In this chapter, you will learn how the ownership of real estate is conveyed from one owner to another. Voluntary conveyance of real estate by deed, conveyance after death, conveyance by occupancy, accession, public grant, dedication, and forfeiture are covered. An important part of this chapter, and the part that you should review very carefully, is the coverage of the central elements of the deed. Likewise, the various covenants and warranties should be reviewed. In the previous three chapters we emphasized how real estate is described, the rights and interests available for ownership, and how title can be held. In this chapter we shall discuss how ownership of real estate is conveyed from one owner to another.

Deeds

A deed, when properly executed and delivered, is a written legal document by which ownership of real property is conveyed from one party to another. Deeds were not always used to transfer real estate. In early England, when land was sold, its title was conveyed by inviting the purchaser onto the land. In the presence of witnesses, the seller picked up a clod of earth and handed it to the purchaser. Simultaneously, the seller stated that he was delivering ownership of the land to the purchaser. In times when land sales were rare, because ownership usually passed from generation to generation, and when witnesses seldom moved from the towns or farms where they were born, this method worked well. However, as transactions became more common and people more mobile, this method of title transfer became less reliable. Furthermore, it was susceptible to fraud if enough people could be bribed or forced to make false statements. In 1677, England passed a law known as the Statute of Frauds. This law, subsequently adopted by each of the American states, requires that transfers of real estate ownership be in writing and signed in order to be enforceable in a court of law. Thus, the need for a deed was created.

ESSENTIAL ELEMENTS OF A DEED

What makes a written document a deed? What special phrases, statements, and actions are necessary to convey the ownership rights one has in land and buildings? First,
a deed must identify the **grantor**, who is the person giving up ownership, and the **grantee**, the person who is acquiring that ownership. The actual act of conveying ownership is known as a **grant**. To be legally enforceable, the grantor must be of legal age (18 years in most states) and of sound mind.

Second, the deed must state that **consideration** was given by the grantee to the grantor. It is common to see the phrase, *For ten dollars ($10.00) and other good and valuable consideration*, or the phrase, *For valuable consideration*. These meet the legal requirement that consideration be shown but retain privacy regarding the exact amount paid.

If the conveyance is a gift, the phrase *For natural love and affection* may be used, provided the gift is not for the purpose of defrauding the grantor’s creditors. In these situations, consideration is not required in a deed, and the conveyance is still valid.

**WORDS OF CONVEYANCE.** Third, the deed must contain **words of conveyance**. With these words the grantor: (1) clearly states that he is making a grant of real property to the grantee, and (2) identifies the quantity of the estate being granted. Usually the estate is fee simple, but it may also be a lesser estate (such as a life estate) or an easement.

A **land description** that cannot possibly be misunderstood is the fourth requirement. Acceptable legal descriptions are made by the metes and bounds method, by the government survey system, by recorded plat, or by reference to another recorded document that, in turn, uses one of these methods. Street names and numbers are not used because they do not identify the exact boundaries of the land and because street names and numbers can change over time. Assessor parcel numbers are not used either. They are subject to change by the assessor, and the maps they refer to are for the purpose of collecting taxes. If the deed conveys only an easement or air right, the deed states that fact along with the legal description of the land. The key point is that a deed must clearly specify what the grantor is granting to the grantee.

**SIGNATURE.** Fifth, the grantor executes the deed by signing it. Some states require that the grantor’s signature be witnessed and that the witnesses sign the deed. If the grantor is unable to write his name, he may make a mark, usually an X, in the presence of witnesses. They, in turn, print his name next to the X and sign as witnesses. If the grantor is a corporation, the corporation’s seal may be affixed to the deed and the corporation’s authorized officer signs it. More states are now also adopting their own versions of the federal “esign” legislation, which allows signatures or marks to be electronically encoded on the documents. Yes, this does supercede the Statute of Frauds when it requires an original signature.

Figure 5.1 illustrates the essential elements that combine to form a deed. Notice that the example includes an identification of the grantor and grantee; fulfills the requirement for consideration; and has words of conveyance, a legal description of the land involved, and the grantor’s signature. The words of conveyance are *grant and release*, and the phrase *to have and to hold forever* says that the grantor is conveying all future benefits, not just a life estate or a tenancy for years. Ordinarily, the grantee does not sign the deed.

**DELIVERY AND ACCEPTANCE.** For a deed to convey ownership, there must also be **delivery and acceptance**. Although a deed may be completed and signed, it does not transfer title to the grantee until the grantor voluntarily delivers it to the grantee and the grantee willingly accepts it. At that moment title passes. As a practical matter, the grantee is presumed to have accepted the deed if the grantee retains the deed, records the deed, encumbers the title, or performs any
other act of ownership. This includes the grantee’s appointment of someone else to accept and/or record the deed on the grantee’s behalf. Once delivery and acceptance have occurred, the deed is evidence that the title transfer has taken place.

