Land Boundary

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Module 2

Conflicting Title Elements

Following in the Footsteps

The cardinal principle guiding the surveyor who is running lines of a deed previously surveyed is to follow in the footsteps of the previous surveyor. But in a resurvey the surveyor is frequently confronted with the problem of resolving conflicts discovered when applying the deed to the ground. In performing his duties to trace on the ground the calls given in an instrument not infrequently, he encounters latent ambiguities. These are ambiguities that are not apparent from reading the deed itself. In other words, the description may be good on its face but when it is applied to the ground inconsistencies are revealed. For example, the instrument may call for courses and distances to points that it will not reach, the calls may actually over shoot the points found, or the area called for may differ dramatically from that found in measurement. Many other problems develop as well, but first a return for a moment to the order of importance of conflicting title elements. First in order is the right of possession, or unwritten rights.

Right of Possession - Unwritten Rights

It was mentioned previously that unwritten rights or possession that ripens into a fee right could extinguish written rights. The next category in the order of importance is the stipulation that a senior right is superior to a junior right.

Senior Right

When a portion of a tract of land is sold and two parcels are created a new parcel and the remainder of the parent parcel, the remainder will likely become, when it is conveyed, junior. Such are often called sequential conveyances and are based on deeds that came into being with a lapse of time between them.

> "Sequential conveyances are those written deeds in which junior and senior rights exist between adjoining parcels. . . In Texas, Virginia (including the Virginia Reserve in Ohio, Kentucky and several southern states), warrants were issued an area of land. The person with a warrant went upon the land, selected the area he desired and had it surveyed, described, and platted as required by law. The description usually included calls for monuments, trees, topographic features, measurements and area. The person then applied for a patent, and if all legal requirements were met, the patent could be granted. Since each parcel was created in sequence usually as indicated by the date of the patent, these were sequential conveyances." (Brown, Robillard and Wilson 1981: 71-72).

As you would expect, the system resulted in numerous gaps and overlaps.

Contrast the above with what is known as simultaneous conveyances, when several parcels of land are created at the same moment. These might include lots in a subdivision, Sections in a Township and multiple parcels created in a will. For example, sections in a township were all created at the moment the plat was filed and accepted by the GLO (BLM).

The fundamental difference between these conveyances and the surveys that follow them is the treatment of excess or deficiency when it is discovered. In sequential conveyances proportionate measurements rarely apply, but in retracement of simultaneously created parcels, proportionate measurement is usually the rule

The surveyor is daily expected to determine his best opinion to resolve questions which arise with reference to the excess and deficiency of lines shown by his recent measurement as compared with the original measurement. One court wrote in its opinion regarding a case in Nebraska:

> "On a line of the same survey, and between remote corners, the whole length of which is found to be variant from the length called for, it is not presumed that the variance was caused from a defective survey of any part but it must be presumed, in the absence of circumstances showing the contrary that it arose from imperfect measurement of the whole line, and such variance must be distributed between the several subdivisions of the line in proportion to their respective length." [Brooks v. Stanley, 66 Neb. 826, 92 N.W. 1013 (1902)]

This is the general rule, but there are many variations, applied to different conditions. It must also be remembered that to invoke this rule in establishing the boundaries between the several subdivisions of the variant line, such boundary lines and the monuments originally established must be lost. Of course, wherever original corners are to be found, they prevail, even if the measured distances do not appear to be regular.

Where there is an excess or deficiency in the actual land platted into lots and blocks, with intervening streets, and the original monuments have disappeared, each block should, if possible, be treated as distinct. " In the absence of monuments streets are given the width called for on the plat regardless of excess or deficiency that may exist within a subdivision" (Brown, Robillard and Wilson 1981: 137) and the shortage or surplusage apportioned among the lot owners.

> “Block six consists of lots 4, 5, and 6, and upon the official plat these lots occupy the entire space between the north line of the addition and the street next south therefrom. These lots each are marked upon the plat as being 50 feet wide and there is nothing upon the face of the official plat indicating that any deficiency or excess should be taken from or added to any particular lot. So even if there were an excess of four and one half feet in the length of this block, no part of the excess would fall outside of any particular lot, therefore any such excess should be apportioned among them." [Booth v. Clark, 59 Wash. 229, 109 P. 805 (1910)]

However, as previously mentioned where an original tract of land is subdivided by distinct and separate surveys, the second survey is subservient to the first and must bear any subsequently discovered deficiency and, in such cases, the doctrine of apportionment cannot be invoked.

