7 Principal Instruments Of Transfer

A Backward Look

Under the early English common law, ownership of real property was transferred by a technique called "feoffment." This involved delivery of possession, which was termed "livery of seizin." No writing or deed was involved. The transfer was actually effected by a delivery of the land itself or something symbolical of the land, such as a twig, a stone, or a handful of dirt.

Another early method of transfer was by a statement usually made before witnesses in view of the land to the effect that possession was transferred, followed by entry of the new owner. Again, no written instrument was at first required. An interest in land which was not capable of actual possession (termed an incorporeal right), such as an easement, was transferred by a deed called a "deed of grant."

A "conveyance by a release" was a deed given to transfer an estate or interest in land, but no *"livery of seizin"* could be given until the new owner took possession, which involved a multiplicity of formalities. A release was also used for the purpose of extinguishing a right in the land and corresponds to its modern descendant, the quitclaim deed.

A recording system was unknown to the early common law. Ownership was a matter of common knowledge and transfer was not often made except by descent from father to son on the father's death.

The method of making land transfers in California under Spanish and Mexican rule was somewhat similar to that of the common law. It was early held by the Supreme Court of California that land could not be conveyed under Spanish and Mexican laws without an instrument in writing, unless conveyance of the land was made by an executed contract in which actual possession was delivered at the time of sale by entry upon the premises and the doing of certain ceremonial acts (which in a sense were like "livery of seizin" at common law). The ancient "livery of seizin" is symbolized today by the delivery of the deed, not the property, by the grantor to the grantee. The deed is the now the symbol of title.

The Pattern Today

Today, Californians most often transfer title to real property by a simple written instrument, *the grant deed.* The word "grant" is expressly designated by statute as a word of conveyance. (Civil Code Section 1092) A second form of deed is the *quitclaim deed.* It resembles the common law *"conveyance by a release."* Other types of deeds are the warranty deed, the trust deed, the reconveyance deed, the sheriff's deed, and the gift deed.

DEEDS IN GENERAL

When properly executed, delivered and accepted, a deed transfers title to real property from one person (the *grantor*) to another person (the *grantee*). Transfer may be *voluntary*, or *involuntary* by act of law, such as a foreclosure sale.

There are several different essentials to a valid deed:

1. It must be in writing;
2. The parties must be properly described;
3. The parties must be competent to convey and capable of receiving the grant of the property;
4. The property conveyed must be described so as to distinguish it from other parcels of real property.;
5. There must be a granting clause, operative words of conveyance (e.g., "I hereby grant");
6. The deed must be signed by the party or parties making the conveyance or grant; and
7. It must be delivered and accepted.

Contrary to the law and established custom in other states, the expression "to have and to hold" (called the "habendum clause" of a deed) is not necessary, nor are witnesses or seal required. The deed should be dated, but this too is not necessary to its validity.

Any form of written instrument containing the essentials above set out will convey title to land. A typical grant

deed may be in the form as follows:

"I, John A. Doe, a single man, grant to Emma B. Roe, a widow, all that real property situated in Sacramento County, State of California, described as follows: Lot 21, Tract 62, recorded at Page 91 of Book 7 of Maps of Sacramento County, filed January 21, 1965. Witness my hand this tenth day of October, 1983.

(Signed) John A. Doe"

Usually, a deed is executed for consideration, but this is not essential for a valid transfer. Moreover, even when consideration is given for the property, this point need not be mentioned in the deed. However, it should be noted that lack of consideration may affect the rights of the grantee as against the rights of certain third parties because the recording statutes are intended to protect bona fide purchasers.

For example, a transfer made without consideration by a grantor who is or will thereby be rendered insolvent, is fraudulent as to grantor's creditors and those creditors may have the deed set aside in a court action.

A deed need not be acknowledged, nor need it be recorded. However, both *acknowledgment* and *recordation* are part of the standard operating procedure in real estate transfers for very good reasons.

