

## Chapter 3

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# THE CONVEYANCE AND WHAT YOU CAN CONVEY

## Section 1. INTRODUCTION TO CONVEYANCING AND ESTATES IN LAND

There are two principal forms of conveyance of land in use in America today, conveyance by deed and conveyance by will or devise. Technically, a deed is any instrument under seal, but the use of sealed instruments has become so closely associated with conveyances of land or interests in land between living persons that the word *deed* has come to be shorthand for an *inter vivos* conveyance of real property. Most commercial conveyances of real property are by deed, but donative transactions between living people can also be made by deed. Conveyances by will, on the other hand, are almost always donative transactions.

What is the difference between a deed (in the shorthand sense) and a will? The question is easier to ask than to answer. We will attempt an answer at the end of this section (Note on Wills, *infra*, p. S197). For our purposes now, a relatively simple distinction will suffice: a deed conveys something to the grantee presently; a will conveys nothing until the devisor dies. The interest which the grantee obtains under a deed need not be a present interest, but he must presently receive an interest. A will, on the other hand, is ambulatory; the devisor may revoke it at any time before his death, and if he does, the devisee will receive nothing. (One of the issues in the case involving the deed which follows this introduction was whether the document described as a deed was, in fact, a will.)

In commercial conveyances of real property today deeds are but one part of the process. In most American jurisdictions the process will begin [p\*347] with a contract in which the seller (vendor) agrees to sell his land to the buyer (purchaser). The purchaser will then obtain one or more forms of financing, and the vendor will seek to assure or insure his title. The whole process will come to a head at a closing in which the financing documents, the documents of title assurance and/or insurance, and the deed will be exchanged. This section focuses on the deed itself, its form, delivery and recording. The succeeding sections in this chapter deal with the types of possessory estates which can be created by deed or will. Chapter 5 of DKM3 returns to the conveyancing process itself and deals with the elements other than the deed; the contract, financing and title assurance-insurance, but we will not be doing that chapter in this version of the materials. While this organization necessitates splitting the modern conveyancing process into two parts, we think that the most difficult part, estates and future interests, is easier to understand if you read about it right after you have learned about deeds.

**A. DEEDS, FORMAL AND INFORMAL****DEED OF JAMES ABBOTT TO CLARISSA B. ABBOTT**

Kennebec County, Maine

April 30, 1872.<sup>1</sup>

Know all men by these presents, that I, James Abbott of Gardiner in the county of Kennebec, in consideration of one dollar paid by my wife Clarissa B. Abbott, and for the purpose of providing and securing to my said wife a comfortable support in the event of my decease during her life, the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell and convey, unto the said Clarissa B. Abbott of said Pittston, her heirs and assigns forever a certain lot of land situate in said Pittston and bounded . . . .

This deed is not to take effect and operate as a conveyance until my decease, and in case I shall survive my said wife, this deed is not to be operative 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 this deed shall be operative to convey to my said wife said premises in fee simple. Neither I, the grantor, nor the said Clarissa B. Abbott, the grantee, shall convey the above premises while we both live without our mutual consent. If I, the grantor, shall abandon or desert my said wife then she shall have the sole use and income and control of said premises during her life.

To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof to the said Clarissa B. if she shall survive me, her heirs and assigns, to their use and behoof forever. And I do covenant with the said Clarissa B. her heirs and assigns, that I am lawfully seized in fee of the premises; that they are free of all incumbrances; that I have good right to sell and convey the same to the said Clarissa B. if she shall survive me, and her heirs and assigns forever, against the lawful claims and demands of all persons.

In witness whereof, I, the said James Abbott, have hereunto set my hand and seal, this thirtieth day of April in the year of our Lord one thousand eight hundred and seventy-two.

JAMES ABBOTT. [Seal.] [p\*348]

Signed, sealed and delivered in presence of

N.M. WHITMORE,

L. CLAY.

Duly acknowledged and recorded.

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<sup>1</sup> This deed is quoted in full in *Abbott v. Holway*, 72 Me. 298 (1881), *infra*, p. S217.

***Note on the History of Deeds***  
***(with Particular Focus on the Words of Conveyance)***

Examine James Abbott's deed carefully. It represents an uneasy compromise between the formalism which characterizes the drafting of instruments of conveyance and Abbott's own rather individualistic intent. In order to understand how the formal parts of the conveyance came to be as they are we must delve into some history.

*How It All Began—Deeds Poll and Indentures.* In the time of Bracton (13th century), it was highly desirable that someone be seised of every piece of land. Simple possession like that of a squatter or a tenant was not enough; there had to be someone who was seised, i.e., possessed and claiming a freehold (an estate in fee or for life).

We have encountered the concept of seisin before. We have avoided, however, any attempt to

describe why seisin of a freehold was so important historically. The topic is a complicated one. For a basic understanding of the development of the law of deeds (and of estates and future interests) it suffices to say here that the freeholders were persons to whom the king and the other lords in the feudal hierarchy looked for the supply of resources necessary for the maintenance of what a later age would call the public functions of the realm. At first, these resources would be provided in kind. The freeholder might send knights or foodstuffs and, or he might be obliged personally to perform some public duty, like attendance at court or carrying the king's banner in battle. The obligations varied depending upon the conditions of the initial grant of the land and the type of tenure by which the freeholder held. As time went on these obligations tended to be commuted into money payments, so that what began as an intensely personal relationship came to look more like a system of taxation. The most significant of these obligations from the point of view of the development of the law were the "feudal incidents," a miscellany of obligations principally connected with the passage of land from one generation to the next. The important point, however, is that it was the freeholder who owed these obligations. He in turn would extract various forms of service and payment from the non-freeholders on his land, but that was his business. The king and the great lords looked to him for performance, not to the villeins, copyholders and tenants for years who worked the land.<sup>1</sup>

It is not surprising, therefore, that a principal concern of the law (at least the king's law) was to ensure that all land was seised of someone and that in the event of transfer seisin be properly transferred. Conveyancing was accomplished by a process known as an *enfeoffment with livery of seisin*, literally, a handing over of the fee with delivery of the seisin. The ceremony of livery of seisin was accompanied by one or a number of quaint rituals—the [p\*349] transfer of a twig from the trees on the land, the turning over of the hasp on the door of the house—but its legal essence lay not in these ceremonies but rather in the turning over of possession by the feoffor to the feoffee, before witnesses.

In order to make a record of these acts, to strengthen the memory of the witness, and to record the details of more complicated transactions, it became customary to write down a memorial of the transaction in a charter, the ancestor of the modern deed. (Writing was not required for the validity of the conveyance until the seventeenth century, as we shall see, *infra*, p. S176.) In keeping with their character as a memorial the early charters do not say "I do hereby give," as does James Abbott's deed, but rather "I have given." The memorial character of the charter is also indicated by its traditional first words "Know all people present and to come."

In some transactions, particularly those in which the grantee was promising to do something, it was desirable that both parties have a copy. It became the practice to write the deed in duplicate on a single piece of parchment and to cut, "indent," it in an irregular fashion between the two copies of the text. If a dispute arose, the two pieces of the document could be pieced together to determine if they came from the same source. These documents, called *indentures*, were quite different in nature from the traditional charter which came to be known as a *deed poll* because of its unindented, smooth ("polled") top. An indenture is much more like a contract than evidence of a transaction that has already occurred. It begins with such language as: "This indenture made this \_\_\_\_ day of \_\_\_\_ between A, hereinafter called the party of the first part, and B, hereinafter called the party of the second part . . ." (Old movie fans will recall how the comic possibilities of this formula were exploited by Chico Marx in *A Night at the Opera*.)

Is the Abbott deed a deed poll or an indenture?

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<sup>1</sup> This paragraph paints with a very broad brush. While you need not know more to understand what follows, fuller and more accurate discussions may be found in A. SIMPSON, AN INTRODUCTION TO THE HISTORY OF LAND LAW 1–24 (1986); M. BLOCH, FEUDAL SOCIETY (L. Manyon trans. 1961); F. GANSHOF, FEUDALISM (3d Eng. ed. 1964).

*The Words of Conveyance.* Now let us examine the operative words in the Abbott deed: “I . . . do hereby give, grant, bargain, sell and convey . . .” Such apparent tautology makes legalese annoying to non-lawyers. Yet this kind of tautology, although it may have little function today, frequently reveals the fascinating progression of law. In fact, Abbott’s lawyer was rather skimpy in his words of conveyance. He could have said “give, grant, bargain, sell, lease, release, covenant to stand [p\*350] seised, surrender, yield up, remise, and quitclaim forever.” Each word means something slightly different; each has its own history.