COVENANTS AND WARRANTIES

Although legally adequate, a deed meeting the preceding requirements can still leave a very important question unanswered in the grantee’s mind: “Does the grantor possess all the right, title, and interest he is purporting to convey by this deed?” As a protective measure, the grantee can ask the grantor to include certain covenants and warranties in the deed. These are written promises by the grantor that the condition of title is as stated in the deed, together with the grantor’s guarantee that if title is not as stated, he will compensate the grantee for any loss suffered. Five covenants and warranties have evolved over the centuries for use in deeds, and a deed may contain none, some, or all of them, in addition to the essential elements already discussed. They are seizin, quiet enjoyment, against encumbrances, further assurance, and warranty forever.

Under the covenant of seizin (sometimes spelled seisin), the grantor warrants (guarantees) that he is the owner and possessor of the property being conveyed and that he has the right to convey it. Under the covenant of quiet enjoyment, the grantor warrants to the grantee that the grantee will not be disturbed, after he takes possession, by someone else claiming an interest in the property.

In the covenant against encumbrances, the grantor guarantees to the grantee that the title is not encumbered with any easements, restrictions, unpaid property taxes, assessments, mortgages, judgments, and so on, except as stated in the deed. If the grantee later discovers an undisclosed encumbrance, he can sue the grantor for the cost of removing it. The covenant of further assurance requires the grantor to procure and deliver to the grantee any subsequent documents that might be necessary to make good the grantee’s title. Warranty forever is a guarantee to the grantee that the grantor will bear the expense of defending the grantee’s title. If at any time in the future someone else can prove that he is the rightful owner, the grantee can sue the grantor for damages up to the value of the property at the time of the sale. Because these warranties and covenants are a formidable set of promises, grantors often back them up with title insurance (see Chapter 6). The grantee is also more comfortable if the deed is backed by title insurance.

DATE AND ACKNOWLEDGMENT. Although it is customary to show on the deed the date it is executed by the grantor, it is not essential to the deed’s
validity. Remember that title passes upon delivery of the deed to the grantee, and that this may not necessarily be the date it is signed.

It is standard practice to have the grantor appear before a notary public or other public officer and formally declare that he signed the deed as a voluntary act. This is known as an acknowledgment. Most states consider a deed to be valid even though it is not witnessed or acknowledged, but very few states will allow such a deed to be recorded in the public records. Acknowledgments and the importance of recording deeds will be covered in more detail in Chapter 6. Meanwhile, let us turn our attention to examples of the most commonly used deeds in the United States.

**FULL COVENANT AND WARRANTY DEED**

The full covenant and warranty deed, also known as the general warranty deed or warranty deed, contains all five covenants and warranties. It is thus considered to be the best deed a grantee can receive and is used extensively in most states.

Figure 5.2 illustrates in plain language the essential parts of a warranty deed. Beginning at [1], it is customary to identify at the top of the document that it is a warranty deed. At [2] the wording begins with This deed... These words are introductory in purpose. The fact that this is a deed depends on what it contains, not on what it is labeled. A commonly found variation starts with This indenture (meaning this agreement or contract) and is equally acceptable. The place the deed was made [3] and the date it was signed [4] are customarily included, but are not necessary to make the deed valid.

At [5] and [6] the grantor is identified by name and, to avoid confusion with other persons having the same name, by address. Marital status is also stated: husband and wife, single man, single woman, widow, or widower. To avoid the inconvenience of repeating the grantor’s name each time it is needed, the wording at [7] states that in the balance of the deed the word Grantor will be used instead. Next appears the name and marital status of the Grantee [8] and the method by which title is being taken (severalty, tenants in common, joint tenants, etc.). The grantee’s address appears at [9], and the wording at [10] states that the word Grantee will now be used instead of the grantee’s name.

**GRANTING CLAUSE.** The legal requirement that consideration be shown is fulfilled at [11]. Next we come to the granting clause at [12]. Here the grantor states that the intent of this document is to pass ownership to the grantee, and at [13] the grantor describes the extent of the estate being granted. The phrase The grantee’s heirs and assigns forever indicates a fee simple estate. The word assigns refers to anyone the grantee may later convey the property to, such as by sale or gift.

