint tenancy, (or tenancy by the entirety), when such is the grantor's clearly expressed intention? It

29. While an improver cotenant cannot compel other co-tenants to pay for the improvements, the court takes account of the improvement in the partition action. For example, if feasible, the improvement would be included in the portion of the property set aside to the improver. If the property is sold, however, a portion of the proceeds attributable to the improvement would be set off to the improver. See Johnson v. Hendrickson, 71 S.D. 392, 24 N.W.2d 914 (1946).

30. See Calvert v. Aldrich, 99 Mass. 74 (1868) (where two tenants in common owned a machine shop that needed repair after having caught fire and one tenant paid for repairs after the other refused to contribute, the court held that a tenant in common who makes necessary repairs upon common property without the consent of his cotenant cannot maintain an action at law to recover contribution for costs incurred; rather, partition is the usual and natural remedy). See also, Giles v. Sheridan, 179 Neb. 257, 137 N.W.2d 828 (1965)(Co-tenant who pays off mortgage on which co-tenants are equally liable does so for common benefit of the joint tenants and is entitled to contribution).

seems that a proper analysis can bring only an affirmative answer. The cases present at least three distinct views as to the effect of the conveyance.

At common law the husband and wife were one and he was the one. Thus, when the husband granted to himself and wife, he was granting to himself. When one grants to himself, nothing happens. So the conveyance is void. But this concept is an anachronism. Today the wife is a legal person and her personality is no longer merged in that of the husband.

The second view holds that the effect of the conveyance is to create a tenancy in common between the husband and wife, each owning an undivided one half interest in Blackacre. There are two objections to this result. The first is that it does violence to the grantor's clearly expressed intention that H and W shall not take as tenants in common. The second is that it treats H, the grantor, as the same person, as H, the grantee. This view suggests that one part of the conveyance wherein H conveys to H is void and of no effect, and H therefore remains the owner of one half, whereas the other part of the conveyance from H to W affects only an undivided half of Blackacre which H originally owned and therefore W becomes an owner of such other undivided half. Therefore, they are tenants in common.

The third view and the one which is believed to be the correct one is this: Joint means oneness. In joint tenancy when two, three, or a dozen persons are named as grantees, those joint tenants take as a unit, as one juristic person. In this conveyance H is one person and "H and W" constitute in the singular number quite another person. For the purpose of joint tenancy (or tenancy by the entirety) such grantees or devisees take as a unit personage.

Why do all the cases say that when one joint tenant dies, the survivors take nothing from the decedent but take wholly from the original conveyance? Because each owned the whole and they all owned the whole as a unit. When one died the survivors still continued as a unit owning the whole until there was but one survivor. Thus, when H conveyed Blackacre to "H and W" intending them to take as joint tenants, the grantor, H, was one person, and "H and W" was (singular number) another person, and they as a unit took Blackacre as joint tenants. The grantee, "H and W," take title from the same source, at the same time with the same interest and with unity of possession. When H died W held in fee simple by survivorship.

Today, there is much to be said in favor of carrying out the clearly expressed intention of the grantor in the creation of estates,

even though technically all of the so-called four unities may not be present.[31]

**PROBLEM 6.21:** T devises Blackacre to A, B and C as joint tenants. A then conveys all of his right, title and interest in the premises "to X for the period of his natural life." (a) What is the effect of this conveyance? (b) Who now owns Blackacre?

**Applicable Law:** A conveyance by a joint tenant constitutes a severance and a destruction of the joint tenancy as to the conveying joint tenant's interest. Thereafter X owns a life estate in one third as tenant in common and A owns the reversion in that same one third; B and C remain fee simple owners in joint tenancy between themselves as to the other two thirds, but as to X they own the two thirds as a tenant in common.

### Answers and Analysis

A's conveyance destroys the joint tenancy as to A's interest and X owns a life estate as a tenant in common in an undivided one third interest in Blackacre; A owns the reversionary interest in that same undivided one third interest; B and C own the remaining two thirds interest as joint tenants between themselves but with X as a tenant in common for his life.

Any conveyance by a joint tenant of his entire interest or a freehold interest, or probably of an estate for years, constitutes a complete severance of that joint tenant's interest in the jointly owned property and destroys the joint tenancy as to that interest. Thus, by conveying a life estate to X, A has severed A's entire interest in Blackacre from the joint tenancy. Having carved out of the whole estate an undivided one third portion, and having created in that undivided portion a life estate in X, A has a reversion in such undivided one third in fee simple. A's conveyance destroyed the unities of time, title and interest without which a joint tenancy could not continue.

However, the four unities remain as to the two thirds interest remaining in B and C which was unaffected by A's conveyance to X.[32] As to that undivided two thirds interest B and C remain joint tenants. If one of them should die without having made a conveyance, the survivor of those two would own that undivided two thirds by survivorship. In other words, there are two tenants in common with the one unity of possession: X has an undivided one

31. See also Miller v. Riegler, 243 Ark. 251, 419 S.W.2d 599 (1967) (Intent to create a joint tenancy is sufficient to create a joint tenancy even though four unities test not met).

32. Jackson v. O'Connell, 23 Ill.2d 52, 177 N.E.2d 194 (1961).

third, and B and C as a unit possess the other two thirds. Thus, B and C occupy two roles. Between themselves they are joint tenants of two thirds interest but as to X they, as a single unit, constitute a tenant in common of the two thirds interest.

A, the owner of the reversion in an undivided one third interest, is not called a tenant in common. Rather A owns a future interest in an undivided one third. A is not called a tenant in common because the phrase "concurrent estates," is limited to possessory estates. It involves presently possessory estates owned by two or more persons. Thus, in our case, B, C and X, but not A, have immediate possessory estates in Blackacre and the possession of B or C or X of Blackacre is in law the possession of all three together.

*b. Tenancy by the Entirety*

**PROBLEM 6.22:** T devised Blackacre "to H and W, husband and wife, and their heirs forever, jointly." Thereafter H executed to M a mortgage on Blackacre. H then procured a divorce from W and on a later date married W-1. H then died intestate, leaving W-1 his widow, and X as his sole heir. W sues Y and X seeking to quiet in her the title to the whole of Blackacre. May W succeed?

**Applicable Law:** At common law, there was a presumption that a conveyance to husband and wife jointly creates a tenancy by the entirety. A divorce eliminates the unity of person in tenancy by the entirety, destroys that tenancy and the husband and wife become tenants in common of the property. During the existence of the tenancy by the entirety, in most jurisdictions neither spouse has the right or power to dispose of or encumber the property without the consent of the other.

**Answer and Analysis**

No. By appropriate language in the conveyance a husband and wife can hold real property as tenants in common, as joint tenants or as tenants by the entirety, where such estate is recognized. But, at common law, there was a presumption that a conveyance to a husband and wife jointly created a tenancy by the entirety. Under this presumption the conveyance in this case would be construed to make H and W tenants by the entirety rather than joint tenants.

Assuming then that H and W are tenants by the entirety, in most jurisdictions recognizing such estates, neither had the right or power to dispose of or encumber such estate without the consent of the other spouse.[33] Therefore, the mortgage which was executed

33. At common law a husband had greater management and administrative authority over tenancy by the entirety property.

alone by H to M was wholly ineffective at that time to create a lien or incumbrance on the land. M's remedy must be limited to his personal action on the debt owed by H to M. Similarly, creditors of one spouse ordinarily cannot reach the tenancy by the entirety property in satisfaction of their claims.[34]

When H procured a divorce from W, the unity of person which is essential to the creation and continued existence of an estate by the entirety was destroyed and with it the tenancy by the entirety was destroyed.[35] H and W, however, continued in some form of concurrent tenancy. Are they joint tenants with right of survivorship or tenants in common? Logically, theirs would be a joint tenancy because of the five unities in tenancy by the entirety, only one, unity of person, was destroyed by the divorce. The other four unities of time, title, interest and possession, remain. But this generally is not the law. H and W after the divorce should be strangers in their property ownership as far as possible. Tenancy in common is more probably in accord with their intent since it is unlikely either would want the survivorship feature preserved. Most cases so hold.[36]

H and W were then each owner of an undivided one half interest in Blackacre when H married W–1. Upon H's death intestate the title to H's undivided one half interest in Blackacre descended to his heir, X, but subject to W–1's right of dower in such half interest, if dower exists. Thus, W and X each own an undivided one half interest in Blackacre as tenant's in common, with X's undivided half interest possibly being subject to the choate right of dower in W–1 widow.

There is also a good possibility that X's undivided one half interest may be encumbered by the mortgage to M as a result of the doctrine of estoppel by deed. Although the mortgage was initially

**34.** Sawada v. Endo, 57 Hawaii 608, 561 P.2d 1291 (1977); Central National Bank of Cleveland v. Fitzwilliam, 12 Ohio St.3d 51, 465 N.E.2d 408 (1984) (neither spouse can alienate interest in tenancy by the entirety).

**35.** Porter v. Porter, 472 So.2d 630 (Ala.1985) (divorce decree does not automatically sever a joint tenancy between the former spouses); Mann v. Bradley, 188 Colo. 392, 535 P.2d 213 (1975) (provision in divorce settlement agreement that joint tenancy be sold upon spouse's remarriage or when youngest child attained age 21 constitutes a severance of the joint tenancy). See also, Duncan v. Vassaur, 550 P.2d 929 (Okl. 1976)(husband and wife were joint tenants and wife killed husband; that act severed the joint tenancy causing ½ of the property to pass to husband's estate and ½ to wife.

**36.** But see, Finn v. Finn, 348 Mass. 443, 204 N.E.2d 293 (1965) (tenants by the entirety who divorce become joint tenants with right of survivorship pursuant to a property settlement agreement incorporated into the divorce decree). A joint tenancy between husband and wife is not affected by divorce absent a specific provision in their property settlement agreement or divorce decree severing the joint tenancy. See generally, Westerlund v. Myrell, 188 Wis. 160, 205 N.W. 817 (1925).

invalid, upon divorce H acquired an undivided one half interest which was freely alienable and mortgageable. Thus, as to this after-acquired severable interest, H can be estopped to deny the effectiveness of M's mortgage in the same way he would be estopped as to previously conveyed or encumbered other after-acquired property. Thus, if estoppel is invoked against H, his second wife, W–1, and his heir, X, take their interests subject to such mortgage.

COMMON LAW CONCURRENT TENANCIES COMPARED*

| Kind of tenancy | How created | Typical words in deed or will | Unities present | Interest owned by tenant | Power of disposition | How can disposition be made | Rights on intestacy | How destroyed |
|---|---|---|---|---|---|---|---|---|
| Tenancy by the entirety | By act of the parties, *deed or will* | A "to H & W and their heirs." | Time<br>Title<br>Interest<br>Possession<br>Person | Husband and wife as a unit own the whole, *joint ownership* | Both husband and wife must join in conveyance | By deed only and not by will. Survivorship defeats effect of will | Survivor continues to own all but in severalty | Divorce terminates the tenancy and makes them tenants in common |
| Joint tenancy | By act of the parties, deed or will | A to "B & C and their heirs as joint tenants with the right of survivorship and not as tenants in common." | Time<br>Title<br>Interest<br>Possession | All tenants as a unit own the whole, *joint ownership* | All may join and dispose of whole or each tenant can dispose of share he did not own as such | By deed only and not by will. Survivorship defeats effect of will. | If only one survivor he continues to own but in severalty. If more than one survivor they continue to own in joint tenancy. | 1-One tenant conveys his interest. 2-By partition. In kind among tenants. 3-By any act which breaks any unity. |
| Tenancy in coparcenary | By law of inheritance | A. dies intestate leaving 3 daughters, B, C & D, his only heirs | Title<br>Interest<br>Possession | Each tenant owns an *undivided* portion which portions are not necessarily equal | Each tenant can dispose of his undivided share or part thereof | By deed or by will | Heir or heirs inherits undivided interest of deceased parcener. | 1-By partition 2-By conveyance by one parcener 3-By whole descending on vesting in one parcener |
| Tenancy in common | By act of the parties, deed, will, or by law | A "to B and C and their heirs share & share alike as cotenants." | Possession | Each tenant owns an undivided portion which portions are not necessarily equal | Each tenant can dispose of his undivided share or part thereof | By deed or by will | Heir or heirs inherits undivided interest of deceased owner | 1-By partition among tenants 2-By uniting all titles in one tenant in severalty by purchase or otherwise |

[C3454]

# Chapter 15

# THE EVOLUTION OF THE MODERN DEED

## SUMMARY: CONVEYANCES UNDER MODERN STATUTES

1. Every American state has nearly exclusive jurisdiction over the land within its borders.

2. Each state has the power to prescribe the form which a conveyance of real property shall take and the power to determine the legal effect of a conveyance, subject only to federal law.

3. Whether the form prescribed by a statute is to operate as a common law "grant," under the Statute of Uses, or independently of both, is determined by construing the words of the particular statute.

4. In most states the Statute of Uses, 1535, being in force in England at the time of the American Revolution, and being a statute of general application, is considered part of the "common law."

## PROBLEMS, DISCUSSION AND ANALYSIS

### *15.1 Common Law Conveyances*

#### *a. Feoffment*

The ceremony of feoffment consisted of: (a) livery of seisin in which the feoffor, A, picked up a twig or piece of turf symbolizing the land itself, and handed it to the feoffee, B, with appropriate words such as, "I hereby enfeoff you and your heirs of Blackacre"; and (b) A's walking off the land leaving B in possession claiming the freehold estate in such land, that is, B claimed either a life estate, a fee tail or a fee simple. B was then seised of the land. A feoffment always transferred the physical possession of corporeal property. It is said to "lie in livery" because the possession of the land could be physically handed over to the feoffee.[1]

1. See A. W. B. Simpson, A History of the Land Law (2d ed. 1986). W. Holdsworth, 3 A History of English Law 3–275 (2d ed. 1937); 7 id. at 3–400 (5th ed. 1942); T. Plucknett, A Concise History of the Common Law 610–623 (1956); Patton, 1 Land Titles 1–8 (2d ed. 1957).

*b. Grant*

Incorporeal property interests such as reversions, remainders or easements were not subject to physical possession and were therefore said to "lie in grant," which meant they could be transferred only by a deed.

*c. Lease and Release*

By this transaction A leased to B Blackacre for a week. After B took possession A made to B a deed releasing to B and his heirs A's reversionary interest in Blackacre. The purpose of this conveyance was to save the owner, A, the burden of having to go onto the land to make a feoffment. By first making a lease to B, B was in possession and A now had a reversion. The reversion, an incorporeal interest, could be transferred by deed. When the landlord conveys his reversion to his tenant it is called a release. B is then the owner in fee simple.

*d. Surrender*

When the landlord conveys her reversion to the tenant it is a release. When the tenant transfers his leasehold estate to the landlord it is a surrender. Two types of surrender, by agreement and by operation of law, are explained in Problem 15.1 below.

*e. Dedication*

Example, A, fee owner of Blackacre, which consists of 9 blocks or squares of land in the form of a square area, three blocks long and three blocks wide, decides that he can sell the property better if he makes the center block a park. He orally declares his intention by telling his neighbors that he hereby dedicates such block for use of the public as a park. Thereafter people in the community use this block for picnics, playground and recreation. A has dedicated the block. Dedication at common law required no particular form and could be made by words, conduct or writing. When it is accepted by the public by using it as a park, there is a conveyance of an easement for such public use as a park, the fee remaining in A, the dedicator. See Chapter 10.

*15.2 Conveyances Under the Statute of Uses of 1535*

*a. What is a Use?—Brief Historical Sketch*

(1) Example: A enfeoffs "B and his heirs for the use of C and his heirs."

The purpose was to give B the legal title only and to give C the possession and enjoyment. These conveyances were common in feudal England before the Statute of Uses.

(2) Why a Use?

There were many advantages or reasons for creating uses, but among the most important were the avoidance of such feudal incidents of tenure as primer seisin, wardship and marriage.

(3) Enforcement of Uses

*By Whom?* After uses became common, they were enforced by the chancellor, the keeper of the King's conscience. The stated reasons were spiritual: (a) a person should be bound by his promise, or (b) to prevent unjust enrichment, i. e., the feofee to uses would be unjustly enriched if he did not recognize the beneficial interest of the cestui que use.

*How?* The method of enforcement was characteristic of equity jurisprudence: by injunction, fine or imprisonment against the defendant.

*Against Whom?* The use was enforced against four different categories of persons: the feofee to uses (analogous to the modern trustee); the feofee's heir; a donee of the feofee; and also a purchaser from the feofee if the purchaser had knowledge of the use. All of these persons would be unjustly benefitted if the use were not enforced against them.

*Not Against Whom?* There were also four categories of persons against whom the use was not enforced: a bona fide purchaser from the feofee if the purchaser had no notice of the use; the overlord if he obtained the land by escheat, the dower right of the feofee's wife, and a disseisor. The good faith purchaser would acquire both the legal title and an equity from his purchase, and this prevailed over the prior equity of the cestui que use. The overlord had a superior interest and logically the land would escheat free of the use; the dower of the feofee's wife was conferred by law but it is difficult to see how she could get a beneficial estate when her husband had none; and the disseisor, of course, acquired a new and independent title as a result of his own actions and operation of law.

(4) The Statute of Uses—Effect

The Statute of Uses, 1535, converted the use estate into a legal estate. Thus in our example under (1) above, after the Statute of Uses, C acquired a legal fee simple absolute and B had nothing.

*b. Political Background*

Why was the Statute of Uses passed? It was forced upon an unwilling Parliament by a strong willed monarch, Henry VIII, for the purpose of enhancing the depleted royal revenues. This depletion resulted largely from the fact that perhaps four-fifths of all land in England was held to uses to avoid the heavy burdens of a dying feudal system of land tenures. Much of the royal revenues were gained from the burdens of wardship and marriage in the feudal system.

To illustrate the incidents of wardship and marriage, suppose A is an elderly person who owns Blackacre in fee simple and has a son, B, ten years old. If A should die while B is still a minor, then A's overlord would have the right to the profits of the land until B became of age and would also have the right to determine whom B should marry. These were rights which brought the overlord a substantial income. To avoid such results, A could enfeoff a young man, M, of Blackacre for the use of A's son B. Then A's death would not affect M's rights at all for M is of age. Nor would M's overlord have any rights of wardship or marriage concerning B. Further, M would then hold Blackacre for the benefit and profit of B, and would accumulate the net profits for B till B became of age. Under the modern equivalent: A has set up a trust with M as trustee and B as beneficiary.

The King, being the one lord who was not also a tenant in the system, was most directly affected by the fact that land was held to uses. He introduced and forced the passage of the Statute of Uses for the purpose of eliminating uses. He succeeded as to passive uses.[2]

*c. Three Periods of Development*

The law of uses developed through three distinct periods: (1) the "law period" between 1066 and about 1433, during which the law courts did not recognize a use as giving any rights; (2) the "equity period" from 1433 to 1535 when the Statute of Uses was passed, during which equity emerged and began to recognize a use as being an enforceable right; and (3) after the Statute of Uses was in force, during which period the passive use was automatically executed into a legal estate.

*d. Uses Illustrated*

2. See 1 Am. L. Prop. 31 et seq. (Casner ed. 1952).

(1) Uses executed on a feoffment on transmutation of possession (i.e., delivery of possession from feoffor to feoffee):

(a) Use expressly declared by the feoffor at the ceremony of feoffment: example: A enfeoffs B and his heirs of Blackacre *to the use of* C and his heirs

(i) In the law period A had no rights, B had the fee simple and C had no rights at all because the law did not recognize a use. C could merely entreat B to hold the land for C.

(ii) In the equity period A had no rights, B had the fee simple and C could bring a suit in equity and petition the court for a decree ordering B to hold the land for C. The court would issue the decree and B would have to do as ordered or be in contempt of court. This carried out A's expressed intention that the feoffment was for the use of C.

(iii) After the Statute of Uses, A would have no rights, B would have no rights and the legal title in fee simple would be in C. The Statute executed the use by carrying the legal title from B to C in fee simple. This was automatic because the Statute so provided, whereas under (ii) above, before the statute, the use was enforced by proceedings in court.

### *Note: Resulting Use*

In the previous example the reversion in fee simple is in A. Because equity would not raise a use unless there was consideration for the conveyance or a use expressed, it became customary to imply a resulting use in favor of the grantor when the entire beneficial estate was not otherwise disposed of. After the Statute of Uses this resulting use was also executed so that the grantor, A, in the above example, would have a legal reversion in fee simple.

This principle of resulting uses has a modern counterpart in the law of trusts, the usual rule being that the trustee acquires a legal estate just large enough to accomplish the purposes of the trust, and the trustee takes no beneficial interest unless such an intent is clearly expressed.

* * *

(b) Use raised on consideration actually paid at the ceremony of feoffment: example: A enfeoffed B and his heirs of Blackacre, A not stating that it was for the use of C, but C actually pays money to A at the time.

Here the rights of the parties are identical with those given under (a) next above, to wit:

(i) In the law period A had no rights, B had the fee simple by the feoffment and C had no rights because, while the payment of consideration by C raised a use in him, the law courts did not recognize the use or any rights in the cestui que use, that is, C.

(ii) In the equity period A had no rights, B had the fee simple because of the feoffment, but C, whose use was raised by the consideration paid by C, could petition the equity court for a decree ordering B to hold Blackacre for the use and benefit of C. The decree would issue and B would obey or be jailed for contempt of court.

(iii) After the Statute of Uses, A had no rights, B would have no rights and the legal title in fee simple would be in C. The Statute of Uses executed the use by carrying the legal title from B to C in fee simple. This was automatic because the Statute expressly so provided that if one (B in this case) were seised to the use of another (C in this case), then the seisin would be deemed and adjudged in the one who had the use, which was C in this case.

(2) Uses *executed* without transmutation of possession, that is, without a feoffment in which possession is delivered by feoffor to feoffee.

### *Note*

The examples given above involved a feoffment, the common law conveyance in which physical possession was delivered to the feoffee by the feoffor on the land. At common law that was the only way a present freehold estate could be transferred in a single transaction. Then came the revolutionary method of conveying freehold estates in land without making such delivery of possession. The new method, which is codified in modern statutes, eliminates the inconvenience of going onto the land to be conveyed. The conveyance is made by merely executing a deed in the lawyer's office. This was made possible by the Statute of Uses.

(a) Bargain and sale deed: example: A, the fee simple owner of Blackacre, executes and delivers his bargain and sale deed to B. The deed recites, "for and in consideration of $1.00 and other valuable considerations, the receipt of which is hereby acknowledged, I, grantor, A, hereby bargain, sell and convey Blackacre to B and his heirs . . . ," and the deed is signed and sealed by A. What was the legal effect of this transaction in each of the three periods mentioned above?

(i) In the law period this deed had no effect at all. This was not a feoffment, and the ceremony of feoffment with livery of seisin or delivery of possession of the land from feoffor to feoffee was the only method by which A could convey

Blackacre in fee simple to B at common law. Hence, A remained the fee simple owner of Blackacre, and B had nothing and no right in Blackacre because the deed could give him none.

(ii) In the equity period the equity courts recognized that the recital of the $1.00 consideration in the deed raised a use in B. It was immaterial whether or not the $1.00 was paid, because the recital of such payment in an instrument under seal could not be rebutted. Now A, who was seised before the execution of the deed, is still seised because he has not made livery of seisin to any other person. The result was that B, having the use, could petition the equity court for a decree ordering A to let B occupy the land or otherwise use the land for B's benefit. The court would make the order and if A did not obey, he would be punished for contempt of court. But the point is that the equity court before the Statute of Uses in 1535, did enforce the use in B's favor, such use being raised by the recital of the consideration in the bargain and sale deed.

(iii) After the Statute of Uses, A had no further interest in Blackacre, and B was the owner in fee simple. By the recital of the consideration in the deed, the use was raised in the grantee, B. Then A was seised to the use of B. That is the exact situation to which the Statute of Uses applies. In substance it says, when one is seised to the use of another (A seised to the use of B), then he who is seised (A) shall lose such seisin to the other (B). Why did it work that way? Because A had the fee simple before the deed was executed. The deed itself did not transfer the seisin or possession. Neither did A make livery of seisin or deliver possession of Blackacre to anyone. But the deed by its recital of consideration did raise the use in B. *Thus, the Statute of Uses carries the legal title from A who is seised, to the grantee, B, who has the use.*

### *Note: Historical Elements of Bargain and Sale Deed*

Historically, to be effective as a bargain and sale deed three elements were essential. To be a deed it must be under seal. To be a bargain and sale deed the deed must recite a valuable consideration, and it must be delivered, which means it must be intended by the grantor to take effect as a conveyance.

(b) Covenant to stand seised: example: A, owner in fee simple of Blackacre, executes and delivers to B an instrument under seal which provides, "For the love and affection which I have for my son (or son-in-law) B, I hereby covenant to stand seised of Blackacre for the use of B and his heirs" or "For the love and affection which I have for my son (or son-in-law) B, I hereby convey my

Blackacre to B and his heirs." What are the rights of A and B in each of the three periods set forth above?

(i) In the law period, 1066 to 1433, A.D., A remained fee simple owner and B had no rights at all for the reason that at common law only a feoffment could convey a freehold estate, of which the fee simple is one. The law courts did not recognize a use.

(ii) In the period of equity between 1433 and 1535 when the Statute of Uses was passed, A still held the seisin because he had made no transfer of possession by the ceremony of feoffment. However, this sealed instrument raised a use in B which B could, by petition in equity, have enforced by decree against A. In equity the relationship by blood or marriage of the covenantor and covenantee was sufficient to raise a use in the covenantee. On the face of the instrument it appears that B is the son (related by blood, or son-in-law, related by marriage to A) of A. Hence, a use was raised in B so that thereafter A was seised to the use of B. This permitted B to procure a decree in equity ordering A to let B occupy or otherwise use Blackacre for the benefit of B.

(iii) After the Statute of Uses in 1535, which provided that one who was seised to the use of another should lose that seisin to the other, A had no rights in Blackacre and B was the owner in fee simple. This is another example of a modern conveyance without the inconvenience of physical transfer of possession by feoffment out on the land.

Modern statutes on conveyancing are codifications of bargain and sale deeds or covenants to stand seised, both of which grew out of the effects of the Statute of Uses. The Statute of Uses executed the use raised by the instrument of conveyance into a legal title in the grantee or covenantee.