An enfeoffment is a species of the genus gift. It requires no consideration, although consideration may be present. For this reason the operative words in the ancient charters of enfeoffment were simply, “I have given.” But an enfeoffment requires livery of seisin, and the interest which the grantor wishes to give may not be capable of livery. For example, he may wish to give to his neighbor a right of way across his land while retaining possession for himself, or he may wish to give his reversion in fee while a life tenant is on the land. The common law early recognized that certain types of interests were not capable of transfer by livery of seisin and had to be transferred by pieces of paper or parchment. The word *give* had already been preempted as the operative word in charters of enfeoffment, so the word *grant* was chosen to describe the conveyance of interests incapable of livery. To ensure that all interests were being conveyed even in an enfeoffment (*e.g.*, that all the easements appurtenant to the land were conveyed along with it), the words *give and grant* came to be used as the operative words in charters of enfeoffment.

The conveyance of interests between life tenant and remainderman or landlord and tenant was sufficiently peculiar to warrant a special vocabulary. The conveyance of the remainder interest to the life tenant could not take place by livery of seisin since the life tenant was himself seised. The conveyance was accomplished by a type of deed which came to be known by the special term *release*. The conveyance of the landlord’s interest to the tenant for a term of years, by analogy, acquired the same name. While the conveyance by the life tenant or termor to the remainderman or landlord could be accomplished by livery of seisin,<sup>2</sup> this species of conveyance could also be accomplished by a deed known as a *surrender*, the opposite of the *release*. Since it might be nice to have a generic word describing both surrenders and releases lawyers came to use the word *remise*, which also had the advantage of being a fancy French word.

Finally, there were situations in which the state of the title was so confused that no one really knew who was fee owner, life tenant, termor, or anything else. To avoid the expense of litigation, individuals have always been willing to settle their differences for a price. When it came time for the person who was giving up his claim to make a deed embodying the settlement, none of the precise words of conveyance would do, so he was said to *quitclaim* his interest to the other party.

Early in the history of conveyancing, there appears a lawyer called Abundance of Caution. “Even if you’re sure what kind of interest you have,” Abundance tells his client, “what possible harm can there be in using all the words of conveyance, just in case a court later on decides that you didn’t have the interest you thought you had but some other.” Abundance’s clerk who writes up the deeds is delighted with this idea, since he gets paid by the word. The client grumbles, but surely a bit of foolish language is worth it to avoid a lawsuit. So he solemnly signs a deed in which he purports to “give, grant, release, remise, surrender, quitclaim and yield up” all his right, title and interest (another tautological formula) in the land in question.

*The Rise of the Use.* So far we have said nothing which would be terribly surprising to Bracton. The fourteenth century, however, produces some remarkable [p\*351] changes which were to have a permanent effect on Anglo-American law and which were to give us some more

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<sup>2</sup> Or at least of possession. You will recall that the termor, strictly speaking, is not seised, because his interest is not a freehold. See p. 55 *supra*.

words of conveyance.

The great strength of the common law system of livery of seisin was in the notoriety of the conveyance. But there are many situations in which a landowner, for good reasons or bad, does not want to be quite so public about his conveyances. He may wish to give his land to his favorite child and not have his other children know about it, or he may simply not want his family settlement which may involve children born out of wedlock, mistresses, or his favorite charity known to all the gossips in the village, or he may be avoiding his creditors or the tax collector. Further, there were some restrictions on conveyances in the fourteenth century which many landowners wished to avoid. Land could not be conveyed by will. If not conveyed *inter vivos*, it passed by inheritance and the eldest son took all, or if there were no sons, all the daughters took equally. Further, the passage of land by inheritance involved the payment of the feudal incidents. Finally, the Statute of Mortmain of 1279 prohibited conveyances of land to the Church.

During the fourteenth century, the Lord Chancellor was beginning to develop the jurisdiction of a court later to be known as “the court of equity” or “chancery.” See Note on “Equity,” *supra*, p. S114. The Chancellor’s jurisdiction and the desires of land owners combined to develop a device known as the *conveyance to uses*. Here is roughly how it worked:

Suppose that Sir Roger Not-So-Quick is hard-pressed by his creditors. He wishes to avoid their taking his land. Further, since he is not getting any younger, he wishes to convey one-third of his land to his son (born out of marriage) and to make a will leaving one-third of his land to his mistress and the final third to establish a chantry chapel to his memory in the monastery of St. Swithun-by-the-Sea. Sir Roger enfeoffs a committee of lawyers, Master Charles, Master Alan, and Serjeant Picklethorpe, of all his land. The charter of enfeoffment states: “I hereby give, grant [etc.] to C, A, P and their heirs to my use and behoof.” When the creditors arrive Sir Roger gleefully informs them that his land is no longer his, and the common law courts will agree with him. But if C, A, and P attempt to oust Sir Roger, the equity court will prevent them, because Sir Roger retained the use of the land in himself, and it would be inequitable to allow C, A, and P to get something which they clearly didn’t bargain for and which Sir Roger clearly did not intend to give them.

Now Sir Roger is ready to act out the second part of the charade. He *bargains and sells* for valuable consideration, but a low price, his use of one third to his son. The common law courts, since they do not recognize Roger’s interest, obviously cannot recognize the sale. But the equity court recognizes it, and the son now has the use of one third. Sir Roger also makes a will devising the use of the rest of the land as he desired. Common law will have none of it, but equity recognizes the will, and the uses pass to the objects of Sir Roger’s beneficent intent. When the feudal lord comes to collect his feudal incidents, he discovers that the land is seised of C, A, and P, all of whom are alive and disgustingly healthy. The common law, as you recall, taxes the inheritance of the fee but does not recognize the use. Further, when C, A, and P retire from practice they carefully enfeoff Master George, Master Thomas, and Serjeant Whistlethwaite, who are a generation or so their junior, so that the fee need not be inherited by anyone for generations. C, A, P, G, T, and W are all, of course, paid a modest fee for their services which consist simply in seeing to it that they don’t all die out without a new enfeoffment. [p\*352]

You might well ask how a nation of supposedly intelligent people would allow all this to happen. The answer lies partially in the history of the period, but partially too in the nature of the development of law. The use took well over a hundred years to evolve, and its full implications were not perceived at the beginning. Tax avoidance has always been a popular sport among lawyers, and judges do not always keep the needs of the fisc paramount in their minds. Further, the feudal incidents were the product of a social system which was rapidly crumbling in the fourteenth century, and many probably thought they ought to die out. Finally, the barriers which the common law placed on the inheritance of land and its conveyance to churches were also

products of past conditions. The churchmen connected with the Chancellor's court saw much greater value in allowing someone to benefit people whom he thought needed it, and thus in his last moments to benefit his soul, than they saw in preserving dynastic military families.

Some efforts were made to stop the more flagrant abuses of the use. A late fourteenth century statute, 15 Ric. 2, c. 5 (1392), restrained the employment of the use as a device to avoid the Statute of Mortmain. An even earlier statute, 50 Edw. 3, c. 6 (1377), attempted to restrict it as a device for avoiding creditors, although it took further legislation to put a firm stop to this feature of the use.<sup>3</sup>

Despite these statutory restrictions, the use continued to be very popular, so popular in fact that in the early fifteenth century it came to be held that a feoffment which did not recite consideration would be presumed to be for the use of the feoffor. Another holding, with important ramifications for the future law, was that if consideration had passed, the use passed, even if there was no bargain and sale deed conveying the use.

*The Statute of Uses.* At the beginning of the sixteenth century, the gap between those interests in land cognizable in equity and those cognizable at law was narrowed considerably. Henry VIII's largely unsuccessful foreign adventures had brought him close to bankruptcy. As the feudal overlord of large portions of England, he saw in the feudal incidents a potential for revenue which was being denied him because of conveyances to uses. In 1535 he forced a reluctant Court of King's Bench to hold that devises of uses were invalid, and in 1536 Parliament passed the Statute of Uses. This Statute did not abolish the conveyance to uses but simply stated that an enfeoffment of *A* to the use of *B* would have the effect of conveying the legal as well as the equitable estate to *B*. Further, the Statute of Enrollments passed in the same year required that bargains and sales of freeholds must be enrolled in public registries or else they would be void.

