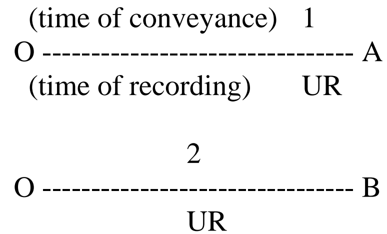
I. The Plan

A. The Common Law Background

Transferring title to real estate by written instrument was common in the Roman Empire. While that practice was adopted in Continental Europe upon Roman occupation, the practice did not immediately affect English land law. Instead, in England, possession of land was the only evidence of title, and proof of a transfer of title existed initially only in the memory of witnesses present at the time when the change of possession occurred. The title change resulted from a symbolic ceremony known as the "livery of seisin". This was a ceremony consisting of a symbolic delivery of the possession of the land by the grantor, or "feoffor," to the grantee, or "feoffee". The parties, with their witnesses, would go upon the land and the feoffor would give to the feoffee a handful of earth, a doorknob or some other symbolic object and deliver it to the feoffee. If the ceremony was conducted on the land itself, it was called a "livery in deed". If the ceremony was conducted at a location other than upon the land actually conveyed, usually when the parties were in sight of the land to be conveyed, the ceremony was called a "livery in law". No writing was necessary to give evidence to livery of seisin, although writings became customary in very early times. Later, livery of seisin was usually accompanied by a written deed which identified the limitations upon the estate granted. However, such a deed was only an evidence of title and not a conveyance itself. A writing was not required to convey title to land until statutes of frauds were adopted. Until that time, anyone in possession of the land could, by livery of seisin, convey the land. Patton, *Patton on Land Titles*, § 3 (1957) (hereinafter cited as Patton).

As the common law developed, the distinction between legal title and equitable title or equitable right originated. Legal title was that title owned by the freehold owner. Equitable title was a right owned by a non-freehold owner and equitable right was the right of the owner to obtain an equitable title by obtaining the proper judgment. Prior to the creation of recording statutes, in general, transfers of the legal title to land ranked in priority, as between themselves, according to the maxim "prior in tempore potior est in jure" or "first in time is first in right", such

as:



Thus, a landowner (O) who conveys a legal estate to another person (A), but who subsequently attempts to convey the same legal estate (or less) to another person (B), necessarily conveys nothing because O has nothing left to convey. *My notes from Real Property class at Baylor University School of Law (1969-1972).*

Also, prior to the recording statutes, a grantee who received a conveyance of the legal title, for value and without notice of a prior equity (a prior claim enforceable only in equity), took free of that equity. This concept was and still is called the "Equitable Doctrine of Bona Fide Purchaser" ("BFP"). But if the same person had notice of the prior equity, even though he paid value, he received the legal title subject to the prior equity. *Id.* Examples of equitable interests, existing both at common law and at present, are:

1. Parties to a contract to sell;
2. Parties to resulting or constructive trusts, which would include purchase money vendor's liens;
3. Easements by prescription and easements by necessity;
4. Fraudulent deeds (usually to protect the grantor from creditors); and
5. Title by descent;

which claims (except for the first) are usually not evidenced by recorded instruments.

Conflicting legal and equitable claims were generally resolved on the following basis:

1. Legal claim v. legal claim - first in time wins, unless estopped;
2. Equitable claim v. equitable claim - first in time wins, unless estopped;
3. Legal claim v. equitable claim - legal claim wins if it is the first conveyance; and
4. Equitable claim v. legal claim - the legal claim wins where it is the second conveyance if the legal owner is a BFP. *Id.*

The first recording act in England was the Statute of Enrollments (or Uses) (1536). Its purpose was to make a public record of all bargain and sale deeds conveying a freehold interest. In the late 1600's, statutes were adopted whose purpose was to prevent fraud in connection with conveyances. Unrecorded deeds were declared to be fraudulent and void against subsequent purchasers or mortgagees who paid a valuable consideration. The statutes were interpreted narrowly and they were not interpreted as providing "constructive notice" as we understand the concept. *Id.*

Concluding the discussion of the English common law, the most important rules concerning the priority of successive conveyances of title to the same land were:

1. The first in time was first in right; and
2. A grantor can transfer no more than he owns.

B. The Statutory Purposes

The present system of recording instruments affecting title to land was established during the colonial period of this country and it contained some new concepts. One of the first statutes that contained the elements of most modern recording statutes was adopted in 1640 by the State of Massachusetts and reads as follows:

> "For avoyding all fraudulent conveyances, and that every man may know what estate or interest other men may have in any houses, lands or other hereditaments they are to deale in, it is therefore ordered, that after the end of this month, no mortgage, bargaine, sale, or graunt hereafter to be made of any houses, lands, rents or other hereditaments, shall bee of force against any other person except the grauntor and his heirs, unless the same be recorded as is hereafter expressed: And that no such bargaine, sale, or graunt already made in way of mortgage where the grauntor remaines in possession, shall be of force against any other but the grauntor or his heires, except the same shall bee entered as hereafter expressed, within one month after the end of this Courte, if the party bee within this jurisdiction, or else within 3 months after hee shall returne. And if any such grauntor, being required by the grauntee to make an acknowledgement of any graunt by him made, shall refuse so to do, it shall bee in the power of any magistrate to send for the party so refusing, and commit him to prison without baile or mayneprize, until hee shall acknowledge the same....
>
> "And it is not intended that the whole bargaine, sale, etc., shall bee entered, but only the names of the grauntor and grauntee, the thing and estate graunted and the date." Powell, *The Law of Real Property* (1982), § 904 (hereinafter cited as Powell). (emphasis added)

Some of the principles originally contained in the earliest recording statutes that have continued to the present are:

1. An instrument is fully operative between its parties without recordation;
2. The essential features of a transaction are made a matter of public record;

3. Priority is determined by recordation (which is a simpler way of saying that the recording acts give a grantor the power to divest the title of a first purchaser if the first purchaser is negligent and does not record); Aigler, *The Operation of the Recording Acts*, 22 Mich. L. Rev. 405 (1924); and

4. Acknowledgements of an instrument are required for recordation. Powell, *supra*.

Patton summarizes the purposes of the recording acts in the following manner:

1. The original purpose - to secure a pr

2. granting priority of right to the purchaser who is

pose - to protect subsequent purchasers against sec

n of which they would otherwise be prejudiced; and

3.

e history of title to land, so that anyone needing

ested in title and the encumbrances against it.

In other words, restated in the same sequence, the recording acts establish:

1. A statutory rule of priority among conveyances;

2. An

of "notice"; and

3. A system of semi-public records wh

gnity and evidentiary value that attaches to public

Krey, Inc., 617 P.2d 1188 (Colo. 1980); *Luthi v. Ev*

Sanchez, 83 N.M. 358, 492 P.2d 1400 (N.M. 1971).

Professor Olds identifies two practical results of the recording act, which are:

1. The acts <u>benefit the first purchaser</u> in that the f

rding); and

2. The recording acts benefit the seller b

arket value for conveying his property because he i

risk of loss because the seller can now demonstrat

ing Act, 8 S.W.L.Jour. 36 (1954). (hereinafter refe

We should not forget that both the necessity and the effect of recordation rests solely on statute. *State Ex Rel State Highway Comm. v. Meeker*, 75 Wyo. 210, 294 P.2d 603; *Dame v. Maliski*, 80 Wyo. 150, 340 P.2d 205 (1959). This article concerns the construction and effect of the recording acts of the 14 states previously identified. The recording act of each state is summarized in Exhibit A.

C. The Statutory Definitions

The recording statutes refer to certain categories of persons that benefit from the statute. The first beneficiary is a "purchaser". Usually, a purchaser is a person who pays present consideration to acquire an interest in land from the record owner, the owner's estate, or the owner's heirs or devisees, *Hallett v. Alexander*, 50 Colo. 37, 114 P. 490 (1911) such as:

1. The buyer of the legal title;

2. A mortgagee or other creditor (many states treat voluntary lien creditors the same as purchasers because they delivered present value); *Wight v. Chandler*, 264 F.2d 249 (Ca. Wyo. 1959) (Canceling pre-existing debts sufficient consideration to constitute one a purchaser for value); *Reserve Petroleum Co. v. Hutcheson*, 254 S.W.2d 802 (Tex.Civ.App.-Amarillo 1952, writ ref'd. n.r.e.), 2 O&GR 366.
3. An assignee of a mortgagee or of another legal interest; *Fannin Investment & Development Co. v. Neuhaus*, 427 S.W.2d 82 (Tex.Civ.App.-Houston (14th Dist.) 1968 - no writ).
4. The buyer at an execution or other forced sale, if he pays consideration in addition to crediting his lien against the property. *Ayres v. Duprey*, 27 Tex. 593 (1864).

As can be discerned from a quick review of Exhibit A, most recording acts now cover all instruments "affecting" title to land or instruments "conveying" real estate so that the original statutes, which contained narrow definitions of purchasers, creditors or encumbrancers that benefited from the act have been replaced. *Riverview State Bank v. Ernest*, (CA 10 Kan.) 198 F2d 876, cert. den. 344 U.S. 892, 97 L.Ed. 690, 73 S.Ct. 212, 34 A.L.R. 2d 892; also see 26 A.L.R. 1546.

Under a tract index system, "subsequent purchaser" means a subsequent purchaser of the same land. Under the usual grantor-grantee index system, it means a subsequent purchaser of the same land tracing title through a common grantor. While the courts may talk about the fact that the recorded instrument is "not in the purchaser's chain of title", the most apparent reason for said holding is that it is unreasonable to require a search in a grantor-grantee jurisdiction of every person identified in the indices. Philbrick, *Limits of Record Search and therefore of Notice*, 93 U. of Penn. L. Rev. 125 (1944).

For a purchaser to have paid "consideration", he must have paid more than a nominal amount but not necessarily fair market value for the property interest involved. Thus, consideration requires more than a promise to pay and more than a recital in the instrument of value received when no more than a nominal amount was tendered. *Maxfield v. Pure Oil Co.*, 91 S.W.2d 892 (Tex.Civ.App.-Dallas 1936, writ

dism. w.o.j.); also see 42 A.L.R.2d 1088. Many statutes require "value", which means consideration that has been performed. A mere promise would be consideration but a mere promise is not value until put in the form of a negotiable instrument. Performance of promises of almost any character can be value, except that a release of or security for an existing debt is not value in land trans- actions. Also, change of position by extension of time of payment or release of other security or sureties may be value. *McCamey v. Thorp*, 61 Tex. 648 (1884); *Reserve Petroleum Co. v. Hutcheson*, *supra*. The requirement that the consideration or value be "present" effectively excludes, in some states, the following persons from the recognized class of "purchasers":

1. Donees;
2. Heirs and devisees; *Hallett v.*

3.

541. Creditors, either general or judgment credito

1017 (1936); *Campbell v. Keys*, 130 Mich. 127, 89 N.

t v. Aldridge, 528 S.W.2d 341 (Tex.Civ.App.-Amarill

en creditor).

4. Assignees for the benefit of creditor

5. . Persons who have filed a lis pendens; *Sparks v. T*

Civil Procedure Code, § 409.

6. Mortgagees, where the

serve Petroleum Co. v. Hutcheson, supra; Dame v. Mi

a, see *Luschen v. Stanton*, 192 Okla. 454, 137 P.2d

Additionally, courts usually do not classify the following persons as "purchasers":

1. The grantee of a stranger to the record title; *Board of County Commissioners v. Adams*, 166 Kan. 593, 203 P.2d 237 (1949).
2. A person claiming through an unrecorded conveyance; *Bennett v. Romos*, 252 S.W.2d 442 (Tex. 1952).
3. Owners of equitable interests, such as:
   a. heirs of a spouse; *Strong v. Strong*, 128 Tex. 470, 98 S.W.2d 346 (1936), 109 A.L.R. 739.
   b. resulting and constructing trusts; *Johnson v. Darr*, 114 Tex. 516, 272 S.W. 1098 (1925); *Roeser & Pendleton, Inc. v. Stanolind Oil & Gas Co.*, 138 S.W.2d 250 (Tex.Civ.App.-Texarkana 1940, writ ref'd.).
   c. mortgage in form of a deed absolute; *James v. Davis*, 150 S.W.2d 326 (Tex.Civ.App.-Galveston 1941, writ dism.); *Rincon Inv. Co. v. White*, 154 S.W.2d 1052 (Tex.Civ.App.-San Antonio 1932, writ dism. w.o.j.); and
   d. adverse possession. *MacGregor v. Thompson*, 7

Tex. Civ. App. 32, 26 S.W. 649, (1894); *Chandler v. Stewart*, 90 S.W.2d 590 (Tex.Civ.App.-Texarkana 1935, writ dism. w.o.j.); also see 9 A.L.R.2d 850.

Since equitable interests are not recordable, protection to innocent purchasers or creditors rests on equitable principles, rather than recording laws. *Scull v. Davis*, 434 S.W.2d 391 (Tex.Civ.App.-El Paso 1968, writ ref'd. n.r.e.).

Being a bona fide subsequent purchaser is an affirmative defense which must be raised by appropriate pleadings. The essential elements which must be pleaded and proved by the subsequent purchaser are:

1. Payment of a valuable consideration;
2. Good faith (not intending to take an unfair advantage of a third person); and
3. The absence of notice, either actual or constructive, of the outstanding rights of others. *Ryle v. Davidson*, 102 Tex. 227, 115 S.W. 28 (Tex. 1909). *Soppe v. Breed*, 504 P.2d 1077 (Wyo. 1973); see 33 A.L.R. 2d 1322.
4. Timely recording (if in a race-notice jurisdiction).

Most states hold that Elements 1-3 must be proven by evidence outside the recitals in the conveyance itself. *Davidson v. Ryle*, 103 Tex. 208, 124 S.W. 616 (1910); *Raposa v. Johnson*, 693 S.W.2d 43 (Tex. App. Fort Worth (2nd Dist.) 1985, writ ref'd. n.r.e.).

If any of these elements is not supported by adequate pleading and evidence, then defendant's proof fails. This is the rule in most states. However, those states which have a "race" statute do not consider whether or not a subsequent purchaser is a bona fide purchaser because the only question is which purchaser recorded first. In other words, they are not concerned with which of the competing purchasers had notice of anything.

Some states reverse the burden of proof and require the first purchaser to show that the second purchaser acquired after receiving notice. *Bell v. Pleasant*, 145 Cal. 410, 78 P. 957; *Martin v. Carlisle*, 46 Okla. 268, 148 P. 833. *Hunter v. Dixon*, 241 Ark. 725, 410 S.W.2d 389 (Ark. 1966); *Horney v. Buffenbarger*, 169 Kan. 342, 219 P.2d 345 (1950). The difference in emphasis by the courts appears to be based upon the differences in the recording acts involved. Where the statute provides that unrecorded instruments are void as to subsequent purchasers in good faith for valuable consideration, the theory is that conveyances are presumed valid, making an invalid conveyance the exception. Therefore, the burden of proving that the first purchaser falls within the exception is on the second purchaser. The decisions which place the burden upon the first purchaser are from states which have a recording act which creates a statutory presumption that a conveyance shall not be valid as against any persons except the grantor, his heirs or devisees and persons having actual notice of it, unless it is recorded. Thus, as for these states, the first purchaser has the burden to prove that he has satisfied the statutory requirement. *Id*. See Exhibit B.

There are two arguments to be made in support of the conclusion of placing the burden of proof upon the second purchaser. First, it avoids making a purchaser prove a negative (as would be the case in the second instance) and it requires proof of the facts from the party most likely to have knowledge of the relevant facts, the second purchaser. Kruse v. Conklin, 82 Kan. 358, 108 P. 856.

Most, but not all, recording acts cover creditors or mortgagees. The definition of "creditor" varies considerably among the states. Usually, a general creditor (one who owns no lien against the property) does not benefit by the recording act. In most states, the recording act applies only to creditors who have obtained a lien, voluntarily or by judicial proceedings such as, an abstract of judgment or levying execution or attachment. In these states, a creditor who obtains a voluntary lien for value will usually be considered the same as a purchaser under the statute. *Paris Grocer Co. v. Burks*, 101 Tex.

106, 105 S.W. 174 (1907); contra, see *Ingram v. Ingram*, 214 Kan. 415, 521 P.2d 254 (1974) (judgment creditors and execution purchasers are not covered by the statute). The treatment of creditors by the different jurisdictions under survey is so diverse that a more detailed coverage of this topic is not within the scope of this paper.

II. The Pattern (Types of Recording Statutes)

The first English and American recording acts provided that the sole test of priority between competing purchasers was: who recorded first. The purpose of these acts was to simplify the resolution of competing interests by eliminating the equitable doctrine of bona fide purchase. However, the equity courts soon began to hold that a purchaser with notice of a prior conveyance committed a fraud against a first purchaser and thus the subsequent purchaser, who may have acquired legal title, was held to be a constructive trustee holding title for the first purchaser. Over time, the certainty of determining priority based upon date of recording was replaced by the uncertainty of permitting the introduction of parol evidence into the resolution process. The English Courts argued that they would not permit a statute intended to prevent fraud to be used itself as a means for committing fraud. Patton, *supra*, § 7.

Recording statutes have evolved into three different types or classifications, the differences being a different emphasis placed upon the concept of "notice". A summary of these classifications are:

1. "Race" - Gives priority to the first grantee to record;
2. "Notice" - Gives priority to the grantee who acquires an interest without notice of a prior transfer; and
3. "Race-Notice" - Gives priority to the grantee who acquires an interest without notice of a prior conveyance only if the subsequent grantee records first. *Id*.

Exhibit A contains the abbreviated recording statutes for all 14 states surveyed.

A. The Race Statutes

The race statutes represent most clearly the original idea that recording is the final act in the process of transferring title and that recording is the controlling factor in deciding, as between conflicting parties, the date of transfer and the party to whom title actually passes. An example of a race statute is the Louisiana statute creating the Public Records Doctrine which is principally contained in La.Rs. 9:2721-9:2759 which I summarize as follows:

La.Rs.9:2721. Filing in Office of Parish Recorder

"No sale, contract, counter letter, lien, mortgage, judgment, surface lease, oil, gas or mineral lease or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the Office the Parish Recorder of the parish where the land or immovable is situated; and neither secret claims or equities nor other matters outside the public record shall be binding on or affect such third parties." (Adopted 1950.) (emphasis added)

The "race" type statute has been adopted in Arkansas (as to mortgages only) and in North Carolina and Louisiana. Ark.Stat.Ann., 16-101 et seq. La.Rev.Stat.Ann., 9:2721. The only test of priority between successive grantees of the same property from a common grantor is the priority of recording. This type of statute is frequently referred to as the "race to the courthouse" statute. The theory of this approach is that the purchaser who records first wins, regardless of his constructive or actual knowledge of earlier unrecorded conveyances. *Craftsmen Homes, Inc. v. Hollywood Door Co., Inc.*, 583 So.2d 879 (La. App. 1 Cir. 1991). As stated in a recent Louisiana case concerning an oil and gas party, the "Louisiana Public Record Doctrine" provides that non-recorded claims are null and void as to third parties in spite of actual knowledge by such third party of unrecorded claims and that one dealing with immovable property is required to look to the public record. See LSA-CC Art. 2266; LSA-RS9:2721; *Meares v. Pioneer Production Corp.*, 382 So.2d 1009, (La. App. 1980) writ ref'd. at 392 So.2d 667.

The exceptions to this rule appear to be:

1. Subsequent purchasers cannot use fraud to delay the recording of the earlier instrument; and Patterson v. Mills, 121 N.C. 258, 28 S.E. 368 (1897).
2. The title of a purchaser or mortgagee is subject to any prior interest identified in the conveyance to the purchaser or mortgagee. Avery County Bank v. Smith, 186 N.C. 65, 120 S.E. 215 (1923).

B. The Notice Statutes

An example of a "notice" type statute is the following from New Mexico:

N.M. Stat. Ann. 14-9-1 (Recording Deeds, Mortgages and Patents)

All deeds, mortgages, United States patents and other writings affecting the title to real estate, shall be recorded in the office of the county clerk of the county or counties in which the real estate affected thereby is situated. (Adopted 1886) (emphasis added)

N.M. Stat. Ann. 14-9-2 (Constructive Notice of Contents)

Such records shall be notice to all the world of the existence and contents of the instrument so recorded from the time of recording. (Adopted 1886.) (emphasis added)

N.M. Stat. Ann. 14-9-3 (Unrecorded Instruments; Effect)

No deed, mortgage or other instrument in writing not recorded in accordance with § 14-9-1 N.M.S.A. 1978 shall affect the title or rights to, in any real estate, of any purchaser, mortgagee in good faith or judgment lien creditor, without knowledge of the existence of such unrecorded instruments. Possession alone based on an unrecorded Executory Real Estate Contract shall not be construed against any subsequent purchaser, mortgagee in good faith or judgment lien creditor either to impute knowledge of or to impose the duty to inquire about the possession or the provisions of the instruments. (Amended 1990.) (emphasis added)

The "notice" type of statute is the second most popular type of recording act. *Colo.Rev.Stat.*, No. 38-35-109.

Kan.Stat.Ann., No. 58-2221 to 58-2223; *Texas Property Code*, § 13.001; *N.M. Stat. Ann*. 14-9-3. The "notice" type statute grants priority to a subsequent grantee only if, at the time of its delivery, the grantee has no notice of the prior conveyance. The critical fact is that the delivery to the second grantee be prior to the recording by the first grantee. *Page v. Fees-Krey, Inc., supra.* This type of statute protects a subsequent purchaser who takes without notice regardless of when he (the subsequent purchaser) records, or whether he (the subsequent purchaser) ever records his own conveyance. *Brown v. Nelms*, 86 Ark. 368, 112 S.W. 373 (1908).

C. The Race-Notice Statutes

There are some states that have what appears to be a notice statute which the courts have interpreted in a "race-notice" fashion. Two examples are Colorado and Oklahoma. See *Page v. Fees-Krey, Inc., supra*; *Eastwood v. Shedd*, 166 Colo. 1936, 442 P.2d 423 (1968); *Plew v. Colorado Lumber Products*, 28 Colo.App. 557, 481 P.2d 127 (1970); for a thorough discussion of the problem see *The Colorado Recording Act: Race-Notice or Pure Notice*, 51 Denver L.J. 115 (1974); *Williams v. McCann*, 385 P.2d 788 (Okla. 1963)

An example of a "race-notice" statute is Utah Code Annotated § 57-3-3 which provides that:

> Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if:
>
> (1) The subsequent purchaser purchased the property in good faith and for a valuable consideration; and
>
> (2) The subse

chaser's

The "race-notice" type recording statute combines the elements of the "race" and the "notice" type statutes. A "race-notice" type statute, where a common grantor sells the same property interest to two persons, gives priority to the first to record, even if the purchaser has notice of the prior or subsequent conveyance. Other examples of race-notice statutes are:

California: Cal. Civ. Code § 1213-1213.
Michigan: MCLA 565.29 and MSA 26.547.
Montana: Mont. Code Ann. § 70-21-302.
New Mexico: N.M. Stat. Ann. 14-9-2 and 14-9-3.
Utah: Utah Code Ann., § 57-3-3.
Wyoming: Wyo. Stat. Ann. § 34-1-120.

For a more detailed discussion of how landmen and attorneys in the 14 states surveyed relate to their recording acts, see Part II, Chapter VI, *The Practice*, *infra*. I have prepared as Exhibit B ("The Smart Chart") a comparison of interesting facts relating to the states surveyed and their classification by recording acts.

III. The Procedure

A. Instruments not Required to be Recorded

All recording acts examined require that an instrument which is not recorded in the county records of the proper county is void as to subsequent purchasers for value. Obviously, the instrument or conveyance must be in writing in order to be recorded. Thus, all recording acts require, among other things, that the instrument conveying land or affecting land be in writing. The following interests, however, are usually not in writing. Therefore, they are not recordable and thus not subject to the penalty of the recording act. The following property interests qualify as usually arising by operation of law,

not by agreement of the parties:

1. Adverse possession;
2. Community property interest of a spouse who is not a grantee in the deed;
3. Resulting and constructive trusts;
4. Title by descent;
5. Easement by prescription and easement by necessity;
6. Vendor's lien;
7. Other equitable liens;
8. Right of reformation or rescission.