The legal description of the land involved is then shown at [14]. When a grantor is unable or does not wish to convey certain rights of ownership, he can list the exceptions here. For example, a grantor either not having or wishing to hold back oil and gas rights may convey to the grantee the land described, “except for the right to explore and recover oil and gas at a depth below 200 feet beneath the surface.” The separate mention at numbers [15] and [16] of buildings, estate, and rights is not an essential requirement as the definition of land already includes these items. Some deed forms add the word appurtenances at [16]. Again, this is not essential wording as appurtenances by definition belong to and pass with the conveyance of the land unless specifically withheld by the grantor. Examples of real estate appurtenances are rights-of-way and other easements, water rights, condominium parking stalls, and improvements to land.
**HABENDUM CLAUSE.** The habendum clause, sometimes called the “To have and to hold clause,” begins at [17] and continues through [18]. This clause, together with the statements at [12] and [13], forms the deed’s words of conveyance. For this reason, the words at [18] must match those at [13].
Number [19] identifies the covenant against encumbrances. The grantor warrants that there are no encumbrances on the property except as listed here. The most common exceptions are property taxes, mortgages, and assessment (improvement district) bonds. For instance, a deed may recite, “Subject to an existing mortgage...,” and name the mortgage holder and the original amount of the loan, or “Subject to a city sewer improvement district levy in the amount of $1,500.”

At [20] the grantor may impose restrictions as to how the grantee may use the property. For example, “The grantee hereby agrees that grantee shall not build upon this land a home with less than 1,500 square feet of living space.” If obligations are imposed on the grantee, the grantor may want the grantee to execute the deed, to acknowledge grantee’s acceptance and agreement with its terms.

SPECIAL WORDING. The covenants of seizin and quiet enjoyment are located at [21] and [22], respectively. Number [23] identifies the covenant of further assurance, and at [24] the grantor agrees to warrant and defend forever the title he is granting. The order of grouping of the five covenants is not critical, and in some states there are laws that permit the use of two or three special words to imply the presence of all five covenants. For example, in Alaska, Illinois, Kansas, Michigan, Minnesota, and Wisconsin, if the grantor uses the words convey and warrant, he implies the five covenants even though he does not list them in the deed. The words warrant generally accomplish the same purpose in Pennsylvania, Vermont, Virginia, and West Virginia, as do grant, bargain, and sell in the states of Arkansas, Florida, Idaho, Missouri, and Nevada.

At [25] the grantor states that he signed this deed on the date noted at [26]. This is the testimony clause; although customarily included in deeds, it is redundant and could be left out as long as the grantor signs the deed at [26]. Historically, a seal made with hot wax was essential to the validity of a deed. Today, those few states that require a seal [27] accept a hot wax seal, a glued paper seal, an embossed seal, or the word seal or L.S. The letters L.S. are an abbreviation for the Latin words locus sigilli (place of the seal). The acknowledgment is placed at [28], the full wording of which is given in Chapter 6. If an acknowledgment is not used, this space is used for the signatures of witnesses to the grantor’s signature. Their names would be preceded by the words In the presence of.

DEED PREPARATION. The exact style or form of a deed is not critical as long as it contains all the essentials clearly stated and in conformity with state law. For example, one commonly used warranty deed format begins with the words Know all men by these presents, is written in the first person, and has the date at the end. Although a person may prepare his own deed, the writing of deeds should be left to experts in the field. In fact, some states permit only attorneys to write deeds for other persons. Even the preparation of preprinted deeds from stationery stores and title companies should be left to knowledgeable persons. Preprinted deeds contain several pitfalls for the unwary. First, the form may have been prepared and printed in another state and, as a result, may not meet the laws of your state. Second, if the blanks are incorrectly filled in, the deed may not accomplish its intended purpose. This is a particularly difficult problem when neither the grantor nor grantee realizes it until several years after the deed’s delivery. Third, the use of a form deed presumes that the grantor’s situation can be fitted to the form and that the grantor will be knowledgeable enough to select the correct form.
GRANT DEED

Some states, notably California, Idaho, and North Dakota, use a grant deed instead of a warranty deed. In a grant deed, the grantor covenants and warrants that: (1) he has not previously conveyed the estate being granted to another party, (2) he has not encumbered the property except as noted in the deed, and (3) he will convey to the grantee any title to the property he may later acquire. These covenants are fewer in number and narrower in coverage than those found in a warranty deed, particularly the covenant regarding encumbrances. In the warranty deed, the grantor makes himself responsible for the encumbrances of prior owners as well as his own. The grant deed limits the grantor’s responsibility to the period of time he owned the property. Figure 5.3 summarizes the key elements of a California grant deed.

