IV. EL NEGOCIO INMOBILIARIO

A. LA COMPRAVENTA

LAS OBLIGACIONES RELACIONALES

Gloria LICARI et al. v. Donald BLACKWELDER et al. Appellate Court of Connecticut 14 Conn. App. 46; 539 A.2d 609, April 5, 1988, Decided

OPINION BY: BIELUCH

[*47] 0] This is an appeal by the defendants from the judgment of the trial court awarding damages to the plaintiffs for breach of the defendants' duty as real estate brokers to find a buyer for the plaintiffs' property at the best possible price, and for acting improperly in dealing for themselves to the financial loss of the plaintiffs. The defendants claim that certain of the court's factual findings were not substantiated by sufficient evidence, and that some of the court's conclusions were not only unsupported by the facts of the case, but also were irrelevant to the cause of action brought by the plaintiffs and therefore were not issues properly before the court. Our review of the transcript and record in this case reveals that the court had before it sufficient evidence on which to base its findings, and that the court's conclusions were fully supported by the facts and the law and were relevant to the issues presented. We therefore find no error.

The trial court found the following facts. The six plaintiffs are brothers and sisters who inherited from their parents the family home and property in question located in Westport. The plaintiffs, whom the court found to be "unsophisticated lay people with no extensive dealings in real estate," decided to sell the property in 1978. The plaintiffs had no real knowledge as to the actual or potential value of their inherited real estate, which was located in a neighborhood of mixed residential and commercial properties at a time of changing property values. Upon the recommendation of a neighbor, the plaintiffs contacted Robert Schwartz, a

Norwalk real estate broker, for guidance and assistance in the sale of their property.

[*48] Schwartz consulted with the real estate agency of the defendants Donald Blackwelder and Hannah Opert, Westport brokers experienced as to the marketing and values of property in the area of the plaintiffs' home. The defendants and Schwartz discussed several prospective clients generated by the defendants who might be interested in various listings held by Schwartz. The defendants and Schwartz also agreed to a "co-broke arrangement" under which they would share the real estate listings and divide the commissions evenly if one of the defendants' prospective clients purchased real estate listed by Schwartz. Thereafter, Opert asked Schwartz to secure a listing on the plaintiffs' property so that it could be shown to a prospective buyer. On October 18, 1978, Schwartz obtained an exclusive twenty-four hour right to sell the plaintiffs' real estate at a price of $ 125,000, and the property was immediately shown to the defendants' prospective buyer by a sales agent employed by Schwartz.

Within the twenty-four hour listing period obtained by Schwartz, the defendants made their own offer of $ 115,000 for the plaintiffs' property, which was accepted by the plaintiffs. The defendants did not negotiate on behalf of or for the plaintiffs with the potential buyer secured by them, and did not allow for a reasonable period of time to expire for such negotiations before they made their own personal offer. The defendants also did not disclose to the plaintiffs their understanding of the potential value that the plaintiffs' property might have to other buyers. The plaintiffs, therefore, believed that they had sold their property at its true market value. On December 29, 1978, the plaintiffs transferred title to the premises to the defendants upon payment of $ 115,000 as follows: cash in the amount of $ 11,500 and a purchase money mortgage in the amount of $ 103,500 from the purchasers.

[*49] The plaintiffs were led to believe that the defendants would occupy and use the property. The defendants neither

took possession nor contracted for any improvements to the property. Instead, immediately upon signing the contract to buy the plaintiffs' property for $ 115,000, the defendant Opert contracted on behalf of her partnership to sell the home to another buyer for the price of $ 160,000. This potential buyer, a neighbor of the plaintiffs, was previously known by them to be interested in the property, but the plaintiffs had instructed Schwartz not to contact him. Title from the defendants passed to this buyer on January 4, 1979, six days after its purchase from the plaintiffs, for $ 160,000, a gain to the defendants of $ 45,000 on their cash investment of $ 11,500. Their purchase money mortgage held by the plaintiffs for six days was paid and released at the second title transfer.

The plaintiffs' revised complaint in two counts claimed first, that the defendants breached their duty to the plaintiffs by withholding from them information of other negotiations with potential buyers for the purchase of the plaintiffs' property at a higher price, and second, that the defendants intentionally misrepresented the identities of the serious prospective buyers in order to mislead the plaintiffs into selling the property to the defendants at a lower price.

The court, from the testimony and exhibits offered during the trial, found that "the more credible and weightier evidence support[ed] an ultimate fact conclusion that the defendants were obligated to act on behalf of the best interest of the plaintiffs." This obligation, the court concluded, "imposed upon the defendants the duty to find a buyer for the property at the best price to the plaintiffs based upon the defendants' knowledge, [*50] advice and information concerning all material facts affecting the property in question." The court also found that the defendants not only breached a duty they owed to their own prospective client, but that "they also acted incorrectly in dealing for themselves at the expense of the plaintiffs." The defendants' obligation to the plaintiffs, the court held, was the result of the defendants' relationship with Schwartz, the listing broker with whom they had an agreement "to split

Mr. Schwartz's commission on the sale to the defendants." Although it found that the plaintiffs had not proven any actual fraud, the court did find that the defendants' failure to use "reasonable efforts on behalf of the plaintiffs," and their own personal offer without disclosure of material facts affecting the plaintiffs' property rendered the defendants' "clear profit" of $ 45,000 "unconscionable."

The defendants appeal from the judgment rendered in favor of the plaintiffs awarding $ 45,000 plus legal interest from January 4, 1979, with taxable costs.

The defendants' claims on appeal begin with an argument that the evidence presented during the trial was insufficient to substantiate several of the court's factual findings. Specifically, the defendants claim that the court erred in finding (1) that the plaintiffs were unsophisticated lay people with no extensive dealings in real estate, (2) that the plaintiffs had no real knowledge as to actual or potential value of their inherited real estate, (3) that Schwartz consulted with the defendants as to marketing and prices of properties in the neighborhood of the plaintiffs' property in order to determine the suggested listing price of $ 125,000, (4) that the defendants asked Schwartz to show the plaintiffs' property to one of their prospective clients, (5) that the defendants made their own personal offer before allowing a reasonable period of time to expire for negotiations to take place between prospective buyers and the [*51] plaintiffs, (6) that the defendants did not disclose to the plaintiffs their understanding of the potential value that the plaintiffs' property might have to others in the neighborhood, (7) that the defendants led the plaintiffs to believe that they would occupy and use the property, and (8) that the defendant Opert, on signing the contract to buy the plaintiffs' property for $ 115,000, immediately contracted for its sale to the ultimate buyer at a price of $ 160,000.

The defendants argue that none of these factual findings was supported by sufficient evidence, and that some of the court's conclusions were irrelevant to the issues presented

to the trial court. Regardless of how these claims of error are presented, they are merely attacks on the factual findings of the trial court. The defendants are asking this court to retry the case. We cannot.

"Our review of the trial court's factual findings is limited solely to the determination of whether they are supported by the evidence or whether, in light of the evidence and pleadings in the whole record, they are clearly erroneous. Practice Book § 4061; Cookson v. Cookson, 201 Conn. 229, 242-43, 514 A.2d 323 (1986); Pandolphe's Auto Parts, Inc. v. Manchester, 181 Conn. 217, 221-22, 435 A.2d 24 (1980); Fortier v. Laviero, 10 Conn. App. 181, 183, 522 A.2d 313 (1987); Cook v. Nye, 9 Conn. App. 221, 224, 518 A.2d 77 (1986). The function of an appellate court is to review, and not retry, the proceedings of the trial court. '"We cannot retry the facts or pass upon the credibility of the witnesses." Johnson v. Flammia, 169 Conn. 491, 497, 363 A.2d 1048 (1975). . . .' Pandolphe's Auto Parts, Inc. v. Manchester, supra, 220; Buddenhagen v. Luque, 10 Conn. App. 41, 44-45, 521 A.2d 221 (1987); Cook v. Nye, supra." Petti v. Balance Rock Associates, 12 Conn. App. 353, 357, 530 A.2d 1083 (1987).

[*52] It is not within the power of this court to find facts or draw conclusions from primary facts found by the trial court. As an appellate court, we review the trial court's factual findings to ensure that they could have been found "legally, logically and reasonably." Appliances, Inc. v. Yost, 186 Conn. 673, 678, 443 A.2d 486 (1982); Hallmark of Farmington v. Roy, 1 Conn. App. 278, 280-81, 471 A.2d 651 (1984). Our review of the record discloses ample support for the court's factual findings. There is no merit to the defendants' claim to the contrary.

The defendants also challenge the court's conclusion that, through their relationship with the plaintiffs' broker, Schwartz, the defendants had certain obligations toward the plaintiffs. The defendants argue that by defining the scope of the defendants' duty towards the plaintiffs, the court went beyond the specific allegations contained in the

plaintiffs' complaint. We find no merit in the defendants' challenge to this aspect of the judgment of the trial court.

To the extent that the defendants' claims rest on grounds of evidentiary insufficiency, we restate the common refrain as to our role as an appellate court. An appellate court is limited in its review of factual findings to a determination of whether such facts are supported by the evidence, or whether, in light of the evidence presented and the whole record, they are clearly erroneous. Practice Book § 4061; Petti v. Balance Rock Associates, supra.

The court's finding that the defendants had an obligation to the plaintiffs through the relationship the defendants had with Schwartz is also subject to this standard of review. Whether the defendants were agents of the plaintiffs is a question of fact. Cohen v. Meola, 184 Conn. 218, 220, 439 A.2d 966 (1981); Teris v. Shearson Hayden Stone, Inc., 5 Conn. App. 691, 693, [*53] 501 A.2d 1228 (1985). In addition, "[t]he relation need not arise from an express appointment and an acceptance, but is often established from the words and conduct of the parties and the circumstances of the particular case." Kurtz v. Farrington, 104 Conn. 257, 269, 132 A. 540 (1926). See also Alaimo v. Royer, 188 Conn. 36, 41, 448 A.2d 207 (1982). The trial court's finding that the defendants were obligated to the plaintiffs through the defendants' relationship with Schwartz was not in error.

The defendants also maintain that the court erred in its findings as to the manner in which they breached their duty to the plaintiffs. Specifically, the defendants argue that because the grounds for the plaintiffs' complaint were limited to allegations that the defendants breached a duty to disclose prior negotiations and offers on the plaintiffs' property, and that the defendants had misrepresented the identities of other potential buyers in order to induce the plaintiffs to sell to them, the court's findings went beyond these specific allegations. We do not agree.

The facts found by the court were sufficient to support its conclusion that the defendants had breached a duty owed to

the plaintiffs, and that they had intentionally misrepresented certain facts to induce the plaintiffs to sell their property to them. Once the court had made these requisite threshold findings of fact, the law of this state and general principles of law support its conclusions based on these findings, contrary to the assertion of the defendants.

A real estate broker is a fiduciary. Kurtz v. Farrington, supra. As such, he is required to exercise fidelity and good faith, and "cannot put himself in a position antagonistic to his principal's interest"; Ritch v. Robertson, 93 Conn. 459, 463, 106 A. 509 (1919); by fraudulent conduct, acting adversely to his client's interests, [*54] or by failing to communicate information he may possess or acquire which is or may be material to his principal's advantage. A real estate broker acting as a subagent with the express permission of another broker who has the listing of the property to be sold is under the same duty as the primary broker to act in the utmost good faith. Robertson v. Chapman, 152 U.S. 673, 14 S. Ct. 741, 38 L. Ed. 592 (1893); see 12 Am. Jur. 2d 837-38, Brokers § 84.

This rule requiring a broker, or his subagent, to act with the utmost good faith towards his principal places him under a legal obligation to make a full, fair and prompt disclosure to his employer of all facts within his knowledge which are, or may be material to the matter in connection with which he is employed, which might affect his principal's rights and interests, or his action in relation to the subject matter of the employment, or which in any way pertains to the discharge of the agency which the broker has undertaken. Upon hearing that a more advantageous sale or exchange can be made, the facts concerning which are unknown to the principal, the broker has the duty to communicate these facts to the principal before making the sale. A failure to do so renders the broker liable to the principal for whatever loss the latter may suffer as a consequence thereof and precludes recovery of a commission for his services. 12 Am. Jur. 2d 842, Brokers § 89.

Our state has codified these principles of law in its real estate licensing law; General Statutes §§ 20-311 through 20-329bb; and in the regulations it has promulgated concerning the conduct of real estate brokers and salespersons. Regs., Conn. State Agencies §§ 20-328-1 through 20-328-18. Section 20-320 of the General Statutes provides for the suspension or revocation of a real estate license, as well as the levy of a fine, where a broker or salesperson has violated the code of conduct generally set out in the statute. Included in the proscribed [*55] conduct are the following: "(1) Making any material misrepresentation; (2) making any false promise of a character likely to influence, persuade or induce; (3) acting for more than one party in a transaction without the knowledge of all parties for whom he acts . . . [and] (11) any act or conduct which constitutes dishonest, fraudulent or improper dealings."

The trial court did not err in finding that the essential claims of breach of duty and intentional misrepresentation set out in the plaintiffs' complaint were proven by the facts presented, nor in finding that the conduct of the defendants entitled the plaintiffs to an award of damages. The defendants' conduct fell within the proscriptions of the general principles of law regarding the fiduciary relationship of a broker to his principal, as well as of the code of conduct required by the law of this state in General Statutes § 20-320.

There is no error.

Richard S. MURPHY and Beatrice K. Murphy v. FINANCIAL DEVELOPMENT CORPORATION & a.

Supreme Court of New Hampshire 126 N.H. 536; 495 A.2d 1245, May 24, 1985

OPINION BY: DOUGLAS

[*538] The plaintiffs brought this action seeking to set aside the foreclosure sale of their home, or, in the alternative, money damages. The Superior Court (Bean, J.), adopting the recommendation of a Master (R. Peter

Shapiro, Esq.), entered a judgment for the plaintiffs in the amount of $ 27,000 against two of the defendants, Financial Development Corporation and Colonial Deposit Company (the lenders).

The plaintiffs purchased a house in Nashua in 1966, financing it by means of a mortgage loan. They refinanced the loan in March of 1980, executing a new promissory note and a power of sale mortgage, with Financial Development Corporation as mortgagee. The note and mortgage were later assigned to Colonial Deposit Company.

In February of 1981, the plaintiff Richard Murphy became unemployed. By September of 1981, the plaintiffs were seven months in arrears on their mortgage payments, and had also failed to pay substantial amounts in utility assessments and real estate taxes. After discussing unsuccessfully with the plaintiffs proposals for revising the payment schedule, rewriting the note, and arranging alternative financing, the lenders gave notice on October 6, 1981, of their intent to foreclose.

During the following weeks, the plaintiffs made a concerted effort to avoid foreclosure. They paid the seven months' mortgage arrearage, but failed to pay some $ 643.18 in costs and legal fees associated with the foreclosure proceedings. The lenders scheduled the foreclosure sale for November 10, 1981, at the site of the subject property. They complied with all of the statutory requirements for notice. See RSA 479:25.

At the plaintiffs' request, the lenders agreed to postpone the sale until December 15, 1981. They advised the plaintiffs that this would entail an additional cost of $ 100, and that the sale would proceed unless the lenders received payment of $ 743.18, as well as all mortgage payments then due, by December 15. Notice of the postponement was posted on the subject property on November 10 at the originally scheduled time of the sale, and was also posted at the Nashua City Hall and Post Office. No prospective bidders were present for the scheduled sale.

In late November, the plaintiffs paid the mortgage payment which had been due in October, but made no further payments to the lenders. An attempt by the lenders to arrange new financing for the plaintiffs through a third party failed when the plaintiffs [*539] refused to agree to pay for a new appraisal of the property. Early on the morning of December 15, 1981, the plaintiffs tried to obtain a further postponement, but were advised by the lenders' attorney that it was impossible unless the costs and legal fees were paid.

At the plaintiffs' request, the attorney called the president of Financial Development Corporation, who also refused to postpone the sale. Further calls by the plaintiffs to the lenders' offices were equally unavailing.

The sale proceeded as scheduled at 10:00 a.m. on December 15, at the site of the property. Although it had snowed the previous night, the weather was clear and warm at the time of the sale, and the roads were clear. The only parties present were the plaintiffs, a representative of the lenders, and an attorney, Morgan Hollis, who had been engaged to conduct the sale because the lenders' attorney, who lived in Dover, had been apprehensive about the weather the night before. The lenders' representative made the only bid at the sale. That bid of $ 27,000, roughly the amount owed on the mortgage, plus costs and fees, was accepted and the sale concluded.

Later that same day, Attorney Hollis encountered one of his clients, William Dube, a representative of the defendant Southern New Hampshire Home Traders, Inc. (Southern). On being informed of the sale, Mr. Dube contacted the lenders and offered to buy the property for $ 27,000. The lenders rejected the offer and made a counter offer of $ 40,000. Within two days a purchase price of $ 38,000 was agreed upon by Mr. Dube and the lenders, and the sale was subsequently completed.

The plaintiffs commenced this action on February 5, 1982. The lenders moved to dismiss, arguing that any action was barred because the plaintiffs had failed to petition for an

injunction prior to the sale. The master denied the motion. After hearing the evidence, he ruled for the plaintiffs, finding that the lenders had "failed to exercise good faith and due diligence in obtaining a fair price for the subject property at the foreclosure sale . . . ."

The master also ruled that Southern was a bona fide purchaser for value, and thus had acquired legal title to the house. That ruling is not at issue here. He assessed monetary damages against the lenders equal to "the difference between the fair market value of the subject property on the date of the foreclosure and the price obtained at said sale."

Having found the fair market value to be $ 54,000, he assessed damages accordingly at $ 27,000. He further ruled that "[t]he bad faith of the 'Lenders' warrants an award of legal fees." The lenders appealed.

The first issue before us is whether the master erred in denying [*540] the motion to dismiss. The lenders, in support of their argument, rely upon RSA 479:25, II, which gives a mortgagor the right to petition the superior court to enjoin a proposed foreclosure sale, and then provides: "Failure to institute such petition and complete service upon the foreclosing party, or his agent, conducting the sale prior to sale shall thereafter bar any action or right of action of the mortgagor based on the validity of the foreclosure."

If we were to construe this provision as the lenders urge us to do, it would prevent a mortgagor from challenging the validity of a sale in a case where the only claimed unfairness or illegality occurred during the sale itself — unless the mortgagor had petitioned for an injunction before any grounds existed on which the injunction could be granted. We will not construe a statute so as to produce such an illogical and unjust result. State v. Howland, 125 N.H. 497, 502, 484 A.2d 1076, 1078 (1984).

The only reasonable construction of the language in RSA 479:25, II relied upon by the lenders is that it bars any action based on facts which the mortgagor knew or should

have known soon enough to reasonably permit the filing of a petition prior to the sale.

The master could not have found that this was such an action, because the only unfairness referred to in his report involves the amount of the sale price. Thus, his denial of the lenders' motion to dismiss was proper.

The second issue before us is whether the master erred in concluding that the lenders had failed to comply with the often-repeated rule that a mortgagee executing a power of sale is bound both by the statutory procedural requirements and by a duty to protect the interests of the mortgagor through the exercise of good faith and due diligence. See, e.g., Carrols Equities Corp. v. Della Jacova, 126 N.H. 116, 489 A.2d 116 (1985); Proctor v. Bank of N.H., 123 N.H. 395, 464 A.2d 263 (1983); Meredith v. Fisher, 121 N.H. 856, 435 A.2d 536 (1981); Lakes Region Fin. Corp. v. Goodhue Boat Yard, Inc., 118 N.H. 103, 382 A.2d 1108 (1978); Wheeler v. Slocinski, 82 N.H. 211, 131 A. 598 (1926). We will not overturn a master's findings and rulings "unless they are unsupported by the evidence or are erroneous as a matter of law." Summit Electric, Inc. v. Pepin Brothers Const., Inc., 121 N.H. 203, 206, 427 A.2d 505, 507 (1981).

The master found that the lenders, throughout the time prior to the sale, "did not mislead or deal unfairly with the plaintiffs." They engaged in serious efforts to avoid foreclosure through new financing, and agreed to one postponement of the sale. The basis for the master's decision was his conclusion that the lenders had failed to exercise good faith and due diligence in obtaining a fair price for the property.

[*541] This court's past decisions have not dealt consistently with the question whether the mortgagee's duty amounts to that of a fiduciary or trustee. Compare Pearson v. Gooch, 69 N.H. 208, 209, 40 A. 390, 390-91 (1897) and Merrimack Industrial Trust v. First Nat. Bank of Boston, 121 N.H. 197, 201, 427 A.2d 500, 504 (1981) (duty amounts to that of a fiduciary or trustee) with Silver v. First

National Bank, 108 N.H. 390, 391, 236 A.2d 493, 494-95 (1967) and Proctor v. Bank of N.H., supra at 400, 464 A.2d at 266 (duty does not amount to that of a fiduciary or trustee). This may be an inevitable result of the mortgagee's dual role as seller and potential buyer at the foreclosure sale, and of the conflicting interests involved. See Wheeler v. Slocinski, 82 N.H. at 214, 131 A. at 600.

We need not label a duty, however, in order to define it. In his role as a seller, the mortgagee's duty of good faith and due diligence is essentially that of a fiduciary. Such a view is in keeping with "[t]he 'trend . . . towards liberalizing the term [fiduciary] in order to prevent unjust enrichment.'" Lash v. Cheshire County Savings Bank, Inc., 124 N.H. 435, 438, 474 A.2d 980, 981 (1984) (quoting Cornwell v. Cornwell, 116 N.H. 205, 209, 356 A.2d 683, 686 (1976)).

A mortgagee, therefore, must exert every reasonable effort to obtain "a fair and reasonable price under the circumstances," Reconstruction &c. Corp. v. Faulkner, 101 N.H. 352, 361, 143 A.2d 403, 410 (1958), even to the extent, if necessary, of adjourning the sale or of establishing "an upset price below which he will not accept any offer." Lakes Region Fin. Corp. v. Goodhue Boat Yard, Inc., 118 N.H. at 107, 382 A.2d at 1111.

What constitutes a fair price, or whether the mortgagee must establish an upset price, adjourn the sale, or make other reasonable efforts to assure a fair price, depends on the circumstances of each case. Inadequacy of price alone is not sufficient to demonstrate bad faith unless the price is so low as to shock the judicial conscience. Mueller v. Simmons, 634 S.W.2d 533, 536 (Mo. App. 1982); Rife v. Woolfolk, 289 S.E.2d 220, 223 (W. Va. 1982); Travelers Indem. Co. v. Heim, 352 N.W.2d 921, 923-24 (Neb. 1984).

We must decide, in the present case, whether the evidence supports the finding of the master that the lenders failed to exercise good faith and due diligence in obtaining a fair price for the plaintiffs' property.

We first note that "[t]he duties of good faith and due diligence are distinct . . . . One may be observed and not the

other, and any inquiry as to their breach calls for a separate consideration of each." Wheeler v. Slocinski, 82 N.H. at 213, 131 A. at 600. In order [*542] "to constitute bad faith there must be an intentional disregard of duty or a purpose to injure." Id. at 214, 131 A. at 600-01.

There is insufficient evidence in the record to support the master's finding that the lenders acted in bad faith in failing to obtain a fair price for the plaintiffs' property. The lenders complied with the statutory requirements of notice and otherwise conducted the sale in compliance with statutory provisions. The lenders postponed the sale one time and did not bid with knowledge of any immediately available subsequent purchaser. Further, there is no evidence indicating an intent on the part of the lenders to injure the mortgagor by, for example, discouraging other buyers.

There is ample evidence in the record, however, to support the master's finding that the lenders failed to exercise due diligence in obtaining a fair price. "The issue of the lack of due diligence is whether a reasonable man in the [lenders'] place would have adjourned the sale," id. at 215, 131 A. at 601, or taken other measures to receive a fair price.

In early 1980, the plaintiffs' home was appraised at $ 46,000. At the time of the foreclosure sale on December 15, 1981, the lenders had not had the house reappraised to take into account improvements and appreciation. The master found that a reasonable person in the place of the lenders would have realized that the plaintiffs' equity in the property was at least $ 19,000, the difference between the 1980 appraised value of $ 46,000 and the amount owed on the mortgage totaling approximately $ 27,000.

At the foreclosure sale, the lenders were the only bidders. The master found that their bid of $ 27,000 "was sufficient to cover all monies due and did not create a deficiency balance" but "did not provide for a return of any of the plaintiffs' equity."

Further, the master found that the lenders "had reason to know" that "they stood to make a substantial profit on a quick turnaround sale." On the day of the sale, the lenders

offered to sell the foreclosed property to William Dube for $ 40,000. Within two days after the foreclosure sale, they did in fact agree to sell it to Dube for $ 38,000. It was not necessary for the master to find that the lenders knew of a specific potential buyer before the sale in order to show lack of good faith or due diligence as the lenders contend. The fact that the lenders offered the property for sale at a price sizably above that for which they had purchased it, only a few hours before, supports the master's finding that the lenders had reason to know, at the time of the foreclosure sale, that they could make a substantial profit on a quick turnaround sale. For this reason, they should have taken more measures to ensure receiving a higher price at the sale.

[*543] While a mortgagee may not always be required to secure a portion of the mortgagor's equity, such an obligation did exist in this case. The substantial amount of equity which the plaintiffs had in their property, the knowledge of the lenders as to the appraised value of the property, and the plaintiffs' efforts to forestall foreclosure by paying the mortgage arrearage within weeks of the sale, all support the master's conclusion that the lenders had a fiduciary duty to take more reasonable steps than they did to protect the plaintiffs' equity by attempting to obtain a fair price for the property. They could have established an appropriate upset price to assure a minimum bid. They also could have postponed the auction and advertised commercially by display advertising in order to assure that bidders other than themselves would be present.

Instead, as Theodore DiStefano, an officer of both lending institutions, testified, the lenders made no attempt to obtain fair market value for the property but were concerned only with making themselves "whole." On the facts of this case, such disregard for the interests of the mortgagors was a breach of duty by the mortgagees.

Although the lenders did comply with the statutory requirements of notice of the foreclosure sale, these efforts were not sufficient in this case to demonstrate due

diligence. At the time of the initially scheduled sale, the extent of the lenders' efforts to publicize the sale of the property was publication of a legal notice of the mortgagees' sale at public auction on November 10, published once a week for three weeks in the Nashua Telegraph, plus postings in public places. The lenders did not advertise, publish, or otherwise give notice to the general public of postponement of the sale to December 15, 1981, other than by posting notices at the plaintiffs' house, at the post office, and at city hall. That these efforts to advertise were ineffective is evidenced by the fact that no one, other than the lenders, appeared at the sale to bid on the property. This fact allowed the lenders to purchase the property at a minimal price and then to profit substantially in a quick turnaround sale.

We recognize a need to give guidance to a trial court which must determine whether a mortgagee who has complied with the strict letter of the statutory law has nevertheless violated his additional duties of good faith and due diligence. A finding that the mortgagee had, or should have had, knowledge of his ability to get a higher price at an adjourned sale is the most conclusive evidence of such a violation. See Lakes Region Fin. Corp. v. Goodhue Boat Yard, Inc., 118 N.H. at 107-08, 382 A.2d at 1111.

More generally, we are in agreement with the official [*544] Commissioners' Comment to section 3-508 of the Uniform Land Transactions Act:

"The requirement that the sale be conducted in a reasonable manner, including the advertising aspects, requires that the person conducting the sale use the ordinary methods of making buyers aware that are used when an owner is voluntarily selling his land. Thus an advertisement in the portion of a daily newspaper where these ads are placed or, in appropriate cases such as the sale of an industrial plant, a display advertisement in the financial sections of the daily newspaper may be the most reasonable method. In other cases employment of a professional real estate agent may be the more reasonable method. It is unlikely that an

advertisement in a legal publication among other legal notices would qualify as a commercially reasonable method of sale advertising.

13 Uniform Laws Annotated 704 (West 1980). As discussed above, the lenders met neither of these guidelines.

While agreeing with the master that the lenders failed to exercise due diligence in this case, we find that he erred as a matter of law in awarding damages equal to "the difference between the fair market value of the subject property . . . and the price obtained at [the] sale."

Such a formula may well be the appropriate measure where bad faith is found. See Danvers Savings Bank v. Hammer, 122 N.H. 1, 5, 440 A.2d 435, 438 (1982). In such a case, a mortgagee's conduct amounts to more than mere negligence. Damages based upon the fair market value, a figure in excess of a fair price, will more readily induce mortgagees to perform their duties properly. A fair price may or may not yield a figure close to fair market value; however, it will be that price arrived at as a result of due diligence by the mortgagee.

Where, as here, however, a mortgagee fails to exercise due diligence, the proper assessment of damages is the difference between a fair price for the property and the price obtained at the foreclosure sale. We have held, where lack of due diligence has been found, that "'the test is not "fair market value" as in eminent domain cases nor is the mortgagee bound to give credit for the highest possible amount which might be obtained under different circumstances, as at an owner's sale.'" Silver v. First National Bank, 108 N.H. 390, 392, 236 A.2d 493, 495 (1967) (quoting Reconstruction &c. Corp. v. Faulkner, 101 N.H. 352, 361, 143 A.2d 403, 410 (1958)) (citation [*545] omitted). Accordingly, we remand to the trial court for a reassessment of damages consistent with this opinion.

Because we concluded above that there was no "bad faith or obstinate, unjust, vexatious, wanton, or oppressive conduct," on the part of the lenders, we see no reason to

stray from our general rule that the prevailing litigant is not entitled to collect attorney's fees from the loser. Harkeem v. Adams, 117 N.H. 687, 688, 377 A.2d 617, 617 (1977). Therefore, we reverse this part of the master's decision.

Reversed in part; affirmed in part; remanded.

DISSENT BY: BROCK

I agree with the majority that a mortgagee, in its role as seller at a foreclosure sale, has a fiduciary duty to the mortgagor. I also agree with the majority's more specific analysis of that duty, including its references to the commissioners' comment to the Uniform Land Transactions Act, as well as those to Wheeler and other decisions of this court.

On the record presently before us, however, I cannot see any support for the master's finding that the lenders here failed to exercise due diligence as we have defined that term. I would remand the case to the superior court for further findings of fact.

Specifically, the master made no findings regarding what an "owner . . . voluntarily selling his land" would have done that the lenders here did not do, in order to obtain a fair price. The master's report stated that the lenders "did not establish an upset price or minimum bid," and that they "did not cause the property to be reappraised," but there is nothing in the record to show that an owner conducting a voluntary sale would have done these things.

Nor is there anything to indicate what an appropriate upset price would have been under the conditions present here. The master correctly noted that "[a] foreclosure sale . . . usually produces a price less than the property's fair market value," so it is virtually certain that any upset price would have been less than that amount.

I also cannot accept the majority's statement that the lenders' offer to sell the house for $ 40,000 constitutes support for a finding that they "should have taken more measures to ensure receiving a fair price at the sale." The offer was certainly relevant to the question of what the lenders knew about the house's value. Standing alone,

however, it says nothing about what a reasonable person in the lenders' position would have done to ensure a fair price under the circumstances of this particular sale.

The master, in fact, found that the lenders "did not mislead or [*546] deal unfairly with the plaintiffs" until the sale itself. He did not find, as the majority appears to assume, that the lenders should have adjourned the sale a second time. Although the report nowhere states specifically what the lenders should have done, its clear implication is that they should have made a higher bid at the foreclosure sale.

There is no authority for such a conclusion. The mortgagee's fiduciary duty extends only to its role as a seller. Once the mortgagee has exerted every reasonable effort to obtain a fair price (which may sometimes include setting an upset price and adjourning the sale if no bidder meets that price), it has no further obligation in its role as a potential buyer. See generally 1 Glenn on Mortgages § 108.1, at 652-53 (1943).

As the majority notes, a low price is not of itself sufficient to invalidate a foreclosure sale, unless the price is "so low as to shock the judicial conscience." The price here was clearly not that low. Cf. Shipp Corp., Inc. v. Charpilloz, 414 So. 2d 1122, 1124 (Fla. Dist. Ct. App. 1982) (bid of $ 1.1 million was not grossly inadequate compared to a market value of between $ 2.8 and $ 3.2 million).

Because it is unclear whether the master applied the correct standard regarding the mortgagees' duty, and because the record as presently constituted cannot support a determination that the lenders violated that standard, I respectfully dissent.

Franklin E. BEAN et al., Respondents, v. Carl J. WALKER et al., Appellants. Supreme Court of New York, Appellate Division, Fourth Department 95 A.D.2d 70; 464 N.Y.S.2d 895, July 11, 1983

OPINION BY: DOERR

[*70] OPINION OF THE COURT

Presented for our resolution is the question of the relative rights between a vendor and a defaulting vendee under a land purchase contract. Special Term, in granting summary judgment in favor of plaintiffs, effectively held that the defaulting vendee has no rights. We cannot agree.

The facts may be briefly stated. In January, 1973 plaintiffs agreed to sell and defendants agreed to buy a single-family home in Syracuse for the sum of $ 15,000. The contract provided that this sum would be paid over a 15-year period at 5% interest, in monthly installments of [*71] $ 118.62. The sellers retained legal title to the property which they agreed to convey upon payment in full according to the terms of the contract. The purchasers were entitled to possession of the property, and all taxes, assessments and water rates, and insurance became the obligation of the purchasers. The contract also provided that in the event purchasers defaulted in making payment and failed to cure the default within 30 days, the sellers could elect to call the remaining balance immediately due or elect to declare the contract terminated and repossess the premises. If the latter alternative was chosen, then a forfeiture clause came into play whereby the seller could retain all the money paid under the contract as "liquidated" damages and "the same shall be in no event considered a penalty but rather the payment of rent".

Defendants went into possession of the premises in January, 1973 and in the ensuing years claim to have made substantial improvements on the property. They made the required payments under the contract until August, 1981 when they defaulted following an injury sustained by defendant Carl Walker. During the years while they occupied the premises as contract purchasers defendant paid to plaintiff $ 12,099.24, of which $ 7,114.75 was applied to principal. Thus, at the time of their default, defendants had paid almost one half of the purchase price called for under the agreement. After the required 30-day period to cure the default, plaintiffs commenced this action sounding in ejectment seeking a judgment "[that] they be

adjudged the owner in fee" of the property and granting them possession thereof. The court granted summary judgment to plaintiffs.

If the only substantive law to be applied to this case was that of contracts, the result reached would be correct. However, under the facts presented herein the law with regard to the transfer of real property must also be considered. The reconciliation of what might appear to be conflicting concepts is not insurmountable.

While there are few New York cases which directly address the circumstances herein presented, certain general [*72] principles may be observed. " It is well settled that the owner of the real estate from the time of the execution of a valid contract for its sale is to be treated as the owner of the purchase money and the purchaser of the land is to be treated as the equitable owner thereof. The purchase money becomes personal property" (New York Cent. & Hudson Riv. R.R. Co. v Cottle, 187 App Div 131, 144, affd 229 NY 514). Thus, notwithstanding the words of the contract and implications which may arise therefrom, the law of property declares that, upon the execution of a contract for sale of land, the vendee acquires equitable title (Elterman v Hyman, 192 NY 113, 119; Williams v Haddock, 145 NY 144; Occidental Realty Co. v Palmer, 117 App Div 505, 506, affd 192 NY 588). The vendor holds the legal title in trust for the vendee and has an equitable lien for the payment of the purchase price (Trembath v Berner, 240 NY 618; New York Cent. & Hudson Riv. R.R. Co. v Cottle, supra; Charles v Scheibel, 128 Misc 275, affd 221 App Div 816; 4 Pomeroy, Equity Jurisprudence [5th ed], § 1261; 16 Carmody-Wait 2d, § 98:2, p 503). The vendee in possession, for all practical purposes, is the owner of the property with all the rights of an owner subject only to the terms of the contract. The vendor may enforce his lien by foreclosure or an action at law for the purchase price of the property — the remedies are concurrent (Flickinger v Glass, 222 NY 404; Zeiser v Cohn, 207 NY 407; Charles v Scheibel, supra). The conclusion to be reached, of course,

is that upon the execution of a contract an interest in real property comes into existence by operation of law, superseding the terms of the contract. An analogous result occurs in New York if an owner purports to convey title to real property as security for a loan; the conveyance is deemed to create a lien rather than an outright conveyance, even though the deed was recorded (Schulte v Cleri, 39 AD2d 692) and "one who has taken a deed absolute in form as security for an obligation, in order to foreclose the debtor's right to redeem, must institute a foreclosure, and is entitled to have the premises sold in the usual way" (14 Carmody-Wait 2d, § 92:2, p 612).

Cases from other jurisdictions are more instructive. In Skendzel v Marshall (261 Ind 226 [addressing itself to a land sale contract]), the court observed that while legal [*73] title does not vest in the vendee until the contract terms are satisfied, he does acquire a vested equitable title at the time the contract is consummated. When the parties enter into the contract all incidents of ownership accrue to the vendee who assumes the risk of loss and is the recipient of all appreciation of value. The status of the parties becomes like that of mortgagor-mortagee. Viewed otherwise would be to elevate form over substance (Skendzel v Marshall, supra, p 234). The doctrine that equity deems as done that which ought to be done is an appropriate concept which we should apply to the present case.

Where sale of real property is evidenced by contract only and the purchase price has not been paid and is not to be paid until some future date in accordance with the terms of the agreement, the parties occupy substantially the position of mortgagor and mortgagee at common law. In New York a mortgage merely creates a lien rather than conveying title (Moulton v Cornish, 138 NY 133), but this was not always so. At common law the mortgage conveyed title, and it was to protect the buyer from summary ejectment that courts of equity evolved the concept of "equitable" title as distinct from "legal" title (Barson v Mulligan, 191 NY 306, 313-

314; see, also, 2 Rasch, Real Property Law and Practice, § 1684; 14 Carmody-Wait 2d, § 92:1). The doctrine of equitable conversion had important consequences. The equitable owner suffered the risk of loss (Sewell v Underhill, 197 NY 168, 171, 172) as does a contract vendee in possession today (see General Obligations Law, § 5-1311, subd 1, par b), but concommitantly, the equitable owner was also entitled to any increase in value; "since a purchaser under a binding contract of sale is in equity regarded as the owner of the property, he is entitled to any benefit or increase in value that may accrue to it" (6 Warren's Weed, New York Real Property, Vendee and Vendor, § 6.01). Similarly, upon the parties' death, the vendor's interest is regarded as personal property (i.e., the right to receive money), while the vendee's interest is [*74] treated as real property (Barson v Mulligan, supra, p 313-314).