One of the basic tenets of the recording act is that a purchaser must be able to verify, by a reasonable inspection of the public records, that the records themselves will disclose a competing property interest. *Bowles v. Belt,* 159 S.W. 885 (Tex.Civ.App.-Amarillo 1913, writ ref'd.); *Taylor v. Scott*, 685 S.W.2d 160 (Ark. 1985); see A.L.R.2d 577.

Some of the non-written interests are legal and some are equitable. The interests that will usually be legal are:

1. Easements by prescription or easements by necessity;
2. Adverse possession, and
3. Title by descent.

The remaining interests are usually equitable. *Houston Oil Co. v. Olive Sternenberg & Co.*, 222 S.W. 534 (Tex.Com.App. 1920) and *Texas Lumber Manufacturing Co. v. Branch*, 60 Fed. 201 (5th Cir. 1894). This is important to remember because, if a conflict cannot be resolved by application of the recording acts, then the common law equitable doctrine of BFP becomes the method utilized to obtain a solution.

Before illustrating how the recording statutes operate, we need to understand that there are some types of instruments that do not receive the benefit of either the recording acts or the equitable doctrine of BFP. The following instruments are either void or voidable:

1. Forgery - a forged instrument is void and is a nullity, as if it never existed. All persons claiming under a forged instrument own nothing, no matter how innocent they were or how much consideration they paid. Usually, possession under a forged deed is not considered possession pursuant to the statutes of limitation. *Texas Osage Cooperative Royalty Pool, Inc. v. Cruze*, 191 S.W.2d 47 (Tex.Civ.App.-Austin 1945, no writ; *Nobbs v. Lehigh*, 655 P.2d 547 (Okla. 1982), 31 A.L.R. 4th 1; *McWhorter's Estate v. Wooten*, 593 S.W.2d 366, affirmed 622 S.W.2d 844 (Tex. 1981); *Rasmussen v. Olsen*, 583 P.2d 50 (Utah 1978).
2. Mistaken identity - the execution of an

instrument by the grantor having the same name as the owner of the land conveys no interest and is void. *Blocker v. Davis*, 241 S.W.2d 698 (Tex.Civ.App.-Fort Worth 1951, writ ref'd. n.r.e.).

3. Agent without authority - an instrument executed by a person purporting to be an agent but not authorized pursuant to a written instrument is treated the same as a forgery. *Woodward v. Ortiz*, 150 Tex. 75, 237 S.W.2d 286 (1951).
4. Minority - an instrument executed by a minor is voidable by him until either a statutorily determined time or a reasonable time after the minor reaches majority. *Prudential Building & Loan Assn. v. Shaw*, 26 S.W.2d 168 (Tex.Com.App. 1936).
5. Incapacity - an instrument executed by a person lacking legal capacity, such as a minor, or a person lacking mental capacity is voidable until the minor becomes an adult or until the incompetent person's mental capacity is restored. *Neill v. Pure Oil Company*, 101 S.W.2d 402 (Tex.Civ.App.-Dallas 1937, writ ref'd.), 3 O&GR 419.

The rules that state how these void or voidable interests are treated vary greatly from state to state and thus are not treated in detail here.

B. Constructive Notice

1. From Proper Recording

Most courts agree that there are two types of legally constituted "notice", constructive and actual. However, not all courts agree on the classifications of notice or the titles of notice. Usually, the term "constructive notice" is limited to that notice provided by county public records and means that a purchaser or creditor is conclusively presumed to know, as a matter of law, all the facts contained in the properly recorded instruments within his "chain of title". Most courts extend this legally imposed knowledge to instruments which are referred to in recorded instruments, but which themselves are not recorded. I will discuss this latter issue *infra*.

To be properly recorded, an instrument related to real property must be eligible for recording. To be eligible for recording, the usual requirements are that an instrument must be signed and:

1. Acknowledged before and certified by an officer authorized to take acknowledgments; or
2. Acknowledged by the Grantor in the presence of two or more credible subscribing witnesses. *Texas Property Code*, §12.001(b); 59 A.L.R.2d 1299.

An instrument that is not acknowledged or proved for record as required by law is not entitled to be recorded, except in Colorado. *Fresno Canal & Irrig. Co. v. Rowell*, 80 Cal. 114, 22 P. 53 (1889); *Nordman v. Rau*, 86 Kan. 19, 119 P. 351 (1911); *Wyatt v. Miller*, 255 Ark. 304, 500 S.W.2d 590 (1973); Colo. Rev. Stat. § 38-35-106. If an unrecordable instrument is recorded, it does not constitute constructive notice. *Sowers v. Peterson*, 59 Tex. 216 (1883); *Sweeney v. Vasquez*, 229 S.W.2d 96, (Tex.Civ.App.- San Antonio 1950, writ ref'd.); *Oklahoma State Bank of Ada v. Crumley*, 146 Okla. 12, 293 P. 218 (1930), 59 A.L.R. 2d 1309; *Torgenson v. Connelly*, 348 P.2d 63 (Wyo. 1959); *Lowe v. Sanger*, 478 P.2d 60 (Wyo. 1970).

Usually, a clerk may refuse to accept an instrument for record until the statutory recording fees are paid or tendered. When the clerk makes such a refusal, the instrument will not be deemed filed of record until the statutory fees are paid. *Texas Local Govt. Code*, Sec. 118.001(a)(2), 118.013 and 118.023(b); in some states, however, if the fee is a revenue measure and not a part of the recording act, then non-payment of the fee does not affect constructive notice, *Potwin State Bank v. J. B. Houston & Son Lumber Co.*, 183 Kan. 475, 327 P.2d 1091, 80 A.L.R. 2d 166; see Powell, *supra*, § 906. Some states also require that the mailing address of each Grantee appear on the instrument or in a separate writing signed by the Grantor or Grantee and attached to the instrument. In lieu of including the Grantee's mailing addresses, a

penalty filing fee can be paid. *Texas Property Code*, Sec. 11.003 (Applicable to instruments executed after December 31, 1981); Colo. Rev. State. § 35-35-109(2) (1982); Utah Code Ann. § 57-3-10(2) (1981); Patton supra § 63; for *contra* see *Donald v. Beals*, 57 Cal. 399 (1881) and Cal. Gov't. Code § 27327.

An instrument filed with a clerk for recording is considered recorded from the time that the instrument is "filed". An instrument is filed when it is delivered to the proper officer and placed in his or her official custody. Thus, constructive notice takes effect from the time the instrument is filed with the clerk to be recorded, regardless of when the instrument is actually recorded. *Texas Local Govt. Code*, § 191.003; *William Carlisle & Co. v. King*, 103 Tex. 620, 133 S.W. 241 (1910), rehearing overruled 133 S.W. 864 (1911); *Turman v. Bell*, 54 Ark. 273, 15 S.W. 886 (1891); *Sinclair v. Slawson*, 44 Mich. 123, 6 N.W. 207 (1880); *contra*, see *Dougery v. Bettencourt*, 214 Cal. 455, 6 P.2d 499 (1932); *Northwestern Improvement Co. v. Norris*, 74 N.W.2d 497 (N.D. 1955); Colo. Rev. Stat. § 38-35-109; Mont. Code Ann. § 70-21-32.

An instrument is "recorded" when the clerk places a copy of the instrument in a book, microfilm or microfiche and the location of the instrument is identified, usually, by volume and page. The recorded instrument usually has a stamp on it reflecting the date of filing and the date of actual recording. *Texas Local Govt. Code*, § 193.001 *et seq*. In order to locate the recorded instrument, clerks maintain "indices" which identify all recorded instruments that affect real property. Usually, the indices lists all instruments as recorded alphabetically by Grantor and by Grantee. This type of index is called a "cross index or a direct/indirect index", and each entry identifies each instrument at least by:

1. Type of instrument;
2. Date;
3. Parties;
4. Land covered;
5. Volume and page or other reference to where the instrument is located.

The indices maintained by clerks in some states, and by nearly all abstract and title companies, list each instrument by the land covered, not by parties. This type of index is called a "tract index", or in Kansas a "numerical index".

Most recording statutes provide that an instrument that is properly recorded in the proper county provides notice of its existence and terms to all persons, *Texas Property Code*, § 13.002. However, most courts limit the constructive notice given to only those persons who are bound or have a duty to search the record for such an instrument. Thus, constructive notice is generally restricted to subsequent purchasers and creditors from the grantor or mortgagor of a recorded instrument. *Thornton v. Findley*, 97 Ark. 432, 134 S.W. 627 (1911), *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 65 P. 1004 (1901), 137 A.L.R. 268. Or, stated differently, a subsequent purchaser or creditor has constructive notice of all recorded instruments within their "chain of title". *Hutchins v. Birdsong*, 258 S.W.2d 218 (Tex.Civ.App.- Texarkana 1953, writ ref'd. n.r.e.), 2 O&GR 1001; *Lonestar Gas Co. v. Sheaner*, 297 S.W.2d 855 (Tex.Civ.App. - Waco, 1956) *revd. on other grounds* 157 Tex. 508, 305 S.W.2d 150 (1957); *Callahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788 (1935), 101 A.L.R. 871.

"Chain of title" is defined as the successive conveyances, commencing with the patent from the government, each being a perfect conveyance of the title, down to and including the conveyance to the present owner. A purchaser or creditor is required by law to look only for conveyances that may have been made prior to his purchase by his immediate Grantor, or by a remote Grantor through whom the present Grantor derives his title. A purchaser or creditor is only charged with notice of the public record of conveyances and encumbrances made by the persons through whom title is claimed. *Reserve Petroleum Co. v. Hutcheson*, 254 S.W.2d 802 (Tex.Civ.App.- Amarillo 1952, writ ref'd. n.r.e.) 2 O&GR 366. Thus, a purchaser or creditor is not usually charged with notice of the following:

1. Instruments executed by stranger to title. *White v. McGregor*, 92 Tex. 556, 50 S.W. 564 (1899); *Lonestar Gas Co. v. Sheaner*, *supra*;

2. Instruments affecting other property. *Reserve Petroleum Co. v. Hutcheson*, *supra*;
3. Instruments executed by Grantor but recorded before Grantor acquired title. *Breen v. Morehead*, 104 Tex. 254, 136 S.W. 1047 (1911).
4. Instruments executed by Grantee of a prior unrecorded instrument. *Southwest Title Ins. Co. v. Woods*, 449 S.W.2d 773 (Tex., 1970); and
5. Subsequent conveyances or encumbrances by immediate Grantor or Mortgagor. *White v. McGregor*, *supra*; *Campsey v. Jack County Oil & Gas Assoc.,* 328 S.W.2d 912 (Tex.Civ.App.- Fort Worth 1959, writ ref'd. n.r.e.).

Under the "chain of title" rule, third parties are on notice of only those instruments in the chain of title which purport to affect the lands.

There are two theories which describe the scope of search required by the states surveyed. I will call the minority position the "Broad Scope of Search Theory" and the more popular view the "Narrow Scope of Search Theory". The Broad Scope of Search view requires a prospective purchaser to examine all deeds given by all prior record owners. In other words, the indices must be checked for every prior owner of the property to the present. This view holds that every such deed, once recorded, gives constructive notice to all prospective purchasers.

California: *Mahoney v. Middleton*, 41Cal. 41 (1871), *Clark v. Sawyer*, 48 Cal. 133 (1874) and *County Bank of San Luis Obispo v. Fox*, 119 Cal. 61, 51 Pac. 11 (1897). (Utilizes a grantor/grantee index);

Michigan: *Cook v. French*, 96 Mich. 525, 56 N.W. 101 (1893); *Van Aken v. Gleason*, 34 Mich. 477 (1876); (Michigan uses a tract index system making this scope of search reasonable);

Texas: *Davidson v. Ryle*, 103 Tex. 209, 124 S.W. 616 (1910); *Delay v. Truitt*, 182 S.W. 732 (Tex.Civ.App.-Amarillo 1916, writ ref'd.); and *White v. McGregor*, 92 Tex. 556, 50 S.W. 564 (1899).

Texas utilizes a grantor/grantee index. This is a reasonable scope of search if utilizing a tract index, but an unreasonable scope of search if using a grantor/grantee index.

The second view requires a prospective purchaser to search the record, as to each prior grantor who owned the land in question, from the day of the deed to each grantor (some states would say the day this deed is recorded) to the day the deed from that grantor to a grantee is recorded.

Colorado: *Rocky Mtn. Fuel Co. v. Clayton Coal Co.*, 110 Colo. 334, 134 P.2d 1062 (1943;

Kansas: *Cities Service Oil Co. v. Adair*, 273 F.2d 673 (10th Cir. 1959); *Dwelle v. Home Realty & Inv. Co.*, 134 Kan. 520, 7 P.2d 522 (1932);

Montana: *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 65 Pac. 1004 (1901); *Chowen v. Phelps*, 26 Mont. 524, 69 P. 54 (1902);

New Mexico: *Sheppard v. Sandfer*, 44 N.M. 357, 102 P.2d 668 (1940).

Texas: *Delay v. Truitt*, 182 S.W. 732 (Tex.Civ.App.-Amarillo 1916, writ ref'd.).

For a good discussion of the rule in a modern setting, see *Sabo v. Horvath*, 559 P.2d 1038 (Alaska 1976). This is a reasonable scope of search if utilizing a grantor/grantee index.

The search required by the first view is not the scope of search generally recognized by lawyers and practiced by abstracters. The principle of the first view is impractical because it would require a search to date against every name in the chain of title when using a grantor/grantee index.

In states that require the clerk, recorder or register to maintain tract indices, there is much less problem in locating stray conveyances or wild deeds because all instruments covering or affecting the same land are shown upon the

same tract, which usually reflects a section or parts of a section. *Balch v. Arnold*, 9 Wyo. 17, 59 P. 434 (1899). However, for those states employing the grantor/grantee index system, the problem of locating stray conveyances or wild deeds is substantial. Fortunately, most states have adopted the "Narrow Scope of Search" theory. Basey, *Clearing Land Titles*, § 3 (2d. Ed. 1970); Patton, *supra* § 69; 122 A.L.R. 909.

The record of instruments, duly recorded as provided by law, within the chain of title of purchasers and creditors is constructive notice to them of whatever a proper examination of the record would have disclosed. They are charged with notice of all the facts shown or exhibited by the recorded instruments. Thus, a properly recorded instrument is constructive notice of at least:

1. The terms, recitals, stipulations and conditions of the instrument;
2. All facts disclosed by the acknowledgment of the instrument; and
3. The legal effect of the instrument. *Martin v. Texas Co.*, 89 S.W.2d 260 (Tex.Civ.App.-Fort Worth 1935, writ dism. by agr.); *American Medical Int'l., Inc. v. Feller*, 59 Cal.App.3d 1008, 131 Cal. Rptr. 270 (1976).

As a general rule, subsequent purchasers and creditors are charged by the record with constructive notice of the above facts but are not charged with constructive notice of facts which can be obtained only by inquiring beyond the recorded facts. *Miles v. Martin*, 159 Tex. 336, 321 S.W.2d 62 (1959), 10 OGR 580; *Texas Osage Co-operative Royalty Pool v. Clark,* 314 S.W.2d 109 (Tex.Civ.App.-Amarillo 1958) writ ref'd. n.r.e. at 159 Tex. 441, 322 S.W.2d 506. There are two exceptions to the lack of duty to inquire from the record which are:

1. When the legal description of the instrument is ambiguous or inconsistent; *Carter v. Hawkins*, 62 Tex. 393 (1884); *Wiseman v. Watters*, 107 Tex. 96, 174 S.W. 815 (1915); see 89 A.L.R. 1444; and
2. When the recorded instrument refers to or is subject to other instruments, whether the other instruments are recorded or unrecorded.

Whether or not a fact contained in a recorded instrument is constructive notice is a question of law. *Housman v. Horn*, 157 S.W. 1172 (Tex.Civ.App.-Dallas 1913, no writ); *Miller v. Alexander*, 13 K.A.2d 543, 775 P.2d 198 (1989).

2. From Improper (Defective or Insufficient) Recording?

As previously noted, an instrument filed with the clerk for recording is usually considered recorded from the time that the instrument is filed. Texas Local Govt. Code, § 191.003. The person filing the instrument, usually the Grantee, is ordinarily not responsible for the failure of the clerk to record the instrument or to observe the statutory requirements as to the manner of recording the instrument. *Griggs v. Montgomery*, 22 S.W.2d 688 (Tex.Civ.App.-Beaumont 1929, no writ); *contra*, see *Cady v. Purser*, 131 Cal. 552, 63 P. 844 (1901). Therefore, the filing/recording provides constructive notice even if:

1. The clerk fails to record the instrument; *David v. Roe*, 271 S.W. 196 (Tex.Civ.App.-Fort Worth 1925, writ dism. w.o.j.); *Hudson v. Randolph*, 66 F.216 (Tex., CA5-1984); *Caito v. United California Bank*, 144 Cal. Rptr. 751, 20 C.3d 694, 576 P.2d 466 (Cal. 1978); for contra, see *Judice-Henry-May Agency, Inc. v. Franklin*, 376 So.2d 991 (La. App. 1979), writ denied 381 So.2d 508, which held that unrecorded acts will have no legal effect on third person, even where third person has actual knowledge of the unrecorded acts - remember that Louisiana is a race jurisdiction.
2. The clerk fails to enter the filing of the instrument in the proper index; *William Carlisle & Co. v. King*, *supra*; *Hochstin v. Romero*, 219 Cal. App. 3d 447, 268 Cal. Rptr. 202 (1990) held that a recorded abstract of judgment was not constructive notice because of

improper indexing; *Luthi v. Evans*, 223 Kan. 622, 576 P.2d 1064 (Kan. 1978); see 63 A.L.R. 1057; *Boyer v. Pahvant Mercantile & Inv. Co.*, 76 Utah 1, 287 P. 188 (1930); *Hildebrandt v. Hildebrandt*, 9 K.A.2d 614, 682 P.2d 1288 (1984).

3. The clerk records the instrument in the wrong book; *Lignoski v. Crooker*, 86 Tex. 324, 24 S.W. 278 (1893) different result reached on rehearing on other grounds 86 Tex. 328, 24 S.W. 788 (1894); *Grand Rapids National Bank v. Ford*, 143 Mich. 403, 107 N.W. 76 (1906), 26 A.L.R. 1546; *Cady v. Purser*, 131 Cal. 552, 63lP. 844 (1901), 70 A.L.R. 595.
4. The clerk fails to maintain the proper indexes; *Throckmorton v. Price*, 28 Tex. 605 (1866); or
5. The clerk failed to properly transcribe the instrument. *Griggs v. Montgomery*, *supra*; see 70 A.L.R. 595; *Ziener v. Edgar Zinc Co.*, 79 Kan. 406, 99 P. 614 (1909).

However, strangely, an instrument that is not properly acknowledged or an instrument that, if properly acknowledged is not shown of record to be properly acknowledged, does not provide constructive notice. *Hayden v. Moffat*, 74 Tex. 647, 12 S.W. 820 (1889); *Hughes v. Wright & Vaughan*, 97 S.W. 525 (Tex.Civ.App.-Austin 1906); *revd. on other grounds* 100 Tex. 511, 101 S.W. 789.

There is no presumption that the record title was actually examined. *McLouth v. Hurt*, 51 Tex. 115 (1879). But, if examined, the general rule is that purchasers or creditors with "actual" knowledge of an instrument, whether properly recorded or not, are charged with the duty of a reasonably prudent person with such knowledge to make further "inquiry". *Neyland v. Texas Yellow Pine Lumber Co.*, 64 S.W. 696 (Tex.Civ.App.-Tyler 1901, no writ); see 82 A.L.R. 312. Inquiry notice is discussed *infra*.

3. From Possession?

It is my opinion that the term "constructive notice" should cover all instances where a purchaser is conclusively charged as a matter of law with notice. All courts agree that a purchaser is charged by law with notice of the nature of the possession of the land purchased. However, since nearly all courts classify the type of notice given by possession as "actual notice", I defer discussion of the notice given by possession to the next section.

C. Actual Notice/Implied Notice - Duty to Inquire/Imputed Notice

Most courts conclude that "actual notice" consists of:

1. Actual notice - Knowledge directly communicated to the person affected; *Southland Royalty Co. v. Pan American Petroleum Corp.,* 354 S.W.2d 184 (Tex.Civ.App.-El Paso 1962) 16 O&GR 845, 17 O&GR 466, revd. on other grounds at 378 S.W.2d 50 (Tex. 1964) 20 O&GR 602.
2. Implied notice - Notice implied by law to a person who had means of knowledge sufficient to create a duty to inquire; *Champlin Oil & Refining Co. v. Chastain*, 403 S.W.2d 376 (Tex., 1965) 24 O&GR 462 and *Superior Oil Co. v. Stanolind Oil & Gas Co.*, 230 S.W.2d 346 (Tex.Civ.App.-Eastland 1950) affirmed at 150 Tex. 317, 240 S.W.2d 281; *Grammer v. New Mexico Credit Corp.*, 62 N.M. 243, 308 P.2d 573 (1957); *Johnson v. Abbee*, 105 Kan. 658, 185 P. 738 (1919); and
3. Imputed notice - Notice implied by law based upon a special relationship. *Woodward v. Ortiz*, 237 S.W.2d 286 (Tex. 1951); *Tamburine v. Center*

Save. Assn., 583 S.W.2d 942 (Tex.Civ.App.- Tyler 1979, (writ ref'd. n.r.e.).

Each case involving implied notice depends on its own facts, and there is no general rule as to circumstances that are sufficient to put a party on inquiry. Circumstances that merely arouse suspicion in the mind of a reasonably prudent person are generally regarded as insufficient to charge notice. *Herbert v. Wagg,* 27 Okla. 674, 117 P. 209 (1911); *Cornell Univ. v. Howard*, 170 Kan. 633, 228 P.2d 680 (1951); *Jordan Drilling Co. v. Starr*, 232 S.W.2d 149 (Tex.Civ.App.- El Paso 1949, writ ref'd. n.r.e.); see 89 A.L.R.3d 901. The doctrine of implied notice is based on the theory of negligence in failing to make inquiry. When a person has knowledge of facts that would lead a reasonably prudent person to investigate, failing to investigate or making an incomplete investigation is not sufficient. The person is deemed to know all facts that he would have discovered by making a diligent search. *Oaks v. Weingartner*, 105 Cal. App.2d 598, 234 P.2d 194 (1951) *Sawyer v. Barton*, 55 N.M. 479, 236 P.2d 77 (1951). *Clay v. Bowling*, 66 N.M. 253, 346 P.2d 1037 (1957); *Bell v. Protheroe,* 199 Okla. 562, 188 P.2d 868 (1948); *Hunt Trust Estate v. Kiker*, 269 N.W. 2d 377 (ND 1978); *Jackson v. O'Neill*, 181 Kan. 930, 317 P.2d 440 (1957). Examples of circumstances which would usually create a duty to inquire are:

1. Possession by a party other than the grantor (the most obvious and most frequent). *Clay v. Bowling,* 66 N.M. 253, 346 P.2d 1037 (1959); Knowles, *Wholesale Electronic Supply of Shreveport, Inc.*, 388 So.2d 426 (La.App.1980); *Bell v. Protheroe*, 199 Okla. 562, 188 P.2d 868 (1948); See 105 A.L.R. 845 (1936); *First Nat'l City Bank of Belen v. Luis*, 87 N.M. 94, 529 P.2d 760 (1974); *Weineberg v. Moore*, 194 F.Supp.12 (N.D.) Cal. 1961)l; *Aimes v. Brooks*, 179 Kan. 590, 297 P.2d 195 (1956).
2. Litigation involving the land in question. *Herman v. Hawley*, 118 Kan. 17, 233 P. 1031 (1925); *Torrez v. Gough,* 137 Cal.App.2d 62, 289 P.2d 840 (1955).
3. Contract calling for a grossly inadequate price. *Jordan v. Warnke*, 205 Cal.App.2d 621, 23 Cal.Rptr. 300 (1962); *Hume v. Ware*, 87 Tex. 380 (1894).
4. Receipt of a mere quitclaim deed. (This is a minority position.); The majority of states hold that the receipt of a quitclaim deed does not prevent a grantee from being a BFP. See: *Williams v. McCann*, 385 P.2d 788 (Okla. 1963); *N.D. Cent. Code*, § 47-19-41.

