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proviso that the land remains subject to a trust for sale. To obtain cancellation of the restriction, the equitable title should strictly be produced to the Registrar, though in practice a statutory declaration by the survivor setting out the details is acceptable.[1]

On severance of a joint tenancy in equity, a restriction should be entered to ensure that the survivor cannot make title by himself. The application can be made either by the registered proprietors or by the person effecting the severance, or in the case of bankruptcy, by the trustee or even the Registrar acting on his own initiative.

Subsequent dealings with the equitable interests, such as a sale by one of several equitable tenants in common to another or to a third person, operate behind the curtain and do not appear on the register.[2] They need not result in any alteration in the legal title, though a registered proprietor ceasing to have any beneficial interest may prefer to retire from the trust, thus necessitating a transfer of the legal estate.

3 Other Trusts

The restriction procedure operates effectively in cases where it is apparent there *must* be a trust for sale, either because one is expressly created, or because property is conveyed to joint owners. However as previously noticed[3] a sole owner may strictly be a trustee. Here it is clearly his task to apply for entry of a restriction, but in practice he is often ignorant of his fiduciary character. If no restriction is entered a purchaser takes free from the interests of the beneficiaries under the trust unless they can establish an overriding interest. In a previous chapter it was indicated that whereas a beneficiary under a trust for sale may not be able to claim an overriding interest, even though in possession, an occupant under a bare trust can.[4]

Compared with his unregistered counterpart a beneficiary under a trust for sale affecting registered land is more favourably placed because he can take steps to protect himself, if necessary. Provided the land certificate is produced at the Registry he can apply for entry of a restriction, otherwise he may lodge a caution.[5] Furthermore, as a temporary measure, s. 49 (2) of the Act enables a notice to be lodged protecting the interest pending the appointment of trustees for sale, but this notice must be cancelled if and when the appointment is made and the proper restriction is entered. However a beneficiary under a trust for sale affecting unregistered land, having merely an interest in the proceeds of sale of land, is outside the protection of the Land Charges Act 1972.[6] So is a beneficiary under a bare trust. He does possess an equitable interest in land, but it is not capable of protection by registration as a land charge. He must rely on the uncertainties of the old rules of notice; even his occupation of the land may be insufficient to fix a purchaser with constructive notice of his rights.[7]

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[1] L.R.R. 1925, r. 214; R. & R., 409.

[2] *Cf.* R. & R., 413 ("it is convenient and proper to make some entry on the register after an equitable interest has been dealt with off the register").

[3] Page 287, *ante*.

[4] Pages 49–50, *ante*. L.R.A. 1925, s. 74, does not apply in these circumstances.

[5] *Elias* v. *Mitchell*, [1972] Ch. 652; [1972] 2 All E.R. 153, note 9, p. 58, *ante*.

[6] *Taylor* v. *Taylor*, [1968] 1 All E.R. 843, C.A. (registration of *lis pendens* relating to undivided share in land vacated); see further pp. 336–337, *post*.

[7] *Caunce* v. *Caunce*, [1969] 1 All E.R. 722, p. 334, *post*.

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CHAPTER 13

Investigation and Acceptance of Title

A INVESTIGATION OF TITLE

It is the purchaser's task to investigate the title which the vendor has deduced Basically this involves three things:

(i) perusing the abstract and raising requisitions on title;
(ii) comparing the abstract with the original documents;
(iii) searching in the appropriate registers.

The first two of these processes are the concern of this chapter; the subject of official searches and the related topic of notice will be considered in the next chapter.

1 Perusal of the Abstract

A study of the abstract or copy documents enables the purchaser's solicitor to ascertain whether the vendor is able to convey what he is contractually bound to convey. The solicitor cannot be completely satisfied on this until the deeds have been examined and the results of all necessary searches are to hand. In theory the examination of the deeds should be undertaken after perusal of the abstract and before the purchaser's solicitor asks his questions (requisitions), but in practice this is usually done on completion of the transaction.

A helpful scheme for the perusal of an abstract is suggested in *Emmet on Title*[1] and this can be usefully studied. The purchaser's solicitor is concerned to see that a good title is shown in accordance with the contract. In particular, he should satisfy himself on the following matters: that the abstract commences with the proper root of title, that particular documents are in law capable of having their supposed effect (which entails consideration of whether the executing parties had power to buy, convey, or otherwise deal with the property, as the case may be), that there are no subsisting incumbrances save for those mentioned in the contract, and that all documents are in order as to stamping, execution, registration, enrolment or other formal requirements. The identity of the property must be carefully checked.[2] It is often helpful to make an

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[1] (15th Edn.), 147–52.

[2] *Re Bramwell's Contract, Bramwell* v. *Ballard's Securities Investments*, [1969] 1 W.L.R. 1659, p. 113, *ante*.

epitome or pedigree of the devolution of the title, so that an overall picture can be obtained at a glance.

