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Possession of Land by the Grantor as Notice of His Rights in Pennsylvania

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POSSESSION OF LAND BY THE GRANTOR AS NOTICE OF HIS RIGHTS IN PENNSYLVANIA

Notice, one of the most important concepts in the law of conveyancing, has great significance under Pennsylvania recording statutes. Those statutes provide that a purchaser of land, previously conveyed by an unrecorded deed, may be protected if he records his deed before the first deed is recorded: provided he is without notice of this prior conveyance.[1] This notice may be actual or constructive, and, although the usual method of giving constructive notice is by recording the instrument of conveyance, possession of the land may also be considered notice to subsequent purchasers.[2]

This possession may be by the grantor, the grantee or by a stranger to the original transfer. The scope of this article, however, will be restricted to possession of the land by the grantor as notice of his rights, and with the exception of a few introductory paragraphs, only the law in Pennsylvania will be considered.

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Possession of the land, as already mentioned ,is ordinarily notice of the rights of the party in possession. There is, however, a well recognized exception to this general rule where the grantor remains in possession after a conveyance. The majority of the cases throughout the country seem to favor the view that continued possession by the grantor after he has made a conveyance of the land is not sufficient to put purchasers on inquiry as to any rights which he may have retained.[3] The reasoning in support of this view is that a purchaser is justified in relying on the title conferred by the deed—the inference being that the grantor's possession is permissive.[4]

Nevertheless, a substantial minority of the cases hold that the general rule is applicable in the case of possession by the grantor also.[5] It is argued that the grantor has no more right to be in possession after the conveyance than a stranger has and such retention of possession indicates that the grantor must have reserved some rights in the land, and thus, purchasers should be on inquiry as to such rights.[6]

Even in those jurisdictions which would except from the general rule the continued possession by the grantor there are limitations placed on the exception. That is to say, that if the grantor remains in possession an unreasonable length of time such possession would apparently be sufficient to constitute notice.[7] Thus, it would seem that the purchaser must at least inquire as to how long the grantor has been in possession, and if the possession has been for more than a reasonable time, the

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1 Act of 1925, as amended 1931, P.L. 558, 21 P.S. 351.
2 Allison v. Oligher, 141 Pa. Super. 201, 14 A.2d 569 (1940); Krein v. Steigerwald, 128 Pa. Super. 51, 193 A. 390 (1937).
3 105 A.L.R. 849 (anno.); 66 C.J. 1173, § 1019; 27 R.C.L. 728, § 492; 13 L.R.A. N.S. 118.
4 Turman v. Bell, 15 S.W. 886. (This case is usually cited for giving the reasons on which the divergent rules are based.)
5 See n. 3, supra.
6 See n. 4, supra.
7 55 Am. Jur. 1095, § 725.

purchaser is then put on inquiry as to any rights retained by the grantor. What is a reasonable time will, of course, vary with the circumstances.

Thus, we have the rule that possession of land is notice of the possessor's rights with the majority of courts making an exception in the case of possession by the grantor.

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What is the rule in Pennsylvania? Is possession of the land notice of the grantor's rights or do the Pennsylvania courts follow the majority view on this point? Unfortunately, the law in Pennsylvania is unsettled. There are few cases on point and those few have come to different conclusions. There is authority for holding either view. In a recent law review article[8] it was said that whether or not possession by the grantor is notice to subsequent purchasers is a "moot question." Nothing since then has helped to clarify the situation.

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In support of the view that possession by the grantor is not notice of his rights, the earliest case on record in Pennsylvania is *Scott* v. *Gallagher*.[9] The facts in that case were quite interesting. Thomas Gallagher and his wife conveyed the premises in question to one McCormick by a deed which was recorded. Then McCormick executed a bond to Gallagher, the condition of which was that McCormick was to sell the land before the following February, and if it had not been sold by then, he was to return the deed to Gallagher. The land was never sold, nor did McCormick ever return the deed. Gallagher, however, remained in possession of the land and those claiming under him had been in possession up until the time of the trial. Two years after the date of the deed McCormick died bequeathing to Butler and wife "all my property and estate." Butler and wife conveyed the land by recorded deed to John Rittenhouse. He conveyed to Elizabeth R. Rittenhouse and, she having died intestate, her heirs conveyed the land to Scott, the plaintiff.

