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Ronald Benton Brown  
*Nova Southeastern University Law Center*

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## THE PHENOMENON OF SUBSTITUTION AND THE STATUTE QUIA EMPTORES\*

RONALD BENTON BROWN\*\*

### I. INTRODUCTION

Law students generally think that American property law is a confusing mix of unconnected, inconsistent and nearly incomprehensible rules. In fact, an overview of property law reveals a recurring pattern. In numerous situations, a successor in title takes the place of his or her predecessor regarding rights and responsibilities that are related to ownership of that land. That process is called substitution because the successor is substituted for the predecessor regarding those rights and responsibilities. But sometimes substitution happens automatically and other times it happens only if that is the parties' intent. Automatic substitution seems to follow the pattern established by the ancient Statute of Quia Emptores. Property students would benefit if substitution was taught as a singular concept that explains the connection between the various examples and statutes in Property that concern substitution.

### II. EXAMPLES OF AUTOMATIC SUBSTITUTION

#### A. *Covenants Running with the Land*

A covenant running with the land is a promise that can be enforced by or against a person who was not a party to it. The person's only connection to the covenant is the acquisition of land to which the covenant relates. Why should acquisition of that land involve this person? Casebooks give extensive coverage to answering that question.<sup>1</sup> The third-party beneficiary doctrine

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\*\* Professor of law, Nova Southeastern University Shepard Broad Law Center, Fort Lauderdale, Florida.

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1. See generally CURTIS J. BERGER & JOAN C. WILLIAMS, PROPERTY: LAND OWNERSHIP AND USE 700-91 (4th ed. 1997); JON W. BRUCE & JAMES W. ELY, JR., CASES AND MATERIALS ON MODERN PROPERTY LAW 392-448 (4th ed. 1999); BARLOW BURKE ET AL., FUNDAMENTALS OF PROPERTY LAW 757-74 (1999); A. JAMES CASNER & W. BARTON LEACH, CASES AND TEXT

might have been borrowed from contract law to provide an answer, but it did not exist when covenants running with the land evolved based on the concept of substitution. The transferee is substituted for the original party in the contractual relationship due to his acquisition of that land. That puts the transferee into privity of estate with the other party to the covenant, a relationship that is close enough to include the right of enforcement or the obligation of performance.

The majority of the discussion of covenants running with the land focuses on use covenants. However, property courses also cover title covenants typically found in deeds,<sup>2</sup> and often included in leases. The critical question is usually whether a remote successor can recover from a remote transferor based on the title covenants found in a deed way back in the chain of title. The successor claims to be substituted for the covenantee/grantee enabling him to recover on a promise that was not made to him.

### B. *Servitudes*

A successor to the fee title takes title subject to any outstanding equities, if the successor knew or should have known about them before taking title. In other words, the successor is substituted for the party whose conduct gave rise to the equity unless the successor is protected by his status as a bona fide purchaser for value. Nearly every student is familiar with the origin of servitudes from the landmark case of *Tulk v. Moxhay*.<sup>3</sup> It established equitable servitudes as a species of burden that would afflict the transferee of land based upon the conduct of his predecessor.<sup>4</sup>

Because the court revealed little of its reasoning process, the case presents a mystery to many students. *Tulk* started off with the premise that the buyer of

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ON PROPERTY 937-1078 (4th ed. 2000); EDWARD E. CHASE, PROPERTY LAW: CASES, MATERIALS, AND QUESTIONS 842-916 (2002); JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 595-663 (7th ed. 1996); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 857-919 (4th ed. 1998); SANDRA H. JOHNSON ET AL., PROPERTY LAW: CASES, MATERIALS AND PROBLEMS 633-720 (2d ed. 1998); SHELDON F. KURTZ & HERBERT HOVENCAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 584-714 (3d ed. 1999); EDWARD H. RABIN ET AL., FUNDAMENTALS OF MODERN PROPERTY LAW 427-73 (4th ed. 2000); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 343-523 (2d ed. 1997).

2. See BERGER & WILLIAMS, *supra* note 1, at 1275; BRUCE & ELY, *supra* note 1, at 614-26; BURKE ET AL., *supra* note 1, at 553-57; CASNER ET AL., *supra* note 1, at 759-71; CHASE, *supra* note 1, at 706-17, 759-71; CRIBBET ET AL., *supra* note 1, at 1246-69; DUKEMINIER & KRIER, *supra* note 1, at 600-21; JOHNSON ET AL., *supra* note 1, at 469-75; KURTZ & HOVENCAMP, *supra* note 1, at 1116-23; GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY 557-687 (1996); RABIN ET AL., *supra* note 1, at 1019-34; SINGER, *supra* note 1, at 941-43.