Referring to the numbers in Figure 5.3, [1] labels the document, [2] fulfills the requirement that consideration be shown, and [3] is for the name and marital status of the grantor. By California statutory law, the single word GRANT(S) at [4] is both the granting clause and habendum, and it implies the covenants and warranties of possession, prior encumbrances, and further title. Thus, they need not be individually listed.

Number [5] is for the name and marital status of the grantee and the method by which title is being taken. Numbers [6] and [7] identify the property being conveyed. Easements, property taxes, conditions, reservations, restrictions, etc., are noted at [8]. The deed is dated at [9], signed at [10], and acknowledged at [11].

Why have grantees, in states with more than one-tenth of the total U.S. population, been willing to accept a deed with fewer covenants than a warranty deed? The primary reason is the early development and extensive use of title insurance in these states, whereby the grantor and grantee acquire an insurance policy to
protect themselves if a flaw in ownership is later discovered. Title insurance is now available in all parts of the United States and is explained in Chapter 6.

**SPECIAL WARRANTY DEED**

In a special warranty deed, the grantor warrants the property’s title only against defects occurring during the grantor’s ownership and not against defects existing before that time. The special warranty deed is typically used by executors and trustees who convey on behalf of an estate or principal because the executor or trustee has no authority to warrant and defend the acts of previous holders of title. The grantee can protect against this gap in warranty by purchasing title insurance. The special warranty deed is also known in some states as a bargain and sale deed with a covenant against only the grantor’s acts.

**BARGAIN AND SALE DEED**

The basic bargain and sale deed contains no covenants and only the minimum essentials of a deed (see Figure 5.4). It has a date, identifies the grantor and grantee, recites consideration, describes the property, contains words of conveyance, and has the grantor’s signature. But lacking covenants, what assurance does the grantee have that he is acquiring title to anything? Actually, none. In this deed,
the grantor only implies that he owns the property described in the deed and that he is granting it to the grantee. Logically, then, a grantee will much prefer a warranty deed over a bargain and sale deed, or require title insurance.

QUITCLAIM DEED

A *quitclaim deed* has no covenants or warranties (see Figure 5.5). Moreover, the grantor makes no statement, nor does he even imply that he owns the property he is quitclaiming to the grantee. Whatever rights the grantor possesses at the time the deed is delivered are conveyed to the grantee. If the grantor has no interest, right, or title to the property described in the deed, none is conveyed to the grantee. However, if the grantor possesses fee simple title, fee simple title will be conveyed to the grantee.

The critical wording in a quitclaim deed is the grantor’s statement that he *does hereby remise, release, and quitclaim forever*. *Quitclaim* means to renounce all possession, right, or interest. *Remise* means to give up any existing claim one may have, as does the word *release*. If the grantor subsequently acquires any right or interest in the property, he is not obligated to convey it to the grantee.

At first glance it may seem strange that such a deed should even exist, but it does serve a very useful purpose. Situations often arise in real estate transactions

FIGURE 5.5  EXAMPLE OF A QUITECLAIM DEED

QUITCLAIM DEED

THIS DEED, made the _____ day of ____ , 20 ____ , BETWEEN
___________________ of ________________ , party of the first part, and
_____________________________ of __________________ , party of the second part.

WITNESSETH, that the party of the first part, in consideration of ten dollars ($10.00) and other valuable consideration, paid by the party of the second part, does hereby remise, release, and quitclaim unto the party of the second part, the heirs, successors, and assigns of the party of the second part forever.

ALL that certain parcel of land, with the buildings and improvements thereon, described as follows:

[legal description of land]

TOGETHER WITH the appurtenances and all the estate and rights of the Grantor in and to said property.

TO HAVE AND TO HOLD the premises herein granted unto the party of the second part, the heirs or successors and assigns of the party of the second part, forever.

IN WITNESS WHEREOF, the party of the first part has duly executed this deed the day and year first above written.

______________________________________

(Grantor)

[location of the acknowledgment]
when a person claims to have a partial or incomplete right or interest in a parcel of land. Such a right or interest, known as a title defect or cloud on the title, may have been due to an inheritance, dower, curtesy, or community property right, or to a mortgage or right of redemption because of a court-ordered foreclosure sale. By releasing that claim to the fee simple owner through the use of a quitclaim deed, the cloud on the fee owner’s title is removed. A quitclaim deed can also be used to create an easement as well as release (extinguish) an easement. It can also be used to release remainder and reversion interests. It cannot be used to perpetuate a fraud, however.

OTHER TYPES OF DEEDS

A gift deed is created by simply replacing the recitation of money and other valuable consideration with the statement in consideration of his [her, their] natural love and affection. This phrase may be used in a warranty, special warranty, or grant deed. However, it is most often used in quitclaim or bargain and sale deeds, as these permit the grantor to avoid being committed to any warranties regarding the property.