Because the common-law mortgagor possessed equitable title, the legal owner (the mortgagee) could not recover the premises summarily, but first had to extinguish the equitable owner's equity of redemption. Thus evolved the equitable remedy of mortgage foreclosure, which is now governed by statute (RPAPL 1301 et seq.). In our view, the vendees herein occupy the same position as the mortgagor at common law; both have an equitable title only, while another person has legal title. We perceive no reason why the instant vendees should be treated any differently than the mortgagor at common law. Thus the contract vendors may not summarily dispossess the vendees of their equitable ownership without first bringing an action to foreclose the vendees' equity of redemption. This view reflects the modern trend in other jurisdictions (see Skendzel v Marshall, supra, followed in Sebastian v Floyd, 585 SW2d 381 [Ky]; Thomas v Klein, 99 Idaho 105; Anderson Contr. Co. v Daugherty, 274 Pa Super Ct 13; H & L Land Co. v Warner, 258 So 2d 293 [Fla]), and has been recognized in New York (Hudson v Matter, 219 App Div 252; Gerder Servs. v Johnson, 109 Misc 2d 216; 16

Carmody-Wait 2d, ch 98; see, also, 4 Pomeroy, Equity Jurisprudence, §§ 1260-1262; see cases collected at Ann., 4 ALR4th 993; 47 S Cal L Rev 191; 41 Albany L Rev 71; 36 Mont L Rev 110; 28 Wayne L Rev 239).

The key to the resolution of the rights of the parties lies in whether the vendee under a land sale contract has acquired an interest in the property of such a nature that it must be extinguished before the vendor may resume possession. We hold that such an interest exists since the vendee acquires equitable title and the vendor merely holds the legal title in trust for the vendee, subject to the vendor's equitable lien for the payment of the purchase price in accordance with the terms of the contract. The vendor may not enforce his rights by the simple expedient of an action in ejectment but must instead proceed to foreclose the vendee's equitable title or bring an action at law for the purchase price, neither of which remedies plaintiffs have sought.

[*75] The effect of the judgment granted below is that plaintiffs will have their property with improvements made over the years by defendants, along with over $ 7,000 in principal payments on a purchase price of $ 15,000, and over $ 4,000 in interest. The basic inequity of such a result requires no further comment (see Hudson v Matter, 219 App Div 252, supra; Gerder Servs. v Johnson, 109 Misc 2d 216, supra). If a forfeiture would result in the inequitable disposition of property and an exorbitant monetary loss, equity can and should intervene (Thomas v Klein, 99 Idaho 105, 107, supra; Ellis v Butterfield, 98 Idaho 644, 648).

The interest of the parties here can only be determined by a sale of the property after foreclosure proceedings with provisions for disposing of the surplus or for a deficiency judgment. In arguing against this result, plaintiffs stress that in New York a defaulting purchaser may not recover money paid pursuant to an executory contract (Lawrence v Miller, 86 NY 131). Although we have no quarrel with this general rule of law (see, e.g., Dmochowski v Rosati, 96 AD2d 718, decided herewith), we observe that this rule has

generally been applied to cases involving down payments (see Gerder Servs. v Johnson, supra, p 217, and cases cited therein), or to cases wherein the vendee was not in possession (see, e.g, Leonard v Ickovic, 55 NY2d 727 [factually distinguishable because the defaulting vendee was not in possession and was not attempting to defend his equitable title, but rather to recover money paid under a theory of joint venture]; Havens v Patterson, 43 NY 218 [the defaulting party had abandoned possession eight years earlier, whereupon the vendor retook possession and made substantial improvements]).

By our holding today we do not suggest that forfeiture would be an inappropriate result in all instances involving a breach of a land contract. If the vendee abandons the property and absconds, logic compels that the forfeiture [*76] provisions of the contract may be enforced. Similarly, where the vendee has paid a minimal sum on the contract and upon default seeks to retain possession of the property while the vendor is paying taxes, insurance and other upkeep to preserve the property, equity will not intervene to help the vendee (Skendzel v Marshall, supra, pp 240, 241). Such is not the case before us.

Accordingly, the judgment should be reversed, the motion should be denied and the matter remitted to Supreme Court for further proceedings in accordance with this opinion.

Judgment unanimously reversed, with costs, motion denied and matter remitted to Supreme Court, Onondaga County, for further proceedings, in accordance with opinion.

EL ESTATUTO CONTRA FRAUDES

Thomas W. HICKEY & another v. Gladys M. GREEN. Appeals Court of Massachusetts, Plymouth 14 Mass. App. Ct. 671; 442 N.E.2d 37, November 16, 1982, Decided

OPINION BY: CUTTER

[*671] This case is before us on a stipulation of facts (with various attached documents). A Superior Court judge has adopted the agreed facts as "findings." We are in the same

position as was the trial judge (who received no evidence and saw and heard no witnesses).

[*672] Mrs. Gladys Green owns a lot (Lot S) in the Manomet section of Plymouth. In July, 1980, she advertised it for sale. On July 11 and 12, Hickey and his wife discussed with Mrs. Green purchasing Lot S and "orally agreed to a sale" for $ 15,000. Mrs. Green on July 12 accepted a deposit check of $ 500, marked by Hickey on the back, "Deposit on Lot . . . Massasoit Ave. Manomet . . . Subject to Variance from Town of Plymouth." Mrs. Green's brother and agent "was under the impression that a zoning variance was needed and [had] advised . . . Hickey to write" the quoted language on the deposit check. It turned out, however, by July 16 that no variance would be required. Hickey had left the payee line of the deposit check blank, because of uncertainty whether Mrs. Green or her brother was to receive the check and asked "Mrs. Green to fill in the appropriate name." Mrs. Green held the check, did not fill in the payee's name, and neither cashed nor endorsed it. Hickey "stated to Mrs. Green that his intention was to sell his home and build on Mrs. Green's lot."

"Relying upon the arrangements . . . with Mrs. Green," the Hickeys advertised their house on Sachem Road in newspapers on three days in July, 1980, and agreed with a purchaser for its sale and took from him a deposit check for $ 500 which they deposited in their own account. On July 24, Mrs. Green told Hickey that she "no longer intended to sell her property to him" but had decided to sell to another for $ 16,000. Hickey told Mrs. Green that he had already sold his house and offered her $ 16,000 for Lot S. Mrs. Green refused this offer.

The Hickeys filed this complaint seeking specific performance. Mrs. Green asserts that relief is barred by the Statute of Frauds contained in G.L. c. 259, § 1. The trial judge granted specific performance. Mrs. Green has appealed.

[*673] The present rule applicable in most jurisdictions in the United States is succinctly set forth in Restatement

(Second) of Contracts § 129 (1981). The section reads: "A contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the Statute of Frauds if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement" (emphasis supplied). The earlier Massachusetts decisions laid down somewhat strict requirements for an estoppel precluding the assertion of the Statute of Frauds. See, e.g., Glass v. Hulbert, 102 Mass. 24, 31-32, 43-44 (1869); Davis v. Downer, 210 Mass. 573, 576-577 (1912); Hazelton v. Lewis, 267 Mass. 533, 538-540 (1929); Andrews v. Charon, 289 Mass. 1, 5-7 (1935), where specific performance was granted upon a consideration [*674] of "the effect of all the facts in combination"; Winstanley v. Chapman, 325 Mass. 130, 133 (1949); Park, Real Estate Law § 883 (1981). See also Curran v. Magee, 244 Mass. 1, 4-6 (1923); Chase v. Aetna Rubber Co., 321 Mass. 721, 724 (1947). Compare Gadsby v. Gadsby, 275 Mass. 159, 167-168 (1931); Nichols v. Sanborn, 320 Mass. 436, 438-439 (1946). Frequently there has been an actual change of possession and improvement of the transferred property, as well as full payment of the full purchase price, or one or more of these elements.

"b. . . . Two distinct elements enter into the application of the rule of this Section: first, the extent to which the evidentiary function of the statutory formalities is fulfilled by the conduct of the parties; second, the reliance of the promisee, providing a compelling substantive basis for relief in addition to the expectations created by the promise."

It is stated in Park, Real Estate Law § 883, at 334, that the "more recent decisions . . . indicate a trend on the part of the [Supreme Judicial C]ourt to find that the circumstances warrant specific performance." This appears to be a correct perception. See Fisher v. MacDonald, 332 Mass. 727, 729

(1955), where specific performance was granted upon a showing that the purchaser "was put into possession and . . . [had] furnished part of the consideration in money and services"; Orlando v. Ottaviani, 337 Mass. 157, 161-162 (1958), where specific performance was granted to the former holder of an option to buy a strip of land fifteen feet wide, important to the option holder, and the option had been surrendered in reliance upon an oral promise to convey the strip made by the purchaser of a larger parcel of which the fifteen-foot strip was a part; Cellucci v. Sun Oil Co., 2 Mass. App. Ct. 722, 727-728 (1974), S.C., 368 Mass. 811 (1975). Compare Young v. Reed, 6 Mass. App. Ct. 18, 20-21 (1978), where the questions arose on the defendants' motion for summary judgment and the summary judgment granted was reversed, so that the full facts could be developed at trial; Fitzsimmons v. Kerrigan, 9 Mass. App. Ct. 928 (1980). Compare also D'Ambrosio v. Rizzo, 12 Mass. App. Ct. 926 (1981).

[*675] The present facts reveal a simple case of a proposed purchase of a residential vacant lot, where the vendor, Mrs. Green, knew that the Hickeys were planning to sell their former home (possibly to obtain funds to pay her) and build on Lot S. The Hickeys, relying on Mrs. Green's oral promise, moved rapidly to make their sale without obtaining any adequate memorandum of the terms of what appears to have been intended to be a quick cash sale of Lot S. So rapid was action by the Hickeys that, by July 21, less than ten days after giving their deposit to Mrs. Green, they had accepted a deposit check for the sale of their house, endorsed the check, and placed it in their bank account. Above their signatures endorsing the check was a memorandum probably sufficient to satisfy the Statute of Frauds under A.B.C. Auto Parts, Inc. v. Moran, 359 Mass. 327, 329-331 (1971). Cf. Guarino v. Zyfers, Mass. App. Ct. 874 (1980). At the very least, the Hickeys had bound themselves in a manner in which, to avoid a transfer of their own house, they might have had to engage in expensive litigation. No attorney has been shown to have

been used either in the transaction between Mrs. Green and the Hickeys or in that between the Hickeys and their purchaser.

There is no denial by Mrs. Green of the oral contract between her and the Hickeys. This, under § 129 of the Restatement, is of some significance. 9 There can be no doubt (a) that Mrs. Green made the promise on which the Hickeys so promptly relied, and also (b) she, nearly as promptly, but not promptly enough, repudiated it because she had a better [*676] opportunity. The stipulated facts require the conclusion that in equity Mrs. Green's conduct cannot be condoned. This is not a case where either party is shown to have contemplated the negotiation of a purchase and sale agreement. If a written agreement had been expected, even by only one party, or would have been natural (because of the participation by lawyers or otherwise), a different situation might have existed. It is a permissible inference from the agreed facts that the rapid sale of the Hickeys' house was both appropriate and expected. These are not circumstances where negotiations fairly can be seen as inchoate. Compare Tull v. Mister Donut Development Corp., 7 Mass. App. Ct. 626, 630-632 (1979).

We recognize that specific enforcement of Mrs. Green's promise to convey Lot S may well go somewhat beyond the circumstances considered in the Fisher case, 332 Mass. 727 (1955), and in the Orlando case, 337 Mass. 157 (1958), where specific performance was granted. It may seem (perhaps because the present facts are less complicated) to extend the principles stated in the Cellucci case (see esp. 2 Mass. App. Ct. at 728). We recognize also the cautionary language about granting specific performance in comment a to § 129 of the Restatement (see note 6, supra). No public interest behind G. L. c. 259, § 1, however, in the simple circumstances before us, will be violated if Mrs. Green fairly is held to her precise bargain by principles of equitable estoppel, subject to the considerations mentioned below.

Over two years have passed since July, 1980, and over a year since the trial judge's findings were filed on July 6, 1981. At that time, the principal agreed facts of record bearing upon the extent of the injury to the Hickeys (because of their reliance on Mrs. Green's promise to convey Lot S) were those based on the Hickeys' new obligation to convey their house to a purchaser. Performance of that agreement had been extended to May 1, 1981. If that agreement has been abrogated or modified since the trial, the case may take on a different posture. If enforcement of that agreement still will be sought, or if that agreement has [*677] been carried out, the conveyance of Lot S by Mrs. Green should be required now.

The case, in any event, must be remanded to the trial judge for the purpose of amending the judgment to require conveyance of Lot S by Mrs. Green only upon payment to her in cash within a stated period of the balance of the agreed price of $ 15,000. The trial judge, however, in her discretion and upon proper offers of proof by counsel, may reopen the record to receive, in addition to the presently stipulated facts, a stipulation or evidence concerning the present status of the Hickeys' apparent obligation to sell their house. If the circumstances have changed, it will be open to the trial judge to require of Mrs. Green, instead of specific performance, only full restitution to the Hickeys of all costs reasonably caused to them in respect of these transactions (including advertising costs, deposits, and their reasonable costs for this litigation) with interest. The case is remanded to the Superior Court Department for further action consistent with this opinion. The Hickeys are to have costs of this appeal.

So ordered.

JAMES R. BROWN et al., Appellees, v. MAUREEN M. LOBER, Ex'r, Appellant. Supreme Court of Illinois 75 Ill. 2d 547; 389 N.E.2d 1188, May 18, 1979, Filed

OPINION BY: UNDERWOOD

[*549] 90] Plaintiffs instituted this action in the Montgomery County circuit court based on an alleged breach of the covenant of seisin in their warranty deed. The trial court held that although there had been a breach of the covenant of seisin, the suit was barred by the 10-year statute of limitations in section 16 of the Limitations Act (Ill. Rev. Stat. 1975, ch. 83, par. 17). Plaintiffs' post-trial motion, which was based on an alleged breach of the covenant of quiet enjoyment, was also denied. A divided Fifth District Appellate Court reversed and remanded. (63 Ill. App. 3d 727.) [*550] We allowed the defendant's petition for leave to appeal.

The parties submitted an agreed statement of facts which sets forth the relevant history of this controversy. Plaintiffs purchased 80 acres of Montgomery County real estate from William and Faith Bost and received a statutory warranty deed (Ill. Rev. Stat. 1957, ch. 30, par. 8), containing no exceptions, dated December 21, 1957. Subsequently, plaintiffs took possession of the land and recorded their deed.

On May 8, 1974, plaintiffs granted a coal option to Consolidated Coal Company (Consolidated) for the coal rights on the 80-acre tract for the sum of $ 6,000. Approximately two years later, however, plaintiffs "discovered" that they, in fact, owned only a one-third interest in the subsurface coal rights. It is a matter of public record that, in 1947, a prior grantor had reserved a two-thirds interest in the mineral rights on the property. Although plaintiffs had their abstract of title examined in 1958 and 1968 for loan purposes, they contend that until May 4, 1976, they believed that they were the sole owners of the surface and subsurface rights on the 80-acre tract. Upon discovering that a prior grantor had reserved a two-thirds interest in the coal rights, plaintiffs and Consolidated renegotiated their agreement to provide for payment of $ 2,000 in exchange for a one-third interest in the subsurface coal rights. On May 25, 1976, plaintiffs filed this action

against the executor of the estate of Faith Bost, seeking damages in the amount of $ 4,000.

The deed which plaintiffs received from the Bosts was a general statutory form warranty deed meeting the requirements of section 9 of "An Act concerning conveyances" (Ill. Rev. Stat. 1957, ch. 30, par. 8). That section provides:

"Every deed in substance in the above form, when [*551] otherwise duly executed, shall be deemed and held a conveyance in fee simple, to the grantee, his heirs or assigns, with covenants on the part of the grantor, (1) that at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all incumbrances; and (3) that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same. And such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at length in such deed." Ill. Rev. Stat. 1957, ch. 30, par. 8.

The effect of this provision is that certain covenants of title are implied in every statutory form warranty deed. Subsection 1 contains the covenant of seisin and 91] the covenant of good right to convey. These covenants, which are considered synonymous (McNitt v. Turner (1873), 83 U.S. (16 Wall.) 352, 21 L. Ed. 341), assure the grantee that the grantor is, at the time of the conveyance, lawfully seized and has the power to convey an estate of the quality and quantity which he professes to convey. Maxwell v. Redd (1972), 209 Kan. 264, 496 P.2d 1320.

Subsection 2 represents the covenant against incumbrances. An incumbrance is any right to, or interest in, land which may subsist in a third party to the diminution of the value of the estate, but consistent with the passing of the fee by conveyance. Marathon Builders, Inc. v. Polinger (1971),

263 Md. 410, 283 A.2d 617; Aczas v. Stuart Heights, Inc. (1966), 154 Conn. 54, 221 A.2d 589.

Subsection 3 sets forth the covenant of quiet enjoyment, which is synonymous with the covenant of warranty in Illinois. (Biwer v. Martin (1920), 294 Ill. 488; Barry v. Guild (1888), 126 Ill. 439; Bostwick v. Williams (1864), 36 Ill. 65.) By this covenant, "the grantor warrants to the [*552] grantee, his heirs and assigns, the possession of the premises and that he will defend the title granted by the terms of the deed against persons who may lawfully claim the same, and that such covenant shall be obligatory upon the grantor, his heirs, personal representatives and assigns." Biwer v. Martin (1920), 294 Ill. 488, 497.

Plaintiffs' complaint is premised upon the fact that "William Roy Bost and Faith Bost covenanted that they were the owners in fee simple of the above described property at the time of the conveyance to the plaintiffs." While the complaint could be more explicit, it appears that plaintiffs were alleging a cause of action for breach of the covenant of seisin. This court has stated repeatedly that the covenant of seisin is a covenant in praesenti and, therefore, if broken at all, is broken at the time of delivery of the deed. Tone v. Wilson (1876), 81 Ill. 529; Jones v. Warner (1876), 81 Ill. 343.

Since the deed was delivered to the plaintiffs on December 21, 1957, any cause of action for breach of the covenant of seisin would have accrued on that date. The trial court held that this cause of action was barred by the statute of limitations. No question is raised as to the applicability of the 10-year statute of limitations (Ill. Rev. Stat. 1975, ch. 83, par. 17). We conclude, therefore, that the cause of action for breach of the covenant of seisin was properly determined by the trial court to be barred by the statute of limitations since plaintiffs did not file their complaint until May 25, 1976, nearly 20 years after their alleged cause of action accrued.

In their post-trial motion, plaintiffs set forth as an additional theory of recovery an alleged breach of the

covenant of quiet enjoyment. The trial court, without explanation, denied the motion. The appellate court reversed, holding that the cause of action on the covenant of quiet enjoyment was not barred by the statute of limitations. The appellate court theorized that plaintiffs' [*553] cause of action did not accrue until 1976, when plaintiffs discovered that they only had a one-third interest in the subsurface coal rights and renegotiated their contract with the coal company for one-third of the previous contract price. The primary issue before us, therefore, is when, if at all, the plaintiffs' cause of action for breach of the covenant of quiet enjoyment is deemed to have accrued.

This court has stated on numerous occasions that, in contrast to the covenant of seisin, the covenant of warranty or quiet enjoyment is prospective in nature and is breached only when there is an actual or constructive eviction of the covenantee by the paramount titleholder. Biwer v. Martin (1920), 294 Ill. 488; Barry v. Guild (1888), 126 Ill. 439; Scott v. Kirkendall (1878), 88 Ill. 465; Bostwick v. Williams (1864), 36 Ill. 65; Moore v. Vail (1855), 17 Ill. 185.

The cases are also replete with statements to the effect that the mere existence 92] of paramount title in one other than the covenantee is not sufficient to constitute a breach of the covenant of warranty or quiet enjoyment: "[T]here must be a union of acts of disturbance and lawful title, to constitute a breach of the covenant for quiet enjoyment, or warranty * * *." (Barry v. Guild (1888), 126 Ill. 439, 446.) "[T]here is a general concurrence that something more than the mere existence of a paramount title is necessary to constitute a breach of the covenant of warranty." (Scott v. Kirkendall (1878), 88 Ill. 465, 467.) "A mere want of title is no breach of this covenant. There must not only be a want of title, but there must be an ouster under a paramount title." Moore v. Vail (1855), 17 Ill. 185, 189.

The question is whether plaintiffs have alleged facts sufficient to constitute a constructive eviction. They argue that if a covenantee fails in his effort to sell an interest in

land because he discovers that he does not own what his warranty deed purported to convey, he has suffered a [*554] constructive eviction and is thereby entitled to bring an action against his grantor for breach of the covenant of quiet enjoyment. We think that the decision of this court in Scott v. Kirkendall (1878), 88 Ill. 465, is controlling on this issue and compels us to reject plaintiffs' argument.

In Scott, an action was brought for breach of the covenant of warranty by a grantee who discovered that other parties had paramount title to the land in question. The land was vacant and unoccupied at all relevant times. This court, in rejecting the grantee's claim that there was a breach of the covenant of quiet enjoyment, quoted the earlier decision in Moore v. Vail (1855), 17 Ill. 185, 191:

"'Until that time, (the taking possession by the owner of the paramount title,) he might peaceably have entered upon and enjoyed the premises, without resistance or molestation, which was all his grantors covenanted he should do. They did not guarantee to him a perfect title, but the possession and enjoyment of the premises.'" 88 Ill. 465, 468.

Relying on this language in Moore, the Scott court concluded:

"We do not see but what this fully decides the present case against the appellant. It holds that the mere existence of a paramount title does not constitute a breach of the covenant. That is all there is here. There has been no assertion of the adverse title. The land has always been vacant. Appellant could at any time have taken peaceable possession of it. He has in no way been prevented or hindered from the enjoyment of the possession by anyone having a better right. It was but the possession and enjoyment of the premises which was assured to him, and there has been no disturbance or interference in that respect. True, there is a superior title in another, but appellant [*555] has never felt 'its pressure upon him.'" 88 Ill. 465, 468-69.

Admittedly, Scott dealt with surface rights while the case before us concerns subsurface mineral rights. We are,

nevertheless, convinced that the reasoning employed in Scott is applicable to the present case. While plaintiffs went into possession of the surface area, they cannot be said to have possessed the subsurface minerals. "Possession of the surface does not carry possession of the minerals * * *. [Citation.] To possess the mineral estate, one must undertake the actual removal thereof from the ground or do such other act as will apprise the community that such interest is in the exclusive use and enjoyment of the claiming party." Failoni v. Chicago & North Western Ry. Co. (1964), 30 Ill. 2d 258, 262.

Since no one has, as yet, undertaken to remove the coal or otherwise manifested a clear intent to exclusively "possess" the mineral estate, it must be concluded that the subsurface estate is "vacant." As in Scott, plaintiffs "could at any time have taken peaceable possession of it. [They have] in no way been prevented or hindered from the enjoyment of the possession by any one having a better right." (88 Ill. 465, 468.) Accordingly, until such time as one holding paramount title interferes with 93] plaintiffs' right of possession (e.g., by beginning to mine the coal), there can be no constructive eviction and, therefore, no breach of the covenant of quiet enjoyment.

What plaintiffs are apparently attempting to do on this appeal is to extend the protection afforded by the covenant of quiet enjoyment. However, we decline to expand the historical scope of this covenant to provide a remedy where another of the covenants of title is so clearly applicable. As this court stated in Scott v. Kirkendall (1878), 88 Ill. 465, 469:

"To sustain the present action would be to confound all distinction between the covenant of [*556] warranty and that of seizin, or of right to convey. They are not equivalent covenants. An action will lie upon the latter, though there be no disturbance of possession. A defect of title will suffice. Not so with the covenant of warranty, or for quiet enjoyment, as has always been held by the prevailing authority."

The covenant of seisin, unquestionably, was breached when the Bosts delivered the deed to plaintiffs, and plaintiffs then had a cause of action. However, despite the fact that it was a matter of public record that there was a reservation of a two-thirds interest in the mineral rights in the earlier deed, plaintiffs failed to bring an action for breach of the covenant of seisin within the 10-year period following delivery of the deed. The likely explanation is that plaintiffs had not secured a title opinion at the time they purchased the property, and the subsequent examiners for the lenders were not concerned with the mineral rights. Plaintiffs' oversight, however, does not justify us in overruling earlier decisions in order to recognize an otherwise premature cause of action. The mere fact that plaintiffs' original contract with Consolidated had to be modified due to their discovery that paramount title to two-thirds of the subsurface minerals belonged to another is not sufficient to constitute the constructive eviction necessary to a breach of the covenant of quiet enjoyment.

Finally, although plaintiffs also have argued in this court that there was a breach of the covenant against incumbrances entitling them to recovery, we decline to address this issue which was argued for the first time on appeal. It is well settled that questions not raised in the trial court will not be considered by this court on appeal. Kravis v. Smith Marine, Inc. (1975), 60 Ill. 2d 141; Ray v. City of Chicago (1960), 19 Ill. 2d 593.

Accordingly, the judgment of the appellate court is [*557] reversed, and the judgment of the circuit court of Montgomery County is affirmed.

Kenneth L. LOHMEYER, Appellant, v. Carl A. Bower, Jr., Anna S. BOWER and Ted Newcomer, d/b/a Newcomer Agency, Appellees. Supreme Court of Kansas 170 Kan. 442; 227 P.2d 102, January 27, 1951, Opinion Filed

OPINION BY: PARKER

[*443] This action originated in the district court of Lyon county when plaintiff filed a petition seeking to rescind a contract in which he had agreed to purchase certain real estate on the ground title tendered by the defendants was unmerchantable. The defendants Bower and Bower, husband and wife, answered contesting plaintiff's right to rescind and by cross-petition asked specific performance of the contract. The defendant Newcomer answered, stating he was an escrow agent under terms of the agreement, that he had no interest in the action except in that capacity and that he would abide and be governed by whatever decision was rendered by the court. The case was tried upon the pleadings and stipulated facts by the trial court which rendered judgment for the defendants generally and decreed specific performance of the contract.The plaintiff appeals from that judgment.

The pleadings are of little consequence and can be summarized by brief reference to salient features thereof.

Plaintiff's petition alleges execution of the contract whereby he agreed to purchase Lot 37 in Berkley Hills Addition in the city of Emporia and makes such contract a part of that pleading. It avers that after execution of the agreement it came to his attention that the house on the real estate therein described had been placed there in violation of Section 5-224 of the Ordinances of the city of Emporia in that the house was located within approximately 18 inches of the north line of such lot in violation of the ordinance providing that no frame building should be erected within 3 feet of a side or rear lot line. It further avers that after execution of the agreement it came to plaintiff's knowledge the dedication of the Berkeley Hills Addition requires that only a two story house should be erected on the lot described in the contract whereas the house located thereon [*444] is a one story house. It then states the violations of the city ordinance and the dedication restrictions were unknown to the plaintiff when he entered into the contract and that he would not have entered into such agreement if he had known thereof. It next alleges that

after becoming aware of such violations plaintiff notified the defendants in writing thereof, demanded that he be released from his contract and that defendants refused such demand. Finally it charges that such violations made the title unmerchantable and asks that the agreement be canceled and set aside and that all moneys paid by plaintiff under its terms be refunded.

The answer of defendants Bower and Bower admits execution of the contract and denies generally all allegations of the petition. It specifically denies the house on Lot 37 violates Ordinance 5-224 or the restrictions contained in the dedication of the Berkley Hills Addition and alleges the restrictions in such dedication are of no force and effect because they were extinguished by sale of the property for taxes and that such ordinance is of no force and effect because it was repealed by one ordinance of such city, describing it, and conflicts with the provisions of another ordinance which is also described. Their cross-petition alleges performance of the contract, that plaintiff is in the possession of the property but has refused to pay the balance due on the purchase price, and that they are entitled to judgment for specific performance of the contract with directions to defendant Newcomer to pay them all sums paid him by plaintiff as escrow agent under its terms.

The contents of defendant Newcomer's answer have been heretofore referred to and require no further attention.

Further pleadings disclosed by the record are in the form of general denials and consist of a reply to the answer, an answer to the cross-petition, and a reply to plaintiff's answer to the cross-petition.

Pertinent provisions of the contract, entered into between the parties, essential to disposition of the issues raised by the pleadings, read:

"Witnesseth, That in consideration of the stipulations herein contained, and the payments to be made by the second party as hereinafter specified, the first party hereby agrees to sell unto the second party the following described

real estate, situated in the County of Lyon, State of Kansas, to-wit:

Lot numbered Thirty-seven (37) on Berkley Road in Berkley Hills Addition to the City of Emporia, according to the recorded plat thereof.

and to convey the above described real estate to the second party by Warranty Deed with an abstract of title, certified to date showing good merchantable [*445] title or an Owners Policy of Title Insurance in the amount of the sale price, guaranteeing said title to party of the second part, free and clear of all encumbrances except special taxes subject, however, to all restrictions and easements of record applying to this property, it being understood that the first party shall have sufficient time to bring said abstract to date or obtain Report for Title Insurance and to correct any imperfections in the title if there be such imperfections…

"That the deed and/or other papers of transfer are to be executed at once by the first party and placed in escrow with Newcomer Agency, to be held by said Newcomer Agency together with the earnest money until the transaction is completed according to this agreement, and that all further payments are to be made through Newcomer Agency…

"That if the first party cannot deliver title as agreed, the earnest money paid by the second party shall be returned to said second party and this contract cancelled."

Heretofore we have indicated that by agreement the cause was submitted to the trial court upon the pleadings and a stipulation of facts. Having summarized the pleadings it now becomes necessary to direct attention to the stipulation. That instrument is lengthy and we hesitate to quote it in toto. However, since, where the facts are agreed upon and in writing, this court is in the same position to weigh them as the court below (See City of Wichita v. Boles, 156 Kan. 619, 135 P. 2d 542), we have decided that should be done. It reads:

"In this stipulation whenever the term defendants is used, it applies only to defendants Carl A. Bower, and Anne S. Bower.

"It is hereby stipulated between the parties hereto that defendants acquired title to the real property in controversy from Alonzo Walls and Lucy Walls, his wife, by warranty deed dated August 19, 1946; that said Alonzo Walls took title to said property by Sheriff's Deed, dated October 1, 1942, which deed was issued pursuant to the tax foreclosure laws of Kansas, Chapter 375, 1941 Session Laws, Kansas.

"That the real property in controversy is Lot No. 37 on Berkley Road in Berkley Hills Addition, which lot is 50 feet in width and fronts west on the east side of Berkley Road; that defendants procured a permit from the Fire Chief of the City of Emporia, on August 21, 1946, to move a house which had been built elsewhere on to said lot, and pursuant to said permit, did move the house on said lot during August of 1946; that during said year defendants made improvements on said house, which did not include structural alterations.

"The above mentioned house is a frame house and is located on the lot, 41 feet back from the sidewalk. The south wall of the house is 9 feet from the South line of the lot. The north wall of the house is 18 inches from the north line of the lot. The walls of the house are 10 feet 11 inches in height, from the ground to eaves, and the ridge of the roof is 21 feet, 2 inches, from the [*446] ground. The chimney extends 2 feet and 6 inches above the ridge of the roof. Two dormer windows face the front. The sills of these windows are more than 10 feet 11 inches above the ground. The portion of the house above the first or ground floor is immediately under the roof; is unfinished and the only means of access thereto is through a square hole cut through the ceiling of a storeroom closet off the hallway.

"It is further stipulated that defendants had their abstract of title recertified and delivered to said escrow holder, Ted

Newcomer, for delivery to plaintiff, which he did, and the following correspondence ensued.

"Emporia, Kansas
June 13, 1949.
Dr. L. K. Lohmeyer,
Emporia, Kansas.
Dear Dr. Lohmeyer:

You have handed me abstract of title to Lot No. 37, Berkley Hills Addition to the City of Emporia, for examination.

Before examining this abstract I wish to call your attention to one matter. It is my information that the dwelling house located on the above described property extends to within 17 or 18 inches of the North line of the lot. There is nothing in the abstract bearing on this question, and I suggest that before further considering this abstract, you ascertain the location of the dwelling house with reference to the property line, in view of the fact that Section 5-224 of the Ordinances of the City of Emporia, provides as follows:

"In no case shall a frame building be erected within three feet of the side or rear lot line, nor within six feet of another building, unless the space between the studs on such side shall be filled solidly with not less than 2 1/2 inches of brick work or other equivalent incombustible material."

In view of the foregoing Ordinance, you would be subject to having to remove that portion of your building extending beyond the three foot restricted space, in the event the owner of the adjoining property or any subsequent owner, or the City should take exception to the encroachment. The passing of time, commonly referred to as the Statute of Limitations, does not cure such a defect. If your investigation discloses that the building on the above lot complies with the foregoing Ordinance, then I will proceed with the examination of the title.

Very truly yours,
(Signed) Roscoe W. Graves."
RWG/hs
"Emporia, Kansas

June 16, 1949
Ted Newcomer,
Newcomer Agency,
Emporia State Bank Bldg.,
Emporia, Kansas.
Dear Sir:
A copy of the letter written to me by Roscoe Graves, Lawyer, dated June 13, 1949, and delivered to you the same date is called to your attention.
The opinion drawn by this letter makes the title to the property, Lot number [*447] thirty-seven (37) on Berkley Road, non-merchantable, as per agreement date May 19, 1949.
For this reason I am asking the return of my payments totaling thirty-eight hundred dollars ($ 3800.00).
Sincerely yours,
(Signed) K. L. Lohmeyer, M. D."
"No further legal opinion, other than above, nor information with reference to title requirements have been delivered to defendants or their attorneys.
"That plaintiff is now living in said house and has been in possession thereof since June 1, 1949.
"That defendants offered to purchase and convey to plaintiff two feet along the entire north side of the lot in controversy without charge and plaintiff refused such offer.
"It is further stipulated and agreed that the following paragraphs are the portion of the Declaration of Restrictions affecting Berkley Hills Addition to the City of Emporia and that the property in controversy herein is a part of said Addition.
"Declaration of Restrictions Affecting Berkley Hills Addition to Emporia, Kansas
Calvin H. Lambert and wife to the Public:
Filed July 6, 1926,
Register of Deeds
Lyon County, Kansas.
"Persons Bound By These Restrictions.

"All persons who now own or who shall hereafter acquire any interest in any of the lots in Berkley Hills, shall be taken and held to agree and covenant with the owner of the lots shown on said plat, and with his successors and assigns, to conform to and observe the following covenants, restrictions and stipulations as to the use therof, and the construction of residences and improvements thereon, for a period of 25 years from May 15, 1926, provided however, that each of said restrictions shall be renewable in the manner hereinafter set forth.

"Sec. II Required Cost and Height of Residence.

"Any residence erected wholly or partially on any of the following lots or part or parts therof as indicated in this section shall cost not less than the sum herein below set forth, and shall be of the height designated as follows:

"On lots 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 56, 57, 58, 59, 60, 61, 62 and 63, two-story residences, $ 7000.

"Section 9. Duration of Restrictions:

"Each of the restrictions above set forth shall be binding upon Calvin H. Lambert and his successors and assigns for a period of 25 years from May 15, 1926, and shall automatically be continued thereafter for successive periods of 25 years each.

"Section 10. Right to Enforce:

"The restrictions herein set forth shall run with the land and bind the present owner, his successor and assigns and all parties claiming by, through and under him. The section further provides that the owner or owners of any of the above land shall have the right to sue for and obtain an injunction, prohibitory or [*448] mandatory, to prevent the breach of or enforce the provisions of the restrictions above set forth, in addition to the ordinary legal action for damages, and the failure of Calvin H. Lambert or the owner or owners of any other lot or lots in this addition, to enforce any of the restrictions herein set forth at the time of its violation shall in no event be deemed to be a waiver of the right to do so thereafter.

"Tender of Possession.

"The plaintiff does hereby tender the possession of the involved property to the defendants at such time as the payments he has made under the contract of sale have been repaid to him by the escrow party.
"Ordinances of City of Emporia.
"Sec. 5-224. Frame Buildings.
"In no case shall a frame building be erected within three feet of the side or rear lot line, nor within six feet of another building, unless the space between the studs on such side be filled solidly with not less than 2 1/2 inches of brickwork or other equivalent incombustable material.
"1946 Revised Ordinances of City of Emporia.
"Article XXVI. Conflicting Ordinances Repealed.
"Sec. 1. Any ordinances or parts of ordinances and particularly any parts of Ordinance 1314 as Amended, in conflict herewith are hereby repealed.
"Revised Zoning Ordinance,
No. 1674, January, 1949.
"Article V. 'A' Single Family District Regulations.
"Sec. 4. (2) a. Except as hereinafter provided in the following paragraph and in Article XVI, there shall be a side yard on each side of a building, having a width of not less than five (5) feet.
"b. Whenever a lot of record existing.
"2. Side Yard.
"(a) Except as hereinafter provided in the following paragraph and in Article XVI, there shall be a side yard on each side of a building, having a width of not less than five (5) feet.
"(b) Whenever a lot of record existing at the time of the passage of this ordinance has a width of less than fifty (50) feet, the side yard on each side of a building may be reduced to a width of not less than ten (10) per cent of the width of the lot, but in no instance shall it be less than three (3) feet.
"Revised Zoning Ordinance,
No. 1674, January, 1949."

From what has been heretofore related, since resort to the contract makes it clear appellees agreed to convey the involved property with an abstract of title showing good merchantable title, free and clear of all encumbrances, it becomes apparent the all decisive issue presented by the pleadings and the stipulation is whether such property is subject to encumbrances or other burdens making the title unmerchantable and if so whether they are such as are excepted by the provision of the contract which reads "subject however, to all restrictions and easements of record applying to this property."

[*449] Decision of the foregoing issue can be simplified by directing attention early to the appellant's position. Conceding he purchased the property subject to all restrictions of record he makes no complaint of the restrictions contained in the declaration forming a part of the dedication of Berkley Hills Addition nor of the ordinance restricting the building location on the lot but bases his right to rescission of the contract solely upon presently existing violations thereof. This, we may add, limited to restrictions imposed by terms of the ordinance relating to the use of land or the location and character of buildings that may be located thereon, even in the absence of provisions in the contract excepting them, must necessarily be his position for we are convinced, although it must be conceded there are some decisions to the contrary, the rule supported by the better reasoned decisions, indeed if not by the great weight of authority, is that municipal restrictions of such character, existing at the time of the execution of a contract for the sale of real estate, are not such encumbrances or burdens on title as may be availed of by a vendee to avoid his agreement to purchase on the ground they render his title unmerchantable. For authorities upholding this conclusion see Hall v. Risley & Heikkila, 188 Or. 69, 213 P. 2d 818; Miller v. Milwaukee Odd Fellows Temple, 206 Wis. 547, 240 NW 193; Wheeler v. Sullivan, 90 Fla. 711, 106 So. 876; Lincoln Trust Co. v. Williams Bldg. Corp., 229 NY 313, 128 NE 209; Maupin

on Marketable Title to Real Estate, (3rd Ed.) 384 § 143; 175 A. L. R. anno. 1056 § 2; 57 A. L. R. anno. 1424 § 11 (c); 55 Am. Jur. 705 § 250; 66 C. J. 860, 911 §§ 531, 591.