3. 41 Eng. Rep. 1143 (Eng. Chancery 1848), *construed in* BRUCE & ELY, *supra* note 1, at 426; BURKE ET AL., *supra* note 1, at 758; CHASE, *supra* note 1, at 853; CRIBBET ET AL., *supra* note 1, at 613; DUKEMINIER & KRIER, *supra* note 1, at 863.

4. *Tulk*, 41 Eng. Rep. at 1144.

land, who knew that he was getting the land at a low price because the seller thought it was subject to a burden that it be used only as a park, could not escape the burden of that promise in order to buy the surrounding lots.<sup>5</sup> The promisor could not get that windfall because it would amount to unjust enrichment. Thus, an equity was created when the original promisor made the promise. Of course, equity should force him to perform as he promised in an inducement to buying one of the surrounding lots.<sup>6</sup> But the action was not brought against the promisor. It was brought against a remote successor in title, someone who had acquired the title which the promisor had once owned.<sup>7</sup> Should he be burdened? Yes, reasoned the court, even though the covenant could not run with the land under the law of England at that time. An equity had attached and he was the successor.<sup>8</sup> Once again we see substitution at work.

The result would not be different under the new Restatement,<sup>9</sup> which actually expands the class of obligations considered servitudes.<sup>10</sup> The Restatement should also make substitution a more pervasive phenomenon by allowing it to occur with respect to servitudes regardless of whether the burden or benefit touches and concerns the land.<sup>11</sup>

### C. *Liens*

Equitable liens<sup>12</sup> arise by equitable conversion. When the land is subsequently transferred, the transferee is substituted for the party who agreed to the lien. Thus, the transferee takes title subject to the mortgage lien and the mortgage lienor can foreclose on the lien if the obligation the mortgage secures goes into default. Liens created by statute are modern creations that follow the pattern, by legislative fiat, of binding successors. Examples are judgment liens and mechanics' liens.

Note that the substitution is traditionally limited to the obligation relating to the title. Substitution does not automatically apply to bind the successor to the obligation that was secured by the lien. If the successor agrees to be bound by that obligation,<sup>13</sup> he is bound by a process that is technically assuming the obligation, but which is generally known as "assuming the mortgage."

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. See generally RESTATEMENT OF THE LAW (THIRD) PROPERTY (1997) (generally referred to as the Restatement of Servitudes).

10. See generally *id.* § 1.1.

11. See generally *id.* § 3.2.

12. Equitable liens include vendor's liens and mortgage liens in a lien theory jurisdiction.

13. The obligation is generally the promise to repay money borrowed plus interest memorialized in a promissory note.

Substitution does not apply, it appears, because the promise to repay the principal and interest does not touch and concern the land. Thus we draw the distinction between taking subject to the mortgage and assuming the mortgage. Today's property casebooks generally introduce mortgages<sup>14</sup> and illustrate the distinction between taking subject to and assuming a mortgage,<sup>15</sup> but they otherwise ignore liens.<sup>16</sup>

#### D. Voidable Title

Where title has been acquired by fraud or misrepresentation in the inducement,<sup>17</sup> the victim can bring an action in equity for rescission.<sup>18</sup> In the distant past, a judgment of rescission was a personal judgment ordering the current owner to re-convey or be held in contempt. Now, however, a judgment of rescission will effect the transfer of title back to the transferor. The law indicates that the title is subject to rescission by calling it a "voidable title" and distinguishes voidable title from a void title which is a nullity.<sup>19</sup>

But what happens when the voidable title is transferred? To illustrate the problem, let us start with A as the owner of the land. A was the victim of fraud in the inducement. B induced A to convey the land to him by fraud. Thus B's title is voidable. A could bring an action in equity for rescission against B and win, but A does not act quickly enough and consequently, B transfers the land to C. Is C's title voidable? It is if A could get rescission against C. How could A prevail against C if C did not commit the fraud? The only way is if C is substituted for B. And that was the traditional result. A could prevail against C unless C had an equitable defense. After all, rescission is an action in equity. If C was a bona fide purchaser for value, then A could not establish that the equities would balance in A's favor, so A would not prevail.

