

LEGAL ASPECTS OF REAL ESTATE

A DEFINITION OF REAL PROPERTY

There are, in the legal sense, two basic classes of property: (1) real property, sometimes referred to as real estate; and (2) personal property. In general and perhaps oversimplified terms, the difference between the two is that real property has to do with an interest in the land itself or something firmly affixed thereto, whereas personal property is readily movable from one place to another. In more specific terms, there are many other distinctions between real property and personal property. Title to real property, for example, is conveyed by means of a legal document known as a deed. An item of personal property normally referred to as a chattel is, on the other hand, commonly transferred by virtue of a bill of sale, or simply by delivery of possession. In a general sense, then, real property may be defined as the land itself, including, under normal circumstances, everything attached to or growing from the earth, whether through the course of nature or as a result of man's construction. It is, however, more than this. As stated the federal courts in the 1945 case of *Causby v. United States*:

Under the old common law doctrine ... a land owner not only owns the surface of his land, but also owns all that lies beneath the surface even to the bowels of the earth and all the air space above it even unto the periphery of the sky

In theory, therefore, ownership of land means ownership of a triangle with its apex at the center of the earth and its base extending upward to infinity.

This definition is perhaps broader than is generally recognized today. For example, aircraft are observed flying over parcels of property daily without any claim that they are violating the property rights of individual property owners. This over-flight would amount to a trespass in the strict interpretation of the definition set forth above; however, the element of control is a vital factor in determining ownership in today's economy.

Thus, the degree to which ownership may be said to extend is normally regulated or governed by the degree to which a particular property owner can maintain control or dominion over a parcel of property.

If, for example, an individual were to construct a house with a roof overhanging adjacent property, he would be considered to be trespassing and required to remove his encroachment. In like manner, if an individual were to drill for oil or water under adjacent property, he would be subject to an action in trespass for violating property boundaries. These situations are judged as trespasses, whereas the over flight of an airplane is not, by reason of the fact that the builder and the oil prospector are operating within areas where the owner also could operate. The owner therefore has control and use, of that portion of the property that is being invaded. The common law doctrine that title extends from the center of the earth to the highest heavens is now somewhat obsolete.

An integral part of the definition of real property is the definition of a fixture. Under normal circumstances, fixtures become a part of the real property itself, as noted in the following definitions:

Fixtures have been variously defined as a species of property lying along the dividing line between real and personal property but which, by reason of their annexation to or use in association with real property, have become a part of the realty; as chattels which, although retaining their separate identity, become realty but are susceptible of regaining their status as personality; as chattels so attached to realty that, for the time being, they become part thereof; and as chattels annexed to realty in such a manner that they cannot be removed without injury to the freehold.

A fixture is a thing that was originally personal property that has been annexed to the land in a more or less permanent manner and under such circumstances that it is deemed to have become a part of the land and thus belongs to the owner of the land. While it still retains its separate physical identity, it is so connected with the land that a disinterested person, on observing it, would consider it a part thereof. For example, A buys a garbage disposal which is personal property. He has it installed in his kitchen. It is then a part of the land.

It is of critical importance to determine whether or not a particular item is, in fact, a fixture and thus part of the real property; for if an item of personal property has changed its character from personal to real and has become a fixture, then the sale of the real property includes title to that item. If, on the other hand, the chattel has not become a fixture, then the purchaser of the property would not be entitled to ownership of that particular item unless he contracted separately to buy it.

There are three major criteria that can be applied in the average case to assist one in determining whether or not a particular item has, in fact, become a part of the real property. The first concerns the manner in which the article in question is affixed to the real property. If the method of fixation is of a permanent nature, it normally would be considered to be a part of the real estate and to have lost its character as personal property. The second criterion relates to the character of the article itself and its use insofar as the real property is concerned. For example, a printing press might be installed in a building even before all of the walls have been erected. Even though this press may be merely sitting on a floor, without being permanently affixed to the building itself, it is clear that because the building was constructed

ESTATES IN LAND

The word "estate" in this text is used to express the degree, nature, quality, or extent of a person's interest in real property. Numerous types of interests in land can be created; the most commonly used are defined below.