Let us consider Sir Roger's shenanigans after the Statutes of Uses and Enrollments. His enfeoffment of *C*, *A*, and *P* to his own use is still a valid conveyance, but under the Statute of Uses, Sir Roger's use is said to be *executed*, which simply means that seisin and legal title bounce right back to Sir Roger. Now suppose that Sir Roger bargains and sells the use of his land to his son. This is a valid conveyance but under the statute the use is executed, and his son acquires both legal and equitable title. Further, under the Statute of Enrollments, Sir Roger must enroll his conveyance in order for it to be valid, so that his other children, the village gossip, and his creditors all know about it. Finally, Sir Roger can no longer devise a use since the courts have just held that such devises are invalid. This holding was particularly galling to landowners. The example of King Lear was paramount in their minds, and they had become [p\*353] used to the power to devise. In 1540 Parliament passed the Statute of Wills permitting the devise of legal title to land but providing that the feudal incidents would attach to one-third of the devised land. See generally Ives, *The Genesis of the Statutes of Uses*, 82 ENG. HIST. REV. 673 (1967).

*After the Statute of Uses.* The desired effects of the Statutes of Uses and Enrollments were short-lived. By the beginning of the seventeenth century lawyers had devised a means to get around the Statutes of Uses and Wills in such a way as to avoid the feudal incidents, and from that time forward the incidents were a dead letter as a means of taxation. For the details, see A. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 191–92 (1986). The Statute also had some remarkable and unforeseen effects on the law of estates in land and future interests which we will consider *infra*, pp. S222–225.

In the seventeenth century, as well, the courts developed the notion that an active use, one in

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<sup>3</sup> 1 Hen. 7, c. 1 (1485); 19 Hen. 7, c. 15 (1504).

which the feoffee to uses was supposed to manage the estate for the benefit of the *cestui que use*,<sup>4</sup> would not be executed under the statute, and thus began the modern law of trusts.

The law of conveyancing takes a queer turn at this point dictated by the desire of landowners to avoid the Statute of Enrollments. That Statute, you will recall, required that the bargain and sale of freeholds be enrolled in order to be valid. Suppose, however, that the conveyance was not a bargain and sale but was made in consideration of natural love and affection. This form of conveyance, a variety of a form known as a *covenant to stand seised*, was known before the Statutes of Uses and Enrollments and had the effect of passing the use to the covenantee while keeping the legal estate in the covenantor. Under the Statute of Uses the use would be executed, but the Statute of Enrollments would not apply. Thus, Sir Roger could convey secretly to his son through the device of the covenant to stand seised.

But what of Sir Roger's mistress or his business partner? The courts would not allow the covenant to be used for them (limiting it to relationships by marriage or blood). It was not until the end of the sixteenth century that a brilliant lawyer, Serjeant Moore, saw his way clear to avoiding the Statute of Enrollments in these situations. Bargains and sales of freeholds must be enrolled, but the statute said nothing about bargains and sales of non-freehold interests. If Sir Roger bargains and sells a term of years to his mistress, she will get, under the Statute of Uses, both the legal and the equitable term without the need for her actually to enter into possession. Sir Roger can then execute a deed of release conveying his reversionary interest to her without the necessity of livery of seisin, since it had been decided by this time that it would be pretty silly to require livery of seisin to a termor whom the law presumes is already possessed. (The logic of this one slithers around a bit. Can you see why?) All of this can be done without any publicity, and the Statute of Enrollments becomes a dead letter. [p\*354]

### Questions

1. Why does James Abbott's deed say that Clarissa B., her heirs and assigns will get the land "to their use and behoof"? Do you detect the unseen hand of Abundance of Caution here too?

2. Assume that the common law is in force in Maine in 1872. (The "common law" includes both legal and equitable principles and such statutes as the Statute of Uses which are "in and of the common law," if they were passed by Parliament prior to 1776.) Is James Abbott's deed valid? What kind of interest does Clarissa B. have? Consider the Note on Wills, p. S197 *infra*, and the material on executory interests, pp. §§ 2C2–3 *infra*.

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<sup>4</sup> A law French term shortened from the phrase *cestui a que use le feoffment fuit fait*, "he to whose use the feoffment was made," an odd bit of French but recognizable as such. You will frequently see the plural of the phrase (or its modern equivalent) rendered as *cestuis que usent* (*trustent*), a phrase which cannot be parsed. See A. SIMPSON, *supra*, at 173–74.

### Note on the Parts of Deeds

Examine the Abbott deed again. Notice how it falls into definite parts. The initial recitals including the heading, the consideration and the circumstances, the operative words of conveyance, the description of the land and its appurtenances, and the recitals of reservations, exceptions, conditions or restrictions all form the first part known as the *premises*.

There follows a curious clause beginning "to have and to hold." This is the *habendum* clause from the Latin *habeo* meaning "to have". Originally this was the most vital part of the deed from the point of view of the grantee. It told him he had possession (*habendum*), that he would hold (*tenendum*) the land of a certain feudal lord, and that he would render (*redendum*) to that lord certain feudal services, and it also told him what kind of estate he had: e.g., "to have and to hold of Lord Coke unto said grantee for and during his natural life (*or* unto said grantee his heirs,

successors and assignees forever) and to render unto said Lord seven knight's fees." The *redendum* clause went out with the abolition of feudal services. The *tenendum* remained as a silent reminder that the notion of tenure of land is not quite dead. And, of course, the *habendum* and the description of the estate granted remained.

Unfortunately, Abundance of Caution got into the act, and he began to put a description of the estate granted in the premises after the words of conveyance. In the Abbott deed it is in the phrase "unto the said Clarissa B . . . her heirs and assigns forever." See *infra*, p. S201. Naturally, the time came when Abundance's clerk wrote up a deed in which the estate conveyed in the granting clause conflicted with that described in the *habendum* clause. The general rule today in such cases is that the *habendum* clause may add to, modify, or qualify the estate in the granting clause, but in the case of direct conflict the latter will prevail. Hence, in all probability, a modern court would hold that the description of the estate in the granting clause in the Abbott deed should be read together with the qualifications in the *habendum* clause.

After the premises and the *habendum* clause there follow the covenants of title. James Abbott's deed contains four of the traditional covenants—of seisin, of good right to convey, against encumbrances, and of general warranty. He does not make the traditional covenant of quiet enjoyment, or the slightly less traditional covenant of further assurances. Suffice it to say here that the first three are breached, if at all, at the time they are made, while the last three are breached, respectively, when the events warranted against occur, when the quiet enjoyment of the grantee is disturbed, and when the grantor refuses to buy off a newly-discovered outstanding interest. This has obvious consequences for the Statute of Limitations. (Query: when are the covenants in the Abbott case effective? Why did Abbott's lawyer leave out the other covenants?) The presence of these covenants also illustrates that the sale of real estate is the last bastion of *caveat emptor* in the law. Absent these covenants I can sell you the Brooklyn Bridge and the law will not imply my warranty that I own it.<sup>1</sup>

The final clause in the deed is the *testimonium* clause. While the clause is self-explanatory, the formalities of execution are not, and we will consider them *infra*, p. S183.

Deed-writing today has had some of the mystery taken out of it by the use of forms. Many states have even adopted forms of deeds by statute. See, e.g., MINN. STAT. ANN. § 507.09 (Supp. 1991). Some of these statutory forms are streamlined; rather than including the full text of all operative terms, they incorporate statutory provisions, such as warranties, by reference. See, e.g., ILL. ANN. STAT. ch. 30, para. 9 (Smith-Hurd Supp. 1991); N.J.S.A. §§ 46:4–1 through 46:4–11 (1989). Determine what deed forms are regularly used in your state. Are they statutory forms? If they are statutory forms what are the statutory incentives for their use? Do the forms include one that would be appropriate for a non-commercial family transfer like that reflected in the Abbott deed? [p\*356]

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<sup>1</sup> The courts in many jurisdictions do imply a warranty in favor of the purchasers of new homes from the builder. See, e.g., *Gable v. Silver*, 258 So. 2d 11 (Fla. Dist. Ct. App. 1972), *aff'd mem.*, 264 So. 2d 418 (Fla. 1972); Annotation, 25 A.L.R.3d 383 (1969); *infra* pp. 586–88. This warranty is not a warranty of title but one variously described as a warranty of fitness, merchantability, or habitability. However, since the opinions recognizing such a warranty often draw upon analogy to the Uniform Commercial Code, the doctrine may eventually be extended to warranties of title as well. Cf. *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E.2d 102 (1975) (holding a non-commercial seller of land liable under an implied warranty when a house could not be built on the land because of lack of proper drainage for a septic tank).



**METZGER V. MILLER**

United States District Court for the  
Northern District of California.  
291 F. 780 (1923).

VAN FLEET, J. This is an action in equity against the defendant as Alien Property Custodian to have it declared that certain property, seized by the latter under the supposed protection of the Trading with the Enemy Act of October 6, 1917 (Comp.St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115 1/2a-3115 1/2j), is the property of the plaintiff, and for an accounting of the income and profits thereof.