On the other hand there can be no question the rule respecting restrictions upon the use of land or the location and type of buildings that may be erected thereon fixed by covenants or other private restrictive agreements, including those contained in the declaration forming a part of the dedication of Berkley Hills Addition, is directly contrary to the one to which we have just referred. Such restrictions, under all the authorities, constitute encumbrances rendering the title to land unmerchantable. See the authorities above cited, also decisions to be found in American Digest System, Vendor and Purchaser, § 134 (4); 66 C. J. 588 § 909; 55 Am. Jur. 702 § 246 and Maupin on Marketable Title to Real Estate (3rd Ed.) 323 § 106; 57 A. L. R. Anno 1414 § 11 (a).

In the instant case assuming the mere existence of the restrictions imposed by the provisions of section 5-224 of the ordinances of the [*450] city of Emporia do not constitute an encumbrance or burden and that the dedication restrictions fall within the exception clause of the contract providing Lot 37 was to be conveyed subject to all restrictions and easements of record applying thereto there still remains the question whether, under the stipulated facts, the restrictions imposed bysuch ordinance and/or the dedication declaration have been violated and if so whether those violations make the title to such property unmerchantable.

As we turn to the stipulation of facts upon which our decision as to whether the record discloses violations of the dedication declaration or the ordinance must depend we shall first dispose of contentions advanced by appellees regarding the construction to be given that instrument.

The first of these contentions is to the effect the phrase, "any residence erected wholly or partially on any of the following lots . . .", to be found in section 2 of the declaration is to be construed as limited to residences

actually constructed thereon and that hence the moving of the house now located on Lot 37, long after it had been constructed, even though it was not of the height required by its terms did not result in a violation. We do not agree. The word "erected" as used in section of the declaration in question, in our opinion, is so comprehensive that it must be construed as including houses moved upon the restricted area. Next it is argued that even though such house was a one story dwelling the stipulated facts show that between its foundation and the top of the chimney there was sufficient room to make it into a two story dwelling and therefore it did not violate the restrictive covenant of section 2 providing it should be of the height of a two story residence. Here again we believe appellees have placed too narrow a construction upon this section which contemplates that houses constructed within the restricted area must be two story residences. Finally it is urged the dedication restrictions insofar as they apply to Lot 37 have no force and effect because they were extinguished by the tax foreclosure proceeding referred to in the second paragraph of the stipulation. We know of no Kansas decision sustaining appellees' position on this point. It is true, as they suggest, a sheriff's deed to this property was executed in 1942 and that the statute then in force and effect (G. S. 1941 Supp. 79-2803) contained no provision requiring the district court to render judgment subject to valid covenants running with the land and to valid easements of record or in [*451] use. They insist the fact the section just mentioned was amended in 1943 (see L. 1943 Ch. 302 [2]) and still later in 1945 (L. 1945 Ch. 362[3]) so that it now contains an express provision that tax foreclosure judgments are to be rendered subject to such covenants and easements indicates that legislative intent under the 1941 statute was to extinguish all such covenants and easements by judgment. Our view is the subsequent amendments are indicative of an intention directly to the contrary. However, we need not pass upon that question. The right to enforce the dedication restrictions, which are conceded to have

been of record, was vested in all persons owning property in the area covered by the declaration and the common grantor. Before we could say their rights to enforce such restrictions were extinguished by the judgment affecting Lot 37 it must be established they were parties defendant to the action in which such judgment was rendered. That does not appear from the stipulation of facts, indeed no one contends they were.

Other contentions advanced by appellees relate to the force and effect to be given portions of the stipulation relative to violation of section 5-224 of the ordinance. They first insist the word "erected", as used in such section, does not include the building moved upon the lot in question. Heretofore we have indicated the same word as used in the dedication declaration includes buildings moved upon such lots. We believe it is entitled to the same construction in the ordinance. Next it is claimed section 5-224 is of no force and effect because it had been repealed by other ordinances of the city of Emporia. If so we fail to find anything in the stipulation warranting that conclusion. Lastly it is argued that because the stipulation discloses appellees procured a permit from the Fire Chief of the city of Emporia to move the involved house on Lot 37 the provisions of such ordinance had no application and hence were not violated. We find nothing in the stipulation to indicate, let alone warrant a conclusion, that this permit authorized the appellees to move the house within 18 inches of the rear lot line in violation of the terms of such ordinance. Moreover, it should perhaps be added, that even if it had, in the absence of anything in the stipulation to show its existence, we would not be justified in concluding the Fire Chief or any other official of the city had authority to take action resulting in the nullification of its express terms.

With contentions advanced by appellees with respect to the force and effect to be given certain portions of the stipulation disposed of [*452] it can now be stated we are convinced a fair construction of its terms compels the conclusion that on the date of the execution of the contract

the house on the real estate in controversy was a one story frame dwelling which had been 0] moved there in violation of section 2 of the dedication restrictions providing that any residence erected on Lot 37 should be of the height of a two story residence and that it had been placed within 18 inches of the side or rear lot line of such lot in violation of section 5-224, supra, prohibiting the erection of such building within three feet of such line.

There can be no doubt regarding what constitutes a marketable or merchantable title in this jurisdiction. This court has been called on to pass upon that question on numerous occasions. See our recent decision in Peatling v. Baird, 168 Kan. 528, 213 P. 2d 1015, and cases there cited, wherein we held:

"A marketable title to real estate is one which is free from reasonable doubt, and a title is doubtful and unmarketable if it exposes the party holding it to the hazard of litigation.

"To render the title to real estate unmarketable, the defect of which the purchaser complains must be of a substantial character and one from which he may suffer injury. Mere immaterial defects which do not diminish in quantity, quality or value the property contracted for, constitute no ground upon which the purchaser may reject the title. Facts must be known at the time which fairly raise a reasonable doubt as to the title; a mere possibility or conjecture that such a state of facts may be developed at some future time is not sufficient." (Syl. paras. 1, 2)

Under the rule just stated, and in the face of facts such as are here involved, we have little difficulty in concluding that the violation of section 5-224 of the ordinances of the city of Emporia as well as the violation of the restrictions imposed by the dedication declaration so encumber the title to Lot 37 as to expose the party holding it to the hazard of litigation and make such title doubtful and unmarketable. It follows, since, as we have indicated, the appellees had contracted to convey such real estate to appellant by warranty deed with an abstract of title showing good merchantable title, free and clear of all encumbrances, that

they cannot convey the title contracted for and that the trial court should have rendered judgment rescinding the contract. This, we may add is so, notwithstanding the contract provides the conveyance was to be made subject to all restrictions and easements of record for, as we have seen, it is the violation of the restrictions imposed by both the ordinance and the dedication declaration, not the existence of those restrictions, that renders the title unmarketable. The decision just announced [*453] is not without precedent or unsupported by sound authority.

In Moyer v. DeVincentis Con. Co., 107 Pa. Super. 588, 164 A. 111, involving facts, circumstances, and issues almost identical to those here involved, so far as violation of the ordinance is concerned, the plaintiff (vendee) sued to recover money advanced on the purchase price pursuant to the agreement on the ground that violation of a zoning ordinance had made title to the property involved under its terms unmarketable. The court upheld the plaintiff's position and in the opinion said:

"We are of the opinion that a proper construction of the agreement of sale supports the position of appellant, the vendee in the agreement. The vendor agreed to furnish a good and marketable title free from liens and incumbrances, excepting existing restrictions and easements, if any. As applied to the facts of the case in hand, vendee agreed to purchase the premises subject to the zoning ordinance, but not to purchase the premises, when the house was built in violation of the terms of that ordinance.

"The facts lend weight to the force of this construction. It appears from the pleadings that the premises to be conveyed embraced not only the bare land, but an entire parcel of real estate which included a semidetached dwelling. The description is not by metes and bounds but by house number. The vendee could not take possession without immediately becoming a violator of the law and subject to suit, with a penalty of $ 25 for every day the

building remained in position overlapping the protected area.

"The title was not marketable, not because of an existing zoning ordinance, but because a building had been constructed upon the lot in violation of that ordinance . . ." (p. 592).

To the same effect is 66 C. J. 912 § 592, where the following statement appears:

"Existing violations of building restrictions imposed by law warrant rejection of title by a purchaser contracting for a conveyance free of encumbrances. The fact that the premises to be conveyed violate tenement house regulations is ground for rejection of title where the contract of sale expressly provided against the existence of such violations, . . ."

See, also Moran v. Borrello, 4 N. J. Misc., 344, 132 A. 510.

With respect to covenants and restrictions similar to those involved in the dedication declaration, notwithstanding the agreement — as here — excepted restrictions of record, see Chesebro v. Moers, 233 N. Y. 75, 134 N. E. 842, 21 A. L. R. 1270, holding that the violation by a property owner of covenants restricting the distance from front and rear lines within which buildings may be placed renders the title to such property unmarketable.

[*454] See, also, Hebb v. Severson, 32 Wash. (2d) 159, 201 P. 2d 156, which holds, that where a contract provided that building and use restrictions general to the district should not be deemed restrictions, the purchaser's knowledge of such restriction did not estop him from rescinding the contract of purchase on subsequent discovery that the position of the house on the lot involved violated such restrictions. At page 172 of the opinion in that case it is said:

"Finally, the fact that the contract contains a provision that protective restrictions shall not be deemed encumbrances cannot aid the respondents. It is not the existence of protective restrictions, as shown by the record, that constitutes the encumbrances alleged by the appellants; but,

rather, it is the presently existing violation of one of these restrictions that constitutes such encumbrances, in and of itself. The authorities so hold, on the rationale, to which we subscribe, that to force a vendee to accept property which in its present state violates a building restriction without a showing that the restriction is unenforcible, would in effect compel the vendee to buy a lawsuit. 66 C. J. 911, Vendor and Purchaser, § 590; Dichter v. Isaacson, 132 A. 481, 138 A. 920, 4. N. J. Misc., 297; Chesebro v. Moers, 233 N. Y. 75, 134 N. E. 842, 21 A. L. R. 1270." (p. 172.)

Finally appellees point to the contract which, it must be conceded, provides they shall have time to correct imperfections in the title and contend that even if it be held the restrictions and the ordinance have been violated they are entitled to time in which to correct those imperfections. Assuming, without deciding, they might remedy the violation of the ordinance by buying additional ground the short and simple answer to their contention with respect to the violation of the restrictions imposed by the dedication declaration is that any changes in the house would compel the purchaser to take something that he did not contract to buy.

Conclusions heretofore announced require reversal of the judgment with directions to the trial court to cancel and set aside the contract and render such judgment as may be equitable and proper under the issues raised by the pleadings.

It is so ordered.

 VOORHEESVILLE ROD AND GUN CLUB, Inc., Respondent, v. E. W. TOMPKINS COMPANY, Inc., Appellant. Court of Appeals of New York 82 N.Y.2d 564; 626 N.E.2d 917, December 20, 1993, Decided

OPINION BY: HANCOCK

[*567] The first issue in this case is whether the subdivision regulations of the Village of Voorheesville apply to a conveyance of a portion of a parcel of land where it is intended by the parties to the transaction that the lands shall

remain undeveloped. If the regulations apply, then the primary issue is whether defendant seller's failure to seek subdivision approval before the transfer renders the title unmarketable. We conclude that the Village's subdivision regulations apply to this sale of property. But we further hold that defendant's refusal to seek the subdivision approval here does not cause the title to be unmarketable. Because no provision in the contract requires defendant to obtain subdivision approval and the only basis for plaintiff's specific performance claim is its failed assertion of unmarketable title, we reverse, deny plaintiff's summary judgment motion for specific performance, and dismiss the complaint.

I

On January 15, 1986, plaintiff Voorheesville Rod & Gun Club, Inc., signed a standard preprinted contract with defendant E. W. Tompkins Company, Inc., to purchase a portion of defendant's property located in the Village of Voorheesville, Albany County, for $ 38,000. The contract specified that the property would be conveyed by warranty deed subject to all covenants, conditions, restrictions and easements of record, and also to zoning and environmental protection laws, "provided that this does not render the title to the premises unmarketable." The property to be conveyed consisted of 24.534 acres of undeveloped land used for recreational purposes. The parties agree that plaintiff buyer did not intend to change the existing condition or use of the property after the purchase.

On August 23, 1986, prior to the revised closing date, plaintiff's attorney sent defendant's attorney a copy of the Village of Voorheesville's subdivision regulations and requested that defendant comply with them. Defendant did not seek subdivision approval. Defendant sent plaintiff a time-of-the-essence notice, demanded a closing on August 29, 1986, and notified plaintiff that if it did not close, that would be considered an anticipatory breach of contract. When plaintiff failed to close, defendant canceled the contract and returned [*568] plaintiff's $ 5,000 deposit. On

September 4th, plaintiff informed defendant that the cancellation was unacceptable because defendant's failure to obtain subdivision approval had rendered the title unmarketable and, for that reason, plaintiff's financing bank was unwilling to close. Plaintiff then sought the requisite approval from the Village of Voorheesville Planning Commission. The Commission denied the application, stating that the subdivision regulations required that the application be submitted "by the [property] owner or an agent of the owner."

Plaintiff commenced this action on September 12, 1986, for specific performance or damages for breach of contract and then moved for partial summary judgment seeking specific performance. Supreme Court ordered that the contract be specifically performed by defendant and directed that defendant apply to the Village for subdivision approval and close on the subject property within a reasonable time after approval. The court held that defendant's failure to obtain subdivision approval made the title unmarketable and relieved plaintiff from closing until the approval was obtained (Voorheesville Rod & Gun Club v Tompkins Co., 141 Misc 2d 38).

The Appellate Division affirmed, stating that the sale of a portion of defendant's real property subjected the sale to the subdivision regulations of the Village of Voorheesville, even though development of the land was not then contemplated. The Court concluded that defendant's refusal to obtain subdivision approval rendered the title unmarketable, particularly because it appeared that plaintiff "would be 'plagued by zoning problems' " (Voorheesville Rod & Gun Club v Tompkins Co., 158 AD2d 789, 791).

Thereafter, plaintiff moved in Supreme Court for an order compelling defendant to file the subdivision application and convey the property. Noting that the subdivision application had been made and approved, Supreme Court directed defendant to transfer the property. Then the parties stipulated to discontinue all causes of action interposed in the pleadings except plaintiff's claim for specific

performance of the contract. This Court granted defendant leave to appeal from the stipulation, deemed a judgment, bringing up for review the prior nonfinal Appellate Division order pursuant to CPLR 5602 (a) (1) (ii).

II

The preliminary issue is whether the Village's subdivision [*569] regulations apply at all under the circumstances presented. If they do not, that is the end of the matter and we do not reach the separate question of whether defendant's refusal to obtain subdivision approval rendered the title to the property unmarketable. Thus, we must first interpret the Village's Land Subdivision Regulations, which provide in pertinent part:

"Article II: Definitions

"Subdivision: means the division of any parcel of land into two or more lots, blocks, or sites, with or without streets or highways and includes re-subdivision.

"Article III: Procedure in Filing Subdivision Applications

"Whenever any subdivision of land is proposed to be made, and before any contract for the sale of, or any offer to sell any lots in such subdivision or any part thereof is made, and before any permit for the erection of a structure in such proposed subdivision shall be granted, the subdivider or his duly authorized agent shall apply in writing for approval of such proposed subdivision."

Defendant maintains that, pursuant to article III, subdivision approval is required only in instances where building or development is contemplated; and because no development of the subject property was intended, the regulations do not apply in this case. This claim is not persuasive. It is undisputed that defendant was selling only a portion of its property; therefore, the subject property transfer constituted a subdivision within the meaning of article II of the regulations. Article III clearly requires subdivision approval "[w]henever any subdivision of land is proposed" and before any sales contract is executed. Contrary to defendant's interpretation, merely because article III requires subdivision approval, inter alia, "before

any permit for the erection of a structure in such proposed subdivision shall be granted", it does not follow that subdivision approval is necessary only when a building permit will be sought (see, Matter of Esposito v Town of Fulton Planning Bd., 188 AD2d 779). Indeed, defendant's interpretation would effectively limit the purpose of the regulations to controlling building on individual parcels of property. Such an [*570] interpretation is contrary to the Village's broader policy, as stated in article I of the regulations, to "consider land Subdivision Plats as part of a plan for the orderly, efficient and economical development of the Village", which means, among other things, that "all proposed lots shall be so laid out and of such size as to be in harmony with the development pattern of the neighboring properties". Clearly, the stated policy of the regulations is that subdivision approval should be acquired for any proposed subdivision, not just those to be immediately developed.

III

Given that the subdivision regulations apply, we turn to the main issue: whether lack of subdivision approval constitutes a cloud on the title which renders the title unmarketable. It is undisputed that the contract is silent as to the specific issue of subdivision approval. Thus nothing in the contract imposes upon defendant the affirmative obligation of obtaining subdivision approval. Rather, paragraph 4 of the contract, entitled "Existing Conditions", provides that the property would be conveyed by warranty deed

We also note that this is not a case where the seller is seeking specific performance of a contract to compel a buyer to purchase property lacking subdivision approval or where a municipality is trying to block such a conveyance, and we do not address such situations here.

"subject to all covenants, conditions, restrictions and easements of record. Subject also to zoning and environmental protection laws; any existing tenancies; ... and any state of facts which an inspection and/or accurate

survey may show, provided that this does not render the title to the premises unmarketable" (emphasis added).

As stated, plaintiff was to purchase the property subject to zoning laws, which are closely related to subdivision regulations (see generally, Matter of Golden v Planning Bd., 30 NY2d 359, 372; 2 Anderson, New York Zoning Law and Practice § 21.02 [3d ed]). This requirement conforms to the well-settled rule that " where a person agrees to purchase real estate, [*571] which, at the time, is restricted by laws or ordinances, he will be deemed to have entered into the contract subject to the same [and] [h]e cannot thereafter be heard to object to taking the title because of such restrictions" (Lincoln Trust Co. v Williams Bldg. Corp., 229 NY 313, 318; see, Pamerqua Realty Corp. v Dollar Serv. Corp., 93 AD2d 249, 251; 3 Warren's Weed, New York Real Property, Marketability of Title, § 8.07 [4th ed]; Annotation, Zoning or Other Public Restrictions On the Use of Property as Affecting Rights and Remedies of Parties to Contract for the Sale Thereof, § 3, 5 [b], 39 ALR3d 362, 370, 376).

The only limitation that the contract places upon plaintiff's duty to purchase the property subject to zoning laws is when the application of such laws would render title to the property unmarketable. It was not necessary for the contract to specify that a marketable title was required because, in the absence of a stipulation to the contrary, it is presumed that a marketable title is to be conveyed (see, Regan v Lanze, 40 NY2d 475, 482; Laba v Carey, 29 NY2d 302, 311; 3 Warren's Weed, op. cit., Marketability of Title, § 1.01). Accordingly, the issue reduces to whether the lack of subdivision approval constitutes a defect in the title which makes it unmarketable.

The test of the marketability of a title is "whether there is an objection thereto such as would interfere with a sale or with the market value of the property" (Regan v Lanze, 40 NY2d 475, 481, supra). A marketable title is "a title free from reasonable doubt, but not from every doubt" (id., at 482). We have said that a "purchaser ought not to be

compelled to take property, the possession or title of which he may be obliged to defend by litigation. He should have a title that will enable him to hold his land free from probable claim by another, and one which, if he wishes to sell, would be reasonably free from any doubt which would interfere with its market value" (Dyker Meadow Land & Improvement Co. v Cook, 159 NY 6, 15). As can be seen from these definitions, marketability of title is concerned with impairments on title to a property, i.e., the right to unencumbered ownership and possession, not with legal public regulation of the use of the property (see, Lincoln Trust Co. v Williams Bldg. Corp., 229 NY 313, 318, supra; 5A Warren's Weed, op. cit., Title, § 1.01; compare, 3 Warren's Weed, op. cit., Marketability of Title, § 1.01, 2.01, with § 8.07). Accordingly, a zoning ordinance, existing at the time of the contract, which regulates only the use of the property, generally is not an encumbrance making the title unmarketable [*572] (see, Lincoln Trust, supra, at 318; Anderson v Steinway & Sons, 178 App Div 507, 513, affd 221 NY 639; Pamerqua Realty Corp. v Dollar Serv. Corp., 93 AD2d 249, 251, supra; 3 Warren's Weed, op. cit., Marketability of Title, § 8.07; 1 Rasch, New York Law and Practice of Real Property § 22.61 [2d ed]).

Where, however, a contract expressly provides that the seller warrants and represents that, upon purchase, the property will not be in violation of any zoning ordinance, the purchaser "is entitled to demand that the vendor rectify the same or return any moneys paid on account" (Pamerqua Realty Corp., 93 AD2d 249, 251, supra; see, Artstrong Homes v Vasa, 23 Misc 2d 608 [Meyer, J.]; 3 Warren's Weed, op. cit., Marketability of Title, § 8.07; 1 Rasch, op. cit., § 22.61). Contrary to plaintiff's claim, the present case does not fall within this exception to the general rule. Defendant did not warrant or represent that it would obtain subdivision approval; rather, plaintiff agreed to purchase the property subject to the zoning laws. In effect, plaintiff is attempting to add a term to the contract after the deal has been made. Thus, although defendant's

failure to obtain subdivision approval was a violation of the regulations which were in effect when the parties contracted, such violation did not make the title unmarketable (see, Lincoln Trust, supra, at 318; Pamerqua Realty Corp., 93 AD2d 249, 251, supra; 3 Warren's Weed, op. cit, Marketability of Title, § 8.07; 1 Rasch, op. cit., § 22.61).

We recognize, as noted by the courts below, the increasing sophistication of municipalities regarding subdivision regulation and their ability to prevent the purchaser from developing property as allowed by the zoning laws until the requisite subdivision approval is obtained (see, Delaware Midland Corp. v Incorporated Vil. of Westhampton Beach, 79 Misc 2d 438, 445, affd on opn below 48 AD2d 681, affd on opn at Sup Ct 39 NY2d 1029 ["Implicit in the power to control subdivisions is the authority to prevent illegal development by denial of permission to build"]; see also, Village Law § 7-714; Town Law § 268; Matter of Golden v Planning Bd., 30 NY2d 359, 372, supra; cf., Freundlich v Town Bd., 73 AD2d 684, affd 52 NY2d 921 [property may not be sold pursuant to invalid sales map without approval of planning board]). The solution for avoiding [*573] such problems, however, is not for the courts to expand the conditions which render title unmarketable, thereby altering the concept of marketability of title, but for the parties to real estate contracts to include specific provisions dealing with the duty to obtain subdivision approval.

Accordingly, the judgment appealed from and the order of the Appellate Division brought up for review should be reversed, with costs, plaintiff's motion for partial summary judgment should be denied, and defendant's cross motion for summary judgment dismissing the complaint should be granted.

COLONIAL CAPITAL CORPORATION and Edward W. Drinkard v. Dallas Wayne SMITH and Phyllis Smith. Court of Civil Appeals of Alabama 367 So. 2d 490, February 7, 1979

OPINION BY: WRIGHT

[*490] This is a suit upon the covenant against encumbrances contained in a warranty deed. Summary judgment was rendered in favor of plaintiffs as to liability of the [*491] defendant. The issue of damages due plaintiffs from defendant was tried to a jury. Defendant filed a third party complaint. Verdict and judgment were in favor of plaintiffs and against defendant for $1,750. Verdict and judgment for $875 were entered in favor of plaintiffs against third party defendant. Both defendants appeal. The dispositive issue is whether plaintiffs were due summary judgment as to liability of defendant and judgment for damages. We reverse.

The affidavits for and against summary judgment for plaintiffs, together with the complaint, pleadings and exhibits thereto, show without dispute that on August 22, 1973, defendant executed and delivered a warranty deed to plaintiff as a result of a sale of certain real estate. Plaintiffs at the same time assumed certain mortgages then outstanding against the property. Plaintiffs went into possession of the property and remained peaceably thereon until on or about June 8, 1977. At that time plaintiffs entered into an agreement to sell the property and pending such sale, gave possession to the prospective purchaser.

Title examining attorney for the purchasers or their financing agency, upon examining the mortgage records at the Autauga County Court House, found a mortgage upon the property dated in 1969, unsatisfied of record and not excepted from the warranty deed from defendant to plaintiffs. The purchasers or their financing agency did not complete the purchase because of the unsatisfied record even though defendant informed the agency's examining counsel that the mortgage had been paid in full prior to execution of the deed to plaintiffs. Plaintiffs subsequently filed suit claiming breach of warranty for a defective title because of the unsatisfied record. Defendant thereafter obtained an affidavit of satisfaction from the mortgage.

We have said plaintiffs were granted summary judgment against defendant upon the issue of liability for breach of warranty due to a defect in the title of defendant. Rule 56 (c) ARCP provides that summary judgment is to be entered when there is no genuine issue as to any material fact and that the moving party is entitled to judgment upon those facts as a matter of law. Imperial Group, Ltd. v. Lamar Corporation, 347 So.2d 988 (Ala. 1977). There is no dispute as to the material facts. We have set them out above. Defendant did execute a warranty deed. There was an absence of satisfaction shown on a recorded mortgage. That mortgage was in fact satisfied. However, accepting the truth of these facts, were plaintiffs entitled to judgment as a matter of law? We find they were not.

Defendant's liability and obligations to the plaintiffs arise from the covenants contained in the warranty deed. The language of the deed is that generally contained in a warranty deed in Alabama. Such a deed is considered to encompass five covenants. LeMaistre, George A. Legal Aspects of Real Estate Transactions, University of Alabama 1971, at 109. The covenants of seisin and the right to convey are basically the same and mean that the grantor owns the estate which he proposes to convey. Russell v. Belsher, 221 Ala. 360, 128 So. 452 (1930); Mackintosh v. Stewart, 181 Ala. 328, 61 So. 956 (1913). These covenants are broken at the time of conveyance if the grantor does not have good title. Wolff v. Woodruff, 258 Ala. 1, 61 So.2d 69 (1952). There is no claim that defendant did not in fact own the fee simple to the property. Therefore the covenants of seisin and right to convey are not in issue in this case.

The covenants of general warranty to defend the title of grantee and his successors against the lawful claims of all persons are in substance those for possession and quiet enjoyment. They are not broken so long as the grantee's enjoyment and possession are not interfered with. Chicago, Mobile Development Co. v. G. C. Coggin Co., 259 Ala. 152, 66 So.2d 151 (1953). Plaintiffs have suffered no

eviction or disturbance of possession. They have suffered no breach of these covenants.

The remaining of the five covenants is that against encumbrances. A covenant [*492] against encumbrances is a stipulation by the covenantor that there are no outstanding rights or interests to the estate conveyed that will diminish the value, but which are consistent with the passage of the fee. 20 Am.Jur.2d Sec. 81, Covenants, Conditions, Etc. An existing mortgage would be an encumbrance. If such covenant is broken, it is broken at the time it is made, and a cause of action arises at that time and does not pass to any subsequent grantee. Chicago, Mobile Development Co. v. G. C. Coggin Co., supra. It is not broken however, unless the alleged outstanding encumbrance is valid, legal and subsisting. 5 A.L.R. 1086. A paid mortgage, although unsatisfied of record, is not an encumbrance within the meaning of the covenant. Judevine v. Pennock, 15 Vt. 683; Boulware v. Mayfield, Fla.App., 317 So.2d 470 (1975).

It is clear that liability of defendant under the covenants contained in the warranty deed could not arise under any of the covenants when there was in fact no defect in its title which could result in an eviction, either actual or constructive or which did not in fact diminish the interest which was conveyed to plaintiffs. A mortgage which was in fact paid, though not satisfied of record by the mortgagee, could never be a legal basis for an action for breach of general warranties. There was no covenant nor warranty contained in plaintiffs' deed which has been breached.

The doctrine of caveat emptor generally is applicable to the sale of real estate in this state. Except in cases of fraud, the only protection of title afforded a purchaser is in the covenants contained in the deed. Cochran v. Keeton, 47 Ala.App. 194, 252 So. 2d 307 (1970); aff'd, 287 Ala. 439, 252 So.2d 313 (1971).

For the reason that under the undisputed facts plaintiffs could not recover as a matter of law, the grant of summary judgment against defendant must be set aside. For the same reason, summary judgment in favor of defendant should

have been granted. However, we find no issue addressed to that failure in the appeal. We therefore reverse and set aside summary judgment on the issue of liability entered in favor of plaintiffs. It follows that the verdict and judgment against defendant as to damages and the verdict and judgment against third party defendant must also be reversed and set aside. Reversed in all aspects and remanded.

LA RECLAMACIÓN POR VICIOS OCULTOS

Jeffrey M. STAMBOVSKY, Appellant, v. Helen V. ACKLEY et al., Respondents. Supreme Court of New York, Appellate Division, First Department 169 A.D.2d 254, July 18, 1991

OPINION BY: RUBIN

[*255] Plaintiff, to his horror, discovered that the house he had recently contracted to purchase was widely reputed to be [*256] possessed by poltergeists, reportedly seen by defendant seller and members of her family on numerous occasions over the last nine years. Plaintiff promptly commenced this action seeking rescission of the contract of sale. Supreme Court reluctantly dismissed the complaint, holding that plaintiff has no remedy at law in this jurisdiction.

[1] The unusual facts of this case, as disclosed by the record, clearly warrant a grant of equitable relief to the buyer who, as a resident of New York City, cannot be expected to have any familiarity with the folklore of the Village of Nyack. Not being a "local", plaintiff could not readily learn that the home he had contracted to purchase is haunted. Whether the source of the spectral apparitions seen by defendant seller are parapsychic or psychogenic, having reported their presence in both a national publication (Readers' Digest) and the local press (in 1977 and 1982, respectively), defendant is estopped to deny their existence and, as a matter of law, the house is haunted. More to the point, however, no divination is required to conclude that it is defendant's promotional efforts in

publicizing her close encounters with these spirits which fostered the home's reputation in the community. In 1989, the house was included in five-home walking tour of Nyack and described in a November 27th newspaper article as "a riverfront Victorian (with ghost)." The impact of the reputation thus created goes to the very essence of the bargain between the parties, greatly impairing both the value of the property and its potential for resale. The extent of this impairment may be presumed for the purpose of reviewing the disposition of this motion to dismiss the cause of action for rescission (Harris v City of New York, 147 AD2d 186, 188-189) and represents merely an issue of fact for resolution at trial.

[2] While I agree with Supreme Court that the real estate broker, as agent for the seller, is under no duty to disclose to a potential buyer the phantasmal reputation of the premises and that, in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff hasn't a ghost of a chance, I am nevertheless moved by the spirit of equity to allow the buyer to seek rescission of the contract of sale and recovery of his down payment. New York law fails to recognize any remedy for damages incurred as a result of the seller's mere silence, applying instead the strict rule of caveat emptor. Therefore, the theoretical basis for granting relief, even under the extraordinary facts of this case, is elusive if not ephemeral.

[*257] "Pity me not but lend thy serious hearing to what I shall unfold" (William Shakespeare, Hamlet, Act I, Scene V [Ghost]).

[3] From the perspective of a person in the position of plaintiff herein, a very practical problem arises with respect to the discovery of a paranormal phenomenon: "Who you gonna' call?" as a title song to the movie "Ghostbusters" asks. Applying the strict rule of caveat emptor to a contract involving a house possessed by poltergeists conjures up visions of a psychic or medium routinely accompanying the structural engineer and Terminix man on an inspection of every home subject to a contract of sale. It portends that the

prudent attorney will establish an escrow account lest the subject of the transaction come back to haunt him and his client — or pray that his malpractice insurance coverage extends to supernatural disasters. In the interest of avoiding such untenable consequences, the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises is a hobgoblin which should be exorcised from the body of legal precedent and laid quietly to rest.

It has been suggested by a leading authority that the ancient rule which holds that mere nondisclosure does not constitute actionable misrepresentation "finds proper application in cases where the fact undisclosed is patent, or the plaintiff has equal opportunities for obtaining information which he may be expected to utilize, or the defendant has no reason to think that he is acting under any misapprehension" (Prosser, Torts § 106, at 696 [4th ed 1971]). However, with respect to transactions in real estate, New York adheres to the doctrine of caveat emptor and imposes no duty upon the vendor to disclose any information concerning the premises (London v Courduff, 141 AD2d 803) unless there is a confidential or fiduciary relationship between the parties (Moser v Spizzirro, 31 AD2d 537, affd 25 NY2d 941; IBM Credit Fin. Corp. v Mazda Motor Mfg. [USA] Corp., 152 AD2d 451) or some conduct on the part of the seller which constitutes "active concealment" (see, 17 E. 80th Realty Corp. v 68th Assocs., AD2d [1st Dept, May 9, 1991] [dummy ventilation system constructed by seller]; Haberman v Greenspan, 82 Misc 2d 263 [foundation cracks covered by seller]). Normally, some affirmative misrepresentation (e.g., Tahini Invs. v Bobrowsky, 99 AD2d 489 [industrial waste on land allegedly used only as farm]; Jansen v Kelly, 11 AD2d 587 [land containing valuable minerals allegedly acquired for use as campsite]) or [*258] partial disclosure (Junius Constr. Corp. v Cohen, 257 NY 393 [existence of third unopened street concealed]; Noved Realty Corp. v A. A. P. Co., 250 App Div 1 [escrow agreements securing lien

concealed]) is required to impose upon the seller a duty to communicate undisclosed conditions affecting the premises (contra, Young v Keith, 112 AD2d 625 [defective water and sewer systems concealed]).

Caveat emptor is not so all-encompassing a doctrine of common law as to render every act of nondisclosure immune from redress, whether legal or equitable. "In regard to the necessity of giving information which has not been asked, the rule differs somewhat at law and in equity, and while the law courts would permit no recovery of damages against a vendor, because of mere concealment of facts under certain circumstances, yet if the vendee refused to complete the contract because of the concealment of a material fact on the part of the other, equity would refuse to compel him so to do, because equity only compels the specific performance of a contract which is fair and open, and in regard to which all material matters known to each have been communicated to the other" (Rothmiller v Stein, 143 NY 581, 591-592 [emphasis added]). Even as a principle of law, long before exceptions were embodied in statute law (see, e.g., UCC 2-312, 2-313, 2-314, 2-315; 3-417 [2] [e]), the doctrine was held inapplicable to contagion among animals, adulteration of food, and insolvency of a maker of a promissory note and of a tenant substituted for another under a lease (see, Rothmiller v Stein, supra, at 592-593, and cases cited therein). Common law is not moribund. Ex facto jus oritur (law arises out of facts). Where fairness and common sense dictate that an exception should be created, the evolution of the law should not be stifled by rigid application of a legal maxim.

The doctrine of caveat emptor requires that a buyer act prudently to assess the fitness and value of his purchase and operates to bar the purchaser who fails to exercise due care from seeking the equitable remedy of rescission (see, e.g., Rodas v Manitaras, 159 AD2d 341). For the purposes of the instant motion to dismiss the action pursuant to CPLR 3211 (a) (7), plaintiff is entitled to every favorable inference which may reasonably be drawn from the pleadings (

Arrington v New York Times Co., 55 NY2d 433, 442; Rovello v Orofino Realty Co., 40 NY2d 633, 634), specifically, in this instance, that he met his obligation to conduct an inspection of the premises and a search of available public records with respect [*259] to title. It should be apparent, however, that the most meticulous inspection and the search would not reveal the presence of poltergeists at the premises or unearth the property's ghoulish reputation in the community. Therefore, there is no sound policy reason to deny plaintiff relief for failing to discover a state of affairs which the most prudent purchaser would not be expected to even contemplate (see, Da Silva v Musso, 53 NY2d 543, 551).

The case law in this jurisdiction dealing with the duty of a vendor of real property to disclose information to the buyer is distinguishable from the matter under review. The most salient distinction is that existing cases invariably deal with the physical condition of the premises (e.g., London v Courduff, supra [use as a landfill]; Perin v Mardine Realty Co., 5 AD2d 685, affd 6 NY2d 920 [sewer line crossing adjoining property without owner's consent]), defects in title (e.g., Sands v Kissane, 282 App Div 140 [remainderman]), liens against the property (e.g., Noved Realty Corp. v A. A. P. Co., supra), expenses or income (e.g., Rodas v Manitaras, supra [gross receipts]) and other factors affecting its operation. No case has been brought to this court's attention in which the property value was impaired as the result of the reputation created by information disseminated to the public by the seller (or, for that matter, as a result of possession by poltergeists).

[4] Where a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity. Any other outcome places upon the buyer not merely the obligation to exercise care in his purchase but rather to be

omniscient with respect to any fact which may affect the bargain. No practical purpose is served by imposing such a burden upon a purchaser. To the contrary, it encourages predatory business practice and offends the principle that equity will suffer no wrong to be without a remedy.

Defendant's contention that the contract of sale, particularly the merger or "as is" clause, bars recovery of the buyer's deposit is unavailing. Even an express disclaimer will not be given effect where the facts are peculiarly within the knowledge of the party invoking it (Danann Realty Corp. v Harris, 5 NY2d 317, 322; Tahini Invs. v Bobrowsky, supra). Moreover, a fair reading of the merger clause reveals that it expressly [*260] disclaims only representations made with respect to the physical condition of the premises and merely makes general reference to representations concerning "any other matter or things affecting or relating to the aforesaid premises". As broad as this language may be, a reasonable interpretation is that its effect is limited to tangible or physical matters and does not extend to paranormal phenomena. Finally, if the language of the contract is to be construed as broadly as defendant urges to encompass the presence of poltergeists in the house, it cannot be said that she has delivered the premises "vacant" in accordance with her obligation under the provisions of the contract rider.

To the extent New York law may be said to require something more than "mere concealment" to apply even the equitable remedy of rescission, the case of Junius Constr. Corp. v Cohen (257 NY 393, supra), while not precisely on point, provides some guidance. In that case, the seller disclosed that an official map indicated two as yet unopened streets which were planned for construction at the edges of the parcel. What was not disclosed was that the same map indicated a third street which, if opened, would divide the plot in half. The court held that, while the seller was under no duty to mention the planned streets at all, having undertaken to disclose two of them, he was obliged

to reveal the third (see also, Rosenschein v McNally, 17 AD2d 834).

In the case at bar, defendant seller deliberately fostered the public belief that her home was possessed. Having undertaken to inform the public-at-large, to whom she has no legal relationship, about the supernatural occurrences on her property, she may be said to owe no less a duty to her contract vendee. It has been remarked that the occasional modern cases which permit a seller to take unfair advantage of a buyer's ignorance so long as he is not actively misled are "singularly unappetizing" (Prosser, Torts § 106, at 696 [4th ed 1971]). Where, as here, the seller not only takes unfair advantage of the buyer's ignorance but has created and perpetuated a condition about which he is unlikely to even inquire, enforcement of the contract (in whole or in part) is offensive to the court's sense of equity. Application of the remedy of rescission, within the bounds of the narrow exception to the doctrine of caveat emptor set forth herein, is entirely appropriate to relieve the unwitting purchaser from the consequences of a most unnatural bargain.

Accordingly, the judgment of the Supreme Court, New York [*261] County (Edward H. Lehner, J.), entered April 9, 1990, which dismissed the complaint pursuant to CPLR 3211 (a) (7), should be modified, on the law and the facts, and in the exercise of discretion, and the first cause of action seeking rescission of the contract reinstated, without costs.

DISSENT BY: SMITH

I would affirm the dismissal of the complaint by the motion court.