Fee Ownership

The highest type of ownership is complete ownership. The terms given to this complete ownership of property are ownership in fee, "in fee simple," or "in fee simple absolute." The individual claiming this type of ownership is referred to as the "fee owner" of the property. . For

all intents and purposes, this means that that individual is the owner of the entirety of the property, that his ownership is without limitations insofar as time is concerned, and that as long as he complies with the law, he may do as he will with that property, in the knowledge that on his death his title will pass to his heirs. In addition to ownership in fee simple, there are many other types of ownership, each of a lesser degree than fee simple absolute.

Leasehold

Perhaps the most common condition of title outside of fee ownership is the lease. A lease is a contract that provides for the lessee, or tenant, to occupy the land or property of the lessor, or landlord, for a specific period of time. This period of time, normally expressed in the lease itself, is known as a "leasehold estate," or an "estate for years." It is a right that is created entirely by contract, and yet by virtue of the contract the lessee, or tenant, actually becomes owner of an interest in the land.

Easements

Another common interest in real property is an easement. An easement is defined as a right acquired by an individual to use the land or property of another individual for a special or particular purpose. An easement may be of a limited duration; however, because of a grant or because of use, it is usual permanent in nature, and even though the ownership of the land itself is conveyed to another, the easement holder (i.e., the owner of the easement right) may continue to use the land in the manner expressed in the easement.

Easements may be created for a great variety of purposes, including access, drainage, pipelines, or pole lines. They may involve the right to use only the subsurface of the land, only the air space over the land, or only the surface of the land. They may include more than one of these factors, as in the case of an easement for an underground sewer that includes the right to use the surface of the land for maintenance of the underground facility. The right conferred may be granted exclusively to one user; it may be granted for the joint benefit of many users; or it may be a part of a mutual grant.

A right of way is a type of easement, conferring on one person or class of persons the right or privilege of passing over the land of another. In common usage, the term is used to describe either the right itself or the strip of land so occupied.

License

A license is an interest in real property that is often confused, with an easement. It is a permit for use of or entry upon a parcel of property for a limited time and purpose. Ordinarily, any unauthorized person on another's property would constitute a trespass, and the trespasser might be liable to pay damages to the owner of the property. If, however, the entry on the land were permitted, the individual would be said to have a license and no damages would be payable. An example might clarify the limited scope of a license. If a person sells land to be used as a parking lot and reserves for himself the right to pass over the land or to park there, his right would be an easement. A patron of the parking lot, who uses the driveway to enter and to leave and who pays a fee to park on the premises, has a license for that use only.

Life Estate

A life estate is a right created in real property that can be created either by will or by deed. The recipient of a life estate is entitled to the use and enjoyment of the particular parcel of real property. However, that use and enjoyment is limited to his lifetime. At his death, all rights, title, and interest passes to the remainder man, and the heirs and devisees of the life tenant have no further interest in the property whatsoever.

TYPES OF OWNERSHIP

In a general discussion of real property, one normally refers to the "owner" of a particular parcel. The term "owner" would, by strict grammatical interpretation, mean an individual; however, in most instances more than one individual share in the ownership of property. The sharing of ownership may be the result of a number of different situations, as will be discussed below.

Single Ownership

If the person is the sole owner of the parcel of real property, he would be known as the "owner in severalty." This type of ownership is rare, however, and in most instances, either by law or by intent, the ownership is not so restrictive but is shared by one or more other individuals.

Joint Ownership

When dealing with the concept of joint ownership, one encounters two common terms: "joint tenancy" and "tenancy in common." These two terms create entirely different interests in real property.

Joint Tenancy. Perhaps the most common type of joint ownership is that known as joint tenancy. A joint tenancy is defined as an estate held by two or more persons jointly which, on the death of one, vests title in the survivor or survivors.

The feature that is particular characteristic of this type of ownership is the right of survivorship without regard to the laws of descent through inheritance. When one of the parties dies, he merely drops out of title and his title interest ceases. That interest which remains is now vested in the survivor, not under any new document of title or deed, but under the original deed, since in theory the joint tenants individually own the fee title to the whole property, subject to a life estate in the other joint tenant. Therefore, the title is not derived by a survivor from the deceased joint tenant, because the survivor owned title to the total property all the time.