In 1914, one Mathilde Graf died in Sacramento, in this state, leaving an estate, the bulk of which she devised to her sister, Karoline Schwab, living in Germany and a subject of the then German Emperor. Her will was in due course admitted to probate, the estate administered, and the devised property regularly distributed to the devisee by decree entered in 1916. The money or cash distributed to Mrs. Schwab, something over \$63,000, was duly transmitted to her in Germany; but the property in suit, consisting of two parcels of real estate in the city of Sacramento and certain notes secured by trust deeds on real estate, were left standing in her name on the records under the decree of distribution and so remained at the time of the passage of the Trading with the Enemy Act, and was thereafter seized and taken into the custody of the defendant Miller as the property of an alien enemy and is still so held by him.

Plaintiff, a son of Karoline Schwab, who has lived in this country for many years and is now a naturalized citizen, brings the action based upon the claim that prior to the seizure of the property in suit, the same had been for a good and valuable consideration conveyed and assigned to him by his mother, and for that reason was not subject to seizure by the defendant under the act in question as the property of the latter. The plaintiff's alleged deraignment of title is a series of letters written to him by his mother and a daughter at her direction, and the sole question upon which the cause has been submitted is whether the declarations in these letters are of a character to constitute a conveyance of the property to plaintiff.

The evidence in behalf of plaintiff is wholly uncontroverted and discloses in a general way these facts: The plaintiff, at the death of his mother's sister, was living in Idaho and employed in earning his livelihood-receiving a salary of \$100 per month. Upon learning of her sister's death and of the devise made to her, his mother wrote the plaintiff asking and urging upon him that he leave Idaho and go to Sacramento to look after her interests in the sister's estate, stating that she would pay his expenses and, moreover, intended that the property left to her, except the ready money, should be his; that all she wanted was the money. Plaintiff, it seems, was an illegitimate son, and his mother took occasion to refer to the fact and that he had never gotten anything from her husband's estate, which she felt was an injustice, and that now she proposed to provide for him and make up for the wrong done him.

After the receipt of several letters and repeated assurances of his mother's intention to give him a portion of the estate left to her by her sister, plaintiff abandoned his employment and home in Idaho, and went to live in Sacramento, and has resided there since; aiding in looking after the property of his aunt's estate during the administration, and being permitted by his mother to occupy with his family the dwelling of his late aunt (one of [p\*357] the parcels of real estate involved) without rent, and to enjoy the rent of the other and smaller parcel. During this time and prior to the time of the seizure of the property by the defendant, plaintiff had many letters from his mother with reference to her purpose to give him the property. At first the statements took the form more of a future purpose than a present intent to give him the property, but later her expressions assumed a more definite form indicating a present intention that the property, excepting the cash, was to be then regarded by him as his own. The following extracts from the letters will illustrate their character:

In one of her early letters addressed to him in Idaho she wrote, "Now you go to Sacramento and I will give you what my sister left me," stating that her intention to do this was because he was an illegitimate son and she had not been able to do as much for him as she had for the other children. In a letter of March 13, 1915, the sister wrote him:

"You worry so much about the inheritance. All you want to know I have already often written you. The house on Ninth street mother has written you already long since; you shall have it."

In January, 1916, the mother wrote:

"The house which Marcus built shall belong to you. You need no lawyer for that. I have already written Reverend Oehler to this effect. You are now living there and are to stay there and nobody can ever send you out."

In another letter written in 1916 she wrote plaintiff:

"I am giving you that property and you now send me the remainder of the cash and then you have a nice share. I could not have done so much for you as I have for the other children. They got their share from the father so this is now yours."

On February 11, 1916, the mother wrote plaintiff:

"I am grateful to you for looking after the matter and hope it will soon be settled finally"—referring to the administration of the estate.

On March 16, 1916, she wrote plaintiff:

"Now dear August, you repeatedly write of the house in which you are living. I have on several occasions written to you and the Reverend (Reverend Oehler, one of the executors) that the house and the little place with the garden are your property. It is surely a nice large share of aunt's property. And also Uncle John's watch. I have already written you. I do not know whether you received the letter."

On June 8, 1916, she wrote:

"How often have you not written about our dear aunt's house on Ninth Street? I have written to you many times and also to the Reverend Oehler that the small place also, as well as all the mortgages are your property. On account of the wicked war some letters are lost."

Do these expressions sufficiently disclose a present intention and purpose on the part of the mother to pass the title to constitute in law a grant of transfer of the property in question? I was left somewhat in doubt on the question at the hearing, but a more mature consideration of the material features of the correspondence in the light of the authorities has tended to remove that doubt. The mother's expressions of her purpose are to be considered in the light of the circumstances surrounding the parties at the time. As to the later of the letters, written after plaintiff's removal to Sacramento and the abandonment of his employment in Idaho, they show that the mother knew that plaintiff had no means of support for himself and [p\*358] family other than this property. She had authorized his occupation with his family of one piece of the real estate and the enjoyment of the rent coming from the other, while the notes and mortgages were evidently not yet surrendered by the executors because of the administration of the estate being still incomplete. This course on the part of the mother would seem to have an important bearing upon the question whether her intention was to presently vest title of the property in her son or was only intended as expressing a future purpose to do so.

All these letters are to be considered as written by the mother to the plaintiff, those written by the daughter being at the direction of the former. They are therefore to be regarded as one transaction and evidencing one contract. California Civil Code, 1642; *Brannan v. Mesick*, 10 Cal. 106; *Firth v. Los Angeles*, 28 Cal. App. 400, 152 Pac. 935.

A contract concerning real property need not be in any particular form. A letter is a sufficient memorandum of an agreement relating to such property to avoid the statute of frauds. *Moss v. Atkinson*, 44 Cal. 3. The California Civil Code defines a “transfer” as an act of the parties by which title to property is conveyed from one person to another. Civil Code, 1039. When in writing it is called a grant (Civil Code, 1053), and a grant is to be interpreted in like manner as contracts in general (Id. 1066), and may be explained by the circumstances under which they are made and the matters to which they relate (Id. 1647). *MacFarland v. Walker*, 40 Cal. App. 512, 181 Pac. 248.

Words of inheritance or succession are not necessary to transfer a fee (C.C. 1072), and a fee-simple title is presumed to pass by a grant unless it appears a lesser estate was intended (C.C. 1105). These provisions of the California Code were intended to modify the common-law rule in this state with respect to transfers of real property. *Painter v. Pasadena*, 91 Cal. 81, 27 Pac. 539.

In *Devlin on Deeds* (2d Ed.) 211, it is said:

“The word ‘grant’ has become a generic term of transfer. But no particular formula of words is necessary to effect a valid conveyance of land. If the words used show an intent to convey they are sufficient for the purpose.”

And in a note to the text it is said:

“Precise technical words, however, are unnecessary, any language equivalent to a present contract of bargain and sale being sufficient. If the courts can discover an intention to pass title they will give effect to the deed, although the expression may be inaccurate.”

See also, *Ball v. Wallace*, 32 Ga. 171.

Tested by the foregoing rules of interpretation, I am constrained to the view that when considered in the light of the circumstances as they existed when the letters were written, the language employed must be regarded as sufficient to show a present purpose to convey and to sustain the contention that it operated as a conveyance by the mother of the real property involved; and there is no question made that it was sufficient to pass title to the chattels described in the bill.

It is suggested but not argued that plaintiff is in some manner concluded by the decree of distribution. But there is nothing in the suggestion. In the first place, plaintiff was not bound to know the legal effect of these letters, nor to submit any claim arising thereunder to the probate court. And in the [p\*359] second place, he was not a party to that decree, and it does not, in any wise, preclude him from making the present claim.

This conclusion renders it unnecessary to consider the other theories advanced by plaintiff under which he claims the same result must be reached.

Plaintiff should have a decree directing a surrender by defendant of the property described in his bill, and for an accounting of the income derived therefrom since its seizure.

It is so ordered.

### *Note*

1. Today most states have eased the formal requirements for a valid deed. Thus, as in the principal case, courts will generally uphold a deed, despite its form or language, if it is sufficient to exhibit the grantor’s intention presently to convey an interest in a particular tract to a named grantee. That means that the effective language of conveyance can be contained in a writing that is not labeled a “deed” but “joint venture agreement” or “affidavit” or in a letter. *See Petersen v. Schafer*, 42 Wash. App. 281, 709 P.2d 813 (1985) (language of present conveyance in joint venture agreement constitutes a deed); *Lavender v. Ball*, 267 Ala. 104, 100 So. 2d 331 (1958)

(unattested conveyance, in clear violation of Alabama attestation statute, written on a printed personal property "Bill of Sale," held to include sufficient language to convey undivided one-half interest); P. BASYE, *CLEARING LAND TITLES* § 232 (2d ed. 1970) (includes extensive case and statute citations concerning informal conveyance). Not all courts are so loose as was the court in the principal case, however. *See, e.g.,* Sessions v. Cowart, 601 S.W.2d 82 (Tex. Civ. App. 1980) ("Brick Home owned by Effie Cowart-Location 2 1/2 miles on left on Airport Road (Lost Scott Rd.) west of U.S. 96" held inadequate description of property); Baliles v. City Service Co., 578 S.W.2d 621 (Tenn. 1979) (same for "Lots 99 and 100 in Cherokee Hills").