*e. Effect of Statute of Uses on Modern Law*

(1) *Conveyancing.* Land became transferable by a single written deed; livery of seisin is no longer necessary.

(2) *Estates.*

(a) Executory interests, i. e., springing and shifting legal interests, became possible.

(b) The Rule against perpetuities was formulated to prevent indestructible future interests from unduly cluttering titles.

(3) *Trusts.* The modern law of trusts developed.

*15.3 Conveyances Under Modern Statutes*

**PROBLEM 15.1:** In some states a simple form of conveyance of real property is set forth as follows:

"For the consideration of _____, I hereby convey to A. B. the following real property (describing it)."

Audrey owns Blackacre in such a state in fee simple. She signs, acknowledges and delivers a deed in the above form to A. B. She properly describes the property and fills in $1.00 as the consideration. On what theory would this deed operate as a conveyance in State X?

**Applicable Law:** A conveyance under a modern statutory form may be effective on any one of three theories: (a) as a common law grant; (b) under the Statute of Uses; or (c) merely as a prescribed form set by the legislature.

**Answer and Analysis**

Assuming the acknowledged instrument to be the equivalent of a common law deed with seal, this deed could operate as a conveyance on any one of three theories:

(a) The deed could be a common law "grant." At common law only incorporeal rights or hereditaments lay in grant, that is, could be transferred by deed. Such rights having no physical existence, they could not be delivered over to the grantee. Only physical property was subject to livery of seisin and required delivery of possession by feoffment. If the legislature of State X intended, by prescribing the above form of conveyance, to say that corporeal real property lay in grant as well as in livery, then such a deed can operate as a conveyance equivalent to a common law "grant."

(b) The deed could be valid under the Statute of Uses. The recital of the $1.00 consideration in the deed raises a use in the grantee, A. B. Then the grantor is seised to the use of A. B. The Statute of Uses then automatically carries the legal title from grantor to A. B., grantee. This statute seems to be a codification of the doctrine of conveyances under the Statute of Uses by bargain and sale deed, for the prescribed instrument contains a recital of consideration.

(c) This statutorily prescribed form can operate as a conveyance wholly independently of the past methods of transfer of real property, whether common law, equity or under the Statute of Uses, simply because the legislature of State X has so declared. The local statute gives this form the efficacy of a conveyance, and no reasons are needed beyond the fact that the legislature has power to prescribe forms of conveyance and this is the form so prescribed.

***Note: The Statute of Uses and the Statute of Frauds***

The Statute of Uses (1536) made the modern conveyance by written instrument a practical alternative to the ceremony of feoffment

by livery of seisin. Not until after the Statute of Frauds was passed in 1677, however, did courts *require* a writing to give effect to the conveyance of a freehold. In 1845 Parliament provided that a feoffment should be void unless it were evidenced by a written deed.[3]

**PROBLEM 15.2:** In California the legislature declared that a grant of an estate in real property may be made in substance as follows:

> **"I, AB, grant to CD all that real property situated in JJ county, State of California, bounded or described as follows: (here insert boundaries or description by name as 'The Norris Ranch'). (date) (signed) AB."**[4]

The statute then defined "transfer" as an act of the parties by which title to real property is conveyed from one person to another. It continued by saying that a written transfer is a grant and can be explained by circumstances under which it is made, and that a fee simple is presumed to pass in a conveyance unless a lesser estate is intended.

M owned Blackacre in California. She wrote several letters to her son, Sam, in a distant state requesting him to leave his job there, go to California to live, and take care of Blackacre and other property. In her letters, dated and signed by her, she wrote, "Blackacre is your property" and "I have written you several times that the little place with the garden, Blackacre, is your property." M was a citizen of Germany and lived there. Sam was a United States citizen and lived in the United States. Sam then left his job, traveled to California, moved his family onto Blackacre, and claims the property as his own. Is his claim valid?

**Applicable Law:** Mere informal letters from the conveyor to the conveyee may constitute an effective conveyance of real property under a modern statute which defines a "transfer" as an act of the parties by which title to real property is conveyed from one person to another.

### Answer and Analysis

Yes. There are two questions involved in this problem, the intention of the legislature and the intention of M. It is obvious that the California statute did not intend to require any definite formula of words to constitute a conveyance. No consideration is required. It appears that a mere writing signed and dated by the property owner would constitute a conveyance if that were the

3. 8 & 9 Vict. ch. 3, § 1 (1845). See Goodwin, Before the Statute of Frauds, Must an Agreement to Stand Seised Have Been in Writing?, 7 Harv. L. Rev. 464 (1894).

4. Cal. Civil Code § 1092.

intention of the owner. The statute providing that a fee simple is presumed unless a lesser estate is intended is also typical. It makes unnecessary the common law requirement that words of inheritance "and his (or her) heirs" be used with the name of the grantee.

M's intent seems clear. She wrote, "The property is yours." These informal letters constituted a compliance with the statutory requirements, and conveyed Blackacre to Sam. The State has power to prescribe methods of conveying real property. If it prescribes merely a signed and dated writing, then compliance with such statutes will convey land wholly without reference to technical requirements of the common law or former statutes.[5]

**PROBLEM 15.3:** H and W were husband and wife. H owned Blackacre and executed, acknowledged, delivered and recorded a deed to Blackacre in favor of W. The deed provided, "This deed is not to take effect and operate as a conveyance until my death, and in case I shall survive my said wife, this deed is not to operate as a conveyance, it being the sole purpose and object of this deed to make a provision for the support of my said wife if she shall survive me, and if she shall survive me then and in that event only, shall it be operative to convey to my said wife said premises in fee simple." It named the wife specifically as grantee and recited a consideration of $1.00 as paid. The statute provided, "a person owning real estate and having a right of entry into it, whether seised of it or not, may convey it, or all his interest in it, by a deed to be acknowledged and recorded as hereinafter provided." Other statutes provided how the acknowledgment and recordation should be made and that such deed should be effective as a conveyance. No specific provision dealt with the time when a conveyance should take effect. H then cut down trees on the premises, and W sues him for damages for waste. May she recover?

**Applicable Law:** Estates to commence in futuro may be created under modern statutes. This could not be done at common law.

### Answer and Analysis

No. There are two reasons why a common law conveyance could not take effect in the future. One is that there had to be livery of seisin which had to be made on the land as evidence of change of possession then or not at all. The other was that seisin could not be in abeyance, for the feudal overlord had to know who was seised at all times so that he would know on whom to call for the feudal services. Under such rule this deed could not operate as

5. Metzger v. Miller, 291 Fed. 780 (N.D.Cal.1923).

a common law conveyance, even though the reasons for the rule have long since disappeared. Under the doctrine of *springing uses*, a valid conveyance could be made to commence in futuro. There being in this instrument of conveyance a recital of consideration, in addition to the love and affection for a spouse, a use would spring up in the grantee, and the Statute of Uses would execute the use into a legal estate. The executed use will be a legal springing executory interest. It will become possessory at the moment of H's death if W survives him. Should W not survive H, W's interest will cease and terminate. And what interest, if any, does W have in Blackacre during the lives of H and W? The answer is that W has an irrevocable assurance that the land will be hers if she survives H, but in the interim she has no interest in the land which will support an action for waste.

Another view may be taken, namely, that the local statute makes the deed effective as a conveyance wholly independent of the Statute of Uses. By analogy the Maine Supreme Court took the view that the publicity and notoriety which livery of seisin gave a common law conveyance, the acknowledgment and recording of a deed gives to this statutory conveyance: "Our law now says to a party having such an interest in real estate as is mentioned in [the statute quoted above,] you may convey that interest or any part thereof in any manner herein prescribed with such limitations as you see fit, provided you violate no rule of public policy, and place what you do on record so that all may see how the ownership stands." The court also concluded that deeds "executed in accordance with the provisions of our statutes and deriving their validity therefrom may be upheld thereby, as well as under the statute of uses, notwithstanding they purport to convey freeholds to commence at a future day." It continued, "The mere technicalities of ancient law are dispensed with upon compliance with statute requirements. The acknowledgment and recording are accepted in place of livery of seisin.... "[6]

6. See Abbott v. Holway, 72 Me. 298 (1881).

# Chapter 16

# CONVEYANCING BY DEED

*Table of Sections*



**SUMMARY**

## § 16.1 The Written Deed

1. The common law ceremony of feoffment by which a freehold estate was conveyed was oral and no writing was required.

2. Today the Statute of Frauds requires a writing and a signature by the conveyor of an interest in real property, excluding short term leases.

## § 16.2 Description and Boundaries

1. To be effective as a conveyance of land the deed must describe the land sufficiently so as to identify it.

2. A deed which fails to describe a specific divided part of a larger tract but describes a distinct fractional part of it is occasionally upheld as a conveyance of an *undivided* part (even though this was probably not the grantor's intent)—e.g., a conveyance of "one half of Blackacre" may be held to create an undivided half interest, rather than exclusive ownership in one half.

3. If a deed, in describing the land to be conveyed, refers to a particular map or plat, that map or plat is part of the deed for the purpose of identifying the land conveyed.

4. A metes and bounds description is the oldest known method of describing land. Literally, the term means "measurements and boundaries." This method describes the tract by using compass directions and distances from an ascertainable starting point. Monuments, when applicable, are frequently included, as, for example, " . . . then proceed N. 30 degrees E. for 200 ft. to the South side of

Utopia Avenue." In this case, Utopia Avenue is a "monument," or physical object located in a definite place on the land.

5. In a metes and bounds description, two things are vital: (1) the description must begin at some readily identifiable known point of a substantial character so that it can be relocated if the marker is removed; and (2) the description must close, that is, if the courses and distances are followed step by step, one will return to the place of beginning.

6. When a deed describes the boundaries of the land to be conveyed by reference to monuments, natural or artificial, *the intent of the parties is the controlling factor* and all rules of construction are mere aids in determining such intent.

7. In a description of land, a monument is any object on the ground which helps to identify the land conveyed. It may be either natural or artificial. Such things as a tree, a stone, a stake, a river, a lake, a highway, a wall, a house, a ditch, a graveyard, an ocean, a farm, and a mining claim have been found effective as monuments.

8. The "course" of a line in a description means the direction it takes across the country, and is usually determined by its angle with some other known line.

9. The "distance" means the length of a line from one point to another point, and the "contents" means the area of a tract of land.

10. When the terms of a deed conflict, then generally: (a) monuments, either natural or artificial, govern over courses and distances; (b) courses govern over distances; (c) a specific description will govern over a general description; and (d) any of these will govern over an estimated "contents" or area. These are rules of construction only, not rules of law, and different priorities will prevail if there is evidence of such an intent.

11. Parol evidence is not admissible to determine the identity of land described in a deed unless it is first found that the description is ambiguous. Even then it is not admissible to alter, but only to explain the ambiguity, unless the suit is in equity for reformation.

12. When the description of land in a deed carries it "to," "by," "from" or "along" a street, road, alley, way, highway, creek, stream or similar monument, the common law rule is that the grantee takes title to the land to the center of such monument, assuming, of course, that the grantor owned to the center of such monument.

13. If the description of land in a deed carries it to or from *a point on the side of a street,* stream, road or similar monument, *and along such monument,* still the grantee should take title to the

center of such monument under the common law rule, but there are contrary cases.

14. If the description of land in a deed carries it to or from *a point on the side of a street,* stream, road or similar monument and *along the line on the side* of such monument, still the grantee should take title to the land to the center of such monument under the common law rule unless it is expressly excluded from the grant.

15. An oral agreement made between adjoining owners of land settling an uncertain boundary line or one in dispute is valid and binding and does not come within the Statute of Frauds.

A related but not necessarily identical doctrine is that of acquiescence, under which a boundary can be established by a long period of tacit acquiescence, without an explicit agreement.[1]

16. When the boundary of a tract of land is the thread or center line of a stream of water, such boundary is a variable and changes with the thread of the stream.

17. Title to the land under the waters of a non-navigable stream belongs to the abutting riparian owners, while title to the land under the waters of a navigable stream belongs to the state.

18. When a landowner owns to the water of a stream, lake, pond or ocean, but owns no land under the water, his boundary line and land area may be extended by the imperceptibly slow addition of soil by the action of the water, called accretion, or by the land rising and water receding, called reliction. The newly made land is called alluvion.

19. Alluvion belongs to the owner of the land abutting the water for three reasons: (a) she is the only person who is in a position to use it advantageously and make it produce; (b) such owner runs the risk of losing his land by erosion and should have a corresponding right to the gain by water deposits; and (c) her access to the water as a littoral (i.e., by a lake) or riparian (i.e., by a river) owner should be preserved.[2]

20. When a river by sudden and violent change (called avulsion) alters its course and overflows privately owned land, the title to such lands is not changed.

1. See Ault v. Holden, 44 P.3d 781 (Utah 2002) (requiring 20 continuous years of mutual acquiescence); Day, Validation of Erroneously Located Boundaries by Adverse Possession and Related Doctrines, 10 U.Fla.L.Rev. 245, 263–264 (1957); Browder, The Practical Location of Boundaries, 56 Mich. L. Rev. 487 (1958); Halladay v. Cluff, 685 P.2d 500 (Utah 1984) (noting that doctrine of boundary by acquiescence required a long period of tacit acquiescence but not an agreement, while the doctrine of boundary by agreement required evidence of a parol agreement, but not the long period of acquiescence).

2. See Gifford v. Yarborough, 5 Bing. 163, 130 Eng. Rep. 1023 (1828) (land gradually added to adjoining lands from water dissipation belongs to adjacent land owner, for it would be of no use to the king but the landowner could use it).

21. In the United States private ownership as to tidal lands stops at the high water mark.

22. An exception is an exclusion from the operation of a deed of some part of the corporeal property described in it. The excepted portion is wholly unaffected by the deed and remains in the grantor. E. g., A conveys Section 14 to B and his heirs "except the northeast quarter thereof."

23. A reservation in the United States today is the creation of a new right in the land conveyed for the benefit of land retained by the grantor. E. g., A conveys Blackacre to B and his heirs but reserves an easement across such tract in favor of A's Whiteacre.

24. In the United States the word "reservation" is sometimes construed as an exception, and the word "exception" is sometimes construed as a reservation. The intent of the grantor is the important consideration.

## § 16.3 Exceptions and Reservations

1. An exception in a deed merely subtracts from the entire tract described in the deed some corporeal portion which is not to pass to the grantee, but is to remain in the grantor wholly unaffected by the deed or conveyance.

2. Historically, a reservation created a right or incorporeal interest which had not existed previously, and which issued out of the land as a feudal service. The grantor was considered to have conveyed the entire property to the grantee free from any burden, then the grantee in the same deed "regranted" the interest reserved to the grantor.

## § 16.4 Delivery, Escrow and Acceptance

1. Delivery of a deed means a grantor's intent that it shall operate or take effect as a conveyance.

2. There must be in existence a physical deed duly executed by the grantor before delivery is possible.

3. If the grantor intends the deed to be effective, delivery takes place irrespective of whether the physical paper is in the possession of the grantee, the grantor or a third person.

4. Delivery is primarily a question of fact, and what the grantor does with the physical deed may be some evidence of his intent concerning its taking effect.

5. If the grantor hands the deed to the grantee with no intent that it operate as a conveyance, it is ineffective and there is no delivery; if she keeps possession of the deed but intends that it operate as a conveyance in favor of the grantee, there is a delivery.

6. Delivery, being the state of mind of the grantor, is wholly dehors (external to) the deed, and the parol evidence rule should not apply. That is, delivery must be established by evidence not appearing on the face of the instrument.

7. Delivery to a third person to be delivered to the grantee upon the occurrence of an event or the performance of a condition is commonly referred to as a delivery in escrow. Nevertheless, a distinction between the commercial transaction and a donative transaction is helpful in analyzing the cases and arriving at the correct solution.

8. In a commercial escrow transaction, the delivery is truly conditional. The condition may be the payment of the balance of the purchase price, the obtaining of certain quitclaim deeds, the satisfaction of mortgages or other incumbrances, or the performance of other acts or conditions which may or may not take place. In all of these cases, however, the performance of the condition is beyond the control of the grantor. Control is vested either in the grantee or in third parties.

9. A delivery in escrow in a typical commercial transaction is a valid delivery.

10. There cannot be an escrow or conditional delivery to the grantee under the traditional view. Conditional delivery to the grantee, the grantor retaining no other control over the instrument, takes effect immediately.[3]

11. A true escrow requires the grantor to give up all control over the operation of the deed, subject only to the performance of the condition or the happening of the event which is involved. It vests in the grantee the power to become the owner upon either the performance of the condition or the happening of the event.

12. The delivery in escrow or conditional delivery must be to a third person, and requires the manual handing over of the deed to the escrow depositary.

13. The escrow depositary is neither an agent nor a trustee of either the grantor or grantee; its duty is merely to carry out its instructions.

14. In a commercial escrow, the title to the property passes to the grantee upon the performance of the condition or upon the happening of the event, that is, from the so-called "second delivery." In case of death of the grantor, however, or his becoming *non compos mentis*, title relates back or passes from the date of the

3. But see Chillemi v. Chillemi, 197 Md. 257, 78 A.2d 750 (1951), discussed below.

"first delivery," that is, from the time when the grantor hands the deed to the escrow depositary.

15. When the grantor makes a commercial escrow delivery of a deed, it is irrevocable and she loses all control over the operation of the instrument as a conveyance subject only to the failure of the grantee to perform or failure of the other conditions. There is authority that a commercial escrow delivery is revocable unless there is an ancillary underlying enforceable contract to convey. But there is conflicting authority that the question at this stage of the transaction is not whether there is an enforceable contract to convey, but whether the grantor has sufficiently divested herself of control over the deed and title.

16. In a donative escrow transaction, the grantor delivers the deed to a depositary to be delivered to the grantee upon the occurrence of an event or condition. Depending upon the amount of control relinquished by the grantor, the delivery may be either valid or invalid.

17. In a donative escrow transaction where the delivery to the grantee is to occur on the death of the grantor whenever and however that occurs, there is a valid delivery, because:

a. The death of the grantor is a certainty; the only contingency is when.

b. The grantor in this case gives up all control.

c. When necessary to determine the rights of the parties before the death of the grantor, the analogy to a fee simple and executory interest or life estate and remainder is employed.

d. The deed in this case takes effect on the initial deposit with the depositary. However, it does not then vest the entire estate in the grantee; rather it vests presently a valid future interest.

18. In a donative escrow transaction where the depositary is subject to further instructions and control by the grantor, there is no delivery at all. Such a transaction is illustrated by a direction to the depositary to "deliver this deed to the grantee on my death if I don't recall it before then." In this case it is clear that the grantor reserves the right to control the deed in the hands of the depositary; thus, the depositary is his agent, and there is no delivery.

19. In the case of a donative transaction where the deed is to become effective upon the occurrence of an event within the control of neither the grantor nor the grantee, there are conflicting decisions. This situation may be illustrated by the direction to "deliver this deed if I die before the grantee, but if she dies before me, then return it." It is clear that the grantor does intend to retain (or get back) the entire title if one contingency happens, but to divest

himself completely of the title if another contingency happens. The more logical view is that such a delivery is valid and that the grantee will acquire title if the specified event occurs. The analogy to the commercial escrow situation seems appropriate.

20. An instrument of conveyance may, and usually does, arise out of a preexisting contract, and it may include within its terms a contract such as a warranty of title, but it is not a contract.

21. Logically, because a conveyance is merely a transfer of title from grantor to grantee, like a gift from donor to donee in personal property, no express acceptance is required. The law presumes one will accept that which is to her financial benefit or advantage. The deed poll, the most commonly used deed form in the United States, does not have a space for the grantee's signature; so evidence of the grantee's acceptance is not ordinarily apparent on the face of the instrument.[4]

22. At common law, an heir could not prevent title coming to him by descent by operation of law, although most states now have statutes permitting such refusal. In any event, a conveyance cannot be forced upon a purchaser against his will; every grantee in a conveyance has the right to make disclaimer and cast the title back upon the grantor.

23. Assuming delivery by the grantor, she who says title does not vest in the grantee has the burden of showing affirmative disclaimer by such grantee.

24. Many American cases assert, but fewer cases actually hold, that acceptance of a deed by the grantee is essential to an inter vivos conveyance.

25. All cases agree that infants and persons *non compos mentis* may hold title by purchase even though they have no capacity to accept contractual responsibility.

26. In the absence of evidence to the contrary, a valid delivery to one of several co-grantees serves as a delivery to all of them.[5]

## PROBLEMS, DISCUSSION AND ANALYSIS

### *§ 16.1 The Written Deed*

The common law ceremony of feoffment by which a freehold estate was conveyed was oral and no writing was required. The

4. English law required an acceptance, but held that such an acceptance could be presumed if the grant was beneficial to the grantee and there was no evidence of nonacceptance. Thompson v. Leach, 2 Vent. 198, 86 Eng. Rep. 391 (1691).

5. Arwe v. White, 117 N.H. 1025, 381 A.2d 737 (1977) (one co-grantee rejected his share; others not precluded from taking interest conveyed to them); LeMehaute v. LeMehaute, 585 S.W.2d 276 (Mo.App.1979) (delivery to one grantee operates as delivery to all).

common law "grant" conveying such incorporeal interests as remainders, reversions, easements and profits was a deed and had to be under seal. The Statute of Frauds required a writing and a signature by the conveyor of an interest in real property, excluding short term leases.[6] Covenants to stand seised and bargain and sale deeds under the Statute of Uses were required to be under seal. No general statement concerning the requirements of conveying instruments in the United States can have widespread, much less, universal application. The Statute of Frauds and the statute on conveyancing in each state should be consulted. In most states a seal is no longer required for the validity of a deed.[7]

## § 16.2 *Description and Boundaries*

### *Note: The Federal Survey*

In 1796 Congress adopted the rectangular system of surveys as the official method of land measurement in the United States. The principal units of this system used in land descriptions are townships, ranges, sections and subdivisions. Each regular township is six miles square and contains 36 sections. Each section is one mile square and contains 640 acres. Chart 1 below shows how the system is used in locating townships in any given state. Chart 2 shows the method of numbering the sections within any given township. Chart 3 shows how each section may be subdivided and the number of acres in each subdivision, and is followed by a description of such subdivisions. Federal survey lines are generally given the highest priority in cases of inconsistencies in deed descriptions.[8]

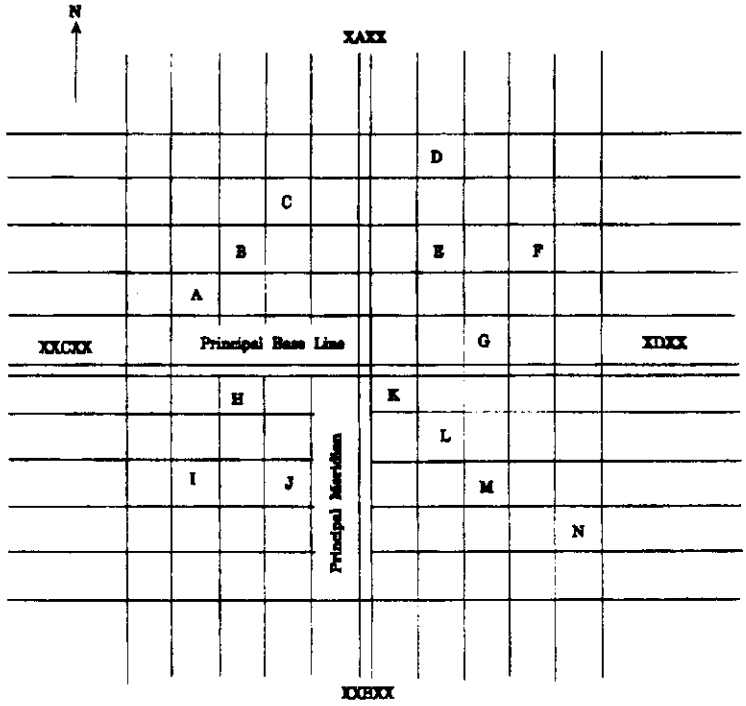
6. E.g., Beazley v. Turgeon, 772 S.W.2d 53 (Tenn.App.1988) (deed with forged signature violated Statute of Frauds).

7. North Carolina (at least as of 1978), is an exception. See Garrison v. Blakeney, 37 N.C.App. 73, 246 S.E.2d 144, 147–148 (1978), where the court states that a seal is necessary in North Carolina and then relates the history of the seal.

8. E.g., Rivers v. Lozeau, 539 So.2d 1147 (Fla.App.1989).

CHART 1

SHOWING "PRINCIPAL BASE LINE" AND "PRINCIPAL MERIDIAN" BY WHICH TOWNSHIPS AND RANGES IN LAND DESCRIPTIONS ARE MEASURED




In each state using the rectangular system of surveys there are drawn arbitrary lines perpendicular to each other, one called the "principal base line" running east and west and the other called the "principal meridian" running north and south. Townships are measured north and south of the principal base line and ranges are measured east and west of the principal meridian. Each of the squares indicated in the above chart lettered from A to N indicates a township six miles square.

[5A]

Some of these squares will be described as they would appear in a land description: the square indicated by letter A would be described as "Twp. 2 N, Rn. 4 W." By counting north from the Principal Base Line we find A in the second tier and by counting west from the Principal Meridian we find A in the fourth tier: thus the description given above. Continuing, square B would be "Twp. 3 N, Rn. 3 W"; square F would be "Twp. 3 N, Rn. 4 E"; square J would be "Twp. 3 5, Rn. 2 W" and square N would be "Twp. 4 S, Rn. 5 E," etc. The abbreviation "Twp." means township and the abbreviation "Rn." means range. In land descriptions, the township always precedes the range.