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14. BERGER & WILLIAMS, *supra* note 1, at 1204-55; BRUCE & ELY, *supra* note 1, at 498-516; CASNER & LEACH, *supra* note 1, at 771-82; CHASE, *supra* note 1, at 302-03; CRIBBET ET AL., *supra* note 1, at 1001-06; DUKEMINIER & KRIER, *supra* note 1, at 632-49; JOHNSON ET AL., *supra* note 1, at 593-632; KURTZ & HOVENCAMP, *supra* note 1, at 1068-73; NELSON ET AL., *supra* note 2, at 867-84; RABIN ET AL., *supra* note 1, at 985-1017; SINGER, *supra* note 1, at 961-69.

15. See BERGER & WILLIAMS, *supra* note 1, at 1204-55; BRUCE & ELY, *supra* note 1, at 515-16; DUKEMINIER & KRIER, *supra* note 1, at 643-44; NELSON ET AL., *supra* note 2, at 867-84.

16. *But see* CASNER & LEACH, *supra* note 1, at 775.

17. This is distinguished from fraud in the factum which would render the title void because of the lack of at least one of the requisites for transferring title.

18. Creditors also have a cause of action for rescission when the transfer was in fraud of the creditors.

19. See Beth Kaler, *An Overview of Void and Voidable Title*, 29 THE FUND CONCEPT 149 (Att'y's Title Ins. Fund) Oct. 1997.

The concept of voidable title is raised in some property casebooks;<sup>20</sup> but the discussion is brief. Texts for real estate transactions courses do not seem to provide coverage either. Perhaps property teachers are counting on the topic being covered in sales courses, but that may be wishful thinking. It is important to any lawyer dealing with land titles and should not be missed by property students.

#### E. Shelter

A person may take title free of an adverse claim or interest based on the protection of a recording act, the operation of equitable estoppel or other equitable principle. However, what happens when that land is transferred to a person who cannot satisfy the same requirements for protection? For example, let us start with A as the owner of land. A was induced to transfer title by B's fraud. B, as we discussed in the prior section, would get voidable title. If B transferred title to a bona fide purchaser (BFP), a good faith purchaser for value, and without notice, BFP's title would not be voidable. However, if BFP later gave the land to D as a gift, the situation would be different. D did not pay value for the land, so D is not a bona fide purchaser for value. The logic behind equity's protection of a bona fide purchase would not apply to protect D. Logically, A should be able to get rescission against D because D would not be harmed. After all, D started out with nothing, so he will not be in a worse position if he ends up with nothing. However, substitution would now save D. Since D acquired BFP's land, D is substituted for BFP and can raise any defense against A that BFP could have raised.<sup>21</sup> We may describe that by saying that D is sheltered<sup>22</sup> by the protections that apply to BFP who was his predecessor in title. In other words, D's title was improved by going through a "bfp filter."<sup>23</sup> There is, however, a limit to the application of the shelter

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20. See BERGER ET AL., *supra* note 1, at 547; BURKE ET AL., *supra* note 1, at 112; CHASE, *supra* note 1; CRIBBET ET AL., *supra* note 1, at 151; DUKEMINIER ET AL., *supra* note 1, at 153. These textbooks use *O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980), as a principal case. While its primary focus is adverse possession, it also introduces the concept of void and voidable title to personal property in the context of UCC § 2-403. *O'Keeffe*, 416 A.2d at 867-68.

21. See 4 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES (1952); RUFFORD G. PATTON AND CARROLL G. PATTON, 1 PATTON ON LAND TITLES § 15 (1957); 8 THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 4315 (1963).

22. See GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 340 (3d. ed. 1998). The term "shelter" is not widely used in real estate law to describe this phenomenon although it is used in this text. See generally ROBERT A. HILLMAN ET AL., COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE § 24.02 (1985). Shelter is a term that is used in commercial law.

23. See BURKE ET AL., *supra* note 1, at 626-32; NELSON ET AL., *supra* note 2, at 993; GRANT S. NELSON & DALE A. WHITMAN, CASES AND MATERIALS ON REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 228-29 (5th ed. 1998). These texts use the term "bfp filter."

doctrine: if B, the wrongdoer, reacquires the land, he will not be able to claim shelter under BFP's title because B is the one who committed the fraud.

