SUMMARY OF *HAYES*

1. Summary of *Hayes*:

    a. We established that *Hayes* holds that we need more than evidence of the oral conveyance such as might be provided by the taking of possession and payment of taxes. We may need acts of detrimental reliance such as would give rise to an estoppel; at a minimum we need acts to indicate that a fee interest was conveyed. The holding is standard and different from what is normally required in cases of personal property (i.e., sales of goods). The reason for this is that there many ways in which someone may have possession of land with an interest less than full fee ownership.

    b. What is required in *Hayes* is strong: a change of position such as could not, at least not easily, but put back with the payment of money damages. In this regard the case is stronger than some. The purchase of additional land may be key. The building of a new barn and other improvements can be compensated.

    c. In order to get at why it is we must ask a question: Why did the court not hold that Matt and Susie had established title by adverse possession under Minnestota's 15 year statute of limitations?

    d. The reason why the case is stronger than some is probably because there is so little evidence that an oral transaction took place. To put it bluntly we need a double estoppel: you're estopped from claiming the statute of frauds and then you're estopped from claiming that no oral conveyance took place.

2. What are the implications of this for the Statute of Frauds generally (a problem both in contracts and in property)? There are at least three different justifications "taking an oral conveyance out of the statute." The relative conceptual clarity of this scheme is rarely reflected in the opinions, where the different concepts tend to merge and blur.

    a. Do we have enough evidence that the purpose of the statute can be fulfilled, even though its specific requirements are not? This is all that need be implied in the phrase "executed parol gift." An alternative idea is found in the notion of "part performance," which may be limited to taking out of the statute only that part of the oral contract (which should have been in writing) that has been performed on one side (e.g., 1000 widgets only 500 of which have been delivered). In the case of a fee interest in land more performance is required than simply taking possession, because taking possession could be evidence of a short-term lease or even of an estate at will. No estoppel is required here, at least conceptually.

    b. Has the grantor in the oral conveyance behaved in such a way and the grantee relied on that behavior in such a way that it would be unjust to allow the grantor to claim the benefit of the statute? This is, of course, an estoppel. It assumes that there has been an oral conveyance, which we are forbidden by the statute to look into. It calls, however, for a balancing act: how conducive to reliance was the grantor's behavior, how detrimental was the reliance?

    c. *Hayes* seems to require more, not only detrimental reliance but also such reliance as could not be set right by money damages. In this case, building the barn was not enough (we can compensate Susie for that), but buying adjoining pieces of property and getting married are things that can't be undone, or at least not easily. My suggestion was that such extreme acts of

reliance may be required in this case because the court had already decided that there was no oral gift, at least not one in 1892. An entry onto land pursuant to an oral gift is "hostile," within the meaning of the concept of adverse possession. The court had already decided that Matt's entry was not hostile in 1892. Hence, it had to use estoppel both to create an oral gift where none was evidenced, and, once it had been created, to take it out of statute. Hence further, while this is one of the leading American cases on this topic, one can't be sure that in a case where it is clear that there was an oral conveyance the court would require as much as it did in the *Hayes* case.

DELIVERY AND RECORDING

1. Where do they fit into the 4-stage process of conveying land that we described yesterday?
2. Delivery as an outward manifestation of intent. Why have a delivery requirement, (which has no parallel in the case of contracts)?
    a. A survival of livery of seisin
    b. Gives grantee evidence of the conveyance
    c. Impresses the grantor with the finality of his/her act
    d. Protects the unwary grantor

    Are any of these satisfactory explanations?
3. Recording as a title assurance mechanism
    a. What does the statute say?

Statute 1 N.C. GEN. STAT. § 47–18 (2012): (a) No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county. Unless otherwise stated either on the registered instrument or on a separate registered instrument duly executed by the party whose priority interest is adversely affected, (i) instruments registered in the office of the register of deeds shall have priority based on the order of registration as determined by the time of registration, and (ii) if instruments are registered simultaneously, then the instruments shall be presumed to have priority as determined by:

(1) The earliest document number set forth on the registered instrument. (2) The sequential book and page number set forth on the registered instrument if no document number is set forth on the registered instrument.

The presumption created by this subsection is rebuttable.