How would you rule concerning the following instrument executed by Eugene H. Harlan prior to his death?

#### AFFIDAVIT

PERSONALLY APPEARED, before me, the undersigned Notary at Large, Eugene H. Harlan, and upon his oath, deposes and says:

THAT he is the owner of Mineral and Oil Leases being situated in Texas (19 counties approximately), Arkansas, Kansas, Kentucky, Louisiana and Oklahoma;

THAT he purchased these Mineral Interest from his father in 1952; FURTHER, that he is very ill with heart disease and the work of assessing and setting up in book form has fallen entirely upon his wife, NORMA JEAN HARLAN.

FURTHER, IT IS THE WISH OF Eugene H. Harlan, by the execution of this instrument, that his wife be considered to own these Mineral Interests with him as Joint Tenants, with the right of Survivorship; that this Affidavit will suffice to be filed in the appropriate counties and will stand as indeed a Mineral Deed.

FURTHER, it is the wish of Eugene H. Harlan that his wife be considered to have full power and authority over the now existing producing royalties; that she have the power to sell, assign and convey, if she deems it necessary; that she have full power and authority to sell the non-producing mineral interest or retain them, whatever suits her best. By this Affidavit, [p\*360] Eugene H. Harlan, give to his wife, to be hers absolutely upon his death, all the right, control and ownership of what was United Royalty Corporation, a Missouri corporation, as well as all interest Eugene H. Harlan had in and to the Mineral Interest that may or may not be in the name of United Royalty Corporation . . . and conveys, upon his death, full right and title to the mineral interest in his name solely. It is further the wish of Eugene Harlan, that no one cause his wife any problem in carrying out the wishes of Eugene H. Harlan.

DATED THIS the 19th day of June, 1981, and signed in the presence of witnesses.

Harlan v. Vetter, 732 S.W.2d 390 (Tex. Ct. App. 1987). Are there the necessary words showing a present intention to convey? Are the full requirements of the Statute of Frauds satisfied? See the following note.

2. Some explanation for the relaxed approach of the court in the principal case may be found in the fact that under the Trading with the Enemy Act of 1917, ch. 106, § 12, 40 Stat. 411, the Alien Property Custodian was not made the owner but the trustee of the property for the alien owner. At the time the case was tried, a number of years had gone by without any claims being put in other than that of the plaintiff. Holding against the plaintiff would have put the title of the land in abeyance, pending claims by Karoline Schwab or her heirs, none of whom seems to have shown the slightest interest in the property. Suppose the deed were held invalid, could Karoline Schwab or her heirs have prevailed in a suit against Metzger? Don't make up your mind on this question until you have read the next case.

Another factor which may have been influential is the fact that at the time the case was

decided Congress had failed to act to instruct the Alien Property Custodian as to how to dispose of the property, although World War I had been over for a number of years. Legislation did not come until 1928. Settlement of War Claims Act of 1928, ch. 167, 45 Stat. 254. In the meantime the operations of the Alien Property Custodian had become a part of the national scandal known as “Teapot Dome.” See M. WERNER, *PRIVILEGED CHARACTERS* 315 (1935). For a legal discussion of the whole affair (including the dubiety of our procedure as a matter of international law), see Borchard, *Reprisals on Private Property*, 30 AM. J. INT’L L. 108 (1936).

### *Note on the Statute of Frauds*

As the court points out in *Abbott v. Holway*, *infra*, p. S225, James Abbott could not have conveyed the type of interest he did by feoffment with livery of seisin. But suppose that he simply wished to give Clarissa B. a present interest in the land. Could he have passed such an interest by feoffment with livery of seisin without reducing the whole transaction to writing? Until 1677 the answer to this question was “yes.” After the Statute of Uses the normal method of conveying legal interests in land was by bargain and sale, covenant to stand seised, lease and release, or will. But there were still a few fuddy-duddies who did it the old-fashioned way with livery of seisin just as in Bracton’s time. The trouble was that what with bear-baiting and bawdy theatre as competitive attractions attendance at liveries of seisin had fallen off drastically, so that what had begun as the most public method of conveyance now became a quite private one. Further, people’s memories of such events are not always reliable, particularly if the question about the conveyance does not arise until a couple of generations later.

To remedy this situation (and similar problems in the contracts field) Parliament passed the Statute of Frauds, 29 Chas. 2, c. 3 (1677). Every state has some version of this statute. The current Pennsylvania version follows with the date that the section was first adopted given in square brackets at the end of the section:

## **PENNSYLVANIA STATUTE OF FRAUDS**

PA. STAT. ANN. tit. 33, §§ 1–8

### **§ 1. Parol leases, etc.; estates in lands not to be assigned, etc., except by writing**

From and after April 10, 1772, all leases, estates, interests of freehold or term of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding; except, nevertheless, all leases not exceeding the term of three years from the making thereof; and moreover, that no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall, at any time after the said April 10, 1772, be assigned, granted or surrendered, unless it be by deed or note, in writing, signed by the party so assigning, granting or surrendering the same, or their agents, thereto lawfully authorized by writing, or by act and operation of law. [1772]

### **§ 2. Declarations of trusts and grants thereof to be in writing**

All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, and all grants and assignments thereof, shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or else to be void: Provided, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may

arise or result by implication or construction of law, or be transferred or extinguished by act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as if this act had not been passed. [1856]

### **§ 3. Promise to answer for debt of another**

No action shall be brought whereby to charge any executor or administrator, upon any promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise, to answer for the debt or default of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him authorized. [1855]

### **§ 4. Contracts for less than twenty dollars excepted**

This act shall not go into effect until the first day of January next [1856], or apply to or affect any contract made or responsibility incurred prior to that time, or for any contract the consideration of which shall be a less sum than twenty dollars. [1855]

### **§ 5. Acceptances to be in writing**

No person within this state shall be charged, as an acceptor on a bill of exchange, draft or order drawn for the payment of money, exceeding twenty dollars, unless his acceptance shall be in writing, signed by himself, or his lawful agent. [1881]

### **§ 6. When written instruments without consideration valid**

A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound. [1927]

### **§ 7. Uniformity of interpretation**

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [1927]

### **§ 8. Short title**

This act may be cited as the Uniform Written Obligations Act. [1927]

### ***Notes and Questions***

1. In 1951, the Pennsylvania legislature repealed § 1 of the statute insofar as it applies to leases and substituted the following: “Real property, including any personal property thereon, may be leased for a term of not more than three years by a landlord or his agent to a tenant or his agent, by oral or written contract or agreement.” PA. STAT. ANN. tit. 68, § 250.201.

2. The Statute of Frauds is not generally regarded as a “received” statute (notice that Pennsylvania thought it necessary to adopt a Statute of Frauds in 1772), but, as noted above, every state has a statute of frauds, patterned, to a greater or lesser extent, on the English version, 29 Chas. 2, c. 3 (1677). The Caroline statute had the following provisions that are relevant here:

- a. § 1 had wording quite similar to what is given above.
- b. § 2 excepted short-term leases at rack rent. (This is the exception discussed in note 1.)

- c. § 3 dealt with the assigning and surrendering of interests already created or the creation of incorporeal interests. (This provision is, to some extent, incorporated in § 1 of the Penn. statute.)
- d. § 4 dealt with a miscellany of contractual obligations including contracts for the sale of land. (Some of this is in §§ 3–6 of the PA statute; the PA courts have interpreted § 1 as applying to contracts for the sale of land. *See* *Empire Properties, Inc. v. Equireal, Inc.*, 449 Pa.Super. 476, 674 A.2d 297 [1996], and cases cited therein.)
- e. § 5 dealt with wills. (See PA. STAT. ANN. tit. 20, § 2502.)
- f. § 6 dealt with changes in wills. (See PA. STAT. ANN. tit. 20, § 2505.)
- g. § 7 dealt with trusts of land. (Section 2 of the PA. STAT. ANN. tit. 33.)
- h. § 17 dealt with the sale of goods. (See UCC sec. 2–201 [=PA. STAT. ANN. tit. 13, § 2201]: contracts for the sale of goods for a price of \$500 or more must be in writing; partial performance validates the contract but only as to goods that have been accepted or for which payment has been made.)