A minority of states take a different view and hold that the receipt of a quitclaim deed puts a grantee on notice that the grantor has little confidence in his title and thus an investigation is necessary. See: *Downs v. Rich*, 81 Kan. 43, 105 P. 9 (1909); *Miller v. Pullman*, 72 S.W.2d 379 (Tex.Civ.App.-Galveston 1934, writ ref'd.); but *Bryan v. Thomas*, 365 S.W.2d 628 (Tex. 1963) holds that a quitclaim deed which conveys "all of the undivided interest" of the grantor in a mineral estate was more than a quitclaim deed and the grantee thereunder was an innocent purchaser for value without notice of undisclosed claims.

5. Construction or repair work visible on the property. *Lenexa State Bank & Trust Co. v. Dixon*, 221 Kan. 238, 559 P.2d 776 (Kan. 1977); *Hostetter v. Inland Development Corp. of Montana*, 172 Mont. 167, 561 P.2d 1323 (Mont. 1977).
6. Information revealed through actual examination of materials in the chain of title. Westland Oil Development Corp. v. Gulf Oil Corp., 637 S.W.2d 903 (Tex. 1982).

As for Circumstance (6) identified above, actual notice of the contents of an instrument in a chain of title charges one with knowledge of other instruments referred to in the instrument examined, even if the other instruments are not recorded or are not recorded in the chain of title.

Colorado, however, has a curative statute, Colo. Rev. Stat. § 38-35-108, which provides that when a recorded instrument affecting title to real property contains a recital referring to an unrecorded instrument purportedly affecting that title, the reference does not bind anyone other than the parties to the recorded instrument and does not place any other person on inquiry. *Rocky Mountain Fuel Co. v. Clayton Coal Co.*, 110 Colo. 334, 134 P.2d 1062 (1943).

Actual possession of land creates such notice to persons dealing with the land that they are charged with the duty to inquire as to the possessor's claims. *Long Falls Realty Co. vs. Anchor Electric Co.*, 405 S.W.2d 170 (Tex.Civ.App.-Dallas 1966, no writ); 105 A.L.R. 892 and 2 A.L.R.2d 857. The possession of the land must be open and visible, notorious and exclusive, but no greater in degree than that of an adverse possessor. *Kransky v. Hensleigh*, 146 Mont. 486, 409 P.2d 537 (1965); *Sorenson v. Olson,* 235 N.W.2d 892 (N.D. 1975); *Hoult v. Rich*, 161 Kan. 587, 170 P.2d 834 (1946) - Kansas has adopted a "reasonably cautious man" standard; *Aimes v. Brooks*, 179 Kan. 590, 297 P.2d 195 (1956); *Randall v. Allen*, 180 Cal. 298, 180 P. 941. Possession by a tenant not only gives notice of occupancy but also provides notice of the landlord's title. *Clay v. Bowling*, 66 N.M. 253, 346 P.2d 1037 (1959); *Bell v. Protheroe*, *supra*; *J. M. Radford Grocery Co. v. Matthews,* 78 S.W.2d 989 (Tex.Civ.App.-Waco 1935, no writ); see 1 A.L.R. 2d 322; *Rogers v. Dumas*, 166 Kan. 519, 203 P.2d 165 (1949). Possession of the land which is abandoned at the time of the transaction is not notice.

Imputed notice is created as a result of specific relationships, such as:

1. Principal and agent;
2. Attorney and client;
3. Partner in a partnership;

and notice to one is imputed as a matter of law to the other. *Woodward v. Ortiz*, 237 S.W.2d 286 (Tex. 1951); *Tamburine v. Center Save. Assn.*, 583 S.W.2d 942 (Tex.Civ.App.- Tyler 1979, (writ ref'd. n.r.e.).

The issue of actual notice is only a question of law in the event there are no disputed facts. Therefore, the question of whether or not a party has actual notice and whether or not a person exercised due diligence pursuant to his duty to inquire is usually a fact question for the jury. *Texas Bank & Trust Co. v. Spur Security Bank*, 705 S.W.2d 349 (Tex.App.-Amarillo 1986, no writ). As a general rule, the party asserting that notice was given has the burden of proving it. For example, between two parties who are both claiming legal title to the same property, the majority opinion is that the burden of proof rests on the subsequent purchaser to show that he did not have notice of the rights of the previous purchaser. *Farmers Mutual Royalty Syndicate, Inc. v. Isaacks,* 138 S.W.2d 228 (Tex.Civ.App.-Amarillo 1940, no writ); *Kransky v. Hensleigh*, 146 Mont. 486, 409 P.2d 537 (1965); *Dreyfus v. Hirt*, 82 Cal. 621, 23 P. 193. On the other hand, where the rights of the first purchaser are equitable and the subsequent purchaser is claiming legal title, the burden of proof rests on the first purchaser to show that the subsequent purchaser had notice of the first purchaser's equitable rights at the time the second purchase was made. *Farmers Mutual Royalty Syndicate, Inc. v. Isaacks*, *supra*; *Amason v. Woodman*, 498 S.W.2d 142 (Tex. 1973); *Westland Oil Development Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903 (Tex. 1982).

D. How They Operate

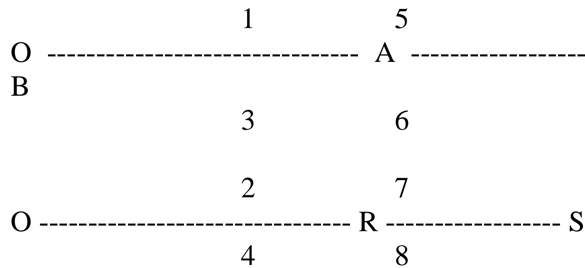
To understand how the recording acts operate, I provide as illustration three scenarios, Situations A, B, and C. We assume that no purchaser has actual notice of any prior conveyance and we apply the Narrow Scope of Search theory. The conflict in each situation is between Purchaser R and subsequent Purchaser B.

Situation A

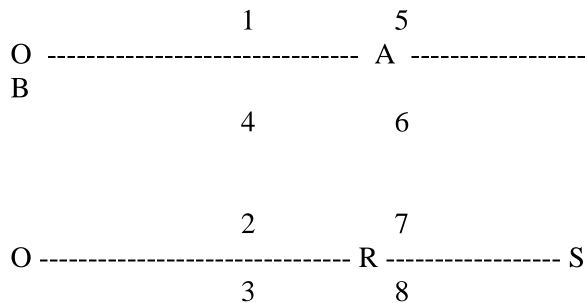
(Order of delivery) 1 5
O ------------------------------- A ------------------ B
(Order of recording) 2 6

3
O ------------------------------- R
4

Situation B



Situation C



Situation A illustrates a situation where B, a purchaser from A, pays value without notice of the deed to R. B has priority because of the well accepted rule that a purchaser is not charged with record notice of a conveyance executed after the recording of his deed in his chain of title. *White v. McGregor*, 92 Tex. 556, 50 S.W. 564 (1899); see 5 Tiffany 1268. This is the most common situation.

Situation C concerns subsequent purchasers B and S, B purchasing from A and S purchasing from R. Stated previously, the recording acts place a power in the common grantor (O herein) to displace the first grantee by conveying to a second grantee who either has no notice or records first. In this fact situation, O lost this power when R recorded. (Assuming no actual notice by any party). Therefore, S wins.

Putting these two cases together, they hold that a prospective purchaser, B from A, must search for deeds executed by O from the time O acquires title until the time B's grantor (A) records O's deed to A. B takes with notice of any instrument recorded prior to the recording of the deed to his grantor.

Situation B deals with the question, must B search the records for a possible deed from O to R even after the deed from O to A has been recorded? *Houston Oil Co. v. Kimball*, 103 Tex. 94, 122 S.W. 533 and 124 S.W. 85 (1909). While there are no Texas decisions directly on point, there is a decision where S was the purchaser from R in Situation C. *Delay v. Truitt*, 182 S.W. 732 (Tex.Civ.App.-Amarillo 1916, writ ref'd.). It held that S must search down to the time of S's purchase. Ideally, a purchaser such as B from A should not have to check later than the date A's deed was recorded. This would, in effect, make such state a race-notice jurisdiction as to purchasers from A. This conclusion is sustained by other Texas cases. See *Segal v. Sanders*, 220 S.W.2d 339 (Tex. Civ. App. - Ft. Worth 1949, writ refd. n.r.e.) and *Fitzgerald v. LaGrande*, 187 S.W.2d 155 (Tex. Civ. App. - El Paso 1945, no writ), and the narrow scope of search rule is, in my opinion, the best rule to follow. However, *White v. McGregor*, *supra*, is the only Texas Supreme Court case dealing with this issue and it holds that Texas is a broad scope of search Texas.

In summary, for all states, the beginning of search is the date of the deed into the common grantor (or the date this deed is recorded), O in our example. *Breen v. Morehead*, 104 Tex. 254, 136 S.W. 1047 (1911). For states adopting the Narrow Scope of Search theory, the ending date of search is the date the purchaser's grantor records his deed. For those minority states who have adopted the Broad Scope of Search theory, such as Texas, the period of search as to each purchaser or creditor is from the date of the deed into the common grantor to the present.

One other qualification, in a minority of the states, is that the purchaser, if he is to receive a greater interest than his grantor owned, must accept a deed, not a quitclaim. A quitclaim conveys all of the grantor's "right, title and interest", without the grantor acknowledging or claiming to own any interest in the land itself. A quitclaim does convey all interest that the grantor does in fact own but, since in a quitclaim the grantor does not claim to own anything, the grantee does not benefit thereby. *Houston Oil Co. of Texas v. Niles*, 255 S.W. 604 (Tex.Com.App. 1923). This rule applies in both

recording and in the BFP situations. However, conveyances by a grantor of "all of my lands in Potter County" or "all of my property in Texas" or other broad conveyances are usually given effect, at least between the parties, and courts generally determine that said instruments, when recorded, do provide constructive notice to subsequent purchasers. *Texas Consolidated Oils v. Bartels*, 270 S.W.2d 708 (Tex.Civ.App.-Eastland 1954, writ ref'd.). This rule is confirmed in *U. S. Enterprises Inc. v. Dauley,* 535 S.W.2d 623 (Tex. 1976) at p. 628; *contra*, *Luthi v. Evans*, *supra*.

E. Taking Notice to the Extreme in Texas (and your state too?)

Heretofore, I have discussed all rules from a general rule-exception or a majority rule-minority rule perspective. For this topic only, I discuss two Texas cases, one familiar old case and one recent dangerous case. The footnotes reflect the position on these issues of the other states surveyed.

1. The Duhig Rule - Ignoring Notice

As already noted, one of the main purposes of the recording acts is to facilitate conveyances of real property by making it easier for a purchaser to discover all facts which he must know in order to make an intelligent purchase decision. It can be said that the recording acts and the doctrines of constructive and actual notice generated by the recording make it possible for a purchaser to discover all title defects and problems prior to making his purchase. All of us who make our living in the real estate business appreciate and utilize the recording acts, constructive notice and commonly accepted rules or canons of construction for interpreting instruments to enable us to form an opinion of the quality of title to land for the benefit of ourselves or our clients. However, there is one rule of construction, which, in order to be effective, requires that the doctrines of constructive notice and actual notice be ignored. I refer of course to the Duhig Rule. (sometimes referred as “The Rule”). *Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (1940); also see Ellis, *Rethinking the Duhig Doctrine*, 28 Rocky Mt.Min.L.Inst. 947 (1982); Smith, *The Subject To Clause*, 30 Rocky Mt.Min.L.Inst. 1, 15-20 (1984) which provides that the grantor of a warranty deed, who purports to convey a mineral interest and reserve a mineral interest and at the time of the conveyance does not own sufficient mineral interest to make both the grantee and himself whole, must make the grantee whole (if possible) at the expense of his reservation. Or to state it more simply, if both the grantor and the grantee cannot be made whole, the grantor loses. The Duhig Rule has been adopted in at least nine oil and gas producing states:

Alabama: *Morgan v. Roberts*, 434 So.2d 738 (Ala. 1983) which does not refer to *Duhig* but reaches the same conclusion citing *Brannon v. Varnado*, a Mississippi Supreme Court case, see *infra*. Arkansas: *Peterson v. Simpson*, 286 Ark. 117, 690 S.W.2d 720 (Ark. 1985) which refers to *Ellis, supra*, as an "outstanding article";

Arkansas rejected the Duhig Rule as to reservations contained in quitclaim deeds in *Hill v. Gilliam*, 284 Ark. 383, 682 S.W.2d 737 (1985).

Colorado: *Dixon v. Abrams*, 145 Colo. 86, 357 P.2d 917 (1960); *Brown v. Kirk*, 127 Colo. 453, 257 P.2d 1045 (1953); *O'Brien v. Village Land Company*, 794 P.2d 246 (Colo. 1990).

California: No case; the guess is that California courts would interpret the Duhig type deed subjectively, thus rejecting the Duhig Rule.

Louisiana: *Continental Oil Co. v. Tate,* 211 La. 852, 30 So.2d 858 (1947); *Dillon v. Morgan*, 362 So.2d 1130 (La. App. 2d Cir. 1978).

Michigan: No case, but would probably follow Oklahoma and/or majority.

Mississippi: *Brannon v. Varnado*, 234 Miss. 466, 106 So.2d 386 (1958).

Montana: Has not adopted Duhig but Montana follows the doctrine of "estoppel by deed" upon which Duhig is premised; see *Hart v. Anaconda Copper Mining Co.*, 69 Mont. 354, 222 P. 419 (1924).

North Dakota: *Kadramas v. Sauvageau*, 188 N.W.2d 753 (N.D. 1971) limited *by Gilbertson v. Charlson,* 301 N.W.2d 144 (N.D. 1981); *Siebert v. Kubas*, 357 N.W.2d 495 (N.D. 1984); *Acoma Oil Corporation v. Wilson*, 471 N.W.2d 476 (N.D. 1991).

New Mexico: *Atlantic Refining Co. v. Beach,* 78 N.M. 634, 436 P.2d 107 (1968); Oklahoma: *Bryan v. Everett*, 365 P.2d 146 (Okla. 1960); *Birmingham v. McCoy*, 358 P.2d 824 (Okla. 1960).

Texas: *Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (1940);

Utah: *Hartman v. Potter,* 596 P.2d 653 (Utah 1979) rejects the Duhig Rule without referring to the Duhig case.

Wyoming: Body v. McDonald, 79 Wyo. 371, 334 P.2d 513 (Wyo. 1959).

The majority holding in Duhig was based upon a confusing estoppel theory which most courts reviewing Duhig have rejected. As Professor Ellis points out in his perceptive article, the Duhig Rule is based upon two established rules of construction:

1. A warranty deed that does not specify the quantity of interest in the minerals being granted purports to grant 100%, or the totality, of the interest in the minerals (described by him as the "100% Rule");
2. If the grantor of a warranty deed does not own enough interest to fill both the grant and the reservation, the grant must be filled first (referred to by him as the "Allocation of Shortage Rule"). Ellis, *supra.*

For these two rules to apply, however, the examiner and the court must usually completely ignore constructive notice and actual notice. Professor Ellis points out that the courts which have rejected the Duhig Rule elected to construe the instruments in question subjectively, not objectively. While an objective construction of the instruments would permit application of established rules of construction, the rejecting courts engaged in subjective deed construction, even though the trial courts they reviewed had ruled that the deeds were unambiguous and that reformation was not involved. Ellis' noted:

> In many cases no testimony was taken in the trial court. Where do the facts, other than the words of the deed, come from? In most instances, we can only guess. ... *Id.*

Experienced title attorneys should be equally skillful, if not more skillful, than trial judges in recognizing an ambiguous deed in a chain of title. Any attempt by the courts to interpret deeds that would generally be construed as unambiguous by interjecting the subjective intent of the parties into the construction impairs the ability of a title examiner to express an unqualified opinion of ownership and thus impairs the ability of a purchaser to rely upon the recording acts.

I agree with Professor Ellis' conclusion in his article that:

1. The Duhig Rule is not intended to uncover the "real" intent of the parties. (I add that this is another way of stating that the doctrine of actual notice, which usually creates a fact question, is ignored.) It is intended to protect BFP's.
2. The Duhig Rule is the only reasonable rule of construction for the Duhig problem (overconveyance).
3. An attorney who wants the court to apply The Rule in litigation, should prove that his client is a BFP and relied upon The Rule. Otherwise, he may find the court engaging in subjective construction even though the deed is not ambiguous and no evidence of intent was heard by the trial court. *Id.*

Duhig involved a warranty deed and the rule would appear, at least in part, to be based upon the grantor's breach of his covenant of warranty. However, the rule in Texas, and in most states adopting the estoppel by deed rationale, is to apply the Duhig Rule in the absence of a warranty as long as the grantor "purports to convey a definite estate". *Lindsay v. Freeman*, 18 S.W. 727 (Tex. 1892). Thus the controlling issue is "not whether grantor actually owned the title to the land it conveyed, but whether, in the deed, it asserted that it did, and undertook to convey it". *Blanton v. Bruce,* 688 S.W.2d 908 (Tex. App.-Eastland 1985 writ ref'd. n.r.e.), 86 O&GR 138; *Thomas v. Southwest Settlement & Development Co.*, 132 Tex. 413, 123 S.W.2d 290, *Greene v. White*, 137 Tex. 361, 153 S.W.2d 575, 136 A.L.R. 626.Texas has not extended Duhig to the point where the estoppel applies through a quitclaim deed, Texas being one of the minority of states which does not permit the grantee of a quitclaim deed to be a BFP. Dickenson, *The Doctrine of After-Acquired Title*, 11 Sw.L.J. 217 (1957); Hemingway, *After-Acquired Title in Texas - Part I*, 20 Sw.L.J. 97 (1966) and *Part II*, 20 Sw.L.J. 310 (1966).

While the Duhig Rule has been extended as shown above, subsequent cases also illustrate how Duhig can be limited. Duhig and subsequent cases applying Duhig all involve an overconveyance created, at least in part, because the granting language of the deed in question does not except from the grant any previously reserved interest. This protection to the grantor's warranty is usually created by:

1. Language excepting a specifically described interest or reference to a specifically described prior deed; or
2. Language excepting in a general manner all previously recorded mineral interests and other encumbrances.

A careful draftsman will always include in the excepting language the phrase "for all purposes" to obtain the maximum benefit from the exception. *Harris v. Windsor*, 156 Tex. 324, 294 S.W.2d 798 (Tex. 1956); 4 O&GR 1547 and 6 O&GR 1234. The careful draftsman should also remember the distinctions between an exception and a reservation. An exception does not pass title itself; instead it operates to prevent the excepted interest from passing to the grantee at all. *Pich v. Lankford*, 157 Tex. 335, 302 S.W.2d 645 (1957). On the other hand, a reservation is made in favor of the grantor, wherein he reserves unto himself a royalty interest, a mineral interest or other rights. *Benge v. Scharbauer*, 152 Tex. 447, 259 S.W.2d 166 (1953); 2 O&GR 1350. Proper drafting of a reservation of royalty will permit the parties to a deed to overcome the presumption that royalty interest should be proportionate to the mineral estate involved. *Patrick v. Barrett*, 734 S.W.2d 646 (Tex. 1987); 94 O&GR 566.

Assuming the facts of Duhig, if a grantor intended to reserve 1/2 of the mineral estate and he is willing for the grantor to have the rest of the mineral estate, if any, a provision substantially as follows should be used:

> Grantor excepts and reserves for the exclusive benefit of Grantor, his heirs and assigns, an undivided 1/2 mineral interest, this reservation and exception being in addition to any and all other interest in minerals, or parts thereof, including royalty interest, not owned by Grantor, this deed conveying to the Grantee only the surface estate and any mineral interest, if any, owned by Grantor in and to the undivided 1/2 mineral interest not reserved and excepted hereby to the Grantor, his heirs and assigns. *Benge v. Scharbauer*, 259 S.W.2d at 176; 2 O&GR 1360.

2. Westland Oil - Pushing Duty to Inquire off the Page

Summarizing what has been previously discussed, a purchaser has constructive notice of a properly recorded instrument in his chain of title. The scope of the notice covers the terms, recitals, conditions and the legal effect of each instrument in his chain of title. See Note 22. The subsequent purchaser or creditor does not have the duty to inquire beyond the facts stated and implied from the instrument unless:

1. The legal description of the instrument is ambiguo

2. The recorded instrument refers to or is subject to other instruments, whether the other instruments are recorded or unrecorded themselves.

However, a purchaser who actually examines an instrument obtains actual knowledge, and has the duty to inquire to the extent that the facts contained in the instrument would lead a reasonably prudent person to investigate. *Board of County Commissioners v. Adams*, *supra.* In the event a purchaser actually examines an instrument but fails to inquire further, then the purchaser is charged with constructive notice of the facts that would have been revealed by a reasonable search. *Oaks v. Weingartner*, 105 Cal. App.2d 598, 234 P.2d 194 (1951) *Sawyer v. Barton*, 55 N.M. 479, 236 P.2d 77 (1951). *Clay v. Bowling*, 66 N.M. 253, 346 P.2d 1037 (1957); *Bell v. Protheroe,* 199 Okla. 562, 188 P.2d 868 (1948); *Hunt Trust Estate v. Kiker*, 269 N.W. 2d 377 (ND 1978); *Jackson v. O'Neill*, 181 Kan. 930, 317 P.2d 440 (1957). This is called the doctrine of implied notice or implied actual notice.

The rules of implied notice do not charge a purchaser with knowledge of every conceivable fact, but knowledge is charged whenever a known fact would naturally and reasonably motivate a person of ordinary care and prudence to investigate. *First Nat'l Bank in Dalhart v. Flack*, 222 S.W.2d 455 (Tex.Civ.App.-Amarillo 1949, rev'd on other grounds, 226 S.W.2d 628 (Tex. 1950)). The rules of implied notice must necessarily be general in nature. There is no hard and fast measuring stick by which the duty of inquiry or the sufficiency of the search can be confirmed. Each application of the rule must be decided upon the basis of the reasonableness of the party sought to be charged with notice, and a comparison of his actions with those of the elusive "reasonably prudent purchaser". Reasonableness must be determined in each case in relation to its own particular set of circumstances and the general principles which may be very helpful in one instance may be almost worthless in another. *Hines v. Perry*, 25 Tex. 443 (1860); *Luckel v.;Barnsdall Oil Co.*, 74 S.W.2d 127 (Tex.Civ.App-Texarkana 1934) affirmed 130 Tex. 476, 109 S.W.2d 960 (1937).

The rule conclusively charges a party with notice when he has actual knowledge of sufficient facts that reasonably should excite him to make further inquiry and when he also has the means with which to make that inquiry. *Wessels v. Rio Bravo Oil Co.*, 250 S.W.2d 668 (Tex.Civ.App.-Eastland 1952, writ ref'd.). The reasonably prudent person is only required to inquire into the matters in which he is interested, and only then when some fact indicates that another has rights in the same matter. *O'Ferral v. Coolidge*, 149 Tex. 61, 228 S.W.2d 146 (1950). The duty to inquire is further limited by practical considerations. A party is only required to be interested and pursue those facts which reasonably seem relevant to the business at hand; thus, the party's abilities and his practical business considerations become a factor. *O'Ferral v. Coolidge*, *supra; University State Bank v. Gifford-Hill Concrete*, 431 S.W.2d 561 (Tex.Civ.App.-Fort Worth 1968, writ ref'd. n.r.e.). The duty to inquire is not imposed when the facts support only rumors or suspicions in the mind of the reasonably prudent purchaser because these vague suspicions do not provide a party with any "positive information, or any tangible clue" supporting an investigation. *Meador Bros. v. Hines,* 165 S.W. 915 (Tex.Civ.App.-Amarillo 1914, writ ref'd. n.r.e.). The doctrine of implied notice is "harsh in nature", and a "vague allusion to something that may or may not lead to an interest in the property" should not be sufficient to charge a party with notice. *Houston Oil Co. of Texas. v. Griggs*, *supra.*

The basis of the rules stated above is negligence. The duty to inquire is only imposed upon a party when it is reasonable to require him

to investigate to protect his rights in the subject matter. He is only obligated to make a reasonable inquiry, to not be negligent in his refusal to go further. *Brown v. Hart,* 43 S.W.2d 274 (Tex.Civ.App.-Amarillo 1931, writ ref'd.); *Southwestern Petroleum Corp. v. Udall*, 361 Fed.2d 650 (10th Cir. 1966).