Acknowledgment

An acknowledgment is a formal declaration before a duly authorized officer, such as a notary public, by a person who has executed an instrument that such execution is his or her act and deed. The piece of paper (or form) executed by the officer before whom the formal declaration was made (for example, the grantor in a grant deed) is a Certificate of Acknowledgment. This certificate is either printed right on the grant deed itself or is a separate piece of paper which is stapled to the grant deed. The acknowledgment of a writing is a way of proving that the writing was in fact signed (or executed) by the person who purported to sign (or execute) the writing. Moreover, an acknowledgment is a safeguard against forgery and false impersonation. Duly acknowledged writings are entitled to be introduced into evidence in litigation without further proof of execution.

Many instruments are not entitled to be recorded unless acknowledged. Unless by statute an acknowledgment is made essential to the validity of an instrument, the instrument itself is valid between the parties and persons having actual notice of it, though not acknowledged. The time of acknowledgment is almost invariably immaterial if the rights of innocent third parties do not intervene.

Where acknowledgments may be taken and by whom. Anywhere within the state, proof or acknowledgment of an instrument may be made before a justice, retired justice or clerk of the Supreme Court, or District Court of Appeal, or the judge or retired judge of a superior court, or, after September 17, 1959, a notary public. (Before that date a notary could not act outside the notary's own county.)

In this state and *within the city, county, city and county, or district for which the officer was selected, or appointed,* acknowledgment of an instrument may be made before either: a clerk of a municipal or justice court; a county clerk; a court commissioner; a judge or retired judge of a superior, municipal or justice court or certain other local officials. (Civil Code Section 1181)

Acknowledgments may be made and taken by any deputy of the foregoing, duly authorized by law. Also, certain military officers are authorized to take acknowledgments of persons serving in the armed forces. (Civil Code Section 1183.5)

The principal form of acknowledgement authorized by California law is provided for in Civil Code Section 1183.5. An acknowledgment taken outside this state, must be in accordance with the forms, provisions, and laws of this state. If not, it should have attached thereto a certificate of a clerk of the court of record of the county or district where the same was taken, or of a consul or consular agent of the U.S., or judge if in a foreign country. The certificate of acknowledgment must state that it is in accordance with the laws of the state, the United States or the foreign country in which it was taken and that the officer taking the same was authorized by law to do so and that the signature is true and genuine.

A form of acknowledgment called an "Apostille" may be used in California to authenticate a certificate of acknowledgment drafted in a foreign country.

If the certificate of acknowledgment is sufficient in other respects, it will not be invalidated by a mistake in the

date or even by the absence of a date. It is sufficient that such date appears by evidence within the instrument itself and, in the absence of proof to the contrary, it may be presumed that the acknowledgment was taken on the date of the execution of the instrument or at least before the recordation thereof.

Where the date of the deed is subsequent to that of the acknowledgment, the later date may be taken as the true date of the deed. The certificate must be authenticated by the signature of the officer followed by the name of his or her office. An official seal must be affixed if the officer is by law required to have a seal.

In California, a notary public must provide and keep an official seal, which must clearly show, when embossed, stamped, impressed or affixed to a document, the name of the notary, the State Seal, the words "Notary Public," the name of the county wherein the bond and oath of office are filed, and the date the notary public's commission expires. In addition the Notary Stamp contains the sequential identification number (commission number) assigned to the notary public, as well as the identification number assigned to the seal manufacturer or vendor. Because the legal requirement that the seal be photographically reproducible, the rubber stamp seal is almost universal; however, notaries public may use an embosser seal in addition to the rubber stamp.

A notary public is required to keep one active sequential journal at a time of all acts performed as a notary public. The journal must be kept in a locked and secured area, under the direct and exclusive control of the notary public. The journal must include the items shown below. (Government Code Section 8206 (a))

- Date, time, and type of each official act (e.g. acknowledgment, jurat).
- Character of every instrument sworn to, affirmed, acknowledged or proved before the notary public (e.g. deed of trust).
- The signature of each person whose signature is being notarized.
- A statement that the identity of a person making an acknowledgment or taking an oath or affirmation was based on "satisfactory evidence" pursuant to Civil Code Section 1185.
- The fee charged for the notarial service.
- If the document to be notarized is a deed, quitclaim deed, or deed of trust affecting real property or a power of attorney document, the notary public must require the party signing the document to place his or her right thumbprint in the journal. Government Code Section 8206 specifies alternatives if right thumbprint is not possible.