A guardian’s deed is used to convey a minor’s interest in real property. It contains only one covenant, that the guardian and minor have not encumbered the property. The deed must state the legal authority (usually a court order) that permits the guardian to convey the minor’s property.

Sheriff’s deeds and referee’s deeds in foreclosure are issued to the new buyer when a person’s real estate is sold as the result of a mortgage or other court-ordered foreclosure sale. The deed should state the source of the sheriff’s or referee’s authority and the amount of consideration paid. Such a deed conveys only the foreclosed party’s title, and, at the most, carries only one covenant: that the sheriff or referee has not damaged the property’s title.

A correction deed, also called a deed of confirmation, is used to correct an error in a previously executed and delivered deed. For example, a name may have been misspelled or an error found in the property description. A quitclaim deed containing a statement regarding the error is used for this purpose. A cession deed is a form of a quitclaim deed wherein a property owner conveys street rights to a county or municipality. An interspousal deed is used in some states to transfer real property between spouses. A tax deed is used to convey title to real estate that has been sold by the government because of the nonpayment of taxes. A deed of trust may be used to convey real estate to a third party as security for a loan and is discussed in Chapter 10.

Conveyance After Death

If a person dies without leaving a last will and testament (or leaves one that is subsequently ruled void by the courts because it was improperly prepared), she is said to have died intestate, which means without a testament. When this happens, state law directs how the deceased’s assets shall be distributed. This is known as a title by descent, or intestate succession. The surviving spouse and children are the dominant recipients of the deceased’s assets. The deceased’s grandchildren receive the next largest share, followed by the deceased’s parents, brothers and sisters, and their children. These are known as the deceased’s heirs, or, in some states, distributees. The amount each heir receives, if anything, depends on individual state law and on how many persons with superior positions in the succession are alive. If no heirs can be found, the deceased’s property escheats (reverts) to the state.
TESTATE, INTESTATE

A person who dies and leaves a valid will is said to have died testate, which means that a testament with instructions for property disposal was left behind. The person who made the will is the testator (masculine) or testatrix (feminine). In the will, the testator names the persons or organizations who are to receive the testator’s real and personal property. Real property that is willed is known as a devise, and the recipient, a devisee. Personal property that is willed is known as a bequest or legacy, and the recipient, a legatee. In the will, the testator usually names an executor (masculine) or executrix (feminine) to carry out the instructions. If one is not named, the court appoints an administrator or administratrix. In some states the person named in the will or appointed by the court to settle the estate is called a personal representative.

Notice an important difference between the transfer of real estate ownership by deed and by will: once a deed is made and delivered, the ownership transfer is permanent, the grantor cannot have a change of mind and take back the property. With respect to a will, the devisees, although named, have no rights to the testator’s property until the testator dies. Until that time the testator is free to have a change of mind, revoke the old will, and write a new one.

PROBATE OR SURROGATE COURT

Upon death, the deceased’s will must be filed with a court having power to admit and certify wills, usually called a probate court or surrogate court. This court determines whether the will meets all the requirements of law: in particular, that it is genuine, properly signed and witnessed, and that the testator was of sound mind when the will was made. At this time anyone may step forward and contest the validity of the will. If the court finds the will to be valid, the executor is permitted to carry out its terms. If the testator owned real property, its ownership is conveyed using an executor’s deed prepared and signed by the executor. The executor’s deed is used both to transfer title to a devisee and to sell real property to raise cash. It contains only one covenant, a covenant that the executor has not encumbered the property. An executor’s deed is a special warranty deed.

PROTECTING THE DECEASED’S INTENTIONS

Because the deceased is not present, state laws attempt to ensure that fair market value is received for the deceased’s real estate by requiring court approval of proposed sales, and, in some cases, by sponsoring open bidding in the courtroom. As protection, a purchaser should ascertain that the executor has the authority to convey title.

For a will to be valid, it must meet specific legal requirements. All states recognize the formal or witnessed will, a written document prepared in most cases by an attorney. The testator must declare it to be his or her will and sign it in the presence of two to four witnesses (depending on the state), who, at the testator’s request and in the presence of each other, sign the will as witnesses. A formal will prepared by an attorney is the preferred method, as the will then conforms explicitly to the law. This greatly reduces the likelihood of its being contested after the testator’s death. Additionally, an attorney may offer valuable advice on how to word the will to reduce estate and inheritance taxes.