Once a purchaser is afflicted with actual notice of a fact, usually a fact which suggests a limitation or some other negative effect on the estate to be conveyed, then he becomes duty bound to conduct a reasonable inquiry into the matter. The purchaser's duty requires him to search "step by step from one discovery to another and from one instrument to another, until...complete knowledge of all the matters referred to" is obtained. *Loomis v. Cobb*, 159 S.W. 305 (Tex.Civ.App.-El Paso 1913, writ ref'd.). This "step by step" process is the second step in imposing implied actual notice upon a purchaser. It's beginning and ending points are controlled by the general rules previously stated.

Usually, this "step by step" process is straight forward and does not require that the purchaser take many "steps". For example, a deed conveyed land "excepting and reserving herefrom all the exceptions and reservations contained in the said instrument...". The instrument referred to was a contract of sale for the land and it contained limitations on the mineral estate conveyed. The court held that the facts fairly disclosed matters possibly affecting the estate conveyed and that the subsequent purchasers negligently failed to verify the strength of their title, and thus they were charged with notice. *Id.* On the other hand, if the matter referred to is an immaterial fact which would not excite the inquiry of a prudent purchaser, then notice will not be imposed. For example, the inclusion of the adjective "Mrs." in a notary certificate of a deed did not charge a purchaser with notice that the grantor was a married woman. The court concluded that the use of "Mrs." merely charged subsequent purchasers with notice of the fact that, at sometime during her lifetime, she was a married woman. *Houston Oil Co. v. Griggs*, *supra*. In summary, implied notice and the corresponding duty to inquire is imposed only when a purchaser becomes aware of extraneous facts or documents, referred to but not contained within his chain of title, which reasonably appear to be title related.

In the opinion of Angus McSwain, former Dean of the Baylor School of Law, the Texas Supreme Court, in *Westland Oil Development Corp. v. Gulf Oil Corp.* 637 S.W.2d 903 (Tex. 1982), extends this concept by abandoning the prudent approach described above and creating a type of "incorporation by reference" rule requiring a purchaser to search all instruments referenced by any other instrument he is required to search, whether or not reasonably related to title. The facts in this case are somewhat complicated so I will summarize the transactions involved as follows:

Mobil Oil Corporation owned oil and gas leases covering 29 sections in the Rojo Caballos Field in Pecos County.

1. 8/66 - Farmout Agreement from Mobil to Westland to drill a test well and earn all of Mobil's leasehold right in the drillsite section and 1/2 of Mobil's rights in five other sections.
2. 11/66 - Letter Agreement whereby Westland conveyed its farmout rights to C & K and C & K agreed to:
   a. Assume all of Westland's obligations imposed by the Mobil farmout (1);
   b. Pay Westland $50,000.00 in cash;
   c. Assign to Westland a 1/16 of 8/8 overriding royalty in any acreage acquired from Mobil;
   d. Assign to Westland a 3.125% working interest in any leases obtained from Mobil pursuant to the Mobil farmout; and
   e. Assign to Westland a production payment of $150,000.00 payable out of the production from the test well.

   In addition, this agreement created an area of mutual interest between the parties and paragraph 5 of the agreement provides, in part, as follows:

"If any of the parties hereto, their representatives or assigns, acquire any additional leasehold interest affecting any of the

lands covered by said Farmout Agreement, or any additional interest from Mobil Oil Corporation under lands in the area of the farmout acreage, such shall be subject to the terms and provisions of this agreement...". (emphasis added)

3. 3/68 - Operating Agreement between C & K and Mobil. Paragraph 31 of the Operating Agreement provided that if there was a conflict between (3) and (1) and (2), then (1) and (2) prevail.
4. 3/68 - Assignment from Mobil to C & K pursuant to (1), subject to the Operating Agreement (3). This and (8) are the only recorded instruments in this series of transactions.
5. 4/72 - Farmout Agreement from Mobil to Hanson covering deep rights in three of the six sections covered by (1) made subject to the Operating Agreement (3).
6. 4/72 - Farmout Agreement from C & K to Hanson of the leases C & K received in (4), also subject to the Operating Agreement (3).
7. Early 1973 - Hanson assigned its interest in the Farmout Agreements to Gulf and Superior.
8. Early 1973 - Gulf and Superior drilled a large gas producer pursuant to the prior agreements and earned an Assignment of Oil and Gas Leases. In 5/73, Mobil assigned the required leases to Gulf and Superior subject to (3).

Before I summarize the Texas Supreme Court's holding, it is helpful to understand the parties' contentions. Westland claimed that Gulf and Superior had notice as a matter of law of the provisions of the Letter Agreement (2) through the references to that document contained in the 1973 Assignment (8). The assignment was made "subject to" the Operating Agreement (3), therefore Westland claimed that Gulf and Superior were on notice of the contents and provisions of the Operating Agreement. Being thus put on notice of those provisions, they would further be bound to inquire into and inspect the Letter Agreement because of the reference thereto in the Operating Agreement.

Gulf and Superior did not contend that they were not to be bound by the provisions of the Operating Agreement, rather they asserted that as prudent purchasers, they would not be bound to inquire further than the Operating Agreement in order to discover a title defect. The duty to inquire further, they claimed, rested upon the sufficiency of the facts revealed by the Operating Agreement, and whether a prudent purchaser would therefore be put on notice of a possible title defect. Gulf and Superior urged that such a question was one for the jury and should not have been decided as a matter of law; thus the cause should be remanded so that the jury may pass upon the question of notice.

The Trial Court gave Plaintiff a Summary Judgment and vested title to the items listed in (2) in Westland. The intermediate Appellate Court reversed and remanded holding that a fact question existed as to whether or not Gulf and Superior had notice of the Letter Agreement (2). The Texas Supreme Court reversed and rendered. Its primary holdings are that:

1. A purchaser is bound by every recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of title under which he claims; *Wessels v. Rio Bravo Oil Co.*, *supra.*
2. The rationale of the rule is that any description, recital of fact, or reference to other documents puts the purchaser upon inquiry, and he is bound to follow up this inquiry, step by step, from one discovery to another and from instrument to another, until the whole series of title deeds is exhausted and a complete knowledge of all the matters referred to and affecting the state is obtained; *Loomis v. Cobb*, *supra.*
3. Gulf and Superior had a copy of the Operating Agreement in their files and thus it was possible for them to learn of the reference in Paragraph 31 of the Operating Agreement to Letter Agreement (2).

Thus, the court held as a matter of law that

Gulf and Superior were charged with the duty to inquire as to all agreements referenced above, that if they did not make such an inquiry they would be charged as a matter of law with knowledge of the results of such an investigation, and thus they could not enjoy the status of innocent purchasers.

As you might guess, the holding in *Westland*, has been criticized. McSwain, *Westland Oil Development Corp. v. Gulf Oil*: *New Uncertainties as to Scope of Title Search,* 35 Baylor L. Rev. 629 (1983). The critics agree that Gulf and Superior had notice of and the duty to inquire as to the Operating Agreement (3). The problem in this case occurs in concluding, as a matter of law, that the Defendants had the duty to move from the Operating Agreement to the Letter Agreement (2).

Operating Agreements generally deal with contractual obligations concerning the testing and development of oil and gas leases. Such an agreement normally does not create or establish an interest in land; it merely governs the contractual obligations of the parties in relation to the development of the land. Logically, a reference in an Operating Agreement to a Letter Agreement would disclose additional contractual provisions concerning development. The specific reference in the Operating Agreement to the Letter Agreement provided that if:

> "Any conflict between this contract...and a Letter Agreement...then such prior agreement shall prevail...". *Westland Oil*, 637 S.W. at 909.

Both the dissent in the Texas Supreme Court opinion and the intermediate appellate court agreed that this type of reference could serve the function of exciting further inquiry into the terms of the Letter Agreement by one interested in operations, but that a prudent purchaser interested in title might well perceive, from the reference, that the Letter Agreement had nothing at all to do with title. Thus, the facts "fairly disclosed or suggested" from the Operating Agreement only arguably includes sufficient notice of the rights of another in Gulf's and Superior's title to require them to investigate further. McSwain, *supra.*

Both the dissent and the intermediate appellate court were prepared to follow prior case law and permit a holding that the duty to inquire could push Gulf and Superior to examine the Letter Agreement. However, they were of the opinion that the rules of implied notice dictated that, unless ordinary minds could not have "differed as to the conclusion to be drawn from the evidence", then the question was not one of law, but one of fact. *O'Ferral v. Coolidge*, *supra.*

In all of the cases cited by the majority in *Westland*, the "recital, reference or reservation" referred to a collateral title-related instrument. Thus, the cases cited by the court, do not support the court's holding which required the purchaser to look from the recorded instrument, to an unrecorded nontitle-related instrument to (presumably) another nontitle-related instrument. Secondly, applying the *Westland* case, purchasers now have a more oppressive burden in checking title. It appears that purchasers in the future must either ignore *Westland* and comply with the "two step chain of title analysis" which requires only a reasonable inquiry, or accept *Westland* and search all references to and from all documents until they can go no further. There appears to be no middle ground in Texas and no certainty, until the *Westland* case is reviewed again by the Texas Supreme Court.

MBank Abilene, N.A. v. Westwood Energy, Inc., 723 S.W.2d 246 (Tex.Civ.App.-Eastland 1986, no writ history). appears to be a natural extension of the *Westland* case. The Plaintiff, Westwood Energy, Inc., was the operator of several leases wherein Stroube Exploration, Inc. (SEI) was a non-operating working interest owner. The Operating Agreements executed by the parties provided that the operator had a preferred lien against the leasehold interest of any non-operator who failed to pay his share of the lease operating expenses. The agreements further provided that the liens extended to the non-operator's interest in the oil and gas produced and in the proceeds from the sale of such oil and gas. The Operating Agreements were not recorded. However, assignments of the leases in question were made subject to the Operating Agreements.

SEI incurred a debt to the predecessor of

MBank Abilene, N.A., which debt was secured by a recorded Deed of Trust. The Deed of Trust was recorded subsequent to the assignments of the leases to SEI. Westwood sued SEI to collect operating expenses and joined MBank Abilene, N.A., to foreclose its contractual liens upon the leasehold interests of SEI. MBank counterclaimed for conversion. MBank argued that it was an innocent purchaser for value in that the recorded assignments containing the reference to the Operating Agreements were not in MBank's chain of title and, if they were, *Westland* should not apply because MBank never had an actual copy of the Operating Agreement in its files. The appellate court held that the oil and gas leases and the assignments thereof were in MBank's chain of title and that MBank was charged with notice of the liens contained in the Operating Agreements because of the reference to said agreements in the recorded assignments.

The leading cases from the other states surveyed on the topic of implied notice are discussed.

Arkansas: *Killam v. Texas Oil & Gas Corp.*, 303 Ark. 547, 798 S.W.2d 419 (1990) holds that Texas Oil & Gas Corp. was not a BFP and was charged as a matter of law with notice of the Plaintiff's 1/2 mineral interest (created by an unrecorded wild deed into the Plaintiffs) because the Plaintiffs had previously paid taxes due upon the property and because the Defendant knew that the Plaintiffs were active in purchasing minerals in the area; *Massey v. Wynne*, 302 Ark. 589, 791 S.W.2d 368 (1990); Arkansas appears to be an "outer limits" jurisdiction.

California: No extreme cases; see *Taylor v. Ballard,* 41 Cal. App. 232 (1919); *High Fidelity Enterprises, Inc. v. Hall*, 210 C.A.2d 279, 26 Cal. Rptr. 654 (1962).

Kansas: *Luthi v. Evans*, 223 P.2d 622 (Kan. 1978); *Bacon v. Lederbrand*, 98 Kan. 631, 160 P. 1029 - Kansas does not have an extreme case.

Louisiana: No extreme cases; see *Robinson v. North American Roylties, Inc.*, 463 So.2d 1384 (La. App. 3d Cir. 1985), remanded in 470 So.2d 112 (La. 1985), decision after remand at 509 So.2d 679 (La. App. 3d Cir. 1987).

Michigan: *Burton v. Freund*, 243 Mich. 679, 220 N.W. 672 (1928). No extreme cases noted.

Montana: No case, but the guess is that Montana would not take an extreme position on notice.

New Mexico: *Camino Real Enterprises v. Ortega*, 107 N.M. 387, 758 P.2d 801 (1988). North Dakota: No "outer limits" case but would probably charge notice where a recorded instrument is subject to an unrecorded instrument.

Oklahoma: *Pasternak v. Lear Petroleum Exploration*, 790 F.2d 828 (10th Cir. - Okla. 1986); *Tenneco Oil Company v. Humble Oil & Refining Company,* 449 P.2d 264 (Okla. 1969).

Utah: No case. The guess is that Utah would not take an extreme position on notice. Wyoming:

IV. The Problems

Situation A - Deed from a Stranger to Record Title

A "stranger to title" is a person who is not shown by the record to have had a prior ownership interest in the property in question. For example, an affidavit showing the existence of prior unrecorded mineral deeds which was executed and recorded by the grantee only, not as grantor, was not part of the grantor's chain of title (in a state utilizing a grantor/grantee index) and did not charge a subsequent purchaser of the land with constructive notice of such mineral deeds. *White v. McGregor*, 92 Tex. 556, 50 S.W. 564 (1899); *Lonestar Gas Co. v. Sheaner*, *supra;* Angle v. Slayton, *supra.*

Situation A concerns a person who is either:

1. A total stranger to the record (like an adverse possessor); or
2. Totally unconnected therewith because of an unrecorded instrument.

No constructive notice is created by a deed from a stranger in title (Situation A(1)) because constructive notice exists solely to protect persons who register instruments that affect the title to land, either at law or in equity. *Bothin v. California Title Ins. & Title Co.*, 153 Cal. 718, 96 P. 500 (1908); 133 A.L.R. 886. Being void, there is no duty to search for such a deed and, in jurisdictions utilizing grantor-grantee indices, it is unlikely that this type of deed would ordinarily be located. However, in a tract index jurisdiction, a deed from a stranger in title would usually be discovered.