If protection was claimed under a notice or race-notice recording act, the result should be the same. These recording acts protect a subsequent bona fide purchaser for value from a claim based on an unrecorded instrument. Let us take the following example: X owned land. Subsequently, X conveyed the land to Y, but Y failed to record. X later conveyed the very same land to BFP, a bona fide purchaser for value who acquired the land without notice of X's prior conveyance to Y. What would happen if BFP gave the land to Z? As a donee, Z is not a bona fide purchaser who is protected by the recording act. However, due to the shelter doctrine, Z would be able to claim the same protection for his title that Y could have claimed. Viewed alone, this might be attributed to courts interpreting a statute, or more rightly, to putting a judicial gloss on the statute in order to accomplish the legislative intent. But in context we can see that Z is substituted for his grantor Y because he is the transferee of Y's title. That this substitution is justified by the policy of effectuating the legislative intent does not make it any less an example of substitution.

The recording acts are covered in all first year property casebooks,<sup>24</sup> but few of them address shelter.<sup>25</sup> Only students who take an advanced real estate transactions course are likely to encounter it in a real estate context.<sup>26</sup> Shelter would seem to be a logical topic to cover in completing the discussion of title assurance. It is a concept that students will need in commercial law or real estate practice and it is not difficult to understand if presented as another example of substitution.

#### F. Tacking in Adverse Possession

Adverse possession is a common topic for the first-year course in property.<sup>27</sup> The traditional doctrine provides that a person who possesses land

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24. See BURKE ET AL., *supra* note 1, at 597-652; CASNER & LEACH, *supra* note 1, at 783-814; CHASE, *supra* note 1, at 682-98; CRIBBET ET AL., *supra* note 1, at 1169-1228; DUKEMINIER ET AL., *supra* note 1, at 651-710; KURTZ & HOVENCAMP, *supra* note 1, at 1126-50; JOHNSON ET AL., *supra* note 1, at 475-516; NELSON ET AL., *supra* note 2, at 972-1004; RABIN ET AL., *supra* note 1, at 1035-72; SINGER, *supra* note 1, at 943-59.

25. *But see* BURKE ET AL., *supra* note 1, at 626-32; NELSON ET AL., *supra* note 2, at 993. *See also* JOHNSON ET AL., *supra* note 1, at 491 n.1 (mentioning shelter, but without any explanation).

26. LEFCOE, *supra* note 1, at 340; NELSON ET AL., *supra* note 2, at 228-29.

27. *See* BERGER & WILLIAMS, *supra* note 1, at 499-560; BRUCE & ELY, *supra* note 1, at 563-85; BURKE ET AL., *supra* note 1, at 129-43; CASNER & LEACH, *supra* note 1, at 111-49; CHASE, *supra* note 1, at 57-123; CRIBBET ET AL., *supra* note 1, at 148-66; DUKEMINIER & KRIER, *supra* note 1, at 117-68; PAUL GOLDSTEIN, REAL PROPERTY 24-60 (1984). Shelter is also mentioned in first-year textbooks. *See* JOHNSON ET AL., *supra* note 1, at 44-68; KURTZ & HOVENCAMP, *supra* note 1, at 174-225; SINGER, *supra* note 1, at 135-69; NELSON ET AL., *supra* note 2, at 77-114.

he does not own may acquire title to it by satisfying certain requirements. The entry into possession of the land must be hostile to the owner's title, open and notorious, exclusive and under color of title; and that possession must be continuous for the statutory period.

What happens if the person who has taken possession of land in such a way that the time has begun to run transfers the land to another? Does the transferee have to begin the adverse possessing all over again? That was the traditional rule applied to adverse possession of personal property; but in real property the transferee was allowed to continue his predecessor's period of adverse possession. This was referred to as tacking periods of possession. In other words, the transferee is substituted for his transferor in regard to the adverse possession his predecessor began.

*Howard v. Kunto*<sup>28</sup> is used to illustrate tacking<sup>29</sup> because it presents an interesting wrinkle. Due to a surveying error, the transferor was not in possession of the lot described in the deed the transferor delivered to the transferee. He was actually in possession of the neighboring lot. The transferee did get possession of the house he thought he was buying, but his transferor did not own that house and his deed did not describe that house. The transferee tried to solve his dilemma by claiming title to the house by adverse possession. If he tacked his period of possession onto the period of possession of his predecessor, he would have title by adverse possession. However, his adversary claimed he could not tack periods because he was not in privity with his transferor. The deed described the neighboring lot, so it had nothing to do with the lot whose title he was claiming by adverse possession; how could the conveyance of nothing effect a substitution? The court struggled to come up with an explanation of why tacking should be allowed. It concluded that the adverse possessor did transfer possession, regardless of what the deed said. Possession does provide rights to the land. The court reasoned that the transfer of possession was sufficient to justify tacking.<sup>30</sup> In essence, the transfer of possession is sufficient to justify substitution of the transferee for the transferor for purposes of continuing the adverse possession. The critical factor was that some interest in land had been transferred so substitution occurred.