Likewise, where there are separate conveyances at different periods from unplatted lands by metes and bounds the rule does not apply. The first conveyances would be entitled to the full amount purchased; the second, next in order; (junior) and the last would be entitled to all of the surplusage, if any, and must stand any deficiency, if there is any.

> "In metes and bounds states surveyors, as well as the people think of their lane, as being fixed by definite calls, not as a proportionate part of a whole. . .If one item characterized the difference between metes and bounds states and other states, it is the subject of proportionate measurement." (Distribution of excess and deficiency) (Brown, Robillard, Wilson 1986)

The next category in the often-quoted order of importance is the written intentions of the parties to a deed.

Deeds

A deed is an instrument in writing which when executed and delivered conveys an estate in real property. It is the instrument by which the title to real property is transferred from one person, called the grantor, to another person, called the grantee. And there are various categories of deeds.

For example there are deeds that are sometimes created in connection with court proceedings; a sheriff's deed, a marshal's deed, a commissioner's deed, an executor's deed, a guardian's

deed, a tax deed, and a trust deed. A trust deed establishes a trust, meaning, it is an instrument, which conveys legal title to property to a trustee and states his authority and the condition binding upon him in dealing with that property. A trust deed is frequently used to secure lenders against loss. Trust deeds are not primarily for the purpose of conveying title from one person to another. They are usually used to create a lien on real property. When the debt secured by the trust deed has been paid a reconveyance deed is sometimes used to convey the title from the trustee to the trustor.

An unrecorded deed that is not recorded in the registry of deeds or other repository of public record is usually only binding upon the grantor, his heirs and devisees and anyone who has actual notice of it. It is not valid against anybody else.

Quitclaim Deeds

A quitclaim deed conveys whatever interest the grantor possesses in the property described in the deed is conveyed to the grantee without warranty of title. If the grantor indeed has valid title, a quitclaim deed is just as complete as a general warranty deed. Under these conditions a quitclaim deed is sufficient to pass title. However, if the grantor in fact has no right, title or interest in the property, a quitclaim deed has no validity.

Grant Deeds

A grant deed conveys the fee title of the land described and owned by the grantee. If at a later date the grantor acquires a better title to the land conveyed the grantee immediately acquires the better title without formal documents. A grant deed also contains implied covenants or

warranties. The statutes of most states stipulate that the use of the word grant in a conveyance by which a fee estate is passed implies these covenants on the part of the grantor and his heirs, unless specifically stated otherwise:

1. The grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee.
2. That such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or any person claiming under him.

In a special warranty deed the grantor warrants the title only against defects arising during the period of his ownership of the property and not against defects existing before that time. It usually uses language such as, "by, through or under the grantor but not otherwise."

In a general warranty deed the grantor warrants the title against defects arising at any time, either before or after the grantor became connected with the land. It is a deed where the grantor warrants he holds clear title to the property even if it is examined all the way back to the property's origins. And further that there are no hidden liens or encumbrances on the property.

Why is a discussion of deeds important? The concept of a deed is simplicity itself and embodied in these definitions. However, precisely what an instrument conveys and what it doesn't convey is expressed by the construction and language of the instrument. It is therefore important that a surveyor be well-versed in reading and understanding the sufficient and legal words which are required to be incorporated into a valid deed. Said another way, the words do not need to be

legal jargon but they must communicate the intentions of the parties to the deed clearly. The words of the deed must contain a description of the land and describe the particular parcel. The words must also define and limit the estate being conveyed. These are critical issues to a surveyor engaged in understanding the property conveyed. In most states a valid deed includes some or all of the following.

Typical Deed Requirements

Competent Parties and Proper Subject Matter

The proper subject matter for a deed is real property and the parties to a deed in real property must be made reasonably certain in the instrument for it to be valid. A deed must include a named grantor, a person conveying the property, and grantee, a person receiving the property. That is the grantee must be named or otherwise designated in such a way as to be ascertainable. The person may be natural or artificial, but capable of taking title. For example, it has been held that a deed to a dead person is void. However, infants, insane or incompetent persons may be grantees. If the grantee's name is inserted in a deed executed by the grantor without proper authorization, it is void. A deed to a fictitious person is also void, but a deed to a person using an assumed name is not. In short a deed must have a competent grantor and a grantee capable of holding title. They must have the legal capacity to convey and receive.

A Valid Consideration

A sum of some amount may need to be mentioned in some jurisdictions to validate a deed, but it need not reflect the actual value of the property. In early common law a consideration was said to be necessary to a valid conveyance, but is no longer required in many states.