Acknowledgments taken by officers having an interest in the transaction. In general, case law has consistently provided that officers who take an acknowledgment of a writing should not have a direct financial interest in the transaction. The purpose of the prohibition is to discourage fraud, and if an acknowledged instrument discloses on its face that such conflict of interest exists, it has been held the recorded instrument does not impart constructive notice of its contents.

No reliance should be placed on instruments acknowledged before an officer who is known to have, or who may reasonably be expected to have, a direct financial or beneficial interest in the transaction. For example: an officer acknowledging his own signing of a document or instrument; an officer acknowledging a mortgagor's execution of a mortgage naming the officer as mortgagee; and an officer acknowledging a deed in which he or she is named as grantee.

An acknowledging officer who is one of several grantors or mortgagors may properly acknowledge signing of the instrument by the other grantors or mortgagors, but his or her own signing must be acknowledged by a different officer.

Effective January 1, 1978 the following statutes became effective with respect to the acknowledgments taken by notaries public:

- *Government Code* S*ection 822.*

A notary public who has a direct financial interest in a transaction can not perform any notarial act in connection therewith. Transactions covered include the following:

1. Financial transactions in which the notary public is named, individually, as a principal.
2. Real property transactions in which the notary public is named, individually, as grantor, grantee,

mortgagor, mortgagee, trustor, trustee, beneficiary, vendor, vendee, lessor or lessee.

- *Government Code Section 8224.1*

A notary public can not take the acknowledgment or proof of instruments in writing executed by him or by her.

Certain instruments must be acknowledged by affected party. California law protects property owners from unwarranted or unauthorized encumbrance of their property on the official records. Most instruments affecting real property must be executed and acknowledged or proved by the owner of the property before the instrument is eligible for recordation.

Among such instruments, besides conveyances, mortgages and trust deeds, are agreements for sale, option agreements, deposit receipts, commission receipts or any affidavit which quotes or refers to these instruments.

Any instrument transferring or encumbering community property must be executed by both the husband and the wife.

Recordation

While recording a deed does not affect its validity, it is extremely important to record since recordation protects the grantee. If a grantee fails to record, and another deed or any other document encumbering or affecting the title is recorded, the first grantee is in jeopardy. The recording system is established to show the sequence of transfers or other actions affecting property, and it is foolish to fail to avail oneself of the privilege of recording.

Possession of property also gives notice of the rights of persons in possession. A person buying real property should not rely entirely on a title policy, but should investigate to see if somebody is in possession and find out what their rights are. The occupants might be in possession under a partly paid contract of purchase and sale, or they could be in possession under a lease that gave them an option to buy.

Consistency of names in title instruments. Complete record title to land cannot be established unless the various instruments in a chain of title in the recorder's office show direct connection by name between the different owners. Any substantial variation between the name of the grantee in one instrument and the name of the grantor in the next instrument executed by that grantee will, irrespective of the fact that identity may be shown by "off record" evidence, render the title defective. Furthermore, the subsequent instrument executed by the grantor of that grantee cannot impart constructive notice of its contents to a third person.

A legal name of an individual consists of one personal, or given, name and one surname/family name. The old common law recognized but one given name and frequently disregarded middle names or initials. It has been stated that the insertion or omission of, or mistake or variance in a middle name or initial is immaterial. However, while the omission or addition of a middle name or initial in an instrument affecting real property is generally considered immaterial, a variance in middle names or initials may result in defective record of title.

Change of name. With limited exceptions, a person in whom title to real estate is vested who afterwards has a name change must, in a conveyance of the real estate, set forth the name in which he/she took title. For example: If a single woman acquires title as "Mary Doe" and later marries a man whose last name is Smith, she should convey the property as "Mary Doe Smith, formerly Mary Doe" (or "who acquired title as Mary Doe").

Generally, any conveyance, though recorded as provided by law, which does not comply with the foregoing provision does not impart constructive notice of the contents to subsequent purchasers and encumbrancers, but the conveyance is valid as between the parties thereto and those who have actual notice. To correct a situation in which an incorrect name has been used in a transfer of title, it is advisable to clear title by filing a special action and proceeding under Section 770.020 of the California Code of Civil Procedure.