Where the title is registered, it can readily be appreciated how much simpler this task is, particularly in relation to absolute titles. The purchaser is not concerned with the devolution of the title. He must still ensure that the office copy entries do not reveal anything inconsistent with the description of the property in the contract. Requisitions may still have to be raised,[3] but on the whole they tend to be the exception rather than the rule, and since it is common for the copy entries to be sent with the draft contract, any queries raised by the entries on the register tend to be incorporated into the preliminary inquiries. As we saw in Chapter 12, these office copy entries are admissible to the same extent as the originals and the purchaser is entitled to compensation for loss resulting from any inaccuracy in them.[4] Since the accuracy of these copies is guaranteed, any verification against the actual register or the land certificate is strictly unnecessary, provided the purchaser makes an official search of the register prior to completion to ensure that the entries are up to date. Nevertheless a brief comparison with the land, or charge, certificate is normally undertaken on completion.

The simplification of our land law and the reduction in the period of investigation of title has, happily, greatly reduced, compared with one hundred years ago, the likelihood of the practitioner encountering a thoroughly bad title. Nevertheless the investigation of title is just as vital to the purchaser today. In the event of the title being defective, he is much more favourably placed if he discovers the defect before, rather than after, completion. Thus he may well be entitled to rescind the contract should the vendor be unable to remedy a defect discovered prior to completion, but thereafter he cannot as a general rule re-open the transaction. He cannot, for instance, recover the purchase money because he finds that the title is defective. What his remedies are in such situations is considered in Chapters 23 and 24.

2 Requisitions on Title

Queries about or objections to the title, discovered by perusing the abstract, are brought to the vendor's attention by means of requisitions on title. They are technically more than mere questions, for they require the vendor to remove the defect or the doubt revealed by the abstract—hence their name.

(a) *Nature of requisitions*

The matters on which requisitions are in practice raised are legion. They may concern flaws or defects in the title,[5] or inconsistencies between the contract description of the property and that deduced. The proper course here is to state the defect or objection and either ask how the vendor proposes to rectify it or state the purchaser's requirements. Over the years conveyancing practice has extended the categories of acceptable requisitions. Often they do no more than remind the vendor of matters on which the purchaser requires to be satisfied, e.g. the obtaining of a licence to assign, the discharge of an existing mortgage, the production of receipts on completion and the observance of covenants.

[3] Page 323, *post*.

[4] L.R.A. 1925, s. 113, p. 303, *ante*.

[5] For typical illustrations, see 18 Ency. F. & P., 783–804.

Other requisitions may be concerned with the evidence of facts, the existence of official certificates of search or the clarification of mistakes in the abstract.

In the past use of standard form printed requisitions, obtainable from law stationers, tended to widen the scope of requisitions so as to include planning enquiries and non-title matters of a general nature. Printed requisitions have in large measure been superceded by preliminary enquiries, since the general non-title matters previously raised by way of requisition are now covered by preliminary enquiries and therefore resolved before exchange of contracts. Such matters need not be repeated later as so called requisitions. It is, however, customary to seek confirmation that if the preliminary enquiries were repeated as requisitions, the replies would be the same, a practice which, though judicially approved,[6] has been criticised[7] on the grounds that it duplicates work and lets in many improper requisitions by the back door. A short form of printed requisitions is available for use when preliminary enquiries have been answered. This form deals with several routine matters such as the production of receipts (e.g. for rates), and the mode of payment of the purchase money. Requisitions founded on the abstract or the contract must, of course, be added.

Improper or unnecessary requisitions. The purchaser should not raise requisitions which infer that relevant matter might have been suppressed from the abstract.[8] He is precluded by statute from making requisitions to the earlier title,[9] but as we have seen he is not debarred from proving *aliunde* that the title is defective. One salutary point to remember is that most formal contracts contain a clause enabling the vendor to rescind the contract in certain circumstances if he is unable or unwilling to comply with a particular requisition. This factor ought to suffice to confine the purchaser's requisitions to matters of substance upon which he is likely to insist if an unsatisfactory answer is given. Since the vendor is bound by his contract to do all that he can to complete the conveyance, the purchaser need not strictly raise requisitions on matters of conveyance,[10] as distinct from matters of title, but they are often raised simply as reminders.

(b) *Time for making requisitions*

Where the contract is silent on this point, requisitions must be delivered within a reasonable time. This is clearly unsatisfactory, so a fixed period is provided for in the standard Conditions of Sale,[11] as follows:

requisitions: to be sent within fourteen days after delivery of the abstract;
observations upon vendor's replies: to be sent within seven days after delivery of those replies.

Prima facie time runs from delivery of a perfect abstract, i.e. an abstract as perfect as the vendor can furnish having regard to the documents and evidence

[6] *Goody* v. *Baring*, [1956] 2 All E.R. 11, at pp. 16–17, *per* DANCKWERTS, J.

[7] (1959), 23 *Conv.* (*N.S.*) 153–54; *cf.* Emmet, 154.