Plaintiff seeks to rescind his contract to purchase defendant Ackley's residential property and recover his down payment. Plaintiff alleges that Ackley and her real estate broker, defendant Ellis Realty, made material misrepresentations of the property in that they failed to disclose that Ackley believed that the house was haunted by poltergeists. Moreover, Ackley shared this belief with

her community and the general public through articles published in Reader's Digest (1977) and the local newspaper (1982). In November 1989, approximately two months after the parties entered into the contract of sale but subsequent to the scheduled October 2, 1989 closing, the house was included in a five-house walking tour and again described in the local newspaper as being haunted.

Prior to closing, plaintiff learned of this reputation and unsuccessfully sought to rescind the $ 650,000 contract of sale and obtain return of his $ 32,500 down payment without resort to litigation. The plaintiff then commenced this action for that relief and alleged that he would not have entered into the contract had he been so advised and that as a result of the alleged poltergeist activity, the market value and resaleability of the property was greatly diminished. Defendant Ackley has counterclaimed for specific performance.

"It is settled law in New York State that the seller of real property is under no duty to speak when the parties deal at arm's length. The mere silence of the seller, without some act or conduct which deceived the purchaser, does not amount to a concealment that is actionable as a fraud (see, Perin v Mardine Realty Co., 5 AD2d 685, affd 6 NY2d 920; Moser v Spizzirro, 31 AD2d 537, affd 25 NY2d 941). The buyer has the duty to satisfy himself as to the quality of his bargain pursuant to the doctrine of caveat emptor, which in New York State still applies to real estate transactions." (London v Courduff, 141 AD2d 803, 804 [1988], lv dismissed 73 NY2d 809 [1988].)

The parties herein were represented by counsel and dealt at arm's length. This is evidenced by the contract of sale which, inter alia, contained various riders and a specific provision [*262] that all prior understandings and agreements between the parties were merged into the contract, that the contract completely expressed their full agreement and that neither had relied upon any statement by anyone else not set forth in the contract. There is no allegation that defendants, by some specific act, other than

the failure to speak, deceived the plaintiff. Nevertheless, a cause of action may be sufficiently stated where there is a confidential or fiduciary relationship creating a duty to disclose and there was a failure to disclose a material fact, calculated to induce a false belief. (County of Westchester v Becket Assocs., 102 AD2d 34, 50-51 [1984], affd 66 NY2d 642 [1985].) However, plaintiff herein has not alleged and there is no basis for concluding that a confidential or fiduciary relationship existed between these parties to an arm's length transaction such as to give rise to a duty to disclose. In addition, there is no allegation that defendants thwarted plaintiff's efforts to fulfill his responsibilities fixed by the doctrine of caveat emptor. (See, London v Courduff, supra, 141 AD2d, at 804.)

Finally, if the doctrine of caveat emptor is to be discarded, it should be for a reason more substantive than a poltergeist. The existence of a poltergeist is no more binding upon the defendants than it is upon this court.

Based upon the foregoing, the motion court properly dismissed the complaint.

EL TRASLADO DE DOMINIO

George W. WITHAM v. Allen BROONER. Supreme Court of Illinois, Central Grand Division 63 Ill. 344, January, 1872, Decided

OPINION BY: THORNTON

[*345] The refusal to admit in evidence the deed to Hallowbush is the only error assigned.

The deed was executed to Hallowbush "in trust for White and Smith." The trustee had no trusts to execute—no duties to perform. He was a mere naked trustee.

One of the cestuis que trust had executed a deed to the same land to the plaintiff below, under which he claimed title.

In whom was the legal estate, by operation of the deed to Hallowbush—the trustee or the cestuis que trust?

Our statute is a substantial re-enactment of the Twenty-seventh Statute of Henry VIII—usually termed the Statute

of Uses. Leaving out some of the verbiage, it enacts that when any person shall be seized of any lands, to the use, confidence or trust of any other person, by any bargain, sale, agreement or otherwise, in such case all persons that have such use or trust in fee simple shall be seized, deemed and adjudged in lawful seizin, estate and possession of and in the same land, to all intents, in law, as they shall have in the use or trust of and in the same. Rev. Stat. 1845, p. 103, sec. 3.

The clear and positive language of the statute, aided by the first section of the same act, unmistakably determines the question. The person having the use shall be adjudged to be [*346] in lawful seizin, estate and possession. No language could more aptly stamp the character of the title.

Livery of seizin is abolished by the first section of the Conveyance Act, and the title is thereby absolutely vested in the donee, grantee, bargainee, etc. independently of the Statute of Uses. Hence, under this statute, a deed in the form of a bargain and sale must be regarded as having the force and effect of a feofment; and under the Statute of Uses, a feofment to A, for the use of or in trust for B, would pass the legal title to B. In a deed purely of bargain and sale, independently of the first section of the Conveyance Act, the rule would be different, and the title would vest in the bargainee. Without the first section, the legal title would be in the trustee, in this case; but as the trust was a passive one, the deed operated as a feofment would at common law, and vested the legal title in the cestuis que trust, by virtue of the Statute of Uses. Thus the statute executes itself. It conveys the possession to the use, and transfers the use to the possession; and by force of the statute the cestuis que trust had the lawful seizin, estate and possession.

The three things necessary to bring this estate within the operation of the statute did concur. There was a person seized to a use; a cestui que use; and a use in esse . The use was then executed, and the statute operated. There was nothing in the deed to prevent the execution of the use.

There was nothing to be done by the trustee to make it necessary that he should have the legal estate. There was to be no payment of rents and profits to another, or debts, or taxes. The statute operated instantly, and vested the legal estate in the cestuis que trust.

All the authorities sustain this view.

Blackstone says that previous to the enactment of Twenty-seventh Henry VIII, abundance of statutes had been provided which tended to consider the cestui que use as the real owner, and that this idea was carried into full effect by the Twenty-seventh Henry VIII, called, in conveyances and [*347] pleadings, the Statute for Transferring Uses into Possession; that the statute annihilated the intervening estate of the feofee, and changed the interest of the cestui que use into a legal instead of an equitable ownership; and that the legal estate never vests in the feofee for a moment, but is instantaneously transferred to the cestui que use, as soon as the use is declared. Book 2, 332-333, Black. Com.

CRUISE, in his Digest of the Law of Real Property (Green. Ed. 1 Vol. top p. 313, sec. 34), says when the three circumstances concur, necessary to the execution of a use, "the possession and legal estate of the lands out of which the use was created are immediately taken from the feofee to uses, and transferred, by the mere force of the statute, to the cestui que use. And the seizin and possession thus transferred is not a seizin and possession in law only, but are actual seizin and possession in fact—not a mere title to enter upon the land, but an actual estate.

We are of opinion that the legal estate was in the cestuis que trust, and that the rejected deed was admissible.

The cases referred to in this court are not in conflict with our conclusion.

The judgment is reversed and the cause remanded.

Walter H. ROSENGRANT, et al., Appellees, v. J. W. ROSENGRANT, et al., Appellants. Court of Appeals of Oklahoma, Division 2 1981 OK CIV APP 18; 629 P.2d 800, March 31, 1981

OPINION BY: BOYDSTON

[*802] This is an appeal by J. W. (Jay) Rosengrant from the trial court's decision to cancel and set aside a warranty deed which attempted to vest title in him to certain property owned by his aunt and uncle, Mildred and Harold Rosengrant. The trial court held the deed was invalid for want of legal delivery. We affirm that decision.

Harold and Mildred were a retired couple living on a farm southeast of Tecumseh, Oklahoma. They had no children of their own but had six nieces and nephews through Harold's deceased brother. One of these nephews was Jay Rosengrant. He and his wife lived a short distance from Harold and Mildred and helped the elderly couple from time to time with their chores.

In 1971, it was discovered that Mildred had cancer. In July, 1972 Mildred and Harold went to Mexico to obtain laetrile treatments accompanied by Jay's wife. Jay remained behind to care for the farm.

Shortly before this trip, on June 23, 1972, Mildred had called Jay and asked him to meet her and Harold at Farmers and Merchants Bank in Tecumseh. Upon arriving at the bank, Harold introduced Jay to his banker J. E. Vanlandengham who presented Harold and Mildred with a deed to their farm which he had prepared according to their instructions. Both Harold and Mildred signed the deed and informed Jay that they were going to give him "the place," but that they wanted Jay to leave the deed at the bank with Mr. Vanlandengham and when "something happened" to them, he was to take it to Shawnee and record it and "it" would be theirs. Harold personally handed the deed to Jay to "make this legal." Jay accepted the deed and then handed it back to the banker who told him he would put it in an envelope and keep it in the vault until he called for it.

In July, 1974, when Mildred's death was imminent, Jay and Harold conferred with an attorney concerning the legality of the transaction. The attorney advised them it should be sufficient but if Harold anticipated problems he should draw up a will.

In 1976, Harold discovered he had lung cancer. In August and December 1977, Harold put $ 10,000 into two certificates of deposit in joint tenancy with Jay.

Harold died January 28, 1978. On February 2, Jay and his wife went to the bank to inventory the contents of the safety deposit box. They also requested the envelope containing the deed which was retrieved from the collection file of the bank.

Jay went to Shawnee the next day and recorded the deed.

The petition to cancel and set aside the deed was filed February 22, 1978, alleging that the deed was void in that it was never legally delivered and alternatively that since it was to be operative only upon recordation after the death of the grantors it was a testamentary instrument and was void for failure to comply with the Statute of Wills.

The trial court found the deed was null and void for failure of legal delivery. The dispositive issue raised on appeal is whether the trial court erred in so ruling. We hold it did not and affirm the judgment.

The facts surrounding the transaction which took place at the bank were uncontroverted. It is the interpretation of the meaning and legal result of the transaction which is the issue to be determined by this court on appeal.

In cases involving attempted transfers such as this, it is the grantor's intent at the time the deed is delivered which is of primary and controlling importance. It is the function of this court to weigh the evidence presented at trial as to grantor's intent and unless the trial court's decision is clearly against the weight of the evidence, to uphold that finding.

[*803] The grantor and banker were both dead at the time of trial. Consequently, the only testimony regarding the transaction was supplied by the grantee, Jay. The pertinent part of his testimony is as follows:

A. And was going to hand it back to Mr. Vanlandingham [sic], and he wouldn't take it.

Q. What did Mr. Vanlandingham [sic] say?

A. Well, he laughed then and said that "We got to make this legal," or something like that. And said, "You'll have to give it to Jay and let Jay give it back to me."
Q. And what did Harold do with the document?
A. He gave it to me.
Q. Did you hold it?
A. Yes.
Q. Then what did you do with it?
A. Mr. Vanlandingham [sic], I believe, told me I ought to look at it.
Q. And you looked at it?
A. Yes.
Q. And then what did you do with it?
A. I handed it to Mr. Vanlandingham [sic].
Q. And what did he do with the document?
A. He had it in his hand, I believe, when we left.
Q. Do you recall seeing the envelope at any time during this transaction?
A. I never saw the envelope. But Mr. Vanlandingham [sic] told me when I handed it to him, said, "Jay, I'll put this in an envelope and keep it in a vault for you until you call for it."
A. Well, Harold told me while Mildred was signing the deed that they were going to deed me the farm, but they wanted me to leave the deed at the bank with Van, and that when something happened to them that I would go by the bank and pick it up and take it to Shawnee to the court house and record it, and it would be mine. (emphasis added)

When the deed was retrieved, it was contained in an envelope on which was typed: "J. W. Rosengrant- or Harold H. Rosengrant."

The import of the writing on the envelope is clear. It creates an inescapable conclusion that the deed was, in fact, retrievable at any time by Harold before his death. The bank teller's testimony as to the custom and usage of the bank leaves no other conclusion but that at any time Harold was free to retrieve the deed. There was, if not an

expressed, an implied agreement between the banker and Harold that the grant was not to take effect until two conditions occurred — the death of both grantors and the recordation of the deed.

In support of this conclusion conduct relative to the property is significant and was correctly considered by the court. Evidence was presented to show that after the deed was filed Harold continued to farm, use and control the property. Further, he continued to pay taxes on it until his death and claimed it as his homestead.

Grantee confuses the issues involved herein by relying upon grantors' goodwill toward him and his wife as if it were a controlling factor. From a fair review of the record it is apparent Jay and his wife were very attentive, kind and helpful to this elderly couple. The donative intent on the part of grantors is undeniable. We believe they fully intended to reward Jay and his wife for their kindness. Nevertheless, where a grantor delivers a deed under which he reserves a right of retrieval and attaches to that delivery the condition that the deed is to become operative only after the death of grantors and further continues to use the property as if no transfer had occurred, grantor's actions are nothing more than an attempt to employ the deed as if it were a will. Under Oklahoma law this cannot be done. The ritualistic "delivery of the deed" to the grantee and his redelivery of it to the third party for safe keeping created under these circumstances only a [*804] symbolic delivery. It amounted to a pro forma attempt to comply with the legal aspects of delivery. Based on all the facts and circumstances the true intent of the parties is expressed by the notation on the envelope and by the later conduct of the parties in relation to the land. Legal delivery is not just a symbolic gesture. It necessarily carries all the force and consequence of absolute, outright ownership at the time of delivery or it is no delivery at all.

The trial court interpreted the envelope literally. The clear implication is that grantor intended to continue to exercise control and that the grant was not to take effect until such

time as both he and his wife had died and the deed had been recorded. From a complete review of the record and weighing of the evidence we find the trial court's judgment is not clearly against the weight of the evidence. Costs of appeal are taxed to appellant.

BACON, P.J., concurs and BRIGHTMIRE, J., concurs specially.

CONCUR BY: BRIGHTMIRE

In a dispute of this kind dealing with the issue of whether an unrecorded deed placed in the custody of a third party is a valid conveyance to the named grantee at that time or is deposited for some other reason, such as in trust or for a testamentary purpose, the fact finder often has a particularly tough job trying to determine what the true facts are.

The law, on the other hand, is relatively clear. A valid in praesenti conveyance requires two things: (1) actual or constructive delivery of the deed to the grantee or to a third party; and (2) an intention by the grantor to divest himself of the conveyed interest. Here the trial judge found there was no delivery despite the testimony of Jay Rosengrant to the contrary that one of the grantors handed the deed to him at the suggestion of banker J. E. Vanlandengham.

So the question is, was the trial court bound to find the fact to be as Rosengrant stated? In my opinion he was not for several reasons. Of the four persons present at the bank meeting in question only Rosengrant survives which, when coupled with the self-serving nature of the nephew's statements, served to cast a suspicious cloud over his testimony. And this, when considered along with other circumstances detailed in the majority opinion, would have justified the fact finder in disbelieving it. I personally have trouble with the delivery testimony in spite of the apparent "corroboration" of the lawyer, Jeff Diamond. The only reason I can see for Vanlandengham suggesting such a physical delivery would be to assure the accomplishment of a valid conveyance of the property at that time. But if the grantors intended that then why did they simply give it to

the named grantee and tell him to record it? Why did they go through the delivery motion in the presence of Vanlandengham and then give the deed to the banker? Why did the banker write on the envelope containing the deed that it was to be given to either the grantee "or" a grantor? The fact that the grantors continued to occupy the land, paid taxes on it, offered to sell it once and otherwise treated it as their own justifies an inference that they did not make an actual delivery of the deed to the named grantee. Or, if they did, they directed that it be left in the custody of the banker with the intent of reserving a de facto life estate or of retaining a power of revocation by instructing the banker to return it to them if they requested it during their lifetimes or to give it to the named grantee upon their deaths. In either case, the deed failed as a valid conveyance.

[*805] I therefore join in affirming the trial court's judgment.

AMERICAN LAND HOLDINGS OF INDIANA, LLC, et al., Plaintiffs-Appellants/Cross-Appellees, v. STANLEY JOBE, et al., Defendants-Appellees, and WILLIAM BOYD ALEXANDER, Defendant-Appellee/Cross-Appellant. United States Court of Appeals for the Seventh Circuit 604 F.3d 451, May 6, 2010, Decided

OPINION BY: POSNER

[*453] This diversity suit, brought by affiliates of the Peabody Energy Corporation (for simplicity we'll pretend there is a single plaintiff and call it Peabody), seeks both a declaration that Peabody has the right to strip mine coal on the defendants' land, and specific performance of an option to purchase the land. The land is in Indiana, and the substantive issues in the case are governed by Indiana law. The district judge, after conducting a bench trial, entered judgment for the defendants, 655 F. Supp. 2d 882 (S.D. Ind. 2009), and Peabody appeals. One of the defendants (Alexander) cross-appeals—improperly, because he is seeking not to modify the judgment but merely to defend it

(so far as it affects him) on an alternative ground to the district judge's. Wellpoint, Inc. v. Commissioner, 599 F.3d 641, 647-51 (7th Cir. 2010). The other defendants also filed a cross-appeal, but have dismissed it.

The defendants own a total of 62 acres of farmland in Sullivan County, Indiana; there are farmhouses and other buildings on the land. The land is an island in an area that Peabody is busy strip mining for coal, and it is eager to strip mine the defendants' land as well, and insists that a 1903 deed entitles it to do so. The coal beneath the land is worth $ 50 million (of course minus the cost of extraction) at the current spot price of $ 42 per ton for coal of this type and quality. The parties say the coal is worth $ 180 million, but that appears to be an arithmetical error; for the quantity of coal that Peabody expects to extract if it is allowed to strip mine the land is only 1.2 million tons. (There is, however, more at stake for Peabody, because if it cannot extend its existing strip mine across the defendants' land it will apparently be unable to get at another 2.5 millions tons of coal in the land immediately surrounding the defendants' land.)

[*454] Peabody contends that the deed entitles it both to strip mine the land without compensating the owners and also, if it wants, to obtain full title to the land (that is, fee simple) for $ 30 an acre. Under the first entitlement the right to use the surface would revert to the defendants when Peabody was finished strip mining it; under the second it would be Peabody's property to do with it as it wanted, forever. One might wonder why Peabody would prefer litigating rather than just digging an underground mine, as the deed allows. But the district judge found that strip mining was necessary to remove all the coal—underground mining wouldn't do it because the coal seams aren't very thick and in places they are layered over one another so that a good amount of the coal would have to be left in place in order to support the shafts required for getting at and extracting the rest of the coal.

The deed, given by the defendants' predecessors to Peabody's predecessor, grants the latter and its successors "all the coals, clays, minerals and mineral substances underlying" the defendants' land, "together with the right to mine and remove said coals [etc.—we can ignore the reference to 'clays, minerals and mineral substances,' as do the parties] without further payment of any nature whatsoever." Moreover, the coal company is not to be liable for any damages "occasioned by mining or removing of said coals . . . not to exceed 5 acres"—in other words, it can damage five acres of the defendants' 62 acres without having to pay for the damage. And "at any time hereafter upon demand and payment therefor at rate of $ 30 per acre," the grantors are to convey to the coal company "without further payments . . . such portion of surface of said Real Estate as may be necessary for location of coal mines, tracks, tipples, railroads, railroad switches and all buildings necessary to carry on business of mining and transporting said . . . coal." The coal company is also "granted the use of so much of surface of said Real Estate as may be necessary in putting down test holes and holes for pumping water from and for ventilating and draining mines and for other like purposes necessary to secure [the coal company's] mining and removing that portion of said Real Estate thereby granted and conveyed to it." However, "no . . . coal . . . [is] to be mined or removed from under any dwelling house now situated on said Real Estate," and "five acres of surface where present buildings are now situated is reserved by the grantors." Peabody argues that the conveyance of "all the coals" means that it owns all the coal under the surface of the defendants' land and so, since the deed entitles it "to mine and remove" the coal, it can extract it by any method it wants, including strip mining.

But the further portions of the deed that we quoted seem to confine the coal company's use of the surface to structures and activity relating to underground mining. For $ 30 an acre the company can purchase portions of the surface for structures related to such mining, but removal of the

surface for purposes unrelated to under-ground mining is nowhere authorized unless by the reference to "all the coals."

The tension between the right to mine "all the coals" and the limits on the mining company's use of the surface of the land marks the deed as ambiguous. And so the judge admitted extrinsic evidence (evidence beyond the deed itself) to help him decide whether the deed had conveyed, either directly or by grant of the purchase option, the right to strip mine the land. Extrinsic evidence is admissible to disambiguate an ambiguous deed, Symmes v. Brown, 13 Ind. 283, 13 Ind. 318 (1859); Hoose v. Doody, 886 N.E.2d 83, 89-90 (Ind. App. [*455] 2008); Kopetsky v. Crews, 838 N.E.2d 1118, 1124 (Ind. App. 2005); United States v. LaRosa, 765 F.2d 693, 696-97 (7th Cir. 1985) (Indiana law), just as it is admissible to disambiguate an ambiguous contract.

The key extrinsic evidence presented at the bench trial was that there was no strip mining of coal in Sullivan County, Indiana, in 1903; and apparently no strip mining of coal anywhere in the United States at that time, beyond isolated experimentation. See Denver Harper, Chris Walls & Deborah DeChurch, "Coal Mining History of the United States With an Emphasis on Indiana" (Indiana Geological Survey 2003), igs.indiana.edu/geology/coalOilGas/coalMiningHistory/coal_history.html (visited April 12, 2010); Denver Harper, "The Development of Surface Coal Mining in Indiana" 5-7 (Indiana Dept. of Natural Resources, Geological Survey Special Report No. 35, 1985). Commercially significant strip mining had to await the advent of the huge steam shovels developed for the construction of the Panama Canal, which began in 1904. Strip mining even on a modest scale seems not to have been done in Sullivan County until 1918, or to have become common anywhere in Indiana until the 1920s. See Harper et al., supra; Harper, supra, at 7-11; Harper, "Coal Mining in Sullivan County, Indiana" 2 (Indiana Dept. of Natural Resources, Geological Survey

Special Report No. 43, 1988). The defendants' expert witnesses testified consistently with the published sources; Peabody offered no expert testimony relating to the history of strip mining in Indiana.

The judge concluded that the right to mine "all the coals" referred to extracting the coal beneath the surface of the defendants' land by underground mining only. That explained, he thought, why all the surface uses permitted to the coal company, and the purchase option as well, related expressly to underground mining—none to strip mining. His conclusion that the deed is ambiguous and the infeasibility of strip mining at the time it was granted allows the ambiguity to be resolved in favor of the surface owner is consistent with the case law. Phillips v. Fox, 193 W. Va. 657, 458 S.E.2d 327, 335 (W. Va. 1995); Skivolocki v. East Ohio Gas Co., 38 Ohio St. 2d 244, 313 N.E.2d 374, 376, 378-79 (Ohio 1974); Stewart v. Chernicky, 439 Pa. 43, 266 A.2d 259, 262-65 (Pa. 1970); West Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 832, 42 S.E.2d 46, 47-50 (W. Va. 1947); cf. Compass Coal Co. v. Commonwealth of Pennsylvania Game Commission, 71 Pa. Commw. 252, 454 A.2d 1167 (Pa. Commonwealth Ct. 1983). The Indiana Supreme Court has not spoken to the issue. But Peabody argues that Indiana's intermediate appellate court has held in a pair of successive cases—Consolidation Coal Co. v. Mutchman, 565 N.E.2d 1074 (Ind. App. 1990), and Mutchman v. Consolidation Coal Co., 666 N.E.2d 461 (Ind. App. 1996)—that a conveyance of the right to mine "all coal" (the phrase in our deed is "all the coals, n" but presumably the meaning is the same) can be limited to underground mining only if the deed imposes a "severe limitation" on the mining company's use of the surface, whatever exactly that means.

Assuming that these intermediate appellate decisions are authoritative statements of Indiana law, nevertheless we don't read them as Peabody does. In the first Mutchman case the court was interpreting a large number of heterogeneous deeds granting coal rights, and the court

noted that two sets of the deeds "appear to severely limit surface use, either by expressly stating that it is not the intention of the grantors to 'grant any surface rights,' or requiring the grantee to accommodate surface farming and pay damages for crops as the damage occurs." 565 N.E.2d at 1082. That was an observation [*456] rather than the statement of a rule. The court said that the deeds were ambiguous and so, "to construe [them], it would be appropriate to permit the introduction of extrinsic evidence to aid in construction." Id. at 1083. It further observed that they "expressly preclude use of the surface or . . . require immediate payment of damages for injury to the surface." Id.

On remand from the first Mutchman decision by the appellate court, the trial court received evidence which showed that in 1922, when the deeds in question had been issued (the date is not in the Mutchman opinion, but is in the briefs in that case), "strip mining methods were being used in the counties surrounding [the county in which the grantors' land was located]; and it was most likely the grantors of the coal deeds were aware of the probability that their coal was being acquired for strip mining . . . [and] would have been aware of the widespread solicitation of land for strip mining purposes." 666 N.E.2d at 465-66. The appellate court concluded that "from this evidence, we cannot say it was unreasonable for the trial court to conclude that the grantors had knowledge that the surface coal could be removed by strip mining methods, and, if the grantors did not want their land strip mined, they could have clearly limited the use of the surface to preclude strip mining." Id. at 466.

Neither appellate opinion in the Mutchman case holds that only a "severe limitation" on a coal company's right to use the surface of the land to get at its coal can exclude, from a grant of the right to mine "all coal" or "all the coals," coal that can be extracted only by strip mining. We read the court to be saying that, consistent with the cases we cited earlier, if the deed both grants the coal company the right to

mine "all the coals" and imposes restrictions inconsistent with a literal interpretation of that right the deed is ambiguous and extrinsic evidence can properly be used to disambiguate it. A conveyance that contains a contradiction must be interpreted with the help of something more than the inconsistent text and that something usually and in this case, as in Mutchman, is extrinsic evidence.

The deed in our case satisfies the condition that it be ambiguous (thus allowing recourse to extrinsic evidence) because it imposes a number of restrictions, and in fact rather onerous ones, on the coal company's use of the surface; to get free of most of them the company would have to pay the grantors $ 30 per acre, which is the equivalent of having to pay damages for impairing the landowners' use of the surface, a restriction similar to one mentioned in Mutchman. The deed forbade the company to take coal from under the defendants' buildings or the five acres on which the buildings sat (plus yards presumably, since apparently there was only one farmhouse in 1903 plus some farm buildings, and the ensemble would not have occupied five acres). Peabody acknowledges that if it had to leave five acres of the surface untouched it might be unable to recover most of the coal beneath the defendants' land.

It tries to sneak around this limitation by arguing that since the contours of the five-acre reserved tract are not indicated in the deed, the reservation is void under Indiana property law because its boundaries cannot be determined. True, Edens v. Miller, 147 Ind. 208, 46 N.E. 526 (Ind. 1897); De Long v. Starkey, 120 Ind. App. 288, 92 N.E.2d 228, 230 (Ind. App. 1950); 10 Indiana Law Encyclopedia (Deeds) § 17 (2010); see also Barlow Burke, Ann M. Burkhart & R.H. Helmholz, Fundamentals of Property Law 490 (2d ed. 2004), but a two-edged sword: if the five-acre tract carved out of the 62-acre grant is indefinite (and the [*457] indefiniteness cannot be resolved by extrinsic evidence), as appears to be the case, the 57-acre tract in which Peabody does have mineral rights is equally indefinite. Anyway the

indefiniteness is irrelevant. The only significance of the five-acre reservation for the case at hand is the light it casts on the parties' understanding of what the deed granted the coal company: the grantors could hardly have thought that the reservation was void and the coal company's rights therefore more extensive than the deed said they were.

So the 1903 deed is richly ambiguous, like the comparable deeds in the Mutchman cases. But there is a critical difference between this case and Mutchman, and it is the difference between 1903 and 1922. By 1922 it was clear that a coal company seeking a grant of "all coal" might seek to strip mine it, but nineteen years earlier strip mining of coal had been unknown and apparently unanticipated. And notice that Peabody's claim produces a paradox: if Peabody built a rail line to the entrance to an underground mine, it would have to pay $ 30 per acre for the surface occupied by the track; but if it destroyed the surface completely by strip mining, it would, on its interpretation of the deed, owe nothing.

The difference between strip mining and underground mining, as far as the effect on the grantor of the mining rights is concerned, is profound: strip mining destroys the surface, making it completely unusable by the owner of the surface unless and until it is restored after all the coal has been stripped, while underground mining allows some and maybe almost all of the surface to remain undisturbed and thereby usable by the surface owner. On this basis, some courts create a presumption against interpreting a grant of mineral rights to convey a right to strip mine the grantor's land. E.g., Phillips v. Fox, supra, 458 S.E.2d at 332-35; Skivolocki v. East Ohio Gas Co., supra, 313 N.E.2d at 377-79 and n. 1; Stewart v. Chernicky, supra, 266 A.2d at 263; Compass Coal Co. v. Commonwealth of Pennsylvania Game Commission, supra, 454 A.2d at 1169-70; see also Ward v. Harding, 860 S.W.2d 280, 282-88 (Ky. 1993); Doochin v. Rackley, 610 S.W.2d 715, 718-19 (Tenn. 1981); Wilkes-Barre Township School District v. Corgan, 403 Pa. 383, 170 A.2d 97, 99-100 (Pa. 1961); West

Virginia-Pittsburgh Coal Co. v. Strong, supra, 42 S.E.2d at 49-50. We don't have to go that far to conclude that the district judge did not commit a clear error (the proper standard of appellate review of a decision interpreting a contract, deed, or other document with the aid of extrinsic evidence, e.g., Matterhorn, Inc. v. NCR Corp., 763 F.2d 866, 873 (7th Cir. 1985)) in ruling that, in light of the language of the deed read against a background that includes the technology of coal mining when the deed was signed, the grant of a right to mine "all the coals" was intended to be limited to underground mining, and likewise the right to use the surface to enable mining.

For completeness we address the two alternative grounds for affirmance proposed by the defendants. One, which is limited to Peabody's claim for specific performance of the option to purchase the defendants' land, is that the option violates the rule against perpetuities, which remains in force in Indiana. Ind. Code §§ 32-17-8-1 et seq. (Uniform Statutory Rule Against Perpetuities). For property interests created as in this case before 1991 (the date of the Indiana statute), the common law rule against perpetuities continues to govern, see section 32-17-8-1(b), and invalidates the grant of a property interest that goes into effect more than 21 years and nine months after the death of a person living when it was made. Francis [*458] v. Yates, 700 N.E.2d 504, 506 (Ind. App. 1998); Buck v. Banks, 668 N.E.2d 1259, 1260-61 (Ind. App. 1996); see also Ind. Code § 32-1-4-1 (1982). If the grantee is a corporation and the agreement doesn't use a person's life as a measuring rod for the vesting deadline, the grant must go into effect within 21 years. E.g., Murphy Exploration & Production Co. v. Sun Operating Limited Partnership, 747 So. 2d 260, 265 (Miss. 1999); Symphony Space, Inc. v. Pergola Properties, Inc., 88 N.Y.2d 466, 669 N.E.2d 799, 806, 646 N.Y.S.2d 641 (N.Y. 1996); see also Restatement of Property § 374, comments h and o (1944). We haven't found an Indiana case, but we assume that the Indiana rule is the same.

There is a crucial difference between the going into effect of a granted right and the exercise of the right by its holder once it has gone into effect. If the 1903 deed conveyed the right to strip mine, which is Peabody's primary argument, that right took effect in 1903, even though strip mining did not begin then. Similarly, the right to mine (if only by underground mining) the coal under the defendants' land took effect in 1903 and so would not have been forfeited even if the mining of the coal had not begun until 2000. The right to mine is an "appurtenant" right, meaning a right (which may be granted expressly, as in the deed involved in this case, or by implication, as when a landowner sells a parcel wholly surrounded by his land and the purchaser is deemed to have an implied easement of ingress and egress through the seller's property) that is necessary to the full exploitation of another property right. The right to mine coal is appurtenant to the ownership of a coal deposit, for without that right the coal would have severely diminished value to its owner (though not zero value, because the owner of the surface would have an incentive to buy the coal from the owner of the coal). To subject the exercise of an appurtenant right to the rule against perpetuities would therefore encourage premature exploitation of the right.

Suppose that after the sale of coal rights to Peabody's predecessor in 1903 the price of coal had plummeted or the cost of extraction had soared and as a result mining the coal was uneconomical, but that conditions gradually improved and in 1923 the coal company judged that mining the coal would be profitable beginning in 1925. If to preserve its right to mine, the coal company had to begin mining within 21 years of acquiring the right, it would have an incentive to begin mining prematurely, in order to preserve its right. And that would be wasteful. See, e.g., Quarto Mining Co. v. Litman, 42 Ohio St. 2d 73, 326 N.E.2d 676, 685 (Ohio 1975); Douglas A. Kysar, "Law, Environment, and Vision," 97 Nw. U. L. Rev. 675, 698-99 (2003); Robert C. Ellickson, "Property in Land," 102 Yale L.J. 1315, 1368-69 (1993). In effect, it would be mining to acquire a right to

mine in the future, rather than mining because it wanted to extract and sell the coal now.

Consistent with this analysis, we read in Threlkeld v. Inglett, 289 Ill. 90, 124 N.E. 368, 371 (Ill. 1919) (citations omitted), that "when anything is granted, all the means to attain it and all the fruits and effects of it are granted also, and pass, together with the grant of the thing itself, without any words to that effect. Where a grant is made for a valuable consideration it is presumed that the grantor intended to convey and the grantee expected to receive the full benefit of it, and therefore the grantor not only conveyed the thing specifically described, but all other things, so far as it was within his power to pass them, which were necessary to the enjoyment of the thing granted. The deed, when made, would not only pass the coal, oil, and gas, [*459] with the right to mine and remove the same, but also the right to enter upon and use so much of the surface of the land as might be necessary to the enjoyment of the property and rights conveyed, and the agreement was merely that the land taken for such use should be paid for, when located, at the rate of $ 150 an acre. It was not within the rule against perpetuities."

The district judge as we said was entitled to reject Peabody's contention that the 1903 deed conveyed to its predecessor the right to strip mine the defendants' land. But not because Peabody (or its predecessor) failed to begin strip mining the land by 1924. Peabody also claims, however, that the deed gave it an option to buy all the defendants' land at any time for $ 30 an acre—an option that Peabody sought to exercise more than 21 years after its predecessor acquired the option. That option is the target of the defendants' attack based on the rule against perpetuities. There is a difference, pointed out in Post v. Bailey, 110 W. Va. 504, 159 S.E. 524, 526-27 (W.Va. 1931), between the present grant of a right to the use of land and an option to acquire that right in the future. In the latter case, the grant, because it does not take effect until the option is exercised, is subject to the rule against perpetuities. West Virginia-

Pittsburgh Coal Co. v. Strong, supra, 42 S.E.2d at 50-52; Barton v. Thaw, 246 Pa. 348, 92 A. 312, 315 (Pa. 1914).

Not that "option" is a magic word, the mere utterance of which conjures up the rule. Buck v. Walker, 115 Minn. 239, 132 N.W. 205, 208 (Minn. 1911). The word is sometimes used to designate an appurtenant right, as when one says that by acquiring land zoned residential one acquired an "option" to build a house, or not, as one chooses, at any time. But that is different from an option to buy an adjacent property—that is a right to the future grant of a property right. And so the purchase option granted in the 1903 deed would be extinguished by the rule against perpetuities were the option interpreted to enable Peabody to buy the defendants' land in order to strip mine it rather than just to use parts of it to enable underground mining. But we have rejected that interpretation. The deed we have said permits the purchase of the surface only as may be necessary for mining operations underground. The grant of that option is the grant of an appurtenant right that Peabody can exercise at any time. Consolidation Coal Co. v. Mutchman, supra, 565 N.E.2d at 1084-85; Quarto Mining Co. v. Litman, supra, 326 N.E.2d at 683-85. If the right were not appurtenant to Peabody's (limited) mining right—if it were a right to build a ferris wheel on the defendants' land—then it would be subject to the rule against perpetuities. But it is not a right to strip the surface.

The other alternative ground, this one pressed only by defendant Alexander, on which we are urged to affirm the district court's decision (but only insofar as it relates to Alexander) is that both federal law and Indiana law forbid strip mining within 300 feet of a residence, and all of Alexander's land (it is only three acres) is within that radius of his house. 30 U.S.C. § 1272(e); 312 Ind. Admin. Code § 25-3-1(5). But if the deed gave the coal company the right to acquire the surface (for any and all purposes, including strip mining) for $ 30 an acre, the company could exercise the right, tear down the house, and be then free of legal restrictions on strip mining the land.

Because strip mining is a more valuable use of the defendants' land than farming and home occupying, our decision will not prevent the land from being put to its most valuable use, which is indeed for strip mining. It will simply affect the terms on [*460] which Peabody acquires the right to strip mine the land. It would like to be able to acquire the right for $ 1860 (62 acres times $ 30). With $ 50 million worth of coal under the land (though its net value, as we said earlier, is less because of the cost of extraction—but may be more because Peabody needs to strip mine the defendants' land in order to extract more coal from beneath the surrounding land), it will have to pay the defendants a good deal more.

The judgment is affirmed and the cross-appeal denied.

B. EL ARRENDAMIENTO

EL FUEDO NO LIBRE

Abraham SOMMER, Plaintiff-Respondent, v. James A. KRIDEL, JR., Defendant-Appellant. Supreme Court of New Jersey 74 N.J. 446; 378 A.2d 767,
June 29, 1977, Decided
OPINION BY: PASHMAN

[*448] We granted certification in these cases to consider whether a landlord seeking damages from a defaulting tenant is under a duty to mitigate damages by making reasonable efforts to re-let an apartment wrongfully vacated by the tenant. Separate parts of the Appellate Division held that, in accordance with their respective leases, the landlords in both cases could recover rents due under the leases regardless of whether they had attempted to re-let the vacated apartments. Although they were of different [*449] minds as to the fairness of this result, both parts agreed that it was dictated by Joyce v. Bauman, 113 N.J.L. 438 (E. & A. 1934), a decision by the former Court of Errors and Appeals. We now reverse and hold that a landlord does have an obligation to make a reasonable effort to mitigate damages in such a situation. We therefore overrule Joyce v.

Bauman to the extent that it is inconsistent with our decision today.

I

A.

Sommer v. Kridel

This case was tried on stipulated facts. On March 10, 1972 the defendant, James Kridel, entered into a lease with the plaintiff, Abraham Sommer, owner of the "Pierre Apartments" in Hackensack, to rent apartment 6-L in that building. The term of the lease was from May 1, 1972 until April 30, 1974, with a rent concession for the first six weeks, so that the first month's rent was not due until June 15, 1972.

One week after signing the agreement, Kridel paid Sommer $ 690. Half of that sum was used to satisfy the first month's rent. The remainder was paid under the lease provision requiring a security deposit of $ 345. Although defendant had expected to begin occupancy around May 1, his plans were changed. He wrote to Sommer on May 19, 1972, explaining

I was to be married on June 3, 1972. Unhappily the engagement was broken and the wedding plans cancelled. Both parents were to assume responsibility for the rent after our marriage. I was discharged from the U.S. Army in October 1971 and am now a student. [*450] I have no funds of my own, and am supported by my stepfather.