HOLOGRAPHIC WILL

A holographic will is a will that is entirely handwritten, with no typed or preprinted words. The will is dated and signed by the testator, but there are no witnesses. Nineteen states recognize holographic wills as legally binding. Persons selecting
this form of will generally do so because it saves the time and expense of seeking professional legal aid and because it is entirely private. Besides the fact that holographic wills are considered to have no effect in 31 states, they often result in much legal argument in states that do accept them. This can occur when the testator is not fully aware of the law as it pertains to the making of wills. Many otherwise happy families have been torn apart by dissension when a relative dies and they read the will, only to find that there is a question as to whether it was properly prepared and, hence, valid. Unfortunately, what follows is not what the deceased intended; those who would receive more from intestate succession will request that the will be declared void and of no effect. Those with more to gain if the will stands as written will muster legal forces to argue for its acceptance by the probate court.

**ORAL WILL**

An oral will, more properly known as a nuncupative will, is a will spoken by a person who is very near death. The witness must promptly put in writing what was heard and submit it to probate. An oral will can only be used to dispose of personal property. Any real estate belonging to the deceased is disposed of by intestate succession. Some states limit the use of oral wills to those serving in the armed forces.

**CODICIL**

A codicil is a written supplement or amendment made to a previously existing will. It is used to change some aspect of the will or to add a new instruction, without the work of rewriting the entire will. The codicil must be dated, signed, and witnessed in the same manner as the original will. The only way to change a will is with a codicil or by writing a completely new will. The law will not recognize cross-outs, notations, or other alterations made on the will itself.

**Adverse Possession**

Through the unauthorized occupation of another person’s land for a long enough period of time, it is possible under certain conditions to acquire ownership by adverse possession. The historical roots of adverse possession go back many centuries to a time before written deeds were used as evidence of ownership. At that time, in the absence of any claims to the contrary, a person who occupied a parcel of land was presumed to be its owner. Today, adverse possession is, in effect, a statute of limitations that bars a legal owner from claiming title to land when he has done nothing to oust an adverse occupant during the statutory period. From the adverse occupant’s standpoint, adverse possession is a method of acquiring title by possessing land for a specified period of time under certain conditions.

Courts of law are quite demanding of proof before they will issue a decree in favor of a person claiming title by virtue of adverse possession. The claimant must have maintained actual, visible, continuous, hostile, exclusive, and notorious possession and be publicly claiming ownership to the property. These requirements mean that the claimant’s use must have been visible and obvious to the legal owner, continuous and not just occasional, and exclusive enough to give notice of the claimant’s individual claim. Furthermore, the use must have been without permission (hostile), and the claimant must have acted as though he were the owner, even in the presence of the actual owner. Finally, the adverse claimant must be able to prove that he has met these requirements for a period ranging from 3 to 30 years, as shown in Table 5.1.
The required occupancy period is shortened and the claimant’s chances of obtaining legal ownership are enhanced in many states if he has been paying the property taxes and the possession has been under “color of title.” Color of title suggests some plausible appearance of ownership interest, such as an improperly prepared deed that purports to transfer title to the claimant or a claim of ownership by inheritance. In accumulating the required number of years, an adverse claimant may tack on his period of possession to that of a prior adverse occupant, commonly called tacking. This could be done through the purchase of that right. The current adverse occupant could in turn sell his claim to a still later adverse occupant until enough years were accumulated to present a claim in court.

<table>
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<th>Table 5.1</th>
<th>Adverse Possession: Number of Years of Occupancy Required to Claim Title</th>
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<td>Adverse occupant has color of title and/or pays the property taxes</td>
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As may be seen, in a substantial number of states, the waiting period for title by adverse possession is shortened if the adverse occupant has color of title and/or pays the property taxes. In California, Florida, Indiana, Montana, Nevada, and Utah, the property taxes must be paid to obtain the title. Generally speaking, adverse possession does not work against minors and other legal incompetents. However, when the owner becomes legally competent, the adverse possession must be broken within the time limit set by each state’s law (the range is 1 to 10 years). In the states of Louisiana, Oklahoma, and Tennessee, adverse possession is referred to as title by prescription.
Although the concept of adverse possession often creates the mental picture of a trespasser moving onto someone else’s land and living there long enough to acquire title in fee, this is not the usual application. More often, adverse possession is used to extinguish weak or questionable claims to title. For example, if a person buys property at a tax sale, takes possession, and pays the property taxes each year afterward, adverse possession laws act to cut off claims to title by the previous owner. Another source of successful adverse possession claims arises from encroachments. If a building extends over a property line and nothing is said about it for a long enough period of time, the building will be permitted to stay.