Now for Situation A(2), consider the following conveyances:

```
        Mtg-1820 (delivered)   1
A ------------------------------ B
                  (recorded)   2


              WD-1826          3
A ------------------------------ B
                 UR

                               4
B ------------------------------ M
                               5

           A's heirs-1862      6
A ------------------------------ R
                               7
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The root of M's title was the unrecorded warranty deed from A to B. The court held that R had neither constructive notice nor inquiry notice of the disconnected chain of title from A to M. The court stated that:

> This (M's) proposition in effect is, that if a person has made a deed of land having no recorded title, he must, nevertheless, be supposed to have had some title, and subsequent purchasers must take notice of whatever title he had. Much as registry laws have been frittered away by the doctrine of putting parties upon inquiry, we do not think that any court has ever gone to the extent of adopting this rule. It would substantially defeat the object of registry laws... . This rule would require a person purchasing from one who has the title on record, to take subject to the unrecorded deeds of persons claiming under a chain of title having no connection of record with the true source of title. If such purchaser is to be held to notice of such a chain of title at all, he has the right to presume, in the absence of any other information, that whatever title the persons claiming under such chain have is on record, as the law requires it to be, and that they have no title if the record shows none. *St. John v. Conger*, 40 Ill. 535 (1866).

Two questions are presently postponed until Situations D and F. What if a subsequent purchaser has actual notice of the two chains of title, does he have a duty to inquire further? Second, what if a subsequent purchaser takes a deed from B and B later acquires the true title - does the record notice that B is a stranger impair the title the purchaser received?

Situation B - Does a Purchaser have Notice of Easements Created by Instruments Covering Adjacent Lands that Affect his Land?

Must a purchaser who is interested in acquiring Blackacre search the record titles of surrounding tracts to determine if there are easements owned by the owners of the surrounding tracts that affect Blackacre? The answer is usually no. *Lesley v. City of Rule*, 255 S.W.2d 312 (Tex.Civ.App.-Eastland 1953, writ ref'd. n.r.e.); *Pokorny v. Yudin,* 188 S.W.2d 185 (Tex.Civ.App.-El Paso 1945, no writ); see 16 A.L.R. 1013. The primary reason for this rule, though not always clearly stated in opinions, is the unreasonable burden placed upon a purchaser to examine instruments not only that expressly convey an interest in the land he is interested in but to examine all instruments affecting all adjacent lands. This view is by far

the majority view when the only question is that of constructive notice.

As for actual notice, most states acknowledge that title chains to the dominant and servient estates created by easements are distinct. The problems usually arise from a recital in a recorded deed that is in the purchaser's chain, which points to an easement previously created by the conveyance of adjacent land. Generally, the purchaser has constructive/record notice of the recital. Does the purchaser have actual notice, the duty to inquire, into the title chain of the adjacent land? The courts have inconsistently referred to this type of notice as being either constructive or actual. It appears to make no difference as no court has held that the recital is no notice.

The only other way in which this issue could arise is if a purchaser accidentally discovered a valid recorded conveyance in the title chain of the dominant estate. The knowledge of one isolated deed does not create actual knowledge of a hostile title. Knowledge of the one deed should trigger the purchaser's duty to inquire but, until additional incriminating facts were discovered, would not be notice of a hostile title and would not defeat purchaser's title. *Wichita Valley Railway v. Marshall,* 37 S.W.2d 756 (Tex.Civ.App.-Amarillo 1931, no writ). Therefore, in the absence of the accumulation of additional facts, the purchaser has no duty to search the records for easements on adjacent lands.

Situation C - Does a Purchaser have Actual Notice of an Instrument in his Chain of Title that is Unrecordable but which he or his Agent Personally Examines?

As a matter of public policy, nearly all states agree that an instrument that is not entitled to be recorded does not give constructive notice if it is actually recorded. *Farmers Mutual Royalty Syndicate, Inc. v. Isaacks,* 138 S.W.2d 228 (Tex. Civ. App. - Amarillo 1940, no writ); *Kransky v. Hensleigh*, 146 Mont. 486, 409 P. 2d 537 (1965); *Dreyfus v. Hirt*, 82 Cal. 621, 23 P. 193. The effect of this public policy would appear to favor the beneficiary of the recording statutes, the subsequent purchaser. However, the injection of actual notice and the duty to inquire into this fact situation usually causes harm to the subsequent purchaser.

This problem area concerns instruments which, for one reason or another, are improperly recorded, and includes:

1. Instruments which are totally invalid such as:
   a. Forgery;
   b. Nondelivery;
   c. Lack of named parties;
   d. Incompetence of the grantor; and
   e. Other causes;
2. Instruments that are conveyances, at law or in equity, as between the parties, but are unauthorizedly recorded because of formal defects such as inadequate acknowledgement; and
3. Instruments of conveyance which are imperfectly recorded.

All courts agree that records of Types 1 and 2 provide no constructive/record notice. In other words, the purchaser is not charged as a matter of law with notice of said instruments. The courts disagree as to whether or not the third type of instruments provide constructive/record notice. The majority appears to hold that constructive notice is provided only of the portions of the instrument actually recorded, if the instruments are otherwise properly indexed. *Northwestern Improv. Co. v. Norris*, 74 N.W.2d 497 (N.D. 1955). (The clerk omitted a mineral reservation in a recorded deed and the reservation was not sustained against a subsequent BFP from the grantee.)

The more difficult question is whether or not the above described types of instruments, if actually read by a purchaser or his agent, provide actual/inquiry notice?

1. Erroneous Copies (the third type)

The accepted general rule is that anything that would suggest to a normally prudent purchaser the probable existence of a prior hostile title should put the purchaser upon inquiry. However, the duty to inquire should not be recognized when an unlawful record excuses the nonrecording of a prior deed.

Therefore, purchaser will not be held, as a matter of law, to be charged with notice of facts contained in an instrument which, because of an error, was not completely recorded. *Id*.

2. Recorded Void Instruments (the first type)

This problem arises in two situations, where the facts creating the void deed are apparent on the face of the record and situations where they are not apparent on the face of the record. Thus, deeds which contain no executing grantor, no grantee, defective legal descriptions are void and, usually, not a part of the purchaser's chain of title because of the impediment. *Stiles v. Japhet*, 84 Tex. 91, 19 S.W. 450 (1892); *Loomis v. Brush,* 36 Mich. 40 (1877). However, defects not apparent of record, such as lack of competence, absence of delivery, the presence of forgery are defects which are discoverable only by inquiry. However, the effect of these impediments is the same, the deeds are void and thus do not provide actual notice. To allow a void instrument or an instrument that has been defectively recorded to constitute actual notice to a purchaser is to give to that type of instrument an effect that is denied in a court of law. *Id.*

3. Unauthorized Record of Effective Instrument (the second type)

Now, we look at instruments of the second type, instruments which are usually held valid between the parties, their heirs and devisees but, if the instrument is not recorded properly, it is void as to third parties and provides no constructive notice. However, at least three states have, by statute, reversed this rule so that constructive notice is imputed to third parties. Colo.Stat.Ann. 40 § 36, 111-112; Mont. Rev. Codes Ann. Art. 6932; *First State Bank v. Mussigbrod*, 83 Mont. 68, 271 P. 695 (1928). Also, the statutes of Colorado permit recording without acknowledgements and thus avoid the general rule. Colo. Rev. Stat. § 38-35-106. While many cases hold that the incomplete record does not provide constructive notice, there are also numerous cases which hold that the same instruments do create, when actually read, inquiry notice. *Flack v. First Nat'l. Bank of Dalhart*, 148 Tex. 495, 226 S.W.2d 628 (1950). The better rule is that a subsequent purchaser otherwise in good faith is not defeated because he has actually read a prior recorded instrument which was not entitled to be recorded, and thus the purchaser retains priority. Philbrick, *supra.*

> Situation D -Does a Purchaser have Notice of a Deed by his Grantor Executed before his Grantor Acquires Record Title?

The usual concept of examining the chain of title is that a prospective purchaser finds the deed to his grantor in the grantee/reverse index and then goes backwards using the reverse index to locate the deed to each prior grantor. In order to verify that no instruments were overlooked, the examiner then reverses the search and examines the grantor/direct index from the patent to the present grantor. The purchaser's primary concern is that one of the prior grantors, all being prior record owners, conveyed the same property twice. Situations D and F cover this problem. Situation D concerns a deed from a grantor prior to that grantor receiving title and Situation F concerns a deed by a grantor after he has already conveyed title. In both situations, applying the Narrow Scope of Search rule, the courts would hold that the deeds in question were "outside the chain of title". The proper rule thus appears to be that a "chain of title" is:

> Conveyances not only made by successive holders of the record title but made by them while respectively holders thereof.

This definition comports with all ordinary situations under the recording statutes, and also covers Situation A previously discussed. If this were not the rule, then the person making the search would have to examine the index for all time before each grantor acquired title and he would be required to search forward indefinitely. *Breen v. Morehead*, 104 Tex. 254-258, 136 S.W. 1047 (1911), 25 A.L.R. 83. This would create an intolerable burden upon the purchaser.

Situation D, however, which concerns the doctrine of after-acquired title or title by

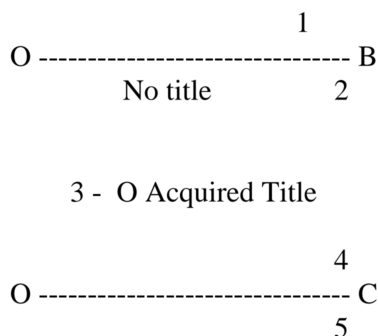
estoppel, would permit the recording doctrine to transform an originally void deed into a valid conveyance. This possibility concerns the following questions:

1. Is the first deed void?
2. Do the facts fall within or without the recording statutes?
3. Can a subsequent purchaser be in good faith?

The doctrine of estoppel by deed has been recognized in more than half of our states and, by statute, is an unqualified rule of property in slightly more than one-third of the states. *Cagle v. Sabine Valley Lumber & Timer Co.,* 109 Tex. 178, 202 S.W. 942 (1918); *Henningsen v. Stromberg*, 124 Mont. 185, 221 P.2d 438 (1949); *Sheppard v. Zeppa*, 199 Ark. 1, 133 S.W.2d 860 (1939); *Schultz v. Cities Service Oil Company*, 149 Kan. 148, 86 P.2d 533 (1939); *Far West Savings & Loan Assn. v. McLaughlin*, 201 Cal. App. 3d 67, 246 Cal. Rptr. 872 (1988) and the following statutes:

Ark. Stat. § 50-404 (1947);
Cal. Civ. Code § 1106 (1941);
Colo. Rev. Stat. Ann. § 118-1-15 (1953);
Kan. Stat. Ann. § 67-207 (1949);
Mont. Rev. Code Ann. § 67-1609 (1947);
N.D. Rev. Code § 47-1015 (1943);
Okla. Stat. Tit. 16 § 17 (1951);
Utah Code Ann. § 57-1-10 (1933).

The following diagram illustrates the typical situation:



There is, of course, no objection to the theory when applied solely between the original parties, since the end would be equitably justified. However, the application of the estoppel doctrine in favor of parties such as B above does an obvious injustice to third persons such as C above, who are the very persons entitled to receive special favor under the policy of the recording acts.

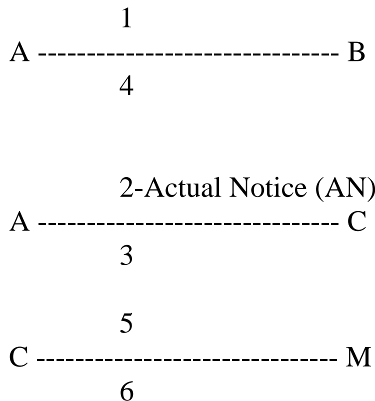
When you consider the recording statutes, a different result is reached. The first deed is taken by one who is conclusively determined to have known that he dealt with a grantor who was not a record owner, and thus, that the tendered deed was void. As a result, his "equity", though prior in time, is of a lower rank than that of the second grantee who consults and relies upon the record. The second grantee can have no constructive notice from the first deed because it is void. Since the general basis of record notice is the feasibility of discovering from a record the danger to the subsequent purchaser of a particular instrument, it must be conceded that the deed to B would not be located as the result of a reasonable search. *Breen v. Morehead, supra*; 25 A.L.R. 83. A subsequent purchaser cannot be "put upon inquiry" by the recording of an instrument such as the deed to B. Consequently, the subsequent grantee can become a bad faith purchaser only by receipt of information off the record of the existence of the estoppel deed and of its possible or probable legal effect adversely to his claim.

If the definition provided above of "chain of title" is accepted, no court could logically hold a subsequent purchaser bound to search for, nor therefore be endangered by, the earlier and recorded estoppel deed. The courts which deny priority to the estoppel deed base their holdings on this basis. A number of the states that give priority to the estoppel grantee have a tract recording system. In those states, of course, the ordinary meaning of a title chain does not exist. However, the courts that reject the estoppel by deed doctrine do not necessarily define "chain of title" differently. These decisions should be considered as an exception to the general and ordinary rule that field of search and field of record title are identical.

Situation E - Multiple Conveyances by a Record Owner while he is a Record Owner

Situation E concerns multiple conveyances

by a record owner while he is a record owner. The assumed facts that we will discuss are:



There are two questions:

1. Is M, a purchaser in good faith barred by B's recording? Or stated differently, does M take with record notice of B's deed so that he must search for it no matter how soon or how tardily it be recorded after A has parted with his record title by the recording of C's deed?
2. If no record notice, can M be given inquiry notice by B's deed if M accidentally discovers it or otherwise receives information of its existence?

In a race-notice state, M's title would fail because B recorded first. Also, it is without dispute that, since B's deed is unrecorded, C is not put upon record notice; however, since C has actual notice of B's deed, he cannot be a good faith purchaser.

The solution to this dilemma requires that we again understand the phrase "chain of title". I have already defined the Broad and Narrow Scope of Search theories.

Considering the Broad Scope of Search position - the chain of title to be examined is that of all deeds given by all successive record owners. Every such deed, if recorded, gives record notice to all prospective purchasers. Therefore, M would have record notice of B's deed.

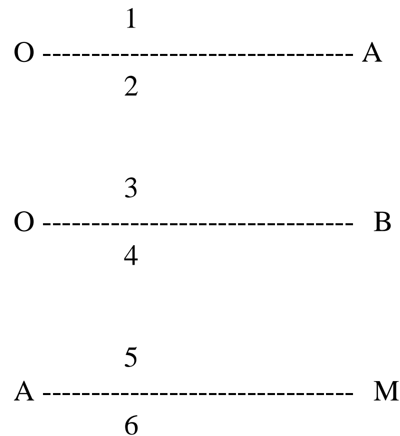
In those states adopting the Narrow Scope of Search theory - a prospective purchaser would search the record for the deed to his immediate grantor and for the deeds into each successive prior grantor; therefore, M would not have record notice of B's deed.

This is a good opportunity to reaffirm the well established rule that a purchaser can be a good faith purchaser from one who is himself a bad faith purchaser. In other words, the fact that C is a bad faith purchaser does not, in and of itself, prevent M from being a good faith purchaser. *White v. Dupree*, 91 Tex. 66, 40 S.W. 962 (1897); also see 42 A.L.R. 2d 1088; *Rose v. Knapp*, 153 Cal.App.2d 379, 314 P.2d 812 (1957).

Situation F - Conveyance by a Grantor after he has already Conveyed the Land to a Third Party

As discussed in the first portion of Situation D, this grantor's second conveyance is outside of his chain of title because, by the definition adopted in most states, a conveyance covered by the recording acts must be made while the grantor holds title.

Situation F can be described simply:



B's deed is void because O had no title. M can take a perfect title from A without constructive/record notice of the deed to B. M has no duty to inquire as to recordings subsequent to the deed to A because any such recordings would be out of his chain of title, in most states. A purchaser cannot be given notice by a claim that has no substance and constitutes no danger to him and cannot be guilty of bad faith in ignoring such. Therefore, M can pass a perfect title to anybody because any subsequent

conveyance by O would be outside the recording acts.

V. The Protestation

Professor Philbrick, in his excellent article entitled *Limits of Record Search and Therefore of Notice*, *supra,* argues that the American courts have construed recording acts in such a way as to defeat the expressed primary purpose of the recording acts, to reward subsequent purchasers for value who record. Philbrick argues that the courts have expanded the common law equitable doctrine of notice so that the first purchaser, the common law favorite, too often prevails. His main contentions are that record notice should be limited by the search that can reasonably be required of a purchaser; and that no actual/inquiry notice should be attributed to any instrument unlawfully recorded. This result, in Philbrick's opinion, could be reached if the courts reenforced the primary purpose of the recording acts - to force "...all title documents upon the record, in order that it may show a complete history of the title" and if legislatures changed the recording acts so that they reflect the following concepts:

1. No "inter vivos instruments" could affect title or be valid unless and until recorded (universal adoption of the race statute);
2. If concept 1 is not adopted, then the option would be for the statute to provide for "...the divestment of an unrecorded title in favor of a subsequent purchaser, who should therefore, as respects all matters of substance and procedure, be treated as the deliberately appointed favorite of the statute;
3. To the greatest extent possible, the subsequent purchaser should be protected in relying upon the record, and the burden of proof in litigation between him and the negligent non-recorder of the prior deed should invariably be upon the non-recorder; and
4. Public policy should never permit recognition of any recorded document in any manner or for any purpose unless:
   a. It is authorized to be recorded; and
   b. The recording is in strict compliance with statutory requirements.

If these changes were in fact statutorily adopted, then the recording practice would be simplified and many of the problems and most of the confusion previously identified would no longer arise.

PART II

VI. The Practice

As mentioned earlier, this portion of the article contains specific information concerning the recording laws and practice of the states considered. An effort has been made to make the information from all states consistent, complete and accurate. This material is organized by the following general topics:

A. Types of records maintained by county clerks, county recorders or other county record keepers.
B. Types of public records maintained by record keepers located outside the county where the land is located; and
C. Miscellaneous topics, including the cost for purchasing abstracts, how landmen and attorneys work together in examining title and any other topic of interest to the responding friend.

DISCLAIMER

The information set forth in the practice portion of this article is intended to be general in nature. An individual conducting an examination should always consult with the county personnel or a local attorney or landman on an initial foray into a county to ascertain exactly what indices and recording methods are employed by that particular county.

Arkansas

A. Records in the County

1. The records in the courthouses in Arkansas are kept in three main offices:

1. Circuit Clerk's office;
2. County Clerk's office;
3. Tax Assessor's office.

The Circuit Clerk's records include at least the following:

1. Deeds;
2. Oil and Gas Leases;
3. Assignments;
4. Mortgages;
5. Liens; and
6. Lis Pendens.

The Circuit Clerk maintains a single Grantor/Grantee Index on all recorded instruments. All lawsuits, except probate matters, are filed and maintained by the Circuit Clerk.

The County Clerk maintains all will and probate records which are accessed by an alphabetical index listing each probate by year. All past-due tax assessments and payments are provided in the County Clerk's office and the County Clerk maintains current voter registration.

The Tax Assessor's office maintains all current tax assessments and payments. These records are the best available to obtain current addresses. The Tax Assessor also maintains plats reflecting the surface ownership of each section and containing the subdivisions within a town or city.

Since the county offices do not maintain tract indices, the examiner must begin at the abstract office in the county. After the examiner has made a complete list of all instruments to be examined, he would go to the courthouse to review all instruments listed. After taking notes of all instruments examined, he would prepare his chain of title and determine present ownership of all interest and title defects, if any.

B. Records Outside the County

The Arkansas Oil and Gas Commission maintains production records which are necessary to determine if a drilling unit is held by production. The Commission also maintains records concerning pooling, unitizations and field matters. Its main office is located in Eldorado, Arkansas 501-862-4965. Duplicates of North Arkansas records are also kept in the Fort Smith office 501-646-6611.

C. Other Topics

1. Abstracters do not have consistent policies toward standup examinations. It is best for an attorney to be honest about his intentions and be willing to fairly compensate the abstracters for using their indices.

2. In standup work, it is common for the landman to prepare takeoffs from the abstracter's records and then work with the attorney in the courthouse assisting him in any way possible. Also, attorneys and landmen work together to reduce the number of potential requirements. While an attorney is preparing an opinion, the landman may obtain additional instruments or conduct additional research so that the issue could be resolved without the title attorney making a requirement.

3. The only source for tract indices is privately owned abstract offices. Abstract offices in Arkansas charge from $10.00 per hour to $50.00 per hour for examining their tract indices. Most abstract offices do not have copies of instruments or do not permit you to review their instruments. Therefore, to conduct a standup examination, you would review the instruments in the public offices previously identified.

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California

A. Records in the County

1. There are 58 counties in California. The principle oil and gas producing areas are as follows:

Oil- Orange, Los Angeles, Ventura, San Luis Obispo, Kern, Kings, Tulare, Fresno, Monterey and San Bernardino counties.

Gas- San Joaquin, Contra Costa, Sacramento, Solano, Yolo, Sutter, Yuba, Colusa, Glenn, Butte and Tehema counties.

Examining the location of the referenced counties quickly discloses that production of oil in California exists west of the Sierra foothills and south from Fresno County. Production of gas primarily exists in the northern San Joaquin Valley and in the Sacramento Valley, with some modest production possible in portions of the east slope of the coastal mountain range in Northern California.

2. Recording in California requires more than the instrument simply being executed and acknowledged. The instrument must effect title to or the right to possession of real property or an interest in real property or must be an instrument which is otherwise specifically allowed to be recorded by California Statutes. If the instrument transfers real property or an interest in real property, it is required that the instrument be recorded with a completed change of ownership form, or an additional fee must be paid and the change in ownership form completed and returned within twenty days (this requirement is driven by California's ad valorem tax limitation contained in California Constitution, Article XIII A under which property is revalued only when there is new construction or a transfer has been made). The cost of recording is $5.00 for the first page and $3.00 for each subsequent page or portion thereof and is statutory.

3. Recorded instruments are identified by different county recorders in different ways. Most counties continue to identify recorded instrument by both instrument number and by book and page of recording. Some counties have, in recent years, switched to identifying recorded instruments only by instrument number. Additionally, some counties have begun in the past seven years or so identifying recorded instruments by a numerical date of recording followed by a consecutively numbered page of recording.

4. All California recorders maintain a grantor/grantee index as well as a UCC file index. Cal. Gov. Code § 27231 et seq. et al lists over 15 types of instruments that require separate grantor/grantee indices.

5. County recorders do not maintain tract indices. However, in most counties private title companies maintain tract indices which are available for examination for a fee per hour.

6. California recorders do not maintain a tract index. There are instruments allowed to be recorded in California which do not contain a legal description and, sometimes, which do not

even reference two parties. These are maintained in the general grantor/grantee index.

7. In California there is a statutory form of "Abstract of Judgment" which must be recorded to obtain a judgment lien against a defendant in any particular county. An Abstract of Judgment must be recorded in the particular county where the judgment debtor's property is located in order for the judgment lien to be created in that county.

8. There must be an ancillary probate commenced and completed to transfer title to California property from a non-resident decedent. There are, however, summary administration proceedings (California Probate Codes Sections 13,000 - 13,209 and Sections 6,600 - 6,615) available to facilitate distribution of property of small estates in California as long as the type and value of the property fits within the language of those sections.

9. There is no requirement that any notice of bankruptcy proceedings be recorded in California. County recorders must accept a notice of bankruptcy or a copy of a petition in bankruptcy for recording. The bankruptcy stay, of course, applies automatically whether or not any notice of bankruptcy is recorded. I have no suggestion as to how to deal with this problem, and I fully agree that it can be a significant problem.

10. Virtually all practitioners in California file UCC-1's both with the County Recorder and with the California Secretary of State. The general rule which you have expressed is generally applicable in California. However, since there are numerous exceptions to the rule, it is common practice for California lawyers to file all UCC-1's in both locations. For example, when dealing with a transmitting utility it is specifically required under Section 9-401(5) that the UCC-1 be filed with the Secretary of State.

11. Birth certificates are indexed in the names of both the parents and the child. They are maintained by the Department of Health in the Department of Health Services.

12. All title companies in California maintain tract indices. There is a potential battle brewing between certain title companies and oil and gas landmen and lawyers regarding utilization of title company indices. Certainly the charges per hour sought are increasing dramatically, sometimes with cause and sometimes without cause (ostensibly because of getting in the way of title company work and leaving indices and title examination rooms in a state of disarray). Some title companies are now refusing to allow nonemployees to utilize their records.

13. ln theory all patents should be recorded in county records. Sometimes they are not. In that case, the local office of the Bureau of Land Management can provide a certified copy of the Federal Patent for recording, and the State Lands Commission can provide a copy of a State patent for recording.

B. Records Outside the County

14. Drilling and production activity, to the modest extent that it is regulated in California, is regulated by the State of California Division of Oil and Gas (1416 9th Street, Sacramento, CA 95814, (916) 445-9686). There are essentially no Division of Oil and Gas records which are recordable, with the possible exception of an Abstract of Judgment which might be obtained by the Division of Oil and Gas against an operator for failure to properly plug and abandon a well. There are essentially no Division of Oil and Gas records required to be reviewed in rendering a drilling title opinion in California.

16. A stand-up title examination of fee lands would consist of a review of the following indexes and records:

County Recorder's office:

1. general index county clerks;
2. judgment docket for all parties and
3. probate index

County Tax Collector's office:

1. ad valorem property taxes and assessments collected with tax bills

County Local Agency Formation Commission:

1. ascertain the existence of any special districts whose boundaries include the subject land, and make contact with the assessment collector for each such

special district so identified to ascertain whether there exists any unpaid assessments supported by liens against the subject land.

California Secretary of State:

1. UCC-1 Financing Statements;
2. Corporate Status

C. Other Topics

1. Comparison of purchasing abstracts to co

indices existing California only in privately owned

ess to their records by nonemployees are charging ra

for examining their indices, and a price per page fo

cost for obtaining copies of recorded documents fro

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the drafting of an opinion) could easily be [illegible] im [illegible] excee

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Colorado

I. Records in the County

Out of 63 Colorado counties, 39 have production. The major producing areas are the Denver Basin (Front Range) and Piceance basin (Western Slope).

Those with production are:

Adams	Delta	Huerfano
Arapahoe	Denver	Jackson
Archuleta	Dolores	Jefferson
Baca	Elbert	Kiowa
Bent	Fremont	Kit Carson