In view of the above, I cannot take possession of the apartment and am surrendering all rights to it. Never having received a key, I cannot return same to you.

I beg your understanding and compassion in releasing me from the lease, and will of course, in consideration thereof, forfeit the 2 month's rent already paid.

Please notify me at your earliest convenience.

Plaintiff did not answer the letter.

Subsequently, a third party went to the apartment house and inquired about renting apartment 6-L. Although the parties agreed that she was ready, willing and able to rent the apartment, the person in charge told her that the apartment

was not being shown since it was already rented to Kridel. In fact, the landlord did not re-enter the apartment or exhibit it to anyone until August 1, 1973. At that time it was rented to a new tenant for a term beginning on September 1, 1973. The new rental was for $ 345 per month with a six week concession similar to that granted Kridel.

Prior to re-letting the new premises, plaintiff sued Kridel in August 1972, demanding $ 7,590, the total amount due for the full two-year term of the lease. Following a mistrial, plaintiff filed an amended complaint asking for $ 5,865, the amount due between May 1, 1972 and September 1, 1973. The amended complaint included no reduction in the claim to reflect the six week concession provided for in the lease or the $ 690 payment made to plaintiff after signing the agreement. Defendant filed an amended answer to the complaint, alleging that plaintiff breached the contract, failed to mitigate damages and accepted defendant's surrender of the premises. He also counterclaimed to demand repayment of the $ 345 paid as a security deposit.

The trial judge ruled in favor of defendant. Despite his conclusion that the lease had been drawn to reflect "the 'settled law' of this state," he found that "justice and fair dealing" imposed upon the landlord the duty to attempt to re-let the premises and thereby mitigate damages. He also [*451] held that plaintiff's failure to make any response to defendant's unequivocal offer of surrender was tantamount to an acceptance, thereby terminating the tenancy and any obligation to pay rent. As a result, he dismissed both the complaint and the counterclaim. The Appellate Division reversed in a per curiam opinion, 153 N.J. Super. 1 (1976), and we granted certification. 69 N.J. 395 (1976).

B.

Riverview Realty Co. v. Perosio

This controversy arose in a similar manner. On December 27, 1972, Carlos Perosio entered into a written lease with plaintiff Riverview Realty Co. The agreement covered the rental of apartment 5-G in a building owned by the realty

company at 2175 Hudson Terrace in Fort Lee. As in the companion case, the lease prohibited the tenant from subletting or assigning the apartment without the consent of the landlord. It was to run for a two-year term, from February 1, 1973 until January 31, 1975, and provided for a monthly rental of $ 450. The defendant took possession of the apartment and occupied it until February 1974. At that time he vacated the premises, after having paid the rent through January 31, 1974.

The landlord filed a complaint on October 31, 1974, demanding $ 4,500 in payment for the monthly rental from February 1, 1974 through October 31, 1974. Defendant answered the complaint by alleging that there had been a valid surrender of the premises and that plaintiff failed to mitigate damages. The trial court granted the landlord's motion for summary judgment against the defendant, fixing the damages at $ 4,050 plus $ 182.25 interest.

[*452] The Appellate Division affirmed the trial court, holding that it was bound by prior precedents, including Joyce v. Bauman, supra. 138 N.J. Super. 270 (App. Div. 1976). Nevertheless, it freely criticized the rule which it found itself obliged to follow:

There appears to be no reason in equity or justice to perpetuate such an unrealistic and uneconomic rule of law which encourages an owner to let valuable rented space lie fallow because he is assured of full recovery from a defaulting tenant. Since courts in New Jersey and elsewhere have abandoned ancient real property concepts and applied ordinary contract principles in other conflicts between landlord and tenant there is no sound reason for a continuation of a special real property rule to the issue of mitigation.

II

As the lower courts in both appeals found, the weight of authority in this State supports the rule that a landlord is under no duty to mitigate damages caused by a defaulting tenant. See Joyce v. Bauman, supra; Weiss v. I. Zapinski, Inc., 65 N.J. Super. 351 (App. Div. 1961); Heyman v.

Linwood Park, 41 N.J. Super. 437 (App. Div. 1956); Zucker v. Dehm, 128 N.J.L. 435 (Sup. Ct. 1942); Heckel v. Griese, 12 N.J. Misc. 211 (Sup. Ct. 1934); Muller v. Beck, 94 N.J.L. 311 (Sup. Ct. 1920); Tanella v. Rettagliata, 120 N.J. Super. 400, 407 (Cty. Ct. 1972); but see Zabriskie v. Sullivan, 80 N.J.L. 673, 675 (Sup. Ct. 1910) (characterized as dictum and rejected in Muller v. Beck, supra), aff'd 82 N.J.L. 545 (E. & A. 1911); Carey v. Hejke, 119 N.J.L. 594, 596 (Sup. Ct. 1938). This rule has been followed in a majority of states, Annot. 21 A.L.R. 3d 534, § 2[a] at 541 (1968), and has been tentatively adopted in the American Law Institute's Restatement of Property. Restatement [*453] (Second) of Property, § 11.1(3) (Tent. Draft No. 3, 1975).

Nevertheless, while there is still a split of authority over this question, the trend among recent cases appears to be in favor of a mitigation requirement. Compare Dushoff v. Phoenix Co., 23 Ariz. App. 238, 532 P. 2d 180 (App. 1975); Hirsch v. Merchants National Bank & Trust Co., 336 N.E. 2d 833 (Ind. App. 1975); Wilson v. Ruhl, 277 Md. 607, 356 A. 2d 544 (1976) (by statute); Bernstein v. Seglin, 184 Neb. 673, 171 N.W. 2d 247 (1969); Lefrak v. Lambert, 89 Misc. 2d 197, 390 N.Y.S. 2d 959 (N.Y. Cty. Ct. 1976); Howard Stores Corp. v. Rayon Co., Inc., 36 A.D. 2d 911, 320 N.Y.S. 2d 861 (App. Div. 1971); Ross v. Smigelski, 42 Wis. 2d 185, 166 N.W. 2d 243 (1969); with Chandler Leas. Div. v. Florida-Vanderbilt Dev. Corp., 464 F. 2d 267 (5 Cir. 1972) cert. den. 409 U.S. 1041, 93 S. Ct. 527, 34 L. Ed. 2d 491 (1972) (applying Florida law to the rental of a yacht); Winshall v. Ampco Auto Parks, Inc., 417 F. Supp. 334 (E.D. Mich. 1976) (finding that under Michigan law a landlord has a duty to mitigate damages where he is suing for a breach of contract, but not where it is solely a suit to recover rent); Ryals v. Laney, 338 So. 2d 413 (Ala. Civ. App. 1976); B.K.K. Co. v. Schultz, 7 Cal. App. 3d 786, 86 Cal. Rptr. 760 (App. 1970) (dictum); Carpenter v. Riddle, 527 P. 2d 592 (Okl. Sup. Ct. 1974); Hurwitz v. Kohm, 516 S.W. 2d 33 (Mo. App. 1974).

The majority rule is based on principles of property law which equate a lease with a transfer of a property interest in the owner's estate. Under this rationale the lease conveys to a tenant an interest in the property which forecloses any control by the landlord; thus, it would be anomalous to require the landlord to concern himself with the tenant's abandonment of his own property. Wright v. Baumann, 239 Or. 410, 398 P. 2d 119, 120-21, 21 A.L.R. 3d 527 (1965).

For instance, in Muller v. Beck, supra, where essentially the same issue was posed, the court clearly treated the lease [*454] as governed by property, as opposed to contract, precepts. The court there observed that the "tenant had an estate for years, but it was an estate qualified by this right of the landlord to prevent its transfer," 94 N.J.L. at 313, and that "the tenant has an estate with which the landlord may not interfere." Id. at 314. Similarly, in Heckel v. Griese, supra, the court noted the absolute nature of the tenant's interest in the property while the lease was in effect, stating that "when the tenant vacated, . . . no one, in the circumstances, had any right to interfere with the defendant's possession of the premises." 12 N.J. Misc. at 213. Other cases simply cite the rule announced in Muller v. Beck, supra, without discussing the underlying rationale. See Joyce v. Bauman, supra, 113 N.J.L. at 440; Weiss v. I. Zapinski, Inc., supra, 65 N.J. Super. at 359; Heyman v. Linwood Park, supra, 41 N.J. Super. at 411; Zucker v. Dehm, supra, 128 N.J.L. at 436; Tanella v. Rettagliata, supra, 120 N.J. Super. at 407.

[*455] Thus, in 6 Williston on Contracts (3 ed. 1962), § 890A at 592, it is stated:

There is a clearly discernible tendency on the part of courts to cast aside technicalities in the interpretation of leases and to concentrate their attention, as in the case of other contracts, on the intention of the parties, * * *.

This Court has taken the lead in requiring that landlords provide housing services to tenants in accordance with implied duties which are hardly consistent with the property notions expressed in Muller v. Beck, supra, and

Heckel v. Griese, supra. See Braitman v. Overlook Terrace Corp., 68 N.J. 368 (1975) (liability for failure to repair defective apartment door lock); Berzito v. Gambino, 63 N.J. 460 (1973) (construing implied warranty of habitability and covenant to pay rent as mutually dependent); Marini v. Ireland, 56 N.J. 130 (1970) (implied covenant to repair); Reste Realty Corp. v. Cooper, 53 N.J. 444 (1969) (implied warranty of fitness of premises for leased purpose). In fact, in Reste Realty Corp. v. Cooper, supra, we specifically noted that the rule which we announced there did not comport with the historical notion of a lease as an estate for years. 53 N.J. at 451-52. And in Marini v. Ireland, supra, we found that the "guidelines employed to construe contracts have [*456] been modernly applied to the construction of leases." 56 N.J. at 141.

Application of the contract rule requiring mitigation of damages to a residential lease may be justified as a matter of basic fairness.Professor McCormick first commented upon the inequity under the majority rule when he predicted in 1925 that eventually

the logic, inescapable according to the standards of a 'jurisprudence of conceptions' which permits the landlord to stand idly by the vacant, abandoned premises and treat them as the property of the tenant and recover full rent, will yield to the more realistic notions of social advantage which in other fields of the law have forbidden a recovery for damages which the plaintiff by reasonable efforts could have avoided. McCormick, "The Rights of the Landlord Upon Abandonment of the Premises by the Tenant," 23 Mich. L. Rev. 211, 221-22 (1925).

Various courts have adopted this position. See Annot., supra, § 7(a) at 565, and ante at 453-454.

The pre-existing rule cannot be predicated upon the possibility that a landlord may lose the opportunity to rent another empty apartment because he must first rent the apartment vacated by the defaulting tenant. Even where the breach occurs in a multi-dwelling building, each apartment may have unique qualities which make it attractive to

certain individuals. Significantly, in Sommer v. Kridel, there was a specific request to rent the apartment vacated by the defendant; there is no reason to believe that absent this vacancy the landlord could have succeeded in renting a different apartment to this individual.

We therefore hold that antiquated real property concepts which served as the basis for the pre-existing rule, shall [*457] no longer be controlling where there is a claim for damages under a residential lease. Such claims must be governed by more modern notions of fairness and equity. A landlord has a duty to mitigate damages where he seeks to recover rents due from a defaulting tenant.

If the landlord has other vacant apartments besides the one which the tenant has abandoned, the landlord's duty to mitigate consists of making reasonable efforts to re-let the apartment. In such cases he must treat the apartment in question as if it was one of his vacant stock.

As part of his cause of action, the landlord shall be required to carry the burden of proving that he used reasonable diligence in attempting to re-let the premises. We note that there has been a divergence of opinion concerning the allocation of the burden of proof on this issue. See Annot., supra, § 12 at 577. While generally in contract actions the breaching party has the burden of proving that damages are capable of mitigation, see Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 455 (App. Div. 1976); McCormick, Damages, § 33 at 130 (1935), here the landlord will be in a better position to demonstrate whether he exercised reasonable diligence in attempting to re-let the premises. Cf. Kulm v. Coast to Coast Stores Central Org., 248 Or. 436, 432 P. 2d 1006 (1967) (burden on lessor in contract to renew a lease).

III

The Sommer v. Kridel case presents a classic example of the unfairness which occurs when a landlord has no responsibility to minimize damages. Sommer waited 15 months and allowed $ 4658.50 in damages to accrue before attempting to re-let the apartment. Despite the availability

of a tenant who was ready, willing and able to rent the apartment, the landlord needlessly increased the damages by turning her away. While a tenant will not necessarily be excused from his obligations under a lease simply by finding another person who is willing to rent the vacated premises, see, e.g., [*458] Reget v. Dempsey-Tegler & Co., 70 Ill. App. 2d 32, 216 N.E. 2d 500 (Ill. App. 1966) (new tenant insisted on leasing the premises under different terms); Edmands v. Rust & Richardson Drug Co., 191 Mass. 123, 77 N.E. 713 (1906) (landlord need not accept insolvent tenant), here there has been no showing that the new tenant would not have been suitable. We therefore find that plaintiff could have avoided the damages which eventually accrued, and that the defendant was relieved of his duty to continue paying rent. Ordinarily we would require the tenant to bear the cost of any reasonable expenses incurred by a landlord in attempting to re-let the premises, see Ross v. Smigelski, supra, 166 N.W. 2d at 248-49; 22 Am. Jur. 2d, Damages, § 169 at 238, but no such expenses were incurred in this case.

In Riverview Realty Co. v. Perosio, no factual determination was made regarding the landlord's efforts to mitigate damages, and defendant contends that plaintiff never answered his interrogatories. Consequently, the judgment is reversed and the case remanded for a new trial. Upon remand and after discovery has been completed, R. 4:17 et seq., the trial court shall determine whether plaintiff attempted to mitigate damages with reasonable diligence, see Wilson v. Ruhl, supra, 356 A. 2d at 546, and if so, the extent of damages remaining and assessable to the tenant. As we have held above, the burden of proving that reasonable diligence was used to relet the premises shall be upon the plaintiff. See Annot., supra, § 11 at 575.

In assessing whether the landlord has satisfactorily carried his burden, the trial court shall consider, among other factors, whether the landlord, either personally or [*459] through an agency, offered or showed the apartment to any prospective tenants, or advertised it in local newspapers.

Additionally, the tenant may attempt to rebut such evidence by showing that he proffered suitable tenants who were rejected. However, there is no standard formula for measuring whether the landlord has utilized satisfactory efforts in attempting to mitigate damages, and each case must be judged upon its own facts. Compare Hershorin v. La Vista, Inc., 110 Ga. App. 435, 138 S.E. 2d 703 (App. 1964) ("reasonable effort" of landlord by showing the apartment to all prospective tenants); Carpenter v. Wisniewski, 139 Ind. App. 325, 215 N.E. 2d 882 (App. 1966) (duty satisfied where landlord advertised the premises through a newspaper, placed a sign in the window, and employed a realtor); Re Garment Center Capitol, Inc., 93 F. 2d 667, 115 A.L.R. 202 (2 Cir. 1938) (landlord's duty not breached where higher rental was asked since it was known that this was merely a basis for negotiations); Foggia v. Dix, 265 Or. 315, 509 P. 2d 412, 414 (1973) (in mitigating damages, landlord need not accept less than fair market value or "substantially alter his obligations as established in the pre-existing lease"); with Anderson v. Andy Darling Pontiac, Inc., 257 Wis. 371, 43 N.W. 2d 362 (1950) (reasonable diligence not established where newspaper advertisement placed in one issue of local paper by a broker); Scheinfeld v. Muntz T.V., Inc., 67 Ill. App. 2d 8, 214 N.E. 2d 506 (Ill. App. 1966) (duty breached where landlord refused to accept suitable subtenant); Consolidated Sun Ray, Inc. v. Oppenstein, 335 F. 2d 801, 811 (8 Cir. 1964) (dictum) (demand for rent which is "far greater than the provisions of the lease called for" negates landlord's assertion that he acted in good faith in seeking a new tenant).

IV

The judgment in Sommer v. Kridel is reversed. In Riverview Realty Co. v. Perosio, the judgment is reversed and the [*460] case is remanded to the trial court for proceedings in accordance with this opinion.

Ella HILDER v. Stuart St. Peter and Patricia ST. PETER. Supreme Court of Vermont 144 Vt. 150; 478 A.2d 202, February 3, 1984, Opinion filed

OPINION BY: BILLINGS

[*154] Defendants appeal from a judgment rendered by the Rutland Superior Court. The court ordered defendants to pay plaintiff damages in the amount of $ 4,945.00, which represented "reimbursement of all rent paid and additional [*155] compensatory damages" for the rental of a residential apartment over a fourteen-month period in defendants' Rutland apartment building. Defendants filed a motion for reconsideration on the issue of the amount of damages awarded to the plaintiff, and plaintiff filed a cross-motion for reconsideration of the court's denial of an award of punitive damages. The court denied both motions. On appeal, defendants raise three issues for our consideration: first, whether the court correctly calculated the amount of damages awarded the plaintiff; secondly, whether the court's award to plaintiff of the entire amount of rent paid to defendants was proper since the plaintiff remained in possession of the apartment for the entire fourteen-month period; and finally, whether the court's finding that defendant Stuart St. Peter acted on his own behalf and with the apparent authority of defendant Patricia St. Peter was error.

The facts are uncontested. In October, 1974, plaintiff began occupying an apartment at defendants' 10-12 Church Street apartment building in Rutland with her three children and new-born grandson. Plaintiff orally agreed to pay defendant Stuart St. Peter $ 140 a month and a damage deposit of $ 50; plaintiff paid defendant the first month's rent and the damage deposit prior to moving in. Plaintiff has paid all rent due under her tenancy. Because the previous tenants had left behind garbage and items of personal belongings, defendant offered to refund plaintiff's damage deposit if she would clean the apartment herself prior to taking

possession. Plaintiff did clean the apartment, but never received her deposit back because the defendant denied ever receiving it. Upon moving into the apartment, plaintiff discovered a broken kitchen window. Defendant promised to repair it, but after waiting a week and fearing that her two year old child might cut herself on the shards of glass, plaintiff repaired the window at her own expense. Although defendant promised to provide a front door key, he never did. For a period of time, whenever plaintiff left the apartment, a member of her family would remain behind for security reasons. Eventually, plaintiff purchased and installed [*156] a padlock, again at her own expense. After moving in, plaintiff discovered that the bathroom toilet was clogged with paper and feces and would flush only by dumping pails of water into it. Although plaintiff repeatedly complained about the toilet, and defendant promised to have it repaired, the toilet remained clogged and mechanically inoperable throughout the period of plaintiff's tenancy. In addition, the bathroom light and wall outlet were inoperable. Again, the defendant agreed to repair the fixtures, but never did. In order to have light in the bathroom, plaintiff attached a fixture to the wall and connected it to an extension cord that was plugged into an adjoining room. Plaintiff also discovered that water leaked from the water pipes of the upstairs apartment down the ceilings and walls of both her kitchen and back bedroom. Again, defendant promised to fix the leakage, but never did. As a result of this leakage, a large section of plaster fell from the back bedroom ceiling onto her bed and her grandson's crib. Other sections of plaster remained dangling from the ceiling. This condition was brought to the attention of the defendant, but he never corrected it. Fearing that the remaining plaster might fall when the room was occupied, plaintiff moved her and her grandson's bedroom furniture into the living room and ceased using the back bedroom. During the summer months an odor of raw sewage permeated plaintiff's apartment. The odor was so strong that the plaintiff was ashamed to have company in

her apartment. Responding to plaintiff's complaints, Rutland City workers unearthed a broken sewage pipe in the basement of defendants' building. Raw sewage littered the floor of the basement, but defendant failed to clean it up. Plaintiff also discovered that the electric service for her furnace was attached to her breaker box, although defendant had agreed, at the commencement of plaintiff's tenancy, to furnish heat.

In its conclusions of law, the court held that the state of disrepair of plaintiff's apartment, which was known to the defendants, substantially reduced the value of the leasehold from the agreed rental value, thus constituting a breach of the implied warranty of habitability. The court based its award of damages on the breach of this warranty and on breach of an express contract. Defendant argues that the court misapplied the law of Vermont relating to habitability because the plaintiff never abandoned the demised premises and, therefore, it [*157] was error to award her the full amount of rent paid. Plaintiff counters that, while never expressly recognized by this Court, the trial court was correct in applying an implied warranty of habitability and that under this warranty, abandonment of the premises is not required. Plaintiff urges this Court to affirmatively adopt the implied warranty of habitability.

Historically, relations between landlords and tenants have been defined by the law of property. Under these traditional common law property concepts, a lease was viewed as a conveyance of real property. See Note, Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases, 56 Cornell L. Q. 489, 489-90 (1971) (hereinafter cited as Expansion of Tenants' Rights). The relationship between landlord and tenant was controlled by the doctrine of caveat lessee; that is, the tenant took possession of the demised premises irrespective of their state of disrepair. Love, Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?, 1975 Wis. L. Rev. 19, 27-28. The landlord's only covenant was to deliver possession

to the tenant. The tenant's obligation to pay rent existed independently of the landlord's duty to deliver possession, so that as long as possession remained in the tenant, the tenant remained liable for payment of rent. The landlord was under no duty to render the premises habitable unless there was an express covenant to repair in the written lease. Expansion of Tenants' Rights, supra, at 490. The land, not the dwelling, was regarded as the essence of the conveyance.

An exception to the rule of caveat lessee was the doctrine of constructive eviction. Lemle v. Breeden, 51 Hawaii 426, 430, 462 P.2d 470, 473 (1969). Here, if the landlord wrongfully interfered with the tenant's enjoyment of the demised premises, or failed to render a duty to the tenant as expressly required under the terms of the lease, the tenant could abandon the premises and cease paying rent. Legier v. Deveneau, 98 Vt. 188, 190, 126 A. 392, 393 (1924).

Beginning in the 1960's, American courts began recognizing that this approach to landlord and tenant relations, which had originated during the Middle Ages, had become an anachronism in twentieth century, urban society. Today's tenant enters into [*158] lease agreements, not to obtain arable land, but to obtain safe, sanitary and comfortable housing.

[They] seek a well known package of goods and services — a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

Javins v. First National Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

Not only has the subject matter of today's lease changed, but the characteristics of today's tenant have similarly evolved. The tenant of the Middle Ages was a farmer, capable of making whatever repairs were necessary to his primitive dwelling. Green v. Superior Court, 10 Cal. 3d 616, 622, 517 P.2d 1168, 1172, 111 Cal. Rptr. 704, 708 (1974). Additionally, "the common law courts assumed that

an equal bargaining position existed between landlord and tenant . . . ." Note, The Implied Warranty of Habitability: A Dream Deferred, 48 UMKC L. Rev. 237, 238 (1980) (hereinafter cited as A Dream Deferred).

In sharp contrast, today's residential tenant, most commonly a city dweller, is not experienced in performing maintenance work on urban, complex living units. Green v. Superior Court, supra, 10 Cal. 3d at 624, 517 P.2d at 1173, 111 Cal. Rptr. at 707-08. The landlord is more familiar with the dwelling unit and mechanical equipment attached to that unit, and is more financially able to "discover and cure" any faults and breakdowns. Id. at 624, 517 P.2d at 1173, 111 Cal. Rptr. at 708. Confronted with a recognized shortage of safe, decent housing, see 24 V.S.A. § 4001(1), today's tenant is in an inferior bargaining position compared to that of the landlord. Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 324-25, 391 N.E.2d 1288, 1292, 418 N.Y.S.2d 310, 314, cert. denied, 444 U.S. 992 (1979). Tenants vying for this limited housing are "virtually powerless to compel the performance of essential services." Id. at 325, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314.

In light of these changes in the relationship between tenants and landlords, it would be wrong for the law to continue to impose the doctrine of caveat lessee on residential leases.

The modern view favors a new approach which recognizes that a lease is essentially a contract between the landlord [*159] and the tenant wherein the landlord promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent for such habitable premises. These promises constitute interdependent and mutual considerations. Thus, the tenant's obligation to pay rent is predicated on the landlord's obligation to deliver and maintain the premises in habitable condition.

Boston Housing Authority v. Hemingway, 363 Mass. 184, 198, 293 N.E.2d 831, 842 (1973).

Recognition of residential leases as contracts embodying the mutual covenants of habitability and payment of rent does not represent an abrupt change in Vermont law. Our case law has previously recognized that contract remedies are available for breaches of lease agreements. Clarendon Mobile Home Sales, Inc. v. Fitzgerald, 135 Vt. 594, 596, 381 A.2d 1063, 1065 (1977); Keene v. Willis, 128 Vt. 187, 188, 191-92, 260 A.2d 371, 371-72, 374 (1969); Breese v. McCann, 52 Vt. 498, 501 (1879). More significantly, our legislature, in establishing local housing authorities, 24 V.S.A. § 4003, has officially recognized the need for assuring the existence of adequate housing.

[Substandard] and decadent areas exist in certain portions of the state of Vermont and . . . there is not . . . an adequate supply of decent, safe and sanitary housing for persons of low income and/or elderly persons of low income, available for rents which such persons can afford to pay . . . this situation tends to cause an increase and spread of communicable and chronic disease . . . [and] constitutes a menace to the health, safety, welfare and comfort of the inhabitants of the state and is detrimental to property values in the localities in which it exists . . . .

24 V.S.A. § 4001(4). In addition, this Court has assumed the existence of an implied warranty of habitability in residential leases. Birkenhead v. Coombs, 143 Vt. 167, 172, 465 A.2d 244, 246 (1983).

Therefore, we now hold expressly that in the rental of any residential dwelling unit an implied warranty exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean and fit for human habitation. This [*160] warranty of habitability is implied in tenancies for a specific period or at will. Boston Housing Authority v. Hemingway, supra, 363 Mass. at 199, 293 N.E.2d at 843. Additionally, the implied warranty of habitability covers all latent and patent defects in the essential facilities of the residential unit. Id. Essential facilities are "facilities vital to the use of the premises for residential purposes . . . ." Kline

v. Burns, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971). This means that a tenant who enters into a lease agreement with knowledge of any defect in the essential facilities cannot be said to have assumed the risk, thereby losing the protection of the warranty. Nor can this implied warranty of habitability be waived by any written provision in the lease or by oral agreement.

In determining whether there has been a breach of the implied warranty of habitability, the courts may first look to any relevant local or municipal housing code; they may also make reference to the minimum housing code standards enunciated in 24 V.S.A. § 5003(c)(1)-5003(c)(5). A substantial violation of an applicable housing code shall constitute prima facie evidence that there has been a breach of the warranty of habitability. "[One] or two minor violations standing alone which do not affect" the health or safety of the tenant, shall be considered de minimus and not a breach of the warranty. Javins v. First National Realty Corp., supra, 428 F.2d at 1082 n.63; Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972); King v. Moorehead, supra, 495 S.W.2d at 76. In addition, the landlord will not be liable for defects caused by the tenant. Javins v. First National Realty Corp., supra, 428 F.2d at 1082 n.62.

However, these codes and standards merely provide a starting point in determining whether there has been a breach. Not all towns and municipalities have housing codes; where there are codes, the particular problem complained of may not be addressed. Park West Management Corp. v. Mitchell, supra, 47 N.Y.2d at 328, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316. In [*161] determining whether there has been a breach of the implied warranty of habitability, courts should inquire whether the claimed defect has an impact on the safety or health of the tenant. Id.

In order to bring a cause of action for breach of the implied warranty of habitability, the tenant must first show that he or she notified the landlord "of the deficiency or defect not known to the landlord and [allowed] a reasonable time for

its correction." King v. Moorehead, supra, 495 S.W.2d at 76.

Because we hold that the lease of a residential dwelling creates a contractual relationship between the landlord and tenant, the standard contract remedies of rescission, reformation and damages are available to the tenant when suing for breach of the implied warranty of habitability. Lemle v. Breeden, supra, 51 Hawaii at 436, 462 P.2d at 475. The measure of damages shall be the difference between the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition. Birkenhead v. Coombs, supra, 143 Vt. at 172, 465 A.2d at 246. In determining the fair rental value of the dwelling as warranted, the court may look to the agreed upon rent as evidence on this issue. Id. "[In] residential lease disputes involving a breach of the implied warranty of habitability, public policy militates against requiring expert testimony" concerning the value of the defect. Id. at 173, 465 A.2d at 247. The tenant will be liable only for "the reasonable rental value [if any] of the property in its imperfect condition during his period of occupancy." Berzito v. Gambino, 63 N.J. 460, 469, 308 A.2d 17, 22 (1973).

We also find persuasive the reasoning of some commentators that damages should be allowed for a tenant's discomfort and annoyance arising from the landlord's breach of the implied warranty of habitability. See Moskovitz, The Implied Warranty of Habitability: A New Doctrine Raising New Issues, 62 Calif. L. Rev. 1444, 1470-73 (1974) (hereinafter cited as A New Doctrine); A Dream Deferred, supra, at 250-51. Damages for annoyance and discomfort are reasonable in light of the fact that

the residential tenant who has suffered a breach of the warranty . . . cannot bathe as frequently as he would [*162] like or at all if there is inadequate hot water; he must worry about rodents harassing his children or spreading disease if the premises are infested; or he must avoid certain rooms or worry about catching a cold if there is inadequate weather protection or heat. Thus, discomfort and annoyance are the

common injuries caused by each breach and hence the true nature of the general damages the tenant is claiming.

Moskovitz, A New Doctrine, supra, at 1470-71. Damages for discomfort and annoyance may be difficult to compute; however, "[the] trier [of fact] is not to be deterred from this duty by the fact that the damages are not susceptible of reduction to an exact money standard." Vermont Electric Supply Co. v. Andrus, 132 Vt. 195, 200, 315 A.2d 456, 459 (1974).

Another remedy available to the tenant when there has been a breach of the implied warranty of habitability is to 0] withhold the payment of future rent. King v. Moorehead, supra, 495 S.W.2d at 77. The burden and expense of bringing suit will then be on the landlord who can better afford to bring the action. In an action for ejectment for nonpayment of rent, 12 V.S.A. § 4773, "[the] trier of fact, upon evaluating the seriousness of the breach and the ramification of the defect upon the health and safety of the tenant, will abate the rent at the landlord's expense in accordance with its findings." A Dream Deferred, supra, at 248. The tenant must show that: (1) the landlord had notice of the previously unknown defect and failed, within a reasonable time, to repair it; and (2) the defect, affecting habitability, existed during the time for which [*163] rent was withheld. See A Dream Deferred, supra, at 248-50. Whether a portion, all or none of the rent will be awarded to the landlord will depend on the findings relative to the extent and duration of the breach. Javins v. First National Realty Corp., supra, 428 F.2d at 1082-83. Of course, once the landlord corrects the defects, the tenant's obligation to pay rent becomes due again. Id. at 1083 n.64.

Additionally, we hold that when the landlord is notified of the defect but fails to repair it within a reasonable amount of time, and the tenant subsequently repairs the defect, the tenant may deduct the expense of the repair from future rent. 11 Williston on Contracts § 1404 (3d ed. W. Jaeger 1968); Marini v. Ireland, 56 N.J. 130, 146, 265 A.2d 526, 535 (1970).

In addition to general damages, we hold that punitive damages may be available to a tenant in the appropriate case. Although punitive damages are generally not recoverable in actions for breach of contract, there are cases in which the breach is of such a willful and wanton or fraudulent nature as to make appropriate the award of exemplary damages. Clarendon Mobile Home Sales, Inc. v. Fitzgerald, supra, 135 Vt. at 596, 381 A.2d at 1065. A willful and wanton or fraudulent breach may be shown "by conduct manifesting personal ill will, or carried out under circumstances of insult or oppression, or even by conduct manifesting . . . a reckless or wanton disregard of [one's] rights . . . ." Sparrow v. Vermont Savings Bank, 95 Vt. 29, 33, 112 A. 205, 207 (1921). When a landlord, after receiving notice of a defect, fails to repair the facility that is essential to the health and safety of his or her tenant, an award of punitive damages is proper. 111 East 88th [*164] Partners v. Simon, 106 Misc. 2d 693, 434 N.Y.S.2d 886, 889 (N.Y. Civ. Ct. 1980).

The purpose of punitive damages . . . is to punish conduct which is morally culpable . . . . Such an award serves to deter a wrongdoer . . . from repetitions of the same or similar actions. And it tends to encourage prosecution of a claim by a victim who might not otherwise incur the expense or inconvenience of private action . . . . The public benefit and a display of ethical indignation are among the ends of the policy to grant punitive damages.

Davis v. Williams, 92 Misc.2d 1051, 402 N.Y.S.2d 92, 94 (N.Y. Civ. Ct. 1977).

In the instant case, the trial court's award of damages, based in part on a breach of the implied warranty of habitability, was not a misapplication of the law relative to habitability. Because of our holding in this case, the doctrine of constructive eviction, wherein the tenant must abandon in order to escape liability for rent, is no longer viable. When, as in the instant case, the tenant seeks, not to escape rent liability, but to receive compensatory damages in the amount of rent already paid, abandonment is similarly

unnecessary. Northern Terminals, Inc. v. Smith Grocery & Variety, Inc., supra, 138 Vt. at 396-97, 418 A.2d at 26-27. Under our holding, when a landlord breaches the implied warranty of habitability, the tenant may withhold future rent, and may also seek damages in the amount of rent previously paid.

In its conclusions of law the trial court stated that the defendants' failure to make repairs was compensable by damages to the extent of reimbursement of all rent paid and additional compensatory damages. The court awarded plaintiff a total of $ 4,945.00; $ 3,445.00 represents the entire amount of rent plaintiff paid, plus the $ 50.00 deposit. This appears to leave $ 1500.00 as the "additional compensatory damages." However, although the court made findings which clearly demonstrate the appropriateness of an award of compensatory damages, there is no indication as to how the court reached a figure of $ 1500.00. It is "crucial that this Court and the parties be able to determine what was decided and how the decision [*165] was reached." Fox v. McLain, 142 Vt. 11, 16, 451 A.2d 1122, 1124 (1982).

Additionally, the court denied an award to plaintiff of punitive damages on the ground that the evidence failed to support a finding of willful and wanton or fraudulent conduct. See Clarendon Mobile Home Sales, Inc. v. Fitzgerald, supra, 135 Vt. at 596, 381 A.2d at 1065. The facts in this case, which defendants do not contest, evince a pattern of intentional conduct on the part of defendants for which the term "slumlord" surely was coined. Defendants' conduct was culpable and demeaning to plaintiff and clearly expressive of a wanton disregard of plaintiff's rights. The trial court found that defendants were aware of defects in the essential facilities of plaintiff's apartment, promised plaintiff that repairs would be made, but never fulfilled those promises. The court also found that plaintiff continued, throughout her tenancy, to pay her rent, often in the face of verbal threats made by defendant Stuart St. Peter. These findings point to the "bad spirit and wrong

intention" of the defendants, Glidden v. Skinner, 142 Vt. 644, 648, 458 A.2d 1142, 1144 (1983), and would support a finding of willful and wanton or fraudulent conduct, contrary to the conclusions of law and judgment of the trial judge. However, the plaintiff did not appeal the court's denial of punitive damages, and issues not appealed and briefed are waived. R. Brown & Sons, Inc. v. International Harvester Corp., 142 Vt. 140, 142, 453 A.2d 83, 84 (1982).

We find that defendants' third claimed error, that the court erred in finding that both defendant Stuart St. Peter and defendant Patricia St. Peter were liable to plaintiff for the breach of the implied warranty of habitability, is meritless. Both defendants were named in the complaint as owners of the 10-12 Church Street apartment building. Plaintiff's complaint also alleged that defendant Stuart St. Peter acted as agent for defendant Patricia St. Peter. Defendants failed to deny these allegations; under V.R.C.P. 8(d) these averments stand as admitted.

Affirmed in part; reversed in part and remanded for hearing on additional compensable damages, consistent with the views herein.

C. EL REGISTRO PÚBLICO DE LA TENENCIA

EL AVISO DE TÍTULO

Dale A. LUTHI and Marcia Luthi, Appellees, v. John R. EVANS, and J. R. Burris, Appellees, and International Tours, Inc., a corporation, Appellant. Supreme Court of Kansas 223 Kan. 622; 576 P.2d 1064, April 1, 1978, Opinion filed

OPINION BY: PRAGER

[*622] This is a review of the judgment of the Court of Appeals entered in Luthi v. Evans, 1 Kan. App. 2d 114, 562 P.2d 127. The factual circumstances and issues of law presented are discussed in depth in the majority opinion of Judge Spencer and in the dissenting opinion of Judge Abbott. We will set forth here only those facts necessary for the determination of the issue appealed to this court.

On February 1, 1971, Grace V. Owens was the owner of interests in a number of oil and gas leases located in Coffey county. On that date Owens, by a written instrument designated "Assignment of Interest in Oil and Gas Leases," assigned to [*623] defendant International Tours, Inc. (hereinafter Tours) all of such oil and gas interests. This assignment provided as follows:

"ASSIGNMENT OF INTEREST IN OIL AND GAS LEASES

"KNOW ALL MEN BY THESE PRESENTS:

"That the undersigned Grace Vannocker Owens, formerly Grace Vannocker, Connie Sue Vannocker, formerly Connie Sue Wilson, Larry R. Vannocker, sometimes known as Larry Vannocker, individually and also doing business as Glacier Petroleum Company and Vannocker Oil Company, hereinafter called Assignors, for and in consideration of $ 100.00 and other valuable consideration, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer and set over unto International Tours, Inc., a Delaware Corporation, hereinafter called Assignee, all their right, title, and interest (which includes all overriding

royalty interest and working interest) in and to the following Oil and Gas Leases located in Coffey County, Kansas, more particularly specified as follows, to-wit:

"(Lease descriptions and recording data on 7 oil and gas leases not involved in this appeal are stated here.)

together with the rights incident thereto and the personal property thereon, appurtenant thereto or used or obtained in connection therewith.

"And for the same consideration the Assignors covenant with the Assignee, his heirs, successors or assigns: That the Assignors are the lawful owners of and have good title to the interest above assigned in and to said Lease, estate, rights and property, free and clear from all liens, encumbrances or adverse claims; That said Lease is valid and subsisting Lease on the land above described, and all rentals and royalties due thereunder have been paid and all conditions necessary to keep the same in full force have been duly performed, and that the Assignor will warrant and forever defend the same against all persons whomsoever, lawfully claiming or to claim the same. Assignors intend to convey, and by this instrument convey, to the Assignee all interest of whatsoever nature in all working interests and overriding royalty interest in all Oil and Gas Leases in Coffey County, Kansas, owned by them whether or not the same are specifically enumerated above with all oil field and oil and gas lease equipment owned by them in said County whether or not located on the leases above described, or elsewhere in storage in said County, but title is warranted only to the specific interests above specified, and assignors retain their title to all minerals in place and the corresponding royalty (commonly referred to as land owners royalty) attributable thereto.

"The effective date of this Assignment is February 1, 1971, at 7:00 o'clock a.m.

"/s/ Grace Vannocker Owens
"Grace Vannocker Owens
"Connie Sue Vannocker
"Larry R. Vannocker

"(Acknowledgment by Grace Vannocker Owens before notary public with seal impressed thereon dated Feb. 5, 1971, appears here.)" (Emphasis supplied.)