## CHART II

### TOWNSHIP MAP SHOWING SECTION NUMBERS

| | | | | | |
|---|---|---|---|---|---|
| 6 | 5 | 4 | 3 | 2 | 1 |
| 7 | 8 | 9 | 10 | 11 | 12 |
| 18 | 17 | 16 | 15 | 14 | 13 |
| 19 | 20 | 21 | 22 | 23 | 24 |
| 30 | 29 | 28 | 27 | 26 | 25 |
| 31 | 32 | 33 | 34 | 35 | 36 |

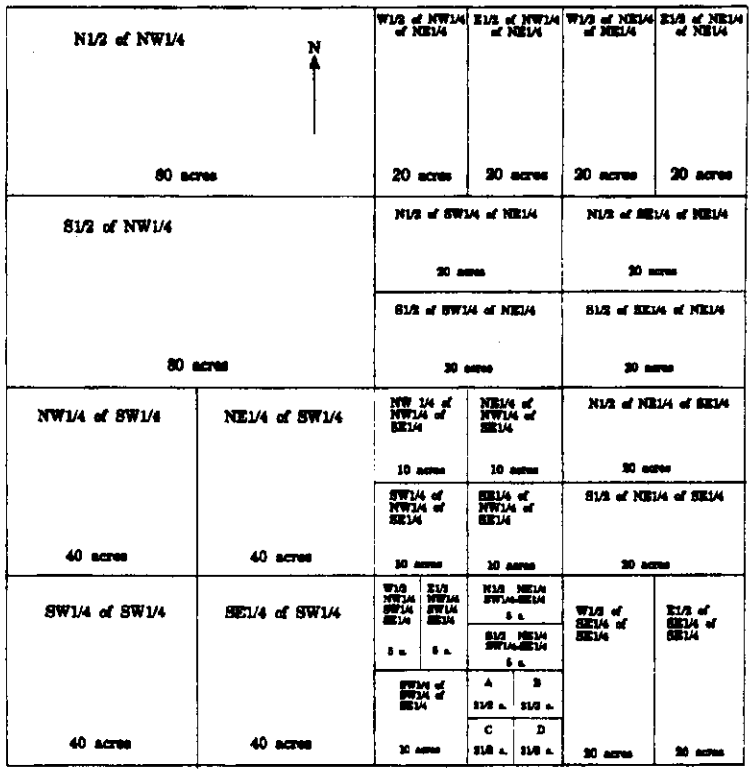
N
A
S

The method of numbering the sections within a township should be carefully studied even though it is a simple process. Beginning with section number 1 in the northeast corner of the township, the sections are numbered to the left from 1 to 6 in the top tier of sections, then down one tier and the counting is to the right to section 12, then down one tier and to the left, then down one tier and to the right, then down another tier and to the left and down one tier and to the right, ending with section 36 in the lower right hand corner of the township.

(7A)

CHART III

SECTION MAP SHOWING SUBDIVISIONS THEREOF




Tract A is the NW1/4 of SE1/4 of SW1/4 of SE1/4
Tract B is the NE1/4 of SE1/4 of SW1/4 of SE1/4
Tract C is the SW1/4 of SE1/4 of SW1/4 of SE1/4
Tract D is the SE1/4 of SE1/4 of SW1/4 of SE1/4

MAI

**PROBLEM 16.1:** Arthur, owner of Blackacre in fee simple, borrowed $500 from Doris. To secure this indebtedness Arthur executed a mortgage to Doris describing the mortgaged land as: "That certain tract of land, gristmill and storehouse, said tract to contain three acres and within my forty-acre farm." Thereafter Arthur gave a mortgage to Catherine covering Arthur's forty-acre farm and properly describing it. This was the same farm referred to in Doris's mortgage. Doris was about to sell the land under foreclosure proceedings when Catherine brought suit to enjoin the sale on the ground that Doris's mortgage was void for want of description identifying any specific land. Should the injunction issue?

**Applicable Law:** No conveyance is valid unless the description of the land sought to be conveyed is sufficient to identify the land.

### Answer and Analysis

Yes. No deed or mortgage is valid unless the description of the land sought to be conveyed or mortgaged is sufficient to identify such land. What land is identified in Arthur's mortgage to Doris? The tract is three acres. But where is it? It is some place within a 40 acre tract. But no words locate it at any particular place within the 40 acres, and no words describe the shape of the three acres. Even if the buildings are intended to be within the three acres, a specific shape and location is lacking. Neither do the words used refer to any map or plat from which the three acre tract can be located. No monuments, no lines and no points give any indication of how to identify the land intended to be mortgaged to Doris. Hence, Doris's mortgage is void and the injunction should issue at the instance of the mortgagee, Catherine, whose mortgage appears to be valid.[9]

**PROBLEM 16.2:** A, being owner in fee simple of Blackacre, executed a deed in favor of B as grantee in which she used the following language, "I hereby grant to B and his heirs that certain piece of land, it being one half of my Blackacre." What are the rights of the parties?

**Applicable Law:** The courts will give effect to the language of the instrument of conveyance if possible, *even making the parties tenants in common,* when an undescribed "piece" of land is mentioned but which was to be a distinct fractional part of the whole tract.

### Answer and Analysis

The answer is probably that A and B are tenants in common of Blackacre, even though this was not likely the grantor's intent. The parties to this transaction intended that something should be conveyed by the deed. If possible the courts give effect to the language used. It is obvious that the words in the deed describe no specific "certain piece" or a divided part of Blackacre. Hence, the deed would fail if it were to be applied to any specific piece of land. On the other hand, the language "it being one half of Blackacre" does describe that which can be the subject matter of a conveyance, an undivided half. Hence, the deed should be construed as transferring an undivided half interest in Blackacre to B, thus making A and B tenants in common of Blackacre. If, on the other hand, such a deed had attempted but had failed to describe a distinct piece of

9. See Harris v. Woodard, 130 N.C. 580, 41 S.E. 790 (1902).

Blackacre, and if it were clear that the grantor intended to convey a divided portion of the tract, and the words, "it being one half of my Blackacre" were meant to describe merely the area of the piece intended to be conveyed, then the deed would fail for lack of description.[10]

**PROBLEM 16.3:** Florence, owner in fee simple of Blackacre, executed a deed in the following language to Frances as grantee, "I hereby grant to Frances and her heirs that certain Lot 1, Block 1 of Veterans Addition to the City of Tucson, State of Arizona, according to that certain map on page 66 of Book 5 of Maps and Plats filed in the Office of the County Recorder of Pima County, State of Arizona." This described Blackacre. Frances paid full value for the lot and recorded the deed. Then Florence borrowed money from Diana and executed a mortgage on several pieces of land to secure the payment of this debt. Blackacre was included in the mortgage to Diana. Diana foreclosed the mortgage and was about to sell Blackacre. Frances seeks to enjoin this sale, and Diana contends that the description in Frances's deed is insufficient to pass title. In the trial Frances seeks to introduce in evidence the map and plat of Lot 1 Block 1 as it appears on page 66 of Book 5 of Maps and Plats in the Recorder's Office. Is such evidence admissible?

**Applicable Law:** If a deed in its description of the land to be conveyed refers to a map or plat, that reference makes the map or plat a part of the deed for the purpose of identifying the land.

### Answer and Analysis

Yes. If a deed in its description of the land to be conveyed refers to a map or plat, the reference makes the map or plat a part of the deed for the purpose of identifying the land. It is obvious in the facts given that the description of the land as Lot 1, Block 1, etc., does not describe any land or locate any property which could be the subject of the conveyance apart from the map or plat. But by construing the deed and the map or plat together, there is a piece of land with specific and accurate dimensions which is located on the terrain in reference to other pieces of land which bound it. In fact, with the map or plat the deed is complete; without it the deed is incomplete and void. Thus the courts carry out the expressed intent of the grantor by treating the deed and map or plat as one for purpose of making the conveyance complete. Hence, the evidence is admissible and Frances is the title holder of Blackacre.[11]

10. See Morehead v. Hall, 126 N.C. 213, 35 S.E. 428 (1900) (conveyance of unspecified "one half of a tract of land" could not convey a divided portion but was sufficient to create undivided one-half interest).

11. See Deery v. Cray, 77 U.S. (10 Wall.) 263, 19 L.Ed. 887 (1869).

**PROBLEM 16.4:** A owned Blackacre in fee simple. Blackacre was a lot 80 feet wide and 200 feet long. The front 40 feet of Blackacre was subject to an easement for street purposes, and was not usable by the owner as long as Market Street was used over such area. Market Street was 80 feet wide and the south line of Blackacre formed the center line of such Street for a distance of 80 feet. The long sides of Blackacre extended due north and south and were perpendicular to Market Street which extended due east and west. A executed a deed to B of such property using the following language, "I hereby grant to B the following described property to wit: Beginning at a steel stake in the north side line of Market Street exactly 100 feet west of the intersection of said north side line of Market Street with the west side line of Spruce Street, in the City of Dover, State of Arisota; thence due north at right angles to the north side line of Market Street 160 feet to another steel stake; thence due west and at right angles to the line just drawn 80 feet to another steel stake; thence due *north* and at right angles to the line just drawn 160 feet to Market Street; thence along Market Street to the place of beginning." (a) Is this deed valid to transfer to B any part of Blackacre? (b) If so, does B take title to the 40 feet of the lot which is covered by Market Street?

**Applicable Law:** (a) If, in the description in a deed there is a conflict between the calls of a deed as to courses and distances on the one hand, and monuments, natural or artificial, on the other, the monuments will govern over the courses and distances. (b) When the description in a deed carries it "to," "by," "from" or "along" a street, road, alley, way, highway, creek, stream or similar monument, the common law rule is that the grantee takes title to the center of such street, road, alley, way, highway, creek, stream or similar monument, provided the grantor owns to the center of such monument. (c) Courses govern over distances.

### Answers and Analysis

The answers are (a) the deed is valid and passes title to B, and (b) title to the 40 feet covered by Market Street passes to B. Question (a) raises a very important rule of construction: when there is a conflict in a deed description between the calls of a deed as to courses and distances on one hand and monuments natural or artificial on the other, *the monuments will govern over courses and distances.*[12] The reason for the rule is that human experience

12. Some courts apply this rule even when it is clear that the monuments were improperly placed. E.g., DD & L, Inc. v. Burgess, 51 Wash.App. 329, 753

suggests that one is much more apt to be correct when referring to a monument than when turning off an angle for the direction of a line (a course) or in measuring a distance. The description in the problem started at a monument, a stake specifically located in the north line of Market Street. The first course went north to another monument, a stake; the second course went west to another monument, a stake. Thus far the courses and distances and monuments coincide. Next comes the parting of the ways. The course turns due north but the monument, Market Street, is south. If the course is followed, there will be no land enclosed and the deed will fail for the courses describe only a broken line. If the monument governs, then the course will be carried not due north as the words indicate, but due south where the monument is located on the ground. Furthermore, by carrying the third course to the monument, Market Street, it will be possible, by following the fourth course, "along Market Street to the place of beginning," to enclose a piece of land which could be the subject matter of the conveyance. By using the rule of construction that monuments govern over courses and distances, the deed with its calls enclose an area of ground and will be valid. Thus, the third course runs "due south" to Market Street, the monument, and not "due north" as the deed states in words, and the deed is valid to pass title to B.[13]

Question (b) involves another very important common law principle of construction: when the description of land in a deed carries it "to," "by," "from" or "along" a street, road, alley, way, highway, creek, stream or similar monument, the grantee takes title to the land to the *center* of such monument, provided the grantor owns to the center. In our case the calls of the deed start from a point on the side line of Market Street and take a northerly direction "from" such point or Street. When the calls return to the monument, Market Street, they run "along" Market Street to the place of beginning. If the view is taken that the stake in the north side line of Market Street indicates an intent on the part of the grantor that the land conveyed shall be no further south than that point, then it can be argued that the grantee takes only to the north side line of Market Street, the tract which B gets is only 80 ft. by 160 ft., and no part of the lot under Market Street passes to B. But the general rule stated above should ordinarily apply and the stake on the north side line of Market Street is but a measuring

P.2d 561 (1988). See also Doman v. Brogan, 405 Pa.Super. 254, 592 A.2d 104 (1991) (where property description divided a building by reference to a "center wall," which was inconsistent with the given metes and bounds description, court divides property along wall currently in place closest to center, even though it may not have been the historical wall referenced in the deed; significantly, the metes and bounds description would have divided the property down the center of a room).

13. See Providence Properties, Inc. v. United Virginia Bank, 219 Va. 735, 251 S.E.2d 474 (1979).

point from which the area to be conveyed is to be identified. The location of that stake does not, in the absence of other factors, constitute a basis for determining the grantor's intent as to the area to be conveyed. The reason for the rule is that the only purpose which the retention in the grantor of a narrow strip of land in a street can possibly serve is to be the subject of future litigation. This possibility is eliminated by construing the deed in B's favor.[14]

### *Note*

Another rule of construction is that *courses govern over distances* in the calls of a deed when the two are in conflict. To illustrate, suppose the third call in a deed is from a point to a given line on the side of a road south of said point. The deed reads, "then south to the road a distance of 66 feet, such line forming a right angle with the line on the north side of said road." The fact is that a line between the point and the line and forming a right angle with it will be exactly 60 feet long. If the line is to be 66 feet, then it will do one of three things as it swings in an arc: it will go 6 feet past the line; or it will form either an acute or an obtuse angle with such line. In such case the *course,* the direction of the line from the point to the road and making a right angle therewith, will govern over the length of the line, the *distance,* and the deed will be so construed that the line will be 60 instead of 66 feet in length.[15] Suppose the lengths of two lines in a deed cannot both be correct. One or the other must be in error. In that case there is an ambiguity and parol evidence is admissible to explain what was actually done on the ground.[16] In Temple v. Benson,[17] the court permitted a remote grantor to testify to the boundaries as they were marked out on the ground.

**14.** See Hoban v. Cable, 102 Mich. 206, 60 N.W. 466 (1894); Low v. Tibbetts, 72 Me. 92 (1881).

**15.** See Hall v. Eaton, 139 Mass. 217, 29 N.E. 660 (1885).

**16.** See Walters v. Tucker, 281 S.W.2d 843, 847 (Mo.1955):

> The law is clear that when there is no inconsistency on the face of a deed and, on application of the description to the ground, no inconsistency appears, parol evidence is not admissible to show that the parties intended to convey either more or less or different ground from that described. But where there are conflicting calls in a deed, or the description may be made to apply to two or more parcels, and there is nothing in the deed to show which is meant, then parol evidence is admissible to show the true meaning of the words used.... Such evidence must not contradict the deed, or make a description of other land than that described in the deed.

**17.** 213 Mass. 128, 100 N.E. 63 (1912). Accord Riley v. Griffin, 16 Ga. 141 (1854), where a witness was permitted to testify concerning his recollection as to where surveyor's marks on trees were located, even though the trees had been cut down many years earlier.

One should distinguish the case where surveyors or other experts are brought in to testify as to the meaning or interpretation of certain terms of art. Cf. Philpot v. State, 843 So.2d 122 (Ala. 2002) (permitting surveyor to testify, even though dead was not found to be ambiguous).

**PROBLEM 16.5:** Marion owns Blackacre, a quarter section of land which abuts Lincoln Highway, a road 80 feet wide. The south 40 feet of Blackacre is covered by the pavement of Lincoln Highway. In her deed to Fried as grantee, Marion uses this language, "thence south to a point on the north side line of Lincoln Highway, thence along the north side line of said Highway to the place of beginning, being a steel stake in the north side line of said Highway." The rest of the description was accurate as to Blackacre lying north of Lincoln Highway. Lincoln Highway was then abandoned, and Fried took possession of and struck oil on the 40 feet of Blackacre which had been used as part of said Highway. Marion sues to eject Fried from said 40 foot strip. May Marion recover?

**Applicable Law:** If the description in a deed is carried to two points constituting a line or the "side line" of a street, road, alley, way, highway, creek, stream or similar monument, still the grantee takes title to the center of such monument unless in express words the grantor excludes any part of such monument from the operation of the deed. This is the better rule, but some cases disagree.

### Answer and Analysis

The dominant, but not uniform, answer is no. When the description in the deed describes two points or a line which constitutes one side of a monument, such as a road, street, highway, stream, alley or the like, and the grantor owns to the center of the monument, does the description carry title to the center of the monument, or does the grantor retain the strip between the side line and the center of the monument? To be sure, two points determine a line and a line determines a boundary. The grantor has described the boundary line of the land conveyed as the "side line" of the Highway. This suggests that no part of the Highway passes to the grantee. The result is that the strip in the highway still belongs to Marion, and Marion can eject Fried.

The better view is that when a description carries the boundary of land conveyed to a monument such as a street, stream, road and the like, the general rule that the land goes to the center of the monument should apply unless the strip between the center and the side line is expressly excluded. This view seeks to avoid litigation which may arise by the grantor's retention of narrow strips of land. Such litigation is just about the only purpose which such retention of title can serve, for until the street is abandoned the grantor is in no position to use it beneficially. What of the grantor's intent? The parties usually do not think of the strip under the monument when the deed is delivered. Of course, the grantor has the right to retain the strip, and also the grantee would have the

right to reject the deal if the strip were retained. However, it is not inconsistent with the general rule allowing title to the center of the monument to pass to the grantee, to treat the two points, or the line on the side of the highway where it is more convenient to place stakes than in the road, not as a boundary line as such, but merely as the measuring points from which to identify the land conveyed, and indicating the side of the road on which the land lies.[18]

**PROBLEM 16.6:** A owned Blackacre in fee simple, which consisted of a tract 180 feet square and bounded on the north by the line AB, on the east by the line DA, on the south by the line CD and on the west by the line BC. Monument A was at the northeast corner, Monument B at the northwest corner, Monument C at the southwest corner and Monument D at the southeast corner. A executed his deed to a portion of Blackacre to B, using the following language: "I grant to B that certain portion of Blackacre bounded on the east by the line AD, on the north by the line AM which is the easterly 100 feet of the line AB, on the south by the line DN which is the easterly 100 feet of the line DC and on the west by the line joining the two points M and N, which enclosed tract is the easterly one half of my Blackacre." B fenced in the easterly 100 feet of Blackacre, which left the westerly 80 feet in A's possession. A sues B to eject him from the westerly 10 feet within B's fence. May A succeed?

**Applicable Law:** When there is a conflict in the description in a deed between a specific description or description by metes and bounds on the one hand, and a general description by fractional part or area on the other, the clear specific description will govern over the general description.

**Answer and Analysis**

No. It is obvious that the first part of the description in the deed defines with particularity the boundary lines of the east 100 feet of Blackacre. It is just as obvious that the east 100 feet of such tract is more than half by an excess of 10 feet in width. Consequently, if B owns such 100 feet to the east, then A has only 80 feet to the west and has retained less than half of Blackacre. Here then is a conflict between a specific description or description by metes and bounds on the one hand, and a general description by fractional part or area on the other. In such case the rule is well settled that the clear specific description governs over an inconsistent general description. Title to the east 100 feet of Blackacre passes to B, and

18. See Salter v. Jonas, 39 N.J.L. 469 (E. & A.1877) ("nothing short of an intention expressed in ipsis verbis, to 'exclude' the soil of the highway, can exclude it"). See also Safwenberg v. Marquez, 50 Cal.App.3d 301, 123 Cal. Rptr. 405 (1975) (grantee takes to center).

A's general description that such property conveyed was one-half of Blackacre has no effect.[19]

*§ 16.3 Exceptions and Reservations*

**PROBLEM 16.7:** Greg, fee simple owner of Blackacre, used the following language in his deed to Sara as grantee: "I hereby grant to Sara and her heirs Blackacre except the east half thereof, and except the standing timber on Blackacre, and except the coal under Blackacre." What interest did Sara take under the deed?

**Applicable Law:** An exception in a deed merely subtracts from the entire tract described in the deed some corporeal portion which is not to pass to the grantee, but is to remain in the grantor wholly unaffected by the deed or conveyance. Such portion must be sufficiently described so that it can be identified.

**Answer and Analysis**

Sara took the west half of Blackacre minus the standing timber and the coal. An exception merely subtracts from the entire tract described in a deed, some corporeal portion which is not to pass to the grantee. Of course the portion excepted must be clearly described so that it can be identified. The deed given describes Blackacre. It then, by exception, subtracts the east half, all the standing timber on the whole tract, and all the coal under the entire tract. All three subjects of exception, the east half, the standing timber and the coal, are corporeal property. The grantor can dispose of such excepted property by deed or by will, or it will descend by intestacy.

**PROBLEM 16.8:** A, being fee simple owner of Whiteacre and Blackacre which abutted each other, and there being a visible roadway from a highway to the house on Whiteacre running across Blackacre (a quasi-easement), executed to B a deed to Blackacre, using these words: "I hereby grant Blackacre to B and his heirs, reserving to me and my heirs an easement from my house on Whiteacre to the highway along our usual roadway;" (a) What interest was conveyed to B? (b) What interest, if any, was retained by A in Blackacre?

**Applicable Law:** This case distinguishes exceptions and reservations as they existed at common law, the former applying only to corporeal property which remained in the grantor wholly unaffected by the conveyance, and a reservation being

19. See Morse v. Kelley, 305 Mass. 504, 26 N.E.2d 326, 127 A.L.R. 1037 (1940).

limited to incorporeal rights newly created by the deed and issuing out of the land. In the United States today, both easements and profits may be created by "reserving" such to the grantor if this is her intent. Indeed, the intent of the grantor will govern whether the word "exception" or "reservation" is used. Words of inheritance never had to be used in cases of an exception. Such words must be used in creating a reservation to last longer than the grantor's lifetime unless a statute dispenses with such in the creation of a fee simple estate.

### Answers and Analysis

The answers are as follows: (a) B received Blackacre in fee simple burdened with an easement appurtenant in favor of Whiteacre, and (b) A retained in Blackacre an easement appurtenant to Whiteacre running from the house on Whiteacre across Blackacre to the highway over the road which had been the usual way of passage.

In the common law field of exceptions and reservations, history has played an important role and cannot be ignored. In England, a reservation created a right or incorporeal interest which had not existed previously, and which issued out of the land as a feudal service. It was created as a "regrant." The grantor was considered to have conveyed the entire property to the grantee free from any burden, then the grantee in the same deed "regranted" the interest reserved to the grantor. This was possible in England where both grantor and grantee signed or sealed the deed. But the theory did not seem to work in this country where only the grantor usually signed the deed. How, then, did our courts reach the result given in the answer above? They solved the case given as though it were an exception rather than a reservation. Because exceptions applied only to presently existing interests, the concept could not be applied to an easement or profit which was to be newly created by the deed and which did not exist before. So the courts simply took the view that a "quasi-easement" (case in which the grantor had two properties and used one to serve the other, which, of course, in law, was no easement at all), constituted a sufficiently existing "present interest" to be the subject of an exception. By so treating the matter in our case, the grantor, A, simply excepted his "quasi-easement" over Blackacre, and it became an actual easement over the now servient estate, Blackacre, in favor of the dominant estate, Whiteacre, which was retained by A.

Suppose, however, that Blackacre had never been used by A to serve Whiteacre when she owned both Blackacre and Whiteacre. The same fiction obtained and the same result achieved, and A was considered the owner of an easement over Blackacre without any

previously existing quasi-easement. If a "quasi-easement" can be made into an easement just by calling it such, the courts had no difficulty in saying a (non-existing) "quasi-easement" is an easement, if the grantor so intended. The result is that the word reservation may now actually create a new incorporeal interest in the grantor in the land conveyed, whether it be easement or profit, which was not a feudal service and which did not issue out of the land.

Notice that the set of facts given uses words of inheritance, "reserving to me *and my heirs*" an easement, etc. Words of inheritance were never necessary in an exception because exceptions were simply unaffected by the conveyance. But on the theory of a regrant in a reservation, only an easement or profit for life of the grantor could be created unless words of inheritance were used. Some cases held such reservation lasted only for the lifetime of the grantor and could not be claimed by his heirs. Of course, in a jurisdiction which has a statute dispensing with words of inheritance to create an estate of inheritance (fee simple or fee tail), the easement or profit reserved to the grantor without using the words "and his heirs" could last beyond his lifetime.[20]

**PROBLEM 16.9:** Amy owned Blackacre in fee simple. Millie owned adjacent Whiteacre in fee simple. A road over Blackacre would be a great convenience to Whiteacre as a much shorter way to travel to and from a nearby small town, Ionia. Amy executed a deed to Blackacre using the following language, "I hereby grant Blackacre to Missie and her heirs, reserving to Millie and her heirs a way across Blackacre in favor of Whiteacre to Ionia, such way to be over a 10 foot strip along the east edge of Blackacre." The deed was delivered to Missie. Millie starts to use the road described in the deed. Missie seeks to enjoin Millie's use. Should the injunction issue?

**Applicable Law:** Although courts are divided on the issue, they increasingly hold that a reservation of an easement made in favor of a third party to the deed should be valid if such be the intent of the parties.

### Answer and Analysis

The answer is no. Missie's suit is based on the traditional proposition that a reservation must be wholly and solely for the benefit of the grantor or conveyor. In this case the reservation is in favor of Millie, a third party to the deed. Historically, an exception or a reservation could be in favor of the grantor only. Obviously the way attempted to be created in favor of Millie cannot be an exception, for it was not in existence before the deed. It seems fair

20. See Restatement of Property §§ 472, 473.

to assume from the very words of the instrument taken as a whole, that the grantor Amy intended to create in Millie an easement appurtenant to Whiteacre. There is no logical reason why a grantor cannot in the same deed create a possessory estate in one person and an easement in another. No one could question Amy's power to create such interests had Amy used two instruments, first, one to Millie granting the easement, and second, one to Missie creating the fee. It should make no difference that two interests, one possessory and the other nonpossessory, are created in the same instrument if such be the intent. If these propositions be true, then the fact that Amy used the word "reserving" instead of "granting," or "I hereby grant" should be immaterial, provided Amy intended to create in Millie an easement over Blackacre.[21]

### *§ 16.4 Delivery, Escrow and Acceptance*

**PROBLEM 16.10:** A, owner of Blackacre in fee simple, was negotiating with B for a sale of the premises for cash. A made out a complete deed to the land, named B as grantee and acknowledged it before a notary public. When B came to A's house to talk further about the possible deal, A handed B the deed with these words, "If we make this deal and you pay me the $5,000.00 cash, this is the deed which I will give to you." B replied, "I'll take the deed home and show it to my spouse. We may buy the property tomorrow." B left with the deed, recorded it in the proper county office and now sues to eject A from Blackacre. Should she succeed?

**Applicable Law:** Delivery of a deed to real property means that the grantor intends that the deed shall operate as a conveyance. To effectuate such a conveyance there must be a physical deed and an intent on the part of the grantor that it take effect as a conveyance. It is not material where the physical deed is.