Boulder	Garfield	La Plata
Cheyenne	Gunnison	Larimer
Las Animas	Phillips	Sedgwick
Lincoln	Pitken	Washington
Logan	Prowers	Weld (#1-Gas)
Mesa	Rio Blanco (#1-Oil)	Yuma
Moffat	Rio Grande	
Montezuma	Routt	
Morgan	San Miguel	

The elected county clerk is the ex-officio recorder of deeds and has custody and the obligation to preserve all documents received for recording or filing by the clerk and recorder.

Colorado statutes obligate the clerk and recorder to maintain the following indices:

(a) A grantor index and a grantee index of every document filed or recorded concerning or affecting real estate. Colo. Rev. Stat. § 30-10-408 (2000);
(b) A reception book listing chronologically each document accepted by the clerk and recorder for recording or filing. Colo. Rev. Stat. § 30-10-409 (2000);
(c) A file of all subdivision plats presented for recording in accordance with law. The subdivision plats are indexed in the grantor index under the name of the person that signs and acknowledges the plat as owner and dedicator and in the grantee index under the name of the plat shown. In addition, the clerk and recorder must also keep an alphabetical index of such subdivision plats by the name of the plat. Colo. Rev. Stat. § 30-10-410 (2000); and
(d) Index of trade name registration records provided by the Department of Revenue. Colo. Rev. Stat. § 30-10-420 (2000).

There are few recording requirements in Colorado, and almost anything may be recorded, without an acknowledgment. Deeds must set forth the address of the grantee.

The clerk and recorders statewide charge $5 per page to record real property instruments and $10 for oversized plats. Colo. Rev. Stat. § 30-1-103 (2000). Documents containing multiple grants, notices, assignments or releases of leases, deeds of trust, mortgages or liens, or other instruments which require multiple entries in the grantee index shall incur an additional fee of $5 for each entry in excess of one per document.

In Weld County, instruments are identified by Book and Reception Number in both the real property and U.C.C. records. Older documents were identified by Book and Page. In other counties, such as Adams, documents are still identified by Book and Page.

Since the clerk and recorder in Colorado is not required by law to maintain a tract index, most title examiners rely upon examination of the tract indices maintained by the local abstract office. In some counties, such as La Plata County, abstracters may not make their records available to the public. If the abstracter permits access to their tract records, then the charges range anywhere from $25 to $125. Many abstracters charge a separate lower fee for examining copies of their deeds and conveyances. This can sometimes be an economic proposition where the clerk and recorders' documents are difficult to access (for example, when the computers are down or all terminals are being used). It is not unusual for some of the smaller counties to have only one computer terminal or microfiche reader for the general public.

In the larger metropolitan areas, the abstract companies have also limited access to the records for purposes of searching mineral title. In Denver, Boulder, Adams, Arapahoe and El Paso Counties, most of the abstract companies are focused on the business of providing title insurance and, therefore, ceased maintaining a tract index and have been relying on a computerized system of ARBS which roughly corresponds to a tract index. These companies maintain that the information from this system is proprietary, and they will not sell the information to you. Therefore, in some situations, you have no choice but to examine the grantor/grantee indices after the date upon which the abstract company begins using the ARBS system.

Some Colorado counties also maintain a Torrens Title Registration System. We have rarely encountered situations where a title has been placed in the Torrens system. The system mainly occurs in eastern Colorado counties, such as Kiowa, Morgan or Washington Counties. If there is a Torrens system, one must examine Torrens title as well as normal title. If there is an indication of conversion to Torrens (which will appear in the title chain), it is suggested that oil and gas leases be recorded in both systems. One cannot abandon the regular county records even if conversion to Torrens is found, since many people record or file documents in one or the other.

The county assessor maintains a current list of surface owners. The county treasurer

maintains an alphabetical list of owners paying ad valorem taxes assessed against lands within the county. Although severed minerals are subject to ad valorem taxation, Colorado has a voluntary reporting system. If the severed minerals are not reported and assessed, then no taxes are due and the severed mineral interest cannot be sold for unpaid taxes.

A judgment entered by the district or county court is not a lien against real property in the county until a transcript of that judgment is recorded in the county records. As a result, examination of the records of the clerk of the district court and clerk of the county court is not necessary to identify judgment liens affecting the lands under examination. Nonetheless, it would be prudent to examine these records to determine if there is any ongoing litigation or judgments that have been recently entered, but not recorded in the county. If you are relying upon the abstracter's tract index to conduct your examination of the county records, you should also be certain to examine various miscellaneous indices maintained by the abstracter in order to obtain any documents which have not been indexed in the tract book, such as transcripts of judgment.

II. Records Outside the County

If the minerals underlying the lands under examination are owned by the State of Colorado, then it will be necessary to examine the records of the State Board of Land Commissioners, at the Department of Natural Resources, 1313 Sherman Street, Suite 620, Denver, Colorado 80203 (303-866-3454).

If you determine that the minerals underlying the lands under examination are owned by the United States of America, then it will be necessary to examine the records of the Colorado State Office, Bureau of Land Management, located at 2850 Youngfield Street, Lakewood, Colorado 80215-7093.

To obtain information about the orders entered by the Colorado Oil and Gas Conservation Commission with respect to lands under examination, or obtain history of the oil and gas operations, you will need to examine the records of the Oil and Gas Conservation Commission at 1580 Logan Street, Suite 380, Denver, Colorado 80203. The Commission records contain a plat book of all wells drilled since 1953, individual well files, and files on spacing and other orders. Examination of the plats will allow you to ascertain if a particular spacing cause applies. If so you should examine the entire cause file to see if a spacing order has been entered or amended to affect your particular tract. Pertinent information and forms can be obtained from the Commission's web site at www.dnr.state.co.us.

III. Miscellaneous Topics

A. In lieu of the attorney doing a stand-up examination or obtaining from the abstractor a "title chain" for a fee, some attorneys will employ a landman to either prepare a "title chain" or prepare an abstract to be examined by the attorney in his office.

B. The Title Standards Committee of the Colorado Bar Association's Real Estate Section annually reviews and revises as necessary the Colorado Real Estate Title Standards. The most current title standards were revised and effective October 1, 1998. The title standards are published by Attorneys' Title Guaranty Fund, Inc., 999 18th Street, Suite 1101, Denver, Colorado 80202, phone 303-292-3055 or 800-525-6558; copies are available at a cost of $10.00 per copy. The table of contents of the Colorado Real Estate Title Standards is attached hereto as Appendix A.

C. The Colorado legislature has specifically provided that the Colorado Recording Act, Colo. Rev. Stat. § 38-35-109 (2000), is a race-notice statute. Under a race-notice statute, one must not only acquire the property without notice of an outstanding claim or defect, but the party intended to be protected must also be the first to record. For a detailed discussion, *see* George E. Reeves, "The Colorado Recording Act — Part I: History and Character of the Act," 24 *Colo. Law.* 1321 (1995). In Colorado, a purchaser is bound by the recitals and conveyances

or other instruments of transfer in his own chain of title, except as it may be modified by statute. *See Page v. Fees-Krey, Inc.*, 617 P.2d 1188 (Colo. 1980)

A great deal of oil and gas exploration activity occurs on federal and state lands. The Colorado Supreme Court has held that the purchaser may have a duty of inquiry with respect to instruments reflected in the records of the Colorado State Office of the Bureau of Land Management or the Colorado State Land Office. *See Page v. Fees-Krey, Inc.*, 617 P.2d 1188 (Colo. 1980); *Grynberg v. City of Northglenn*, 739 P.2d 230 (Colo. 1987).

D. Colorado also has a unique statutory provision related to recording which states that when an instrument in writing has been recorded and such instrument makes reference to some other instrument which is not recorded in the county records, such reference shall not be notice to any other person. Colo. Rev. Stat. § 38-35-108 (2000). No person other than the parties to the instrument shall be required to make inquiry or investigation concerning such recitation or reference. *Id.*

This statute can create a number of problems in the normal way that an oil and gas company conducts its business. First, the custom of making reference to agreements not of record in the conveyancing documents, such as purchase and sale agreements, farm out agreements or joint operating agreements, does not place third parties on notice and the statute arguably eliminates the duty to make further inquiry. Second, the statute calls into question the notice that would otherwise be provided by a memorandum or notice of agreement (for example, a memorandum of operating agreement). It would be better practice in Colorado to set out the pertinent terms of your agreement when recording any memorandum of agreement or notice of agreement.

APPENDIX A

COLORADO
REAL ESTATE
TITLE STANDARDS

Revised and Effective October 1, 1998

TABLE OF CONTENTS

Title

SPECIAL THANKS

THE TITLE STANDARDS COMMITTEE

INTRODUCTION TO REAL ESTATE TITLE STANDARDS

I. TITLE EXAMINATION; GENERALLY

1.1 Standards and Duties of Examining Attorney

1.1.1 Duty on discovering Defect in Title Previously Examined by another Attorney
1.1.2 Examinations for Title Opinions 1
1.1.3 Scope of Search of Real Property Records
1.1.4 Scope of Search of Abstract of Title
1.1.5 Scope of Search of Matters not of Record 3
1.1.6 Presumptions

II. ACTIONS AND PROCEEDINGS

2.1 Quiet Title

2.1.1 Actions and Proceedings - Effect of Defects
2.1.2 Decrees Affecting Real Estate 5
2.1.3 Re Address or Last Known Address
2.1.4 Quiet Title Suit - No Known Address of Defendant
2.1.5 Quiet Title - Conveyance

Before a Decree 6

2.2 Rule 120

2.2.1 Proceedings Under Rule 120 - Jurisdiction of County Court

2.3 Lis Pendens
2.3.1 Effect of Notice
2.3.2 Nature of Claim
2.3.3 Legal Description
2.3.4 Identity of Court
2.3.5 Identity of Case
2.3.6 Corrective Notice
2.3.7 Termination of Notice of Release of Property 8
2.3.8 Notice of Lis Pendens on Appeal 8

III. CONVEYANCING

3.1 Execution

3.1.1 Conveyance - Execution by Mark 9

3.2 Delivery

3.2.1 Delivery of Deeds - Presumption 9

3.3 Recording

3.3.1 Stranger to Title - Instrument by 9
3.3.2 Recording in Wrong County 10

IV. CONVEYANCES FROM PUBLIC OFFICIALS

4.1 Public Trustee and Sheriff

4.1.1 Certificate of Purchase - Assignment
4.1.2 Foreclosure - Public Trustee - Under Rule 120

4.2 Treasurer (Tax Titles)

4.2.1 Marketability - Tax Deeds 10 6
4.2.2 Conveyance of Tax Title by City and County of Denver 6

V. CAPACITY TO CONVEY 7
7
5.1 Agents and Representatives; Generally 11 7
7
7
8
5.1.1 Description of the Person as to Grantee 8
5.1.2 Description of the Person as to Grantor

5.2 Attorneys-in-Fact

5.2.1 Power of Attorney - Where no Record of Military Service 9
5.2.2 Power of Attorney - Authority 13 9
5.2.3 Power of Attorney - Description of Property
5.2.4 Power of Attorney - Form of Execution

5.3 Trade Name Affidavits 9

5.3.1 Trade Name Affidavit - Non-Human Entities as Members
5.3.2 Trade Name Affidavit - Title Held in Trade Name 9

5.4 Miscellaneous

5.4.1 Conveyances or Encumbrances by Persons Eighteen Years of Age or Older

VI. CORPORATIONS 10

6.1 Evidence of Authority to do Business 15 10

6.1.1 Corporation - Recital as to Existence 10
6.1.2 Corporation - National Banks 16 10
6.1.3 Foreign Corporations - Certificate of Authority 10

6.2 Evidence of Authorization of

6.2.1 Corporation - Execution of Instruments
6.2.2 Corporate Seal - Omission of 16
6.2.3 Conveyance of Corporation - to Officer thereof

6.3 Variances in Name

6.3.1 Corporation - Word “The” in Name 17
6.3.2 Corporations - Use of Abbreviated or Non-Abbreviated Terms 17

VII. COTENANCY

7.1 Joint Tenants

7.1.1 Joint Tenancy - Necessity of Affidavit
7.1.2 Joint Tenancy - Grantees 18
7.1.3 Joint Tenancies Prior to March 27, 1939 18
7.1.4 Joint Tenants - Conveyance 18

7.2 Tenants in Common

7.2.1 Cotenancy - Grantees

VIII. LEGAL DESCRIPTIONS

8.1 Generally

8.1.1 Description of Property - Formerly in Arapahoe County, Now in the City and County of Denver
8.1.2 Metes and Bounds Descriptions 19

8.2 Subdivisions

8.2.1 Conveyance by Deed Reference to Vacated Plat
8.2.2 Description Omitting Part of Name of Addition

8.3 Vacated Roads, Street and Alleys 21

16

8.3.1 Streets and Alleys - Vacation 21
8.3.2 Conveyance of Block after Vacation of Alley 17

IX. VARIANCES, INCONSISTENCIES AND OMISSIONS 17

9.1 Name or Description of Individual 22

9.1.1 Names - Variances in
9.1.2 Evidence of Change of Name 22
9.1.3 Deed to Grantee by given Name 23 17
9.1.4 Variance with Respect to Gender 23 17

17

9.2 Acknowledgments

9.2.1 Acknowledgments - Statement of Date of Expiration of Commission
9.2.2 Date of Acknowledgment 24
9.2.3 Mistake in Stating Expiration of Commission 19
9.2.4 Notarial Certificate 19
9.2.5 Acknowledgment by Attorney-in-Fact 19
9.2.6 Acknowledgments - Address of Notary 19
9.2.7 Scope of Acknowledgment Statute 25

9.3 Form of Ownership

19

9.3.1 Joint Tenancy Form of Conveyance to Single Individual
9.3.2 Granting and Habendum Clauses Inconsistent with Joint Tenancy 26 20

9.4 Releases 20

9.4.1 Release of Lien - Re-recorded Encumbrance
9.4.2 Release of Lien - Errors in Recitals 27

9.5 Revenue Stamps and Documentary Fee

9.5.1 Revenue Stamps and Documentary Fee Notation

9.6 Name or Description of Entity

9.6.1 Partnership registered as a Limited Liability Partnership or as a Limited Liability Limited Partnership 27

9.6.2 Conversion or Merger of Entities 28

X. RELEASES

10.1 Inheritance Tax

10.1.1 Inheritance Tax Release - Joint Tenancy
10.1.2 Death of Owner - Release of Colorado Inheritance or Estate Tax Liens

10.2 Mortgages and Deeds of Trust

10.2.1 Assignment of Rents - Release 29

10.2.2 Releases
10.2.3 Releases of Deeds of Trust - Execution by Deputy Public Trustee

10.3 Miscellaneous

10.3.1 Attachments and Levies - Release 30
10.3.2 Sidewalk Certificates

XI. DECEDENTS' ESTATES

11.1 Transfers of Decedents' Property; Generally 26

11.1.1 Release of Deed of Trust - Request for in Decedent's Estate
11.1.2 Decedents' Estates - Transfer of Title, Release of Encumbrances
11.1.3 Decedents' Estates - Acquisition of Title through Foreclosure 27
11.1.4 Statutory Sale of Real Estate - Necessity of Recording Letters 27
11.1.5 Informal or Formal Appointment of Local Personal Representative 27
11.1.6 Documents for Distribution by Personal Representative
11.1.7 Order Necessary to Vest Merchantable Title in Distributees (Under Color

11.1.8 Documents for Conveyance from Local Personal Representative to Purchaser

11.1.9 Documents for Conveyance from Foreign Personal Representative to Purchaser 29

11.2 Transfers Pursuant to Powers in Wills 35 29

11.2.1 Sale of Real Estate Under Power in Will - Order of Confirmation 29

11.2.2 Deed by Administrator with Will Annexed under Power Contained in Will which is not a Foreign Will 29 29
11.2.3 Deed by Administrator with Will Annexed under Power Contained in a F

11.2.4 Wills - Contingent Beneficiary 36 30
30
11.2.5 Wills - Requiring Sale of Real Estate 36 30

11.3 Augmented Estates - Effect on

11.3.1 Augmented Estate - Conveyances - Recitals as to Marital Status 37 31
31
11.3.2 Augmented Estate - Conveyances - Married Grantor

11.3.3 Augmented Estate - Separate Consent - Acknowledgment

11.3.4 Augmented Estate - Recitals in Conveyance and Consent
11.3.5 Augmented Estate - Partnership in Property
11.3.6 Augmented Estate - Assumed Name 39
11.3.7 Augmented Estate - Powers of Attorney
11.3.8 Augmented Estate - Encumbrances or Subdivision Plat

11.4 Intestate Estates; Heirship Proceedings 40

11.4.1 Determination of Descent of Same Property of Two or More Persons in One Proceeding
11.4.2 Real Estate Sold Under Order of Court - Necessity of Determination of Heirship
11.4.3 Small Estates (Real Estate) 40
11.4.4 Determination of Interests - Petition - Heirs of Heirs
11.4.5 Presumption of Intestacy 41

11.5 Service in Probate Proceedings

11.5.1 Service by Publication under the Colorado Probate Code - Number of Publications

11.5.2 Service by Mail on Minors Under Section 153-1-11, C.R.S. 1963
11.5.3 Estates - Citation to Attend Probate 42

XII. CONSERVATORSHIP PROCEEDINGS

12.1 Notice

12.1.1 Estate of a Mental Incompetent - Sale of Real Estate
12.1.2 Notice on Application for Letters of Conservatorship

XIII. TRUSTS AND TRUSTEES
and Recording 38
13.1 General 39

13.1.1 Trust - Necessity of Conveyance by Trustee 39

XIV. HOMESTEADS 40

14.1 General 40

14.1.1 Homesteads - Failure to Convey 44
14.1.2 Homestead - Identity of Surname - Separate Conveyance
14.1.3 Homestead - Conveyance - One Spouse to the Other
14.1.4 Homestead - Death of or Divorce from Spouse
14.1.5 Homestead - Conveyance - Spousal Joinder 40

XV. SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940 40

15.1 Actions and Foreclosure Proceedings 46 41

15.1.1 Soldiers' and Sailors' Civil Relief Act - Time for Bringing Action or Proceeding

15.1.2 Soldiers' and Sailors' Civil Relief Act as Applicable to Statutory Proceeding fo 41

15.1.3 Soldiers' and Sailors' Civil Relief Act as Applicable to Estate or Probate Proceedings 46 41 42
15.1.4 Title Acquired through Foreclosure as Affected by the 1942 Amendment

15.2 Liens and Encumbrances 42

15.2.1 Colorado Fifteen-Year Statute of Encumbrances 42
15.2.2 Soldiers' and Sailors' Civil Relief Act - Liens of Judgments 42

APPENDIX A - HISTORICAL REFERENCE 43

TABLE

INDEX

Kansas

A. Records in the County

1. Most records in the State of Kansas pertaining to real estate and oil and gas are maintained in the office of the Register of Deeds, as opposed to the County Clerk's office. The Register of Deeds is required to maintain a Grantor/Grantee Index and, whenever deemed necessary by the Board of County Commissioners, the Register of Deeds may maintain a tract/numerical index containing:

1. The name of the instrument;
2. The name of the Grantor;
3. The name of the Grantee;
4. A brief description of the property; and
5. The volume and page where recorded.

The tract index usually describes the lands by sections but each page reflects quarter of quarter or 40 acre tracts.

Kansas has 105 counties. All counties maintain a tract/numerical index except for Sedgwick County and Butler County (as to records prior to the early 1960s). Therefore, a standup examination from inception of title is not possible in these counties utilizing only the county records. The Register of Deeds makes no charge for use of the records, except for copy expense.

Records not maintained by the Register of Deeds will be found in the office of the Clerk of the District Court. The Clerk of the District Court maintains at least the following records:

1. All lawsuits;
2. Probate proceedings;
3. Divorce proceedings;
4. All types of mechanic's liens;
5. Foreclosure actions;
6. Partition actions;
7. Quiet title actions; and
8. Tax warrants and judgment liens issued by the Department of Revenue for the State of Kansas.

A-1

B. Records Outside the County

I-1

1. (Is it necessary to review records of the Kansas Corporation Commission or examine records re patents?)

C. Other Topics

1. Since the counties maintain a numerical/tract index, the standup examination begins in the county.

Most abtracters in Kansas still abstract, that is they do not copy every page of every instrument, but provide a summary of most instruments. The abstracter will provide complete copies of any instruments requested. The instruments usually requested to be copied in full are:

a. Oil and gas leases;

b. Assignments and other related instruments;
c. Unitization Agreements;

2. Affidavits of Production and of Non-Production. Kansas has the same requirements as Colorado, however, Kan. Stat. Ann. § 55-205 has some teeth. Cities Service v. Adair, 273 F.2d 673 (10th Cir. - Kan. 1959) held that a lease partially expired in the following situation. In 1923, Lessors executed an oil and gas lease covering 1,280 acres. The ownership of the lease became fragmented in that Sinclair owned 480 acres, Cities Service owned a separate 160 acres, with the remaining acreage owned by third parties. Sinclair drilled producing oil wells on its 480 acres and timely filed an Affidavit of Production to extend the primary term as to its acreage. This affidavit only identified the 480 acres owned by Sinclair. In 1955, Defendants obtained an oil and gas lease from the mineral owners of the same 160 acres covered by Cities Service's portion of the 1923 lease. Defendants drilled producing oil wells and Cities Service sued claiming title. The court held for the Defendants and stated that the Defendants did not have actual notice of Cities' leasehold, because Cities did not conduct any surface operations, and the Defendants did not have constructive notice of Cities' leasehold, because the Affidavit of Production was not in the chain of title for the 160 acre leasehold owned by Cities Service.

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Louisiana

A. Records in the County

1. Recordkeeping in Louisiana's 64 parishes (same as common law counties) is not consistent. Generally, instruments conveying fee lands, mineral servitudes and oil and gas leases and assignments are found in the Deed or Conveyance Records located in the Clerk of Courts in the parish where the property is located. Some parishes, however, maintain separate records such as:

a. Conveyance or deeds;
b. Mortgage;
c. Suit;
d. Judicial;
e. Charter book;
f. Books of Donation;
g. Probate, etc.
h. U.C.C.

Usually, each type of record has its own index. While older records were indexed manually by year of transaction, many of the more recent records have been indexed by computer and may be found alphabetically in the Grantor/Vendor/Direct Index and the Grantee/Vendee/Indirect Index. Although Parish Clerks do not maintain tract indices, some abstracters do.

2. In Louisiana, an attempt to sell or reserve the ownership of oil and gas results in the creation of a mineral servitude, that is, a right in the land owned by another to explore for, produce, and reduce the minerals to possession and ownership. That right is a real right that can be owned separately from the ownership of the land. As the Louisiana Supreme Court stated in its 1984 opinion in Steele v. Denning, 456 So. 2nd 992 (L.A. 1984) a mineral servitude "is a dismemberment of title insofar as it creates a secondary right in the property separate from the principal right of ownership of the land. The court continued: "the creation of amineral servitude effectively fragments the title such that different elements of ownership are held by different owners." This separate right is fully alienable and inheritable. Unlike a mineral estate which can be created in perpetuity with no obligation on the owner to use his rights, a mineral servitude is subject to prescription of nonuse for ten years.

B. Records Outside the County

1. Because Louisiana follows the non-ownership theory of oil and gas and therefore does not recognize a separate estate in oil and gas, it is extremely important that anyone running title in Louisiana include a check of the mineral and production history of the property under examination, as well as the surrounding and contiguous tracts, if the initial examination of the public record reveals the creation of a

mineral servitude. The research for the mineral and production history is done at the home office of Louisiana Office of Conservation in Baton Rouge or one of its three district offices, which are located in Lafayette, Monroe and Shreveport. This is the only accurate way to determine if the owner of the mineral servitude has exercised the rights he has acquired within 10 years from the date of the creation of the servitude in a manner sufficient to interrupt the running of prescription of non-use and prevent the extinguishment of the servitude.

2. While orders of The Office of Conservation creating compulsory units are usually recorded in the parishes, the Office of Conservation also contains other orders and drilling and production records of the Commissioner which are generally not found in individual parishes. These records are computerized and require some familiarity to retrieve and interpret the pertinent data. Use of the rights granted in a mineral servitude must meet the requirements of the Mineral Code. The Mineral Code contains more than 30 sections that deal with problems of interrupting or suspending prescription. A discussion of this subject is beyond the scope of this article.

3. Since complete severance information is often missing from the parish records, the records of the State Land Office in Baton Rouge and the records of the Bureau of Land Management in Alexandria, Virginia, should also be researched. Since early records in several parishes were destroyed in whole or in part by courthouse fires, a direct search of the state and federal severance materials is generally required to insure that the severance information contained in the parish records is complete and accurate.

4. Title 9 of the UCC has recently been adopted in part of Louisiana. UCC records are maintained by the __________ in Baton Rouge but can be accessed by computer from the Clerk of Court's office in each parish. As adopted in Louisiana, financing statements do not directly affect immovable property, such as land and mineral leases, but they can affect severed minerals.

5. To verify the legal existence of corporations and partnerships, contact the Secretary of State of the State of Louisiana. This is often handled via telephone (504) 925-4704.

C. Other Topics

1. An examiner can conduct a standup examination by examining the indices of the Clerk of Court. However, this is neither the fastest nor the most accurate method to construct a chain of title. Since tract books are not maintained in the clerk's offices, most abstracters in Northern Louisiana will permit examination of their tract indices for a charge determined on a per hour rate (beginning at $10.00 per hour), or per reference rate (ranging from $1.00 to $4.00 per reference), or even per 40 acre tract examined. Some abstracters, however, do not permit the public to use the tract indices. The parishes with substantial oil and gas activity where the examiner must utilize the indices of the Clerk of the Court in Southern Louisiana are:

(LIST PARISHES)

2. Abstracters have traditionally charged by the page for their services. Costs range from $2.00 to $3.50 per page. Large abstracters maintain abstract libraries and commonly rent or copy old abstracts for a lower per page rate than the rate applicable to new abstracts. Abstracters are generally willing to limit the instruments copied to meet the client's request. Some abstracters do not include subsequent grants of right of ways or mortgages of right of ways, etc., unless requested to do so.

3. There is an increasing trend to use landmen charging a day rate from $150.00 to $250.00 plus expenses to prepare chain sheets or abstracts. This permits the attorney to examine the information presented in his office.

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Michigan

A. Records in the County

In Michigan, all land records are maintained by the county register of deeds. There are 83 counties in Michigan. By statute in Michigan, each register of deeds is to maintain separate grantor/grantee indices for deeds and

for mortgages. While the statutes are fairly specific in terms of the types of books and information to be maintained by the register of deeds, in both form and content (MCLA 565.24 et seq.; MSA 26.542 et seq.), in actuality there is a wide diversity in the systems employed by the various county registers of deeds. In fact, certain registers of deeds maintain only tract indices. Other registers of deeds maintain tract indices in addition to the official grantor/grantee indices. Many registers of deeds have, over time, employed a variety of systems for the maintenance of the records. These include books, card systems, computer printouts and computer disks. The registers of deeds generally will maintain separate books or files for liens other than mortgages. The register of deeds also maintain separate files for UCC financing statements.

In addition to the register of deeds office, other pertinent land title records may be located in the county probate court files; circuit court files (although a lis pendens should be filed in the register of deeds office for any circuit court action which pertains to real estate); county treasurer's office (as to the status of real estate taxes - Michigan has a series of statutes which, in effect, provide for the auctioning-off of property for which real estate taxes have not been paid for three consecutive years); and county clerk's office (to locate co-partnership filings and certificates of persons doing business under an assumed name). All other instruments relating to real property should be recorded in the register of deeds office.

As previously noted, certain registers of deeds maintain tract indices as well as grantor/grantee indices. Generally, the register of deeds will charge an hourly rate for the use of the tract index, which is not the official county index. No charge may be made for use of the official grantor/granee indices. A landman or title attorney performing a stand-up title examination would likely run title in the local county abstractor or register of deeds tract index, and confirm title in the official records for a period commencing with the first recorded conveyance prior to forty years from that date of the search. This limited method of searching title is in keeping with the Michigan Forty Year Marketable Record Title Act (MCLA 565.101 et seq.; MSA 26.1271 et seq.). The Marketable Record Title Act is remedial in effect and, with certain exceptions enumerated in the statute, may be relied upon to cure defects which pre-date the period of time established by the statute. The county abstractors vary as to the rates charged, and in certain instances, whether or not they allow the public to use their indices.