This assignment was filed for record in the office of the register of deeds of Coffey county on February 16, 1971.

It is important to note that in the first paragraph of the assignment, seven oil and gas leases were specifically described. Those [*624] leases are not involved on this appeal. In addition to the seven leases specifically described in the first paragraph, Owens was also the owner of a working interest in an oil and gas lease known as the Kufahl lease which was located on land in Coffey county. The Kufahl lease was not one of the leases specifically described in the assignment.

The second paragraph of the assignment states that the assignors intended to convey, and by this instrument conveyed to the assignee, "all interest of whatsoever nature in all working interests and overriding royalty interest in all Oil and Gas Leases in Coffey County, Kansas, owned by them whether or not the same are specifically enumerated above . . ." The interest of Grace V. Owens in the Kufahl lease, being located in Coffey county, would be included under this general description.

On January 30, 1975, the same Grace V. Owens executed and delivered a second assignment of her working interest in the Kufahl lease to the defendant, J.R. Burris. Prior to the date of that assignment, Burris personally checked the records in the office of the register of deeds and, following the date of the assignment to him, Burris secured an abstract and title to the real estate in question. Neither his personal inspection nor the abstract of title reflected the prior assignment to Tours.

The controversy on this appeal is between Tours and Burris over ownership of what had previously been Owens's interest in the Kufahl lease. It is the position of Tours that the assignment dated February 1, 1971, effectively conveyed from Owens to Tours, Owens's working interest in the Kufahl lease by virtue of the general description

contained in paragraph two of that assignment. Tours then contends that the recording of that assignment in the office of the register of deeds of Coffey county gave constructive notice of such conveyance to subsequent purchasers, including Burris. Hence, Tours reasons, it is the owner of Owens's working interest in the Kufahl lease.

Burris admits that the general description and language used in the second paragraph of Owens's assignment to Tours was sufficient to effect a valid transfer of the Owens interest in the Kufahl lease to Tours as between the parties to that instrument. Burris contends, however, that the general language contained in the second paragraph of the assignment to Tours, as recorded, which failed to state with specificity the names of the lessor and lessee, [*625] the date of the lease, any legal description, and the recording data, was not sufficient to give constructive notice to a subsequent innocent purchaser for value without actual notice of the prior assignment. Burris argues that as a result of those omissions in the assignment to Tours, it was impossible for the register of deeds of Coffey county to identify the real estate involved and to make the proper entries in the numerical index. Accordingly, even though he checked the records at the courthouse, Burris was unaware of the assignment of the Kufahl lease to Tours and he did not learn of the prior conveyance until after he had purchased the rights from Grace V. Owens. The abstract of title also failed to reflect the prior assignment to Tours. Burris maintains that as a result of the omissions and the inadequate description of the interest in real estate to be assigned under the second paragraph of the assignment to Tours, the Tours assignment, as recorded, was not sufficient to give constructive notice to a subsequent innocent purchaser for value. It is upon this point that Burris prevailed before the district court. On appeal, the Court of Appeals held the general description contained in the assignment to Tours to be sufficient, when recorded, to give constructive notice to a subsequent purchaser for value, including Burris.

At the outset, it should be noted that a deed or other instrument in writing which is intended to convey an interest in real estate and which describes the property to be conveyed as "all of the grantor's property in a certain county," is commonly referred to as a "Mother Hubbard" instrument. The language used in the second paragraph of the assignment from Owens to Tours in which the assignor conveyed to the assignee "all interest of whatsoever nature in all working interests . . . in all Oil and Gas Leases in Coffey County, Kansas," is an example of a "Mother Hubbard" clause. The so-called "Mother Hubbard" clauses or descriptions are seldom used in this state, but in the past have been found to be convenient for death bed transfers and in situations where time is of the essence and specific information concerning the legal description of property to be conveyed is not available. Instruments of conveyance containing a description of the real estate conveyed in the form of a "Mother Hubbard" clause have been upheld in Kansas for many years as between the parties to the instrument. (In re Estate of Crawford, 176 Kan. 537, 271 P.2d 240; Bryant v. Fordyce, 147 Kan. 586, 78 P.2d 32.)

[*626] The parties in this case agree, and the Court of Appeals held, that the second paragraph of the assignment from Owens to Tours, providing that the assignors convey to the assignee all interests in all oil and gas leases in Coffey County, Kansas, owned by them, constituted a valid transfer of the Owens interest in the Kufahl lease to Tours as between the parties to that instrument. We agree. We also agree with the parties and the Court of Appeals that a single instrument, properly executed, acknowledged, and delivered, may convey separate tracts by specific description and by general description capable of being made specific, where the clear intent of the language used is to do so. We agree that a subsequent purchaser, who has actual notice or knowledge of such an instrument, is bound thereby and takes subject to the rights of the assignee or grantor.

This case involves a legal question which is one of first impression in this court. As noted above, the issue presented is whether or not the recording of an instrument of conveyance which uses a "Mother Hubbard" clause to describe the property conveyed, constitutes constructive notice to a subsequent purchaser. The determination of this issue requires us to examine the pertinent Kansas statutes covering the conveyance of interests in land and the statutory provisions for recording the same. Statutes pertaining to conveyances are contained in K.S.A. 58-2201 through K.S.A. 58-2269. We will mention only those sections which we deem to be pertinent on this appeal. K.S.A. 58-2203 provides in part as follows:

"58-2203. Form of warranty deed. Any conveyance of lands, worded in substance as follows: A. B. conveys and warrants to C.D. (here describe the premises), for the sum of (here insert the consideration), the said conveyance being dated, duly signed and acknowledged by the grantor, shall be deemed and held a conveyance in fee simple to the grantee, . . ." (Emphasis supplied.)

K.S.A. 58-2204 sets forth a similar statutory form for a quitclaim deed. Under these sections an instrument, to constitute a deed, must "describe the premises." The degree of specificity of the description of the premises required is not indicated.

The manner of execution and acknowledgment of instruments of conveyance is covered by K.S.A. 58-2205, 58-2209, 58-2211, and 58-2212. K.S.A. 58-2213 through 58-2217 provide for the certification of acknowledgments and the procedure for proving an unacknowledged deed. No issues have been raised in this case [*627] as to the execution, acknowledgment, or certification of the Owens assignment to Tours and it is not necessary to set forth these statutes in detail.

The recordation of instruments of conveyance and the effect of recordation is covered in part by K.S.A. 58-2221, 58-2222, and 58-2223. These statutes are directly involved in this case and are as follows:

"58-2221. Recordation of instruments conveying or affecting real estate; duties of register of deeds. Every instrument in writing that conveys real estate, any estate or interest created by an oil and gas lease, or whereby any real estate may be affected, proved or acknowledged, and certified in the manner hereinbefore prescribed, may be recorded in the office of register of deeds of the county in which such real estate is situated: Provided, It shall be the duty of the register of deeds to file the same for record immediately, and in those counties where a numerical index is maintained in his or her office the register of deeds shall compare such instrument, before copying the same in the record, with the last record of transfer in his or her office of the property described and if the register of deeds finds such instrument contains apparent errors, he or she shall not record the same until he or she shall have notified the grantee where such notice is reasonably possible.

"The grantor, lessor, grantee or lessee or any other person conveying or receiving real property or other interest in real property upon recording the instrument in the office of register of deeds shall furnish the register of deeds the full name and last known post-office address of the person to whom the property is conveyed or his or her designee. The register of deeds shall forward such information to the county clerk of the county who shall make any necessary changes in address records for mailing tax statements."

"58-2222. Same; filing imparts notice. Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the register of deeds for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice."

"58-2223. Same; unrecorded instrument valid only between parties having actual notice. No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record."

It is the position of Tours that the statutes contained in Chapter 58, Article 22, of K.S.A. are the only statutes which are material for a determination of this case and that statutory provisions in other chapters need not be examined. Simply stated, it is the position of Tours that the assignment from Owens to Tours was properly executed and acknowledged as required by the statutes and constituted a valid transfer of the Owens interest in the Kufahl lease to Tours. This instrument, when filed for record in [*628] full compliance with the provisions of K.S.A. 58-2221, imparted constructive notice to all subsequent purchasers, including Burris, who are deemed to purchase with notice under K.S.A. 58-2222. This was the position taken by the Court of Appeals.

Burris maintains that our examination must extend beyond the statutes set forth above. It is his position that we must also consider the Kansas statutes which govern the custody and the recordation of instruments of conveyance, and the duties of the register of deeds in regard thereto, as contained at K.S.A. 19-1201 through K.S.A. 19-1219. We will discuss only those statutes which we deem pertinent in the present controversy. K.S.A. 19-1204 makes it the duty of the register of deeds in each county to take custody of and preserve all of the records in his office and to record all instruments authorized by law to be recorded. K.S.A. 19-1205 requires the register of deeds to keep a general index, direct and inverted, in his office. The register is required to record in the general index under the appropriate heading the names of grantors and grantees, the nature of the instrument, the volume and page where recorded, and, where appropriate, a description of the tract.

K.S.A. 19-1207 requires the register to keep a book of plats with an index thereof. K.S.A. 19-1209 provides that the county commissioners of any county may order the register of deeds to furnish a numerical index containing "the name of the instrument, the name of the grantor, the name of the grantee, a brief description of the property and the volume and page in which each instrument indexed is recorded."

K.S.A. 19-1210 makes it the duty of the register to make correct entries in the numerical index, of all instruments recorded concerning real estate, under the appropriate headings, and "in the subdivision devoted to the particular quarter section described in the instrument making the conveyance."

At this point we should refer back to K.S.A. 58-2221 which is set forth above. That statute makes it the duty of the register of deeds in those counties where a numerical index is maintained to compare any instrument offered for recordation, before copying the same in the record, with the last record of transfer in his office of the property described; if the register of deeds finds that such instrument contains apparent errors, he shall not record the same until he shall have notified the grantee where such notice is [*629] reasonably possible. The second paragraph of K.S.A. 58-2221 requires either the grantor or grantee, upon recording the instrument in the office of the register of deeds, to furnish the register of deeds the full name and last known post-office address of the person to whom the property is conveyed. The register of deeds is required to forward the necessary information to the county clerk who shall make any necessary changes in address records for mailing tax statements. These two provisions in K.S.A. 58-2221 show a legislative intent that instruments of conveyance should describe the land conveyed with sufficient specificity to enable the register of deeds to determine the correctness of the description from the numerical index and also to make it possible to make any necessary changes in address records for mailing tax statements.

We have concluded that the statutes contained in K.S.A. Chapter 58 pertaining to conveyances of land and the statutes contained in Chapter 19 pertaining to recordation of instruments of conveyance constitute an overall legislative scheme or plan and should be construed together as statutes in pari materia. (City of Overland Park v. Nikias, 209 Kan. 643, 498 P.2d 56.) It also seems obvious

to us that the purpose of the statutes authorizing the recording of instruments of conveyance is to impart to a subsequent purchaser notice of instruments which affect the title to a specific tract of land in which the subsequent purchaser is interested at the time. From a reading of all of the statutory provisions together, we have concluded that the legislature intended that recorded instruments of conveyance, to impart constructive notice to a subsequent purchaser or mortgagee, should describe the land conveyed with sufficient specificity so that the specific land conveyed can be identified. As noted above, K.S.A. 58-2203 and 58-2204 require a deed to describe the premises. A description of the property conveyed should be considered sufficient if it identifies the property or affords the means of identification within the instrument itself or by specific reference to other instruments recorded in the office of the register of deeds. Such a specific description of the property conveyed is required in order to impart constructive notice to a subsequent purchaser.

Again, we wish to emphasize that an instrument which contains a "Mother Hubbard" clause, describing the property conveyed in the general language involved here, is valid, enforceable, [*630] and effectively transfers the entire property interest as between the parties to the instrument. Such a transfer is not effective as to subsequent purchasers and mortgagees unless they have actual knowledge of the transfer. If, because of emergency, it becomes necessary to use a "Mother Hubbard" clause in an instrument of conveyance, the grantee may take steps to protect his title against subsequent purchasers. He may take possession of the property. Also, as soon as a specific description can be obtained, the grantee may identify the specific property covered by the conveyance by filing an affidavit or other appropriate instrument or document with the register of deeds.

We also wish to make it clear that in situations where an instrument of conveyance containing a sufficient description of the property conveyed is duly recorded but

not properly indexed, the fact that it was not properly indexed by the register of deeds will not prevent constructive notice under the provisions of K.S.A. 58-2222. (See Gas Co. v. Harris, 79 Kan. 167, 100 Pac. 72.)

From what we have said above, it follows that the recording of the assignment from Owens to Tours, which did not describe with sufficient specificity the property covered by the conveyance, was not sufficient to impart constructive notice to a subsequent purchaser such as J.R. Burris in the present case. Since Burris had no actual knowledge of the prior assignment from Owens to Tours, the later assignment to Burris prevails over the assignment from Owens to Tours.

The judgment of the Court of Appeals is reversed and the judgment of the district court is affirmed.

Christina ORR, as Administratrix, etc., Plaintiff and Appellant, v. Rick BYERS et al., Defendants and Respondents. Court of Appeal of California, Fourth Appellate District, Division Three 198 Cal. App. 3d 666; 244 Cal. Rptr. 13, February 16, 1988

OPINION BY: SONENSHINE

[*667] The question presented in this appeal is whether an abstract of judgment containing a misspelled name imparts constructive notice of its contents under the doctrine of idem sonans. We conclude it does not and, accordingly, affirm the trial court's ruling.

I.

The facts are not in dispute. In October 1978, James Orr obtained a judgment in excess of $ 50,000 against William Elliott. The written judgment prepared by Orr's attorney identified Elliott erroneously as "William Duane Elliot." The following month, an abstract of judgment was recorded in the Orange County Recorder's office, this time identifying Elliott both as "William Duane Elliot" and "William Duane Eliot." Consequently, the abstract was listed in the Orange County Combined Grantor-Grantee Index under those names only.

Elliott thereafter obtained title to a parcel of property which became subject to Orr's judgment lien. But when Elliott sold that property to Rick [*668] Byers in July 1979, a title search failed to disclose the abstract of judgment. As a result, the preliminary title report did not identify Orr's judgment lien against Elliott, and the judgment was not satisfied from the proceeds of Elliott's sale to Byers.

In February 1981, Orr filed an action against Byers, Elliott, Pomona First Federal Savings & Loan Association and Imperial Bank seeking a declaration of the rights and duties of all parties. Essentially, he was requesting judicial foreclosure of his judgment lien.

At the June 1985 trial, Orr argued the defendants had constructive notice of the abstract of judgment through application of the doctrine of idem sonans. The trial judge acknowledged the doctrine's existence, but he concluded it was inapplicable and announced his intended decision to deny Orr's request for declaratory relief. A formal judgment was filed February 21, 1986, and this appeal followed.

[*669] II.

(1a) Orr takes the position his attorney did not misspell Elliott's name on the abstract but rather, used alternative spellings of the same name. And, he argues, it is imperative that a title searcher be charged with knowledge of such alternative spellings under the established doctrine of idem sonans.

(2) "The doctrine of idem sonans is that though a person's name has been inaccurately written, the identity of such person will be presumed from the similarity of sounds between the correct pronunciation and the pronunciation as written. Therefore, absolute accuracy in spelling names is not required in legal proceedings, and if the pronunciations are practically alike, the rule of idem sonans is applicable." (46 Cal.Jur.3d, Names, § 4, p. 110, fns. omitted; see also Napa State Hospital v. Dasso (1908) 153 Cal. 698, 701 [96 P. 355].) The rule is inapplicable, however, under circumstances "where the written name is material." (Emeric v. Alvarado (1891) 90 Cal. 444, 466 [27 P. 356].)

"[To] be material, [a variance] must be such as has misled the opposite party to his prejudice." (Black's Law Dict. (5th ed. 1979) p. 671.)

(1b) Orr insists all that is required to invoke the doctrine is a similarity in pronunciation; thus, the trial court erred in refusing to do so here. We cannot agree. There is no question the names Eliot, Elliot and Elliott are idem sonans. But we refuse to extend the doctrine's application in the manner urged.

In virtually all of the cases cited by Orr, the doctrine was applied solely to establish sameness of identity. (See, e.g., Kriste v. International Sav. etc. Bk. (1911) 17 Cal.App. 301 [119 P. 666], Galliano v. Kilfoy (1892) 94 Cal. 86 [29 P. 416], Hall v. Rice (1884) 64 Cal. 443 [1 P. 891, 2 P. 889].)Furthermore, and contrary to Orr's assertion, the rule does not have "widespread application" in the area of real property law. Simply stated, the doctrine of idem sonans remains viable for purposes of identification. But it has not, to our knowledge, been applied in this state to give constructive notice to good faith purchasers for value.

Orr's reliance on Flora v. Hankins (1928) 204 Cal. 351 [268 P. 331], a case involving an action to foreclose a mechanic's lien, is misplaced. In that [*670] case, the lien contained the name "Robert Hankins," while in the builder's contract underlying the lien, the individual's name appeared as "Hankines." The court rejected the defendant's contention the claimed lien did not comply with the requirements of former section 1187 of the Code of Civil Procedure, stating "[it] requires no citation of authority . . . to uphold the view that the rule of idem sonans applies to such a case." (Id., at p. 353.) But in that case, the lien itself contained the correct spelling; here, neither the judgment nor the abstract was accurate. More importantly, the issue there was whether the spelling error was an immaterial variance constituting compliance with the identification requirements of former section 1187.

Nor are we impressed with the reasoning behind the decision in Green v. Meyers (1903) 98 Mo.App. 438 [72

S.W. 128], a case Orr urges us to follow. In Green, a purchaser of property from an individual named Eleanor G. Sibert was charged with notice of a judgment against Sibert appearing in the judgment abstract as entered against E. G. Seibert. The appellate court concluded: "The names Seibert and Sibert are not only idem sonans — they not only sound the same in utterance — but they are, practically, the same name. Therefore, no matter which way it may be spelled by the party . . ., or by the recording officer, it is notice. It is common knowledge that proper names are spelled in a variety of ways, and everybody is presumed to have such knowledge. Thus, 'Reed,' 'Reid,' and 'Read,' are different ways of spelling one name. Manifestly, the record of a judgment against 'Reed' is notice to a subsequent purchaser from the same man signing the deed as 'Reid.' 'Persons searching the judgment docket for liens ought to know the different forms in which the same name may be spelled, and to make their searches accordingly, unless, indeed, the spelling is so entirely unusual that a person cannot be expected to think of it.' [Citation.]" (Id., at p. 129.)

The Green court recognized "[some] confusion has arisen in the authorities as to whether the rule as to idem sonans applies to records. It is said that the law of notice by record is addressed to the eye and not the ear, and that therefore the rule cannot apply to records. It is true that record notice is principally a matter of sight and not sound. Yet it is, above all, a matter for the consideration of the mind, and if the record of a name spelled in one way should directly suggest to the ordinary mind that it is also commonly spelled another way, the searcher should be charged with whatever the record showed in some other spelling under the same capital letter. It is not necessary to decide here whether this would be carried out to the extent of holding that the searcher for information in the record should look under some other capital for another mode of finding the same name, as, for instance, 'Kane' and 'Cain,' 'Phelps' and 'Felps,' etc. But that the rule of [*671] idem sonans has been applied to records has been too often accepted by the

supreme court of this state for us to question it. [Citations.]" (Ibid.)

Respondents make no effort to distinguish Green. They simply caution us not to be swayed by cases from other jurisdictions, in light of our high court's pronouncement in Henderson v. De Turk (1912) 164 Cal. 296 [128 P. 747].

In Henderson, the court refused to apply the doctrine to a tax deed which was void for erroneously reciting the name of the individual assessed as "E. W. Davies" instead of "E. W. Davis." The court adhered to the ruling in Emeric v. Alvarado, supra, 90 Cal. 444, 465 where "the assessment was to 'Castero,' while the owner's name was 'Castro.' The court said: 'It is not a case to which the rule of idem sonans applies. Tax proceedings are in invitum, and, to be valid, must closely follow the statute, and idem sonans applies to cases of pleas of misnomer and issues of identity, where the question is whether the change of letters alters the sound — not to assessments and other cases of description, where the written name is material.' . . . While there is a diversity of opinion in other jurisdictions on this point, we think this ruling [Emeric v. Alvarado] should be followed in this state." (Henderson v. De Turk, supra, 164 Cal. at pp. 298-299, italics added.)

In our view, the case at bar presents a situation where the written name is material. We therefore decline to follow Green's holding which, in essence, dispenses with the formalities of record notice. Moreover, the Green opinion entirely ignores the added burden placed on the searcher who is charged with knowledge of the alternative spellings.

In refusing to apply the doctrine here, the trial judge found that requiring a title searcher to comb the records for other spellings of the same name would place an undue burden on the transfer of property. The court observed "if you put the burden on those people in addition to what comes up when the name is properly spelled, to track down and satisfy themselves [*672] about whatever comes up when the name is improperly spelled in all different ways that it

might be improperly spelled, it leads to, I think, an unjustifiable burden." We agree.

At oral argument, Orr's attorney displayed a local telephone directory which he brought to illustrate his position the practice of searching for alternative spellings is commonplace today. Indeed, the following notations appear in the November 1987 edition of the Pacific Bell White Pages for Orange County Central & North: (1) directly above the listings for "Eliot," are the words "See Also-Elliot-Elliott," (2) preceding the listings for "Elliot," appear the words "See Also-Eliot-Elliott," and (3) before the name "Elliott," the reader is instructed to "See Also-Eliot-Elliot."

Indeed, not every name disclosed by a search corresponds to the individual who is subject to the lien. Thus, if a search uncovered alternative spellings of the same name, the searcher would be required to locate every lien against every individual with a name similar to the one being searched and determine whether that lien impacted the transaction under consideration.

We reject Orr's contention "modern technology has provided a solution to the burden at relative inexpense to the title industry." He advocates use of a system known as Soundex whereby each last name is reduced to a code consisting of a letter and a three digit number. He argues use of that system here would have revealed all three spelling variations.

Testimony at trial disclosed the Soundex system is presently utilized by two title companies in the area, and that the doctrine of idem sonans "is one of the reasons why some companies use [that] system." But the same witness also told of a drawback to its use: According to Donald Henley, a developer of software and computer systems for the title insurance industry, "the problem with Soundex is that you may get a lot of extraneous names if it is computer generated. And the task of going through all these names and determining which name affects your search, you know, can be lengthy if it is a popular name in a large county."

We conclude the burden is properly on the judgment creditor to take appropriate action to ensure the judgment lien will be satisfied. The procedure is simple enough. In fact, "'[the] judgment lien is one of the simplest and most effective means by which a judgment creditor may seek to secure payment of the judgment and establish a priority over other judgment creditors.'" (8 Witkin, Cal. Procedure (3d ed. 1986) Enforcement of Judgment, § 62, p. 77, quoting from 16 Cal. Law Revision Com. Rep., p. 1041.) Indeed, to rule otherwise is to grant the judgment creditor a "free ride."

As respondents succinctly state, Orr asks us "to change the law of constructive notice to accommodate [his] error in such a way that future title searches will be required to be performed only by trained individuals with elaborate and expensive equipment at their disposal or else to go uninsured in a world where prudence demands title insurance. Neither result is satisfactory, especially considering that the simple alternative is to require [*673] [judgment creditors] simply to spell the names of their judgment debtors properly."

Judgment affirmed. Respondents to receive costs.

Frederick S. MESSERSMITH, Plaintiff and Appellant, -vs- Herbert B. SMITH, Jr., and E. B. Seale, Defendants and Respondents. Supreme Court of North Dakota 60 N.W.2d 276, August 20, 1953, Filed

OPINION BY: James Morris

[*277] Comes now, E. B. Seale, one of the above named Defendants and Respondents in the above entitled action and respectfully requests the Supreme Court of the State of North Dakota to grant a rehearing to said Defendant and Respondent.

It is respectfully submitted that this Honorable Court has overlooked a principle of controlling law which requires a reversal of its decision. In the case at bar, there is no question whatever that E. B. Seale paid a valuable consideration for the mineral conveyance from Defendant

Herbert B. Smith, Jr., and that E. B. Seale was wholly unaware of any infirmity either in the title of the then record owner, Caroline Messersmith, or of any defect in the acknowledgment of the execution of her conveyance to Smith. That Seale was an innocent purchaser in fact seems to have been clearly established. Likewise, Frederick S. Messersmith, the Plaintiff and Appellant, was in fact an innocent purchaser of the interest owned by Caroline Messersmith. Thus, we have a situation which concerns two innocent purchasers, both of whom were ignorant of any misconduct on the part of either the record owner or the Grantee of the record owner. It is also undisputed that Frederick S. Messersmith neglected/to record his deed for a period of five years from the delivery of his deed and for more than six weeks after the instruments in the chain of conveyance to Seale had been placed of record, although it was unquestionably within the power of Messersmith to have recorded his conveyance. It is respectfully submitted and most strenuously urged to the Court that the following controlling principle of law has been overlooked, viz:

"When one of two innocent persons must suffer by the wrongful act of a third person, he must suffer who left it in the power of such third person to do the wrong."

This principle of law was aptly applied in the case of Henniges v Paschke (1900) 9 N.D. 489, 84 N.W. 350. In that case this Court, after holding that an assignment of a real estate mortgage was a "conveyance" as used in the recording statutes, held that the purchaser of the land who relied on the record title prevailed over the holder of an unrecorded assignment of mortgage notwithstanding the fact that the purchaser was shown a satisfaction of mortgage executed by one who had sold it and had no further interest in it.

In Hennigs v Paschke, supra, this significant quotation appears:

"Under this state of facts, which party to this litigation must bear the loss,—plaintiffs, who are the innocent purchasers of the notes secured by the mortgage, or defendant

Paschke, who in good faith, and without actual knowledge of plaintiffs' rights, purchased the mortgaged premises? Both upon principles of equity and under the statutes of this state, plaintiffs must bear the loss, and this for the reason that by not taking and recording an assignment of the mortgage they made the commission of the fraud possible. This has been held in states where the recording of assignments was not compulsory. See Bank v. Anderson, 14 Iowa 544, in which the Court, speaking through Wright, J., said 'A secret or clandestine assignment, whether by parol or upon the instrument itself, or by the transfer of the debt, and however honest the purpose, is liable to untold abuse. They ought, therefore, to be made a matter of public record. The spirit, if not the very letter, of our recording law requires it. Such a requirement can work no possible hardship, while the contrary rule can only be attended by evil, and that continually. Parties should not be permitted to leave their rights and interests in liens and real estate in such a condition as to injure those who are deceived by appearances without a record to guide them.' This is upon the general principle 'that when one of two innocent persons must suffer by the wrongful act of a third person, he must suffer who left it in the power of such third person to do the wrong.' McClure v. Burris, 16 Iowa 591; Livermore v. Maxwell (Iowa) 87 Iowa 705, 55 N.W. 37; Williams v. Jackson, 107 U.S. 478, 2 S. Ct. 814, 27 L. Ed. 529. And it is generally held that statutes which have for their purpose the better security and repose of titles may postpone one who voluntarily neglects to avail himself of the registry laws, which enables him to give notice to all the world of his claims to the claims of a subsequent purchaser who acted on the faith of the public record."

True, in the case at bar, the conveyance by Caroline Messersmith to Smith was not entitled to record because its execution was not acknowledged. However, the defect in the acknowledgment (consisting in the failure of the Grantor to acknowledge the execution of the Deed) does

not appear on the face of the instrument nor in the acknowledgment certified by the notary public.

It would not be denied by the Court that had the Grantor, Caroline Messersmith, properly acknowledged the execution of the mineral deed, that the conveyance to Seale would have been upheld as against Frederick S. Messersmith. In either situation the record in the office of the Register of Deeds would appear to be the same. With a proper acknowledgment Frederick S. Messersmith's actual title would be held subordinate to the apparent title notwithstanding the fact that Caroline Messersmith, at the time of her conveyance to Smith, had nothing to convey. Should the rule be any different in either situation where the Grantee of the unrecorded deed leaves it within the power of his grantor to effectively disseise him by proper conveyance?

The case at bar should be distinguished from a forgery of the Grantor's signature as in such case the ostensible grantor is guilty of no wrongful and is guilty of no negligence and no matter how perfect the pretended conveyance, the lawful owners can not be disseised. This conclusion is reached upon sound and compelling reasons of social policy. Likewise, in the case of the conveyance of a homestead, by statute the acknowledgment of the execution of the Deed is as important to the validity of the conveyance, even between the parties, as the signatures of the homestead claimants. In the case at bar, we are not concerned with the conveyance of a homestead nor are we concerned with a forgery of the signature of the record owner. Furthermore, no forces of public policy are present in this case which demand protection for the Plaintiff for the reason, as already pointed out, that in a situation where the Deed by Caroline Messersmith is properly executed, the Plaintiff would clearly lose his title upon the prior recording of her second conveyance. If public policy were involved, the Plaintiff should prevail in either instance.

On the contrary, it is respectfully submitted that strong grounds of social policy exists for a rule which will protect

those who rely upon the record so as to uphold conveyances made by the record owner notwithstanding the prior conveyance to one who withholds the same from record. It is respectfully submitted that any other rule will create uncertainty and stifle the sale of property to say nothing of the opportunities for fraud which the holding in this case will permit.

Clearly, one should be able to rely upon the record and purchase a mineral interest without the danger of losing his title to such mineral interest by one who later records a conveyance from a common grantor who neglected to properly acknowledge the execution of the first recorded conveyance where such defect does not appear on the face of the instrument. Surely, a purchaser should be granted every possible security in reliance on the record title in the absence of actual knowledge and notice afforded by inquiry from those in possession, neither of which situation is present in the case at bar.

It is respectfully submitted that this Honorable Court has failed to perceive the significance and consequences of its holding which in effect nullifies the commonly accepted right to rely on the record title in making a purchase of an interest in real property in situations of this kind.

See I C. J. Acknowledgments, Sec. 55, page 773, where the majority rule is stated as follows:

"According to the weight of authority, where an instrument bearing a certificate of acknowledgment or proof which is regular on its face is presented to the recording officer, it becomes his duty to record it, and the record thereof will operate as constructive notice, notwithstanding there be a hidden or latent defect in the acknowledgment; but there are authorities in which a contrary view has been asserted."

In Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 181, 92 P. 624, 93 P. 661, cited in 1 C. J. Acknowledgments, Sec. 55, the Court said:

"The statement occasionally to be found in judicial decisions to the effect that an acknowledgment taken before an officer disqualified on account of interest is void for all

purposes is not, we think, entirely accurate if intended to apply in all cases. Its correctness may be conceded in respect to instruments which are absolutely void without a proper acknowledgment, and also instruments which disclose the defect upon their face or the face of the certificate of acknowledgment. Where, however, the infirmity is not apparent upon the face of the deed or instrument or certificate of acknowledgment, but the acknowledgment appears to be fair and regular and to have been properly taken, and the instrument is one which would not be invalidated as between the parties to it by a defective acknowledgment, he recording of the instrument in the proper office will operate as constructive notice thereof, notwithstanding the latent defect. This rule is sustain by abundant authority and is founded upon public policy to carry out the purpose of the recording acts and preserve the reliability of the public records of transfers and conveyances. It is readily to be seen that a contrary rule would render unsafe any reliance upon the record of deeds or instruments requiring acknowledgment to entitle them to be recorded. It is clearly not incumbent upon the recording officer to enter upon an extrinsic investigation before receiving for record an instrument regular on its face to discover whether the acknowledging officer was in fact disqualified because of interest. So far as the defect now being considered is concerned, if upon the face thereof the instrument is recordable and it is in fact recorded, the record should be held constructive notice to subsequent purchasers and others chargeable with record notice."

The case of Case Co. v. Sax Motor Co. (1934) 64 N.D. 757, 256 N.W. 219, cited by the Court, is easily distinguished upon two grounds, first, that it concerned a chattel mortgage and secondly, the alleged defect appeared on the face of the instrument.

The case of First National Bank v. Casselton Realty & Investment Co. (1919) 44 N.D. 353, 175 N.W. 720, may likewise be distinguished upon the ground that the defect in the corporate acknowledgment appeared on the face of the

instrument itself. Goss v. Herman (1910) 20 N.D. 295, 127 N.W. 78, may likewise be distinguished upon the ground that the officer before whom the instrument purported to be acknowledged was not authorized by law to take acknowledgments and hence the defect appeared on the face of the instrument and obviously did not constitute constructive notice.

The case of Severtson v. Peoples (1914) 28 N.D. 372, 148 N.W. 1054 is easily distinguished from the case at bar in that the lands conveyed were the homestead of the grantors the conveyance of which by statute requires an acknowledgment valid in fact.

In conclusion, it is respectfully submitted that this Court should hesitate before placing the State of North Dakota within the minority group of states which adhere to the strict and outmoded rule which prevents an innocent purchaser from relying on the chain of recorded titles unaware of any latent defects and that on the contrary this Court should follow the sound principle reiterated in our statute (NDRC 1943 Sec. 31-1105, No. 34):

"When one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer".

Thus Frederick S. Messersmith, who failed to record his conveyance, should suffer the loss of his title to the minerals in controversy, in favor of E. B. Seale, the innocent purchaser who relied on the record title.

Dated at Williston, North Dakota, this 19th day of August, 1953.

Morris, Ch. J. This is a statutory action to quiet title to three sections of land in Golden Valley County. The records in the office of the register of deeds of that county disclose the following pertinent facts concerning the title: For some time prior to May 7, 1946, the record title owners of this property were Caroline Messersmith and Frederick Messersmith. On that date, Caroline Messersmith executed and delivered to Frederick Messersmith a quit claim deed to the property which was not recorded until July 9, 1951.

Between the date of that deed and the time of its recording the following occurred: On April 23, 1951, Caroline Messersmith, as lessor, executed a lease to Herbert B. Smith, Jr., lessee, which was recorded May 14, 1951. On May 7, 1951, Caroline Messersmith, a single woman, conveyed to Herbert B. Smith, Jr., by mineral deed containing a warranty of title, an undivided one-half interest in and to all oil, gas and other minerals in and under or that may be produced upon the land involved in this case. This deed was recorded May 26, 1951. On May 9, 1951, Herbert B. Smith, Jr., executed a mineral deed conveying to E. B. Seale an undivided one-half interest in all of the oil, gas and other minerals in and under or that may be produced upon the land. This deed was also recorded in the office of the Register of Deeds of Golden Valley County, on May 26, 1951. Seale answered plaintiff's complaint by setting up his deed and claiming a one-half interest in the minerals as a purchaser without notice, actual or constructive, of plaintiff's claim. To this answer [*278] the plaintiff replied by way of a general denial and further alleged that the mineral deed by which Seale claims title is void; that it was never acknowledged, not entitled to record and was obtained by fraud, deceit and misrepresentation. The defendant Herbert B. Smith, Jr., defaulted.

For some time prior to the transactions herein noted, Caroline Messersmith and her nephew, Frederick S. Messersmith, were each the owner of an undivided one-half interest in this land, having acquired it by inheritance. The land was unimproved except for being fenced. It was never occupied as a homestead. Section 1 was leased to one tenant and Sections 3 and 11 to another. They used the land for grazing. One party had been a tenant for a number of years, paying $ 150.00 a year. The amount paid by the other tenant is not disclosed. The plaintiff lived in Chicago. Caroline Messersmith lived alone in the City of Dickinson where she had resided for many years. She looked after the renting of the land, both before and after she conveyed her

interest therein to her nephew. She never told her tenants about the conveyance.

On April 23, 1951, the defendant Smith, accompanied by one King and his prospective wife, went to the Messersmith home and negotiated an oil and gas lease with Miss Messersmith covering the three sections of land involved herein. According to Miss Messersmith, all that was discussed that day concerned royalties. According to the testimony of Mr. Smith and Mr. King, the matter of the mineral deed was discussed.

Two or three days later, Smith and King returned. Again the testimony varies as to the subject of conversation. Miss Messersmith said it was about royalties. Smith and King say it was about a mineral deed for the purchase of her mineral rights. No agreement was reached during this conversation. On May 7, 1951, Smith returned alone and again talked with Miss Messersmith. As a result of this visit, Miss Messersmith executed a mineral deed for an undivided one-half interest in the oil, gas and minerals under the three sections of land. Smith says this deed was acknowledged before a notary public at her house. She says no notary public ever appeared there. She also says that Smith never told her she was signing a mineral deed and that she understood she was signing a "royalty transfer." The consideration paid for this deed was $ 1400.00, which is still retained by Miss Messersmith. After leaving the house Smith discovered a slight error in the deed. The term "his heirs" was used for the term "her heirs." He returned to the home of Miss Messersmith the same day, explained the error to her, tore up the first deed, and prepared another in the same form, except that the error was corrected. According to Smith's testimony, he took the second deed to the same notary public to whom Miss Messersmith had acknowledged the execution of the first deed and the notary called Miss Messersmith for her acknowledgment over the telephone and then placed on the deed the usual notarial acknowledgment, including the notary's signature and seal. The notary, who took many acknowledgments about that

time, has no independent recollection of either of these acknowledgments. It is the second deed that was recorded on May 26, 1951, and upon which the defendant, E. B. Seale, relied when he purchased from the defendant, Herbert B. Smith, Jr., the undivided one-half interest in the minerals under the land in question.

The trial court reached the conclusion that the transaction resulting in the mineral deeds to Smith was not fraudulent and he so found. While Miss Messersmith was an elderly woman, 77 years of age, she appears to have been in full possession of her faculties and a person of considerable business experience. She owned a number of other farms upon which she had executed oil and gas leases previous to the time she made the lease of this land to Smith. Although Miss Messersmith is very positive that she did not know she signed a mineral deed, she is very vague as to what she thought she was signing. She knew she had already signed an oil and gas lease to all of the land in favor of [*279] Smith, so she does not contend that she thought she was signing another lease. On cross examination she was asked:

Q Well, will you tell the Court what you thought you were signing?

A Thought that I was selling a certain percentage of it on royalty. That's what I thought."

A day or two after signing the deed she wrote to the plaintiff, her nephew, and he wrote a letter back by air mall. She did not send him a copy of the mineral deed. In fact, there is nothing in the record that indicates a copy was ever made. She testifies that Smith tore up the first deed in her presence and put the pieces in his pocket. He took the second deed with him. Without consultation with anyone, except the correspondence with her nephew, she wrote the defendant Smith on May 26, 1951, as follows:

"My dear Mr. Smith.

"Am sorry to say that, I didn't have the right to sell that mineral right to you.

"I should have consulted my nephew in any deals like this. He is 1/2 owner in this land and should have been

consulted. He is very much put out about it and when I stop to give it a serious thought I realize that he should have had a voice in this deal and of course signed the deed with me. I would like to buy it back. The money $ 1400.00 is here and what ever expense connected with it, shall be sent you.

"Don't think that there are any other deals on. There are not.