In the case of contracts that must be in writing, the original statute required that what must be in the writing is “a sufficient memorandum thereof,” and similar language is carried over into most of the modern descendants.

3. What happens if you violate § 1 of the Pennsylvania statute?

4. The Statute of Frauds is frequently said to require four things for a valid deed: (a) the name of the grantor and grantee, (b) a description of the property, (c) a word or words of conveyance indicating the present passage of an interest, and (d) the signature in writing (no printing or typing, please) of the grantor. (Possible exceptions to this last requirement are discussed *infra*, p. S183).

Examine carefully the text of the Pennsylvania statute. Where does the statute impose these requirements? Can you see how they might be inferred?

Were these requirements met in *Metzger*? The Harlan affidavit, *supra*? Where are the names of grantor and grantee? The description? The words of conveyance? The signature?

5. Cases involving the interpretation of the Statute of Frauds are legion, and the courts have been unwilling to enforce its full rigor, since its policy of preventing frauds is not always served by adherence to its letter. Consider the following case:

### **HAYES V. HAYES**

Supreme Court of Minnesota.

126 Minn. 389, 148 N.W. 125 (1914).

BUNN, J. This action in ejectment was commenced in the district court of Dakota county in July, 1909. It was tried to the court without a jury and a decision rendered in favor of plaintiffs. An order denying a new trial was affirmed by this court. *Hayes v. Hayes*, 119 Minn. 1, 137 N.W. 162. Defendant exercised the right she had under the statute then existing to a second trial. This trial was to a jury and resulted in a verdict for defendant. The case is now here on plaintiffs' appeal from an order denying their motion [p\*363] in the alternative for judgment notwithstanding the verdict or for a new trial.

Plaintiffs contend that the evidence was insufficient to justify submitting the case to the jury. They also complain of . . . certain instructions.

The question submitted to the jury was whether there had been an executed parol gift of the land by Timothy Hayes to his son Matthew Hayes. And the first question for our decision is whether there was evidence of such a gift sufficient to warrant submitting the issue to the jury.

The facts, including those admitted, and those which the evidence tends to establish, are in substance as follows:

Timothy Hayes was a prosperous farmer in Dakota county. He had five sons, Richard, Timothy, Thomas, Matthew and Patrick. As each son became of age he placed him upon a farm which he purchased for him. In the case of Richard, the first son, and Timothy, the second son, the father and his wife executed and delivered to each a deed to the farm furnished him. Richard proved improvident and mortgaged his farm; thereafter the record title to the farms that the father purchased and furnished to his boys remained in the father. In 1892 Timothy Hayes purchased the farm in controversy, and in the fall of that year put his son Matthew in possession. Matthew remained in possession until his death March 15, 1909. In May, 1903, Matthew Hayes and the defendant were married, and they continued to live together on the farm as husband and wife until Matthew's death. They had no children. April 13, 1909, Timothy Hayes, in whom the record title still stood, executed a deed of the farm to the plaintiffs in this action, the minor sons of Richard Hayes, the eldest son of the grantor. This deed was recorded April 21, 1909. On April 29, Richard Hayes wrote to defendant, who was in possession of the farm, the following letter.

“Lebannon, April 29, '09.

“Mrs. Susie Hayes:

“I suppose that you are aware that we own that place now. You have no more to do with it. There is no use in you bothering yourself about that crop, as we are entitled to the share of it. I want you to vacate our place as soon as you can, May tenth at latest.

“Yours Respectfully,

“Richard Hayes.”

Defendant claimed to own the farm as the sole heir to her husband, Matthew, and refused to vacate. The present action was then commenced. The complaint was in the usual form, alleging title in plaintiffs, and wrongful withholding of possession by defendant. The answer alleged that defendant was rightfully in possession as the widow and sole heir of Matthew Hayes; that Matthew was at the time of his death rightfully in possession and had good title to the premises. It further alleged title by adverse possession. The reply was a general denial.

It appears with little dispute that Matthew Hayes, at all times during the 17 years that he lived on the farm, treated it as his own. He added to the land by purchase of adjoining parcels, constructed buildings, paid taxes and insurance, put in and took off crops each year. His relations with his father and brothers were entirely friendly. There is evidence that the father considered the farm as Matt's. Indeed the evidence is persuasive, considering [p\*364] the entire situation, that but for the accident that caused the son's death, leaving a widow and no children, there would have been no claim that Matthew did not own the land. The father admitted that he put Matt on the farm, but denied that he gave it to him. He testified:

“I did not exactly put him on it; I told him he might go on; he wanted to go west; I told him he could make a start and go any time he had a mind to; I told him if wanted he could live a few years on it until he got started.”

There was some testimony of a like purport by brothers of Matthew. But the facts are not quite consistent with this claim of a temporary loan of the place until Matt could “make a start.” His marriage, the purchase of additional land, the building of a new barn and other improvements, preparations, stopped by his death, to build a new house, are circumstances that indicate at least the son's belief that he owned the land, and his intention to make it the permanent home of himself and wife. There is evidence, also, of declarations of Timothy Hayes to the effect that the farm was Matt's; one witness testifies to a statement of the father that he would give the son a deed when he got married and that the farm belonged to the son; another to the father's insisting



to him, as county treasurer, that Matt pay the taxes on the farm saying “Let Matt pay his own taxes.”

Without further stating here the evidence bearing on the question, our conclusion from the entire record is that there was enough reasonably tending to show a parol gift of the land from Timothy Hayes to his son Matthew to make the question one for the jury.

Of course this is not all that is necessary to give the son title. But we regard the evidence as clearly sufficient to take the parol conveyance out of the statute of frauds. As we have stated before, it appears without dispute that from 1892 to 1909 Matthew Hayes was in exclusive possession of the farm. It is reasonably clear that he claimed it as owner, with the knowledge and consent of his father. The evidence tends to show an acceptance of the parol gift, and a performance that takes it out of the statute. [Citations omitted.] . . .

Counsel for plaintiffs argue that it was necessary to prove that Matthew was in adverse possession of the land for the statutory time. This is incorrect. If there was a parol gift, completely executed, it was not necessary that there be adverse possession for 15 years. The taking of and remaining in possession, the making of improvements and the other acts of the donee are important on the question of acceptance and performance, or in other words on the question whether the parol gift was executed. But we do not understand that the possession must necessarily continue for 15 years to make a good title, or to entitle the donee to specific performance; nor do we understand that the other elements necessary to make title by adverse possession must exist. The question is not whether there was title by adverse possession, but is whether there was an executed parol gift. That such a gift may be accepted and executed so as to take it out of the statute of frauds, without reference to how long the possession under it has continued, or to its character as being hostile, open or notorious, is clear under our decisions. [Citations omitted.] The claim of an executed parol gift is distinct from a claim of title by adverse possession. The trial court, though seemingly instructing the jury that title in Matthew could not become perfect until the end of 15 years’ possession, open, adverse and under claim of right, correctly and distinctly told the jury that the issue was not adverse possession, but whether there had been [p\*365] an executed gift. Of course the character of the donee’s possession, the length of time it continues, and the acts of the donee are all material on the question of whether there has been an executed parol gift, as they would be were the issue adverse possession. But the ultimate question to be determined is quite different. We admit that the opinion in *Malone v. Malone*, [88 Minn. 418, 93 N.W. 605 (1903) ] apparently assumes that adverse possession for the statutory time is necessary to take a parol gift out of the statute, but this is not the law. To take a parol grant or gift of land out of the statute of frauds, there must be not only an acceptance, a taking of possession under and in reliance upon the contract, but such a performance in the way of making valuable improvements as would make it substantial injustice or fraud to hold the grant or gift void under the statute. . . .

The assignments of error in the charge are disposed of by what we have said in regard to the propriety of submitting the issue of an executed parol gift to the jury. The charge as a whole was very clear and quite as favorable to plaintiffs as they were entitled to. There was nothing in it, as plaintiffs seem to claim, calculated to induce the jury to decide the case against the evidence upon a natural feeling that the justice of it was with defendant. We have tried, successfully we think, to determine this appeal without being influenced by the manifest injustice that would be done to the widow of Matt Hayes if the efforts of his family met with success.

Order affirmed.