Easement by Prescription

An easement can also be acquired by prolonged adverse use. This is known as acquiring an easement by prescription. As with adverse possession, the laws are strict: the usage must be openly visible, continuous, and exclusive, as well as hostile and adverse to the owner. Additionally, the use must have occurred over a period of 5 to 20 years, depending on the state. All of these facts must be proved in a court of law before the court will issue the claimant a document legally recognizing his ownership of the easement. As an easement is a right to use land for a specific purpose and not ownership of the land itself, courts rarely require the payment of property taxes to acquire a prescriptive easement.

As may be seen from the foregoing discussion, a landowner must be given obvious notification at the location of his land that someone is attempting to claim ownership or an easement. Since an adverse claim must be continuous and hostile, an owner can break it by ejecting the trespassers, by preventing them from trespassing, or by simply giving them permission to be there. Any of these actions would demonstrate the landowner’s superior title. Owners of stores and office buildings with private sidewalks or streets used by the public can take action to break claims to a public easement by either periodically barricading the sidewalk or street or by posting signs giving permission to pass. These signs are often seen in the form of brass plaques embedded in the sidewalk or street. In certain states, a landowner may record with the public records office a notice of consent. This is evidence that subsequent uses of his land for the purposes stated in the notice are permissive and not adverse. The notice may later be revoked by recording a notice of revocation. Federal, state, and local governments protect themselves against adverse claims to their lands by passing laws making themselves immune.

Ownership by Accession

The extent of one’s ownership of land can be altered by accession. This can result from natural or man-made causes. With regard to natural causes, the owner of land fronting on a lake, river, or ocean may acquire additional land because of the gradual accumulation of rock, sand, and soil. This process is called accretion and the results are referred to as alluvion and reliction. Alluvion is the increase of land that results when waterborne soil is gradually deposited to produce firm, dry ground. Reliction (or dereliction) results when a lake, sea, or river permanently recedes, exposing dry land. When land is rapidly washed away by the action of water, it is known as avulsion. Man-made accession occurs through annexation of personal property to real estate. For example, when lumber, nails, and cement are used to build a house, they alter the extent of one’s land ownership.
Public Grant

A transfer of land by a government body to a private party is called a public grant. Since 1776, the federal government has granted millions of acres of land to settlers, land companies, railroads, state colleges, mining and logging promoters, and any war veteran from the American Revolution through the Mexican War. Most famous was the Homestead Act passed by the U.S. Congress in 1862. That act permitted persons wishing to settle on otherwise unappropriated federal land to acquire fee simple ownership by paying a small filing charge and occupying and cultivating the land for five years. Similarly, for only a few dollars, a person may file a mining claim to public land for the purpose of extracting whatever valuable minerals can be found. To retain the claim, a certain amount of work must be performed on the land each year. Otherwise, the government will consider the claim abandoned and another person may claim it. If the claim is worked long enough, a public grant can be sought and fee simple title obtained. In the case of both the homestead settler and the mining claim, the conveyance document that passes fee title from the government to the grantee is known as a land patent. In 1976, the U.S. government ended the homesteading program in all states except Alaska.

Dedication

When an owner makes a voluntary gift for the use of land to the public, it is known as dedication. Dedication is not a transfer of title, only a dedication of use for the benefit of the public. To illustrate, a land developer buys a large parcel of vacant land and develops it into streets and lots. The lots are sold to private buyers, but what about the streets? In all probability they will be dedicated to the town, city, or county. By doing this, the developer, and later the lot buyers, will not have to pay taxes on the streets, and the public will be responsible for maintaining them. The fastest way to accomplish the dedication is by either statutory dedication or dedication by deed. In statutory dedication, the developer prepares a map showing the streets, has the map approved by local government officials, and then records it as a public document. In dedication by deed, the developer prepares a deed that identifies the streets and grants them to the city.

Common law dedication takes place when a landowner, by his acts or words, shows that he intends part of his land to be dedicated, even though he has never officially made a written dedication. For example, a landowner may encourage the public to travel on his roads in an attempt to convince a local road department to take over maintenance.

Forfeiture

Forfeiture of title can occur when a deed contains a condition or limitation. For example, a grantor states in the deed that the land conveyed may be used for residential purposes only. If the grantee constructs commercial buildings, the grantor can reacquire title on the grounds that the grantee did not use the land for the required purpose.