While it is true that, in theory, the joint tenants each own the entirety of the property, it is also true that while they live, either joint tenant can sever his interest from that of his fellow owners. If, for example, a joint tenant were during his lifetime to convey his interest in the property to another, that new owner would become a tenant in common with the seller's co-owners. No one can be required to become a joint tenant with another, with the accompanying right of survivorship, without the consent of both parties.

While some states of the United States have abolished the joint tenant right of survivorship and now provide that at the death of a joint tenant the share or interest of the deceased owner

shall go to his heirs, the same states provide that if the deed expressly provides that the property in question shall go to the surviving tenants or grantees, then the wishes of the original grantor are obeyed and the property passes in the same manner as though a true joint tenancy had existed.

Tenancy by Entirety. In some states of the United States, a tenancy by entirety is a particular type of joint tenancy that, by modification of ancient common doctrines, treats husband and wife as one person. Thus, unless another intent is clearly shown by the language of the instrument of title itself, a deed to a husband and wife creates, in these states, a tenancy by entirety. In case of the death of one spouse, the survivor is entitled to the entirety of the property. This right exists only where the persons are married at the time they acquired the property. One spouse cannot change it during his or her lifetime by conveying his or her interest in the property to another without the consent of the other.

In addition to tenancy by entirety, other types of common ownership exist as a result of the marriage between the owners. In this category are community property, *dower*, and *curtesy*.

Community Property. In many jurisdictions in the United States, the law of the state provides for community property, or common ownership between a husband and wife in property acquired during the marriage. In this respect, however, it is necessary to distinguish between the term "community property" and the term "separate property."

Separate property, in most jurisdictions recognizing the theory of community property, is defined as property acquired before the marriage, property acquired after marriage by gift or inheritance, or property conveyed by either husband or wife to the other spouse with the intent of making it separate property. For the most part all other property acquired by a husband or wife during the existence of a marriage is considered to be community property.

Dower. Dower is the interest in the husband's real estate that many states give to the widow to provide for her support after her husband's death. In most jurisdictions it is considered to be a life estate in a certain statutory portion of the land that the husband owned during the marriage. In some states the right has also been extended to the husband, in the respect that at the death of the wife the husband takes an interest in the land owned by her during marriage.

Curtesy. Somewhat akin to dower rights is the right known as curtesy. In those few states that still retain this right, a surviving husband has a life interest in the lands owned by the wife during the marriage, and while it is somewhat similar to the dower rights of a widow, there are points of difference. In ancient times, for the right to exist, a child must have been born to the couple during the marriage; however, in those states where the right still exists, this requirement has, for the most part, been done away with. The ancient rule has been modified by statute in many of those states recognizing the right, and the portion of the wife's lands affected by the right varies from state to state.

Tenancy in Common. A tenancy in common is another type of multiple ownership, wherein the co-owners own undivided interests in a property. If, for example there are three owners in common, it would mean that each would own an undivided interest in the property (usually one-third each), and that at any time an action could be brought to require the property to be partitioned or divided so as to allocate a particular portion to each co-owner.

In the case of a tenancy in common, the death of the owner of an undivided interest creates a new ownership team, since the interest of the deceased party passes by will or inheritance to his heirs and the interest of the surviving owners is unchanged. There is, in other words, no right of survivorship, as is characteristic of joint tenancy.

TRANSFER OF TITLE

Escrow

In many of the states of the United States, transactions between buyers and sellers of property are consummated through the use or creation of an escrow. An escrow is simply an agreement between a buyer and a seller to accomplish the transaction through a third person, called an escrow holder. The escrow holder is, by virtue of the agreement between the parties, instructed when and under what circumstances he is to complete the transaction. In return for a fee normally paid to him, the escrow holder receives and holds the deed from the seller and receives and holds the money or other documents from the buyer. In conformity with the terms of the escrow agreement, or escrow instructions, when the title is in such condition as to satisfy the terms of the escrow and all of the deposits of money or documents have been made with the escrow holder, he has the deed recorded and delivers the money to the seller.

Conveyances

Under normal circumstances a parcel of real property, or an interest in real property, is transferred by virtue of a written instrument called a conveyance. The most common type of such conveyances are known as "deeds." The deeds that are most commonly used in the United States are of two basic types: a grantor warranty deed, and a quitclaim deed. It should be noted that in certain states the term "indenture" is used synonymously with "deed."