It is interesting to note that traditionally tacking was not allowed for the adverse possession of personal property.<sup>31</sup> Each new possession was treated as a new conversion of the property that also started the limitations period

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28. 477 P.2d 210 (Wash. Ct. App. 1970).

29. CRIBBET ET AL., *supra* note 1, at 1320; DUKEMINIER & KRIER, *supra* note 1, at 143.

30. The same point is made in *Carpenter v. Huffman*, 314 So. 2d 65 (Ala. 1975), used as a principal case in BRUCE & ELY, *supra* note 1, at 569.

31. This, *inter alia*, is revealed in *O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980), construed in BERGER & WILLIAMS, *supra* note 1, at 547; CRIBBET ET AL., *supra* note 1, at 151; DUKEMINIER & KRIER, *supra* note 1, at 153; KURTZ & HOVENCAMP, *supra* note 1, at 220 n.1; SINGER, *supra* note 1, at 179.



running again. That might be explained by the fact that adverse possession was a real property doctrine that was expanded to include personal property and that the expansion had not included all of the adverse possession doctrine.

### G. *Lis Pendens*

The doctrine of *lis pendens* is rarely explained in property casebooks,<sup>32</sup> but it is a common topic in real estate transactions books.<sup>33</sup> Under the doctrine, once litigation has commenced concerning the title to land, the transfer of the land subjects the transferee to the outcome of the litigation. Thus, if A brings a suit against B to quiet title to certain land, and B conveys the land to C, C's title is subject to the outcome of A's litigation against B. By acquiring B's interest, C is substituted for B as far as the outcome of the litigation goes. So if A wins, A's title is quieted against not only B, but also against C. Thus, by accepting title, C is substituted for B in the outcome of the litigation.

Of course, what makes the application of this doctrine so interesting and challenging is how it intersects with recording. Typically, the recording of a notice of *lis pendens* is required to invoke the doctrine in a case. Therefore, if A did not record a notice of *lis pendens* as required by statute, C may be protected by the recording act. In addition, C may be able to invoke the protection of equity if he can establish the elements of estoppel, meaning, good faith detrimental reliance on some act, or failure to act despite a duty to act, against A. Procedural due process may also provide C with a defense if C did not get notice and an opportunity to defend his title.

## III. WHEN AUTOMATIC SUBSTITUTION DOES NOT OCCUR

### A. *Easements*

An easement is created by the transfer, voluntary or not, of a nonpossessory interest in the land. Property casebooks generally provide extensive coverage of easements.<sup>34</sup> No examples have been found where the recipient of an easement is substituted for the transferor.

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32. See, e.g., BURKE ET AL., *supra* note 1, at 618-19. *Lis pendens* may be mentioned, without explanation in the context of the discussion of recording acts. See, e.g., DUKEMINIER & KRIER, *supra* note 1, at 652, 655 n.1.

33. See, e.g., LEFCOE, *supra* note 22, at 298-303; ROBIN MALLOY & JAMES SMITH, REAL ESTATE TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 316-18 (1998); NELSON & WHITMAN, *supra* note 23, at 595-600.

34. See, e.g., BURKE ET AL., *supra* note 1, at 705-44; CASNER & LEACH, *supra* note 1, at 937-1078; CHASE, *supra* note 1 at 745-840; CRIBBET ET AL., *supra* note 1, at 523-95; DUKEMINIER & KRIER, *supra* note 1, at 780-857; KURTZ & HOVENCAMP, *supra* note 1, at 584-686; JOHNSON ET AL., *supra* note 1, at 633-730; NELSON ET AL., *supra* note 2, at 688-771; RABIN ET AL., *supra* note 1, at 355-473; SINGER, *supra* note 1, at 285-323, 395-433.

However, the fact that the recipient of an easement is not substituted for the grantor does explain one of the oddities of property law, the grant-re-grant theory of easement by reservation. If A wanted to convey land to B but keep an easement, it would seem logical for A to simply convey the title except for the easement that A intended to keep, but that is not how things work under the common law. The traditional rule was that A would convey his entire title to B and B would grant back an easement to A, hence grant and re-grant. This might be explained by the avarice of medieval lawyers who chose to employ two documents to do what could be accomplished by one because that would enable them to charge more. But that would not explain why the theory continued even after two documents were no longer used because the grant-re-grant became an irrebuttable legal fiction.