Party in title instrument cannot be fictitious but may use fictitious name. A deed to a purely fictitious person (false or feigned name) is void, but a deed to an actual person under a fictitious name by which he or she is known or which this person assumes for the occasion is valid. If the grantee is misnamed in the deed, the error can be corrected by a second deed to the same grantee under the true name. The grantee designated in the deed must be a person in existence, either natural or artificial, and must be capable of taking title to the land, for a deed to a dead person is void. A deed to the estate of a deceased person is questionable. A deed to the administrator of the estate of a deceased person, if the administrator is duly nominated, appointed and acting, conveys title to the heirs or devisees of the deceased, subject to administration of the estate.

For example: A better mode of granting deeds to an estate, and one which has been approved by most title companies would be "to the heirs or devisees of John Doe, deceased, subject to the administration of his estate."

Delivery and Acceptance

A deed is of no effect unless delivered. But delivery in this context means more than a turning over of the physical possession of the document. The grantor must have the *intention* to pass title immediately. It is possible in some cases to have a legal delivery without the instrument actually being handed to the grantee, if the grantor has the requisite intent to transfer title.

That intention is not present if A gives B a deed but tells B not to record it until A's death, both parties believing the deed is ineffective until recorded. Nor is such intention present in the typical case of cross-deeds between husband and wife placed in a joint safe-deposit box with the understanding that the survivor will record his or her deed.

The law presumes a valid delivery if the deed is found in the possession of the grantee or is recorded, but such presumption is rebuttable. A deed may be entrusted to a third party (such as an escrow agent) with directions that it be delivered to the grantee upon the performance of designated conditions. The deed itself may contain conditions. But with reference to delivery, by statute, a grant cannot be delivered to the grantee conditionally. Delivery to the grantee, or to the grantee's agent as such, is necessarily absolute, and the instrument takes effect immediately, discharged of any condition on which the delivery was made which is not expressed in the deed. (Or, no delivery may have occurred and the deed may be found to be void.) The grantor attempting a conditional delivery should withhold transfer of the deed to the grantee until the conditions are satisfied; or incorporate the conditions in the deed itself; or deposit the deed into an escrow with appropriate instructions. Transfer of a deed conditioned on the grantor's death is ineffective as an attempted testamentary disposition failing to meet the requirements of a will.

A duly executed deed is presumed to be delivered as of its dated date. The dated date of a deed is often different from its recorded date. Possession or the rights thereto must be given when the deed is delivered.

Ordinarily, a deed cannot be given effect unless it is accepted by the grantee. An exception to this rule is made when the grantee is a minor or mentally incompetent. Acceptance of a deed may be shown by acts, words or conduct of the grantee showing an intent to accept. A deed to a governmental entity must ordinarily contain (either on the face of the deed itself or on a separate sheet attached to the deed) a certificate of acceptance.

TYPES OF DEEDS

Grant Deed

Because of inclusion of the word "grant" in a grant deed, the grantor impliedly warrants that he or she has not already conveyed to any other person and that the estate conveyed is free from encumbrances done, made or suffered by the grantor or any person claiming under grantor, including taxes, assessments and other liens. This does not mean that the grantor warrants that grantor is the owner or that the property is not otherwise encumbered. The grant includes appurtenant easements for ingress and egress and building restrictions. The grantor's warranty includes encumbrances made during grantor's, but no other individual's, possession of the property. It conveys any title acquired after the grantor has conveyed the title to the real property (after-acquired title), generally. Observe that these warranties carried by a grant deed are not usually expressed in the grant deed form. They are called "implied warranties" because the law deems them included in the grant whether or not explicitly expressed in the deed

Quitclaim Deed

A quitclaim deed is a deed by which a grantor transfers only the interest the grantor has at the time the conveyance is executed. There are no implied warranties in connection with a quitclaim deed. This type of deed guarantees nothing and there is no expressed or implied warranty that grantor owns the property or any interest in it. Moreover, a quitclaim deed does not convey any after-acquired title. A quitclaim deed effectively says, "I am conveying all the title that I have in the property described in this quitclaim - if I have, in fact, any title."