Grant or Warranty Deed. A grant deed contains certain covenants or guarantees of title. The words "Grant" or "warranty," when used in such a conveyance or deed, imply that the person signing the document as grantor has not previously conveyed this property to another person, and that the property conveyed is free from encumbrances or other defects in title that would in some way impair the validity of the transfer.

.Some jurisdictions make further distinctions in respect to warranty deeds and classify them as general warranty deeds or special warranty deeds. The general warranty deed contains covenants of title against all defects, regardless of whether they came into existence before or after the grantor acquired the title. A special warranty deed, on the other hand warrants title only against defects arising after the grantor acquired title.

Quitclaim Deed. A quitclaim deed conveys only that title which the grantor has in the property at that time. It does not in any way warrant or guarantee that the grantor has title. If, for example, the person signing the quitclaim deed has, in fact, no interest in the property, no interest in the property is conveyed, and the grantor is in no way obligated or bound as far as the deed itself is concerned. A quitclaim is used to clear title where a person may have an interest in the property. For example, a seller who is uncertain or who does not know whether his title is good or bad usually uses a quitclaim deed to convey.

Deed of Bargain and Sale. Another type of deed used in some jurisdictions is a deed of bargain and sale. It is a hybrid variety and could describe many grant deeds as well as quitclaim deeds. It may however, be neither a quitclaim nor a grant deed. A deed of bargain and sale may be defined as any deed that recites a monetary consideration and purports to transfer title to another. It need not contain warranties, and it may purport to convey more than the grantor's interest in the parcel. Use of the words "grant, sell, and convey" by a corporation in a deed are in many states considered to make the document a bargain and sale deed.

Patent. The term "*patent*" has double meaning in the law, and in one context is applicable in the real property field. In its more common use, "patent" or, more correctly, "letters patent" means that the holder of the letters patent has the exclusive right to manufacture or sell a new invention. It is a right conferred by the national government

The second meaning of the term "*patent*" refers to the instrument or conveyance by which a state or the national government grants public lands to a particular individual. This use of the term is more common in the new states of the United States, but it becomes appropriate in any area where lands currently in the public domain are transferred to private ownership.

Mortgages and Deeds of Trust. Also important in the area of conveyances are those, which are, in fact, the conveyance only of a security interest in a property. Such conveyances commonly take the form of mortgages or deeds of trust.

When an individual borrows money from another individual, often the lender will require that the borrower produce some security to protect the lender in the event that the borrowed sum is not repaid. The method whereby this security is held, insofar as real property is concerned, is in some jurisdictions known as a mortgage, while in other jurisdictions it is known as a deed of trust. In certain jurisdictions, the terms are, for the most part, synonymous; however, in other areas the law makes a basic distinction between the two.

A deed of trust may provide for conveyance of the borrower's title in the secured property to a trustee, with provisions that in the event that the borrowed sum is not repaid, the lender may call on the trustee to sell the secured property.

A mortgage is distinguished in most jurisdictions from a deed of trust in that a mortgage is a contract by which the mortgagor, or borrower, gives certain rights in a parcel of real property to the mortgagee, or lender. The mortgage, in all instances, creates a security interest in the real property, but the effect of the document itself varies from jurisdiction to jurisdiction.

In many states the mortgage is considered to be a conveyance that gives the mortgagee legal title to the land. Among the states of the United States accepting this theory are Alabama, Arkansas, Connecticut, Illinois, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, and West Virginia. Other states adopt the lien theory, in which the document itself merely creates a lien or encumbrance in favor of the mortgagee, and the mortgagor retains legal title. Among the states adopting this theory are Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

The mortgage, then, is an agreement between two parties only: the mortgagor (borrower), and the mortgagee (lender). To assert his right, the mortgagee must foreclose. This normally requires the initiation of a lawsuit, which, of course, takes times to resolve.

The deed of trust differs from the mortgage in that there are three parties involved: the trustor, who is the borrower, the trustee, who holds legal title, and the beneficiary, or lender. In the event of default in payment on the loan in this type of transaction, the provisions of the document itself give authority to the trustee to immediately sell the property and satisfy the debt owed to the beneficiary. States of the United States that use the deed of trust transaction include Illinois, Colorado, California, Missouri, Mississippi, New Hampshire, Tennessee, Virginia, and West Virginia. The transaction itself, however, is much more common in some states than in others, and is almost the exclusive method of financing used in some states, such as California.