Substitution provides a logical answer. If A was conveying the land, A would want to escape all the burdens associated with owning that land. That would be accomplished if B was completely substituted for A. If A did not convey all his title, A would still have some responsibility. If A wanted to have B substituted for all the burdens, then A would have to completely divest himself of the entire title. Conveying the easement back to A would not cause a substitution because A had only received an easement. Thus the term "reservation" to indicate an easement that the grantor had retained by the process of this grant and re-grant in contrast to merely an "exception" of the easement from the title being conveyed.

Grant-re-grant theory had significance when it came to interpreting the terms of the easement and in justifying the rule that an easement could not be reserved in favor of a third party, but that rule has been under attack for ages.<sup>35</sup> Once an important part of the discussion of easement creation, it may not even be mentioned in a modern property casebook. If discussed at all,<sup>36</sup> coverage is minimal and generally limited to the rule prohibiting the reservation of an easement in a third party.<sup>37</sup>

#### B. Leases

Substitution does not occur when a landlord leases land to a tenant. The essence of a lease is that the landlord has a continuing interest in the land despite having leased the land to the tenant. The tenant may have the right to present possession, but the landlord has more than a future interest. During the

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35. See, e.g., RESTATEMENT (FIRST) OF PROPERTY § 472 cmt. b (1944).

36. Courts have been inhospitable to such technical requirements which are seen as medieval in nature and likely to thwart the intent of the parties. The Third Restatement of Servitudes rejects such technicalities. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.6(2) (1998).

37. See, e.g., BRUCE & ELY, *supra* note 1, at 330; BURKE ET AL., *supra* note 1, at 706-07; CRIBBET ET AL., *supra* note 1, at 529-34; DUKEMINIER & KRIER, *supra* note 1, at 783-89; KURTZ & HOVENCAMP, *supra* note 1, at 586-92; NELSON ET AL., *supra* note 2, at 694-95; RABIN ET AL., *supra* note 1, at 376-77; SINGER, *supra* note 1, at 410-11.

term of the lease, the landlord is involved in a relationship with the tenant that is defined by doctrine and history, as well as by modern statutes. The study of leases seems to constitute a significant part of first-year Property based on the casebook coverages.<sup>38</sup>

### C. *Subleases*

The term sublease is used in distinction to an assignment of a lease interest. In the former substitution does not occur, while in the latter it does. The term assignment is used to indicate that the assignee will be substituted for the prior tenant while a subtenant will not. The subtenant holds of the tenant who holds of the landlord. So, the subtenant, or sublessee, is not substituted for the tenant in the relationship with the landlord. Consequently, there is no privity between the subtenant and the landlord. Each is in privity with the original tenant. Thus, the landlord cannot enforce against the subtenant any obligation that requires privity, such as an obligation based on a promise.

Whether a tenant's transfer is an assignment or a sublease is a product of the parties' intent. There is a presumption that a transfer of the entire leasehold effects an assignment and that a transfer of only part of the leasehold effects only a sublease, but that presumption is rebuttable. The casebooks generally make a point of the distinction between a sublease and an assignment.<sup>39</sup>

## IV. THE STATUTE OF QUIA EMPTORES

The Statute of Quia Emptores was enacted in England in 1290 to protect the incomes of the great lords and it is still considered part of the common law of almost every state of the United States.<sup>40</sup> It was enacted because clever landowners had learned to use subinfeudation to avoid the burdens of the feudal obligations that were owed to those lords. The statute provided:

38. See, e.g., BERGER & WILLIAMS, *supra* note 1, at 197-375; BURKE ET AL., *supra* note 1, at 341-482; CASNER & LEACH, *supra* note 1, at 377-556; CHASE, *supra* note 1, at 371-627; CRIBBET ET AL., *supra* note 1, at 409-522; DUKEMINIER & KRIER, *supra* note 1, at 419-546; JOHNSON ET AL., *supra* note 1, at 248-416; KURTZ & HOVENCAMP, *supra* note 1, at 427-583; RABIN ET AL., *supra* note 1, at 27-161; SINGER, *supra* note 1, at 761-901.