[8] *Re Ford and Hill* (1879), 10 Ch. D. 365, p. 321, *post*. But a query whether official searches (not disclosed by the abstract) were made on the occasion of a previous transaction is regarded as acceptable.

[9] L.P.A. 1925, s. 45 (1), p. 257, *ante*.

[10] *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158, at p. 209; [1874–80] All E.R. 83, at p. 88, *per* Lord HATHERLEY. For matters of conveyance, see p. 248, *ante*.

[11] N.C.S. 8 (2); L.S.C. 10 (1), (4).

within his control. The vendor's default in not delivering the abstract by the specified date releases the purchaser from his time obligations.[12] But the standard conditions protect the vendor in both these respects. An abstract is deemed perfect, though imperfect, except for requisitions which could not otherwise have been made, and time runs against the purchaser notwithstanding that the abstract is not delivered timeously.[13]

(c) Time of the essence

The standard Conditions of Sale provide that time is of the essence and that, subject to those requisitions raised in time, the purchaser is deemed to have accepted the title.[14] He cannot therefore resist an action for specific performance on the ground of an objection to title raised out of time,[15] though equity may refuse to decree specific performance if the title is clearly bad. A contractual provision that objections not made within the specific period are deemed to be waived and the title accepted has been construed as equivalent to making time of the essence.[16]

(d) Requisitions not subject to a time limit

A clause making time of the essence does not prevent the raising of requisitions out of time in three cases:

(i) *Objections going to the root of the title.* The purchaser can object that the vendor has no title at any time before completion; this is a fundamental objection importing that the vendor has broken or has no means of performing his contract, and the matter ceases to be simply one of objection and answer.[17] In *Want* v. *Stallibrass*[18] the court upheld the purchaser's belated objection that the vendors had no present power of sale.

(ii) *Defects not discoverable on a perusal of the abstract.*[19] The purchaser can similarly raise requisitions on matters discovered *aliunde* as a result of his own enquiries or searches (e.g. the search in the land charges register), or the inspection of the deeds.[20] It is customary for the purchaser's solicitor, when raising requisitions, to reserve the right to make additional requisitions arising out of the usual searches and inspection of the deeds. The traditional reply, "Noted subject to contract", does not entitle the vendor to refuse to answer any requisitions so arising.

[12] *Upperton* v. *Nickolson* (1871), 6 Ch. App. 436. The onus lies on the purchaser to establish imperfection: *Ward* v. *Grimes* (1863), 8 L.T. 782. An abstract may be perfect though the title shown by it is bad: *per* POLLOCK, B., in *Want* v. *Stallibrass* (1873), L.R. 8 Exch. 175, at p. 184.

[13] N.C.S. 8 (5); L.S.C. 10 (3).

[14] N.C.S. 8 (3), (4); L.S.C. 10 (2), (5).

[15] *Oakden* v. *Pike* (1865), 34 L.J. Ch. 620. For a recent example see *Re Martins Bank, Ltd.'s Contract, Thomas* v. *Williams* (1969), 21 P. & C.R. 221.

[16] *Oakden* v. *Pike* (1865), 34 L. J. Ch. 620. This seems to be the true basis of this decision. It is not authority, it is submitted, for the view that the time for submission of requisitions is always of the essence, even without express mention; *cf.* 1 Dart, 173; Walford 47–48.

[17] *Want* v. *Stallibrass* (1873), L.R. 8 Exch. 175, at p. 181, *per* KELLY, C.B.

[18] (1873), L.R. 8 Exch. 175; *Re Tanqueray-Willaume and Landau* (1882), 20 Ch. D. 465, C.A. See also L.S.C. 10 (2). *Cf. Rosenberg* v. *Cook* (1881), 8 Q.B.D. 162, C.A. (vendor having possessory title only; objection out of time not sustained).

[19] *Warde* v. *Dixon* (1858), 28 L.J. Ch. 315. This right is expressly reserved by N.C.S. 8 (5); L.S.C. 10 (3).

[20] See p. 324, *post*.

(iii) *Matters of conveyance.* Requisitions as to such matters need not be raised at all and, if raised, are not subject to any time limit,[1] unless perhaps the Conditions of Sale expressly extend to such matters.

3 Vendor's Replies

(a) Extent of vendor's duty

It has been said that the vendor is bound to answer all *specific* questions put to him in respect of the property or the title, unless this *prima facie* obligation is expressly negatived by the contract.[2] Inquiries of a general nature may strictly be ignored. In *Re Ford and Hill*[3] the vendors were held entitled to refuse to answer a requisition asking:

> "Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?"