Contracts of Sale. Contracts of sale constitute another method whereby real property is transferred. Such contracts normally are of two main types. The first provides for immediate transfer of ownership to the buyer, in which event the purchase price is paid in cash or partly in cash and partly by a note secured by a mortgage or deed of trust. The contract covers the interim period during which the title is examined and a policy of title insurance is obtained.

The second type of contract is a land installment contract, whereby the purchase price is paid for the land over a given period of time on an installment basis. Normally it stipulates that the buyer will buy at an agreed sum, with payments to be made in a certain specified period. When all of such payments have been made, the seller agrees to convey title to the buyer. The buyer normally acquires no recordable interest in the property at the time the contract is signed.

LIENS AND ENCUMBRANCES

Among the terms used in connection with titles to real property are liens and encumbrances. An encumbrance or, more properly, an "incumbrance" may be defined as any claim, lien, or liability attached to real property. It may take many forms, including a mortgage, unpaid taxes, a mechanic's lien, a deed restriction, a judgment lien, an easement, or right of way. It constitutes any right to or interest in land that may be held by someone other than the owner of that land and tends to reduce the fee simple interest claimed by the owner.

Lien. In the case of a lien, the property stands as security for payment of the debt. A lien may take many forms. It may be for unpaid real estate taxes or for unpaid state or federal income taxes. It may exist as a mechanic's or material man's lien, in the case of one who has furnished work or materials for the improvement of the real property concerned. It may be created as a result of a judgment tendered by a court against the owner of the property. The lien is usually enforced by means of foreclosure, in somewhat the same manner as a mortgage.

APPURTENANT RIGHTS

Rights Running with the Land

When an individual acquires the fee simple to a parcel of property, the deed conveying title to him should be carefully examined, as should the title itself. It is distinctly possible that the

grantor, in conveying title, has reserved an easement for himself or for some adjacent property owner, providing a service to that adjacent property at the expense of the new buyer.

Easements created for the benefit of adjacent tracts of land are normally known as easements appurtenant. Title to the easement area, once granted to the adjacent property owner normally becomes a right that attaches to that adjacent property, and when that property is conveyed, the easement appurtenant is also conveyed, even though it is not specifically mentioned in the deed. For such an easement to exist, there must be two parcels of property with different owners; one parcel, normally referred to as the "dominant tenement," has the benefit of the easement, and the other parcel, normally known as the "servient tenement," is subject to that easement right. Although the dominant tenement need not be adjacent to the servient tenement., it usually is.

Riparian Rights

Other rights that run with title to a parcel of property are those related to the right to receive the flow and use of water where a stream or river passes through the property. Such rights are known as riparian rights. The upstream owner must not by his use, materially diminish the flow of water so as to deprive the downstream owner of its use. In addition to the owner's riparian right to the flow and use of the water, he has certain other benefits and rights that are inherent to his ownership. He has, for example, the right to erect piers or other structures on piles driven into the stream bottom, provided, of course, that he does not thereby dam up the stream so as to interfere with the flow of the water to those downstream. It should also be mentioned that in the event the river is navigable, it is for all intents and purposes in the eyes of the law a public thoroughfare, the use of which cannot be prohibited by adjacent owners. The regulation of surface use in such an event rests with the United States Congress.

Accretion

Accretion is a term that is normally applicable to parcels of property lying adjacent to a body of navigable water. Where the natural action of the waters deposit soil on adjacent property the land thus created is said to be formed by accretion and becomes a part of the land to which it has accreted. A deed, therefore, to a tract of land affected by accretion would automatically pass title to the accretion, in addition to the original tract, even though the new portion of the land was not specifically described. Just as the owner of the adjacent property acquires land by accretion, in the event that soil is washed away through the normal action of a stream or river to be deposited elsewhere, the owner of the land from whom the soil is lost loses title to that property. And if the stream that constituted the boundary between two parcels of land gradually changes its course! by taking soil from one bank and adding it to the other, the boundary of the parcels changes with the location of the stream.