Alienation

A change in ownership of any kind is known as an alienation of title. In addition to the forms of alienation discussed in this chapter, alienation can result from court action in connection with escheat, eminent domain, partition, foreclosure, execution sales, quiet title suits, and marriage. These topics are discussed in other chapters.
Vocabulary Review

Match terms a–z with statements 1–26.

a. Accretion 1. A written document that, when properly executed and delivered, conveys title to land.
b. Adverse possession 2. Requires that transfers of real estate be in writing to be enforceable.
d. Alluvion 4. The act of conveying ownership.
e. Bargain and sale deed 5. Anything of value given to produce a contract.
f. Cloud on the title 6. Promises and guarantees found in a deed.
g. Codicil 7. Any claim, lien, or encumbrance that impairs title to property.
h. Color of title 8. A deed that contains the covenants of seizin, quiet enjoyment, encumbrances, further assurance, and warranty forever.
i. Consideration 9. A deed that contains no covenants; it only implies that the grantor owns the property described in the deed.
j. Correction deed 10. A deed with no covenants and no implication that the grantor owns the property she is deeding to the grantee.
k. Covenants and warranties 11. To die without a will.
l. Dedication 12. A will written entirely in one's own handwriting and signed but not witnessed.
m. Deed 13. The process of verifying the legality of a will and carrying out its instructions.
n. Easement by prescription 14. A supplement or amendment to a previous will.
o. Executor 15. Acquisition of real property through prolonged and unauthorized occupation.
q. Grantor 17. Acquisition of an easement by prolonged use.
r. Holographic will 18. Waterborne soil deposited to produce firm, dry ground.
t. Land patent 20. Private land voluntarily donated for use by the public.
u. Probate 21. The process of land build-up due to the gradual accumulation of rock, sand, and soil.
w. Special warranty deed 22. A change in ownership of any kind.
x. Statute of Frauds 23. Used to correct an error in a previously executed and delivered deed.
y. Warranty deed 24. A person named in a will to carry out its instructions.
z. Will 25. Grantor warrants title only against defects occurring during the grantor's ownership.

26. Instructions stating how a person wants his property disposed of after death.
Questions & Problems

1. Is it possible for a document to convey fee title to land even though it does not contain the word deed? If so, why?
2. In the process of conveying real property from one person to another, at what instant in time does title actually pass from the grantor to the grantee?
3. What legal protections does a full covenant and warranty deed offer a grantee?
4. As a real estate purchaser, which deed would you prefer to receive: warranty, special warranty, or bargain and sale? Why?
5. What are the hazards of preparing your own deeds?
6. Name at least five examples of title clouds.
7. What is meant by the term intestate succession?
8. With regard to probate, what is the key difference between an executor and an administrator?
9. Does your state consider holographic wills to be legal? How many witnesses are required by your state for a formal will?
10. Can a person who has rented the same building for 30 years claim ownership by virtue of adverse possession? Why or why not?
11. Cite examples from your own community or state where land ownership has been altered by alluvion, reliction, or avulsion.

Additional Readings

American and English Law on Title of Record: Practice and Procedure by Alfred Bonito Cosey (Gaunt, Inc., 1999).
“A Friend in Deeds” by Peter J. G. Williams (Estates Gazette, May 19, 2001, issue 120, p. 224).
Chapter 5

Transferring Title

VOCABULARY REVIEW

a. 21 f. 7  k. 6  o. 24  s. 11  w. 25
b. 15 g. 14  l. 20  p. 4  t. 19  x. 2
c. 22 h. 16  m. 1  q. 3  u. 13  y. 8
d. 18 i. 5  n. 17  r. 12  v. 10  z. 26
e. 9  j. 23

QUESTIONS & PROBLEMS

1. Yes. The fact that a document is a deed depends on the wording it contains, not what it is labeled or not labeled.
2. Title passes upon delivery of the deed by the grantor to the grantee and its willing acceptance by the grantee.
3. The full covenant and warranty deed offers the grantee protection in the form of the grantor’s assurances that he is the owner and possessor, that the grantee will not be disturbed after taking possession by someone else claiming ownership, that the title is not encumbered except as stated in the deed, and that the grantor will procure and deliver to the grantee any subsequent documents necessary to make good the title being conveyed.
4. Warranty deed. It provides the grantee with the maximum title protection available from a deed.
5. The hazards of preparing one’s own deeds are that any errors made will cause confusion and may make the deed legally invalid. Preprinted deeds may not be suitable for the state where the land is located or for the grantor’s purpose. An improperly prepared deed, once recorded, creates errors in the public records.
6. Dower right, curtesy right, community property right, mortgage right of redemption, tax lien, judgment lien, mechanic’s lien, undivided interest held by another, inheritance rights, and easements are all examples of title clouds.
7. When a person dies without leaving a will, state law directs how that person’s assets are to be distributed.
8. An executor is named by the deceased in the will to carry out its terms. In the absence of a will, the court appoints an administrator to settle the deceased’s estate.
9. Requires local answer.
10. No. Occupancy on a rental basis is not hostile to the property owner but, rather, is by permission.
11. Requires local answer.