This raises the question whether a vendor can refuse to answer the so-called requisitions, incorporated in the standard printed forms, not relating to matters of title at all. In practice a vendor's solicitor will tolerantly reply out of courtesy, sometimes using the occasion as an opportunity to sharpen his wits.[4]

Where necessary a solicitor should always confirm the accuracy of his answers before replying to the requisitions. It has been suggested that a reply "not so far as we are aware" should not be accepted if what is being sought is the *vendor's* confirmation.[5] A reply which accords with the general conveyancing practice does not give rise to any action by the vendor against his solicitor even though the answer enables the purchaser to resile from the contract.[6] Answers to requisitions submitted out of time should be given "without prejudice", otherwise the vendor may be held to have waived the time limit.[7] An omission from the abstract may be cured by an answer to a requisition so as to cast on the purchaser the expense of verification.[8]

(b) Failure to reply

No time limit is specified in the standard Conditions of Sale for answering requisitions, but procrastination by the vendor can prove fatal. Should he delay the purchaser may serve a notice requiring an answer within a specific time (i.e. making time of the essence), failing which the purchaser can rescind the contract. In *Re Stone and Saville's Contract*[9] it was held that a notice to complete served by the vendor on the purchaser at a time when requisitions

[1] *Re Scott and Eave's Contract* (1902), 86 L.T. 617.

[2] Emmet, 154, italics added.

[3] (1878), 10 Ch. D. 365, C.A. There is some uncertainty as to the limits of this decision; Emmet, *loc. cit.*

[4] See the correspondence at (1966), 110 Sol. Jo. 930, 960; see also Wilkinson, "Requisition on Title or Request for Information" (1967), 111 Sol. Jo. 591.

[5] Emmet, 154.

[6] *Simmons* v. *Pennington & Son,* [1955] 1 All E.R. 240, C.A.

[7] *Cutts* v. *Thodey* (1842), 13 Sim. 206; *Oakden* v. *Pike* (1865), 34 L.J. Ch. 620.

[8] *Re Wright and Thompson's Contract,* [1920] 1 Ch. 191.

[9] [1963] 1 All E.R. 353, C.A.

going to the root of the title remained unanswered entitled the purchaser to rescind at once, without first having to serve his own notice.

(c) Inaccurate replies

Little appears to have been said[10] about the standard of care that should be exercised when replying to requisitions, or about the purchaser's rights in the event of a reply proving to be erroneous. If he discovers the inaccuracy before completion, the purchaser should be able to re-open the question, whether it goes to the root of the title or not, even though the time for raising observations or replies has elapsed. The vendor can hardly rely upon his contractual rights where he has misled the purchaser. It is perhaps more likely that the error will only be discovered after completion. Whatever rights a purchaser may have, it seems he must be content with damages; he cannot have the transaction set aside, even if the reply is fraudulent. A statutory action for damages may lie if the false reply involves the concealment of any instrument or incumbrance material to the title; however, success requires proof of the defendant's intent to defraud.[11] An action in deceit may possibly lie[12] but this, though seemingly wider in scope than the statutory remedy, also requires a fraudulent intent. In the absence of fraud, the circumstance may be such as to give rise to an action on the covenants for title. However, as with preliminary inquiries,[13] it would appear that a duty of care is owed when replying to requisitions, a duty which is owed separately by the vendor or his solicitor depending on the nature of the requisition raised. The purchaser could, therefore, sue for damages in respect of a negligent reply to a requisition if he could show that he had suffered financial loss resulting therefrom.

(d) Observation on replies

Having considered the vendor's replies, the purchaser has a further period in which to submit any observations, should he still not be satisfied.[14] If as a result of a requisition a supplementary abstract is delivered, a question on that abstract constitutes an original requisition which the purchaser should raise within the appropriate time limit.[15] The vendor's offer of an indemnity may amount to a sufficient answer to the purchaser's objection.[16]

The purchaser should always consider his position carefully before raising further observations. A purchaser who discovers a fundamental defect in the

[10] For the fullest treatment, see Farrand, 117–19.

[11] See L.P.A. 1925, s. 183 (2), p. 267, *ante*; *District Bank, Ltd.* v. *Luigi Grill, Ltd.*, [1943] Ch. 78; [1943] 1 All E.R. 136, where Lord CLAUSON assumed with considerable reservation (see [1943] 1 All E.R. at p. 139) that a failure to disclose the payment of rent in advance when answering requisitions came within s. 183. Maybe the section adds nothing to the liability incurred by the original omission from the abstract: Farrand, *loc. cit.*

[12] *Gray* v. *Fowler* (1873), L.R. 8 Exch. 249, at p. 282, *per* BLACKBURN, J., who suggested that a purchaser might recover damages in deceit for loss resulting from being induced to act on the vendor's representation, known by the vendor to be false, that the abstract was perfect.

[13] Page 156, *ante*. In one respect there may be a difference. It does not seem open for the vendor's solicitor to give the replies "without responsibility".

[14] See L.S.C. 10 (4); N.C.S. 8 (2).

[15] *Re Ossemsley's Estates, Ltd.*, [1937] 3 All E.R. 774.