#### Answer and Analysis

No. A can convey title by deed by doing two things: (a) making a deed; and (b) delivering it to the intended grantee. In this case he made out the deed. He did not make delivery. It is true, A handed over the deed physically to the named grantee, B. B had physical

21. See Restatement of Property §§ 572, 573. See also Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal.3d 473, 102 Cal.Rptr. 739, 498 P.2d 987 (1972), upholding a reservation in favor of a third party. The deed to X contained a provision "subject to an easement ... for parking purposes ... for the benefit of [Y] Church." The court repudiated the old rule of no reservation in favor of a third party, and gave effect to the intent of the parties. Some courts cling to the historical rule forbidding such reservations. E.g., Estate of Thomson v. Wade, 69 N.Y.2d 570, 574, 516 N.Y.S.2d 614, 615, 509 N.E.2d 309, 310 (1987) (declining to follow *Willard*).

possession of the deed with no wrongdoing on her part. *But delivery is a question of the intent of the grantor that the instrument shall operate as a conveyance,* and that it shall pass title to the grantee. The grantor must intend to relinquish all control over the instrument as an effective transfer of title. Giving up control over the mere physical piece of paper on which the writing or printing appears is insufficient. Such intent is in the mind of the grantor and is usually a question of fact. In this case it is probably so clear that reasonable people could not differ as to A's intent. The grantor's words were, "If we make this deal ... I will give it to you...." This indicates no present but a future time when A intends to give efficacy to the deed, and on a condition. The words of the named grantee likewise show no misunderstanding. She too understood that, while A did intend to hand over physical control of the deed, he did not intend to relinquish control of the deed as a transfer of title to Blackacre.[22] Hence, there was no delivery and as between A and B, A is still the owner of Blackacre.[23]

**PROBLEM 16.11:** Roselle, owner in fee simple of Blackacre, makes out a completed deed to Michael. Roselle puts the deed in the drawer of her office desk. Michael, who has been negotiating with Roselle for the purchase of Blackacre, hands Roselle the agreed price of $50,000.00 which Roselle accepts and says to Michael: "Blackacre is yours." Thereafter, Roselle having refused to turn over the physical deed to Michael, Michael sues Roselle in ejectment. Roselle answers that Blackacre is still hers because there has been no delivery. How should the court rule on Roselle's defense?

**Applicable Law:** Title will pass to the grantee if there is a physical deed and the grantor intends it to operate as a conveyance, even though the grantor retains possession of the physical paper on which the deed is written.

### Answer and Analysis

The court should reject Roselle's defense. The alleged facts constitute delivery as a matter of law. The deed being made and delivery being a question of the grantor's intent, it is clear that the words of the grantor, "Blackacre is yours," meant that she intended the deed to operate as a transfer of title to Michael. It is important that Michael have possession of the physical deed so that he can record it as evidence of his title. But he need not have the

22. See Rosengrant v. Rosengrant, 629 P.2d 800 (Okl.App. 1981) (brief handing of deed to boy by banker, acting as grantor's agent, was not a delivery).

23. See Martinez v. Martinez, 101 N.M. 88, 678 P.2d 1163 (1984) (grantor instructed grantee to place deed in escrow awaiting for delivery contingent on mortgage payment; grantee recorded it immediately; no delivery).

physical piece of paper or deed in order to have the title as against Roselle when it is established that there is such a physical deed, and that Roselle intended it to be operative as a legal conveyance of title from Roselle to Michael.[24]

### *Note: Delivery and the Language of the Deed*

Delivery is a physical act entirely distinct from the drafting of a deed, and quite independent of any language that the deed might contain. For example, a deed that says "O unequivocally, absolutely and unconditionally hereby grants Blackacre to A" nevertheless transfers no interest if it is not delivered. As a general rule courts hold that the fact of delivery must be established "*dehors* the instrument"—or by evidence entirely independent of the language of the deed itself. A few courts, perhaps inadvertently, have suggested that the fact of delivery could be inferred (or negated) by the language of the deed. Such reasoning is generally incorrect.[25]

The other side of the coin is that you should distinguish the *delivery* question from the issue of conditional language in the deed itself. For example, although courts hold that a conditional delivery of a deed passes no title, because it reveals that the grantor did not intend to depart with dominion and control, many courts hold that *conditional language in the deed itself,* entitling the grantor to revoke, is valid. If such a deed is properly delivered, both the grant and the power to revoke are valid in a plurality of jurisdictions.[26] Some courts hold that such deeds are really will substitutes and do not validly convey any property interest as deeds, although they may as wills.[27] Of course, a will can be revoked by the testator any time until her death, while a deed, once delivered, cannot be. A few courts hold that the grant is valid, but the reserving condition is not; so the conveyance is absolute.[28]

**24.** See Kanawell v. Miller, 262 Pa. 9, 104 A. 861 (1918).

**25.** For example, see State, by Pai v. Thom, 58 Haw. 8, 563 P.2d 982 (1977), which found delivery, in part because the granting language of the deed was "absolute and unconditional." In this case the words "grant, bargain, sell, transfer and deliver unto Grantee" showed "the present intention of the appellants to grant their interest.... We find no clauses or conditions in the deed limiting or qualifying the estate conveyed." Compare Erbach v. Brauer, 188 Wis. 312, 206 N.W. 62 (1925), finding no delivery because "the deed itself contains no language expressive of a delivery or of an intention of delivery."

**26.** See, e.g., St. Louis County National Bank v. Fielder, 364 Mo. 207, 260 S.W.2d 483 (1953), where the deed conveyed decedent's home, but reserved a "life estate with power to sell, rent, lease, mortgage or otherwise dispose of property during [decedent's] life." The court held that the deed created a defeasible fee subject to a life estate. Since the life estate had expired, the grantee had absolute title.

**27.** E.g., Peebles v. Rodgers, 211 Miss. 8, 50 So.2d 632 (1951) (deed providing that grantor was to live on, control and possess property during his lifetime, and to take effect upon his death, was testamentary, and inoperative).

**28.** See Newell v. McMillan, 139 Kan. 94, 30 P.2d 126 (1934), where the deed gave a fee simple subject to life estate in grantor, but also gave grantor

**PROBLEM 16.12:** A, being owner in fee simple of Blackacre, makes and delivers a deed to B as grantee. B initially takes the deed and puts it in his pocket but later decides that he does not want to be indebted to the grantor. He gives it back, saying "Here is your deed back again. Thanks, anyway!" B handed the deed to A and A tore it up and threw it in the stove where it was totally destroyed by the fire. Who is the owner of Blackacre?

**Applicable Law:** Once title has lodged in the grantee, he cannot abandon such title. Title can leave him only by his act by deed or will, or by another taking from him by adverse possession. Once title has lodged in the grantee without his disclaimer, he cannot reconvey to the grantor by returning to the grantor the same deed which the grantor delivered to the grantee. He can reconvey only by drafting a new deed.

### Answer and Analysis

B is the owner of Blackacre. The facts state that A "delivers" his deed to B. That means that he intended such deed to pass title to B. It transferred title to B, subject only to B's disclaimer which would cast title back on A *ab initio*. But B did not disclaim. So title was in B. When B later changed his mind, such change of mind did not change the title which was in B. There are only two ways by which B can be divested of the title to Blackacre: (1) by a deed or will voluntarily executed by B as grantor to another and; (2) by some other person taking it from B involuntarily by adverse possession. When B returned the deed to A, he was returning A's voluntary conveyance or deed. It was not B's deed to A. B had not executed a deed of his own and delivered it to A. Title had vested in B, and a voluntary conveyance executed by B was essential to reconvey the property to A. All that A destroyed was evidence. This is fundamental to one's understanding of the nature of a conveyance. The fact that such facts may be difficult or impossible to prove is totally immaterial here because the facts are stipulated.

This problem should be distinguished from one in which the grantee immediately states that he does not want the property, or his first reaction upon hearing that he has received property is to reject it.[29]

the right to mortgage, sell or otherwise dispose of the property. The court found the reservation of the powers to mortgage, sell or dispose void. "A clause in a deed which is at variance with the grant is a nullity." Only the life estate was validly reserved.

**29.** See Hood v. Hood, 384 A.2d 706 (Me.1978) (finding no delivery where a son immediately told his mother that he "wanted no part" of the property).

**PROBLEM 16.13:** John, owner in fee simple of Blackacre, made a deed to Nancy as grantee and placed it in his safe deposit box in the bank where it was found upon John's death. John's will did not mention Blackacre but disposed of all the rest of his property. A dispute arose between Nancy and John's heirs as to who was the owner of Blackacre. Who owns Blackacre?

**Applicable Law:** (a) Delivery is a question of intent and intent is a fact question to be determined by the trier of fact. (b) Delivery is in the mind of the grantor and wholly *dehors* the deed. (c) The burden is on the one who says there was a delivery to prove it.

### Answer and Analysis

This question cannot be given a yes or no answer in its present form because it merely raises an issue of fact. The answer depends upon whether or not John made a delivery of the deed during his lifetime. If, during John's lifetime, he intended that deed to be effective to convey title to Nancy, then Nancy is the owner of Blackacre. If, during John's lifetime, he had no intent that the deed convey title to Nancy, then the heirs of John are the owners of Blackacre. No deed can be effective unless delivered during the lifetime of the grantor for the simple reason that there can be no intent in one who is deceased. Only a will can take effect the instant following death. The fact that John made a deed to Blackacre is no evidence of and raises no presumption of delivery. The fact of delivery is wholly outside of and extrinsic to the instrument itself. Delivery must be proved as an independent fact, and the burden is on the person claiming delivery. In this case the burden would be on Nancy to show by a preponderance of evidence that during his lifetime John intended the deed to be effective. Whether he did or did not so intend would be a question for the trier of fact.[30] Possession of the deed by the grantee creates a presumption that it has been delivered.[31]

**PROBLEM 16.14:** A, fee simple owner of Blackacre, made a complete deed to Blackacre in favor of B, the named grantee. A authorized C to record the deed. When the deed was recorded it was mailed to C who returned it to A. A remained in possession of Blackacre. B died and D was his sole heir. A now brings suit

**30.** See Erbach v. Brauer, 188 Wis. 312, 206 N.W. 62 (1925). See also Lenhart v. Desmond, 705 P.2d 338 (Wyo. 1985), holding that when the grantor placed a warranty deed in his safety deposit box and gave grantee access to the box, no delivery occurred. The grantor's intent was apparently to pass title upon his death, not before. Grantee's taking the deed from the box and recording it without grantor's knowledge did not create a presumption of delivery.

**31.** Walls v. Click, 209 W.Va. 627, 550 S.E.2d 605 (2001).

against D to remove the cloud which the recorded deed casts upon his title. The only evidence adduced at the trial on the question of delivery were C's statement that A told C to record the deed, and A's bald assertions that the physical deed was never in B's possession and that he, A, had never "delivered" the deed to B. The trial court, sitting without a jury, found for and gave judgment to the defendant and A appeals. How should the appellate court rule?

**Applicable Law:** When the grantor makes out a deed and has it recorded in favor of the grantee, there is a presumption of delivery and the burden is on the grantor to overcome such presumption.

### Answer and Analysis

The appellate court should affirm the decision of the lower court. Here again the question of delivery is a question of fact. But when a grantor records his deed in favor of a grantee, there is a presumption that she intends to deliver the deed, and that it shall pass title to the grantee. The burden of overcoming the presumption is then on the grantor. A mere assertion by the grantor that he did not intend to deliver the deed is ordinarily not sufficient to overcome the presumption of delivery. He must prove no delivery by clear and positive proof. In this case he might have done so by showing clearly that C was not authorized by A to record the deed. This was not accomplished by merely saying he did not deliver the deed. In any event the question of delivery was a question of fact, and the trial court found the question in favor of the defendant with plenty of evidence to sustain the finding.[32]

**PROBLEM 16.15:** A, owner in fee simple of Blackacre, made a complete deed in favor of grantee, B. A handed the deed to B with this admonition, "I'm going on a dangerous mission. If during this mission I am killed, record this deed." A returned safely from the mission, but during A's absence B had recorded the deed and claimed the property. May A set aside the deed?

**Applicable Law:** A grantee cannot be an escrow depositary. A conditional delivery cannot be made to the grantee; the deed either takes effect at once or not at all.

### Answer and Analysis

No, but this holding is anomalous. There is no reason in logic why, if delivery is a matter of the grantor's intent, a deed cannot be

32. See Stiegelmann v. Ackman, 351 Pa. 592, 41 A.2d 679 (1945) (grantor's mere assertion that he had no intent to deliver was insufficient to overcome presumption arising from recordation). Accord Estate of Dykes v. Estate of Williams, 864 So.2d 926 (Miss. 2003).

handed to the grantee to take effect on a condition. But the great majority of the cases hold that if the grantor hands the deed to the grantee with the intent that it be a conditional delivery, then it is an absolute delivery. The grantee cannot be an escrow depositary. If effective delivery means what the cases hold, that the grantor intends to give up all control over the operation of the deed as a conveyance, it should be wholly immaterial whether the physical deed is in the hands of the grantor, the grantee or a third person. But in this instance where the grantor hands the paper to the grantee to be effective on a condition which may or may not happen, the shades of the past which treat the deed like a feoffment which must take effect presently or not at all, continue to govern the more enlightened view on the subject.[33]

In an important decision to the contrary, H and W, husband and wife, owned Blackacre in fee simple as tenants by the entirety. H was ordered by the government to perform a dangerous mission in Korea and Japan. He made a deed to W of his interest in Blackacre and handed it to her on the conditions (a) that she would not record the deed until such time as he "should be reported missing, killed or had failed to return," and (b) that if he should return, the deed would be returned and destroyed. W recorded the deed contrary to the condition and refused to return it to H upon his return. H sued to have the deed annulled.

The court found that the deed had been conditionally delivered by H to the grantee, W, and that it should be annulled, saying:

> there is actually no logical reason why a deed should not be held in escrow by the grantee as well as by any other person. The ancient rule is not adapted to present-day conditions and is entirely unnecessary for the protection of the rights of litigants. After all, conditional delivery is purely a question of intent, and it is immaterial whether the instrument, pending the satisfaction of the condition, is in the hands of the grantor, the grantee or a third person. After the condition is satisfied, there is an operative conveyance which is considered as having been delivered, although the ownership does not pass until satisfaction of the conditions. We therefore *hold* that it is the intent of the grantor of a deed that determines whether the

33. See Wipfler v. Wipfler, 153 Mich. 18, 116 N.W. 544 (1908) ("a delivery of a deed by a grantor to a grantee in escrow or upon condition is effectual to pass title presently" and "Nor do we know of any authority which goes to the extent of holding that a deed delivered to a grantee with an intention on the part of the grantor that it shall be subject to a future condition, but with no express provision for recall by the grantor and requiring for its validity no additional act on the part of the grantor or any third person, can be defeated by parol proof of such condition."). Of course, one must distinguish between conditions stated in the deed itself and conditions upon its delivery. See Valley Honey Co., LLC v. Graves, 666 N.W.2d 453 (N.D. 2003).

delivery of the deed is absolute or conditional, although the delivery is made directly to the grantee.

The court concluded that

> [t]he ancient rule that the mere transfer of a deed from the grantor to the grantee overrides the grantor's explicit declaration of intent that the deed shall not become operative immediately is a relic of the primitive formalism which attached some peculiar efficacy to the physical transfer of the deed as a symbolical transfer of the land.... In England in ancient times there could be no change of possession of land until a livery of seisin had taken place. A knife was produced and a piece of turf was cut, and the turf was handed over to the new owner. Later, under the Roman influence, the written document came into use. These documents, which few people had the art to manufacture, were regarded with mystical awe. Just as the sod had been taken up from the ground to be delivered, so the document was laid on the ground and then solemnly lifted and delivered as a symbol of ownership. In this way the principle developed that the delivery of the deed was the mark of finality.

The court then explained that the first sign of breaking away from this strict formalism was the recognition that there could be a conditional delivery to a third person in escrow. But such conditional delivery was not allowed when the deed was handed to the grantee.[34]

In any event, if a condition is *stated in the deed* itself, this is quite a different matter than if the condition is extrinsic to the language of the deed. For example, if a deed says "Blackacre to A, to take effect only upon A's marriage," the question is not of delivery but merely of the nature of the interest granted. In this case, the deed creates a springing executory interest which is valid, assuming that the deed itself was properly delivered.

**PROBLEM 16.16:** A, owner in fee simple of Blackacre, executed a specifically enforceable contract to sell Blackacre to B. He also executed a deed in B's favor as grantee and placed it in the hands of X bank, an escrow depositary, with written instructions to X that X should hand the deed to B when B paid the full purchase price to X. Thereafter B paid the full purchase price to X. A then instructed X not to hand the deed to B. X refused to give the deed to B. B sues for possession of the deed. May he recover?

**Applicable Law:** A delivery in escrow is a conditional delivery. When the condition is fulfilled or the event happens on

34. Chillemi v. Chillemi, 197 Md. 257, 78 A.2d 750 (1951).

which the delivery depends, then title passes to the grantee even when the physical deed is retained wrongfully by the escrow depositary, and the grantee has the right to the possession of the physical deed as evidence of his title. There must be a physical deed and it must be handed over to the escrow depositary who is not an agent of either party but has merely the duty to carry out his instructions.

**Answer and Analysis**

Yes. Such commercial escrow transactions generally produce little difficulty. The rights of the parties are clear. When the specifically enforceable contract was executed, equitable conversion took place whereby B became the equitable owner of Blackacre and A retained the legal title as security for the payment of the purchase price. Had there been no escrow, B, having performed in full, could have sued for specific performance and compelled A to execute to him a deed to Blackacre. These are the rights of the parties under the contract.

Under the escrow transaction it was clearly intended that title should remain in A until B had fully performed his contractual obligations. Conversely, it was just as clear that the deed should take effect as an operative conveyance when B had fully performed. Hence, when B paid the full purchase price to X, the deed became effective and title passed to B irrespective of whether the physical paper were handed over to the grantee, B, because such was A's intent and delivery is merely a question of intent of the grantor that the deed operate as a conveyance. Consequently, B had the right to the possession of the physical deed for the purpose of evidence and to place it of record.

The following principles should be carefully noted in connection with this and every escrow transaction. (a) There must be a deed. (b) It must be delivered to a third person. (c) Title remains in the grantor until the occurrence of an event or performance of the condition. (d) Title passes to the grantee upon the occurrence of the event or performance of the condition irrespective of who holds the physical deed. (e) The escrow depositary has merely the duty to carry out his instructions or perform his contract if there is one. (f) The escrow depositary *is not an agent for either party* nor trustee for either; if he is, then he is not an escrow depositary. In this case when A delivered the deed to X, the escrow depositary, (called the *first* delivery) A invested B with power to become the owner of Blackacre by performing his obligation. Thereafter A had no control over the deed or its operation unless B failed to perform. Neither did A have any control over the escrow depositary X, and X's

refusal to make the *second* delivery to B was without authority. Such is the nature of a true escrow.[35]

**PROBLEM 16.17:** A, owner in fee simple of Blackacre, *orally* agreed to sell Blackacre to B. A executed a deed to B and placed the deed in the hands of X bank as escrow depositary with oral instructions to deliver the deed to B when B paid the full purchase price, which was to be paid in five installments of $1,000 each. B paid four installments. A then instructed X to return the deed to A, which X refused to do. B then paid the last installment to X, making full payment of $5,000 according to the original oral agreement, and demanded the deed from X which X refused. A offered to repay to B the entire $5,000 which B refused. Who owns Blackacre?

**Applicable Law:** A conveyance is not a contract. In an escrow transaction the grantor invests the grantee with power to become the owner of the land represented by the deed, and such power is irrevocable as to the grantor who loses all control over the operation of the instrument as a conveyance subject only to the failure of the grantee to perform. Under the better-reasoned cases, the Statute of Frauds has no application, and an oral placing of the deed in escrow is enforceable by the grantee who performs. A specifically enforceable contract is not essential to a valid escrow under this view.

**Answer and Analysis**

In most jurisdictions B owns Blackacre and has the right to the deed, but there is contrary authority. The answer requires a presupposition as to the very nature of an escrow transaction. If a conveyance is not a contract, and it is not, and if delivery is merely a question of the grantor's intent, and it is, then it would appear that a grantor has the power and right to invest a grantee named in a deed with a power to become the owner of property by performance of a condition, or, or by an act of payment of money. Further, it would appear that he could make such power in the grantee irrevocable as to the grantor, subject only to the performance by the grantee. If such be the case, then the Statute of Frauds has no application to the case and the grantor is bound by his irrevocable delivery to the escrow depositary subject to performance by the grantee. Such seems to be the true nature of an escrow transaction and gives to it great practical utilitarian value in the field of conveyancing. To require in such case a specifically enforceable contract is to thwart the intent of the grantor at the time of

35. See Ferguson v. Caspar, 359 A.2d 17 (D.C.App.1976) (holding that the escrow's duty is merely to fulfill her instructions; if one party attempts unilaterally to change the terms of the transaction, the escrow's duty is to stop the transaction).

establishing of the escrow and permit him to change his mind to the detriment of the grantee, and at the same time to detract materially from the value of escrows as a practical method of carrying on conveyancing business. Surely the grantor intended more than an oral contract for the sale of Blackacre when he executed a deed and placed it in escrow.

Further, delivery is a requirement in addition to the requisite formalities pertaining to the execution of sales contracts and deeds of conveyances. Since it is possible to have a fully completed delivery when there was no ancillary contract at all, then it should also be possible to show that there was a conditional delivery when there was either no contract or only an unenforceable one. The question is not whether there was an enforceable ancillary contract, but whether the grantor had either completely effectuated the conveyance by delivery or had gone so far in that direction as to put it beyond his power to revoke. A conditional delivery in escrow should be irrevocable except for the non-performance of the condition although there is no enforceable ancillary contract. There are cases to the contrary.[36]

**PROBLEM 16.18:** A, owner in fee simple of Blackacre, executes his deed in favor of B and hands it to X bank with instructions to deliver said deed to B upon A's death. A dies and his heirs or devisees claim Blackacre. Who is the owner of Blackacre?

**Applicable Law:** A delivery in escrow in a donative transaction in which the deed is to be delivered on the death of the donor whenever and however that occurs, is a valid delivery. When necessary, the relationship of the parties prior to the occurrence of the certain event is analogized to that of a fee simple and executory interest, or life estate and remainder. If the grantor makes the depositary his agent subject to further control, there is no delivery. In donative escrow transactions where the event or condition is not certain to occur, the cases are divided as to whether there is a valid delivery.

### Answer and Analysis

B is the owner. Here it should be noted that there is no contract at all; merely an event to happen. This is a donative transaction in which the grantor gave up all control over the operation of the deed as a conveyance, subject only to the occurrence of an event.

The event in this case is certain to happen since death is inevitable. Thus, construing A's instructions as manifesting an intent to deliver the deed whenever and however A dies, the only

36. See generally 3 A.L.P. 323; Campbell v. Thomas, 42 Wis. 437 (1877).

contingency is time. A has thus given up all control over the title's eventually vesting completely in B; thus there is a valid delivery. This should be contrasted with the situation where the grantor and the escrow have an understanding that the grantor can reclaim the deed whenever he pleases. In that case, the death escrow is ineffectual to transfer the interest, even if the grantor in fact never does reclaim the deed.[37]

In the instant case no controversy arose before A's death; so the only question to be decided was whether there was a delivery, and whether B now has title to Blackacre. Suppose, however, a dispute should arise as to the rights of the parties after the initial deposit and before the death of A, as, for example, if B should learn of the deed and bring ejectment against A, or creditors of B should attempt to levy on Blackacre, or B should sue A for waste. What is the status of the parties during the interim? In donative cases of this type, it is frequently held that the deed takes effect on the initial deposit or it does not take effect at all. It is not necessary, however, that the deed take effect initially to convey an entire fee simple; it can take effect presently to convey a future interest. The analogy in this case to the creation of a springing executory interest with A retaining the fee simple subject thereto, or A vesting in B a remainder with the reservation of a life estate, is rather striking and often construed accordingly.[38] Likewise, B should not be able to eject A during his lifetime; and B's creditors could reach only his future interest in Blackacre; further, B should not be able to recover for waste.

### *Note: Conditional Escrows*

If, on depositing the deed with the third party, the grantor evidences an intent to control the deed and title, as, for example, he states that unless he should give contrary instructions or ask for the deed back, then the depositary should deliver the deed on the death of the grantor, the depositary is simply an agent of the grantor and there is no delivery. The transaction is testamentary and fails for lack of compliance with the statute of wills.[39]

**37.** See Rosengrant v. Rosengrant, 629 P.2d 800 (Okl.App. 1981) (fact that names of both grantor and grantee were on envelope left at bank, the escrow, indicated that either could have retrieved it; thus grantor did not give up control and there was no delivery upon his death).

**38.** See Osborn v. Osborn, 42 Cal.2d 358, 362–63, 267 P.2d 333, 335 (1954):

> It has long been established in this state that the deposit of a deed granting an estate in fee simple, with instructions that it be transmitted to the grantee upon the death of the grantor, conveys a remainder interest in fee simple with a life estate reserved in the grantor, if the grantor intended the deposit to be irrevocable.... The result is the same as if the grantor delivered to the grantee a deed reserving a life estate and granting a remainder in fee.

**39.** Cf. Estate of Dittus, 497 N.W.2d 415 (N.D.1993), where the grantor gave the grantee one key to a safe deposit box containing the deed but the retained the

The most troublesome cases are donative transactions in which the deed is to become fully effective on the occurrence of an event within the control of neither party and not certain to occur. An example might be the death of the grantor before the grantee. By analogy to the commercial escrow situation, the delivery should be sustained because the grantor has put beyond his control whether or not the title will fully vest in the grantee. On the other hand, he has not irrevocably parted with title, and he will recover full ownership when the condition or event fails to occur. The cases are divided with probably the majority finding no delivery.[40]

**PROBLEM 16.19:** A, owner in fee simple of Blackacre, executed his deed in B's favor as grantee and delivered it to X bank as escrow depositary with instructions to deliver the deed to B when B paid the full purchase price to X in installments. Before all payments were made and without the knowledge or consent of A, X let B have the deed. B recorded the deed and sold Blackacre to C, a bona fide purchaser, who knew nothing of the escrow transaction. Blackacre is undeveloped land and no one is in possession. A sues B and C to cancel the deeds and to quiet title. May A succeed?