Most oil and gas abstracts in the State of Michigan are prepared by one of two state-wide oil and gas abstractors, as opposed to local county abstractors. Generally, there is a per page, as well as a certificate charge, and the abstractors will, upon request and with the inclusion of an abstractor's note, provide partial copies of an instrument.

Michigan is a race-notice jurisdiction (MCLA 565.29; MSA 26.547). Unrecorded, or after-recorded conveyances are void as against subsequent purchasers in good faith and for a valuable consideration, as against a party whose instrument of conveyance is first duly recorded. The fact that the first recorded conveyance is in the form of a quit claim deed, or contains language of quit claim or release, shall not affect the issue of good faith.

As noted in the statute, in Michigan, a person is charged with notice of facts which a reasonable person in the use of ordinary diligence would have ascertained. This has been interpreted to include, for instance, a diligent effort to obtain a copy of any written instrument which, althought not of record, is referenced in a recorded instrument. Inclusion of such a reference would be construed to constitute constructive notice of the terms of the unrecorded instrument, as a matter of law.

B. Records Outside the County

In addition to the county records, the Michigan Secretary of State maintains Uniform Commercial Code files on a state-wide basis. The Michigan Corporations & Securities Bureau maintains records of all limited partnership and corporate filings, as required by law. Although not official records, the State of Michigan, Department of Natural Resources, Lands Division, maintains separate files as to the title to lands in which the State of Michigan owns the oil, gas and minerals, whether or not in conjunction with the surface. These files would include copies of the original instrument

whereby the interest was acquired or reserved, as well as any and all oil and gas leases issued by the one State, any assignments (state oil and gas lease forms require stae approval before an assignment of all or part of the lessee's interest is effective), ratifications, extensions and releases thereof.

C. Other Topics

When conducting a stand-up title examination, it is important to know that most county abstractors, as well as registers of deeds that maintain tract indexes, also maintain a miscellaneous name file wherein may be located any instrument recorded in the county register of deeds office which does not contain a specific legal description. This may include certifictes of death, certain probate proceedings, judgments of divorce and powers of attorney. As previously mentioned, in performing a stand-up search, a title attorney would generally review the county abstractor's tract index from U.S. government patent to the date through which the index is updated, and thereafter confirm title by conducting a limited grantor/grantee search in keeping with the provisions of the Forty Year Marketable Record Title Act. Copies of all pertinent documents would be obtained and the title examiner would thereafter prepare a title opinion from these materials, in effect compiling his/her own abstract with the title notes serving as an index. In addition to these records, it is generally advisable to review the county treasurer's tax records for the prior three years as to the property in question; and if there are any partnerships, persons conducting business under an assumed name, incomplete probate proceedings or circuit court actions, it would be advisable to review the appropriate records as noted above.

Frequently, attorneys and landmen will work together to cure title while the title opinion is being drafted. On larger projects (generally acquisitions of producing properties) the attorney may review the records and compile a list of the "liber and page" recording references for the pertinent documents. The landman would then reviw the appropriate books, hard copies, or microfilm and obtain and provide copies of same to the attorney. Depending upon the client and the sophistication level of the landman, the attorney may delegate more responsibility to the landman for review of the records. However, most clients desire a stand-up title opinion which is based, at least in part, upon a review of the pertinent records by the attorney drafting the title opinion.

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MISSISSIPPI

A. Records in the county

1. The records in the courthouses of Mississippi are kept in four places:
   1. Chancery Clerk's office;
   2. Circuit Clerk's office;
   3. Tax Assessor's office;
   4. Tax Collector's office.

   The Chancery Clerk's records include the following:
   1. Deeds
   2. Oil and Gas Leases
   3. Assignments
   4. Mortgages
   5. Liens
   6. Lis Pendens
   7. Probate records
   8. Court files affecting lands and title to lands

Mississippi has separate courts of law and equity at the trial level. The chancery court is the equity court. The circuit court is the law court. All actions relating to divorce, estates, adoption, confirmation of title, cloud removal and partitions are all in the chancery court and records, court files and indices of these actions are maintained in the office of the chancery clerk.

The circuit clerk's office records include the following:

1. Judgement roll

The Tax Assessor's office records include the following:

1. Tax maps
2. Individual tax statements
3. Indices to tax assessment records

The Tax Collector's office records include

the following:

1. Tax statements for current year
2. Tax receipts

After the tax collection process is completed tax records and books are transferred to the office of the chancery clerk, where they may be examined in order to insure that all taxes have been paid. Taxes may be back assessed for seven years and may be redeemed from tax sales within two years after the sale. As a result a thorough title examination will include verification that taxes have been paid for the past seven years. Sometimes for reasons of expense or time, tax payments will only be verified for the most recent three-year period.

Mississippi counties maintain both a tract or sectional index and a name (direct and reverse) index. Most counties maintain separate indices for deeds and for deeds of trust (mortgages). In most counties, oil and gas records are indexed and kept among the deed records. In some counties, oil and gas instruments are indexed and maintained among the mortgage records.

Ten counties in Mississippi have two "judicial" districts, with a separate courthouse for each district. These counties and the location of the two courthouses are: Bolivar County (Rosedale and Cleveland); Carroll County (Carrollton and Vaiden); Chickasaw (Houston and Okolona); Harrison (Gulfport and Biloxi); Hinds (Jackson and Raymond); Jasper (Paulding and Baysprings); Jones (Ellisville and Laurel); Panola (Sardis and Batesville); Talahatchie (Charleston and Sumner); and Yalobusha (Coffeeville and Water Valley).

B. Records Outside the County

The Mississippi Oil and Gas Board contains records dealing with its enforcement of the oil and gas conservation laws of Mississippi, including permits, pooling, unitization and production records. The main office is located at 500 Greymont Avenue, Suite E, Jackson, Mississippi 39202. Telephone: (601) 354-7412. Website: http://www.ogb.state.ms.us

The Public Lands Division of the office of the Secretary of State is a successor of the now abolished State Land Office (Office of the State Land Commission) and as such maintains among other records copies of original government surveys of all lands in Mississippi, state land patents issued by the state of Mississippi and list of lands sold to the state for taxes. The Secretary of State also maintains records concerning sixteenth section school lands and publicly owned tidelands.

C. Other Topics

1. There are currently no abstract companies or plants in Mississippi. The predominant practice in the rendering of oil and gas title opinions is for landmen to prepare an abstract, which consists of the pertinent title documents photocopied from the public records, for examination by an attorney.
2. Lester and Witcher Abstract Library has for rent an extensive library of over 60,000 volumes of abstracts prepared by Lester and Witcher Abstract Company from the 1940's to 1990. Contact: Teresa Moody, Lester and Witcher Abstract Library, (601) 353-4946. These abstracts can be rented for $1 per page.
3. As each county has a sectional or tract index it is relatively easy to prepare an initial take-off.

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Montana

A. Records in the County

1. There are 56 counties in the State of Montana, with oil and/or gas production attributable to 32. The primary producing areas are the Williston Basin (northeast Montana), Big Horn Basin (south-central Montana), Powder River Region (southeast Montana), Sweetgrass Arch (northern Montana) and the central and south-central portions of Montana.

The types of records maintained in the Montana County Clerk and Recorder's offices include, but are not limited to, the following:

1. Patents;

2. Receiver's Receipts;
3. Deeds;
4. Mortgages;
5. Releases of Mortgages;
6. Contracts for Deeds;
7. Easements and other servitudes;
8. Leases (oil and gas, coal, surface, etc.);
9. Releases of various encumbrances;
10. Lis Pendens;
11. Judgments; and,
12. Other instruments bearing on real property ownership;

which are maintained in separate books with separate indices. The county clerk and recorders in the eastern part of Montana all maintain unofficial tract indices as well as the official grantor/grantee indices. As you move westward in the state, the availability of public tract indices becomes less prevalent.

The Clerk of the District Court in each county usually maintains Judgement and Lien Records. However, these records may be located in the Clerk and Recorder's office. Real and personal property tax information can be obtained from the County Treasurer and County Assessor.

2. In addition to an instrument having to be properly executed and acknowledged, the clerk and recorder cannot record any deed, mortgage or assignment of mortgage unless the post office address of the grantee, mortgagee, or assignee of the mortgagee is contained therein. Recording fees are fixed by statute.

3. In those counties which still maintain hard-copy records, instruments are identified by book and page. In counties which have switched to using aperture cards, instruments may be referred to either as a document number or by book and page. Yet other counties utilize microfilm, and generally refer to recording information as a film number followed by an exposure number.

4. The grantor/grantee indices maintained for various records differ from county to county. Montana Code Annotated § 7-4-2619 sets forth the indices required to be maintained by every county clerk and recorder. Several categories of documents may be grouped together in a single index volume.

5. In Montana, tract indices are not official, thus grantor/grantee indices are required, and will necessarily contain instruments although lacking a legal description.

6. I have never experienced an instance where a county clerk and recorder would refuse to make a copy of the tract index for use by an examiner. As a practical matter, however, many of these indices are quite large, and do not readily lend themselves to copying.

7. Upon entry in the judgment rolls, the lien automatically attaches to all real property located in that county owned by the judgment debtor. In practice, when a judgment is in the nature of quiet title or otherwise serves to transfer title to an interest in land, the judgment should also be recorded in the clerk and recorder's office. To impose a lien upon the judgment debtor's property located in a county other than the county in which the action was maintained, the judgment must be transcribed to the other county and entered in the judgment rolls thereof.

8. Although property owned by a nonresident decedent devolves to the successors at death, either original or ancillary probate proceedings in the State of Montana are necessary to establish proper succession to such decedent's property interests.

9. In Montana, bankruptcy proceedings are filed with the Bankruptcy Court in the City of Butte. Bankruptcy proceedings are not recorded as such, although the procedure is certainly available.

10. Montana follows the general rules as to U.C.C. filings.

11. The method of indexing birth certificates varies from county to county.

12. Every abstract company which I have utilized maintains tract indices. I am unaware of any counties fitting your description wherein the abstractor does not allow access by landmen or attorneys to its tract indices. Abstractors generally charge $20 to $50 per hour for the use of their tract indices by either an attorney or landman, and they charge $1 to $5 per instrument if they prepare chain sheets. Unfortunately, there are some abstractor's records that are suspect so that the examiner has no alternative but to use the grantor/grantee indices in the county clerk and recorder's office.

B. Records Outside the County

13. Patents are located in the Montana State Office, Bureau of Land Management, Billings, Montana.

14. The Montana Board of Oil and Gas Conservation is the State agency charged with regulating drilling and production activity. The administrative office is located at 1520 East Sixth Avenue, Helena, Montana 59620. The technical office and southern district field office is located at 2535 St. Johns Avenue, Billings, Montana 59102. The northern district field office is located at 218 Main Street, Shelby, Montana 59474. The most critical information from an examination standpoint is any special field rules or spacing orders which may be applicable to a particular tract of land. In my opinion, there really isn't any information maintained by the Board which needs to be available in the county.

C. Other Topics

16. Standup title examination of fee lands would generally be conducted as follows, with the procedures perhaps varying depending on the nature of the opinion (i.e., drilling, division order, acquisition, financing, etc.):

First, a patent check is undertaken at the Montana State Office, Bureau of Land Management, to ascertain the existence of any reservations which might be contained therein. Concurrently with that examination, the appropriate abstractor is contacted and requested to compile chain sheets covering the tract of land to be examined.

In the county clerk and recorder's office, the documents indicated by the chain sheets are pulled and examined, with the various grantor/grantee indices consulted as necessary. Thereafter, the federal tax lien index and various lien indexes are examined for the presence of any liens. The clerk of district court's judgment docket is examined for all parties appearing in the chain of title, as well as for any probate information which might be indicated. The county treasurer's and assessor's records are also checked to determine the existence of any delinquent taxes, be they property or severance taxes.

Depending upon the nature of the opinion and the wishes of the company for which it is being prepared, the Board of Oil and Gas Conservation records and files are examined with respect to spacing orders, operator status, etc. Finally, the Montana Secretary of State is contacted to ascertain any outstanding UCC-1 financing statements and the corporate status of certain entities, should an issue have arisen concerning such items.

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New Mexico

A. Records in the County

1. Number of counties: 33; oil and gas producing areas: primarily southeastern New Mexico, including Lea, Eddy, Chaves and Roosevelt counties as the most active. Northwest New Mexico has scattered production, mainly the San Juan Basin.

Prior to 1986, most New Mexico County Clerks maintained the following separate records:

1. Deeds;
2. Mortgages; and
3. Miscellaneous.

Oil and gas leases and assignments were recorded in the Miscellaneous Records. Since 1986, all instruments are recorded as "Clerk's Records". Most Clerks maintain Grantor/Grantee indices, not tract indices. In the last few years, most Clerks have placed their instruments and indices on microfiche.

The Clerk of the District Court in each county maintains the following records which should also be examined:

1. Divorce Decrees;

2. Foreclosures;
3. Civil suits; and
4. Formal probates.

New Mexico requires that an instrument be acknowledged and signed. The county clerks in N.M. are charged with the administration of these requirements. This is not to say that all county clerks require both of these, they could require more or less.

2. Recording cost: $5 for the first page of a document, $2 for each additional page. If an assignment, mortgage, release of mortgage, etc., affects more than one property, then technically there should be a $5 charge for each property in addition to the page charge stated above. Also, if there is more than one acknowledgement, there should be an additional charge.

The recording cost is statutory but not all county clerk's offices are uniform in their interpretation of the statute.

3. Records are identified by book and page. In addition, some older records are identified by "record" (i.e., Deed Records, Mortgage Records, Mics. Records, etc.).

4. General Index for all records. Seems to be consistent throughout the state.

5. County Clerk does not maintain a tract index - this is done by an abstract company. The abstract company has a "general" file for instruments that do not contain a legal description.

6. The tract index is maintained by the abstract company and is personal property, not a public record. Abstract company will not provide a "copy" of a tract index but will allow someone to use the index as long as they are not using for a stand-up title opinion. If someone is doing a stand-up title opinion, they will have to pay an additional cost.

7. A "Transcript of Judgment" must be filed with the county clerk. This instrument summarizes the judgment.

8. There is a difference of opinion on this issue, but in order to insure that a title is marketable, it is wise to probate the will (i.e., court order probating the will) and make sure the taxes are paid.

9. Bankruptcy Court Records are in Albuquerque, New Mexico. In order to give constructive notice, something must be filed in the county; however, there is nothing to require a person to do so.

10. The general rule as to UCC filings applies.

11. Birth Certificates are indexed by mother's maiden name, father's name, baby's name, date of birth, city and county. There is a $10 charge for a copy.

Death certificates are indexed by name, date of death, place of death. There is a $5 charge for a copy.

Bureau of Vital Statistics in Santa Fe, New Mexico (505) 827-0212.

B. Records Outside the County

1. For state lands, it is wise to check the records at the State Land Office in Santa Fe, New Mexico. For federal lands, it is wise to check the records at the Bureau of Land Management in Santa Fe, New Mexico.

2. The Oil Conservation Division is located in Lea County: P. O. Box 1980, Hobbs, New Mexico 88240 (505) 393-6161). Their address in Eddy County is: P. O. Drawer DD, Artesia, New Mexico 88320 (505) 748-1283.

Forms sent to OCD when state or fee lands are: Application for Permit to Drill (C-101), Plat (C-102, State Sundry (C-103), Request for Allowable and Transport (C-104) and Completion (C-104).

OCD records are not constructive notice. Bureau of Land Management records are not constructive notice.

C. Other Topics

Usually an attorney would employ either a landman or a professional "take-off" service to prepare a run sheet from the county records. The examiner's alternative would be to purchase a run sheet from an abstracter.

The following is a list of abstract companies and their specific charges:

Abstract Co,	Charge to Land	Charge to Lawy.
Lawyers Title In Chaves County, Roswell, NM	No charge	No charge
Security Title	$25.00 per hour	$100.00 per hour

Leah County with maximum of
Abstract Co. $75.00
Elliott & Waldron
in Leah County,
Lovington, NM

Guardian Abst. $35.00 per hour$35.00 per hour
& Title Co., Inc.
in San Juan County,
Farmington, NM

Curry County No chrg unless a landman or atty
Abst, & Titleis staying for an extended period
Company, Inc. of time (2-3 days), then $40.00 per hour
Curry County,
Clovis, NM

Courier Abstract None. $100.00 per hour
Company

Eddy County,
Artesia, NM

The landman's role is generally limited to obtaining the run sheet and obtaining curative.

North Dakota

A. Records in the County

1. There are 53 counties in North Dakota; 16 with commercial oil production. These 16 counties are all located in the approximate western half of the State. The geologic reservoir is known as the Williston Basin.

In North Dakota, the county official in charge of maintaining land records is known as the County Recorder. Pursuant to North Dakota law, all County Recorders are required to keep a tract index. N.D. Cent. Code § 11-18-07. They are also required to keep separate grantor and grantee indices. N.D. Cent. Code § 11-18-08. It is the option of the County Recorder whether to maintain one tract index for all instruments or whether to maintain separate deed, mortgage and miscellaneous tract indices. Each County Recorders' office must be consulted to determine how many separate tract indices they maintain. In addition, a separate index for tax liens is maintained by each County Recorder and must be checked.

2. For an instrument to be recordable, it must contain an address for each grantee named in such deed. N.D. Cent. Code § 47-19-05. Additionally, the execution of most instruments must also be acknowledged. N.D. Cent. Code § 47-19-03. The cost of recording instruments is set by statute. N.D. Cent. Code § 11-18-05. In most instances the cost of recording is $10 for the first page and $3 for each additional page. By virtue of the statute setting the County Recorders' fees, there is no discretion with the County Recorders in this regard as to setting the fees.

3. County Recorders have discretion to identify instruments recorded either by book and page or by document number. Some County Recorders utilize both systems; for instance, upon conversion from books to microfiche, the County Recorders commonly changed from a book and page system to a document number system.

4. Typically, one Grantor/Grantee index is maintained for all records. However, the practice varies amongst the County Recorders as to how many tract indices they maintain, some only have one index for all instruments, whereas others maintain as many as three separate tract indices. There may be more than one volume to a particular tract index. For example, several County Recorders' offices have two or more deed indices which resulted from the original deed index being filled to capacity and necessitating subsequent indices. Thus, a title examiner should first ascertain how many separate types of indices are maintained, and then how many volumes there are of each separate index.

5. Most County Recorders also maintain a separate index, usually known as a "miscellaneous" index, identifying all recorded instruments which do not contain a legal description and thus cannot be put into a tract index.

6. Most County Recorders permit copying of tract indices. In many counties a tract index can be photocopied, however, if the tract index books are very old, they often cannot be copied.

7. A judgment need not be recorded in order to constitute a lien. The judgment

becomes a lien on all real property, except the homestead, of the judgment debtor upon docketing by the clerk of court. N.D. Cent. Code § 28-20-13. In order for the judgment to become a lien in a county other than that in which the judgment was rendered, the judgment must be transcribed to the clerk of court of such other counties.

8. An ancillary probate must be completed in this state in order to vest title of a non-resident decedent. N.D. Cent. Code Title 30.1, Article III.

9. A title examiner need not inquire of the Clerk of Bankruptcy Court nor require the abstracter to certify as to bankruptcy filings with the Bankruptcy Court relating to any person in the chain of title, but the examiner must take notice of a copy of the bankruptcy petition or notice of the bankruptcy petition recorded or filed with the County Recorders. North Dakota Title Standard 16-01.

10. The proper place to file, if local law governs perfection, in order to perfect a security interest in "as-extracted" minerals, or when the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures, is in the office of the County Recorders. In all other cases, filing may either be in the office of the County Recorders in any county in this state or in the office of the Secretary of State. N.D. Cent. Code § 41-09-72. There is a limited exception in order to perfect a security interest in collateral, including fixtures, of a transmitting utility; in which case the proper place to file is in the office of the Secretary of State. N.D. Cent. Code § 41-09-72(2).

11. Birth and death certificates are maintained by the North Dakota Department of Human Services at the state capitol in Bismarck. Birth certificates are never recorded and death certificates are only recorded if necessary to establish the death of a life tenant or a joint tenant.

12. To the best of our knowledge, all abstract companies maintain a tract index. As mentioned previously, all County Recorders are required by law to maintain a tract index.

13. No separate state repository exists which needs to be reviewed when preparing a title opinion. However, typically a review will be made of the records of the Oil and Gas Division of the North Dakota Industrial Commission and of U.C.C. filings if producing properties are being transferred.

B. Records Outside the County

14. North Dakota Industrial Commission, Oil and Gas Division, 1016 East Calgary Avenue, Bismarck, North Dakota 58501; phone (701) 328-8020. It is not common practice in this state to examine the records of the Oil and Gas Division in preparation of a title opinion. Oil and Gas Division documents which are commonly recorded in the counties are force pooling orders and orders establishing secondary recovery units.

15. A party engaged in oil and gas drilling is subject to the regulations of the Oil and Gas Division and also to any orders issued with respect to the land in question.

16. If a title opinion includes oil and gas properties owned by the State of North Dakota, typically, a review of the records of the State Land Department at Bismarck will be made. If a title opinion includes oil and gas properties owned by the United States of America, typically, a review of the records of the Bureau of Land Management at Billings, Montana, will be made.

17. To conduct a title examination of fee lands utilizing the public records in North Dakota, one should examine the:

a. County Recorder's Office:

1. Original Government Survey or Master Title Plat
2. Tract (Deed) Indices
3. Mortgage Indices (if applicable)
4. Miscellaneous Indices (if applicable)
5. State/Federal Tax Lien Indices
6. Review of the specific documents and instruments indexed against subject lands.

b. County Treasurer's Office:

1. Check status of county real property taxes

c. Clerk of District Court's Office:

1. Judgment Docket for all parties
2. Probate Index (if applicable)

18. In many instances, prior to an attorney being requested to prepare a title opinion, a landman has already examined title. In these instances a landman is often an excellent source of information to the title attorney in situations where questions arise which are not answered by examination of record title. For example, if leases appear of record from strangers to the title who live out of state, the landman is often helpful to explain that such persons are the heirs of a record title mineral owner who is now deceased and whose estate has not been probated in this state.

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Oklahoma

A. Records in the County

Oklahoma has 77 counties of which 74 produce oil and gas. The County Clerk is the repository of all records other than court documents. The County Clerk's office maintains a tract index. The tract index is divided by the sections within each township and range. For example, if you wish to only look at a 40 acre tract within a section, the page would show all documents filed against that 40 acres. The page would also show all of the documents shown against the entire section. The tract indices shows all deeds, mortgages, releases and all other documents that specifically mention a referenced tract within the document. The indices identify the book and page of each document.

The types of records maintained across the State of Oklahoma are essentially the same in all offices. The primary difference is that some counties maintain records on microfilm or microfiche.

In approximately one-half of the counties in Oklahoma, the abstractor will permit examination of its own tract indexes for free. In the other one-half of the counties, the abstractor will let a landman examine its tract index, but not an attorney. From experience, an examiner learns that in certain counties, the tract indices of the abstractor is more accurate than the tract indices maintained by the County Clerk.

A stand-up title examination would consist of a review of the following indices and records:

a. County Clerk's office

(1) Tract Index
(2) Judgment Lien Index
(3) Federal Tax Lien Index
(4) Oklahoma State Tax Lien Index
(5) Mechanic's and Materialmen's Liens Index

b. County Treasurer's office

(1) Ad Valorem Property Tax Records

c. County Clerk's office

(1) Civil Suit Index for Pending Suits

(2) Probate Index (if owners appear to be deceased)

d. Oil-Law Records

(14) Review of Drilling and Spacing Orders and Pooling Orders

The County Clerk also maintains a miscellaneous index which lists all instruments that do not contain a legal description. The County Clerk also maintains a grantor/grantee index to be reviewed if the tract index appears to be in error.

The filing of a Mortgage and Financing Statement affecting the oil and gas leasehold is filed in the County Clerk's records and should be indexed against the tract indices. The County Clerk maintains a separate index and books for tax liens and judgment liens which are referenced by name, not tract.

Since all tract indices are public records, the examiner can obtain a copy of the tract index by providing the clerk with an affidavit stating that the examiner will not sell the tract index copied to a third party for profit. 67 O.S. 24

Court cases involving title to land are found in the Court Clerk's office indexed by parties to the litigation. A judgment or order affecting the ownership of land should be recorded in the County Clerk's office, but often is not. A judgment lien is perfected in a county when the judgment, together with an affidavit of judgment is recorded.

The statutory cost of recording a document is $13.00 for the first page and $2.00 for each additional page.

B. Records Outside the County

Orders of the Corporation Commission affect title to mineral interests. The effect of an order creating a Drilling and Spacing Unit is to pool for royalty purposes the entire mineral interest within each unit. A Force Pooling order forces all parties with the right to drill, being unleased mineral owners or lessees of oil and gas leases, to either participate in the drilling or to farmout to the participating parties. The statutes require an affidavit of pooling and elections under a pooling order be filed in the County Clerk's records. The affidavit constitutes constructive notice when filed. 52 O.S. 87.4 . Other Corporation Commission orders are not recorded in the county so copies of said orders must be obtained either directly from the Corporation Comission, Jim Thorpe Bldg., 2101 North Lincoln Boulevard,