COVENANTS, CONDITIONS, AND RESTRICTIONS

In years past, a property owner could use his property for almost any purpose, but today the trend is toward the creation of certain restrictions on use. Use is not only limited by governmental control, such as zoning, but also by the creation of covenants, conditions, and restrictions imposed by the sub-divider or seller of the property to restrict the character, size, cost, number, or height of improvements and other similar matters.

Covenant: By way of definition, a covenant can be said to be an agreement or promise to do or not to do certain things, and it can be in favor of anyone to whom it was designed to benefit. A condition is a qualification imposed on a property, restricting the use or further conveyance and can be enforced only by the grantor or his heirs. If a condition is violated the property may even revert to the grantor.

Not all conditions or restrictions are permitted under the law. It is important to point out for example, that while ancient restrictions against the use or sale of certain property to persons other than members of the Caucasian race are still often found in titles, such restrictions are no longer recognized as valid by the courts of the United States, since they violate constitutional guarantees of equal protection of the law.

Covenants, conditions, and restrictions are normally imposed or placed on the property at the time acreage is subdivided into residential lots. The sub-divider will usually define what covenants, conditions, and restrictions are to be placed on the use of the property. Each lot sold thereafter is sold subject to those same covenants, conditions, and restrictions: thus, the end result is an agreement between all of the owners of lots to maintain their lots in conformity with the provisions of those covenants, conditions, and restrictions. Under normal circumstances, therefore, once the property becomes subject to covenants, conditions, or restrictions, it is necessary to secure the consent of the owners of all the individual lots to use the property in a manner that would violate those agreements.

ADVERSE POSSESSION

Adverse possession is a recognition, to some extent, of the often expressed theory that "possession is nine points of the law." Fortunately, the mere possession of a parcel of property is insufficient to vest title. Before an owner can be deprived of his title by virtue of the adverse possession of another, certain tests must be met. While the specific provisions of law dealing with the creation of title by adverse possession depend on the statutes of each jurisdiction, certain general rules can be expressed.

For a person to acquire title by adverse possession, the possession must be "hostile, actual, notorious, exclusive, continuous, and under claim of title." In other words, the individual must actually occupy the property in question. He must occupy it under a claim of right and contrary to any claim that the original owner may assert. His claim must be notorious, that is, it must be such that the real or original owner can observe that it is possession that is in opposition to his claim of ownership, and it must be exclusive for the continuous for a period of time as may be established by statute.

RECORDING STATUTES AND THEIR EFFECTS

Every state in the United States has provisions for recording deeds and other documents of title. As a general rule, the recording of a deed transferring title to property is a most important step, since until a deed is recorded a subsequent deed could be signed and recorded and thus defeat the interest of the prior purchaser. For example, A, having title to a parcel of property, might deed this property to B as a result of a sale. Assume that B fails to record his deed, and thereafter A, because of some reason known only to himself, executes a new deed to C, which

deed C thereafter records. If C is entirely without notice that B was the holder of an earlier deed, C's title would prevail against an action by B.

Another example, which perhaps would be more common, would be a situation where A, while owner of a parcel of property, sells it to B and executes a deed for the property. Again assume that B fails to record the deed. In this case, further assume that A and his heirs, not knowing that he had previously sold the land and conveyed it to another, sells the land to Q and C. Again proceeds to record his deed. Again in this case, C, if an innocent purchaser, would prevail in an action brought by B.

The policy behind this type of protection is the theory that title to real property should be disclosed by a reference to the public records, and purchases of property should be entitled to rely on the record of title that can be ascertained from the public records.

It is not only deeds that are entitled to be recorded, but also trust deeds, mortgages, assignments, and any other instrument that in any way affects the title to land. Under normal circumstances, however, before a document can be recorded it must be signed by the parties themselves, it must be the original document, and the signatures must be acknowledged before a notary public. An exception to the rule that the document must be an original is to be found in the case of a certified copy of an order or document obtained through the normal course from public records.

The recording of deeds, mortgages, and other documents, therefore, is considered, in the eyes of the law, to give the public constructive notice of the transferr of title, or of the interest of the individual having the document recorded. The court, as a consequence, will not permit a man to say that he did not know of a recorded deed or other document, because the fact that it was a matter of public record at the time constituted notice to the individual of its existence.