A Written or Printed Form

The Statute of Frauds requires that a conveyance of any interest in land must be in writing. The writing must be reasonably explicit at least as regarding the essential terms of the conveyance, if not a formal contract.

Sufficient and Legal Wording

A deed must include operative words of conveyance and a valid description. A deed must contain a description sufficient to identify the land conveyed. A sufficient description of the property means a description that is capable of location by a competent surveyor. There is no specification that indicates bearings and distances are included. It suggests that the surveyor is also a gatherer of testimony and evidence in addition to measurements.

It is interesting to note that parol, or oral, evidence can be used in establishing the sufficiency of a legal description in a deed. In other words, testimony may be used to explain latent ambiguities in the deed, uncertainties that are not immediately apparent when looking at the words themselves, but are revealed when looking at outside evidence, such as retracing the boundary on the ground. But it may not be used to overcome patent ambiguities. Patent ambiguities are those that are revealed by looking at the words themselves on the face of the instrument. The idea is derived from of the Statute of Frauds. In many conveyances of real property, the buyer, seller, title lawyer, title insurer or mortgage company request a current survey. The purpose of the survey is generally to insure that the property described in the deed is as it was when last described and to monument the location on the ground.

Execution, Signing, Sealing

A deed must be properly executed by the grantor. It must be signed by him or by attorney-in-fact acting pursuant to written authorization. Usually a grantor writes his name in ink in longhand but signatures by mark are valid. Another person at the grantor's request and in his presence may write the grantor's name for him. The grantor signature need not be at the bottom of the instrument, it just has to appear on it somewhere.

At early common law it was not necessary that the deed be signed, but every deed of land had to be under seal. Later it was decided that the grantor's name had to appear somewhere in the instrument in order to identify him. However, The Statute of Frauds does require an actual signature appear on a conveyance of any interest in land. Since the grantor's signature is now

required, it would seem unnecessary that his name also appear in the conveyance, but most courts have retained that requirement. Only the grantor's signature is required; the grantee is deemed bound by the terms and conditions of the grant when he accepts it and his signature to the conveyance is not necessary to bind him thereto.

Although a seal was essential to a valid conveyance at early common law, it is no longer necessary in most states today.

Unlike a will, there are no set formalities to the execution of a conveyance. Neither attestation by witnesses nor acknowledgements by the grantor of his signature are ordinarily necessary. The grantor must usually acknowledge his signature before a notary public as a pre-requisite to recording the conveyance, but recordation of a deed is not required for it to be valid.

Delivery

A deed is not effective as a transfer of real property until it has been delivered and accepted by the grantee. The determination of whether the instrument has been delivered by the grantor to the grantee is usually the biggest problem in regard to the assuring the validity of a conveyance. Delivery is the act, however, by which the deed takes effect and passes title. It is not merely a transfer of the physical possession of the deed, such as the act of handing a deed to the grantee. In fact, physical transfer itself does not establish delivery, though it sure raises the presumption of it. It is the grantor's intent that is the essence of delivery and it is satisfied if he has shown by word or action his intention that the deed is in force, that title has

passed irrevocably even though actual possession of the property may be postponed. Anything that clearly manifests the intention of the grantor that his deed shall presently become operative and effectual, that he divests control over it, and that the grantee has become the owner, constitutes sufficient delivery.