39. See, e.g., BRUCE & ELY, *supra* note 1, at 337-53; BURKE ET AL., *supra* note 1, at 402-30; CASNER & LEACH, *supra* note 1, at 527-56; CHASE, *supra* note 1, at 605-10; CRIBBET ET AL., *supra* note 1, at 510-22; DUKEMINIER & KRIER, *supra* note 1, at 470-71; GOLDSTEIN, *supra* note 27, at 465-84; JOHNSON ET AL., *supra* note 1, at 321-27; KURTZ & HOVENCAMP, *supra* note 1, at 524-45; NELSON ET AL., *supra* note 2, at 535-56 (1996); RABIN ET AL., *supra* note 1, at 117-39; SINGER, *supra* note 1, at 808-22.

40. Pennsylvania and South Carolina seem to be the only exceptions. AMERICAN LAW OF PROPERTY § 1.41 (A. James Casner ed., 1952).

A STATUTE of our LORD THE KING, concerning the Selling and Buying of Land.

FORASMUCH as Purchasers of Lands and Tenements of the Fees of great men and other Lords, have many times heretofore entered into their Fees, to the prejudice of the Lords, to whom the Freeholders of such great men have sold their Lands and Tenements to be holden in Fee of their Feoffors, and not of the Chief Lords of the Fees, whereby the same Chief Lords have many times lost their Escheats, Marriages, and Wardships of Lands and Tenements belonging to their Fees; which thing seemed very hard and extream unto those Lords and other great men, and moreover in this case manifest Disheritance: Our Lord the King, in his Parliament at Westminster after Easter, the eighteenth year of his Reign, that is to wit, in the Quinzime of Saint John Baptist, at the instance of the great Men of the Realm, granted, provided, and ordained, That from henceforth it shall be lawful to every Freeman to sell at his own pleasure his Lands and Tenements, or part of them; so that the Feoffee shall hold the same Lands or Tenements of the Chief Lord of the same Fee, by such Service and Customs as his Feoffor held before.

AND if he sell any part of such Lands or Tenements to any, the Feoffee shall immediately hold it of the Chief Lord, and shall be forthwith charged with the Services, for so much as pertaineth, or ought to pertain to the said Chief Lord for the same parcel, according to the Quantity of the Land or Tenement so sold: And so in this case the same part of the Service shall remain to the Lord, to be taken by the hands of the Feoffee, for the which he ought to be attendant and answerable to the same Chief Lord, according to the Quantity of the Land or Tenement sold, for the parcel of the Service so due.<sup>41</sup>

The statute prohibited any further subinfeudation, except by the king, but it recognized a freeholder's right to convey a fee title without having to first obtain the lord's permission. That is the point for which the statute is generally mentioned in modern property books, if it is mentioned at all.<sup>42</sup> However, the statute also provided that the transferee of the fee, or any part of it, would thereafter hold that title subject to the same obligations that the transferor had previously owed to his lord. In other words, the transferee would take the transferor's place in the relationship that the transferor had with his lord. The examples of substitution below go beyond the feudal obligations. But they seem to follow the pattern set by the statute and expand its effect to satisfy evolving needs.

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41. STATUTE OF WESTMINSTER THE THIRD (QUIA EMPTORES), 1290, c. 1, §§ 1-2.

42. See, e.g., BRUCE & ELY, *supra* note 1, at 114; CASNER & LEACH, *supra* note 1, at 259-60; DUKEMINIER & KRIER, *supra* note 1, at 194-95; KURTZ & HOVENCAMP, *supra* note 1, at 233-34.

It may very well be that it was with covenants running with the land that the expansion of *Quia Emptores* first began. In feudal times, the lord owed his tenant a duty of protection. In fact, obtaining this protection was such a motivation that some free tenants who owned land allodially would seek out a prospective lord, convey their land to the lord only to have it conveyed back subject to a duty of service and the feudal incidents. They had thereby taken on obligations. But it was worthwhile because they had obtained the protection of a powerful lord who would now warrant and protect their land ownership. The tenant's successor, by conveyance or inheritance, would be entitled to the same protection because he was substituted for the tenant in the feudal relationship with the lord by the Statute of *Quia Emptores*. When title warranties based upon covenant, rather than feudal relationships, evolved, the model of protection extending to successors in title continued to be used. Thus the successor in title is substituted for the grantee regarding the benefits of the future title covenants found in a modern warranty deed.

That model also fits with other real covenants that create an obligation that is analogous to the feudal obligations that the landowner owed to his lord. Such covenants would, by definition, touch and concern the land. Of course, the creation of the covenant required satisfying the contract requirements of a promise that the parties intended to bind them and their successors. Since the covenant involved land, the Statute of Frauds required a writing signed by the obligor. Following the model of the Statute of *Quia Emptores*, the successor to the obligor in fee ownership would then be substituted for the original obligor. That would put him into privity with the other party to the covenant, called privity of estate to distinguish it from the privity of contract that arose between the original parties to the contract.