**Applicable Law:** When the escrow depositary wrongfully hands the deed over to the grantee before the grantee has performed or has a right to the deed, and the grantee records such deed and sells to a bona fide purchaser, the grantor is not estopped to deny the efficacy of his deed, and the bona fide purchaser is not protected unless the grantee is let into possession, the grantor knows of the delivery of the deed and takes no action to revoke, or for other reasons the grantor is estopped. If the grantor retains any control over the operation of the deed it is not a true escrow.

### Answers and Analysis

Most courts say yes. A owned Blackacre and placed the deed to B in escrow. Until B had performed the condition of making full payment, no title could pass from A to B. X is not A's agent so as to bind A by his act contrary to his instructions. A is just as innocent as the bona fide purchaser, C. Title being in A, he has the right to quiet title against C, and the recording acts do not change this

other. The court indicated that delivery of *both* keys would have been sufficient evidence of delivery, but the grantor's retention of one key was sufficient to suggest that he did not intend immediately to give up control.

**40.** See Kenney v. Parks, 125 Cal. 146, 57 P. 772 (1899) (no delivery, where grantor's instruction was to give deed to grantee if grantor died before grantee); Atchison v. Atchison, 198 Okl. 98, 175 P.2d 309 (1946) (no delivery); Videon v. Cowart, 241 So.2d 434 (Fla.App.1970), cert. denied 245 So.2d 88 (Fla.1971) (finding delivery, where deed given on condition that son renounce claim to remaining part of grantor's estate).

result. The recording acts invalidate unrecorded instruments as against subsequent bona fide purchasers for value without notice. They have absolutely nothing to do with recorded but void deeds, and the fact that the deed may be void because of forgery, nondelivery, or for other reasons is entirely immaterial. Thus, the nondelivered deed is invalid and the innocent purchaser relying on the recording act is unprotected.

In the event that the grantor lets the escrow grantee into possession, then the grantor, in the case of a wrongfully procured deed, has in effect permitted the grantee to be clothed with a double indicia of title—both possession and deed. If the grantor remains in possession, then his possession constitutes notice of his interest, and there can be no bona fide purchaser without notice. If nobody is in possession, then the equities should be regarded as equal and the law, holding no title passed, should prevail since the recording acts do not deal with recorded but undelivered deeds. In case the grantor learns of an improperly delivered deed and takes no action to invalidate such a deed, then the grantor should likewise be subordinated to the rights of the bona fide purchaser.[41]

**PROBLEM 16.20:** A, owner in fee simple of Blackacre, executed a deed to B and placed it in the hands of X bank as escrow depositary with instructions to X that the deed should be handed to B upon B's payment of the last installment of the purchase price. Before the last installment was paid by B, the grantor, A, died. Thereafter B paid to X the last installment and demanded possession of A's deed. In whom is the title to Blackacre?

**Applicable Law:** The deed in escrow takes effect to pass title on the so-called "second delivery" with the following exceptions: (a) when the grantor dies between the "first" and "second" delivery; (b) when during that time the grantor becomes non compos mentis; or (c) justice requires it—by relation back in these cases the title passes as of the first delivery, that is, when the deed was handed to the escrow depositary.

### Answer and Analysis

The title is in B and he has the right to the deed. The courts speak of "first" and "second" deliveries in escrow cases. The first is the handing over by the grantor of his deed to the escrow depositary, and the second is the handing over of the deed to the grantee by the escrow depositary. Of course, the first is not a technical

41. See Mays v. Shields, 117 Ga. 814, 45 S.E. 68 (1903). Everts v. Agnes, 4 Wis. 343, 65 Am.Dec. 314 (1855), indicated that a bona fide purchaser from a grantee of a wrongfully procured deed from an escrow agent would get no title.

delivery for the grantor does not intend title to pass to the grantee at that time. If it is a true escrow, the first delivery merely makes the grantor's deed irrevocable and empowers the grantee, by fulfilling the condition or by the occurrence of the event, to become the owner of the property. Further, upon the fulfilling of the condition or occurrence of the event, the deed operates to pass title even without any handing over of the deed to the grantee because that is the grantor's intent. However, there can be no intent of a deceased grantor. The rule that a deed in escrow takes effect at the "second" delivery cannot apply when the grantor has predeceased the time when the condition is fulfilled. By relation back, the deed is made effective as of the date of the first delivery by the grantor to the escrow depositary.[42]

**42.** Fuqua v. Fuqua, 528 S.W.2d 896 (Tex.Civ.App.1975), writ refused n.r.e. . . (enforcing sale contract where grantor executed deed, placed it in escrow, but died before delivery to grantee).

# Chapter 17

# ASSURANCE OF TITLE

*Table of Sections*



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**SUMMARY**

## § 17.1 Deed Covenants for Title

1. There are six covenants for title to real property:

a. Three of these are in the present and are breached, if at all, when the deed is delivered:

(1) Covenant of seisin

(2) Covenant of the right to convey

(3) Covenant against encumbrances.

b. Three covenants cover breaches that occur after the deed is delivered, that is, in the future:

(4) Covenant of quiet enjoyment

(5) Covenant of general warranty

(6) Covenant for further assurances.

2. A deed providing for "usual covenants" includes the first five covenants, and a deed providing for "full covenants" contains all six.

3. Covenants for seisin and of the right to convey are usually construed as identical, and guarantee to the grantee that the grantor owns the estate that the deed purports to convey. Note, however, that a grantor conveying under a power of attorney could have a right to convey without being seised of an estate; and if in a particular jurisdiction seisin is construed as meaning only being in possession and claiming title, then an owner when the land is in the adverse possession of another may have a right to convey without being seised, and similarly, an adverse possessor would be seised without a right to convey a fee.

4. The covenant against encumbrances is a guarantee to the grantee that the property conveyed is not subject to outstanding rights or interests that would diminish the value of the land, examples of which are mortgages, liens, land use restrictions, easements, or profits.

The existence of zoning restrictions does not constitute a breach of the covenant against encumbrances, but the existence of a violation of zoning or building restrictions may constitute such a breach.

5. Covenants of quiet enjoyment and general warranty are construed to have the same legal effect. They undertake to defend the grantee-covenantee against all lawful claims of the grantor himself or of third persons who would evict the grantee-covenantee, actually or constructively.

6. The covenant for further assurance (of relatively little importance in the United States today) is an undertaking on the grantor's part to do such further necessary acts within her power to perfect the grantee's title.

7. None of these covenants protects the grantee against the trespass or aggression of a mere wrongdoer.

8. The construction of these covenants, which may vary with the language used in each case, are governed by contract law principles.

9. Under the traditional view, the first three covenants cannot run with the land because they become personal choses in action when they are breached at the instant the deed is delivered.

10. The last three covenants are covenants that run with the land and can be enforced by remote grantees who take through the covenantee.

11. More than one remote grantee may enforce a given covenant that runs with the land. E. g., A conveys to B in fee with covenant of general warranty. B conveys the east half of the property to C and the west half to D. Each is evicted by O, who has paramount title. Both C and D may hold A on his covenant.

12. Covenants for title are in their nature contracts of indemnity, and damage must be shown as a condition precedent to recovery for breach; it is not enough merely that there has been a breach.

13. The maximum recovery for breach of title covenants in a large majority of jurisdictions is the purchase price paid plus interest.

Interest is usually allowed only when the grantee has not had possession or the benefits of rents or profits from the land, or has had to surrender them to the holder of the paramount title. Additionally, the grantee can usually recover the costs of his unsuccessful defense of the title.

14. In case of a total breach of the covenant of seisin or right to convey, the measure of damages is the purchase price paid plus interest. These covenants are breached, if at all, on delivery of the deed. In the case of a partial breach, recovery is for a proportionate part of the purchase price plus interest.

15. For breach of the covenant against encumbrances, the measure of damages is the cost of removing the incumbrance when that is possible, and the amount by which such incumbrance reduces the value of the land when removal is not possible.

16. For a breach of the covenants of quiet enjoyment and warranty, the measure of damages is the value of the land at the time of breach (eviction), but not to exceed the purchase price paid by the plaintiff-grantee. For a partial breach, recovery is based on the amount expended by the plaintiff to perfect his title, or on the value of the land lost to the superior title.

17. When a covenant for title runs with the land, an intermediate grantee often occupies a dual role. She is a covenantor as to subsequent grantees if she included the covenant in the deed when she conveyed, and she is a covenantee as to prior grantees. For such an intermediate grantee to maintain an action against the original covenantor, or a prior covenantor, she must show both (a) a breach of the covenant and (b) damage to herself.

For example, A conveys to B with covenant of general warranty or quiet enjoyment. B conveys to C with a similar covenant. C conveys to D with like covenant. X, holding paramount title, evicts D. B sues A for the breach. B cannot maintain the action by merely showing the breach by D's eviction. She must show in addition that

D or C has sued her, and that B has been made (or will be made) to pay damages.

18. Each remote grantee has a right to judgment on a covenant running with the land against each and all of the preceding covenantors when the covenant is breached, but such remote grantee has a right to but one full recovery. For example, A conveys to B with covenant of general warranty or quiet enjoyment. B conveys to C with like covenant. C conveys to D with like covenant. D is evicted by X who has paramount title. D sues and takes judgment for $10,000.00 damage against C, B and A. C pays D in full. C then has a claim against B and A. B pays C in full. B then has a claim against A.

19. Payment in full made by the original covenantor to the evicted *last* covenantee—grantee for his damage, constitutes a good defense to such original covenantor to any action by an intermediate covenantee—grantee.

For example, A conveys to B with covenant of general warranty or quiet enjoyment. B conveys to C. C conveys to D. D is evicted by X who has paramount title. A pays D in full for D's injury. B then sues A for breach. A's payment to D is a complete defense to B's action. But suppose B has also paid D in full for D's injury. If such payment was after A's payment to D, then A's payment is still a good defense and B's remedy is against D for overpayment for money had and received. If B's payment was made to D before A's payment, then it would seem B's action may be maintained against A, and A must look to D for reimbursement.

20. Historically, no warranties were implied in a conveyance of real property, and covenants had to be specifically inserted to be effective. Today, "short-forms" are almost universally permitted by statute. These statutory deeds incorporate by reference the covenants designated in the statute.

21. The historical rule not implying covenants in deeds refers to covenants for title. But increasingly courts have implied a covenant of fitness in the sale of homes. See Ch. 14.

22. Title covenants can be modified so as to exclude certain mortgages, restrictive covenants, or other outstanding interests. When the land is conveyed specifically subject to certain interests, as for example, an outstanding mortgage in accordance with the understanding of the parties, the title covenants should be construed as warranting only the estate granted, that is, subject to the mortgage. This construction should apply whether or not the covenants are expressly so modified, but there are some cases to the contrary, especially older ones.

23. The type of deed to be conveyed, if not stipulated in the sales contract, is determined by state or local law or custom.

## § 17.2 Estoppel by Deed

1. Estoppel by deed is a doctrine by which if a person executes a deed purporting to convey an estate which she does not have or which is larger than she has, and such person at a later date acquires such estate in that land, then the subsequently acquired estate will, by estoppel, pass to the grantee.

2. This doctrine is based on the intention of the parties as expressed in the deed—the grantor intends to transfer the estate described in the deed, and the grantee intends to receive the estate described in the deed.

3. The doctrine is an outgrowth of the common law rules relating to warranty of title, but covenants for title are not necessary today for the doctrine to apply.

4. Whether or not the doctrine operates in a given case is wholly dependent on the language which is used in the deed and appears on the face of the instrument.

5. By the better rule, the doctrine may be invoked in favor of a stranger to the deed and is not limited to the parties to the deed and their privies.

6. The doctrine will operate in favor of the grantee even though the deed contains neither a misrepresentation nor a covenant of title.

7. There are two distinct theories on which the doctrine is claimed to operate:

a. the deed having been given and the estate having been subsequently acquired by the grantor, then as a matter of law, the estoppel operates on the estate itself and passes it to the grantee—it is objective and wholly impersonal and the grantee takes even as against a bona fide purchaser of the after-acquired title from the grantor.

b. the deed having been given and the estate having been subsequently acquired by the grantor, then the grantor is only personally estopped to deny that she owned the estate at the time the deed was given, or she is personally estopped to deny the estate has passed to the grantee, but the estate itself is not affected, and the grantor is bound to convey to the grantee the after-acquired title or estate. Under this theory, the estoppel is personal, and a bona fide purchaser from the grantor of the after-acquired title would have priority over the original grantee.

8. Under either theory, if there is a covenant of title in the deed, the grantee cannot be compelled to accept the after-acquired title either in partial or total satisfaction of the covenant. Instead, the grantee has an election either to sue for damages for the breach or to accept the after-acquired title.

9. In most jurisdictions, the doctrine has no application to the case in which the grantor in her deed undertakes merely to convey whatever right, title or interest, if any, she may have at the time of the deed (the general characteristics of a "quitclaim" deed).

10. Note carefully these three cases:

a. A, having no interest in Blackacre, but not knowing whether or not he has an interest, makes a deed to B as follows: "I hereby convey to B all of my right, title and interest in Blackacre, and hereby warrant to the said B any interest which I presently own in such property." Thereafter A inherits the fee simple estate in Blackacre. Here no estoppel applies, for the deed purports to convey and warrants no particular estate in Blackacre, but undertakes merely to convey whatever interest A has at the time of the making of the deed.

b. A, having no interest in Blackacre, and not knowing whether or not he has an interest, makes a deed to B as follows: "I hereby convey to B and his heirs the fee simple estate in Blackacre and hereby warrant such title in him and covenant to defend such against the whole world." Later A inherits the fee simple estate in Blackacre. A's deed contains a granting clause purporting to convey the fee simple. It also contains a clause warranting such title in the grantee. The doctrine of estoppel by deed clearly applies because A intended to convey and B intended to receive the fee simple title in Blackacre. This would be true under either theory of estoppel.

c. A, having no interest in Blackacre, and not knowing whether or not she has an interest, makes a deed to B as follows: "I hereby convey to B and his heirs the fee simple estate in Blackacre." Later A inherits the fee simple estate in Blackacre. A's deed contains a granting clause purporting clearly to convey the fee simple estate in Blackacre. The doctrine of estoppel applies. The deed contains no misrepresentation of fact and contains no covenant of warranty, but it does contain a clearly expressed intent to convey a fee simple estate which the grantor, A, did not have. Later, A acquired the very estate which his deed purported to convey to B, and which B intended to receive from A. These two items, then: (1) an expressed intent in the deed to convey an estate larger than the grantor has; and (2) later acquisition by the grantor of such

estate, are sufficient to support the doctrine of estoppel by deed.

11. If the grantor later acquires a larger estate than he owned at the time of the conveyance, but smaller than he purported to convey, the doctrine of estoppel will apply to such a conveyance. E.g., O, having only a life estate, purports to convey a fee simple absolute to A. Later, O acquires a fee simple on condition subsequent. A will immediately acquire the fee simple on condition subsequent by estoppel.

## § 17.3 Priorities and Recording

*a. Common Law Priorities*

1. At common law the question of priority of title was usually simply one of time: first in time is first in right. E. g., A, owner of Blackacre in fee simple, conveys to B in fee simple. A then conveys the same Blackacre to C in fee simple. B is the owner merely because there was no interest left in A to convey to C.

This rule of priority applied both to competition between equitable interests and also to competition between legal interests. Further, a prior legal interest prevailed over a subsequent equitable interest.

2. There is one exception to the rule of priority based on time. A bona fide purchaser for value without notice takes priority over a former equity or equitable interest. For example, A, being fee simple owner of Blackacre, declares himself trustee of the property for B. A then conveys the legal title in Blackacre to C in fee simple. C pays full value for the property and has no knowledge of the declaration of trust in B's favor. C owns Blackacre in fee simple and B's equity, even though earlier in time, is cut off.

The above example is an illustration of the common law rule that a subsequent equity, when combined with the legal title, prevails over a prior equity. Thus, in the above illustration, C acquires the legal title as a result of the conveyance and he also acquires an equity from his status as a bona fide purchaser without notice. He accordingly prevails over B.

3. Two early English statutes provided that conveyances made for the purpose of defrauding creditors or subsequent purchasers should be null and void. For example, (a) A, fee simple owner, owes creditor, C. To prevent C's being able to collect the debt A fraudulently conveys to B as a donee, B giving no consideration for the deed and knowing the purpose of the conveyance. C may have such deed set aside as null and void. (b) A, fee simple owner, conveys to C as donee, C paying nothing for the deed. A,

intending to defraud B, conveys to B who pays full price for the property and is given no notice of the prior conveyance to C and buys bona fide. B may have the conveyance to C set aside as null and void.

4. The above common law rules as to priority still prevail when the controversy is not governed by an applicable recording act.

*b. The Recording Acts*

**1. TYPES OF ACTS**

Although the language of the recording acts of the several states varies considerably, there are four basic types of recording acts in the United States:

a. *Notice:* An unrecorded conveyance or other instrument is invalid as against a subsequent bona fide purchaser (creditor or mortgagee if the statute so provides) for value and without notice.

Under a notice statute the subsequent bona fide purchaser prevails over the prior unrecorded interest whether the subsequent purchaser records or not. Insofar as the subsequent purchaser is concerned, there is no premium on her race to the recorder's office; her priority is determined upon her status at the time she acquires her deed or mortgage. Of course she should record to protect herself from the possibility of a still later subsequent bona fide purchaser.

b. *Race:* No conveyance or other instrument is valid as against (lien creditors or other specified parties and) purchasers for a valuable consideration until after it is recorded.

Under a race statute, the first to record wins, and a subsequent purchaser need not be bona fide and without notice, since she will prevail if she records first. Priority is determined simply by who wins the race to the recording office.

c. *Race-Notice:* An unrecorded conveyance or other instrument is invalid as against a subsequent bona fide purchaser for value without notice (and possibly other designated parties such as mortgagees and creditors), who first records.

This statute combines the essential features of both the notice and race type recording statutes. In order for a subsequent party to prevail in a race-notice jurisdiction, he must be both a bona fide purchaser for value without notice of the prior interest and record first.

d. *Period of Grace:* A period of grace statute is usually coupled with the features of a notice statute.

Under such a statute, the prior grantee (or holder of other interest) is allowed a period of grace (e. g. 15 days) in which to record his instrument in order to preserve his priority. If a prior grantee does not record within the period of grace, then a subsequent bona fide purchaser will prevail.

Notice and race-notice are the most common types of recording statutes, with only a few jurisdictions having a pure race or period of grace statute.

## 2. CONSTRUCTIVE NOTICE

a. Under the recording acts in England, a recorded instrument of conveyance *does not* give constructive notice of its contents to subsequent purchasers and incumbrancers.

b. Under the recording acts in the United States, a recorded instrument of conveyance, usually a deed or mortgage, *does give* constructive notice of its contents to subsequent purchasers and incumbrancers. Constructive notice is notice implied by law and is not dependent on actual notice or notice of facts from which knowledge of an unrecorded instrument would be implied, or on whether or not the buyer actually conducted a title search. Constructive notice is a rule of law.

c. Such constructive notice prevents a subsequent purchaser or incumbrancer from being a bona fide purchaser. For example, A conveys Blackacre to B who records his deed. A then executes a deed to Blackacre in fee simple to C as grantee. C pays full value in good faith for the property and has no actual notice of the former deed to B. C is not a bona fide purchaser as a matter of law because she is bound to examine the records and is *construed* to have notice of B's recorded deed whether or not she actually knows about it or actually searched the title.

d. Constructive notice applies whether the interest conveyed by the recorded instrument is a legal or an equitable interest. E. g., A, owner of Blackacre, declares himself trustee of Blackacre for B and records the declaration of trust. Later A makes a deed to C covering the fee simple in Blackacre. C is charged with notice of what appears on the record in the declaration of trust, and takes his deed subject to B's prior equitable interest in the property. C cannot be a bona fide purchaser.

### 3. PURCHASER AND SUBSEQUENT PURCHASER

The term purchaser as used in the recording acts generally refers to a purchaser of the legal interest, i. e., a grantee for value, mortgagee, or other person who acquires a legal estate or interest in the property. In some jurisdictions, however, either by decision or statute, a subsequent purchaser of an equitable interest, e. g. a vendee under a contract for sale, is protected by the recording act.

### 4. RECORDER'S ERRORS

A subsequent purchaser or incumbrancer, acting in good faith and with no actual knowledge of a former conveyance, is normally entitled to rely on what appears on the records.

For example, A conveys to B and B does not record. Then A conveys to C who is a bona fide purchaser. C prevails in a notice jurisdiction whether or not C records before B. C prevails in a pure race and a race-notice jurisdiction only if he records ahead of B. In a period of grace jurisdiction, C prevails if B fails to record within the period of grace allowed by the statute.

In the event that B delivers the deed to the proper office for recordation before A's conveyance to C, and the recorder fails to record the deed at all, or the recorder makes a mistake in recording B's deed (such as failing to index it, or misindexing it), then there is a split of authority as to whether C gains priority over B. Under one view, C should be protected on the theory that it was B's responsibility not only:

a. to see that the deed was recorded but also

b. to see that the recordation was accurately made.

Under the other view, which protects B, B's instrument is constructive notice of its actual contents as soon as it is deposited in the proper office. Any mistake as to actual recording or copying of it into the record having no effect on constructive notice.

### 5. "DULY RECORDED"

To be "duly recorded" and thus constitute constructive notice, the instrument must be properly executed, acknowledged in most jurisdictions, and within the chain of title as a condition precedent to being properly recorded. Some decisions have held that the actual physical recording of an improperly executed instrument does not impart constructive notice to a subsequent purchaser or incumbrancer, the legal effect being the same as though no record had in fact been made. However, if one sees such an improperly executed deed or mortgage, or actually knows about it, then she is

charged with at least inquiry notice, and is held to have knowledge of facts that a reasonable inquiry would have disclosed.

### 6. VOID INSTRUMENTS

An instrument of conveyance that is void for reasons such as forgery or lack of delivery is ineffective for any purpose, and recording it has no legal effect. For example, A is fee owner of Blackacre. B forges A's name to a deed to Blackacre in which deed B is the grantee. B then mortgages the property to C who lends the money in good faith and without notice of the forgery except as it appears on the record. The mortgage is wholly ineffective as to A, and gives C no interest in Blackacre.

### 7. ADVERSE POSSESSION

The recording statutes have no application to a title procured by adverse possession or prescription; they apply only to title procured by instruments of conveyance which can be recorded.

### 8. CHAIN OF TITLE PROBLEMS

a. The chain of title to a piece of land means the regular series of recorded instruments from the patent from the United States Government, or former sovereign, down to and including the instrument through which the party claims ownership, each instrument representing a regular link in the chain. E. g., United States makes patent to A; A deeds to B; B deeds to C; C deeds to D; D mortgages to X; D deeds to E subject to X's mortgage; X executes a satisfaction of the mortgage; E deeds to F; etc., each grantee becoming the subsequent grantor.

b. Every subsequent purchaser or incumbrancer takes its interest in the property conveyed subject to prior interests properly recorded, which proper recording means either:

(1) an instrument in the direct chain of title, or

(2) a recital in an instrument in such direct chain of title. E. g., A, who is grantee in a deed in the direct chain of title, gives to B a mortgage on the property, which mortgage is not recorded. A then gives a deed to C which deed recites, "subject to a mortgage given to B on said property." This recital, being properly recorded gives C constructive, or at least inquiry notice of the mortgage to B and prevents C from being a bona fide purchaser.

c. An instrument which does not constitute a regular link in the chain of title or which is not identified by a recital in an

instrument in such chain, is not considered properly recorded and does not give constructive notice to subsequent purchasers or incumbrancers.

For example, A is a grantee in a deed which is a regular link in the chain of title. A makes a deed to B but B does not record it. B's failure to record breaks the chain of title subsequent to the deed in which A is the grantee. B then deeds to C. B, not having appeared as a grantee in any former instrument of record, is now an interloper and a deed by him is not part of the regular chain of title. Then A makes a deed to the same property to D. D records. The deed of B to C, being no part of the regular chain of title, imparts no constructive notice to D. Hence, D is the owner of the property as against B and C, provided in other respects he is a bona fide purchaser.

### 9. PERSONS PROTECTED; THE BONA FIDE PURCHASER

a. The recording statutes are construed to give protection to two persons only, (a) a bona fide purchaser or incumbrancer, or (b) one who claims through such a bona fide purchaser or incumbrancer.

b. In order to be a bona fide purchaser protected under the recording act, one must

(1) be subsequent,

(2) pay value,

(3) be without notice, (the value must have actually been paid before notice), and

(4) be of good faith.

c. Recording statutes generally do not protect a subsequent claimant who has not paid more than a nominal consideration; nor one who takes with either actual or constructive notice of a prior interest; to be protected he must acquire his interest both (a) for value and (b) in good faith, which means without actual or constructive notice of prior inconsistent claims.

d. One who takes a mortgage to secure a pre-existing debt without at the same time relinquishing any right or claim as a consideration for the mortgage is not a purchaser for value. But if the mortgagee surrenders other security for the debt or extends the time of payment by a binding contract, he is regarded as a purchaser for value.

With respect to one who takes an absolute conveyance of land in satisfaction of an antecedent debt, the cases are divided on the question whether he is a purchaser for value, but since the debt is

canceled instead of being secured, the position that he does qualify as a purchaser seems sound.

e. If a person is in possession of land, then any person taking an interest in that land is charged with notice of the interest which the possessor claims in the land. This rule is most properly confined to possession inconsistent with record title.

f. A subsequent purchaser who takes under a quitclaim deed, under the better view, is protected by the recording statutes.[1]

g. A mortgagee, although not specifically mentioned in a recording act, is considered a purchaser to the extent of his interest, and is protected by the recording act if he otherwise qualifies as a subsequent bona fide purchaser for value without notice.

## 10. HAZARDS NOT COVERED BY THE RECORDING ACTS

The recording acts generally afford purchasers and other subsequent parties either no or inadequate protection against the following interests:

a. forged and other void deeds or instruments;

b. deeds by incompetents;

c. fraudulent statements in the instruments as to marital status;

d. claims of undisclosed and pretermitted heirs;

e. falsification of records;

f. undelivered but recorded deeds;

g. false personation of record owner; and

h. adverse possession, prescription, or equivalent property interests acquired by operation of law and without a recordable instrument.

