



Standard practice requires that a Deed of Release of Mortgage should be executed prior to the execution of a Conveyance or Assignment of the property by the Mortgagor (this does not apply to a Building Society vacate which under Section 42 of the Building Societies Act 1874 operates to vest in the person best entitled irrespective of the date of execution).

The reason for this standard practice is that a Vendor will invariably be requested to assure both his legal and equitable interest in the lands. If the lands are already subject to a mortgage, the Mortgagee holds the legal estate and the Mortgagor only retains his equity of redemption. It follows therefore that if a Mortgagor wishes to dispose of the property to a third party he must first re-acquire that legal interest by obtaining a Deed of Release from the Mortgagee.

The normal presumption, in the absence of evidence to the contrary, is that Deeds are executed at the date specified in the Deed. The situation could (and does!) arise whereby on closing a sale a Purchaser's Solicitor is handed the Conveyance and the Release (both deeds undated) and later in a moment of forgetfulness and in his anxiety to have the deeds registered without delay he inadvertently dates the Conveyance prior to the Release.

When the Purchaser later seeks to dispose of his property, the incoming Purchaser's Solicitor may raise an objection that there is an outstanding legal estate vested in the original Mortgagor.

Many would argue that in this case the Mortgagor should now execute a fresh Conveyance of the outstanding legal estate in favour of the incoming Purchaser.

But is that legal estate still vested in him?

The answer often is "no"! The reason is that by virtue of the doctrine of "feeding the estoppel", the legal and equitable interest in the property can become (although at different stages) vested in the Purchaser from the original Mortgagor and he can therefore validly assure the legal and equitable interest in any further Purchaser of the property.

This arises where the Deed of Conveyance or Assignment to the Purchaser contains a clear and unambiguous recital to the effect that the Vendor is seized of the freehold or leasehold interest in the property free from incumbrances.

The principle on which the doctrine of "feeding the estoppel" operates is clearly set out in Williams "Vendor and Purchaser" 4th Edition (1936) Vol.II at Page 1096 in the following terms:

FEEDING THE ESTOPPEL/VACATE/ RELEASE



FEEDING THE ESTOPPEL/VACATE/ RELEASE

(Contd.)

“As previously explained, if the Conveyance to the Purchaser contained a precise averment of the Vendor’s seizure in fee or other right, sufficient to work an estoppel at law, then if the Vendor had not the estate specified at the time of the Conveyance but afterwards acquired it, the same would immediately pass in effect to the Purchaser and his Successors in title with out any further Conveyance, by reason of the fact that the acquisition of the legal estate “feeds” the estoppel. An estate by estoppel of this kind would be available in favour of the Purchaser and his Successor in title as against all persons claiming the whole or any part of the Vendor’s after-acquired estate by any title derived from him, whether gratuitously or for value and whether for a legal or an equitable interest”.

The said paragraph from “Williams” was cited and expressly approved of in Cumberland Court (Brighton) v Taylor Ch.D., 29.

UPDATE:

1. Pursuant to Section 18 of the Housing Act, 1988 *all lenders* may now, similar to a building society, use a vacate in the same way.
Please note however that it is compulsory upon local authorities, but not on other lenders. However it has now become the practice for all lenders to use the vacate. There may be instances however where a release is the more appropriate document in view of the fact that the mortgage may contain a number of securities with one or more (but not all) of the securities being released.
2. Pending the production of the vacate it is recommended that Solicitors acting for purchasers or for mortgagees shall not defer completion of the sale or registration of the purchase deed or completion of the mortgage by the purchaser provided that the Solicitors are satisfied that all monies due on foot of the mortgage have been discharged and that a satisfactory undertaking to forward same with receipt has been furnished.
3. Where there is a release of mortgage instead of a vacate and if it transpires that the deed of release of mortgage is dated subsequent to the deed of assignment of the property to the purchaser, it was felt that a deed of rectification was essential in order to get in an outstanding legal estate.
The clearly held view of the Conveyancing Committee is that the doctrine of Feeding the Estoppel applies to such circumstances and that no deed of rectification is necessary. The doctrine operates effectively to vest the entire legal interest in the purchaser as soon as the deed of release is completed (subject, of course, to whatever necessity there may be for Land Act Consents).