### *Notes and Questions*

1. In *Hayes v. Hayes*, 119 Minn. 1, 137 N.W. 162 (1912), cited in the principal case, the trial judge’s findings were sustained:

The evidence is quite clear that Mathew [sic] Hayes entered into possession of the land in 1892, and continued therein until his death in 1909, and that during this time he received the income from the land, paid the taxes for a portion of the time, made permanent improvements thereon, and insured the buildings thereon in his own name. The evidence, however, is equally clear that such possession was not adverse, but permissive, and with the consent of his father, Timothy Hayes, Sr., the owner of the land. The evidence also tended to show that such possession was with the understanding that Mathew Hayes was to have what he could make on the land for a few years until he could get a start. The record discloses no evidence sufficient to require a finding of either an executed parol gift of the land to Mathew Hayes or title thereto by adverse possession. We must, therefore, hold that the findings of fact are sustained by the evidence, and that they sustain the conclusions of law.

*Id.* at 3, 137 N.W. at 163. A Minnesota statute in effect at the time allowed the unsuccessful defendant in an ejectment action a second trial—a remarkable tribute to the value accorded the possession of land. 1905 Minn. Laws 4430. What new facts came out at the second trial? How could the court sustain its previous holding that there was no adverse possession under Minnesota’s fifteen-year statute and at the same time affirm the second judgment for Susie Hayes?

2. Susie Hayes is described in the case as Matt Hayes’s “sole heir.” Under the Uniform Probate Code, which is currently in effect in Minnesota, Matt Hayes’s entire estate would have passed to Susie, he having died without issue and assuming that he died intestate. If he left a will, it probably would have given everything to her (that’s by far the most common provision today for those who make wills, have a spouse, and are childless.) Under the Probate Code that was in effect in Minnesota in 1909, Susie would also have taken the entire estate, again assuming that he died intestate. (I found the former information in Westlaw. I found the latter information in the Session Laws of 1889, which adopted a probate code. <https://www.revisor.mn.gov/data/revisor/law/1889/0/1889-046.pdf>.) One qualification on the latter information: I did not check all the session laws from 1889 to 1909 to make sure that this provision was not amended.) If he left a will, it gets complicated, but she would have gotten a substantial share, even if he did not include her in his will. The farm would probably have qualified as “homestead,” in which case she would get it even against a will.

3. Could *Metzger v. Miller* have been decided upon the same principles as *Hayes v. Hayes*? Was it?

4. The Statute of Frauds has sometimes been referred to as the “Statute for Frauds” and the “Statute to Commit Frauds.” See Burdick, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273 (1916). Although these may be overstatements, the principal case typifies a situation where strict adherence to the statute would lead to harsh results. The doctrines of part performance and estoppel have operated to take oral transactions out of the Statute of Frauds in situations where there has been part or full payment, marriage, possession, [p\*366] improvements, fraud, services rendered, and combinations of these elements. For a good collection of diverse cases on the subject, see E. RE, CASES AND MATERIALS ON EQUITY AND EQUITABLE REMEDIES 652–705 (1975). While many courts are willing to sustain conveyances which do not comply with the Statute, the doctrines by which they do so are quite muddled and may depend on whether the transaction is viewed as a contract or gift. See *Pocius v. Fleck*, 13 Ill.2d 420, 150 N.E.2d 106 (1958). In *Baliles v. Cities Service Co.*, 578 S.W.2d 621 (Tenn. 1979), *supra*, p. S175, the court made it clear that part performance would not “take a conveyance out of the statute” in Tennessee, but equitable estoppel would. In *Chapman v. Bomann*, 381 A.2d 1123 (Me. 1978), the court was reluctant to apply either part performance or estoppel in pais because of previous Maine cases but held that the defendant’s wife’s independent promise to sign a sales agreement for real estate could be enforced on the ground of promissory estoppel under § 90 of the

RESTATEMENT (SECOND) OF CONTRACTS (1981), if the promisee had detrimentally relied. The distinction between part performance and estoppel seems to be that in part performance the court is simply looking for evidence in the behavior of the parties, independent of the oral agreement, sufficient to substitute for the absence of a writing (see UCC 2-201), while in estoppel there must be detrimental reliance such that failure to enforce the oral conveyance or promise would “shock the conscience of the court.” Which doctrine is involved in the principal case? See 2 A. CORBIN, CONTRACTS §§ 420–443 (1950 & Supp. 1991); Annot., 56 A.L.R.3d 1037 (1974); Note, *The Doctrine of Equitable Estoppel and The Statute of Frauds*, 66 MICH. L. REV. 170 (1967); Comment, *Equitable Estoppel and the Statute of Frauds in California*, 53 CALIF. L. REV. 590 (1965).

Trust doctrines have also been employed to perfect otherwise imperfect transfers. See 1 A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS §§ 44–45 (4th ed. 1987); 4A R. POWELL, REAL PROPERTY §§ 593–98 (P. Rohan ed. 1991).

Does the family relationship between the parties in *Hayes* push for or against recognizing the conveyance. It is settled law in Pennsylvania that in cases of alleged parol gifts between parent and child “evidence of an even more clear and weighty nature is required than is necessary where the alleged gift was between unrelated persons.” *Fuisz v. Fuisz*, 527 Pa. 248, 591 A.2d 1047, 1049 (1991). The *Fuisz* case involved an alleged parent-child gift. Here are its facts as recounted by the Pennsylvania Supreme Court:

Appellant and her husband, Anton Fuisz, purchased fifty acres of land . . . during the 1930’s. . . . Years later during the 1960’s, appellant and her husband gave various parcels of this land to their two sons, Richard and Robert Fuisz. These gifts were accomplished by means of fully executed deeds of conveyance. In 1972, appellee [Richard] built a separate house on the land. The house cost between \$40,000.00 and \$70,000.00, and was built on acreage not previously owned by him, i.e., on land still owned by his parents. Construction was accomplished with the full knowledge and approval [advice and assistance] of his parents. . . . The land affected consisted of a parcel of approximately two and one-half acres. When the house was completed, appellee used it as his personal residence for approximately seven years. In 1979, appellee became divorced from his wife, and, since that time, he has not lived in the house. His ex-wife and children continue, however, to reside there.

Appellee was eventually offered a deed for the parcel. This occurred in 1982, but appellee did not accept the deed because it did not include a right-of-way to his parents’ driveway or the use of their barn. . . . Due to family disharmony, no further offers to convey were made after 1982. [p\*367]

Property taxes on the parcel have always been paid by appellee’s parents, rather than by appellee, and they have retained exclusive possession and control over a portion of the two and one-half acre parcel which contains a rental cottage. No rent has ever been charged to appellee for use of the land. Appellee paid for his own utilities and for certain other expenses directly associated with the house. . . .

Appellee’s father died in 1982, leaving appellant solely in control of the legal title. [Appellee promptly brought an action to compel conveyance of title.]

The trial court found an executed parol gift. Would you affirm? The Superior Court did, but the Pennsylvania Supreme Court reversed. *Id.* How, if at all, should the following facts bear on the conclusion in this case?

(1) Richard Fuisz (the appellee) was “a highly educated and successful physician and business entrepreneur.” (2) Richard treated his parents generously through the years making them gifts of money and “supplying them with luxury automobiles.” (3) The senior Fuiszes

had offered an executed deed which Richard declined. (4) It was possible to move Richard's house (which is worth \$81,000 apart from the land) from the lot.

### *Notes and Questions on the Formalities of Deed Execution*

Clearly, no lawyer, even one far less timorous than Abundance of Caution, would advise a client to proceed in the manner chosen by the parties in *Metzger* and *Hayes*. The purpose of a good conveyance is to avoid litigation and tested by this standard neither the *Metzger* nor the *Hayes* conveyance was a "good" conveyance. In examining titles, however, lawyers are frequently called upon to pass on the validity of, interpret, and even litigate about, instruments they would never dream of drafting themselves. Thus, it becomes important to know just what the bare essentials for a valid deed are, and, since title examination frequently takes us back into the murky past, what the bare essentials for a valid deed were in times long gone. The answer to the question whether the deed meets those bare essentials determines whether or not you will have to fall back on the equitable considerations involved in the *Hayes* case.

We have already examined the minimum essentials for a conveyance under the Statute of Frauds, *supra*, p. S178 note 2. The following formalities are normally observed in executing a deed and in some cases may be required for its validity:

1. *Signing and Sealing*. Prior to the Statute of Frauds, you will recall, certain types of interests (easements, etc.) had to be conveyed by deed. Further, the covenant to stand seised had to be by deed. At common law a "deed" was any instrument under seal. Thus, prior to the Statute of Frauds conveyances which had to be by deed (incorporeal interests and covenants to stand seised) had to be under seal. Further, under the Statute of Enrollments bargains and sales of freeholds had to be in writing and under seal. A signature was not required. The seal took the place of the signature, but the signature would not do in place of a seal.