In addition, some statutes afford no protection against:

i. recording mistakes;

j. indexing mistakes; and

k. possibly other undisclosed interests.

1. E.g., Miller v. Hennen, 438 N.W.2d 366 (Minn.1989) (purchaser who paid value and recorded first protected, even though he received quitclaim deed). In some transactions quitclaim deeds plus title insurance are used to effectively transfer risk of unknown defects from the grantor to the title insurer. In that case the use of the quitclaim deed should raise no presumption that the buyer is on notice of a title defect.

### 11. INDICES

Many of the problems of determining chain of title result from use of the traditional grantor-grantee index. Many of these problems are eliminated when tract indices are used since then all recorded instruments pertaining to a particular tract or parcel will generally be discovered despite "gaps," out of turn recording, and "wild" instruments. Most professional title companies do in fact use their own tract indices (or indices which they share with other companies), regardless of the official index.

*Note*

Because the provisions of recording statutes vary greatly, the cases construing them often reach opposite results. The statutes and cases of each state should be consulted. In the main, the statements above present the general principles.

## § 17.4 Title Insurance

1. In a title insurance policy the insurer promises to indemnify the insured for any injury if the title to land is less than that described in the policy. Title insurers typically do title searches before writing a title insurance policy. Increasingly, the title insurer also acts as commercial escrow agent and may assist in the preparation of transfer documents.

2. Unlike many other forms of insurance (such as medical or casualty insurance) that require periodic payments, title insurance usually is paid for with a single premium paid at the time of the sale.

3. The title policy typically contains exceptions and exclusions for defects of title not shown by the public record, zoning restrictions, defects that could be disclosed by a survey or other inspection of the property, or rights of parties in possession.[2]

4. A title insurer, unlike the grantor of a warranty deed, is generally obligated by the policy to provide a legal defense of title claims arguably covered by the policy.

5. The title insurer's liability is generally limited to the face amount of the policy, which is generally the whole or some fraction of the purchase price. In addition, the policy typically insures only against title defects that arose before the effective date of the policy, not against defects that come into existence after the policy issues.

2. See, e.g., Panciocco v. Lawyers Title Ins. Corp., 147 N.H. 610, 794 A.2d 810 (2002) (exclusion for "parties in possession" excused insurer from paying for property loss resulting from neighbor's visible adverse possession at time of conveyance).

6. Title insurance contracts are normally construed against the insurer.[3]

## PROBLEMS, DISCUSSION AND ANALYSIS

### *§ 17.1 Deed Covenants for Title.*

**PROBLEM 17.1:** Henry executed a deed conveying Blackacre in fee simple to Priscilla. The deed covenanted that "Henry is lawfully seised in fee simple of such premises; that he has good right and lawful authority to sell the same." This deed was delivered in April 1990. In October 2002 Priscilla sued Henry alleging that "Henry's covenants are not true; that Henry was not seised of Blackacre and had no good right or authority to convey the same." Henry raises the statute of limitation as a defense. Has the statute run?

**Applicable Law:** Covenants of seisin and right to convey are synonymous in most instances. They covenant that the grantor owns the land when the deed is executed and delivered. If he does not own the land these covenants are breached immediately and a cause of action accrues at the time of the delivery of the deed.

#### Answer and Analysis

Yes. The plaintiff alleges that defendant has broken the covenants of seisin and of right to convey. These two covenants are identical, and constitute a guarantee by grantor Henry that he owns the land when the deed is executed and delivered. If Henry did not own the land when he made the conveyance, these covenants were immediately broken in April 1990.[4] Since more than 10 years have elapsed between the breach and the time the action was brought, the statute of limitation has run and constitutes a bar.[5]

3. Boel v. Stewart Title Guar. Co., 137 Idaho 9, 43 P.3d 768 (2002) (where government owned strip of land being used as a ditch but insurance policy had exclusion only for damages arising from use of a "ditch," insurer liability remained for claim of the strip itself:

> The United States, as the fee holder of the strip, could have utilized the fee strip for any purpose for which any other landholder might have used it. The fact that the federal government coincidentally utilized its fee strip for the construction and maintenance of the ditch does not mean that the Boels' damages, related to the existence of the deed, in any way "arise" or "result" from the existence of the ditch.)

4. That is, these covenants do not require that the purchaser actually be ousted from the land by someone claiming under paramount title; but merely that there is a substantial defect in the title, whether or not anyone is ready to make a conflicting claim. E.g., Hilliker v. Rueger, 228 N.Y. 11, 126 N.E. 266 (1920).

5. Brown v. Lober, 75 Ill.2d 547, 27 Ill.Dec. 780, 389 N.E.2d 1188 (1979) (plaintiff, having failed to bring a timely action for breach of the covenant of seisin, sought unsuccessfully to bring the action under the covenant of quiet enjoyment).

**PROBLEM 17.2:** Theodore owned Blackacre in fee simple, which he devised in his will to William. Theodore died and it was discovered that one of the two required witnesses on the will was not qualified. Hence, the will was invalid and Blackacre descended to Theodore's heir, Harriet. In the meantime and after Theodore's death, William had conveyed Blackacre to Paula for $4,000 with a covenant of quiet enjoyment and of general warranty. Paula is in possession of Blackacre and is threatened with eviction by Harriet. Paula pays Harriet $5,000 for a deed in fee simple to Blackacre and sues William for damages for breach of covenants. May she recover, and if so how much?

**Applicable Law:** The covenants for quiet enjoyment and of general warranty are generally construed to mean the same thing. They bind the covenantor to defend the grantee-covenantee against eviction, actual or constructive, by anyone under paramount title, including the covenantor. These covenants are breached when the covenantee is disturbed in her enjoyment of the premises conveyed. Actual eviction need not take place. If a valid paramount title is asserted and the grantee is compelled, in order to avoid actual eviction, to buy title from the holder of the paramount title, then there is a constructive eviction which will support a claim for breach of the covenants. Damages recoverable are usually the value at the time of the purchase, measured by the price paid, plus interest from the time of the eviction.

### Answers and Analysis

Yes, Paula may recover. These two covenants are construed to mean substantially the same thing, and bind the covenantor to defend the grantee against eviction, actual or constructive, by anyone under paramount title, including the covenantor. They are breached when the covenantee is disturbed in her enjoyment of the premises conveyed. In this case Harriet held paramount title to William. It is also clear that had Harriet ejected Paula either by legal action or self-help, Paula would have had a cause of action against William for breach of the covenants made. Actual eviction is not necessary to a claim. Constructive eviction is sufficient. In this case the assertion of paramount title by Harriet and Paula's paying her for a release of Harriet's claim, is constructive eviction which will support a claim for breach of the covenants made in William's deed. Of course, in a suit against the covenantor for damages, the plaintiff-covenantee must prove that she was evicted by one having paramount title.[6]

6. See Northeast Petroleum Corp. of New Hampshire v. State, Agency of Transportation, 143 Vt. 339, 466 A.2d 1164 (1983) (third party's assertion of

The damage which Paula can recover is usually the consideration paid, which in this case is $4,000 and not the value of the land at the time of the eviction.[7] When there are legal proceedings to evict the grantee, if such grantee would bind or estop the covenantor by the judgment itself, she must give the covenantor notice of the proceedings and request that he defend the action. Even without such notice to the covenantor, if the grantee-covenantee is evicted, she may still recover from the covenantor, but he has a heavier burden in having to prove that the party who evicted him had a paramount title. As to the measure of damages, Paula can recover the value of the land, measured by the consideration paid at the time of the conveyance, which is $4,000 with interest, not from the time of its payment but from the time of the eviction. The covenantee should not have both interest on the money and use of the land; and she has had the latter until eviction.[8]

If the breach of the covenant upsets title to only a portion of the land, then damages are assessed as a proportion of the value or acreage that is lost.[9] However, a person who takes land described by defined boundaries has no claim if the land is as described, even though it may have less acreage than he thought he was receiving.[10]

**PROBLEM 17.3:** A owned Blackacre, worth $10,000, in fee simple. She executed to X a mortgage of $5,000. A then conveyed Blackacre to B in fee simple with a covenant against encumbrances that did not except the mortgage. X threatened foreclosure, and B paid off the mortgage with interest. B now sues A for breach of the covenant. May he recover?

**Applicable Law:** If an owner of land conveys it with a covenant against encumbrances and there is at the time a mortgage on the premises, the covenant is breached at the time the deed is given. On foreclosure of the mortgage the covenan-

option to purchase constituted a constructive eviction); Foley v. Smith, 14 Wash.App. 285, 539 P.2d 874 (1975) (judgment of different court recognizing third party's paramount title constituted constructive eviction).

7. MGIC Financial Corp. v. H.A. Briggs Co., 24 Wash.App. 1, 600 P.2d 573 (1979) (the "remedy for breach of the covenant against encumbrances is limited to the price paid for the property, plus interest.").

8. See Foley v. Smith, 14 Wash.App. 285, 539 P.2d 874 (1975).

9. See Hillsboro Cove, Inc. v. Archibald, 322 So.2d 585 (Fla.App.1975) (damages limited to proportionate value of the lost portion of larger parcel at the time of conveyance); Maxwell v. Redd, 209 Kan. 264, 496 P.2d 1320 (1972) ("a party contracting on an acreage basis for a specified tract at an agreed price per acre is entitled to recover the difference between the purchase price and the actual acreage times the price per acre.").

10. Ibid. See also Knudson v. Weeks, 394 F.Supp. 963 (W.D.Okl.1975), where part of the house purchased by the plaintiff encroached on adjoining land, necessitating either moving of the house, tearing it down, or acquisition of additional land; the court held that the cost of one of these alternatives should be the measure of damages.

tee who pays such incumbrance is entitled to recover from the covenantor the amount of money paid in principal and interest, plus interest from the date of such payment. If the incumbrance is an easement, a profit or a lease, the damage is the difference between the value of the land with and without the incumbrance.

### Answer and Analysis

Yes. First, it is clear that A's covenant against encumbrances was breached the very instant she conveyed to B because the incumbrance of the mortgage burdened Blackacre at that time. Second, the recovery by B on the covenant should be the loss which the breach has caused B. In this case it would be the amount which B has been compelled to pay X in principal and interest, with interest from the time of such payment. But suppose the mortgagee never forecloses or threatens to foreclose and B is never called upon to pay off the incumbrance. Then there is a breach of covenant but no actual damage, and B can recover merely nominal damages. If the statute of limitation is 6 years on the covenant and 10 years on the right of foreclosure, it would be possible for the mortgagee to wait so long to foreclose that the covenantee would actually be limited to his cause for nominal damages. If the incumbrance is not one measured in money like the note and mortgage given, but one such as an easement, restrictive covenant or a lease, then the measure of damages is the difference between the value of the land with and without the incumbrance.[11]

### *Note: Covenants and Visible Encumbrances*

Courts are divided on the issue whether a purchaser who takes land obviously subject to a visible easement or servitude may later claim a violation of the covenant against encumbrances when that visible encumbrance is not excepted in the deed.[12] The traditional rule, which permits the grantee to enforce the covenant, seems to be the better one. Although the buyer may see the encumbrance itself, she has little idea about its legal status. For example, the seller is in a better position to know (1) whether a right of way has been asserted long enough to ripen into a prescriptive easement; or (2) whether the conditions for an irrevocable license have been met. What if the

11. See In re Meehan's Estate, 30 Wis.2d 428, 141 N.W.2d 218 (1966) (indicating that substantial encroachment would be an encumbrance but finding no damages).

12. See Merchandising Corp. v. Marine National Exchange Bank, 12 Wis.2d 79, 84, 106 N.W.2d 317, 320 (1960), holding that a grantor did not need to warrant against an open and notorious prescriptive easement. But see Leach v. Gunnarson, 290 Or. 31, 619 P.2d 263 (1980), stating the traditional rule, and holding that a covenant against encumbrances gave protection against an open and notorious irrevocable license.

encumbrance is not visible, but it is in the chain of title. In Blissett v. Riley,[13] the grantor gave a general warranty deed that neglected to except a restrictive covenant limiting the owner's use of construction materials, but the encumbrance was recorded. The court held that the seller was liable on the covenant. In such a case the grantee who does a title search probably is in a position to know about the legal status of the covenant.

**PROBLEM 17.4:** Oprah owned Blackacre in fee simple. Phil, who was in possession of Blackacre, conveyed the land to Johnnie with "the usual covenants" of title. Johnnie paid Phil $4,000 for the property and took possession. Johnnie conveyed the property to Joan for $4,000, and Joan took possession. Oprah ejects Joan from the land, and Joan brings suit against Phil for breach of covenants in the deed. May she recover?

**Applicable Law:** A remote grantee can recover against a covenantor only when the covenant sued upon runs with the land. The expression "with usual covenants" includes: (a) covenant of seisin; (b) covenant of right to convey; (c) covenant against encumbrances; (d) covenant of quiet enjoyment; and (e) covenant of general warranty. Under the majority view, the first three of these cannot run with the land because they are breached, if at all, at the time of the delivery of the deed. The covenants of quiet enjoyment and of general warranty are breached, if at all, after the deed is delivered, and they run with the land. Hence, a remote grantee can sue the original grantor on these covenants.

**Answer and Analysis**

The answer is yes, but not on all of the covenants. Phil's "usual covenants" include: (a) covenant of seisin; (b) covenant of right to convey; (c) covenant against encumbrances; (d) covenant of quiet enjoyment; and (e) covenant of general warranty. Of course, Phil is liable on his covenants, but to whom? He made them to Johnnie. Johnnie's assignee, not Johnnie, is suing Phil. The assignee, Joan, was no party to the covenants and cannot be unless the covenants "run" with the land conveyed to her. So which, if any, of the five covenants runs with the land? The answer is that the first two covenants were breached the instant the deed was delivered from Phil to Johnnie, and at that instant became choses in action which Johnnie held against Phil personally. Such a chose cannot run with the land because it is no longer a covenant and because it was not expressly assigned by Johnnie to Joan. (Some contrary cases hold either that the covenant runs, or that the deed itself constitutes an assignment of the chose in action, so as to permit the

13. 667 So.2d 1335 (Ala. 1995).

grantee, Joan, to hold Phil liable.) Hence, in most jurisdictions Joan cannot maintain the action against Phil on the first two covenants. One can hardly say that the third covenant, the one against encumbrances, is involved when Phil had no title at all to Blackacre. But, if it were, it would be breached at once and would not run with the land to Joan.

The fourth and fifth covenants can be breached only after the delivery of the deed. These were breached when Oprah evicted Joan. At that time Joan had a cause of action if, and only if, such covenants "ran" with the estate which Johnnie conveyed to Joan. If the benefit of these covenants was attached to the land as it passed from Johnnie to Joan, then Joan can enforce it against Phil. For such covenants to run there must be an intention not only that the covenant shall protect the immediate covenantee, but also any of his successors, heirs, grantees and assignees who take the land from the covenantee and who may be evicted by paramount title such as Oprah held in this case. There must also be privity of estate, which seems in this connection to mean no more than that the person attempting to enforce the covenant has succeeded to the interest of the covenantee. In this case it would seem clear that Phil's fourth and fifth covenants were intended to protect anyone who took through Phil's deed containing the covenants if such covenants are to be given their ordinary meaning and the owners of the land, including remote grantees, were to be given full protection. And, of course, there was privity of estate between the covenantee, Johnnie, and Joan, the plaintiff. Consequently, Joan can recover against Phil on the covenants of quiet enjoyment and general warranty, but not on those of seisin, of right to convey and against encumbrances.[14] In any event, even if a covenant runs with the land, thus permitting a lawsuit against several persons in the chain of title (the immediate grantor plus remote grantors), the plaintiff is entitled to only one recovery.[15]

### *Note*

The answer in the previous problem is called the American view, and is followed by the great majority of cases. But it is worthwhile looking at the opposite side of that holding. A conveys to B with covenant of seisin which means that A covenants that he is seised of the property at the time he gives the deed. In fact, he is not seised at all and has no interest in the property. Then B conveys to C and the

14. See Solberg v. Robinson, 34 S.D. 55, 147 N.W. 87 (1914) (allowing recovery by remote grantee).

15. Taylor v. Wallace, 20 Colo. 211, 37 P. 963 (1894) ("A remote grantee may simultaneously sue his immediate grantor and all previous covenantors, and recover several judgments against each of them, although entitled to but one satisfaction.... ")

real owner, X, evicts C. C has paid B full value for the land. C now sues A for breach of the covenant. The purpose of the covenant is to give security to the grantee, immediate or remote. Today, many technicalities have been erased from our real property law and choses in action are readily assignable. This covenant is no good to B after he has conveyed for full value to C. The only one needing the security of the covenant is the last owner who has been evicted by paramount title, or C. Chancellor Kent called the doctrine that the covenant could not run with the land because it was breached at the instant the deed was given, a mere "technical scruple." It prevents justice and takes the indemnity from C, the very person who should have it. The deed should be considered as an assignment of the chose in action from B to C, and C should have an action against the covenantor, A, because C alone has suffered from the breach.[16]

### *§ 17.2 Estoppel by Deed*[17]

**PROBLEM 17.5:** A owns Blackacre in fee simple. B, having no interest in Blackacre, executes to C a 5 year lease on Blackacre, the term to begin March 1, 2001. Shortly thereafter A executes to B a 20 year lease on Blackacre to begin March 1, 2001. B subleases to D for 5 years to begin March 1, 2001, stating orally to D at the time of the sublease, "I made a 5 year lease to C for the same period but of course I had no interest in the land at the time so C's lease is no good." D takes possession of Blackacre on March 1, 2001. C demands possession, and D refuses. C sues to eject D. May he succeed?

**Applicable Law:** The doctrine of estoppel by deed is that when a person executes an instrument conveying a larger estate than he has and subsequently acquires this larger estate, it inures by estoppel to the benefit of the grantee. If the conveyor transfers his after-acquired interest to one who is not a bona fide purchaser, then this conveyee is also bound by the doctrine of estoppel by deed and takes title subject to the prior right of the original grantee.

#### Answer and Analysis

Yes. The doctrine of estoppel by deed is as applicable to leases as to other estates in land. When B made the lease to C for 5 years, C received no interest in Blackacre when B, his lessor, had none. However, when the owner of the land, A, leased to B for 20 years, B immediately had a 20 year term in such land and by estoppel this after-acquired estate inured to the benefit of B's lessee, C. But it is D who is in possession of the land. D is a privy of B, the lessor of C.

16. See Schofield v. Iowa Homestead Co., 32 Iowa 317, 7 Am. Rep. 197 (1871) which follows the English rule in principle.

17. Sometimes called the "after-acquired title" doctrine, or the doctrine of "shooting title."

Both the grantors and their privies are bound by the doctrine of estoppel by deed. D cannot claim to be a bona fide purchaser because he was told by B of B's prior lease to C. So whether we take the theory that the doctrine of estoppel operates as a matter of law on the estate, which does not protect bona fide purchasers, or that the doctrine operates only against the grantor or lessor personally and does not affect the estate, D is bound by the doctrine because he is not a bona fide purchaser from B. The result is that C has a right to eject D from Blackacre and to hold possession under his lease.[18]

**PROBLEM 17.6:** A, being fee simple owner of an undivided one half interest in Blackacre, conveys "to B and his heirs the fee simple estate in the whole of Blackacre and agrees to warrant and defend this title in B against the whole world." Thereafter D took possession from B as an adverse possessor and is presently possessed, but the statute of limitation has not yet run. A inherits the fee simple in the undivided half of Blackacre which he did not own when he conveyed to B. A dies intestate and P is his heir. P sues D in ejectment. May he succeed in ejecting D?

**Applicable Law:** Under the theory that the doctrine of estoppel by deed operates in rem and actually conveys the after-acquired estate of the grantor to the grantee, the doctrine will protect a stranger to the original deed as well as the parties to it and their privies; but if the doctrine operates only on persons, and does not affect the estate, it is available only to the parties to the original deed and those in privity with them.

### Answer and Analysis

No. When A owned only an undivided one half interest in Blackacre and executed to B a deed which on its face purported to convey a fee simple estate in the whole property, his deed covered a larger estate than he owned in the property. When A later acquired by inheritance the very estate which his deed purported to convey to B, the benefit of the subsequent acquisition inures to B. Had B been the defendant in this case, he could have claimed the benefit of such doctrine for he was a party to the original deed in which A both granted to B and warranted in him the fee simple in all of

18. See Robben v. Obering, 279 F.2d 381 (7th Cir.1960) (applying the doctrine to an oil and gas lease); Poultney v. Emerson, 117 Md. 655, 658, 84 A. 53, 54 (1912) ("It is a well-recognized rule that if a lease is made by one who has no present interest in the demised property, but acquires an interest during the term, the lease will operate upon his estate as if vested at the time of its execution."). Of course the after-acquired title must itself be formally valid. See Reece v. Smith, 276 Ga. 404, 577 S.E.2d 583 (2003) (estoppel by deed did not apply when the transfer claimed to be an after-acquired title was in fact an oral promise not satisfying the Statute of Frauds).

Blackacre. Such doctrine operates in favor of both the parties to the original transaction and in favor of their privies who claim by consent through them. In other words, had D been a grantee of B, there would be no doubt that he would have the benefit of the doctrine.

Here D is not claiming through B by privity of estate, but as an adverse possessor. Hence, D is not in privity with B in any sense. However, taking the position that the doctrine of estoppel by deed does not merely bind the parties and their privies, but that it operates objectively in rem on the estate itself and as a matter of law, then when the grantor, A, inherited the fee simple estate in the undivided one half interest in Blackacre, which he did not own when he gave his deed to B, the title to that undivided half passed *eo instante* to B and is presently vested in B. In an action of ejectment, the plaintiff must recover on the strength of his own title and not on the weakness of his adversary's title. But the adversary can show that the plaintiff has no title at all. In this case then, the defendant adverse possessor, D, can show that estoppel by deed passed A's inherited title to B, and that A had no title or interest in Blackacre at the time of his death. Thus P received no interest therein by being the heir of A. Therefore, D, a stranger to the original deed from A to B, and not in privity with either party, is permitted to set up estoppel by deed as a defense.

On the other hand, if we take the view that estoppel by deed does not pass the estate by operating in rem, but operates only on persons, then D, a stranger to the original deed between A and B, and not being in privity with either, could not claim the protection of the doctrine. Under that approach, the title would still be in A or his heir P, although A or his heir, as against B would be estopped from denying B's title. Under this theory, the after-acquired title would still be in A if he were alive and in P, his heir, if A is dead. However, A or his privies would be prevented from denying that the title is in B or from denying A had title when he gave the deed to B. Under this theory, the estoppel is only a rule of evidence and does not effectuate an actual passing of title. A or his heir, P, would not be estopped as to wrongdoer D, and P should win the ejectment suit.[19]

**PROBLEM 17.7:** Audrey, having at least an estate *pur autre vie*[20] for the life of Ben in Blackacre, but being quite uncertain of any further interest, conveyed to Phyllis "all of my right, title and interest in Blackacre and hereby warrant and agree to defend such title to Phyllis in the premises." The fee simple in

19. See Perkins v. Coleman, 90 Ky. 611, 14 S.W. 640 (1890), applying the first theory.

20. That is, a life estate measured by the life of another, as often occurs when a life estate is transferred.

Blackacre later came to Audrey by inheritance. Ben died and Audrey demanded from Phyllis the possession of Blackacre. Phyllis refused. Audrey sues to eject Phyllis from the premises. May Audrey succeed?

**Applicable Law:** If when a deed is made it purports to convey only the interest which the grantor presently owns in the property, and the covenants of warranty do not enlarge the estate described in the granting clause, the doctrine of estoppel by deed has no application, and any after-acquired estate which comes to the grantor may be kept by her free from the operation of the doctrine. The doctrine must be based solely on the language used which appears on the face of the instrument and the construction placed on it.

**Answer and Analysis**

Yes. Phyllis's only defense must be estoppel by deed against Audrey. Whether that doctrine applies in any given case depends upon the language actually used in the deed. Generally the granting clause in a deed determines the estate which is intended to be conveyed, and any covenant of warranty thereafter does not enlarge upon the estate granted but merely warrants that the estate described in the granting clause is to be defended. In the facts given there is no doubt but that the granting clause describing the estate conveyed as "all of my right, title and interest in Blackacre" purports only to convey whatever interest Phyllis owned at the time of the deed. Does the covenant of warranty which follows the granting clause enlarge the estate described in the granting clause? Such covenant says, "warrant and agree to defend *such title.*" The expression "such title" must refer to the "right, title and interest" described in the granting clause, no more. Clearly, the covenant of warranty does not in any way enlarge the estate described in and purported to be conveyed by the granting clause. Thus, the effect of Audrey's deed was merely to convey to Phyllis any interest which Audrey owned when the deed was made. It was the intention of the parties, as appears on the face of the deed, that Audrey was conveying and Phyllis was receiving only the interest in Blackacre which Audrey owned when the deed was delivered to Phyllis. The doctrine of estoppel by deed does not apply, and any after-acquired estate which comes to the grantor belongs to the grantor free from such doctrine. The result is that Phyllis's estate in Blackacre came to an end with the death of Ben. Thereafter by virtue of Audrey's inherited fee simple, Audrey has the right to immediate possession of the property and the right to eject Phyllis.[21]

21. See Brown v. Harvey Coal Corp., 49 F.2d 434 (E.D.Ky.1931).

The typical quitclaim deed conveys all the grantor's then-existing interest in Blackacre, and typically does not purport to convey a particular estate. As a result, interests that the quitclaim grantor deed acquires later do not ordinarily pass through to the grantee.[22]

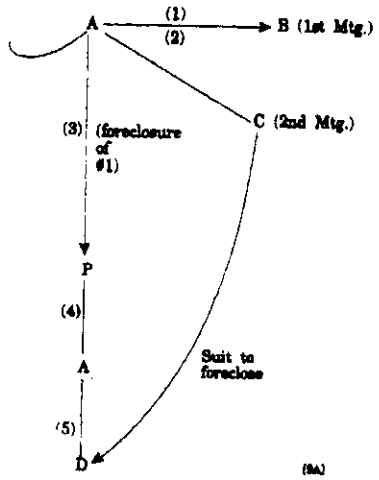
**PROBLEM 17.8:** A, fee simple owner of Blackacre, gave to B a first mortgage on the property. He then executed a second mortgage to C which contained the following language, "this mortgage is given subject to the first mortgage hereinafter described, and I do hereby covenant with the mortgagee herein that I am seised in fee simple of Blackacre, and that said Blackacre is free of all encumbrances and I will warrant and defend said fee simple title to said mortgagee against all claims whatsoever." Thereafter B foreclosed the first mortgage, making A and C parties defendant in the action. A then purchased Blackacre from the purchaser at the foreclosure sale. Both mortgages and the deed to A following the foreclosure were recorded immediately. A then conveyed to D by a deed purporting to convey the fee simple estate in Blackacre. D paid full price for the property and knew nothing about the above transactions except what appeared on the records. C now seeks to foreclose his mortgage, making both A and D parties defendant. May C succeed?