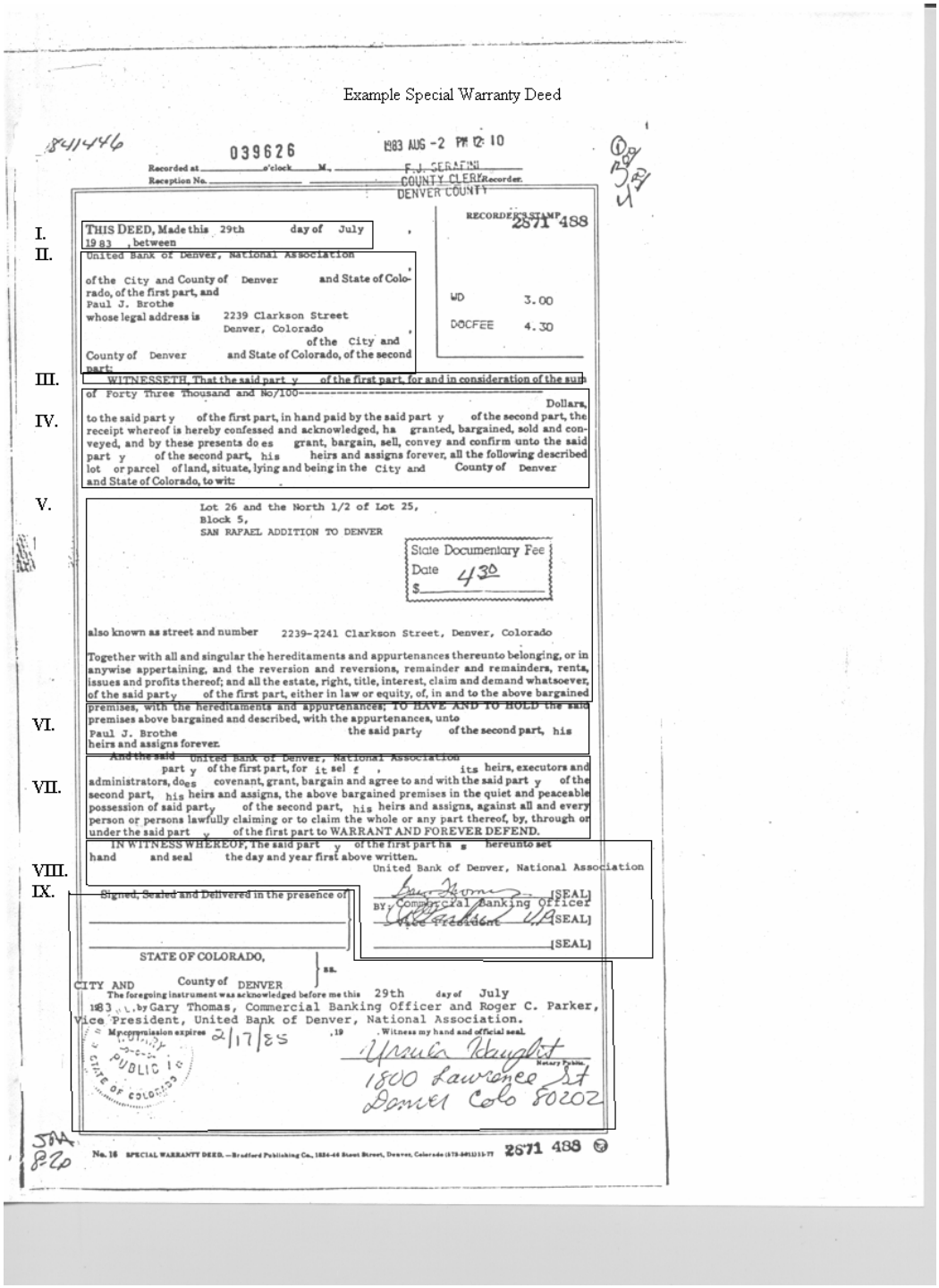
Even though the deed may not have actually been handed to the grantee, it is deemed to be constructively delivered to him where, by agreement of the parties, it is understood to be delivered. The same is presumed where the grantor delivers it to a third party for the benefit of the grantee with the latter's assent.

Acceptance

A conveyance is completed by the grantee's acceptance. The weight of authority supposes acceptance if the conveyance is beneficial to the grantee, even if he is not aware of it - but acceptance of a deed may also be shown by acts, words, or conduct of the grantee. He can indicate an intention to accept, such as execution of an encumbrance on the property, or by other acts of ownership. Acceptance is almost always presumed if the grantee is an infant.

Some Typical Parts of a Deed Document

A conveyance usually consists of specific parts.



Example Special Warranty Deed

8411446

039626

1983 AUG -2 PM 12:10

Recorded at ____ o'clock ____ M., ____ Reception No. ____

F. J. SERAFINI
COUNTY CLERK and Recorder.
DENVER COUNTY

RECORDER'S STAMP 2671 488

I. THIS DEED, Made this 29th day of July 19 83 , between

II. United Bank of Denver, National Association

of the City and County of Denver and State of Colorado, of the first part, and
Paul J. Brothe
whose legal address is 2239 Clarkson Street
Denver, Colorado
of the City and
County of Denver and State of Colorado, of the second part;

WD 3.00
DOCFEE 4.30

III. WITNESSETH, That the said party of the first part, for and in consideration of the sum of Forty Three Thousand and No/100---------- Dollars,

IV. to the said party of the first part, in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns forever, all the following described lot or parcel of land, situate, lying and being in the City and County of Denver and State of Colorado, to wit:

V. Lot 26 and the North 1/2 of Lot 25,
Block 5,
SAN RAFAEL ADDITION TO DENVER

State Documentary Fee
Date 4.30
$

also known as street and number 2239-2241 Clarkson Street, Denver, Colorado

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever, of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances; TO HAVE AND TO HOLD the said

VI. premises above bargained and described, with the appurtenances, unto
Paul J. Brothe the said party of the second part, his
heirs and assigns forever.