The title of the officer or office charged with maintaining the public records differs from state to state. It might be the county recorder, the recorder of deeds, the register of deeds, or the registry of deeds. The individual charged with the responsibility of making, the public record might be the county clerk the county recorder, the town clerk, a particular court clerk, or even, insome.areas, a city clerk.

In any discussion of recording and constructive notice, mention should be made of the effect of actual knowledge. If an individual has actual knowledge that a deed has not been recorded by an earlier grantee, he cannot attempt to better his position by going to the original seller of the land and securing from him a new deed to be immediately recorded. The existence of this new deed would not preclude the earlier buyer from prevailing against him if it can be established that the subsequent buyer knew of the existence of the earlier sale and the failure of the earlier buyer to record his deed.

It should also be mentioned that although a subsequent buyer of a parcel of property who first records his deed may prevail against an earlier buyer who did not record his deed. This does not preclude the right of the earlier buyer to bring suit against the original seller on grounds that two deeds to the same property were executed. If fraud can be established, then the earlier buyer may be entitled to recover damages. He would not, however, be entitled to the land itself, which would belong to the innocent subsequent buyer who first recorded his deed.

It is also important to note that where an improved parcel of property is sold, the buyer is charged with the responsibility of investigating to ascertain the rights that may be claimed by the individuals in possession. If he does not make such an investigation and it is later ascertained that the individual in possession holds an unrecorded deed to the property, the new buyer might well

be charged with constructive knowledge of the interest of the individual in possession. Thus, it may well be that even though his later deed was the first recorded, he may not be able to prevail against an earlier buyer in actual possession.

Torrens System

Certain states have established a land registry system sometimes called the Torrens System. This system establishes a procedure for the registration of title to land whereby a certificate is always available to show the state of the title and the person in whom it was vested. Where real estate is transferred under a registry system in the manner prescribed, the registrar of titles issues a certificate of ownership. It normally constitutes conclusive evidence of the title. The Torrens System usually provides for maintenance of a book or register known as the Register of Title. Each page or folio contains a certificate of title to a particular parcel of property described, with each certificate containing all facts relative to the title to the parcel. A prospective purchaser, lessee, or mortgagee can go to the registrar's office, examine that particular title, and with some degree of safety accept a conveyance or mortgage from the registered owner. The procedures for registering parcels in the jurisdictions using the Torrens System vary greatly, however, and reference should be made to the specific statutes of the subject jurisdictions for guidance.

Chain of Title

Traditionally, title to land was traced by the public records, and the documents establishing this chain of title were known as "abstracts of title." An abstract of title was simply a recitation or summary of the conveyances, transfers, and other factors relied on as evidence of the title to land, together with any liens or encumbrances that might affect that title. An individual preparing the abstract would normally be an attorney or a title searcher, who would go back to the original transaction by which, for example, the U.S. government vested title in the tract to a particular individual. From this starting point, the title to the land could be traced, step by step, to show its present ownership. In some instances, it would be necessary to go back beyond the vesting of title from the U.S. government to an individual and perhaps establish the existence of a Spanish or Mexican land grant.

In recent years, the use of the abstracts of title prepared by attorneys or others has been greatly modified, so that today title insurance companies exist in most of the large metropolitan areas and maintain records of the titles to all of the property within the jurisdiction that they cover. Through the work of these title companies, it is possible for a new buyer of a parcel of land to obtain an insurance policy that will insure the title to the property. It provides for payment to him of certain damages in the event that subsequent investigation should determine that that title was in some way defective. This type of title protection is becoming more and more popular, and the areas covered by title insurance companies grow larger with each passing year.

SUMMARY

The definitions set forth in this document are basic to the field of real property law and to a general understanding of estates in land; types of ownership; transfer of title; liens and encumbrances; appurtenant rights; covenants, conditions and restrictions; adverse possession; and recording statutes. A thorough knowledge of these terms and their meanings is of vital importance to the Right-of-way agent, since he will be called on to use these terms daily in his negotiations with property owners and their attorneys.

In certain jurisdictions varying and additional legal terms may be of particular concern to the right-of-way negotiator. Thus, the newly assigned individual must be constantly on the alert to ascertain these new terms and their meanings.