**22.** Ellingstad v. State of Alaska, 979 P.2d 1000 (Alaska 1999); see also Webster Oil Co. v. McLean Hotels, 878 S.W.2d 892 (Mo.App.1994), where the quitclaim deed at issue contained this habendum clause:

> TO HAVE AND TO HOLD THE SAME, with all the rights, immunities, privileges and appurtenances, thereto belonging; unto the said party of the second part [Webster Oil Company] and assigns forever; so that neither the said party of the first part [Mid-America Motor Lodges, Inc.], nor any other person or persons, for it or in its name or behalf, shall or will hereafter claim or demand any right or title to the aforesaid premises or any part thereof, but they and each of them shall, by these presents, be excluded and forever barred.

The court concluded that, notwithstanding this language, an after-acquired title did not pass through to the grantee.

The facts may be illustrated as follows:




**Applicable Law:** The doctrine of estoppel by deed does not require that there be any misrepresentation of fact on the face of the deed. It requires only that the representations on the face of the deed concerning title be made good whether such representations be in the form of a grant or a covenant or both. In some jurisdictions, however, the scope of title covenants may be construed as modified in terms of the estate granted. Under the recording statutes the general rule is that a subsequent purchaser is not charged with notice of a recorded instrument of conveyance by a person in the chain of title unless such record was made at a time later than the records disclose this person to have acquired such title. This means the record must show a conveyor to be a grantee before he can be a grantor. While some cases treat title through estoppel by deed as an exception to such general rule, the better rule is that it is governed by the general rule and that the subsequent purchaser has priority over the one who claims the benefit of the doctrine, but through an instrument which is outside the chain of title. This is the only holding in harmony with the purpose of the recording acts.

### Answer and Analysis

The answer should be no. When B foreclosed his first mortgage there is no doubt that such proceedings effectively cut off all rights which the original mortgagor, A, and the second mortgagee, C, had in Blackacre. Indeed, that is the very purpose and effect of such foreclosure proceedings. On the records, neither A nor C appears to have any interest in Blackacre. But A's general covenant of warranty still appears in the second mortgage to C. The question whether

C might hold A liable for damages for the breach of such covenant of warranty is not relevant. C is seeking to gain title to Blackacre through the doctrine of estoppel by deed and foreclosure. Does the doctrine apply? The mortgage to C states "this mortgage is given subject to the first mortgage," etc. There was as to such first mortgage then no misrepresentation of fact. But the mortgage continues, "said Blackacre is free of all encumbrances and I will warrant and defend said fee simple title to said mortgagee against all claims whatsoever." When all of this quoted language is read as a whole it may be construed as saying, "Blackacre is subject to a first mortgage but I hereby warrant it to be free from all encumbrances and will defend in the second mortgagee a clear fee simple title."

The doctrine of estoppel by deed does not require that there be a misrepresentation of fact. It is a technical doctrine requiring merely that the covenant or representation which is made in the deed concerning title be made good. Under the foregoing interpretation, the language in this case shows that the mortgagor, A, intended the mortgagee to have a fee simple title for the subject of his mortgage and that the mortgagee intended to receive such. The recital of the existence of the first mortgage does not prevent the assumption by the mortgagor by his covenant that he hereby estops himself from denying the fact of such prior mortgage.

A different interpretation is not only possible but more reasonable. Applying the principle that a document should be considered in its entirety in order to arrive at its proper construction, then when the instrument itself shows that the land is conveyed or mortgaged subject to an outstanding interest, and this granting clause is followed by a covenant for title, the title covenant should be construed as warranting *only the estate granted or mortgaged in the preceding clause.* In effect, the title covenant is construed as if it stated, " . . . warrant and defend the title against the claims of all persons *except as above noted."* Under this interpretation the grantor, A in the instant case, is not estopped to assert his after-acquired title.

Assuming, however, a jurisdiction that would follow the earlier interpretation and would construe the title covenant most strictly against the grantor and without modification, then we would find that C's mortgage with its covenant of warranty is a conveyance by A of a larger interest than he had in the property at the time it was given. After B's foreclosure, A had no interest in the property because it had been completely cut off by B's foreclosure action. Thereafter, A acquires by purchase the fee simple in the property. At the instant of reacquisition, the benefit inures to C under estoppel by deed. The doctrine is binding both on A, a party to the original second mortgage, and on those who take through him, D in

our case. This is true whether or not D is a bona fide purchaser. Such was the common law rule, and were we to stop at this point the answer to our question would be yes, and C could foreclose his mortgage. In other words, if this case were to be determined wholly on the doctrine of estoppel by deed, then C should have the benefit of A's after-acquired property.

In the event that estoppel by deed would apply to this situation, the further effect of the recording act should be considered. Although there is a conflict of authority, it is believed that the better view is that estoppel by deed is modified by the recording acts, and that a *bona fide* purchaser (purchaser in good faith; hereinafter BFP) under the recording acts takes free of the rights of the grantee under the estoppel deed. To illustrate, assume that A in this case had executed two warranty deeds, one first to B and then one to C. C's deed, of course, was ineffective to convey any title since A had already conveyed it to B. When A later reacquired title by another conveyance and then conveyed to D, the question of D's status as a BFP becomes important. D, in checking the chain of title, would normally disregard A after finding the recorded deed from A to B, and would pick up A again after finding the recorded deed back to him from the subsequent purchaser. Thus, D would not normally find the deed from A to C which was executed at a time when A did not have title. Therefore, D would be a BFP relying on record title, and to give full effect to the policy behind the recording act, D should prevail over the estoppel grantee, C. Of course, the recording act in so many words pertains only to unrecorded instruments, but to give full effect to the policy of the act, instruments recorded *out of the chain of title* should be regarded as not recorded.

This theory of protecting the bona fide purchaser as against the grantee of the estoppel deed was not applied to the mortgage situation in the principal case.[23] If applied to the mortgages in such a situation, the application would be subject to criticism for the following reason: it is difficult to see how D can become a BFP under the recording act. A purchaser in D's position in checking title is not justified in disregarding A after A executes a first mortgage, because A still retains a substantial interest which is subject to further mortgage and conveyance. Further, the second mortgage was recorded and C was made a party to the foreclosure suit. D should necessarily check the foreclosure proceedings, and is charged with notice of everything that would be revealed by a search of the records. Thus, he should be charged with constructive notice of C's mortgage and of the covenant of title it contains.

23. Ayer v. Philadelphia & Boston Face Brick Co., 159 Mass. 84, 34 N.E. 177 (1893).

Under such circumstances it would not be unjust to let the estoppel grantee, C, prevail over D who is charged with notice of his rights.

In conclusion, the result should be that D prevails over C because A's title covenant should be considered modified by the recital in the deed that it was a second mortgage. Thus, estoppel by deed should not apply, but there are cases to the contrary. If estoppel by deed does apply, there are conflicting decisions as to whether the doctrine is modified by the recording acts.[24]

*§ 17.3 Priorities and Recording*

*b. The Recording Acts*

**PROBLEM 17.9:** A, owner of Blackacre in fee simple, conveys it to B. B does not record. A then executes a deed to C purporting to convey Blackacre to C. C, having no notice of the deed to B, pays full value of the property to A. B then records his deed, after which C records his deed. At the time C receives his deed, B is not in possession of Blackacre, but later C finds B already in possession. The recording statute in the jurisdiction provides, "Every conveyance of real property shall be void as to subsequent purchasers and incumbrancers who give value and take without notice, unless such conveyance is duly recorded before such subsequent purchase or incumbrance." C sues to eject B. May C succeed in the action?

**Applicable Law:** The recording statutes are intended to protect subsequent purchasers and incumbrancers who give value and take title in good faith without notice of a prior claim. Under notice statutes bona fide purchasers or incumbrancers have priority over prior purchasers who do not record their deeds until after such subsequent purchasers have expended their money and taken their deeds in good faith.

**Answer and Analysis**

The answer is yes. The legislature of a state has power to determine the form, effect and priorities of conveyances of land within the borders of the state. In this case the legislature by its recording statute has undertaken to make void a conveyance as to "subsequent purchasers and incumbrancers ... unless ... duly recorded before such subsequent purchase or incumbrance." This is a *notice* statute which protects the subsequent BFP from claims arising under a prior unrecorded instrument. A's deed to B is a

24. See Breen v. Morehead, 104 Tex. 254, 136 S.W. 1047 (1911), holding for the BFP (subsequent purchaser). See also Sabo v. Horvath, 559 P.2d 1038 (Alaska 1976), holding for the BFP under a federal statute that had the same effect as the doctrine of estoppel by deed.

conveyance of real property which was not recorded. C is a subsequent purchaser who gave full value and had no notice of B's deed. C's purchase preceded in time the recording of B's deed. Every item of the statute specifically applies to C's claim and by the very words of the statute, B's deed is made "void" as to C's purchase. The fact that B's deed was recorded before C's deed is immaterial, for the statute does not consider or make any provision for priority of recording, as some statutes do. Hence, C having purchased for value and in good faith subsequent to B's deed and B having failed to record his deed before C's purchase, B's deed is void as to C and C has priority under the recording statute. B's failure to record his deed has made it possible for C to be injured, which is the very reason for the statute.

However, the provisions of such a statute can work a similar injustice on B. Suppose that B receives his deed late in the evening when the registry of deeds is closed. Immediately following his transaction with B, A sells the same property to C. When the recording office opens the following morning B is there and presents his deed for recordation. Shortly thereafter C records his deed. Under a statute as quoted in our Problem, C has priority. And yet B has been as diligent as it is possible for a person to be. Such a case has led some legislatures to give priority to the grantee who first records his deed. But legislatures promulgate statutes and courts merely interpret them. In this case, C must be given priority over B and may eject B from Blackacre.[25]

### *Note: The "Mother Hubbard" Grant*

Suppose a deed purports to convey Blackacre in addition to "all the grantor's property in Linn County." Such conveyances are sometimes convenient for grantor's on their deathbeds who do not have time to determine exactly what they own. The deed is presumably recorded in such a way as to reveal it as a conveyance of Blackacre—but does its recordation provide notice to subsequent purchasers of parcels other than Blackacre that may have been conveyed in the "Mother Hubbard" clause?[26]

**PROBLEM 17.10:** A, being fee simple owner of Blackacre, conveys it to B, for which B pays A $200,000.00. B records his

25. See Parks v. Stepp, 277 Ga. 704, 594 S.E.2d 364 (2004); Randall v. Hamilton, 156 Ga. 661, 119 S.E. 595 (1923); Craig v. Osborn, 134 Miss. 323, 98 So. 598 (1924).

26. See Luthi v. Evans, 223 Kan. 622, 576 P.2d 1064 (1978), holding that the Kansas recording statutes required land to be described with sufficient specificity that it could be identified, or else the recorded deed would not effectively give notice to subsequent BFPs. The court additionally noted that the basic "Mother Hubbard" clause was valid to convey, and would be good against anyone with actual knowledge that a particular parcel was covered.

deed and takes possession of Blackacre. C goes to A and expresses a desire to purchase Blackacre. A advises C that he has already sold the property to B. C hands A $1.00 and asks A to execute to him a deed to Blackacre in fee simple which A does. C records his deed and brings an action against B to eject him from Blackacre. In this jurisdiction the recording statute provides that any conveyance or incumbrance of real property shall be void as to subsequent purchasers or incumbrancers for value and without notice unless the instrument is duly recorded. May C eject B?

**Applicable Law:** To be a bona fide purchaser entitled to protection under the recording statutes one must give a value which is more than nominal and he must take without notice of a prior claim or interest in the land. One cannot be in good faith if: (a) he takes with constructive notice given by a properly recorded instrument of conveyance; or if (b) he takes with actual notice of a prior claim or interest; or if (c) there is an actual physical possession of the land by one who has a prior interest even though such possessor's deed is not recorded. When one buys land the law charges him with notice of any interest claimed by one in possession of the land, but possession consistent with the record title does not constitute notice of the possessor's inconsistent claims in many jurisdictions, except in the case of tenants.

### Answer and Analysis

No. There are four reasons why C cannot eject B from Blackacre, any one of which would give B a good defense. (1) The recording statute is of the notice type intended to protect bona fide purchasers and incumbrancers. To be a bona fide purchaser or incumbrancer one must both (a) give value and (b) take without notice of a prior claim. In this case the subsequent purchaser, C, gave the sum of $1.00 for what appears to be a piece of property worth $200,000.00. Such a nominal consideration does not make one a purchaser for value. Therefore, C is not a bona fide purchaser who is protected by the recording statute. (2) B's recording of his deed from A did two things, it made inapplicable the recording statute making his deed void as to subsequent purchasers and incumbrancers for the deed was "duly recorded," and prevented C's being a bona fide purchaser because such deed on record gave C constructive notice of B's prior claim regardless of whether C had actual knowledge of such. (3) When C sought to buy Blackacre from A, he was told by A that the property had been sold to B. Such actual knowledge prevents C from being a bona fide purchaser. Even had B's deed not been recorded, such actual notice would have prevented C's obtaining any protection under the recording

statute given. B's deed would have been perfectly valid as to C simply because C took his deed with notice of B's prior deed or title. (4) If we assume that B did not record his deed, that C gave full value for Blackacre and that A had not told C of his deed to B, still C would not be a bona fide purchaser and could not eject B. The reason is that B is in actual physical possession of Blackacre at the time A delivered the deed to C. When C makes such a purchase the law puts the purchaser out on the land and charges him with notice of what appears there, and it is immaterial whether or not the purchaser actually inspects the land.[27] C is charged with seeing B in possession of Blackacre, and that places C on inquiry of B to learn just what B's interest in or claim to Blackacre actually is.

However, there are some instances in which possession of the land may give the subsequent purchaser no notice of any adverse or inconsistent claim, in which case the doctrine of inquiry notice does not apply. For example, suppose A and B are on the record as equal cotenants of Blackacre. A conveys his undivided one half interest in the property to B. B does not record his deed. A then gives a deed to C of an undivided one half interest in Blackacre. C records his deed. B's possession would not give C notice that B claimed more than an undivided one half interest because his possession as a co-owner would be entirely consistent with the record (each cotenant is entitled to possess the whole). There is authority, however, that possession of a tenant, although consistent with record title, may constitute notice of an inconsistent claim because of the fairly common practice of landlords and tenants entering into supplemental agreements and arrangements.[28]

**PROBLEM 17.11:** A, owner in fee simple of Blackacre, conveys it by deed to B. This deed is recorded. B executes to A a purchase money mortgage dated June 1, 1995. This mortgage is not recorded until June 1, 2001. B conveys to C by a deed which states "subject to the mortgage given to A." This deed is dated June 1, 1996 and is not recorded. C gives a mortgage on the premises to D on January 1, 2001 which is recorded January 2, 2001. A brings an action to foreclose his mortgage in which D contends that his mortgage is prior to that of A's. May A have a decree of foreclosure?

**Applicable Law:** A purchaser of land must use diligence both in searching the records and in inspecting the land respecting

27. As a general matter, a subsequent purchaser is also said to be on notice of easements, covenants or other servitudes that can be discovered by physical inspection of the premises. See Otero v. Pacheco, 94 N.M. 524, 612 P.2d 1335 (Ct.App.1980), cert. denied 94 N.M. 674, 615 P.2d 991 (1980), finding that a buried sewer line was sufficiently "visible" to put purchasers on notice of its existence.

28. See Galley v. Ward, 60 N.H. 331 (1880).

prior interests which may be claimed by others. If either the record or an inspection of the land discloses a circumstance which puts him upon inquiry he must pursue such inquiry to the point that he has used due diligence and is bound by such notice which due diligence would disclose. A subsequent purchaser is charged with constructive notice of every recorded instrument of conveyance which is a link in his chain of title. He is also charged with constructive notice of recitals in a recorded instrument which is a link in his chain of title, which recitals may refer to unrecorded instruments. Finally, he is charged with constructive notice of recitals in an unrecorded instrument of conveyance which is an essential link in his chain of title and through such an unrecorded instrument his own claim must be made.

**Answer and Analysis**

Yes. For a party to prevail under most of the recording acts, she must at least satisfy the requirements of being a subsequent bona fide purchaser or mortgagee for value without notice, and the prior interest must not be recorded at the time the subsequent party obtains his interest. The chronology of events in the above set of facts is as follows: (1) A conveys to B. (2) B's deed is recorded. (3) B mortgages to A. (4) B conveys to C "subject to the mortgage." (5) C's deed is not recorded. (6) C mortgages to D. (7) D's mortgage is recorded Jan. 2, 2001. (8) A's mortgage is recorded June 1, 2001. From this set of facts the record alone shows (a) B owns Blackacre, (b) C mortgages to D and (c) B mortgages to A.

Any priority which D claims must be based on her taking as a subsequent incumbrancer without notice. So the question is—does D take with or without constructive notice of A's mortgage? It is quite obvious that had B's deed to C been recorded prior to D's mortgage, D would have been given constructive notice by such recordation because C's deed is an essential link in D's chain of title, and a subsequent purchaser takes with notice either (a) of a deed on record which is a part of her chain of title or (b) of a recital in an instrument which is a part of her chain of title. So if C's deed had been recorded, D would have taken with notice of A's mortgage, whether or not that mortgage was recorded, because C's deed recited that it was "subject to the mortgage given A." But on the face of the record C seems an interloper. The record discloses no interest in C prior to her giving the mortgage to D. This should have put D on inquiry to learn the source of C's title, if any. Either there is such a source or there is not. If there is none, then D has no interest under C's mortgage. If there is such a source, D should have discovered it, and in the absence of such discovery she should be charged with notice of the contents of that source whether or

not it is recorded. Thus D is charged with constructive notice of the recital in C's deed that it is given "subject to the mortgage given to A." Hence, A's mortgage from B is prior to that of D who takes with constructive notice and thus is not a bona fide purchaser from C as to A's mortgage.

In the cases involving priorities of instruments of conveyance, the underlying principle should be constantly kept in mind. It is this—one is protected by the recording statutes if she is diligent but not if she is negligent. The purchaser of real property is duty bound to make diligent search of the records for prior claims, and a diligent inspection of the property for possible claims by possessors. If (a) the record gives the purchaser constructive notice, or (b) the record is such as to leave her in doubt, or (c) someone is in possession of the land that is inconsistent with the record, or (d) the possession of the land leaves the purchaser in doubt; in all of these cases the purchaser is charged with notice and cannot be a bona fide purchaser entitled to protection under the recording statutes.[29]

**PROBLEM 17.12:** In 2001 O gives an oil and gas lease to Blackacre to A; A does not produce oil and gas and there is no evidence of the existence of the lease on Blackacre itself. A does not record the lease. In 2002 O sells the F.S.A. in Blackacre to B by a deed which says "subject to an oil & gas lease in A." B records. In 2004 B conveys F.S.A. in Blackacre to C, by a deed making no reference to the oil & gas lease. Does C take free of the lease or subject to the lease.

**Applicable Law:** In either a notice or race-notice jurisdiction one is obligated not merely to locate the documents in a chain of title, but also to read their contents, and takes subject to any interest referred to in an earlier document, provided that the interest can be readily identified.

### Answer and Analysis

In either a notice or race-notice jurisdiction C will take subject to the oil and gas lease. Under the doctrine of "muniments of title," a purchaser takes with constructive notice not merely of recorded conveyances, but also of unrecorded conveyances referred to in recorded conveyances. The title searcher therefore has a duty to read the contents of each document in the title chain. In this case

29. See Baker v. Mather, 25 Mich. 51 (1872). See also Cohen v. Thomas & Son Transfer Line, Inc., 196 Colo. 386, 586 P.2d 39 (1978), holding that a purchaser who saw tenants on the property had a duty to inquire as to the nature of their unrecorded lease, and thus took subject to a right of first refusal (i.e., a right to purchase the property by matching any offer made by another prospective purchaser).

the oil and gas lease was unrecorded. However, a careful reading of the deed from O to B would reveal that O's interest was subject to the outstanding oil and gas lease.[30]

The doctrine of muniments of title is problematic, however. Although a recorded instrument might refer to an unrecorded instrument, the reference might be so vague that it really does not give a title searcher notice of anything. For example, suppose a title search reveals a fifty-year old deed with a statement that the conveyance is "subject to a mineral lease," but says nothing about (a) the identity of the lessee; (b) the duration of the lease or any requirement that minerals actually be produced; or (c) the identity of the minerals that the lessee has the right to take.[31] A compromise position is to permit the doctrine to be used only when the reference contained in the recorded instrument is sufficiently specific to enable the title searcher to find it.[32]

**PROBLEM 17.13:** A, fee simple owner of Blackacre, conveys it to X. X does not record. X conveys to Y. Y records. Then A executes a deed to B. B records. B executes a deed to C. C records. Neither B nor C knew of the deeds to X and to Y. Blackacre is vacant land with no one actually in physical possession. Y then moves onto the premises and C sues to eject her. May C succeed?

**Applicable Law:** Under the recording statutes, priority in right often depends upon the constructive notice imparted by recordation of instruments rather than on the common law rule, priority in time is priority in right. The chain of title means the unbroken continuity of title with every link in the chain being present from the patent to the claimant. A recorded instrument of conveyance outside the chain of title does not impart constructive notice to a subsequent purchaser or incumbrancer. If a grantor appears as a grantor in an instrument on the record without appearing on the record as a grantee, the instrument is a wild deed and not in the chain of title. A subsequent bona fide purchaser takes priority over a grantee in a recorded instrument which is outside the chain of title.

30. See Guerin v. Sunburst Oil & Gas Co., 68 Mont. 365, 218 P. 949 (1923) (recorded option mentioning unrecorded oil & gas lease constituted notice of the lease); Harper v. Paradise, 233 Ga. 194, 210 S.E.2d 710 (1974) (reference to lost deed contained in a later deed gave notice of the lost deed).

31. See L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 101–102 (1960), concluding that the doctrine unreasonably burdens title searchers.

32. See Richardson v. Lee Realty Corp., 364 Mass. 632, 635, 307 N.E.2d 570, 573 (1974) (no notice if a reference that is "at most ambiguous concerning some possible impropriety" in the title).

### Answer and Analysis

Yes.[33] Of course if this were a case at common law where priority in time is priority in right, Y would be the title holder of Blackacre and have the right to possession because after A's deed to X there would be no interest in A to convey to B. But under the recording statutes the common law rule does not always prevail and the question of priority often depends, as in this case, upon the recordation of instruments and the constructive notice which such recordation imparts. When we are told that A is a fee simple owner, such conclusion presupposes a perfect recorded chain of title from the patent of the United States Government, or other former sovereign, down to and including A. It presupposes no break in the recorded chain and that every link properly binds the links preceding and succeeding it. Then A conveys to X but X does not record his deed. Thus the title in X is good between the parties, A and X. But on the record the chain is not complete without the last link. Then X conveys to Y. Y records his deed. But the record discloses a good chain with all links there down to A. But there is no link on the record between A and Y. Y now appears to be an interloper, a stranger to the chain of title because there is no link connecting him with A, the last link in the chain connected with the original source of title. Now A conveys to B and B to C. Both deeds are recorded. Now the chain of title *on the record* is perfect from the patent down to and including C. So the question is whether the subsequent purchasers B and C are bound by any constructive notice imparted to them by Y's recorded deed from X when X, and therefore Y, are *strangers to the chain of title?*

The general rule answers this question in the negative. A subsequent purchaser or incumbrancer is not bound by constructive notice of any recorded instrument of conveyance unless such instrument constitutes an essential link in the chain of title. No recorded instrument of conveyance gives constructive notice to a subsequent purchaser or incumbrancer unless that recorded instrument is made after the time when some other recorded instrument shows the grantor to have obtained the title. In short, *on the record the grantor must first appear as a grantee before he can be a*

**33.** The answer should be the same under any of the four types of recording statutes, but the reasons would be somewhat different. (1) Under a notice statute both B and C are subsequent BFP's because the X-Y deed is outside the chain of title and doesn't constitute constructive notice. (2) Under a race statute, recording should be construed as meaning the recording of a complete chain of title; therefore the non-recording of the A–X deed precludes Y from claiming a prior recording, and the entire competing chain—A to B to C—is recorded first. (3) In a race-notice jurisdiction, both B and C can qualify as subsequent BFPs whose conveyance were first recorded insofar as Y is concerned because of the reasoning under (1) and (2) supra. (4) In a period of grace statute if the period of grace for X's recording has expired, the result is the same as in a notice jurisdiction, and C will prevail.

*grantor*. Applying this rule to our facts, X is a complete stranger to the chain of title. He does not appear on the record as a grantee at all, much less before he appears as a grantor. On the other hand C's chain of title is perfect and complete. As a subsequent purchaser C is bound by constructive notice only of the instruments in his chain of title. This does not include the instrument from X to Y. Hence, C holds priority as a bona fide purchaser under the recording statutes and can eject Y from Blackacre. Importantly, B took his interest without notice of any interest in Y, C took whatever interest B had, and notice to C would be immaterial. In other words if B, a subsequent purchaser, takes without notice, then he is empowered to transfer his interest to another who does or does not have notice of the prior claim. Of course, this does not mean that one who holds with notice can improve his position by selling to a bona fide purchaser and buying back again.[34]

### *Note 1*

A literal application of the recording act might suggest a different result in the above problem. Take a typical notice statute which provides, in effect, that no deed shall be valid until recorded as against a subsequent bona fide purchaser for value and without notice. In the instant case Y recorded his deed before A conveyed to B, and B in turn conveyed to C. Thus, it could be argued that Y did record his instrument before B entered the picture; so the recording act has no application, and the common law rule of first in time governs. However, the break in the chain of title from A to X affords such persons as B and C no opportunity to find the conveyances to X and Y. Thus, in order to give effect to the policy behind the recording act, the concept of recording should be construed to mean the recordation of a complete chain of title. Under such an interpretation, Y's deed is not recorded within the intent of the act when it is a wild deed unconnected with a prior deed of record in the chain of title. Thus, the result is the same as previously indicated.[35]

### *Note 2*

If the jurisdiction had an official tract index in which all instruments were recorded in reference to the legal description of the land instead of in reference to grantors and grantees, then the chain of title concept would be inapplicable, and B and C in the above problem would have no difficulty in finding the recorded deed to Y and they would be charged with notice.