Why should *Quia Emptores* be the basis for substitution regarding equitable claims or interests? After all, *Quia Emptores* was a statute. Statutes create law. Why should this statute have any impact on equity? Traditionally, equity operates by applying maxims, one of which is "equity follows the law."<sup>43</sup> Experience reveals that equity follows the law only until there is an equitable reason not to. So substitution modeled on the mandate of the Statute of *Quia Emptores* should be the norm. Substitution of the transferee causes the title to be subject to outstanding equities, such as equitable servitudes, equitable liens and rescission.

Focus on the statute also explains why leases, easements and adverse possession of personal property were different. The Statute of *Quia Emptores*, by its express terms, applied only to fee estates. Adverse possession of personal property did not even involve land, so it could not, by any stretch of the imagination, fit within the statute to make tacking occur. Nor did the statute reach easements or leaseholds because they were not freeholds.

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43. *E.g.*, AM. JUR. 2D *Equity* §§ 113-14 (1996).

Reserving an easement by grant-re-grant would take advantage of the way the statute operated. The conveyance of the fee would effect a substitution, but the re-grant of the easement would not. These areas worked well outside the operation of the statute, and apparently there has been no pressure to stretch the statute to cover them.

Quite the contrary, the very point of a lease was to avoid substitution. Consequently, a landowner can still subinfeudate, meaning, create an ongoing relationship based on what is still essentially a feudal relationship. While the modern landlord-tenant relationship has certainly evolved, it is still basically a tenurial relationship as revealed by our choice of terms to identify these parties. That explains the modern tension of rights and duties between the landlord and tenant.

Because the statute does not apply to leases, it does not automatically produce substitution when a tenant transfers his lease. Substitution will only occur if that is what the parties intend. Where substitution does occur, we say the lease was assigned, rather than subleased because that indicates substitution did not occur.

In a sublease, the transferee becomes the subtenant of the tenant who retains the ongoing lease relationship with the landlord. Essentially, this situation would constitute subinfeudation rather than substitution,<sup>44</sup> because a tenant who has transferred his entire leasehold generally has no reason to want to stay involved with his transferee, while a tenant who has a reversionary interest would want the power to protect the interest that being the landlord of his transferee might provide. In the absence of an expression of intent, a presumption has evolved, but that is based on probable intent rather than the statute, meaning, if the tenant transfers its entire interest, there is substitution.

Of course, the reason substitution still occurs is not because it is mandated by a statute passed in England over seven hundred years ago. The statute merely provided a useful model for solving property problems, so it was used and even expanded. If substitution had not been useful, it would have vanished long ago. Whether the statute was the first appearance of automatic substitution is unknown, but clearly it was not the norm or there would have been no need for the statute.<sup>45</sup> Identifying that model will help law students understand the workings of property law.

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44. The distinction between substitution and subinfeudation is very similar to the distinction between assignment and subleasing in landlord-tenant law. *DUKEMINIER & KRIER, supra* note 1, at 194 n.8.

45. Establishing with certainty that substitution began with the Statute of *Quia Emptores* is beyond the scope of this paper. The author has found no evidence that substitution existed before the Statute but the author does not claim to be an historian. However, the author is certainly curious about earlier examples of substitution. If anyone has any leads to earlier examples of substitution, please contact the author at [brownr@nsu.law.nova.edu](mailto:brownr@nsu.law.nova.edu).

## VI. CONCLUSION

At most law schools today, the first course in Property lasts only one semester and it is as far in the real estate curriculum as many students ever get. Students should leave their Property course alert to the possibility that substitution occurs in real estate law and may occur in other areas, such as commercial law. Some of the examples of substitution are covered in the books used for Property courses and probably most courses already cover some of those examples. But students would find those examples easier to understand if they could see them in context as manifestations of a recurring phenomenon that is grounded in history.<sup>46</sup> The more examples of the phenomenon covered, the more understandable substitution should be. Moreover, they should have a better understanding of how real estate law operates.

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46. The time needed to draw the connection between the examples should be minimal. The time needed to cover those examples not currently covered in the basic course, such as liens, shelter and *lis pendens*, should not be too great. However, it is clear that adding anything to the course probably means that something else will get left out or minimized.