[16] *Re Heaysman's and Tweedy's Contract* (1893), 69 L.T. 89, C.A.; *Manning* v. *Turner*, [1956] 3 All E.R. 641 (insurance to cover contingent estate duty liability).

vendor's title can rescind the contract even before the completion date, provided he acts promptly. He will be deemed to have waived his right if, for instance, he seeks explanations or demands the getting in of outstanding interests.[17]

(e) Rescission by vendor

It has for many years been the practice to insert in formal contracts a clause entitling the vendor to rescind the contract if the purchaser raises or persists in any objection to the title which the vendor is on reasonable grounds unable or unwilling to remove. The clause may take various forms and a detailed consideration of this right must await a later chapter.[18] Suffice it to say for the present that unless the clause is suitably drafted the vendor loses his right to rescind if he attempts to answer the requisition by, for example, supplying an abstract which purports to meet the objection.[19] The standard Conditions of Sale cater for this difficulty by permitting rescission notwithstanding any intermediate negotiation or litigation.[20] The reference to litigation enables the vendor to rescind even after the commencement of proceedings by the purchaser for the recovery of his deposit (provided judgment has not been given[1]), but the court will normally award to the purchaser the costs of the proceedings up to the time of receipt of the rescission notice.[2]

4. Registered Land

Where the title to the property is registered there will be less need to raise requisitions on title, for registration will have eliminated any flaws or technical defects in the vendor's title. Some authorities go so far as to say that the Land Registration Act 1925, prevents a purchaser of an absolute title from raising requisitions,[3] or suggest that a purchaser who tries to invent a requisition upon title properly so called is attempting the impossible.[4] Statements of this nature are based on a misconception of the true function of a requisition. Whether the title to the land is registered or unregistered, the purchaser must satisfy himself that the title deduced accords with the title contracted to be conveyed. It is, therefore, proper to raise objections about restrictive covenants entered in the charges register, though not disclosed by the contract,[5] or where the contract is for the sale of an absolute title, but the vendor only has a possessory title.[6]

It may be necessary to raise requisitions about, for example, overriding interests (as to which the register of title is not conclusive), subsisting tenancies, identity, and cautions, though, where possible, matters like these are resolved

[17] *Elliott and H. Elliott (Builders), Ltd.* v. *Pierson*, [1948] Ch. 452, at p. 456; [1948] 1 All E.R. 939, at p. 942, *per* HARMAN, J.

[18] See Ch. 23, pp. 573–576, *post*.

[19] *Tanner* v. *Smith* (1840), 10 Sim. 410; *cf. Shoreditch Vestry* v. *Hughes* (1864), 17 C.B.N.S. 137.

[20] N.C.S. 9 (1): L.S.C. 18 (1).

[1] *Re Arbib and Class's Contract*, [1891] 1 Ch. 601.

[2] *Isaacs* v. *Towell*, [1898] 2 Ch. 285 (condition silent as to intermediate litigation).

[3] R. & R. 341; 18 Ency. F. & P., 174.

[4] R. & R. 345.

[5] *Re Stone and Saville's Contract*, [1963] 1 All E.R. 353, C.A., p. 109, *ante*.

[6] *Re Brine and Davies' Contract*, [1935] Ch. 388.

by pre-contract inquiries since the office copy entries are normally forwarded with the draft contract. In the case of a possessory or qualified title, requisitions may have to be raised upon the earlier title, or the defect, as the case may be, unless the raising of requisitions is precluded by the contract. The purchaser should ensure that the vendor complies with any restriction affecting his powers of disposition. Thus the existence of a restriction in Form 62[7] may necessitate the appointment of another trustee. The vendor's attention should be directed to this, though strictly it is a matter of conveyance.

5 Examination of Original Documents

It is the duty of the vendor to verify the contents of the abstract and certain aspects of this duty were considered in Chapter 10. Verification takes place when the purchaser examines the abstract against the original documents in the vendor's possession. This section is concerned with two additional matters: (a) the object of examination and (b) the time when it should be undertaken.

(*a*) *Object*

Since the abstract does not constitute the vendor's evidence of title,[8] it is essential to compare it with the actual deeds and documents in his possession. Indeed it has been said that the real proof of title only begins on verification and the most careful scrutiny of the abstract may be completely worthless if the purchaser's solicitor is lax in examining the evidence in its support.[9] The object of this examination may be said to be fourfold[10]—to ascertain:

(i) that what has been abstracted is correctly abstracted;
(ii) that what is omitted from the abstract is immaterial;
(iii) that all documents are perfect respecting execution, attestation, and stamps;
(iv) that there are no memoranda endorsed on the deeds, nor any circumstances attending the mode of execution or attestation calculated to arouse suspicion.