"I am anxious to get this fixed right, so there will be peace in my home. My nephew (40 years old, feels that he ought to have some voice in this business, and now realizing this I take all blame. As far as the leasing is concerned that is O.K. with him. But when it comes to giving an oil gas & mineral deed without his consent that is different. You will understand.

"Let me hear from you immediately. I realize that he should have been consulted and that he should have signed with me, if he had favored it."

This letter indicates that she fully understood that she signed a mineral deed. She complains of no fraud in its procurement.

The trial court found "that such deeds, or either of them, were not procured through fraud or false representation." The evidence does not warrant this court in disturbing that finding.

The determination that the mineral deed from Caroline Messersmith to Herbert B. Smith, Jr., was not fraudulently obtained by the grantee does not mean that the defendant, who in turn received a deed from Smith, is entitled to prevail as against the plaintiff in this action. At the time Miss Messersmith executed the mineral deed she owned no interest in the land, having previously conveyed her interest therein to the plaintiff. Smith in turn had no actual interest to convey to the defendant Seale. If Seale can assert title to any interest in the property in question, he must do so because the plaintiff's deed was not recorded until July 9, 1951, while the deed from Caroline Messersmith to Smith and the deed from Smith to the defendant Seale were recorded May 26, 1951, thus giving him a record title prior

in time to that of the plaintiff. Section 47-1907 NDRC 1943 contains this provision:

"An instrument entitled to be recorded must be recorded by the register of deeds of the county in which the real property affected thereby is situated."

Section 47-1908 NDRC 1943 provides:

"An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the register's office with the proper officer for record."

The defendant Seale asserts that priority of record gives him a title superior to that of the plaintiff by virtue of the following statutory provision, Section 47-1941 NDRC 1943:

"Every conveyance of real estate not recorded as provided in section [*280] 47-1907 shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any part or portion thereof, whose conveyance, whether in the form of a warranty deed, or deed of bargain and sale, or deed of quitclaim and release, of the form in common use or otherwise, first is recorded, or as against an attachment levied thereon or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance. The fact that such first recorded conveyance of such subsequent purchaser for a valuable consideration is in the form, or contains the terms, of a deed of quitclaim and release aforesaid, shall not affect the question of good faith of the subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof."

Section 47-1945 NDRC 1943, in part, provides:

"The deposit and recording of an instrument proved and certified according to the provisions of this chapter are constructive notice of the execution of such instrument to all purchasers and encumbrancers subsequent to the recording."

As against the seeming priority of record on the part of Seale's title, the plaintiff contends that the deed from Caroline Messersmith to Smith was never acknowledged and, not having been acknowledged, was not entitled to be recorded, and hence, can confer no priority of record upon the grantee or subsequent purchasers from him.

It may be stated as a general rule that the recording of an instrument affecting the title to real estate which does not meet the statutory requirements of the recording laws affords no constructive notice. J. I. Case Co. v. Sax Motor Co., 64 N.D. 757, 256 N.W. 219; First National Bank v. Casselton Realty & Investment Co., 44 N.D. 353, 175 N.W. 720, 29 A. L. R. 911. The applicability of the rule is easily determined where the defect appears on the face of the instrument, but difficulty frequently arises where the defect is latent. Perhaps the most common instance of this nature arises when an instrument is placed of record bearing a certificate of acknowledgment sufficient on its face despite the fact that the statutory procedure for acknowledgment has not been followed. See Annotations 19 A. L. R. 1074; 72 A. L. R. 1039.

The certificate of acknowledgment on the mineral deed to Smith, while it is presumed to state the truth, is not conclusive as to the fact of actual acknowledgment by the grantor. Trowbridge v. Bisson, 153 Neb. 389, 44 N.W.2d 810; 1 C. J. S., Acknowledgments, Section 124; 1 Am. Jur., Acknowledgments, Section 142; 45 Am. Jur., Records and Recording Laws, Section 108; Thompson on Real Property, Permanent Edition, Section 4091; 1 Am. Jur., Acknowledgments, Section 148; Annotations 41 L. R. A. (ns) 1173, 54 Am. St. Rep. 153.

In Severtson v. Peoples, 28 N.D. 372, 148 N.W. 1054, this court, in the syllabus, said:

"4. A certificate of acknowledgment, regular on its face, is presumed to state the truth, and proof to overthrow such certificate must be very strong and convincing, and the burden of overthrowing the same is upon the party attacking the truth of such certificate.

"5. To constitute an acknowledgment the grantor must appear before the officer for the purpose of acknowledging the instrument, and such grantor must, in some manner with a view to giving it authenticity, make an admission to the officer of the fact that he had executed such instrument.
"6. Where, in fact, the grantor has never appeared before the officer and acknowledged the execution of the instrument, [*281] evidence showing such fact is admissible even as against an innocent purchaser for value and without notice."

It avails the purchaser nothing to point out that a deed is valid between the parties though not acknowledged by the grantor—see Bumann v. Burleigh County, 73 N.D. 655, 18 N.W.2d 10—for Caroline Messersmith, having previously conveyed to the plaintiff, had no title. The condition of the title is such that Seale must rely wholly upon his position as an innocent purchaser under the recording act.

Before a deed to real property can be recorded its execution must be established in one of the ways prescribed by Section 47-1903 NDRC 1943. No attempt was made to prove the execution of this deed other than "by acknowledgment by the person executing the same." It is the fact of acknowledgment that the statute requires as a condition precedent to recording. Subsequent sections of Chapter 47-19 NDRC 1943 prescribe before whom and how proof of the act of acknowledgment may be made. A general form of certificate of acknowledgment is set forth in Section 47-1927. The certificate on the mineral deed follows this form and states:

"On this 7th day of May, in the year 1951, before me personally appeared Caroline Messersmith, known to me to be the person described in and who executed the within and foregoing instrument, and acknowledged to me that she executed the same."

But Caroline Messersmith did not appear before the notary and acknowledge that she executed the deed that was recorded. In the absence of the fact of acknowledgment the deed was not entitled to be recorded, regardless of the

recital in the certificate. The deed not being entitled to be recorded, the record thereof did not constitute notice of its execution (Section 47-1945) or contents (Section 47-1919). The record appearing in the office of the register of deeds not being notice of the execution or contents of the mineral deed, the purchaser from the grantee therein did not become a "subsequent purchaser in good faith, and for a valuable consideration" within the meaning of Section 47-1941 NDRC 1943.

In this case we have the unusual situation of having two deeds covering the same property from the same grantor, who had no title, to the same grantee. The only difference between the two was a minor defect in the first deed, for which it was destroyed. The evidence is conflicting as to whether or not the first deed was acknowledged. The second deed clearly was not. It is argued that the transaction should be considered as a whole, with the implication that if the first deed was actually acknowledged, the failure to secure an acknowledgment of the second deed would not be fatal to the right to have it recorded and its efficacy as constructive notice. We must again point out that the right which the defendant Seale attempts to assert is dependent exclusively upon compliance with the recording statutes. His claim of title is dependent upon the instrument that was recorded and not the instrument that was destroyed. Assuming that Smith is right in his assertion that the first deed was acknowledged before a notary public, we cannot borrow that unrecorded acknowledgment from the destroyed deed and, in effect, attach it to the unacknowledged deed for purposes of recording and the constructive notice that would ensue.

In Dixon v. Kaufman, 79 N.D. 633, 58 N.W.2d 797, we sustained the title to non-homestead lands of purchasers for value and without notice whose title rested upon a deed bearing a certificate of acknowledgment regular on its face but which in fact had not been acknowledged by the grantors. In that case the grantors were the actual owners of the property at the time they signed the deed and as to non-

homestead property the delivery of the deed without acknowledgment was sufficient to pass title which the grantees then had. This title was then purchased by defendants who paid the value therefor in good faith and without notice of any claimed defects in the execution of the deed. The deed executed by the plaintiffs which they sought to attack conveyed [*282] a title which, at the most, was voidable. In that case plaintiffs sought relief from the consequences of their own acts which would result in loss to innocent parties. The situation here is entirely different. The plaintiff seeks relief from the consequences of the acts of a third party, Caroline Messersmith, who, after deeding to the plaintiff her entire interest in the property, executed the mineral deed to Smith. This deed contained a warranty but it actually conveyed no title. As a conveyance it was good between the parties only in theory, for the grantor had nothing to convey. For the loss which resulted from her acts, the plaintiff in this case is not to blame. His failure to record his deed will not defeat the title which he holds unless there appears against it a record title consisting of instruments executed and recorded in the manner prescribed by our recording statutes. The title asserted by the defendant Seale does not meet these requirements and the trial court erred in rendering judgment in his favor.
The judgment appealed from is reversed.

WALDORFF INSURANCE AND BONDING, Inc., Appellant, v. EGLIN NATIONAL BANK, Appellee. Court of Appeal of Florida, First District 453 So. 2d 1383, July 27, 1984
OPINION BY: SHIVERS
[*1384] Waldorff Insurance and Bonding, Inc. (Waldorff) appeals the supplemental final judgment of foreclosure entered against it in favor of Eglin National Bank (Bank) on a condominium unit. Appellant argues that the trial court erred in not finding its interest in the condominium unit superior to the liens of two mortgages held by the Bank. We agree and reverse.

Choctaw Partnership (Choctaw) developed certain properties in Okaloosa County by constructing condominiums. On June 8, 1972, Choctaw executed a promissory note and mortgage on these properties in the amount of $850,000. This indebtedness was later increased to $1,100,000. This note and mortgage was eventually assigned to appellee Bank on January 17, 1975. At that time, the principal balance remaining on this note and mortgage was $41,562.61.

Waldorff entered into a written purchase agreement with Choctaw for condominium unit 111 on April 4, 1973. Choctaw was paid $1,000 at that time as a deposit on Unit 111. The total purchase price of Unit 111 was to be $23,550. In April or May 1973, Waldorff began occupancy of the unit. Furniture worth $5,000 was purchased by Waldorff and placed in the unit. Waldorff continually occupied the unit for about 1 1/2 years thereafter, paying the monthly maintenance fee, the fee for maid service, the fee for garbage pick-up, and paying for repairs to the unit. At the time of the hearing in this case on February 21, 1983, the furniture was still in the unit, the utility bills and monthly maintenance fees were still paid by Waldorff, and Waldorff had the keys to the unit and controlled it.

On October 10, 1973, Choctaw executed a note and mortgage for the principal sum of $600,000 in favor of the Bank. Among the properties included in this mortgage was the condominium unit involved in the instant case, Unit 111.

On June 28, 1974, Choctaw executed yet another note and mortgage, this one in favor of the Bank for the principal sum of $95,000. This mortgage secured a number of units, one of which was Unit 111.

Choctaw was apparently a client of Waldorff, and in 1974, Choctaw owed Waldorff over $35,000 for insurance premiums. Choctaw agreed to consider the purchase [*1385] price of Unit 111 paid in full in return for cancellation of the debt owed by Choctaw to Waldorff. Waldorff "wrote off" the debt, and Choctaw executed a

quitclaim deed to Unit 111 in favor of Waldorff. The deed was recorded in March 1975.

In 1976, the Bank brought a foreclosure action against Choctaw, Waldorff and others. A final judgment of foreclosure was entered in September 1976, but that judgment did not foreclose Waldorff's interest in Unit 111. Instead, the 1976 final judgment explicitly retained jurisdiction to determine the ownership of Unit 111. A hearing was held on February 21, 1983. The issue at this hearing was whether Waldorff's occupancy, together with the purchase agreement, was sufficient notice so as to make Waldorff's interest in Unit 111 superior to that of the Bank. At this hearing, evidence was taken concerning the agreements between Choctaw and Waldorff and Waldorff's occupancy of Unit 111. There was evidence that condominium units other than 111 were also occupied and that many of these units were occupied by persons who had no legal interest in the units, e.g., persons invited by Choctaw to occupy the units for a time as part of Choctaw's marketing campaign.

The trial court entered a supplemental final judgment of foreclosure which found that Waldorff's occupancy of Unit 111 was "equivocal" because Choctaw allowed at least 8 other condominium units to be furnished and used for occupancy by various persons. The trial court also found that Waldorff did not pay the consideration promised for Unit 111 because the debt owed by Choctaw to Waldorff was used as a bad debt write-off for federal income tax purposes rather than being credited to Choctaw. The trial court found that "even if defendant could establish some right to Unit 111 by occupancy, defendant failed to pay the agreed consideration for the quitclaim deed and, therefore, the conveyance is void." Based on these findings, the trial court held the Bank's mortgage liens superior to Waldorff's interest.

A contract to convey legal title to real property on payment of the purchase price creates an equitable interest in the purchaser. Lafferty v. Detwiler, 155 Fla. 95, 20 So.2d 338,

343 (1944); Felt v. Morse, 80 Fla. 154, 85 So. 656 (1920). Beneficial ownership passes to the purchaser while the seller retains mere naked legal title. Arko Enterprises, Inc. v. Wood, 185 So.2d 734 (Fla. 1st DCA 1966); Tingle v. Hornsby, 111 So.2d 274 (Fla. 1st DCA 1959). Subsequent successors to the legal title take such title burdened with the equitable interests of which they have either actual or constructive notice. Hoyt v. Evans, 91 Fla. 1053, 109 So. 311 (1926). In the instant case, it appears clear that the April 4, 1973, Agreement to Purchase entered into between Choctaw and Waldorff vested equitable title in Waldorff. Therefore, the interests acquired by the Bank pursuant to the October 1973 and June 1974 mortgages would be subordinate to Waldorff's equitable interest if the Bank had either actual or constructive notice of that interest. Scott v. Simmons, 151 Fla. 628, 10 So.2d 122 (1942); Marion Mortgage Co. v. Grennan, 106 Fla. 913, 143 So. 761 (1932); Lee County Bank v. Metropolitan Life Insurance Co., 126 So.2d 589 (Fla. 2d DCA 1961).

[*1386] Id. at 46. See generally 38 Fla. Jur. 2d Notice and Notices § 7 (1982) and cases cited therein. In the instant case, Waldorff was in open, visible and exclusive possession of Unit 111 at the time of the making of the October 1973 and June 1974 mortgages.

The trial court found, however, that Waldorff's possession of Unit 111 was "equivocal" because other units in the condominium project were occupied by persons who had no interest in the units. We do not agree with this analysis. Although many of the condominium units were held by a common grantor, Choctaw, the units were separate parcels intended to be alienated individually. The mortgage executed on June 28, 1974, which secures both the $95,000 note and the $600,000 note of October 10, 1973, described the property mortgaged in terms of individual units, specifically including Unit 111. The status of other units within the condominium project, therefore, is irrelevant to the question of the possession of Unit 111. The issue in the instant case concerned only the rights of the parties

involved in Unit 111, not the condominium project as a whole or any other individual units.

Appellee argues, however, that it would have been difficult to ascertain whether any person physically occupying any of the units in the project had a claim of ownership interest in the unit being occupied. Although we agree that it would be more inconvenient for a prospective lender to make several inquiries rather than a single one, we do not find this argument persuasive. We find the ancient, but oft-cited, case of Phelan v. Brady, 119 N.Y. 587, 23 N.E. 1109 (N.Y. 1890), to be instructive in this matter. On May 1, 1886, Mrs. Brady took possession of a tenement building containing 48 apartments occupied by 20 different occupants as tenants from month to month. Her possession was pursuant to a contract for sale secured for her by her attorney. Three of the apartments were occupied by Mrs. Brady and her husband, who kept a liquor store in part of the building. Mrs. Brady began collecting rents immediately upon taking possession of the premises. Mrs. Brady's deed, however, was not recorded until August 26, 1886, subsequent to the recordation of Phelan's mortgage which had been executed by the record owner of the property on July 23, 1886. The court stated:

At the time of the execution and delivery of the mortgage to the plaintiff, the defendant Mrs. Brady was in the actual possession of the premises under a perfectly valid, but unrecorded, deed. Her title must therefore prevail as against the plaintiff. It matters not, so far as Mrs. Brady is concerned, that the plaintiff in good faith advanced his money upon an apparently perfect record title of the defendant John E. Murphy. Nor is it of any consequence, so far as this question is concerned, whether the plaintiff was in fact ignorant of any right or claim of Mrs. Brady to the premises. It is enough that she was in possession under her deed and the contract of purchase, as that fact operated in law as notice to the plaintiff of all her rights. It may be true, as has been argued by plaintiff's counsel, that, when a party takes a conveyance of property situated as this was,

occupied by numerous tenants, it would be inconvenient and difficult for him to ascertain the rights or interests that are claimed by all or any of them. But this circumstance cannot change the rule. Actual possession of real estate is sufficient to a person proposing to take a mortgage on the property, and to all the world, of the existence of any right which the person in possession is able to establish. Gouverneur v. Lynch, 2 Paige, 300; Bank v. Flagg, 3 Barb. Ch. 318; Moyer v. Hinman, [17 Barb. 137] 13 N.Y. [180]; Tuttle v. Jackson, 6 Wend. 213; Trustees, v. Wheeler, 61 N.Y. 88, 98; Cavalli v. Allen, 57 N.Y. [508].

23 N.E. at 1110-1111. Moreover, cases citing Phelan v. Brady have stated that the possession involved there was not equivocal. Swanstrom v. Day, 46 Misc. 311, 93 N.Y.S. 192 (N.Y. Sup. Ct. 1905); Baker v. Thomas, 61 Hun 17, 15 N.Y.S. 359 (N.Y. Sup. Ct. 1891).

[*1387] We also agree with appellant that the trial court erred in finding that the conveyance of the property from Choctaw to Waldorff was void due to lack of consideration for the quitclaim deed. Although Waldorff may have erred in attempting to take a "bad debt" tax deduction after cancelling the debt Choctaw owed to Waldorff for insurance premiums, Choctaw was relieved from payment of that debt, and this constituted a valuable consideration flowing to Choctaw. Booth v. Bond, 56 Cal. App.2d 153, 132 P.2d 520 (Cal. Dist. Ct. App. 1942); see generally Dorman v. Publix-Saenger-Sparks Theatres, 135 Fla. 284, 184 So. 886 (1939); 17 C.J.S. Contracts §§ 74, 87 (1963).

The parties agree that the 1972 mortgage lien is superior to Waldorff's interest in Unit 111. Appellee, however, stated at oral argument that it did not disagree with the proposition that a proper application of the funds from the 1976 foreclosure sale of the rest of the condominium project should first satisfy the 1972 mortgage.Our decision renders moot appellant's other points on appeal. Accordingly, the supplemental final judgment of foreclosure is reversed and the cause remanded for entry of a judgment consistent with this opinion.

Reversed and remanded.

 Pauline A. GUILLETTE & others v. DALY DRY WALL, Inc. Supreme Judicial Court of Massachusetts 367 Mass. 355; 325 N.E.2d 572, April 8, 1975, Decided

OPINION BY: BRAUCHER

[*356] A recorded deed of a lot in a subdivision refers to a recorded plan, contains restrictions "imposed solely for the benefit of the other lots shown on said plan," and provides that "the same restrictions are hereby imposed on each of said lots now owned by the seller." A later deed of another lot from the same grantor refers to the same plan but not to the restrictions. The plan does not mention the restrictions, and the later grantee took without knowledge of them. We reject the later grantee's contention that it was not bound by the restrictions because they were not contained in a deed in its chain of title, and affirm a decree enforcing the restrictions.

The plaintiffs, owners of three lots in the subdivision, brought suit in the Superior Court to enjoin the defendant, owner of a lot in the same subdivision, from constructing a multifamily apartment building on its lot. The case was referred to a master, and his report was confirmed. A final decree was entered enjoining the defendant from "constructing any structures designed, intended, or suited for any purpose other than a dwelling for one family and which . . . [do] not conform to the restrictions contained in a deed from Wallace L. Gilmore to Pauline A. Guillette and Kenneth E. Guillette." The defendant appealed, and the case was transferred from [*357] the Appeals Court to this court under G. L. c. 211A, § 10 (A). The evidence is not reported.

We summarize the master's findings. Gilmore sold lots in a subdivision called Cedar Hills Section I in Easton to the plaintiffs, the defendant, and others. Two of the plaintiffs, the Walcotts, purchased a lot in August, 1967, by a deed referring to a plan dated in July, 1967. The plaintiff Guillette and her husband, now deceased, purchased a lot in

May, 1968, by a deed referring to a plan dated in March, 1968. The 1967 and 1968 plans are the same for all practical purposes; neither mentions restrictions. The plaintiffs Paraskivas purchased a lot in June, 1968, by a deed referring to the 1968 plan. Each of these deeds and five other deeds to lots in the subdivision either set out the restrictions or incorporated them by reference. Only the Guillette deed and one other contained a provision restricting lots retained by the seller. It was the intention of the grantor and the plaintiffs to maintain the subdivision as a residential subdivision to include only dwellings for one family.

The master further found that the defendant Daly Dry Wall, Inc. (Daly), purchased its lot from Gilmore in April, 1972, and that the deed to Daly contained no reference to any restrictions but did refer to the 1968 plan. Daly made no inquiry concerning restrictions and did not know of any development pattern. It had a title examination made. It learned of the restrictions in [*358] August, 1972. Subsequently it obtained a building permit for thirty-six apartment-type units.

In similar circumstances, where the common grantor has not bound his remaining land by writing, we have held that the statute of frauds prevents enforcement of restrictions against the grantor or a subsequent purchaser of a lot not expressly restricted. G. L. c. 183, § 3. Houghton v. Rizzo, 361 Mass. 635, 639-642 (1972), and cases cited. Gulf Oil Corp. v. Fall River Housing Authy. 364 Mass. 492, 500-501 (1974). Where, as here, however, the grantor binds his remaining land by writing, reciprocity of restriction between the grantor and grantee can be enforced. See Snow v. Van Dam, 291 Mass. 477, 482 (1935), and cases cited. In such cases a subsequent purchaser from the common grantor acquires title subject to the restrictions in the deed to the earlier purchaser. Beekman v. Schirmer, 239 Mass. 265, 270 (1921). See Am. Law of Property, § 9.31 (1952); Tiffany, Real Property, §§ 858, 861 (3d ed. 1939); Restatement: Property, § 539, comment i (1944). Each of

the several grantees, if within the scope of the common scheme, is an intended beneficiary of the restrictions and may enforce them against the others. Hano v. Bigelow, 155 Mass. 341, 343 (1892). Gulf Oil Corp. v. Fall River Housing Authy. 364 Mass. 492, 498-499 (1974). Cf. Boston & Maine R.R. v. Construction Mach. Corp. 346 Mass. 513, 521, n. 5 (1963); Merrill v. Kirkland Constr. Co. Inc. 365 Mass. 110, 115 (1974). No question is presented as to compliance with G. L. c. 184, § 27 (a), as amended by St. 1969, c. 666, § 4, or § 30, inserted by St. 1961, c. 448, § 1.

The sole issue raised by the defendant is whether it is bound by a restriction contained in deeds to its neighbors from a common grantor, when it took without knowledge of the restrictions and under a deed which did not [*359] mention them. It has, it says, only the duty to ascertain whether there were any restrictions in former deeds in its chain of title. See Stewart v. Alpert, 262 Mass. 34, 37-38 (1928). But the deed from Gilmore to the Guillettes conveyed not only the described lot but also an interest in the remaining land then owned by Gilmore. That deed was properly recorded under G. L. c. 36, § 12, and cannot be treated as an unrecorded conveyance under G. L. c. 183, § 4. As a purchaser of part of the restricted land, the defendant therefore took subject to the restrictions. See Houghton v. Rizzo, 361 Mass. 635, 642 (1972); Am. Law of Property, § 17.24 (1952); Tiffany, Real Property, § 1266 (3d ed. 1939); Restatement: Property, §§ 533, 539, comment m (1944); Philbrick, Limits of Record Search and Therefore of Notice (Part I), 93 U. of Pa. L. Rev. 125, 172-175 (1944); annos. 16 A. L. R. 1013 (1922), 4 A. L. R. 2d 1364, 1372 (1949).

The defendant argues that to charge it with notice of any restriction put in a deed by a common grantor is to "put every title examiner to the almost impossible task of searching carefully each and every deed which a grantor deeds out of a common subdivision." But our statutes provide for indexing the names of grantors and grantees,

not lot numbers or tracts. G. L. c. 36, §§ 25, 26. Lot numbers or other descriptive information, even though included in an index, do not change what is recorded. Cf. Gillespie v. Rogers, 146 Mass. 610, 612 (1888), and cases cited. In such a system the purchaser cannot be safe if the title examiner ignores any deed given by a grantor in the chain of title during the time he owned the premises in question. In the present case the defendant's deed referred to a recorded subdivision plan, and the deed to the Guillettes referred to the same plan. A search for such deeds is a task which is not at all impossible. Cf. Roak v. Davis, 194 Mass. 481, 485 (1907).

Decree affirmed with costs of appeal.

HARPER et al. v. PARADISE et al. Supreme Court of Georgia 233 Ga. 194; 210 S.E.2d 710, November 5, 1974, Decided

OPINION BY: INGRAM

[*194] This appeal involves title to land. It is from a judgment and directed verdict granted to the appellees and denied to the appellants in the Superior Court of Oglethorpe County.

Appellants claim title as remaindermen under a deed to a life tenant with the remainder interest to the named children of the life tenant. This deed was delivered to the life tenant but was lost or misplaced for a number of years and was not recorded until 35 years later.

Appellees claim title as uninterrupted successors in title to an intervening mortgagee who purchased the property at a sheriff's sale following the foreclosure of a security deed given by the life tenant to secure a loan which became in default. Prior to the execution of the security deed by the life tenant, she obtained a quitclaim deed from all but one of the then living heirs of the original grantor who died earlier. Appellees also claim prescriptive title as a result of the peaceful, continuous, open and adverse possession of the property by them and their record predecessors in title for more than 21 years.

[*195] The life tenant died in 1972 and her children and representatives of deceased children, who were named as the remaindermen, then brought the present action to recover the land. The trial court determined that appellees held superior title to the land and it is this judgment, adverse to the remaindermen, that produced the present appeal to this court.

The above condensation of the title contentions of the parties can be understood best by reciting in detail the sequential occurrence of the facts which produced these conflicting claims of title.

On February 1, 1922, Mrs. Susan Harper conveyed by warranty deed a 106.65-acre farm in Oglethorpe County to her daughter-in-law, Maude Harper, for life with remainder in fee simple to Maude Harper's named children. The deed, which recited that it was given for Five Dollars and "natural love and affection," was lost, or misplaced, until 1957 when it was found by Clyde Harper, one of the named remaindermen, in an old trunk belonging to Maude Harper. The deed was recorded in July, 1957.

Susan Harper died sometime during the period 1925-1927 and was survived by her legal heirs, Price Harper, Prudie Harper Jackson, Mildred Chambers and John W. Harper, Maude Harper's husband. In 1928, all of Susan Harper's then living heirs, except John W. Harper, joined in executing an instrument to Maude Harper, recorded March 19, 1928, which contained the following language: "Deed, Heirs of Mrs. Susan Harper, to Mrs. Maude Harper. Whereas Mrs. Susan Harper did on or about the . . . day of March, 1927, make and deliver a deed of gift to the land hereinafter more fully described to Mrs. Maude Harper the wife of John W. Harper, which said deed was delivered to the said Mrs. Maude Harper and was not recorded; and Whereas said deed has been lost or destroyed and cannot be found; and Whereas the said Mrs. Susan Harper has since died and leaves as her heirs at law the grantors herein; Now therefore for and in consideration of the sum of $ 1.00, in hand paid, the receipt of which is hereby acknowledged,

the undersigned Mrs. Prudence Harper Jackson, Price Harper and Ben Grant as guardian of Mildred Chambers, do hereby [*196] remise, release and forever quit claim to the said Mrs. Maude Harper, her heirs and assigns, all of their right, title, interest, claim or demand that they and each of them have or may have had in and to the [described property]. To have and to hold the said property to the said Mrs. Maude Harper, her heirs and assigns, so that neither the said grantors nor their heirs nor any person or persons claiming under them shall at any time hereafter by any way or means, have, claim or demand any right, title or interest in and to the aforesaid property or its appurtenances or any part thereof. This deed is made and delivered to the said Mrs. Maude Harper to take the place of the deed made and executed and delivered by Mrs. Susan Harper during her lifetime as each of the parties hereto know that the said property was conveyed to the said Mrs. Maude Harper by the said Mrs. Susan Harper during her lifetime and that the said Mrs. Maude Harper was on said property and in possession thereof."

On February 27, 1933, Maude Harper executed a security deed, recorded the same day, which purported to convey the entire fee simple to Ella Thornton to secure a fifty dollar loan. The loan being in default, Ella Thornton foreclosed on the property, receiving a sheriff's deed executed and recorded in 1936. There is an unbroken chain of record title out of Ella Thornton to the appellees, Lincoln and William Paradise, who claim the property as grantees under a warranty deed executed and recorded in 1955. The appellees also assert title by way of peaceful, continuous, open and adverse possession by them and their predecessors in title beginning in 1940.

The appellees trace their title back through Susan Harper, but they do not rely on the 1922 deed from Susan Harper to Maude Harper as a link in their record chain of title. If appellees relied on the 1922 deed, then clearly the only interest they would have obtained would have been Maude Harper's life estate which terminated upon her death in

1972. " No forfeiture shall result from a tenant for life selling the entire estate in lands; the purchaser shall acquire only his interest." Code § 85-609. See Mathis v. Solomon, 188 Ga. 311 (4 SE2d 24); Satterfield v. Tate, 132 Ga. 256 (64 SE 60); New South Building &c. Assn. v. Gann, 101 Ga. 678 (3) (29 SE 15); [*197] McDougal v. Sanders, 75 Ga. 140.

Appellees contend that the 1928 instrument executed by three of Susan Harper's then living heirs must be treated under Code § 67-2502 as having been executed by the heirs as agents or representatives of Susan Harper, thereby making both the 1922 and 1928 deeds derivative of the same source. That Code section provides: "All innocent persons, firms or corporations acting in good faith and without actual notice, who purchase for value, or obtain contractual liens, from distributees, devisees, legatees, or heirs at law, holding or apparently holding land or personal property by will or inheritance from a deceased person, shall be protected in the purchase of said property or in acquiring such a lien thereon as against unrecorded liens or conveyances created or executed by said deceased person upon or to said property in like manner and to the same extent as if the property had been purchased of or the lien acquired from the deceased person."

Appellees argue that since both deeds must be treated as having emanated from the same source, the 1928 deed has priority under Code § 29-401 because it was recorded first. Code § 29-401 provides: "Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the land lies. The record may be made at any time, but such deed loses its priority over a subsequent recorded deed from the same vendor, taken without notice of the existence of the first."

In opposition to the appellees' reliance on Code § 67-2502, the appellants cite the case of Mathis v. Solomon, 188 Ga. 311, supra. In that case, the grantor by deed of 1923 conveyed to his wife for life, then to his heirs in remainder. This deed was not recorded until 1928. In 1926, the life

tenant and one of the remaindermen conveyed the fee simple by warranty deed, recorded in 1927, to B. L. Fetner. Fetner conveyed by quitclaim deed to the defendants in 1930, and that deed was recorded in 1937. The remaindermen who had not joined in the 1926 deed to Fetner sued the defendants to recover the property. This court held in favor of the remaindermen, saying that Code § 67-2502 "enacted in favor of bona fide [*198] purchasers from 'distributees, devisees, legatees, or heirs at law, holding or apparently holding land or personal property by will or inheritance from a deceased person,' cannot be extended beyond its terms so as to aid a bona fide purchaser from a life tenant as against a remainderman who does not join in the conveyance." The court further said that Code § 96-205 (relating to voluntary conveyances and re-enacted, in substantially the same form as Code Ann. § 29-401.1), "while including bona fide purchasers from administrators, executors, and others who in effect sell land as agent of the grantor making the voluntary conveyance, does not include purchasers acquiring title from other sources."

In Mathis, the deed to the life tenant conveyed the remainder interest to the grantor's heirs. Thus, a subsequent purchaser from the life tenant and only one of those heirs could not rely on Code § 67-2502 since the remaining heirs of the original grantor did not join in the deed. As these heirs of the original grantor were remaindermen, their interests could not be defeated by the later deed which was recorded first.

In the present case, the remaindermen in the deed to the life tenant were not the heirs of the grantor. They were named children of the life tenant grantee. Therefore, after the death of the original grantor, Susan Harper, her heirs could have joined in a deed to an innocent person acting in good faith and without actual notice of the earlier deed. If such a deed had been made, conveying a fee simple interest without making any reference to a prior unrecorded lost or misplaced deed, Code § 67-2502 might well apply to place

that deed from the heirs within the protection of Code § 29-401.

However, the 1928 deed relied upon by appellees was to the same person, Maude Harper, who was the life tenant in the 1922 deed. The 1928 deed recited that it was given in lieu of the earlier lost or misplaced deed from Susan Harper to Maude Harper and that Maude Harper was in possession of the property. Thus Maude Harper is bound to have taken the 1928 deed with knowledge of the 1922 deed. See King v. McDuffie, 144 Ga. 318, 320 (87 SE 22). The recitals of the 1928 deed negate any contention that the grantors in that deed were holding [*199] or apparently holding the property by will or inheritance from Susan Harper. Indeed, the recitals of the 1928 deed actually serve as a disclaimer by the heirs that they were so holding or apparently holding the land.

Therefore, Code § 67-2502 is not applicable under the facts of this case and cannot be used to give the 1928 deed priority over the 1922 deed under the provisions of Code § 29-401. The recitals contained in the 1928 deed clearly put any subsequent purchaser on notice of the existence of the earlier misplaced or lost deed, and, in terms of Code § 29-401, the 1928 deed, though recorded first, would not be entitled to priority. See King v. McDuffie, 144 Ga. 318 (2), supra; Hitchcock v. Hines, 143 Ga. 377 (85 SE 119); Stubbs v. Glass, 143 Ga. 56 (84 SE 126); Holder v. Scarborough, 119 Ga. 256 (46 SE 93); Zorn v. Thompson, 108 Ga. 78 (34 SE 303).

We conclude that it was incumbent upon the appellees to ascertain through diligent inquiry the contents of the earlier deed and the interests conveyed therein. See Henson v. Bridges, 218 Ga. 6 (2) (126 SE2d 226). Cf. Talmadge Bros. & Co. v. Interstate Bldg. &c. Assn., 105 Ga. 550, 553 (31 SE 618), holding that " a deed in the chain of title, discovered by the investigator, is constructive notice of all other deeds which were referred to in the deed discovered," including an unrecorded plat included in the deed discovered. Although the appellees at trial denied having

received any information as to the existence of the interests claimed by the appellants, the transcript fails to indicate any effort on the part of the appellees to inquire as to the interests conveyed by the lost or misplaced deed when they purchased the property in 1955. "A thorough review of the record evinces no inquiry whatsoever by the defendants, or attempt to explain why such inquiry would have been futile. Thus it will be presumed that due inquiry would have disclosed the existent facts." Henson v. Bridges, supra, p. 10.

The appellees also contend that they have established prescriptive title by way of peaceful, continuous, open and adverse possession by them and their predecessors in title beginning in 1940. However, the remaindermen named in the 1922 deed had no right of possession until the life tenant's death in 1972. [*200] " Prescription does not begin to run in favor of a grantee under a deed from a life tenant, against a remainderman who does not join in the deed, until the falling in of the life estate by the death of the life tenant." Mathis v. Solomon, supra, p. 312. See also Ham v. Watkins, 227 Ga. 454 (3) (181 SE2d 490); Biggers v. Gladin, 204 Ga. 481 (6) (50 SE2d 585); Seaboard Air-Line R. Co. v. Holliday, 165 Ga. 200 (2) (140 SE 507); Brinkley v. Bell, 131 Ga. 226 (5) (62 SE 67).

A remaining enumeration of error asserted by appellants which deals with the admissibility into evidence of a title examiner's certificate of title is unnecessary to decide in view of the conclusions reached above. The trial court erred in granting appellees' motion for directed verdict and in overruling the appellants' motion for directed verdict. Therefore, the judgment of the trial court is reversed with direction that judgment be entered in favor of the appellants.

Judgment reversed with direction.

James EARL and Rachel E. EARL, Plaintiffs, Appellees, & Cross-Appellants, v. PAVEX, Corp., an Arizona corporation licensed to do business in Montana,

Defendant, Appellant, & Cross-Appellee. Supreme Court of Montana 372 Mont. 476, November 12, 2013, Decided
OPINION BY: MCKINNON

James and Rachel Earl commenced this action against Pavex Corporation in the Sixteenth Judicial District Court, Rosebud County. The Earls sought declaratory rulings concerning two overlapping easements—one 100 feet in width, the other 30 feet in width—that burden the Earls' land for the benefit of Pavex's land. The Earls conceded the 30-foot-wide easement but disputed the 100-foot-wide easement. They asserted that the latter easement is unenforceable because it does not appear in the chain of title to the Earls' property. In the alternative, even if the 100-foot-wide easement is valid, the Earls alleged that they are not required to remove structures and cropland that encroach upon the 30-foot-wide and 100-foot-wide easements.

[*2] The District Court concluded that the 100-foot-wide easement does not burden the Earls' property and, thus, granted summary judgment to the Earls on this issue. The court further concluded that the Earls may be required to remove structures and cropland from the easements—the 30-foot-wide easement, as well as the 100-foot-wide easement if this Court found the latter easement valid—to the extent necessary to effectuate the purposes of the easements. The court thus granted summary judgment to Pavex on this issue.

[*3] Pavex now appeals from the District Court's ruling that the 100-foot-wide easement does not burden the Earls' property, and the Earls cross-appeal from the court's ruling that encroachments may need to be removed. We address two issues: (1) whether Pavex's 100-foot-wide easement was extinguished by failure to properly record it, and (2) whether encroachments need to be removed from Pavex's easements. We reverse as to Issue 1, affirm as to Issue 2, and remand for further proceedings as specified below.

BACKGROUND

[*4] The two parcels of land at issue in this case were previously held by Edward, Mattie, Robert, Mary, Benjamin, and Kathyrn Keim as a single 390.841-acre tract designated "Tract 1" on Certificate of Survey No. 85486, which is shown here:1

1 The diagrams contained in this Opinion are part of the record in this case, with some labeling added for clarity.

[SEE DIAGRAM IN ORIGINAL]

[*5] There is a 30-foot-wide easement over Tract 1 beginning at Rosebud County Road #S-447 and running in easterly and northerly directions, as shown by the dashed line on the diagram above. It appears from documents in the record that one of the Keims' predecessors in interest (Tongue River Farms, LLC) granted this easement in 1999 for purposes of ingress, egress, and utilities to land north and west of Tract 1. As noted, there is no dispute concerning the validity of this easement, although there is a dispute concerning the need for the Earls to remove encroachments from it.

[*6] In 2006, the Keims executed Amended Certificate of Survey No. 85486/99927, which divided Tract 1 into a 275.940-acre parcel designated Tract 1A and a 52.828-acre parcel designated Tract 2A. (It appears the southernmost 62.073 acres of original Tract 1 had already been severed.) Amended Certificate of Survey No. 85486/99927 shows the same 30-foot-wide easement over what is now Tract 2A and Tract 1A.