Statute 2 IOWA CODE §548.1 (2012): "**1. Effect of recording.** An instrument affecting real estate is of no validity against subsequent purchasers for a valuable consideration, without notice, or against the state or any of its political subdivisions during and after condemnation proceedings against the real estate, unless the instrument is filed and recorded in the county in which the real estate is located, as provided in this chapter."

Statute 3 CAL. CIV. CODE § 1214 (2012): "Every conveyance of real property or an estate for years therein, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as

against any judgment affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action."

A self-test version of the following problems with the answers may be found at http://www.law.harvard.edu/faculty/cdonahue/courses/prop/lec/outcl14_19S_classtest.html

b. Problems in recording (p. S190):

i. O —> A not recorded

ii. O —> B (who records)

Who has title as between A and B

i. Under 'common-law' priority, i.e., in the absence of statute? First in time is stronger in right (*primus in tempore potior est in iure*); no one gives what he hasn't got (*nemo dat quod non habet*).

ii. Under Statute 1?

iii. Under Statute 2?

iv. Under Statute 3?

v. One might think that the results under a race statute and a race-notice statute would be quite different. As a practical matter, they are not. In MA, for example, which has a race statute, conveyancers always have their clients record the deed immediately upon receiving it. Can you see why?

vi. A few thoughts on inquiry notice and constructive notice. Although the terms are not always used precisely, we might distinguish between the notice that one is presumed to have from an examination of the recorded instruments (constructive notice from the record) and the notice that one might have obtained by an inspection of the premises (inquiry notice).

4. *Micklethwait*

a. The family setting (my son the lawyer, my son the doctor, and my son-in-law the crook) — who's Fulton, "superintendant of banks in charge of the liquidation"?

b. Holding? (The form of action was an equitable action to cancel the deed as of record.)

c. Does this case involve an application of the recording act? If so, in what sense?

d. What if Marshall had forged the deed?

e. What more could the bank have done?

f. What more could Abigail M. have done?

"It is a general and just rule, that when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune."

g. Who owns the property now?

The court's summary of the case at the beginning says: "Abigail Micklethwait, claimed title to said property, free from the judgment lien of defendant in error, and prayed that the conveyance from her to Louise be ordered canceled of record . . . ."

She prevailed in the trial court but that was reversed in the intermediate appellate court. The opinion of the Supreme Court deals only with the question of the judgment lien, and doesn't say anything about the title to the property. Clearly as between Abigail and Louise, Abigail has the better right even after the judgment. Presumably, the Micklethwaits are going to have to discharge the judgment lien if they want to continue to own the property. If they do, they will then file the discharge as of record. If they want to put the title back into Abigail, they will then have to sue Louise, get a judgment and record that. Much, obviously, depends on how annoyed they are with Louise. Abigail is now 85, and they may just want to leave it as is. They might, however, want to put the property in trust so that Leon G. can't get at it again.

5. *Hood*

   a. This too is an equitable action to cancel a deed as of record.

   b. Just like *Micklethwait*, i.e., the Websters are seeking to have a deed set aside because it should not be on the record?

   c. Why are the Websters relying on the act?

      i. FH —> WH not delivered — 1913

      ii. FH —> Websters — 1928 — recorded

      iii. FH —> WH — 1933 — delivery of first deed

   d. Common law priority and relation back. Under common-law priority the result is clear enough. It is only if we apply the equitable doctrine of relation back that we get into a problem that requires the use of the recording act. Who should have the burden of proof on the question of whether we should relate back the date of the actual delivery of the deed to the date when it was put in escrow?

   e. On the burden of proof question that the court did decide, I must confess myself agnostic. The court's position is certainly defendable, and it is aided by the fact that the Websters are the ones who are seeking the benefit of the statute. There's a note in the material that sets forth some recent cases on the topic. The court's holding is well within the current mainstream. Cases will also be found, however, where the court shifts the burden of producing evidence on the question of notice to the one opposing the claim, once the other party has claimed bona fide purchaser status. No recent cases were found dealing specifically with the burden of proving the status of a purchaser, but perhaps that's because I didn't look far enough.

   f. Anything the Websters can do now? There's a possibility that the executor of Florence Hood's estate, who was not a party to the case, could try again.