**34.** See Board of Educ. of City of Minneapolis v. Hughes, 118 Minn. 404, 136 N.W. 1095 (1912).

**35.** See Salt Lake County v. Metro West Ready Mix, Inc., 89 P.3d 155 (Utah 2004).

**PROBLEM 17.14:** A, having no interest in Blackacre, mortgages the property to X. X assigns the mortgage to Y. Both the mortgage and the assignment are recorded. Thereafter A acquires title to Blackacre and executes a deed for full value to B who conveys to C who conveys to D. All these deeds are duly recorded. Y seeks to foreclose its mortgage against all of the above parties and all resist his effort to foreclose. May Y succeed?

**Applicable Law:** An instrument of conveyance which operates by way of estoppel by deed is outside the chain of title and does not give constructive notice to subsequent purchasers and conveyancers according to the better view. Hence, the general rule, that a subsequent purchaser or incumbrancer of the after-acquired property takes priority over the grantee or mortgagee in an earlier recorded instrument of conveyance which is outside the chain of title, applies to the ordinary case of estoppel by deed when the recording statutes are involved.

### Answer and Analysis

The best answer is no. Both at common law and under modern conveyances the doctrine of estoppel by deed will operate in favor of a grantee and against a grantor as to after-acquired property, and such doctrine extends to the successors in interest of these parties. However, the doctrine of after-acquired title is affected by the recording statutes. When A mortgaged to X and when X assigned the mortgage to Y, A had no interest in Blackacre. His mortgage, therefore, was completely outside the chain of title. He had by such mortgage become on the record a conveyor before any record showed him to be a grantee or a conveyee.

Most courts hold that subsequent purchasers or incumbrancers are not bound by such recorded instruments, because such recordation gives no constructive notice to bona fide subsequent purchasers and incumbrancers. Indeed, when X and Y took A's mortgage they did not carry out their duty of due care with respect to searching the record of the chain of title because the exercise of such diligence would have disclosed that A was not a grantee in the chain of title of Blackacre. Applying the general rule, the purchasers from A after A acquired the title to Blackacre were subsequent purchasers without notice of the mortgage to X and assigned to Y, because such mortgage was outside the chain of title. B and his successors, C and D, are therefore entitled to protection under the recording statutes as subsequent purchasers and take their title free from the encumbrance of Y's mortgage. This is the only holding which complies with the purpose and the spirit of the recording statutes.

There are many cases holding to the contrary, thus making the passing of title by estoppel by deed an exception to the general rule that an instrument of conveyance not in the chain of title does not give constructive notice to subsequent purchasers and incumbrancers. The exception seems unjustified in view of the fact that the one claiming the benefit of the exception is either himself guilty of negligence in searching the record, or he holds through one who is negligent and the record discloses such. Of course, as between parties who are unaffected by the recording statutes, the doctrine of estoppel by deed still continues to operate.[36]

**PROBLEM 17.15:** A, the owner of Blackacre in fee simple, conveys it to B. B bring his deed to the registry for recording and pays the fee. The clerk misplaces the deed among other papers and it is never recorded. A then deeds Blackacre to C who promptly records. Blackacre is vacant land and C has no knowledge of A's former deed to B. C takes possession of the land and B sues to eject him therefrom. May B succeed?

**Applicable Law:** Subsequent purchasers and incumbrancers are entitled to rely on the title records. If a holder of a deed presents it for recordation and the officer fails to record it, the loss or injury under one view must fall on the one who presents such instrument for record and not on a bona fide subsequent purchaser. Likewise, if the officer records the instrument but makes an error in its recordation, the loss or injury under this view must fall on the one who had the instrument recorded and not on a subsequent purchaser or incumbrancer. Under this position the duty lies on the holder of an instrument of conveyance not only to see that the instrument is recorded when he presents it for record, but also to see that it is correctly recorded. Under the contrary position, the loss falls on the subsequent purchaser when the recorder makes a mistake. The reason is that the holder of the instrument does all that is required of him when he deposits such instrument for recordation.

### Answer and Analysis

The answer is no in many jurisdictions, but there is contrary authority. The rationale for putting the loss on B is as follows: Under the recording acts it seems the better rule to require the holder of an instrument of conveyance not only to present a deed

36. See Breen v. Morehead, 104 Tex. 254, 136 S.W. 1047 (1911), holding for the BFP (subsequent purchaser). See also Sabo v. Horvath, 559 P.2d 1038 (Alaska 1976) (applying the rule to a federal statute operating similarly to estoppel by deed); but see Ayer v. Philadelphia & Boston Face Brick Co., 159 Mass. 84, 34 N.E. 177 (1893) (holding for the earlier purchaser, who received title by estoppel).

for recordation but also to see that the instrument is properly recorded. The holder can more easily return to make sure that a *known* instrument is recorded than a subsequent purchaser can search for an *unknown* instrument. The public should be able to rely on a public servant or official to do his duty. But a public servant or officer is human and may make errors. Only B could have prevented the injury because he alone had complete control of the situation at the time of the attempted recordation. There is no way imaginable by which C, who could only act as a result of what B did or did not do, could protect himself. To require C to do more than examine the record with care and diligence would be a determination that the public or subsequent purchasers cannot rely on the public records as to titles. Hence, it seems proper in carrying out the purpose and intent of the recording statutes to require B to use due diligence not only in presenting his instrument for recordation, but also to require him to see that such recordation is made. This principle applies not only where no record at all is made but also when a record is made but it is erroneously made. For example, suppose in our case the owner A had made a first mortgage on Blackacre for $5,000 to B. B takes the mortgage for recordation. By an error the record shows the mortgage for only $500. Then A gives a second mortgage for $2,500 to C. B sues to foreclose his $5,000 mortgage. C is made a party defendant and agrees that B has the right to foreclose for $500 but not for $5,000. Here again B is bound to see that his mortgage is correctly recorded and, as to C, he can foreclose only as to $500. Such doctrine is the only one which gives full effect to the principle that subsequent purchasers and incumbrancers are entitled to rely on what they find on the title records.[37]

The alternative rationale for protecting B and putting the loss on C is that B has done all that is required under the recording act when she files her instrument for record with the proper official. Further, some delay will occur between the deposit of the instrument in the registry and spreading it on the records, and even further delay in compiling the index. Unless the deed is deemed recorded from the time it is deposited in the registry and not from the time it is spread on the record and then indexed, there is a possibility that a person in B's position above will be defeated by a subsequent bona fide purchaser from the original grantor in spite of the fact that B has done all that pragmatically is within her power to do. An ordinary layperson cannot literally perform the recorder's job for him, and it is essential that the deed or other

37. What if the deed is improperly indexed or not indexed at all, owing to no fault of the purchaser? The courts are divided. See Haner v. Bruce, 146 Vt. 262, 499 A.2d 792 (1985), holding that a misindexed deed nevertheless gave notice to a subsequent purchaser, who thus took subject to it. Cf. Mortensen v. Lingo, 99 F.Supp. 585 (D.Alaska 1951) (recordation without indexing does not impart constructive notice).

instrument be deemed recorded from the moment of its deposit in the registry. Thus, although it is hard for an innocent purchaser to suffer a loss as a result of the recorder's mistake, it is equally hard for an innocent owner to suffer such a loss. Under such circumstances there is no more reason to protect the subsequent purchaser than the owner. Such errors in recording, like forged and other void instruments, are simply matters against which the recording act offers no protection. The remedy of the innocent purchaser in such cases should be against the recorder.[38]

**PROBLEM 17.16:** A, fee simple owner of Blackacre, was negotiating with B for the sale of the property to B. B requested A to make out a deed to B, saying he would be back the following day to examine it. The day following B returned to A's house and A handed to B for examination the deed which A had signed and acknowledged as B had requested. B examined the deed and pronounced it satisfactory but stated that he would have to think over the matter a little longer. B returned the deed to A who put it in his pocket. Without A's knowledge or consent and without negligence on the part of A, B clandestinely picked the deed from A's pocket, recorded it, and sold Blackacre to C. Blackacre was vacant property and C had no knowledge other than the record. C took possession of Blackacre and A sues to eject him. May A succeed?

**Applicable Law:** A forged or an undelivered deed is a nullity and no one can claim any interest through such. Placing such a deed on record does not add any legal efficacy to such a forged or undelivered instrument. The recording statutes are not intended to be a means of conveyance nor are they intended for the purpose of assisting wrongdoers, tort-feasors, criminals and forgers in depriving innocent owners of their real property. The original owner continues his ownership even over one who claims even as an innocent purchaser through a forged or an undelivered deed.

### Answer and Analysis

Yes. A did not deliver the deed to B. Further, A was not negligent in respect to B's gaining possession of the instrument

38. However, the recorder may not be liable. See Siefkes v. Watertown Title Co., 437 N.W.2d 190 (S.D.1989) (doctrine of sovereign immunity barred damages action against county registry of deeds for negligent indexing). Contra Terrell v. Andrew County, 44 Mo. 309 (1869). See also 70 A.L.R. 603–608.

Suppose that a grantee changes his or her name before reselling the property, and the records do not reveal that the two different names belong to the same person? See First Financial Bank, F.S.B. v. Johnson, 477 So.2d 1267 (La.App. 1985), holding that a searcher has no duty to search for variations in name, at least where the contest was between the searcher and an earlier grantee who had negligently misspelled the grantor's name.

which he recorded. Hence, estoppel cannot be used against A. There being no delivery of the deed by the owner and he having been guilty of no conduct which could estop him from denying delivery, A is still the owner with the right to possess Blackacre unless the recording acts preclude him from recovery.

The recording acts are intended to protect bona fide subsequent purchasers. Clearly C should be so classified. We may assume that he examined the records and found a deed properly signed and acknowledged by A and that he paid full value for Blackacre. The recording statutes are intended to protect the innocent and when two persons are equally innocent and one is no more to be blamed than the other for their predicament, then the statutes will have no application and the title will remain where the law would recognize it to be. In our case the title was in A. An undelivered deed is a nullity and leaves the title in the owner. C will have to be content with his personal action against B. Why doesn't the record assist C? Because the recording statutes presuppose a valid delivery of the instrument in order that they have any application. There is no such delivery in our case. The same would be true in case B forged A's name to a deed and placed it on record. It would have no legal effect and anyone who claimed through it would have no interest. Nor is an owner bound to examine the records from time to time to see if anyone has placed a forged or an undelivered instrument of conveyance on record. In short, the recording acts protect subsequent parties against prior otherwise valid and delivered but unrecorded instruments; they have no application whatsoever to recorded but void deeds.[39]

In the disturbing *Messersmith* decision[40] the court held that an improperly acknowledged (i.e., improperly notarized) but otherwise valid deed did not give notice to subsequent purchasers because the recording statute, as many recording statutes, required instruments to be acknowledged before they could be recorded. Thus, even though the deed was valid as between the parties and present for any title searcher to see in the chain of title, it did not provide "notice" in the recording act sense. As a result, a purchaser from the person receiving the unacknowledged instrument was not entitled to rely on the record and lost title to an earlier grantee under an unrecorded quitclaim deed.

**39.** See Stone v. French, 37 Kan. 145, 14 P. 530, 1 Am.St.Rep. 237 (1887) (no protection given by recorded but undelivered deed). But see Hauck v. Crawford, 75 S.D. 202, 62 N.W.2d 92 (1953), holding that if the grantor's signature is obtained by fraud (in this case the grantor was told he was signing a lease instead of a deed), but it is nevertheless the grantor's signature, then even though the deed might be set aside by the grantor himself in an action against the grantee, or even though the grantee might be charged with fraud, the deed should be good as against a subsequent BFP relying on the record.

**40.** Messersmith v. Smith, 60 N.W.2d 276 (N.D.1953).

**PROBLEM 17.17:** O conveyed Blackacre, which is vacant land, to A. A did not then record the deed. Later, O conveyed the land to B who had notice of the earlier deed. B recorded. Sometime later, A recorded his deed, and still later, B conveyed the same land to C. C had no notice of the deed to A. A brings suit to quiet title against C. Will he succeed?

**Applicable Law:** A subsequent purchaser is not charged with notice of a prior deed or other instrument which is out of the chain of title although it may be placed on record. A prior deed recorded after a second deed to the same property from the same grantor is out of the chain of title. If a purchaser finds a conveyance from the owner to his grantor which gives him a perfect record title, he is entitled to rely thereon and is not obliged to search the records further to see if there were any prior deeds recorded out of sequence.

**Answer and Analysis**

The answer is no according to the better view. For C to prevail in either a notice or race-notice jurisdiction he must, of course, qualify as a BFP without notice of A's deed. If the contest were between A and B, A would clearly win since B had notice of A's deed. But B recorded before A, and then conveyed to C. At the time C entered the picture, A's deed was filed for record. Looking at the recording statute literally, it might appear that A would be preferred since at the time C entered the picture the prior deed to A had been placed on record, and A had not been divested by the conveyance to B, who took with notice.

However, the realities of tracing title through grantor-grantee indices suggest that C should win. The recording of A's deed out of turn puts it out of the chain of title, since a subsequent purchaser such as C would not be likely to find it in tracing title from O. In checking such title, C would find first the conveyance to B. If thereafter C ignored O on the reasonable assumption that O having conveyed once would have no further title to convey, C would never find the prior deed to A. Thus, C does qualify as a subsequent BFP without notice of the prior deed to A, which is outside the chain of title.

This rule gives due consideration to the practicalities of tracing title. It has also been applied to successive mortgages in the above situation, but the rationale as to mortgages is less sustainable. For example, after O mortgages to A, O still has a substantial interest in Blackacre which is subject to further mortgage or conveyance. Hence, a subsequent person such as C would not be as justified in ignoring O after he finds first the recorded mortgage to B. Of course, C, in taking an assignment of the mortgage from B is

primarily interested in getting a first mortgage and not a junior one. Hence, it is logical to say that he can disregard O after finding the recorded mortgage to B since C is interested only in getting a first mortgage. Having found that B was the first mortgagee, all that concerns C is to be sure that B did not assign the mortgage to someone else. The leading case of Morse v. Curtis[41] did apply the doctrine of chain of title to mortgages in this situation. There is a little authority to the contrary, which regards such out of turn recordings as within the chain of title.[42] This position can be criticized because it imposes a great burden on the title examiner.

The obverse of the situation in problem 17.17 is this one: O sells Blackacre to A; A does not record. O then sells Blackacre to B, a BFP who records promptly. B would thus prevail against A. However, thereafter B sells to C who has actual knowledge of A's interest. This case is governed by the so-called "shelter" rule that once a bona fide purchaser has acquired a title protected under the recording acts, that person is entitled to pass his title on to others. Thus, C will prevail because C's grantor was B, and B would have prevailed over A in a title dispute.[43]

Incidentally, many courts hold that a subsequent purchaser is entitled to protection under the recording acts only if the previous documents in the chain of title were recorded. For example, suppose that O gives A a mortgage on Blackacre. A does not record. Then O sells Blackacre to B by a deed not excepting the mortgage. B does not record either. Now B sells to C who records promptly. Then A records the mortgage and thereafter B records his deed. Who wins in a dispute between A, the mortgagee and C?

In a race-notice jurisdiction A wins because a title search by C at the appropriate time would have revealed that B had no record title. As a result C is not really a BFP "without notice," and he is protected, if at all, only by the recording acts. Thus we revert to common law priorities and A wins.[44]

In a pure notice jurisdiction the outcome might be different, for A's interest would lose to B the instant B purchased, whether or not B recorded first. Under the "shelter" rule B could pass his title on to C; or, to look at it another way, once B acquired his interest A had nothing left to record.

**41.** 140 Mass. 112, 2 N.E. 929 (1885).

**42.** E.g., Woods v. Garnett, 72 Miss. 78, 16 So. 390 (1894).

**43.** Corey v. United Savings Bank, 52 Or.App. 263, 628 P.2d 739 (1981) (even though the defendant had actual notice of an unrecorded access easement, the defendant's grantor was a BFP without notice; D was sheltered by his grantor's protection). See Cross, The Record "Chain of Title" Hypocrisy, 57 Col. L. Rev. 787 (1957).

**44.** See Zimmer v. Sundell, 237 Wis. 270, 296 N.W. 589 (1941) (one who purchases from a stranger to the title not protected by recording statute).

**PROBLEM 17.18:** L owned 2 parcels of adjoining land. She conveyed one parcel to M, covenanting that she would not convey the other parcel unless the grantee entered into a covenant similar to that contained in the deed from L to M with respect to certain building restrictions. L's heirs conveyed the other parcel to G without inserting the covenant. The deed to M was duly recorded. G had no actual knowledge of any restrictions upon the land conveyed to him. G brings an action for breach of covenant for title against L's heirs. Will he succeed?

**Applicable Law:** There is a conflict of authority as to whether the term subsequent purchaser as used in the recording acts means only subsequent purchaser of the same land or whether it means subsequent purchaser from the same grantor. Under the latter view, the subsequent purchaser is charged with notice of servitudes or encumbrances contained in deeds out by a common grantor when such encumbrances affect the land he is purchasing. Under the former view, the subsequent purchaser is charged with notice of encumbrances which appear only in recorded documents pertaining to direct chain of title, i. e., the very land he is purchasing.

### Answer and Analysis

The answer depends upon the jurisdiction. Of course, for G to be obligated to observe the building restrictions, he must take with notice of the restriction in the deed from L to M. Since G had no actual notice, the question is whether he is charged with constructive notice under the recording act of the covenant in the deed from L to M. Under one line of authority he is charged with such notice.[45] Under this view, G must not only check to see that his grantor had not conveyed the very parcel of land which he is acquiring, but also must check deeds out from the common grantor to see that in conveying such neighboring land the grantor did not impose a covenant or servitude which affects the remaining land and which is ultimately conveyed to him. Thus, under this view, G takes with notice of the prior servitude. Therefore, his land is so incumbered, and he does have an action against his grantors for breach of the covenant against encumbrances.

Under the other view, G is charged with notice only of those things appearing in his direct chain of title.[46] Under this view, G

45. E.g., Guillette v. Daly Dry Wall, Inc., 367 Mass. 355, 325 N.E.2d 572 (1975) (requiring the purchaser to search both chains); Stegall v. Robinson, 81 N.C.App. 617, 344 S.E.2d 803 (1986) (same; subdivision covenant).

46. E.g., Puchalski v. Wedemeyer, 185 A.D.2d 563, 586 N.Y.S.2d 387 (App. Div.1992) (refusing to require the purchaser to search both chains of title); Witter v. Taggart, 78 N.Y.2d 234, 573 N.Y.S.2d 146, 577 N.E.2d 338 (1991) (same).

need only check prior recorded deeds of his grantor to see that the land he is purchasing has not been previously conveyed. He need not check the contents of the other deeds out by a common grantor. Under this view since G did not have actual notice of the servitude, he takes free therefrom. Thus, the grantors did not breach the covenant against encumbrances, and G has no action.

The question presented in this problem is sometimes stated in terms of the meaning of "subsequent purchaser" under the recording act. Does the term refer to a subsequent purchaser from the same grantor or simply to a subsequent purchaser of the same land? As indicated previously, the courts take different positions, some thinking that the burden is too great to require a purchaser to examine prior deeds out by a common grantor; others take the contrary viewpoint.

## CHART COMPARING RECORDING ACTS

**Hypothetical I:**

1. O, owner of Blackacre, executes and delivers to A a deed conveying Blackacre to A. A does not record.

2. O, then executes and delivers to B a deed of the same land and at that time B knows of A's prior unrecorded deed.

3. B records his deed.

4. B executes and delivers to C a deed of the land and C does not know of A's prior unrecorded deed.

5. A then records.

6. C then records.

At the end of each numbered transaction the location of title would be as follows under the various recording acts:

| Steps | 1 | 2 | 3 | 4 | 5 | 6 |
|---|---|---|---|---|---|---|
| Notice | A | A | A | C | C | C |
| Reason | Rec'd not necessary between the parties | B not a BFP | B not a BFP | C is a subseq. BFP | C is a subseq. BPF | C is a subseq BFP |
| Race | A | A | B | C | C | C |
| Reason | Same as above | B did not record | B recorded first | Because B had title-chain of title concept | Because B had title-chain of title concept | Because B had title |
| Race-Notice | A | A | A | C | C | C |
| Reason | Same as above | Both of the above | B not a BFP | Subseq. BFP who can rely on B's record | Subseq. BFP who can rely on B's record | Subseq. BFP who can rely on B's record |

Hypothetical II:

1. O, owner of Blackacre, executes and delivers to A a deed conveying Blackacre to A. A does not record.
2. O then executes and delivers to B a deed of the same land. B does not know of A's prior unrecorded deed. B does not record.
3. A then records his deed.
4. B then executes and delivers to C a deed to Blackacre. C does not record.
5. A then deeds Blackacre to D who does not know of either B or C. D does not record.
6. B then records.
7. C then records.
8. D then records.

At the end of each numbered transaction the location of title would be as follows under the various recording acts:

| Steps | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
|---|---|---|---|---|---|---|---|---|
| Notice | A | B | B | C | D | D | D | D |
| Reason | Rec'd not necessary between the parties | He is a subseq BFP | B was a subseq BFP | C gets B's title | Most subseq BFP | Need not record as to prior parties | He had already divested C's title | was subseq BFP and has now recorded |
| Race | A | A | A | A | D | D | D | D |
| Reason | Same as above | Neither recorded so A wins as before | A recorded 1st | A recorded 1st | He gets A's record title | B & C had been divested by A's record | same as — and chain of title concept | same as — and D has now recorded |
| Race-Notice | A | A | A | A | D | D | D | D |
| Reason | Same as above | Although B is a subseq BFP, he did not record | B did not record 1st | C had constr. notice of A's title. A recorded 1st | D is subseq BFP & can use A's recording | Same as — | Same as — | D is subseq BFP and has chain of title traced b/d B & C's |

## § 17.4 *Title Insurance*

**PROBLEM 17.19:** A purchased Blackacre in 1994 for $100,000 and took out a title insurance policy in the amount of a mortgage, $60,000. The policy was designed to cover defects in the title or failure of title, but it contained an exception for "easements, liens or encumbrances not shown by the public records." Thereafter, A finds that the land is subject to a prescriptive easement that reduces its value from $100,000 to $30,000. Can he recover? If so, how much?

**Applicable Law:** Title insurance policies are contractual in nature. Although most courts indulge the presumption that they are to be strictly construed against the insurer, they generally insure only what they say they insure (subject to state regulation, which may require them to insure against certain kinds of losses).

### Answer and Analysis

The answer in most states is that A will not recover anything. Although title failed, the defect was not "shown by the public records."[47] A may, of course, have a claim against his grantor or even a prior grantor under a deed covenant (See § 17.1), but not under this particular title policy.

Suppose that the easement was in fact recorded and thus covered by the policy? Would A be any better off with the title insurance policy than he would be with a general warranty deed? In some respects, yes. First of all, the title company is generally under a duty to defend the insured from claims arguably covered by the policy. Thus, if the claim is based on a recorded easement, probably covered by the policy, it would be the insurer's obligation to defend. If the claim were based on a prescriptive easement, not covered by the policy, the insurer would probably not have an obligation to defend.

Damages measurement, just as other elements of the policy, is usually contractual.[48] As a general matter the limit of the insurer's liability is the face amount of the policy; so the insurer in the Problem will not have to pay more than $60,000, even though the policy holder's loss was $70,000. One general exception to this rule is that if an insurer unreasonably refuses to defend a claim and title subsequently fails, the insurer will be liable for any amount,

47. See also Ryczkowski v. Chelsea Title & Guaranty Co., 85 Nev. 37, 449 P.2d 261 (1969), holding that a deed recorded outside the chain of title was not satisfactorily within the public record to be covered by the title insurance policy. The decision has been criticized because title insurers as a general matter do not rely on grantor-grantee indexes but on records contained in their own private "title plants," which are almost always tract indexes. As a result, a "wild" deed is ordinarily easy to discover.

48. But see Jarchow v. Transamerica Title Ins. Co., 48 Cal.App.3d 917, 122 Cal.Rptr. 470 (1975), holding that a title insurer that breached its duty to defend was liable not only for the title loss but also in tort for emotional distress caused by its negligent and bad faith refusal to defend. Jarchow was later overruled insofar as it gave emotional distress damages for a merely negligent refusal to defend: Soto v. Royal Globe Ins. Co., 184 Cal.App.3d 420, 229 Cal.Rptr. 192 (1986) (requiring bad faith and not mere negligence). Other states have refused to follow *Jarchow's* general recognition of tort liability in addition to contract liability. E.g., Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho, 115 Idaho 56, 764 P.2d 423 (1988) (statute requiring search and examination of title did not create tort duty). See generally Palomar, Title Insurance Companies' Liability for Failure to Search Title and Disclose Record Title, 20 Creighton L. Rev. 455 (1987).

even if it exceeds policy limits. If title fails and an earlier grantor is liable, the title insurer that pays a claim is generally subrogated to any cause of action that the insured had, and may sue for its losses.[49]

Computation of damages is likewise problematic. Is the insurer liable for the full loss up to the limit of the policy, or is it liable only for a percentage of the loss equal to the percentage of coverage that the policy owner purchased? Some courts have held that, for example, if the policy purchaser bought a policy whose face value is only 60% of the purchase price, then the insured should be liable for only 60% of any resulting loss.[50]

**49.** E.g., Safeco Title Ins. Co. v. Citizens & Southern National Bank, 190 Ga.App. 809, 380 S.E.2d 477 (1989).

**50.** See Southwest Title Ins. Co. v. Plemons, 554 S.W.2d 734 (Tex.Civ.App. 1977); Southern Title Guaranty Co., Inc. v. Prendergast, 494 S.W.2d 154 (Tex. 1973) (amount recoverable bears same ratio to policy amount as value of outstanding interest to value of fully insured title).