In particular the description of the property should be carefully checked (especially where the abstract refers to it as "the before abstracted premises"), and the wording of covenants watched. It is important to look for possible memoranda which are often endorsed on the back of a deed. Those most likely to be encountered in practice are those relating to restrictive covenants, the grant of easements, sales-off, the appointment of new trustees, and in the case of a grant of probate, assents affecting the deceased's property. Besides examining all abstracted deeds, search certificates and other certificates produced as evidence of abstracted facts should be inspected. It would also seem prudent to inspect any other documents and papers in the packet of deeds relating to the period of title which the purchaser has investigated; in this way information relating to some third party right might come to light or the existence of a

[7] Page 314, *ante*.
[8] But see p. 270, *ante*, as to examined abstracts.
[9] 1 Williams, V. & P., 180.
[10] 1 Dart, 425.

material document omitted from the abstract discovered. He need not concern himself with title deeds dated prior to the time fixed for the commencement of the title, for he is not deemed to be affected with notice of any matter or thing relating to the earlier title unless he actually investigates such title.[11] Nevertheless he is not precluded from taking objection to the title if he does inspect a deed prior to the root of title and thereby discovers a defect in the title.[12]

That the examination of the abstract against the deeds is a very vital part of the transaction has already been stressed; unfortunately it is all too frequently performed in a very perfunctory manner or undertaken by some inexperienced person. The thoroughness of the actual examination varies in practice. A verbatim check is essential whenever the original deeds are not to be handed over on completion, as when part of a tract of land is sold for residential development, for the abstract will in practice be used as the purchaser's principal documentary evidence of title on future sales.[13] On the purchase of a typical suburban house, the title to which has been deduced several times before, it may be sufficient for an experienced practitioner merely to check that the vital parts of the abstract deeds (e.g. date, stamp duty, parties, descriptions and execution) have been correctly abstracted.[14] When an abstract has been examined, a note to this effect is written in the outer margin. It is becoming customary to dispense with this marking of the abstract if the original deeds are to be handed over on completion.

The use of photographic copies instead of a traditional abstract greatly facilitates the examination of the original deeds, and in the case of registered land an examination of the land, or charge, certificate is, strictly, unnecessary.[15]

(*b*) *Time*

The former practice was to examine the deeds before raising requisitions. Technically this is the correct procedure, for requisitions should strictly relate to those queries which a purchaser is not able to resolve on verification of the abstract. Nowadays it is the almost invariable practice to leave the inspection of deeds until the time of actual completion, a procedure which does not meet with the approval of the Council of The Law Society.[16] Doubtless the increasing pressures of business life, coupled with the belief that the inspection of deeds is unlikely to reveal anything adverse especially if the title has frequently been examined on previous sales within a comparatively short period of time, have encouraged solicitors to adopt this time-saving practice. The discovery on completion of a serious defect is bound to result in delay to the annoyance and inconvenience of both parties, and this possibility ought perhaps to be a

[11] L.P.A. 1925, s. 44 (8), p. 252, *ante*.
[12] *Smith* v. *Robinson* (1879), 13 Ch. D. 148 (discovery of counterpart lease in bundle of deeds when examining abstract).
[13] Page 270, *ante*.
[14] All the abstracted deeds should be so checked, even those purporting to have been examined on a previous occasion. A solicitor should never rely on an examination conducted by someone else, though sometimes he has no alternative, as where the vendor does not possess the deeds of the earlier title. In such a situation the solicitor ought to locate the whereabouts of the deeds and examine his "marked" abstract against them. In practice this is not normally done; see p. 270, *ante*.
[15] Page 318, *ante*.
[16] Law Society's Digest, Third Cumulative Supplement, Opinion No. 95 (a); Emmet, 150.

sufficient condemnation of the procedure. In practice, however, an inspection at this late stage does not seemingly operate to the parties' detriment, largely because so few major defects are in fact discovered, though it is conceivable that defects might well be overlooked, which would not have been missed had more time been available to consider the matter. The practice, often adopted in the case of trivial defects, of completing subject to the vendor's solicitor's undertaking not to account to his client for the purchase money until the defect is rectified, is open to serious objection.

It would not appear to be too late to raise an objection on completion, notwithstanding that the time for raising requisitions has elapsed. A defect only discoverable by inspection of the deeds would rank normally as a defect not discoverable on the face of the abstract itself and in respect of such defects the usual time clause does not apply. Some support for this view is afforded by the recent decision in *Pagebar Properties, Ltd.* v. *Derby Investment Holdings, Ltd.*,[17] where a purchaser was held to be entitled to object to the existence of a lease which his solicitor did not discover until he examined the deeds on completion. However, according to the Council of The Law Society,[18] a solicitor may be guilty of negligence if, as a result of a belated examination of the deeds, he is out of time with his requisitions.

6 Investigation of Title by Mortgagee

A mortgagee should investigate the mortgagor's title in the same way as if he were a purchaser. The possibility of the mortgagee having to exercise his power of sale on the mortgagor's default renders it necessary for him to ensure that he is lending on a good marketable security. It is common practice for an institutional lender to instruct the purchaser's solicitor to act with the result that there is no separate investigation on the mortgagee's behalf. Two matters of particular concern to an intending mortgagee must be mentioned.