The defendants claimed that their possession was notice to Scott and the whole world that Thomas Gallagher and those claiming under him were owners of the equitable interest in the land. The court in holding that the possession by Gallagher was not notice of any rights retained by him said there would be no hardship on Gallagher because ". . . it was his own folly to place himself and others in the power of McCormick." If anyone should suffer, says the court, it should be Gallagher and not Scott—applying the age-old rule of equity that if one of two innocent persons must suffer, he who has been the cause must bear the loss. The court also said that since Scott lived in New Jersey and looked only to the deed from Gallagher to McCormick which was recorded he is not bound to call on the person in possession and ". . . inquire whether he has a secret agreement with the owner of the legal title."

It is interesting to note that here possession of the grantor was for what would

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8 44 Dick. L. Rev. 203.
9 Scott v. Gallagher, 14 S. & R. 333, 16 Am. Dec. 508 (1826).

seem to be an unreasonable length of time. Yet the court made no mention of it.[10] Furthermore, the court emphasized the fact that the deed from Gallagher to McCormick was recorded. Although it did not say what the result would have been if this deed had not been recorded, the reasonable implication would be that if the deed was not recorded, the purchaser would certainly have been required to make inquiry as to the rights of the grantor in possession.

In *Woods* v. *Farmere*[11] the court indicated by *dictum* that possession of the grantor is not sufficient notice to put purchasers on inquiry as to his rights. Here the possession was not by the grantor, but the court said that the possession of land is notice of the possessor's title but the registry by him of a particular title would restrict the generality of notice from possession. This would seem to apply to a grantor who, while remaining in possession, allows a deed to be put on record showing that he has conveyed the land. Recording of the original deed is again given great weight.

The court in another case, *Rowe* v. *Ream*,[12] said by *dicta* that possession of the grantor is not notice of his rights. Title was originally in Davis. The plaintiff put in evidence a deed from Davis and wife to Henry Bennethum in fee simple and a mortgage from Bennethum to the plaintiff. The defendant, Rowe, said she gave Bennethum $300 to purchase the lot in question. He took the deed in his own name. A house was built on the land and she took possession and remained in possession up to the time of the trial. She showed that the plantiff knew she was in possession at the time of the mortgage and that there was from the facts stated a resulting trust in her favor and that the plaintiff had notice of such trust.

The court distinguished this case from *Scott* v. *Gallagher* in that there was an express trust in that case of which there was no record and it ". . . represents a class of cases in which possession by a beneficiary without more is insufficient to affect an otherwise bona fide purchaser for value." The plaintiff offered to prove that Bennethum was a trustee *ex maleficio* by reason of his taking the conveyance to himself in fraud of her rights. The court said: *"She did not appear in the line of title as a former owner who had conveyed her interest* and hence it was the duty of the mortgagee to ascertain by what rights she was in possession." (Italics mine). The court also quotes from *McCulloch* v. *Cowler*[13] to the effect that ". . . possession of land is notice to the world of every right under which the occupant claims it *unless he has put a title on record inconsistent with his possession. . .*" (Italics mine.) Once again the fact that the original deed was recorded is deemed of great importance.

In the case of *Stiffler* v. *Retzloff*[14] it was held that possession of the grantor was not notice. Here John H. Stiffler conveyed to his son one-half of a lot in

10 But see 32 Iowa L. Rev. 166 at 170 where the author says "It would seem, however, that the requirement of inquiry is a reasonable one, and that a purchaser would not be bound to discover a secret reservation of interest in the grantor—possessor."—citing Scott v. Gallagher (see n. 9, supra).
11 Woods v. Farmere, 7 Watts 382, 32 Am. Dec. 772 (1838).
12 Rowe v. Ream, 105 Pa. 543 (1884).
13 McCulloch v. Cowler, 5 Watts & S. 427 (1843).
14 Stiffler v. Retzloff, 7 Sadler 232, 11 A. 876 (1887).