The Statute of Frauds extended the writing requirement to all conveyances but raised the question whether a signature was required in addition to a seal. Although the answer to this question was not uniform, it seems generally to have been held that a seal would do in lieu of a signature, but in those conveyances which the law required be by deed, the signature would not take the place of the seal. Those conveyances for which the prior law had not required a writing could be consummated either by a signature or a seal. [p\*368]

The situation became even more confused in the United States. The Statute of Enrollments is generally held not to be in force here, so the sealing requirement for bargains and sales does not apply by force of that statute. On the other hand, some early state statutes and cases required that all conveyances be under seal. *See, e.g., Jackson ex dem. Gouch v. Wood*, 12 Johns. 73 (N.Y. 1815). Further, many jurisdictions, either by statute or judicial decision, also required that a conveyance be signed by the grantor or his agent. Obviously, Abundance of Caution would advise that all conveyances be both signed and sealed. Today, however, it would seem that over two-thirds of the states no longer require that a "deed" be sealed, exceptions frequently being made for the deeds of corporations. *See Comment, The Status of the Common Law Seal Doctrine in Utah*, 3 UTAH L. REV. 78, 81-88 (1952). The general decline in the use of private seals and their ready substitution in most jurisdictions by the letters "L.S." (from the Latin *locus sigilli*, "the place of the seal"), even if printed, have pretty well undercut the security which earlier courts felt that sealing provided, and this probably accounts for the trend. Of course, today's requirements do not determine the validity of an older deed.

Today, too, it would seem that signature by the grantor is required in virtually all states, some of them further requiring that the instrument be "subscribed," signed at the bottom. An obvious exception to the signature requirement is in the case of an illiterate person, where state statute will govern how he is to make his mark and how it is to be witnessed. There is also some modern authority that an unsigned instrument may be validated by the grantor's acknowledgment.

2. *Attestation.* The common law never required that an instrument of conveyance be attested—signed by witnesses. Wills had to be attested, but this was and remains a statutory requirement. Making an instrument in the presence of witnesses, however, has always been a common practice. Such witnesses, at the very least, are able to verify that it was, indeed, the grantor who signed the instrument, and that he did not have a knife at his throat when he did it.

Today, some states require by statute that a deed be attested as a precondition to recording. A few states seem to require it as a precondition to the instrument's being held valid. Obviously, Abundance of Caution advises that the deed be signed, sealed, and delivered in the presence of at least two witnesses who attest to these facts by signing in the appropriate blank on the form. Obviously, too, Abundance's advice doesn't help when your claim of title includes an instrument not so attested.

3. *Acknowledgment.* Acknowledgment consists in the maker of the instrument appearing before a public official, usually a notary, and stating that the instrument is "his free act and deed" or words to that effect. The notary then records the occurrence of this ceremony in an appropriate place on the instrument.

Acknowledgment was not required or even practiced at common law. It is wholly a creature of statute. Acknowledgment, like attestation, is a precondition of recording in many states; like attestation a few states seem to require it for the validity of all conveyances; many require it for conveyances of homestead interests. Again, Abundance of Caution advises that the instrument be both acknowledged and attested, but the following seems to be the 'bottom line': [p\*369]

In general, either attestation or acknowledgment, but not both, is a condition precedent to effective recordation of an instrument and to its admission in evidence as a "self-proving" document—i.e., without the necessity for affirmative proof of due execution and delivery by the grantor. As a general rule, acknowledgment rather than attestation is utilized in order to meet the statutory prerequisites. But the state statute should be consulted with respect to both attestation and acknowledgment.

O. BROWDER, R. CUNNINGHAM, G. NELSON, W. STOEBUCK & D. WHITMAN, BASIC PROPERTY LAW 758 (5th ed. 1989).

4. *Recital of Consideration.* Since a conveyance of land may be a gift, proof of consideration is not required to validate the transaction.<sup>1</sup> Nevertheless, recital of payment of consideration, even nominal consideration, will rebut any argument of a resulting use in the grantor, will support the transaction as a bargain and sale under the Statute of Uses, and is conclusive between the parties in establishing an equitable interest in the grantee. Such a recital may also entitle the grantee to the presumption that he is a purchaser for value and thus protected under the recording statutes. See p. S188 *infra*. A few states have statutes requiring that the true consideration for a transaction be stated as a precondition to recording the deed. *E.g.*, NEB. REV. STAT. §§ 76–214 to 215 (1990). Since such statutes seem designed primarily to aid in the process of tax assessment and provide for monetary penalties (up to \$500 in Nebraska) rather than invalidating for failure to comply, it is doubtful that any court would hold that a deed which was not accompanied by a statement of

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<sup>1</sup> Occasionally one finds cases in which the courts discuss the question of consideration for a deed almost as if the deed were an ordinary contract. In most of these cases, however, a closer examination shows that (1) the interest in question is not an interest in land but a contractual interest (such as an option) which must be supported by consideration, or (2) the issue in the case is whether the deed constituted a conveyance in fraud of the grantor's creditors, or (3) there are serious doubts about the competence of the donor to make a gift. See, *e.g.*, *Florida Nat'l Bank & Trust Co. v. Havris*, 366 So. 2d 491 (Fla. Dist. Ct. App. 1979) (94-year old grantor's deed to her housekeeper invalid because not supported by valuable consideration and natural love and affection not adequate consideration for a deed to one who was not a relation by blood or marriage). See 3 A.L.P. § 12.43 at 287 n. 6 (Supp. 1977).

the true consideration was invalid for that reason.

5. *Revenue Stamps*. Prior to 1966, ch. 34 of the I.R.C. required the imposition of documentary stamps on instruments of conveyance, and the funds derived from the purchase of these stamps was a source of revenue for the Federal Government. Failure to affix the stamps did not affect the validity of the instrument but subjected the maker to penalties. See I.R.C. § 7271 (1976). The stamp requirement was abolished as of Jan. 1, 1966, but the tax continued until Jan. 1, 1968. At this point most of the states got into the act and passed their own statutes requiring revenue stamps. Michigan's provision is typical. MICH. COMP. LAWS ANN. § 207.501–13 (West 1986 & Supp. 1991). A tax of \$.55 to \$.75 per \$500 of total fair market value at transfer is imposed on the seller or grantor at the time of recording of any contract for the sale of land or any interest therein or of any deed conveying the same-but the tax need be paid only once for any given transaction. The tax is not imposed on gratuitous transactions, and the recording of an instrument without the stamps which evidence the payment of the tax is expressly made valid so far as notice is concerned. A deed may be recorded without the tax stamps and a separate affidavit stating the fair market value may be submitted to the recorder separate from the instrument itself, which will not to be disclosed to any person other than the auditors of the county fund (into which the tax is paid). [p\*370]

## B. DELIVERY AND RECORDING

### *Notes on Delivery*

1. *The Delivery Requirement*. In order that a deed be effective all states require that it be delivered, but just what constitutes delivery is a matter of some ambiguity. In *Parramore v. Parramore*, 371 So. 2d 123, 125 (Fla. Dist. Ct. App. 1978), the decedent had executed a number of deeds conveying to his children remainder interests in his land after his life. He placed the deeds in a safe deposit box and instructed his children to pick up the deeds after his death. The court said, quoting from an earlier Florida case:

Actual manual delivery and change of possession are not always required in order to constitute an effectual delivery. The intention of the grantor is the determining factor. . . . [D]elivery . . . may consist of a transfer of the conveyance without spoken words, or by spoken words without manual act. . . . [If] the grantor intended to reserve to himself the locus poenitentiae, . . . there is no delivery; but if he parts with the control of the deed, or evinces an intention to do so, and to pass it to the grantee, though he may retain the custody or turn it over to another, or place it upon record, the delivery is complete.

In *Parramore* the court held delivery good without relying “on the troublesome test suggested by the disjunctives” in the quoted passage. (Can you see what other issue was presented by the case? See Note on Wills, *infra*, p. S197.)

Thus, the ambiguity about what constitutes effective delivery is caused by the fact that in this area intention is allowed to predominate. An overt manifestation of the grantor's intent that title shall pass constitutes a delivery and marks that point in the transaction where the parties' respective interests have changed. Is it necessary to be so vague? Why not make manual transfer or some other formal act the precise definition? As we shall see in the cases below, the courts in this area vacillate between protecting the presumed intent of the grantor and protecting third parties who have relied on what they thought was the grantor's intent.

Consider the facts of *Barker v. Nelson*, 306 Ark. 204, 812 S.W.2d 477 (1991):

According to . . . Robert and Daniel [Barker], they were called to their parents' home with their wives on the night of September 1, 1982, and presented with a warranty deed executed by [their parents] . . . deeding them four lots . . . with the parents retaining a life estate . . . . At