A quitclaim deed is generally used to clear some "cloud on the title." A "cloud on the title" is some minor defect in the title which needs to be removed in order to perfect the title. Deeds of court representatives, such as guardians, administrators, and sheriffs, usually have the effect of a quitclaim pursuant to court order.

Warranty Deed
A warranty deed contains express covenants of title. Warranty deeds are uncommon in California, no doubt because of the almost universal reliance in this state on title insurance to evidence marketable title.

Trust Deed
A trust deed (or deed of trust) is a 3-party security instrument conveying title to land as security for the performance of an obligation. There are three parties to a trust deed: borrower *(trustor),* lender *(beneficiary),* and a third party, called a *trustee,* to whom legal title to the real property is conveyed. The trustee holds the legal title in trust for the beneficiary and has the power to sell the property if the trustor does not fulfill the obligations as recited in the instrument. The trustee also possesses power to reconvey the legal title to the trustor provided the beneficiary requests a reconveyance of that title. This event occurs if the promissory note is paid in full.

A trustor signing the trust deed retains what is called an equitable title. That is, the trustor enjoys the right of possession and can do with the property whatever the trustor pleases so long as the trustor does not jeopardize the interest of the lender (beneficiary).

Business and Professions Code Section 10141.5 requires that a real estate licensee record a deed of trust within one week after closing of a transaction or deliver it to the beneficiary with a written recommendation that it be recorded or deliver it to the escrow holder. Failure of a real estate licensee to carry out the duties prescribed in Section 10141.5 does not affect the validity of the transfer of title to the real property.

Reconveyance Deed
A reconveyance deed is an instrument conveying title to property from a trustee back to the trustor on termination of the trust. This title is held by the trustee until the note or obligation is fully paid. Then, when the beneficiary issues a "Request for Full Reconveyance," the trustee executes the reconveyance to the borrower. Termination of the trust usually occurs when the promissory note is paid in full.

Sheriff's Deed
A sheriff's deed is a deed given to a party on the foreclosure of property, levied under a judgment for foreclosure on a mortgage or of a money judgment against the owner of the property.

The title conveyed is only that acquired by the state or the sheriff under the foreclosure and carries no warranties or representations whatsoever.

Gift Deed
A grantor may make a gift of property to the grantee, and use a grant deed form or a quitclaim deed form for the purpose. Grantor may, but need not, say in the deed that grantor makes the transfer because of love and affection for the grantee.

A gift deed made to defraud creditors may be set aside if it leaves the debtor/grantor insolvent or otherwise contributes to fraud. (Uniform Fraudulent Transfer Act, Civil Code Sections 3439 through 3439.12)

Void Deeds
Deeds that are void and pass no title even in favor of a bona fide purchaser for value include:

1. A deed from a person whose incapacity has been judicially determined, e.g., a deed from a person for whom a conservator has been appointed (Civil Code Section 40);
2. Forged deeds *(Meley v. Collins,* 41 Cal. 663);
3. A deed from a person under 18 years and not emancipated;
4. A deed executed in blank, where the name of the grantee has been inserted without authorization or consent of the grantor (*Trout* v. *Taylor,* 220 Cal. 652); and
5. A deed purely testamentary in character, i.e., when the grantor intends that the deed not become operative until his or her death.

Voidable Deeds

Deeds which are not void, but are voidable and pass title subject to being set aside in appropriate judicial proceedings include:

1. A deed from a person of unsound mind whose incapacity has not been determined *(Hughes v. Grandy*, 78 Cal. App. 2nd, 555);

2. Prior to March 4, 1972, a deed from a person over 18 years of age and under 21 years of age, except a deed from a lawfully married person 18 years of age or older (Family Code Sections 6700, 6701, 6710). Family Code Section 6701(b) limits the authority of a minor to "make a contract relating to real property or any interests therein". Since any person 18 or over, and under 21, who was lawfully married was deemed to be an adult for the purposes of dealing in property, it may be necessary to determine the legality of the marriage. If the person was married outside of California, and the marriage was valid by the laws of the state or the county in which the same was contracted, the marriage was valid in California. If the person was married in California, the age of the person will determine the procedure necessary to effect a valid marriage. (Family Code Sections 301 and 302.)