[*7] The Keims filed Amended Certificate of Survey No. 85486/99927 with the Rosebud County Clerk and Recorder on August 16, 2006. Nine days later, on August 25, the Keims conveyed Tract 1A to Pavex by a warranty deed which referenced Amended Certificate of Survey No. 85486/99927. The Keims retained Tract 2A. In the deed, the Keims granted Pavex a 100-foot-wide easement over Tract 2A, described as follows:

together with a non-exclusive, perpetual easement, 100 feet in width, running with the land, for ingress and egress, and for the installation, maintenance, repair and replacement of

utilities, from the Tongue River Road to the aforesaid Tract 1A of COS 99927 along, over and beneath an existing roadway on the southerly boundary of [Tract 2A] . . . .

[*8] It appears from the foregoing description that the 100-foot-wide easement follows the same course as the existing 30-foot-wide easement. Pavex's owner, Siamak Samsam, filed an affidavit in the present lawsuit stating that he insisted on the 100-foot-wide easement over Tract 2A when he purchased Tract 1A. He explained that the extra width is necessary to enable the passage of farm equipment and semi-trucks and trailers and that the 30-foot-wide easement, in its existing configuration, is insufficient for this purpose.

[*9] The Keims-Pavex warranty deed was filed with the Rosebud County Clerk and Recorder on September 15, 2006. Seven months later, in April 2007, the Keims entered into a contract for deed for the sale of Tract 2A to the Earls. The contract for deed refers to Amended Certificate of Survey No. 85486/99927 but makes no mention of the 100-foot-wide easement granted in the Keims-Pavex warranty deed.

[*10] The Earls assert that when they purchased Tract 2A, they had knowledge of the 30-foot-wide easement but were unaware of the 100-foot-wide easement. The Earls state that they became aware of the latter easement in April 2008 when James Earl stopped a motorist who was using the roadway over Tract 2A in order to reach Tract 1A. When James asked the motorist what he was doing, the motorist (an associate of Pavex) replied that Pavex holds a 100-foot-wide easement over the southern portion of Tract 2A and that the Earls would need to remove their encroachments from this easement.

[*11] Following this encounter, the Earls contacted Pavex's title company and inquired about the alleged easement. The title company sent the Earls a copy of the deed in which the Keims had granted Pavex the 100-foot-wide easement. The Earls then contacted their own title company. They asserted that their title company had "missed" the Keims-Pavex

deed in the title search and demanded that the title company "fight to get this easement off our land."

[*12] The instant action was filed on July 1, 2008, seeking to invalidate Pavex's claimed 100-foot-wide easement or, in the alternative, to obtain a ruling that the Earls are not required to remove their structures and cropland from Pavex's easement(s). The parties filed cross-motions for summary judgment on both issues. The proceedings were stayed for approximately 20 months while the parties attempted to settle the dispute; however, when such efforts proved unsuccessful, the District Court proceeded to issue its rulings from which the parties now appeal and cross-appeal. The District Court's reasoning will be discussed below.

STANDARD OF REVIEW

[*13] We review a district court's ruling on a motion for summary judgment de novo, applying the criteria set forth in M. R. Civ. P. 56. Gordon v. Kuzara, 2012 MT 206, ¶ 13, 366 Mont. 243, 286 P.3d 895. Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3). At the summary judgment stage, the court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses. Rather, the court examines the pleadings, the discovery and disclosure materials on file, and any affidavits to determine whether there is a genuine issue as to any material fact relating to the legal issues raised and, if there is not, whether the moving party is entitled to judgment as a matter of law on the undisputed facts. Andersen v. Schenk, 2009 MT 399, ¶ 2, 353 Mont. 424, 220 P.3d 675.

DISCUSSION

[*14] Issue 1. Whether Pavex's 100-foot-wide easement was extinguished by failure to properly record it.

[*15] As discussed, the Keims held Tract 1A and Tract 2A in common ownership. In August 2006, they sold Tract 1A to Pavex and retained Tract 2A for themselves. In the deed, the Keims granted Pavex an easement 100 feet in width over Tract 2A for the benefit of Tract 1A. There is no dispute that this was an enforceable easement as between the Keims and Pavex.

[*16] The problem arose eight months later when the Keims sold Tract 2A to the Earls, without any mention of Pavex's 100-foot-wide easement in the Keims-Earls deed. This not uncommon situation has been described in a leading treatise as follows:

A landowner may convey Blackacre and grant therewith an easement, such as a right of way over his adjoining lot, Whiteacre, to which he retains title; or he may agree not to use Whiteacre in a certain way or for certain purposes. In either case, he has created a servitude which is an encumbrance against Whiteacre. Is a subsequent purchaser of the latter, who has no actual notice of the easement or restriction, bound by the record of the deed of Blackacre?2 American Law of Property vol. 4, § 17.24, 601-02 (Little, Brown & Co. 1952).

2 There is some disagreement between the Earls and Pavex about whether the Earls had "actual notice" of the 100-foot-wide easement in April 2007 when they executed the contract for deed. As discussed below, such notice (if it existed) would preclude the Earls from disputing the easement's validity. However, we need not consider the issue of actual notice because we conclude, for the reasons which follow, that the Earls had constructive notice of the easement.

[*17] Whether a subsequent purchaser of the servient estate is bound by the servitude depends on the recording statutes and the required scope of the title search. Laws governing the recording of instruments of conveyance are in force in all the states. Joyce Palomar, Patton and Palomar on Land Titles vol. 1, § 4, 14 (3d ed., West 2003); see generally Title 70, chapter 21, MCA. These laws generally serve

three purposes: to secure prompt recordation of all conveyances by according priority of right to the purchaser who is first to record her conveyance; to protect subsequent purchasers against unknown conveyances and agreements regarding the land; and to preserve an accessible history of each title so that anyone needing the information may reliably ascertain in whom the title is vested and any encumbrances against it. Palomar, Patton and Palomar on Land Titles § 4, 14; see also Blazer v. Wall, 2008 MT 145, ¶ 73, 343 Mont. 173, 183 P.3d 84 (a central depository of instruments affecting title to real property "enables a prospective purchaser to determine what kind of title he or she is obtaining without having to search beyond public records"); Erler v. Creative Fin. & Invs., 2009 MT 36, ¶ 21, 349 Mont. 207, 203 P.3d 744 (the recording system "imparts constructive notice to subsequent purchasers that there exists another interest in the property").

[*18] To effectuate these purposes, the recording acts provide that certain instruments are ineffective or void as to certain parties unless the instruments are duly recorded. Palomar, Patton and Palomar on Land Titles § 5, 24-25. Of relevance here, when multiple purchasers hold conflicting interests in a given property, the recording acts will accord priority of right based on one of three approaches. Under the "race" recording system, the purchaser who records first has priority of right. Thus, to preserve her rights, an earlier purchaser must record her conveyance before a later purchaser records his conflicting conveyance, and this is true even if the later purchaser has knowledge of the prior conveyance. Palomar, Patton and Palomar on Land Titles §§ 6, 7, at 27-30, 33. This has been termed a "race to the courthouse" system of recordation. Wede v. Niche Mktg. USA, LLC, 52 So. 3d 60, 63 n. 6 (La. 2010). Under the "notice" recording system, in contrast, a subsequent purchaser with actual notice of a prior unrecorded conveyance cannot claim priority over the prior purchaser. However, a subsequent purchaser without actual notice of a prior conveyance has priority over an earlier purchaser who

fails to record her conveyance before the later purchase occurs. Palomar, Patton and Palomar on Land Titles § 7, 31-34. Lastly, under the "race-notice" recording system, a subsequent purchaser has priority over an earlier purchaser if the subsequent purchaser (1) lacks notice of the prior conveyance and (2) records his conveyance before the prior conveyance is recorded. Palomar, Patton and Palomar on Land Titles § 8, 35-39. About one-third of the states—including Montana—have a race-notice recording system. See Palomar, Patton and Palomar on Land Titles § 8, 36-37 & n. 8; §§ 70-20-303, 70-21-304, MCA; Hastings v. Wise, 91 Mont. 430, 435-36, 8 P.2d 636, 638-39 (1932).

[*19] The significance of the recording acts in the present case is that the failure to duly record an express easement may result in the easement's termination—which is what the District Court essentially determined had occurred to Pavex's 100-foot-wide easement.

In a state with a notice recording system, an unrecorded express easement is extinguished when a bona fide purchaser acquires title to the servient estate without notice of the easement. The same result occurs in a jurisdiction [such as Montana] with a race-notice recording statute if the bona fide purchaser without notice also records the deed to the servient estate before the easement is recorded.

Jon W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land § 10:32, 10-90 to 10-92 (Thomson Reuters 2013) (footnotes omitted); accord Restatement (Third) of Property: Servitudes § 7.14 (2000); Herbert T. Tiffany, The Law of Real Property vol. 3, § 828, 397-99 (3d ed. 1939 & Supp. 1998); Richard R. Powell, Powell on Real Property vol. 4, § 34.21[2], 34-197 to 34-198 (LexisNexis Mathew Bender 2013). "In either recording system, an easement holder can preserve the easement simply by recording the easement instrument immediately upon receiving it, thereby imparting constructive notice of the servitude to subsequent purchasers of the servient estate." Bruce & Ely, The Law of Easements and Licenses in Land § 10:32, 10-92.

[*20] There is no question that the Keims-Pavex deed was recorded in September 2006, seven months before the Earls entered into the contract for deed with the Keims for the purchase of Tract 2A. However, of further significance to this case, it has been held that a prior conveyance is not "of record" unless and until it is recorded in such a way that a subsequent purchaser may find it in a chain-of-title search. See Palomar, Patton and Palomar on Land Titles § 8, 39-40 (citing Keybank N.A. v. NBD Bank, 699 N.E.2d 322 (Ind. App. 1st Dist. 1998)). As the court explained in Keybank,

[t]he recording of an instrument in its proper book is fundamental to the scheme of providing constructive notice through the records. . . . A person charged with the duty of searching the records of a particular tract of property is not on notice of any adverse claims which do not appear in the chain of title; because, otherwise, the recording statute would prove a snare, instead of a protection[, to subsequent purchasers]. . . . Constructive notice is provided when a deed or mortgage is properly acknowledged and placed on the record as required by statute. However, an otherwise valid instrument which is not entitled to be recorded, improperly recorded, or recorded out of the chain of title does not operate as constructive notice, although binding upon persons having actual notice.

[*21] At this point, it is necessary to briefly explain the indexing system. Traditionally, jurisdictions have used one of two methods of index preparation: tract indices or grantor/grantee name indices. Palomar, Patton and Palomar on Land Titles § 67, 223. Montana uses a grantor/grantee indexing system. As each instrument is received by the county clerk, the name of the grantor is placed alphabetically on the appropriate page of the grantor index, followed by the name of the other party to the document, the book and page of the record, description of the property, dates, etc. At the same time, there is entered alphabetically in a separate grantee index the name of the grantee, with identical information about the document. Palomar, Patton and Palomar on Land Titles § 67, 225; §§

7-4-2613, -2617, -2619, -2620, MCA. These alphabetical indices make it possible to run a chain of title, either forward or backward, from any known owner:

A searcher may begin with the name of the present owner and work backward under the proper letter of the grantee index until finding the name of that party as grantee in a deed for the land involved. The data regarding the deed is copied from the index and the process repeated as to the grantor in that deed, thus finding the earlier deed in which he was grantee, and so on back for a certain number of years or back to the original grant from a sovereignty. In order to ascertain mortgages and other encumbrances, the grantor indices must then be run forward as to each name for the period that said party owned the premises. Another method of search is to run the grantor indices, running the name of an early owner until the deed from him is found, then running the name of party to whom he conveyed and so on down to the date of search, noting en route the encumbrance given by the respective owners.

Palomar, Patton and Palomar on Land Titles § 67, 225-26 (footnotes omitted).

[*22] The crux of the issue in this case is whether Pavex's 100-foot-wide easement was recorded in such a way that the Earls should have found it in a chain-of-title search. "There are two lines of authority on the question whether a servitude created by a common grantor in the deed to the benefited parcel is in the chain of title of the burdened lot." Restatement (Third) of Property: Servitudes § 7.14, Reporter's Note: Chain of Title; see also Palomar, Patton and Palomar on Land Titles § 72, 240; American Law of Property § 17.24, 602; Tiffany, The Law of Real Property vol. 5, § 1266, 23-25. According to the Restatement, "[t]he majority view is that the chain of title includes all servitudes created by the common grantor prior to parting with title to the parcel in question." Restatement (Third) of Property: Servitudes § 7.14, cmt. b. Under this approach, a prospective purchaser is on constructive notice not only of conveyances to the prior owners of the parcel, but also of

conveyances from the prior owners of the parcel during each of their respective periods of ownership. Pavex advocates for this broad chain-of-title concept. Conversely, "the minority view restricts the required title search to conveyances of the parcel in question." Restatement (Third) of Property: Servitudes § 7.14, cmt. b. The Earls advocate for this narrow chain-of-title concept.

[*23] New York applies the narrow approach; hence, an owner of land is bound by encumbrances (of which he does not have actual notice at the time of his purchase) only if the encumbrances "appear in some deed of record in the conveyance to himself or his direct predecessors in title." Buffalo Acad. of the Sacred Heart v. Boehm Bros., Inc., 267 N.Y. 242, 196 N.E. 42, 45 (N.Y. 1935) (emphasis added); accord Witter v. Taggart, 78 N.Y.2d 234, 577 N.E.2d 338, 340-42, 573 N.Y.S.2d 146 (N.Y. 1991); Simone v. Heidelberg, 9 N.Y.3d 177, 877 N.E.2d 1288, 1290, 847 N.Y.S.2d 511 (N.Y. 2007). In explaining the rationale underlying this approach, the Witter court reasoned that

[t]o impute legal notice for failing to search each chain of title or "deed out" from a common grantor would seem to negative the beneficent purposes of the recording acts and would place too great a burden on prospective purchasers. Therefore, purchasers . . . should not be penalized for failing to search every chain of title branching out from a common grantor's roots in order to unearth potential [encumbrances]. They are legally bound to search only within their own tree trunk line and are bound by constructive or inquiry notice only of [encumbrances] which appear in deeds or other instruments of conveyance in that primary stem.

577 N.E.2d at 341 (citation and some internal quotation marks omitted). The court opined that the dominant landowner or the common grantor could safeguard against the encumbrance's extinguishment "by recording in the servient chain the conveyance creating the [encumbrance] so as to impose notice on subsequent purchasers of the

servient land." Witter, 577 N.E.2d at 341. Other cases adopting a similar view include Hancock v. Gumm, 151 Ga. 667, 107 S.E. 872, 877 (Ga. 1921), Glorieux v. Lighthipe, 88 N.J.L. 199, 96 A. 94, 95-96 (N.J. 1915), and Spring Lakes, Ltd. v. O.F.M. Co., 12 Ohio St. 3d 333, 12 Ohio B. 431, 467 N.E.2d 537, 539-40 (Ohio 1984).

[*24] Pavex cites Dukes v. Link, 315 S.W.3d 712 (Ky. App. 2010), in support of the broad chain-of-title concept. The Dukes court held that "the recording of the instrument that grants an easement by a common grantor binds a subsequent purchaser of the tract burdened by the easement regardless of whether it is included in the purchaser's deed." 315 S.W.3d at 717. The court reasoned that "to hold otherwise would leave the holders of easements subject to the whim of a common grantor who could defeat that interest by conveying the same interest to multiple grantees by omitting the easement from the deeds." Dukes, 315 S.W.3d at 717. In addition, the court noted that a landowner cannot convey a greater right or estate than he actually possesses, and that the recording statutes protect purchasers against adverse claims of which they "could not have been reasonably aware." Dukes, 315 S.W.3d at 717. Other cases similarly holding that a purchaser is on notice of recorded encumbrances from a common grantor during the time he held title to the premises in question include Hamilton v. Smith, 212 Ark. 893, 208 S.W.2d 425, 427 (Ark. 1948), Szakaly v. Smith, 544 N.E.2d 490, 492 (Ind. 1989), Beins v. Oden, 155 Md. App. 237, 843 A.2d 147, 151-52 (Md. Spec. App. 2004), Guillette v. Daly Dry Wall, Inc., 367 Mass. 355, 325 N.E.2d 572, 574-75 (Mass. 1975), McQuade v. Wilcox, 215 Mich. 302, 183 N.W. 771, 773-74 (Mich. 1921), Duxbury-Fox v. Shakhnovich, 159 N.H. 275, 989 A.2d 246, 252-53 (N.H. 2009), Cullison v. Hotel Seaside, Inc., 126 Ore. 18, 268 P. 758, 760 (Or. 1928), Piper v. Mowris, 466 Pa. 89, 351 A.2d 635, 639 (Pa. 1976), and Moore v. Center, 124 Vt. 277, 204 A.2d 164, 167 (Vt. 1964). "The rule is based generally upon the principle that a grantee is chargeable with notice of everything affecting his

title which could be discovered by an examination of the records of the deeds or other muniments of title of his grantor." Piper, 351 A.2d at 639 (internal quotation marks omitted).

[*25] We conclude that the broad approach strikes the appropriate balance between the interest of the owner of the dominant property in retaining her easement and the interest of the purchaser of the servient property in ascertaining whether that land is encumbered. The narrow chain-of-title concept creates an unacceptable risk that an otherwise valid and recorded easement will be extinguished through mere failure to mention the easement in a deed conveying the servient property. This result is contrary to the recording system's purpose of "impart[ing] constructive notice to subsequent purchasers that there exists another interest in the property." Erler, ¶ 21. The general rule in Montana is that "[e]very conveyance of real property acknowledged or proved and certified and recorded as prescribed by law, from the time it is filed with the county clerk for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees." Section 70-21-302(1), MCA; see also § 70-21-301, MCA (defining "conveyance" to embrace "every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered or by which the title to real property may be affected, except wills"). Refusing to impute legal notice of recorded encumbrances given by a landowner while he held title to the servient parcel would negate the broad constructive notice contemplated by these statutes.

[*26] Furthermore, we are not persuaded that it would "negative the beneficent purposes of the recording acts" or "place too great a burden on prospective purchasers," Witter, 577 N.E.2d at 341, to require that they search for and examine recorded conveyances by prior owners of the premises in question to ascertain whether encumbrances or servitudes were placed on the property. "The practical effect of the [recording] acts is that an intending purchaser

of land may, by reference to the record, determine whether his vendor has previously disposed of any interest in the land." Tiffany, The Law of Real Property vol. 5, § 1262, 14. The intending purchaser may do the same with respect to preceding owners of the land during their respective periods of ownership. Tiffany, The Law of Real Property vol. 5, § 1262, 14-15.

The searcher beginning his chain of title uses as a starting point the name of the present owner. By following that name back in the grantee index, the examiner will usually find the grantor from whom he acquired title. Then the name of that party is used in tracing back till the name of the previous owner is ascertained, and the process is repeated till one has traced the chain as far back as practical safety requires, or as far as the records are intelligible to the examiner. . . . Having thus made a skeleton chain of title, it is necessary to run the grantor indices as to each name for the period that each party owned the property. This should furnish confirmation of the skeleton and also provide a list of the recorded encumbrances, junior interests, and clouds. In turn, it may be necessary to "grantor" the names of these donees in order to ascertain assignments and releases.

American Law of Property § 18.1, 656-57 n. 3 (emphases added, cross-reference and paragraph breaks omitted). The ability to conduct such searches is made possible by the maintenance of grantor indices and grantee indices in the county clerk offices throughout this State. See §§ 7-4-2613, -2617, -2619, -2620, MCA. Indeed, that is a key function of the two indices. Here, had the Earls properly examined the grantor index for the period during which the Keims owned the land now comprising Tract 2A, they would have found the recorded deed from the Keims to Pavex in which the Keims granted Pavex an easement 100 feet in width over Tract 2A. A purchaser cannot ignore such deeds issued by a common grantor, or fail to search for them, on the theory that the deeds are outside the servient estate's "chain of title." To hold otherwise would undermine the broad

constructive notice afforded recorded conveyances under the recording statutes.

[*27] At this juncture, it is necessary to address our decision in Nelson v. Barlow, 2008 MT 68, 342 Mont. 93, 179 P.3d 529. The Earls rely on Nelson in support of the narrow chain-of-title concept, and the District Court found Nelson "controlling" in resolving this case. In Nelson, the Cedar Hills Partnership owned lots in the Cedar Hills Subdivision, which bordered Flathead Lake. The Partnership sold Tract 1 to Nelson in 1990. In the deed, which was recorded, the Partnership granted Nelson a "roadway easement as shown on Certificate of Survey No. 4377 for access to Lot 8 of Cedar Hills Subdivision." The Partnership still owned Lot 8 at the time. In 1996, the Partnership sold several lots, including Lot 8, to Barlow. Barlow's deed contained no mention of the easement granted in Nelson's deed. A dispute later arose over the parameters of Nelson's easement. Nelson claimed that "access to Lot 8" meant that he was entitled to cross Lot 8 to access Flathead Lake, while Barlow claimed that Nelson had access along Cedar Hills Drive up to the northern boundary of Lot 8, but not across Lot 8. Nelson, ¶¶ 3-7, 10-11.

[*28] The case was decided on the pleadings. Nelson, ¶ 9. This Court concluded that "access to Lot 8" was susceptible to two reasonable but conflicting meanings and, as such, was ambiguous. Nelson, ¶¶ 14-15. The Court further concluded, however, that the easement was unenforceable in any event because Nelson had failed to allege in his complaint that the easement appeared in Barlow's chain of title or that Barlow otherwise had knowledge of the easement. Nelson, ¶ 18. In this regard, the Court cited New York precedent for the proposition that, """[i]n the absence of actual notice before or at the time of . . . purchase or of other exceptional circumstances, an owner of land is only bound by restrictions if they appear in some deed of record in the conveyance to [that owner] or [that owner's] direct predecessors in title."" Nelson, ¶ 16 (brackets and ellipsis

in original) (quoting Puchalski v. Wedemeyer, 185 A.D.2d 563, 586 N.Y.S.2d 387, 389 (N.Y. App. Div. 3d Dept. 1992), in turn quoting Witter, 577 N.E.2d at 340); accord Waters v. Blagg, 2008 MT 451, ¶ 7 n. 2, 348 Mont. 48, 202 P.3d 110.

[*29] Based on the foregoing language in Nelson, the Earls argue that "chain of title" includes only deeds of record in the conveyance "to" a landowner or that landowner's direct predecessors in title (the narrow chain-of-title concept). Thus, because Pavex's 100-foot-wide easement does not appear in a deed of record "to" the Earls or their direct predecessors in title (the Keims), the Earls assert they are not bound by this easement. The District Court agreed with this reasoning in granting summary judgment to the Earls.

[*30] On appeal, Pavex argues that Nelson is distinguishable from the present case and that we should apply the broad chain-of-title approach here. However, we perceive no principled distinction between this case and Nelson. In Nelson and the present case, the land that would become the dominant parcel and the land that would become the servient parcel were held in common ownership. In both cases, the common grantor sold the dominant parcel and retained the servient parcel. In both cases, the deed for the dominant parcel referred to a certificate of survey that did not give notice of the claimed easement. In both cases, the deed for the dominant parcel contained language granting the claimed easement over the common grantor's retained property. In both cases, the common grantor subsequently sold the retained property without any mention of the previously granted easement. In both cases, the purchaser of the servient parcel apparently had no actual knowledge of the easement. In both cases, had the purchaser searched the record for encumbrances given by the common grantor during the time he owned the servient land, the purchaser would have discovered the claimed easement.

[*31] Thus, we are faced with either perpetuating the narrow chain-of-title rule that the Court imported from

New York in the Nelson case, or overruling Nelson in favor of the broad chain-of-title rule. The Court in Nelson, and again in Waters, gave no reasoning to support its application of the narrow chain-of-title rule. Under the narrow approach, as explained, a prospective purchaser is not required to search the records for servitudes created by her grantor prior to parting with title to the parcel. The purchaser, in other words, is not on constructive notice of recorded encumbrances given by her grantor while he owned the property. She is on constructive notice only of conveyances "to" her grantor, not "from" her grantor. This approach is in direct contradiction of Montana law, which provides that every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to real property may be affected, "is constructive notice of the contents thereof to subsequent purchasers and mortgagees" from the time it is filed with the county clerk for record. Sections 70-21-301, -302(1), MCA. Having considered the rationales underlying the two chain-of-title concepts and the purposes of the recording statutes, we conclude that the broad chain-of-title rule strikes the appropriate balance between the dominant landowner's interest and the servient purchaser's interest and is consistent with the broad constructive notice that recorded conveyances are afforded under § 70-21-302(1), MCA. For these reasons, Nelson and Waters are overruled to the limited extent that these cases support the narrow chain-of-title rule.

[*32] In addition to New York precedent, the Court in Nelson, ¶ 16, also cited three Montana cases as examples of the narrow chain-of-title rule: Rigney v. Swingley, 112 Mont. 104, 113 P.2d 344 (1941), Goeres v. Lindey's, Inc., 190 Mont. 172, 619 P.2d 1194 (1980), and Loomis v. Luraski, 2001 MT 223, 306 Mont. 478, 36 P.3d 862. Upon closer examination, however, we conclude that these cases are not controlling here.

[*33] First, Rigney concerned a mortgage on an automobile. The mortgage had been executed by an

individual who was not the automobile's owner. This Court, therefore, held that the mortgage was not in the automobile's chain of title. Rigney, 112 Mont. at 106-09, 113 P.2d at 346-47. That is entirely distinguishable from the present case and Nelson, where the servitude was granted by the undisputed owner of the land in question.

[*34] Second, Goeres—which the Earls cite several times in their brief on appeal—involved a covenant that restricted certain subdivision lots to noncommercial use. Although defendant Lindey's title insurer had found the restriction in its examination of the records, Goeres, 190 Mont. at 174, 619 P.2d at 1195-96, the plaintiffs nevertheless conceded that the restriction was not part of Lindey's chain of title, Goeres, 190 Mont. at 178, 619 P.2d at 1198. The plaintiffs instead sought enforcement of the restriction on equitable grounds. Goeres, 190 Mont. at 175-76, 619 P.2d at 1196-97. On the particular facts of the case, however, this Court concluded that "[e]quity . . . requires more if this Court is to restrict the use of land by mere implication." Goeres, 190 Mont. at 179, 619 P.2d at 1198. This holding does not mandate a narrow chain-of-title approach.

[*35] Lastly, Loomis involved a "stranger to the deed" issue. The Kolbs sold a portion of their land to the Luraskis. In the deed, the Kolbs reserved a 30-foot-wide easement over the Luraskis' parcel, which was depicted on a referenced certificate of survey. The Kolbs included this reservation to provide access to other property, which the Kolbs did not then own, located directly north of the Kolbs' property. The Kolbs had thought they might purchase the property to the north, but when they realized they were not going to be able to do so, they recorded an amended certificate of survey which did not include the 30-foot-wide easement over the Luraskis' parcel. Loomis, ¶¶ 6-15. Later, the Loomises came into ownership of a portion of the northern property and sought to establish an easement over the Luraskis' parcel, for the benefit of the Loomises' land, based on the reservation in the Kolbs-Luraskis deed. Loomis, ¶¶ 16, 27. Yet, neither the Loomises nor their

predecessors had been parties to that deed, which did not pertain to the Loomises' property and was outside the Loomises' chain of title. Loomis, ¶ 28. This Court held, therefore, that the Loomises had the burden to show that the Kolbs intended to reserve an easement for the benefit of a stranger to the deed. Loomis, ¶¶ 32-33. And because the Loomises had failed to meet this burden, the Court concluded that they held no easement rights over the Luraskis' parcel. Loomis, ¶¶ 34-37. This holding does not support a narrow chain-of-title approach; it simply reaffirms settled law that an easement generally cannot be reserved in favor of a stranger to the deed. Loomis, ¶ 31.

[*36] Accordingly, consistent with §§ 70-21-301 and -302(1), MCA, we hold that a prospective purchaser is on constructive notice of recorded servitudes and encumbrances granted by the existing and prior owners of the parcel in question during the respective periods when each owner held title to the parcel. Had the Earls properly searched and examined the grantor index for conveyances by the Keims during their ownership of the land now comprising Tract 2A, the Earls would have discovered Pavex's 100-foot-wide easement. The Earls purchased Tract 2A prior to our decision in Nelson and cannot claim reliance on Nelson in failing to discover the 100-foot-wide easement. The Earls, thus, were on constructive notice of the easement, and the easement is enforceable against the Earls. To the extent that Nelson v. Barlow and Waters v. Blagg are inconsistent with this conclusion, they are overruled. Correspondingly, the District Court's grant of summary judgment to the Earls, and denial of summary judgment to Pavex, is reversed as to this issue.

[*37] Issue 2. Whether encroachments need to be removed from Pavex's easements.

[*38] In August 2006, when the Keims executed the warranty deed conveying Tract 1A to Pavex and granting Pavex a 100-foot-wide easement over Tract 2A, there were several structures located on Tract 2A, including a rental house, a barn, a well house, and animal sheds. Some of

these structures are situated partially within the 30-foot-wide easement. At certain points, the structures restrict the easement to 19 feet of clearance. There also is cropland within the 30-foot-wide easement. Likewise, depending on the precise position of the 100-foot-wide easement, the structures and cropland may encroach upon that easement as well. The Earls maintain, however, that they are not required to remove the structures and cropland because (1) Pavex took its easements over Tract 2A subject to open and obvious encroachments that existed at the time of sale and (2) "the owners of Tract 2A (the Earls) have an implied easement within Pavex's easement for the purpose of using their structures and cropland."

[*39] The District Court ruled in favor of Pavex on this issue. The court reasoned that the plain language of the documents creating the easements is controlling. The court observed that the easements were granted for ingress and egress and for the installation, maintenance, repair, and replacement of utilities. The court noted that there is no language otherwise limiting the dominant estate's use of the easements to the fullest extent. The court further reasoned that had the grantors wished to limit the easements to accommodate structures or cropland, "they could have included such restrictions in the document creating the easement. They did not and the Court is not willing to imply or insert that which was not included by the grantor." Finally, the court rejected the Earls' claim of an implied easement, noting that an owner of land cannot hold an easement on his own land. See Albert G. Hoyem Trust v. Galt, 1998 MT 300, ¶ 22, 292 Mont. 56, 968 P.2d 1135. Thus, the District Court concluded that the encroachments would need to be removed to the extent necessary to effectuate the purposes of Pavex's easements.

[*40] On appeal, the Earls contend that the District Court erred because Pavex took its easements subject to the encroachments and because the Earls hold an implied easement within Pavex's easements. Pavex, conversely, argues that the District Court's decision is correct because

any obstructions which interfere with an easement must be removed. Notably, the parties' citations in support of these arguments are, for the most part, not on point. Pavex cites various authorities—such as Musselshell Ranch Co. v. Seidel-Joukova, 2011 MT 217, ¶ 26, 362 Mont. 1, 261 P.3d 570—for the proposition that the owner of a servient estate may not erect or place physical obstructions within the easement. Yet, the Earls did not erect or place the physical obstructions at issue in Pavex's easements; the obstructions were already there at the time Tract 2A became burdened with the easements benefitting Tract 1A. Likewise, the Earls cite various authorities concerning easements implied from existing use, see Yellowstone River, LLC v. Meriwether Land Fund I, LLC, 2011 MT 263, ¶ 30, 362 Mont. 273, 264 P.3d 1065 (explaining such easements), and easements which occupy the same physical location. Yet, with one exception discussed below, none of these authorities contemplate an easement on the servient property, for the benefit of the servient property, consisting of a permanent physical obstruction within the dimensions of the easement expressly granted to the dominant property. [*41] The one case cited by the Earls that arguably is analogous to the present case is Newton v. N.Y., New Haven & Hartford R.R. Co., 72 Conn. 420, 44 A. 813 (Conn. 1899). There, the court recognized that a landowner whose property abuts a highway owns the soil to the center of the highway in fee. As such, the landowner has not only the rights that all others of the community have to travel on the highway, but also certain privileges that are not common to the public generally, such as the right to construct a sidewalk, set hitching posts, and place stepping stones within the right-of-way as it passes in front of the landowner's property. The court characterized this as "an easement upon an easement." Newton, 44 A. at 815-16. Even so, however, the court noted that any such obstructions must not interfere with the highway or render it unfit for its purpose (public travel). Newton, 44 A. at

815. We conclude that the same principle is controlling here.

[*42] Absent an express provision in a grant or reservation, "[t]he owner of the servient estate may utilize the easement area in any manner and for any purpose that does not unreasonably interfere with the rights of the easement holder." Bruce & Ely, The Law of Easements and Licenses in Land § 8:20, 8-63 to 8-65; accord Sampson v. Grooms, 230 Mont. 190, 196-97, 748 P.2d 960, 964 (1988); Strahan v. Bush, 237 Mont. 265, 268-69, 773 P.2d 718, 721 (1989); Gabriel v. Wood, 261 Mont. 170, 177, 862 P.2d 42, 46 (1993); Mason v. Garrison, 2000 MT 78, ¶ 49, 299 Mont. 142, 998 P.2d 531. In the present case, Tongue River Farms granted an easement 30 feet in width over land now comprising Tract 2A. The Keims granted an easement 100 feet in width over that same land. The use of these easements is expressly limited to ingress, egress, and utilities, but there is no express reservation of a right by the servient landowners (Tongue River Farms and the Keims, and now the Earls) to maintain physical obstructions within the easements, and the Earls have shown neither a legal nor a factual basis for implying such a reservation. Indeed, it is implausible that Tongue River Farms and the Keims, on one hand, granted easements for ingress, egress, and utilities but, on the other hand, intended obstructions which unreasonably interfere with the use of these easements to remain in place.

[*43] Unreasonable interference with an easement holder's use of the servient estate is a form of trespass and constitutes an infringement upon a valuable property right. See Bruce & Ely, The Law of Easements and Licenses in Land §§ 8:21, 8:32, 8-70, 8-91. Consequently, an easement holder is entitled to equitable relief against a servient owner's unlawful interference with the easement holder's enjoyment of the servitude, particularly when the obstruction is of a permanent character. Bruce & Ely, The Law of Easements and Licenses in Land § 8:32, 8-91 to 8-92; see e.g. Strahan, 237 Mont. at 269, 773 P.2d at 721;

Mason, ¶¶ 46-49. We therefore agree with the District Court that the structures and cropland must be removed from the two easements to the extent these encroachments constitute unreasonable interference with Pavex's easement rights. This is a question of fact that will need to be determined on remand. See Musselshell Ranch, ¶ 19 (whether interference is reasonable depends on the factual circumstances of the case).

[*44] We emphasize that the determination whether the encroachments must be removed from the easement requires a balancing of the parties' interests, with reasonableness being the controlling standard. Mattson v. Mont. Power Co., 2009 MT 286, ¶ 52, 352 Mont. 212, 215 P.3d 675 ("[W]e presume that the parties intended a fair balance of their interests."); Musselshell Ranch, ¶ 19 ("The balancing of rights . . . incorporates a standard of reasonableness."). Unless otherwise stated in the terms of the servitude, the parties to an express easement are deemed to have contemplated both (1) that the easement holder may do whatever is reasonably convenient or necessary in order to fully enjoy the purposes for which the easement was granted, though he may not cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment, and (2) that the servient owner may utilize the servient estate, including the easement area, in any manner and for any purpose that does not unreasonably interfere with the easement holder's enjoyment of the servitude. Mattson, ¶¶ 44, 52; Flynn v. Siren, 219 Mont. 359, 361, 711 P.2d 1371, 1372 (1986); Bruce & Ely, The Law of Easements and Licenses in Land §§ 8:3, 8:20, 8-13, 8-65; Restatement (Third) of Property: Servitudes §§ 4.9, 4.10. We have recognized the necessity of balancing these interests in various cases. See e.g. Sampson, 230 Mont. at 197, 748 P.2d at 964 ("The subject easement must be used only for purposes that do not unreasonably burden the servient tenement and which do not interfere with the use and right reserved to the dominant tenement."); Gabriel, 261 Mont. at 177, 862 P.2d at 46

("[A] gate may be constructed across the easement if it is necessary for the reasonable use of the servient estate and does not interfere with reasonable use of the right-of-way."). Again, what constitutes reasonable use and unreasonable interference is a question of fact, and uniform rules are difficult to formulate. Bruce & Ely, The Law of Easements and Licenses in Land §§ 8:3, 8:21, 8-13 to 8-14, 8-70. "Some permanent encroachments may not justify a finding of unreasonable interference. The particular facts of a situation are always controlling, and what is reasonable or unreasonable is often a close call." Musselshell Ranch, ¶ 27.

[*45] As a final matter, the Keims-Pavex deed describes the 100-foot-wide easement as located "along, over and beneath" the 30-foot-wide easement. It thus is clear that the 100-foot-wide easement generally follows the same course as the 30-foot-wide easement. This does not necessarily mean that the centerlines of the two easements line up over the entire length of Tract 2A, however. Indeed, it appears from the depiction on Amended Certificate of Survey No. 85486/99927 that the 30-foot-wide easement, at certain points, runs along Tract 2A's outer boundaries, which may cause the 100-foot-wide easement to encroach on land outside Tract 2A if the centerlines of the two easements were lined up.

[*46] Therefore, it will be necessary for the District Court on remand to determine the precise location of the 100-foot-wide easement relative to the 30-foot-wide easement. Various factors may be relevant to this analysis, including the purposes of the easement, the geographic relationship of the properties, the uses of the dominant and servient estates, the benefit to the easement holder compared to the burden on the servient estate owner, and any admissions of the parties. See Bruce & Ely, The Law of Easements and Licenses in Land § 7:6, 7-13 to 7-17; Broadwater Dev., LLC v. Nelson, 2009 MT 317, ¶ 22, 352 Mont. 401, 219 P.3d 492 ("For purposes of interpreting a writing granting an interest in real property, evidence of the surrounding

circumstances, including the situation of the property and the context of the parties' agreement, may be shown so that the judge is placed in the position of those whose language the judge is to interpret.").

CONCLUSION

[*47] As to Issue 1, the Earls had constructive notice of the 100-foot-wide easement over Tract 2A for the benefit of Tract 1A, and the easement is thus enforceable against the Earls. Pavex is entitled to summary judgment on this issue, and the District Court's contrary conclusion is accordingly reversed. As to Issue 2, the structures and cropland that encroach upon the 30-foot-wide easement and/or 100-foot-wide easement must be removed to the extent they constitute unreasonable interference with Pavex's easement rights. The District Court's grant of summary judgment to Pavex on this legal question is accordingly affirmed.

[*48] However, whether the structures and cropland actually interfere unreasonably with the two easements is a question of fact that will need to be determined on remand. In conjunction with this determination, the District Court will also need to determine the precise location of the 100-foot-wide easement relative to the 30-foot-wide easement based on the factors set out above and any other circumstances the court deems relevant.

[*49] Affirmed in part, reversed in part, and remanded for further proceedings.