VII. And the said United Bank of Denver, National Association
part of the first part, for itself, its heirs, executors and administrators, does covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, the above bargained premises in the quiet and peaceable possession of said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, by, through or under the said party of the first part to WARRANT AND FOREVER DEFEND.

VIII. IN WITNESS WHEREOF, The said party of the first part has hereunto set hand and seal the day and year first above written.

IX. United Bank of Denver, National Association
Signed, Sealed and Delivered in the presence of
BY Gary Thomas [SEAL]
Commercial Banking Officer
Vice President [SEAL]
[SEAL]

STATE OF COLORADO,
CITY AND County of DENVER } ss.

The foregoing instrument was acknowledged before me this 29th day of July
1983 by Gary Thomas, Commercial Banking Officer and Roger C. Parker,
Vice President, United Bank of Denver, National Association.
My commission expires 2/17/85 . Witness my hand and official seal.

Notary Public
1800 Lawrence St
Denver Colo 80202

No. 16 SPECIAL WARRANTY DEED. —Bradford Publishing Co., 1826-46 Street Street, Denver, Colorado (303-861)33-77

2671 488

I. Date

II. Names of the parties to the deed

III. Recitals

A. Statements of fact explaining the transactions: they sometimes begin with “Whereas" or " Witnesseth" or " Know all men by these presents".

B. For example: “Witnesseth, that said party of the first part, for, and in consideration of the sum of . . .”

IV. The operative words of conveyance, consideration and receipt – for example, “ . . . to said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold and conveyed . . .” etc.

V. The description of the land conveyed, exceptions or reservations

A. Reservation - A clause in a deed by which the grantor creates and reserves some interest to himself which had no previous existence, but is first called into being by the instrument i.e. rent, or an easement. It is a taking back of an interest conveyed.

B. Exception - Act of not including something from a description, expressly something which would otherwise pass or be included. An exception excludes from the operation of a conveyance some actually existing part of the thing described (i.e. an apple orchard, or a house on the land). It may

cover not only a particular piece of land but fixtures on it, or timber growing on it, or the minerals underneath it.

C. A reservation on the other hand is a clause by which the grantor secures to himself a new thing. Both exceptions and reservations operate exclusively in favor of the grantor.

VI. The habendum

A. The above, I through V, taken together constitute the premises or granting clause. It is followed by the habendum.

B. The habendum clause usually begins with the words, "To have and to hold."

C. It defines the extent of the ownership. The office of the habendum is properly to determine what estate is granted by the deed. However, the granting clause prevails over the habendum. In other words, the habendum may lessen, explain, or qualify but not contradict the estate granted in the premises.

VII. Conditions and Covenants – agreements, conventions or promises of two or more parties by deed in writing, signed, sealed and delivered by which either of the parties pledges himself to the other that something either is done, shall be done, or shall not be done.

VIII. Execution, signatures and seals

IX. Acknowledgement

Elements Not Required of a Valid Deed

Generally speaking a consideration is not necessary to the validity of a deed. A date is not essential, attestation by witnesses nor an acknowledgment of signatures by a notary. The lack of acknowledgment of a deed by a notary public or similar official does not prevent the conveyance of title. Such an acknowledgment is sometimes required for recordation of a conveyance, but recordation itself is not required for the deed to be valid. Of course, it is a common practice to record deeds and it can be important for title insurance purposes, but even an unrecorded deed is valid between the grantor and grantee and third parties that have notice of it.

Brown, C.M., Robillard, W.G. and Wilson, D.A. (1986) *Boundary Control and Legal Principles*, 3rd edn, New York: John Wiley and Sons.

Brown, C.M., Robillard, W.G. and Wilson, D.A. (1981) *Evidence and Procedures for Boundary Location*, 2nd edn, New York: John Wiley and Sons.

Clark, F.E., Grimes, J.S., Robillard, W.G. and Bouman, L.J. (1987) *A Treatise on the Law of Surveying and Boundaries*, 5th edn, Charlottesville, Virginia: The Michie Company.