Altoona. This deed was recorded. The parties then entered into a written agreement that a certain portion of the land mentioned in the deed should not pass. This agreement was never recorded. The following year the son made an assignment for the benefit of creditors, and the plaintiff purchased from the assignee the lot which had been conveyed to the son by the father. It was held that the plaintiff was not affected by the unrecorded agreement and that the grantor's possession of the part in controversy did not put him on inquiry as to any rights of the grantor. The court made no mention of the length of time the grantor was in possession, but as it was for only a year it is possible that this would be held to be a reasonable time. Here, too, the deed was recorded.[15]

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On the other hand there are cases on record holding that possession of land by the grantor is notice of his rights. One such case is *Hood* v. *Fahnestock*[16] where it is held so impliedly, possession being held by a tenant of the grantor. However, it is generally held that possession of a tenant is constructive notice of both his rights and his landlord's rights.[17] It appears that there was a fraudulent conveyance in this case after which conveyance the fraudulent grantor retained possession of the land exercising every act of ownership over it, holding the premises by his tenant. The issue was whether the defendant who was a purchaser at a sheriff's sale under a judgment against the fraudulent grantee had notice of this fraudulent transaction.

The court said that in order to protect creditors who are not in default and who have no other means of protection it should be the imperative duty of the purchaser of real estate to make diligent inquiry as to the state of the title of his vendor. The court in a statement, which is an express contradiction to the statement made in *Scott* v. *Gallagher*,[18] said: "It is nothing to the purpose that Hood (the purchaser) lives at a distance from the property for this cannot excuse him from making the proper inquiries."

This was an unusually strong case for allowing such possession to constitute notice. First of all, the possession was by a tenant of the grantor who was in fact a stranger to the conveyance, and the purchaser should certainly have been put on inquiry as to his rights, and, having discovered that he was a tenant, the identification and the rights claimed by the landlord of said tenant. In addition, this was a fraudulent conveyance in which the rights of innocent creditors were involved. Although the court did not say whether the rule would be applied only when the grantor remains in possession, it may well be that it is limited to that situation.

In the case of *Jaques* v. *Weeks*[19] there was a deed of the land in question

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15 See 66 C.J. 1172, § 1019 where it is said: "In other jurisdictions the continued possession of a prior vendor after his conveyance is regarded as an exception to the general rule that possession of land is notice of the possessor's rights. This is especially true where the deed to the purchaser is recorded."—citing Stiffler v. Retzloff.

16 Hood v. Fahnestock, 1 Pa. 470, 44 Am. Dec. 147 (1845).

17 U.S. v. Sliney, 21 Fed. 894 (1884).

18 See n. 9, supra.

19 Jaques v. Weeks, 7 Watts 261 (1838).

which was recorded and an unrecorded deed of defeasance. The grantor was still in possession when he later sold the land to the defendant. The plaintiffs purchased the land from the original grantee.

The court held the recorded deed and the unrecorded deed of defeasance to be one transaction which was in the nature of a mortgage, and, since the deed of defeasance was not recorded, it was considered an unrecorded mortgage. In holding that the purchaser did not have notice of the unrecorded mortgage, the court said that such possession was ". . . notice of the title of the possessor but not of every fact which might have been learned by him." It was held that Jaques bought a fee simple subject to the defeasance and liable to the equity of redemption. So this court would seem to say that possession of the land by the grantor is notice of his claim of title but not notice of all facts which might have been learned by inquiry.

In *Brooke* v. *Bordner*[20] the facts were these:
One, Noll had purchased land at a sale but when the deed was executed and delivered it was made out to Bordner with the understanding that as soon as the notes upon which Bordner was security were paid, he was to deed the property over to Noll, the actual owner. The court said that "as his (Noll's) possession was enough to put Brooke upon inquiry, the latter took subject to Noll's equity."