(a) *Tenancies created before completion*

Most purchases of residential property are made with the assistance of a mortgage. If prior to completion the purchaser is allowed into possession of the property and he purports to grant a legal tenancy of part (or the whole) to a third party, the tenancy will bind the mortgagee. At the time of its creation the purchaser has no legal estate to support the grant but at law a tenancy by estoppel arises; under the doctrine of feeding the estoppel, the tenancy becomes a legal tenancy on the purchaser's acquisition of the legal estate on completion. Though the conveyance to, and the mortgage by, the purchaser usually take effect virtually simultaneously there are in law two separate transactions. The conveyance precedes the mortgage; the tenancy is fed as from the moment of the conveyance so that the tenancy becomes binding on the mortgagee.[19] The tenancy must be capable of existing as a legal estate; an informal tenancy cannot be fed and will not bind the mortgagee unless it has been registered as an

[17] [1973] 1 All E.R. 65.

[18] See note 16, *ante*. It is significant that in the *Pagebar* case GOULDING, J., seems to have accepted that the purchaser could object only if there was no fault on his part (see at p. 70). It is, perhaps, arguable that a failure to examine the deeds within the period allowed for raising requisitions constitutes fault, and so bars the purchaser's objection. The purchaser was not at fault in the *Pagebar* case; his solicitor had, prior to exchange of contracts, inspected counterparts of the leases which were stated by the contract to affect the property.

[19] *Church of England Building Society* v. *Piskor*, [1954] Ch. 553; [1954] 2 All E.R. 85, C.A.

estate contract.[20] Where the land is registered, the mortgagee is bound if the tenant is in occupation at the time of the mortgage, irrespective of whether he holds under a legal or an equitable lease; his rights constitute an overriding interest.[1]

Only by inspecting the property immediately before completing can a mortgagee ensure that no tenant is in occupation—clearly an impracticable procedure. It is common practice for the mortgagee's solicitor to obtain confirmation that the purchaser has not created or agreed to create any tenancies, but the purchaser's false reply will not bind the tenant unless in some way he was a party to the representation.[2] The possibility of the mortgagee's being bound can be averted altogether by a direct mortgage from the vendor to the mortgagee, followed by a conveyance to the purchaser subject to the mortgage.[3]

(b) *Priority*

Whilst there can be only one legal fee simple estate in a particular plot of land at any one point of time, several mortgages may affect the mortgagor's title at the same time and the mortgagee needs to preserve his priority both as regards existing and subsequent mortgages. It is not proposed to consider here the rules governing the priority of mortgages.[4] Suffice it to say for present purposes that although in large measure the question of priority is governed by registration under the Land Charges Act 1972, there may still occur today situations when it is necessary to apply the old rules of priority, as where the contest is between an equitable mortgage protected by a deposit of the deeds (which is not registrable as a land charge[5]) and a subsequent legal mortgage. On general principles the mortgagee ought to be fixed with constructive notice of all facts which he would have discovered upon the usual investigation of title,[6] and he should be bound by any prior (unregistrable) equitable mortgage if he refrains from investigating the title. However in determining questions of priority between competing mortgagees the courts have sometimes by-passed the rules of notice in favour of a doctrine of "gross negligence".

Hudston v. *Viney*[7] serves as an illustration.

> In 1908 legal mortgagees of a freehold house accepted as a sufficient root of title a deed of 1888 by which the property was conveyed to the mortgagor. They did not call for any abstract of title nor make any further investigation. In 1889 the mortgagor had created an equitable charge on the property, of which the mortgagees were unaware.

[20] *Coventry Permanent Economic Building Society* v. *Jones*, [1951] 2 All E.R. 901.

[1] *Grace Rymer Investments Ltd.* v. *Waite*, [1958] Ch. 831; [1958] 2 All E.R. 777, C.A.; L.R.A. 1925, s. 70 (1) (g).

[2] See *Piskor's* case, at pp. 561 and 89, respectively, *per* Lord EVERSHED, M.R.

[3] For a precedent see 14 Ency. F. & P., 388, Form 3:91.

[4] See M. & W., 951–69.

[5] Unless the argument that it requires registration as an estate contract is sound; see p. 339, *post*.

[6] *Earl of Gainsborough* v. *Watcombe Terra Cotta Clay Co., Ltd.* (1885), 54 L.J. Ch. 991; *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632, at p. 638, *per* JOYCE, J.

[7] [1921] 1 Ch. 98.