There was no mention made as to whether or not the deed to Bordner was recorded. Furthermore, it should be noted that this was not actually possession by the grantor but rather possession by the actual owner. By its silence on the matter the court seemingly indicated that whether or not the original deed was recorded would be of no significance.

In 1951 the Pennsylvania Supreme Court considered another case with similar facts. This was in *Malamed* v. *Sedelsky*[21] where real estate had been bought by the Sedelskys, but the property was put in the name of Pastner, a brother-in-law in order to take advantage of his status as a veteran. The deed to Pastner was recorded and two years later he delivered a deed for the premises to the Sedelskys. However, after the delivery of this deed but before it was recorded, Pastner executed a judgment note to the plaintiff on which judgment was entered before the recording of the deed.

The court said that possession of the premises by the Sedelskys from the time Pastner took title to the time of the trial was sufficient constructive notice, "for it has been long settled that it is the duty of a purchaser of real property to make inquiry respecting the rights of the party in possession and failing to do so he is affected with constructive notice of such facts as would have come to his knowledge in the proper discharge of that duty."

Here, again, two factors should be pointed out. First, this is not an actual case of the grantor remaining in possession. secondly, the deed to Pastner was recorded. Nevertheless, from the facts, it would seem that possession in this case should constitute notice.

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20 Brooke v. Bordner, 125 Pa. 470, 17 A. 467 (1889).
21 Malamed v. Sedelsky, 367 Pa. 353 (1951).

The court in *Blight* v. *Schenck*[22] without any discussion made the flat statement that ". . . the grantor remained in possession which of itself served to put the purchaser on inquiry." However, in this case the deed was held void, and so the case was not actually decided on the theory of possession being constructive notice.

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There are no recent Pennsylvania cases on point,[23] but the recent decisions in other jurisdictions seem to favor almost unanimously the view that possession of the grantor is *not* notice of his rights and it is the opinion of this writer that this is the better view—with certain qualifications.

As to what the rule is in Pennsylvania or what it will be when the question comes up again is a matter of conjecture. It is the opinion of this writer that such cases should be decided upon their own individual facts rather than by a strict rule of law.

Recognizing the need for predictability in law, however, it is suggested that the rule of law in Pennsylvania should be, and probably will be, that possession of the land by the grantor is not notice of his rights, subject to the following qualifications:

(1) There seems to be no doubt that if the original deed was not recorded, possession by the grantor would be notice of his rights. Without a deed to his vendor to rely on on record the purchaser should be bound to take notice of who is in possession of the land and inquire as to the possessor's rights.

(2) Even if the original deed is recorded, however, if the grantor has been in possession for more than a reasonable time, his possession may be enough to constitute notice. This is a desirable result since the presumption that the grantor's possession is merely at the sufferance of the grantee would seem to be rebutted by the fact that the grantor remains in possession a long time. This would place on the vendee the duty of making a *reasonable* investigation as to the grantor's claim.

(3) If the possession is by a third person, a stranger to the original transaction who is in fact a tenant of the grantor, it would seem that the purchaser should inquire as to his rights. Therefore, since possession of a tenant is notice of his landlord's rights, such possession by the grantor's tenant should constitute notice of the grantor's rights.

(4) In more doubtful cases, the court may apply the equity doctrine that where one of two innocent persons must suffer, it should be the one who caused the loss. This will in most cases be the grantor.

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22 Blight v. Schenck, 10 Pa. 285 at 295 (1849).

23 But see Allison v. Oligher (op. cit., n. 2) where the court said:

"Visible possession is notice of title sufficient to put purchasers from common source of title on notice and require inquiry upon their part."

See also Krein v. Steigerwald (op. cit., n. 2) where the court said:

"Possession of land is notice of every title under which the occupant claims the land unless the occupant has put a title on record inconsistent with his possession."

Note the similarity in language between this case and McCulloch v. Cowler (op. cit. n. 13).