EVE, J., held that they took free from the equitable charge. Although they had been negligent in not investigating the title, their carelessness was not sufficiently gross to disentitle them to the protection of the legal estate. Had the principle of notice been applied, the mortgagees ought, it seems, to have been bound. EVE, J., appears to have assumed that this situation was no different from those cases where the concept of gross negligence had been applied to deprive a prior mortgagee of his priority.[8] In this he apparently had the support of the earlier Court of Appeal decision in *Oliver* v. *Hinton*,[9] where a purchaser of a legal estate who did not investigate the title and accepted an inadequate excuse for the non-production of the deeds was held bound by a prior equitable charge because of her gross negligence. Perhaps this decision is best explained on the basis that a purchaser whose negligence is so gross as to justify the court in concluding that there had been fraud in the equitable sense is not a *bona fide* purchaser and so not entitled to equity's protection, irrespective of the question of notice.[10] So understood the case does not conflict[11] with the ordinary rules of notice, but it provides no support for EVE, J.'s, decision in *Hudston* v. *Viney*[12] which, it is submitted, was wrongly decided. The absence of gross negligence merely went to the question of the mortgagees' good faith, leaving the separate question of notice to be determined by ordinary principles.

B ACCEPTANCE OF THE TITLE

The culmination of these processes of deducing, investigation and verification is the acceptance of the title by the purchaser. Except where there is an express acceptance (which is rare), or the purchaser is contractually bound to accept the vendor's title, a final acceptance does not in practice occur until completion of the transaction. In whatever manner acceptance takes place (and this will be considered shortly), it only relates to the title shown by the abstract. The purchaser can still raise objections not arising on the abstract,[13] or on matters of conveyance. The purchaser's conduct may amount to a waiver of defects disclosed by the abstract, or of irremovable objections of which he has knowledge. In each case the question is whether the facts establish an intention to waive.[14] No intention to waive will be inferred if the purchaser continues to insist upon his objections or acts without prejudice to his right to require a good title.[15]

Conduct amounting to acceptance

(i) *Failure to send requisitions.* Certain old cases establish that a failure to raise requisitions or request an abstract constitutes a waiver of the right to investigate

[8] E.g. *Clarke* v. *Palmer* (1882), 21 Ch. D. 124 (postponement of legal mortgagee failing to ask for deeds). Nowadays he would be postponed on account of non-registration.

[9] [1899] 2 Ch. 264, C.A.; *Hewitt* v. *Loosemore* (1851), 9 Hare 449.

[10] At p. 275, *per* Sir F. H. JEUNE, P. LINDLEY, M.R. (at p. 273), expressly refrained from basing his judgment upon constructive notice.

[11] *Cf.* M. & W., 957, esp. n. 75.

[12] [1921] 1 Ch. 98.

[13] *Bown* v. *Stenson* (1857), 24 Beav. 631; *Becker* v. *Partridge*, [1966] 2 Q.B. 155; [1966] 2 All E.R. 266, C.A.

[14] *Flexman* v. *Corbett*, [1930] 1 Ch. 672, at pp. 682–83; [1930] All E.R. Rep. 420, at p. 426, *per* MAUGHAM, J.

[15] *Burroughs* v. *Oakley* (1819), 3 Swan. 159, an important case on waiver.

the title.[16] This matter is nowadays governed by the Conditions of Sale. The purchaser is deemed to have accepted the title, except for requisitions and observations that are delivered within the appropriate time limits.[17]

(ii) *Delivery of draft conveyance.* A purchaser's solicitor normally submits a draft conveyance for approval by the vendor's solicitor at the same time as he delivers his requisitions. The Law Society's Conditions expressly provide that delivery of the draft or of the engrossment does not prejudice outstanding requisitions.[18] Even in the absence of such a clause, submission of a draft document for approval does not of itself operate as a waiver,[19] and in any case it is common practice to make its submission "subject to the vendor's replies to requisitions being satisfactory."

(iii) *Taking possession.* Entry into possession does not under the standard Conditions of Sale operate as an acceptance of title or waiver of the right to raise requisitions,[20] neither does the purchaser's possession under an express condition in the contract.[1] If the contract is silent on the question of waiver, the position is not absolutely clear; taking possession, though not by itself conclusive of a waiver, has this effect if coupled with other circumstances. In *Re Gloag and Miller's Contract*[2] a purchaser who made structural alterations to the property after receiving notice of certain restrictive covenants not disclosed in the contract was held to have waived his right to object to the title on account of those restrictions.

[16] *Fleetwood* v. *Green* (1809), 15 Ves. 594; *Sibbald* v. *Lowrie* (1853), 23 L.J. Ch. 593. In these and similar cases the purchaser had been allowed into possession.

[17] Page 320, *ante*.

[18] Condition 11 (1). The N.C.S. are silent on this point. Both the L.S.C. and the N.C.S. provide for the draft to be delivered at least 10 days before the completion date; see Conditions 11 (1) and 19 (3), respectively.

[19] *Burroughs* v. *Oakley* (1819), 3 Swan. 159.

[20] N.C.S. 7 (3); L.S.C. 14 (1). See also p. 326, *ante*.

[1] *Stevens* v. *Guppy* (1828), 3 Russ. 171.

[2] (1883), 23 Ch. D. 320. The mere taking of possession (unaccompanied by any alterations) with knowledge of an irremovable defect would have barred the purchaser, but not with respect to a removable defect: *per* FRY, J., at pp. 327–28.