Oklahoma City, OK 73105, (405) 521-2264 or from Oil-Law Records, Eight N.W. 65th, Oklahoma City, OK 73116, (405) 840-1631.

While all instruments affecting title to railroads can be filed in the County Clerk's office, all such instruments are officially maintained in the office of the Secretary of State.

C. Other Topics

The examiner would begin in the County Clerk's office and list all instruments reflected by the tract index. The Grantor/Grantee index maintained by the County Clerk would be reviewed only in the event the tract index appeared to be incomplete. The County Clerk also maintains a "general index" which contains all instruments that do not contain the description of specific property.

An abstractor will charge a fee per page or entry for preparing an abstract from $1.00 per page to $5.00 per page, plus a standard fee of $50-185 for the certificate. Upon direction, most abstractors will limit the abstract and include a note describing the limitation. Often the abstractor will only copy the first page of a mortgage and omit the balance. Often the abstractor will only include the judgment in a lawsuit that may contain many instruments, particularly if the judgment is over 10 years old. Abstractors are accustomed to limiting their

coverage to either the surface or the minerals.

In Oklahoma, as in other states, before an attorney is requested to prepare a title opinion, often a landman has already examined title and prepared what is commonly known as a "takeoff". Thus, to assist the attorney in the preparation of the title opinion, the landman will often furnish a copy of the takeoff along with copies of oil and gas leases obtained by the landman, including any assignments thereof. In these instances, the attorney frequently discusses title issues with the landman where the answer is not apparent from the records examined.

If the attorney is conducting a stand-up examination, the landman often works with the attorney in the County Clerk's office in whatever manner requested by the attorney.

It is not common in Oklahoma for a landman to build an abstract. The attorney either utilizes the landman's "takeoff" records or orders an abstract.

Texas

A. Records in the County

1. Texas has 254 counties and there are only 35 counties without any oil and gas production last year. While the maintenance of certain types of records is mandated by law, most county clerks have exercised considerable discretion in how the records are organized and how they are maintained.

Prior to 1980, County Clerks were required to maintain separate volumes of books with corresponding indices for at least:

1. Deed Records (since 1836)
2. Oil and Gas Lease Records (since 1917)
3. Abstract of Judgment Records (since 1879)
4. Deed of Trust Records (since 1879)
5. Federal Tax Lien Records (since 1923)
6. Financing Statements (since 1966)*
7. Lis Pendens Records (since 1905)
8. Mechanic's and Materialmen's Lien Records (since 1939)

9. Release Records (since 1836)
10. State Tax Lien Records (since 1961)
11. Utility Security Records (since 1966)
12. Vendor's Lien Records (since 1879)
13. Birth Records and Death Records (since 1903; since August 29, 1929, all county clerks forwarded a copy of Birth Certificates and Death Certificates to the Bureau of Vital Statistics in Austin) (phone)
14. Marriage Records (since 1837)
15. Probate Records (since 1836)

For a detailed discussion of the recordkeeping requirements for all of the above and the statutory authority therefor, see Volume 1 of the Texas County Records Manual prepared by the Local Records Division of the Texas State Library at Austin, Texas (1987) and maintained by most County Clerks. All of the above described records are accessed by separate (usually) direct/reverse Grantor/Grantee indices.

Since 1980, to assist in the computerized consolidation of records, most County Clerk's of the more populated counties elected to microfilm their records and to consolidate their books and indices into an "Official Public Records of":

a. Real Property, etc.

1. Real property;
2. Personal property and chattels;
3. Governmental, business and personal matters.

b. Courts

4. Probate;
5. County/civil;
6. Criminal;
7. Commissioner's.

Clerks also have the option, if not microfilming records, to consolidate indices into the same seven categories and maintain hard copies of all records. § 193.008, Texas Government Code.

County Clerks state-wide charge $3.00 for the first page and $2.00 for each subsequent page to record an instrument. Effective September 1, 1991, all clerks have the option to charge up to an additional $5.00, or less per instrument, to go into a fund designated for

records management and preservation. Also, if grantees' addresses are not included on the instrument, the Clerk can, and often does, charge an additional $25.00 to record the instrument. In order to save a phone call, you should enclose $5.00 plus the state-wide recording fee and the clerk will refund any amount due.

Since County Clerks in Texas have not been required by law to maintain a tract index, it would be very unusual to locate a tract index in the County Clerk's office. (You shouldn't rely on it if you find one). Most, but not all, abstract companies maintain a tract index.

The District Court has jurisdiction to litigate title to land. If you choose to check further than the Lis Pendens Records recorded with the County Clerk, the examiner should review the District Clerk's index of litigation.

The Tax Assessor-Collector of each county maintains a current list of all surface owners and owners of producing oil and gas income. Texas does not tax non-producing minerals. The Tax Assessor-Collector's records usually provide a current address for all surface owners and owners of producing minerals and can identify the amount of taxes due, if any.

B. Records Outside the County

Usually, if a state reserves a mineral interest at the time it issues a patent, the reservation is contained in the patent. Unfortunately, Texas is not so straightforward. If the land is patented prior to September 1, 1895, the state had no authority to reserve any mineral interest. For land patented after September 1, 1895, the examiner must determine whether or not the land was classified as mineral or classified in some other manner, such as dry grazing, agricultural, etc. For lands patented subsequent to September 1, 1895, and classified as mineral land, the state reserved the following:

1. For mineral classified land patented between September 1, 1895, and August 21, 1931, the state and the surface owner shares equally in all economic benefits.
2. For land patented with a mineral classification between August 21, 1931, and June 19, 1983, the state reserves a non-participating royalty of "1/8 of all sulphur and other mineral substances from which sulphur may be derived or produced and 1/16 of all other minerals" including oil and gas; and
3. Effective June 19, 1931, the state may reserve "not less than" 1/8 of all sulphur and 1/16 of all minerals. The state usually reserves all minerals.

Not all counties contain separate classification records and the recording of a classification by reference to the land classified is infrequent. Therefore, an examiner must contact the General Land Office (512) 463-5001 in Austin and obtain a letter of classification and/or Certificate of Facts (all instruments preceding the issuance of the patent) to provide this information.

Also, in order to obtain the history or current status of land which the examiner believes may be held by production, the examiner must contact the Central Records Division of the Texas Railroad Commission, whose address is:

Railroad Commission of Texas
ATTN: Central Records Division
P. O. Box 12967
1701 N. Congress Avenue
Austin, TX 78711-2967
(512) 463-6882.

The examiner should provide the Commission with the Railroad Commission district number and/or the county, the field name, the name of the operator and the name of each well upon which he is requesting information. The following forms are the forms most often requested:

1. Form W-1 - Application for Permit to Drill, Deepen or Plug-back.
2. Form W-2 - Oil Well Potential Test, Completion of Recompletion Report and Log.
3. Form W-9 - Net Gas-Oil Ratios Report.
4. Form G-1 - Gas Well Back-Pressure Test, Completion or Recompletion Report and Log.
5. Form P-12 - Certificate of Pooling Authority.
6. Form P-15 - Statement of Productive Acreage.

C. Other Topics

An examiner would prepare a run sheet covering the land examined either from the tract index prepared by an abstract company in the county or by utilizing the direct/reverse Grantor/Grantee, etc., indices provided by the County Clerk.

While a landman might be able to examine the tract indices of an abstracter at no charge, most abstracters will charge a title attorney from $40.00 per hour to $200.00 per hour, if they permit the title attorney to examine the tract indices at all.

Abstract companies charge by the page at a range from $4.00 to $8.00 per page. Generally, the abstracter will not limit the instruments included in the abstract or agree not to copy every page of every instrument.

Landmen work with attorneys in two ways:

1. Standup examination - The landman works with the attorney in the County Clerk's office with the landman preparing run sheets and delivering them to the attorney who examines the instruments indicated.
2. Abstract preparation - The landman "builds" an abstract himself from sovereignty to present by compiling a run sheet and copying the pertinent pages of all documents and delivering them to an attorney for examination, usually in the attorney's office. The landman would include all curative instruments that the landman believed would be necessary.

Utah

A. Records in the County

Currently, the majority of oil and gas development on fee lands in the State of Utah occurs in the Altamont-Bluebell field located in Duchesne and Uintah counties and the coalbed methane plays located in Carbon and Emery counties. The deeds and records pertaining to surface and mineral ownership and interest in these and other counties in the State are maintained by the respective county recorders.

1. County Recorder

County recorders are required by Utah statute to maintain the following records and indices:

a. Ownership Plats – Ownership plats are required under Utah Code Annotated Section 17-21-21 (2001) and show the record owners of each tract, the dimensions of the tract, and generally the tax I.D. number for that tract for ad valorem tax purposes. They typically only apply to surface ownership.

b. Entry Record – Required under Utah Code Annotated Section 17-21-6(1) (2001). Although not an index *per se*, this record is a register of the receipt of instruments to be recorded in order of its reception or entry showing the sequential serial or entry number, the names of the parties, the date of the instrument, hour and day of recording, the kind of instrument, the book and page, and a brief description of the premises.

c. Abstract (tract) Index – Required under Utah Code Annotated Section 17-21-6(1)(f) (2001). This index shows by tract or parcel (by township, range and section, which is then broken down into quarter quarter sections), every conveyance, encumbrance, or other instrument recorded as against that tract, the date and kind of the instrument, the date of the recording, the book and page and entry number where recorded.

d. Grantor/Grentee Index – Required under Utah Code Annotated Section 17-21-6(1)(b) and (c) (2001). As the name implies, the documents are indexed alphabetically by grantor and by grantee and are maintained in separate volumes.

e. Mortgagor/Mortgagee Index – Required under Section 17-21-6(1)(d) and (e) (2001). This index contains a listing of mortgages, deeds of trust, liens, and other instruments in the nature of an encumbrance upon real estate. The mortgagor's index must set forth the entry number of the instrument, the name of each mortgagor, debtor or person charged with the encumbrance in alphabetical order, the name of the mortgagee, lien holder, creditor or claimant, the date of the instrument, time of recording, consideration paid, the book and page and entry number in which it is recorded, and a brief description of property charged; the mortgagee's index contains the same information with the name of the mortgagee, lien holder, creditor or claimant in alphabetical order. Utah no longer requires the maintenance of a chattel mortgage index. Security interests in personal property are generally governed by the Revised Article 9 of the Uniform Commercial Code ("UCC"), codified in Utah at Section 70A-9a-101, *et seq*. (*see* subsection i. below).

f. Map, Plat and Subdivision Index – Required under Utah Code Annotated Section 17-21-6(1)(g) (2001). This index, added to the statute by 1983 amendment, codified a common practice previously existing in the counties whereby subdivisions and other plats as well as recorded maps were separately indexed.

g. Index to Powers of Attorney – Required under Utah Code Annotated Section 17-21-6(1)(h) (2001). However, under Section 57-4a-4(1)(g) (2000), a recorded document executed by an attorney in fact is presumed to be genuine and executed within the scope of the attorney's authority. The former statute (Utah Code Annotated Section 57-1-8, repealed in 1989) specifically required that every power of attorney be acknowledged and recorded in the same manner as conveyances of real estate (date and time of recording, the book and page, and the entry number).

h. Mining Claim Index – Not required by statute, but maintained by some county recorders by locator name and by claim name. Utah Code Annotated Section 40-1-4 (2002) requires notice of location to be filed in the office of the county recorder in which the claim is situated within 30 days of posting the location of a claim. However, most counties do not abstract the claim unless a subsequent conveyance affecting the same property is recorded.

i. Uniform Commercial Code Index – Utah Code Section 70A-9a-519(1) (Revised Article 9 of the UCC) requires that filing offices maintain indices of each filed record (financing statement). Under the revisions to the UCC, the state maintains a central filing office known as the Division of Corporations and Commercial Code. *See* Utah Code Sections 70A-9a-501 and -526. This is generally the place of filing unless the collateral is "as-extracted collateral or timber to be cut" (this includes oil, gas and other minerals that the debtor has an interest in before extraction). *See* Utah Code Annotated Section 70A-9a-102(6). For as-extracted collateral, the filing office is the county recorder. *See* Utah Code Section 70A-9a-501(1). Special filing rules also apply to titled collateral like vehicles and trailers.

The filing office is required to index the records

as if they were a mortgage or conveyance so that the office can retrieve the records by name of the debtor, by entry number, by a legal description of the real property, and the Division of Corporations and Commercial Code must be able to retrieve filed records by its own file number. *See* Utah Code Section 70A-9a-519(4).

j. Miscellaneous Index – Required under Utah Code Annotated Section 17-21-6(1)(i) (2001). This is an important index for a mineral title examiner in that it typically contains instruments of a miscellaneous character not otherwise provided for under the statute including oil and gas leases, declarations of pooling, communitization agreements, mining agreements, unit agreements and other instruments affecting the mineral estate.

k. Index of Judgments – Required under Utah Code Annotated Section 17-21-6(1)(j) (2001). This index reflects judgment debtors, judgment creditors, the amount of judgment, the date and time of recording, the satisfaction, and the book and page, and entry number. Effective July 1, 2002, a judgment entered in a district court does not create a lien upon or affect the title to real property unless the judgment or an abstract of judgment, including the required information set forth in the statute, is recorded in the office of the county recorder in which the real property of the judgment debtor is located. Utah Code Annotated Section 78-22-1.5 (Supp. 2002). A judgment containing a legal description shall also be abstracted in the tract index.

l. General Filing Index – Required under Utah Code Annotated Section 17-21-6(1)(k) (2001). This index contains all executions and writs of attachment with names of plaintiffs in execution, the defendants in execution, the purchasers, the date of sale, and the filing number of the documents.

m. Federal Tax Lien Index – Required by Utah Code Annotated Sections 38-6-1 to -4 (2001). This index contains notices of federal tax liens filed by the United States and copies of certificates discharging those liens.

The records maintained by all the county recorders are substantially the same. However, only some of the recorders maintain mining claims as discussed above.

Every document executed and acknowledged on or before July 1, 1988, may be recorded "regardless of any defect or irregularity in its execution, attestation or acknowledgment", Utah Code Annotated Section 57-4A-1. While recording costs vary by counties, the usual charge is $10.00 for the first page and $2.00 for each additional page, plus $1.00 per additional description if the instrument contains more than one description.

In Utah, the records are identified by book and page. Tract indices are not available for photocopying.

Utah requires ancillary probate of the estate of a non-resident decedent who owns property in Utah. If the will of a non-resident decedent was admitted to probate in another state, the Utah Court would give it full faith and credit. However, a local personal representative can be appointed to administer a foreign will. A personal representative appointed by another state has all the powers of a locally appointed personal representative upon filing authenticated copies of his appointment and any bond previously given.

All birth and death certificates are maintained by the Utah Health Department, Administrative Services, located at 288 North 1460 West, Salt Lake City, Utah 84116, (801) 538-6380. Birth certificates are organized by the baby's name, father's name and mother's maiden name.

Since all county recorders maintain tract indices, most abstract companies in Utah do not maintain their own tract indices.

2. County Clerk's Records

Prior to July 1, 2002, civil judgments automatically become liens upon the interests of the judgment debtor in the county in which the judgment is docketed without the requirement of recording in the county recorder's office (Utah Code Annotated Section 78-22-1 (Supp. 2002). A transcript of the judgment may be filed and docketed in the office of the clerk of the district

court in any other county in Utah and has the same force and effect as a judgment entered in the district court of such county. After July 1, 2002, a judgment entered by a district court or justice court becomes a lien upon real property only if the judgment or an abstract of the judgment (containing the information required in Section 78-22-1.5) is recorded in the office of the county recorder. Utah Code Annotated Section 78-22-1(7) (Supp. 2002). Judgment liens in Utah continue for eight (8) years unless the judgment is satisfied; such liens may be periodically renewed. Enforcement of a child support order can continue for four (4) years after the child reaches the age of majority.

Previously under Utah Rule of Civil Procedure 79(d)(14), the county clerk was required to keep "Probate Record Book" containing all wills, bonds, letters of administration, letters testamentary, and all other papers and orders of the court in probate proceedings required by law to be recorded. Unfortunately, this rule was repealed without replacement. This was an important rule because Utah Code Annotated Section 75-3-201(1) (1993) requires probate of a decedent's estate in the county where the decedent had his domicile at the time of death, or if decedent was not domiciled in Utah, in the county where property of the decedent was located at the time of his death. The Probate Record Book may still be maintained in some counties and if available should be checked to determine if a decedent's estate (especially a decedent with domicile outside Utah) has been probated, thus vesting title to the mineral property in the appropriate heirs and/or devisees.

3. County Treasurer Records

The office of the county treasurer is the repository for records pertaining to ad valorem property taxes. In Utah those records also contain taxes assessed by the State Tax Commission against mines, mining claims, oil and gas wells, and severed mineral estates (so called "state assessed" taxes). The Utah State Tax Commission assessments are then sent to the local county treasurers for levy. Notices are transmitted and taxes are collected by the county. These records are found in the county treasurer's office in the State Assessed Mineral Tax Book.

4. County Planning and Zoning Departments

Utah permits county-wide zoning. A mineral title examiner should check with the county zoning department to verify that the project his client is undertaking complies with applicable zoning.

Correspondence and inquiries directed to the planning and zoning departments, county treasurers, and county clerks in all of the oil producing areas in Utah can be directed to the address set forth for county recorders as these offices are all located in the same county buildings.

B. Records Outside the County

1. Utah Division of Corporations and Commercial Code

(Mailing address: Heber M. Wells Building 160 East 300 South, Salt Lake City, Utah 84111, telephone number (801) 530-4849). Utah, like most other Rocky Mountain states, has with minor variations, adopted the UCC. The Division of Corporations and Commercial Code, within the Department of Commerce, maintains the records of corporate merger and name change as well as limited partnership records. It is also the central repository for the filing of UCC-1 Financing Statements not required to be filed in the county.

2. Utah Division of Oil, Gas and Mining

(Mailing Address: 1594 West North Temple, Suite 1210, Salt Lake City, Utah 84114, telephone number (801) 538-5340). This Division, in the Department of Natural Resources, is responsible for approval and regulation of the drilling maintenance, plugging and abandonment of oil and gas wells; it is also the repository for records pertaining to well location, well production, spacing records and orders, and information on zones of production.

3. Other Records

Utah is a “public land” state. In fact, over 80% of the land mass of the State of Utah is owned either by the federal government, the State of Utah or various Indian tribes. Likewise, these three entities own a majority of the mineral estate in Utah. For example, in any given drilling or division order title opinion in the Altamont-Bluebell field, a title examiner is likely to encounter a combination of fee and Ute Indian Tribal lands. In other fields in eastern central Utah or southeastern Utah, an examiner commonly encounters federal and state lands in the drilling unit or federal or Indian lands or a combination of all of the above with a sprinkling of fee owned minerals. Accordingly, it is important for a title examiner to know where to go to review records pertaining to Indian, state and federal mineral ownership.

A stand-up title examination of fee lands would consist of a review of the following indexes and records:

County Recorder’s Office:

1. Ownership Plat
2. County Abstract (Tract) Index
3. Mortgagor/Mortgagee Index*
4. Mining Claim Index (if being maintained)
5. Uniform Commercial Code Index
6. Miscellaneous Index*
7. Judgment Index
8. Federal Tax Lien Index
9. Review of specific documents and instruments noted as affecting covered lands and parties.

<u>County Clerk's Office</u>:

1. Judgment Docket for all parties
2. Probate Index (if being maintained)

<u>County Treasurer's Office</u>:

xes should be covered in Abstract (Tract) Index.

1. Ad Valorem Property Taxes “State Assessed” taxes

2.

Utah State Division of Oil, Gas and Mining:

1. Approvals to Drill, Sundry Notices, Production Records, Spacing Orders and Operator status.

Utah Division of Corporations and Commercial Code:

1. UCC-1 Financing Statements
2. Corporate Status

C. Other Topics

County recorders and clerks in Utah do not charge for use and review of records, however,

the various counties charge different rates per page for copying records. Unlike Texas and some other states, mineral title examiners seldom, if ever, need to utilize an abstracter's records as the county recorders all maintain tract indexes. However, in our firm, because much of our mineral title work is concentrated in Duchesne and Uintah counties and because of the complexity of title in those lands (a typical drilling and/or division order title opinion in the Altamont-Bluebell field prepared by this office will involve 75 to 120 separate leases and run anywhere from 75 to 125 pages), we have developed our own extensive in-house library of documents affecting title in those counties and all other oil and gas producing counties in Utah. These documents are then available for ready review on any given project encompassing the covered lands and may require only limited updating.

Abstractors generally charge by the page with rate being around $5.00 per page. Most also charge a certification fee of approximately $200.00 per abstract. One company, GeoScout Land and Title in Salt Lake City, Utah, also offers its services on an hourly rate and will limit its search and copy of instruments as directed by the client.

In my experience, independent landmen are utilized, with the client's consent, rather than established abstracters, to examine and copy documents of title as well as research records at the BLM and the Utah School and Institutional Trust Lands. Some landmen in our state are especially adept and experienced in researching records of the BLM.

In preparation of an oil and gas title opinion, either the client or the attorney preparing the opinion may request a landman or abstracter to prepare an abstract of the county documents and/or status report of federal, state or Indian records. The abstract and status report are then delivered to the attorney. The attorney will examine the documents, then request a review of the county clerk's records regarding judgments, tax liens, and probates for the appropriate interest owners.

Our firm has found it to be economical to request an independent landman to provide the examining attorney with the landman's reproduction of the tract index and all loose copies of the applicable documents. Frequently, the attorney will examine the tract index and instruct the landman to copy only those documents we do not have in our in-house library of documents. This procedure saves substantial copying costs. As for federal, state and Indian records, the landman also provides loose copies of the appropriate files and records. This procedure avoids the expense of having an abstract or status report prepared, while having the tract index to check whether all documents were provided. This system works well for our firm because of the experience and skill of the landmen we utilize.

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EXHIBIT A

ABBREVIATED RECORDING STATUTES FROM ALL JURISDICTIONS
(emphasis added)

Arkansas (Race-Notice Type)

Ark.Stat.Ann. § 4-15-404 - Effect of Recording Instruments affecting Title to Property

(a) Every deed, bond or instrument of writing affecting the title, in law or equity, to any real or personal property within this state which is, or may be, required by law to be acknowledged or proved and recorded shall be constructive notice to all persons from the time the instrument is filed for record in the Office of the Recorder of the proper county.

(b) No deed, bond or instrument of writing for the conveyance of any real estate, whereby which the title thereto may be affected in law or equity, made or executed after December 21, 1846, shall be good or valid against a subsequent purchaser of the real estate for a valuable consideration without actual notice thereof or against any creditor of the person executing such an instrument obtaining a judgment or decree which by law may be a lien upon the real estate unless the deed, bond or instrument duly executed and acknowledged or proved as required by law, is filed for record in the Office of the Clerk and ex officio recorder of the county where the real estate is situated. (Adopted 1846, last amended ______.)

Ark.Stat.Ann. § 16-101 et seq. or 51-101 (Race Statute for Mortgages)

(INSERT)

Leading Cases:

California (Race-Notice Type)

Cal.Civ.Code § 1213

Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees... .

Cal.Civ.Code § 1214

Every conveyance of real property, other than a lease for a term not exceeding one year, is void against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded... . (Adopted _______, last amended, _______.)

Leading Cases:

Colorado (Notice Type - interpreted as Race-Notice?)

Colo.Rev.Stat. § 38-35-109 - Instrument may be recorded - Validity of unrecorded instruments - liability for fraudulent documents

(1) All deeds, powers of attorney, agreements or other instruments in writing conveying, encumbering or affecting the title to real property, certificates and certified copies of orders, judgments, and decrees of courts of record may be recorded in the Office of the County Clerk and Recorder of the county where such real property is situated, and no such instrument or document shall be valid as against any class of persons with any kind of rights except between the parties thereto and such as have notice thereof, until the same is deposited with such county

clerk and recorded. In all cases where by law an instrument may be filed, the filing thereof with such county clerk and recorder shall be equivalent to the recording thereof...

(2) All deeds dated after January 1, 1977, and recorded with the county clerk and recorder pursuant to Subsection 1 of this section shall include a notation of the legal address of the grantee of the instrument, including road or street address if applicable. Any such deed submitted to the county clerk and recorder lacking such address shall not be recorded and shall be returned to the person requesting the recordation. Acceptance of a deed by the county clerk and recorder and violation of this Subsection (2) shall not make such deed invalid. A notation as required in this Subsection (2) may be made by a person other than a grantee after the execution of the deed... (Adopted 1963, last amended _______.)

Leading Cases:

See Page v. Fees-Krey, Inc., 617 P.2d 1188 (Colo. 1980), Eastwood v. Shedd, 166 Colo. 1936, 442 P.2d 423 (1968), Plew v. Colorado Lumber Products, 28 Colo.App. 557, 481 P.2d 127 (1970); for a thorough discussion of the problem see The Colorado Recording Act: Race-Notice or Pure Notice, 51 Denver L.J. 115 (1974); Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987).

Kansas (Notice Type)

Kan.Stat.Ann. § 58-2221

> Every instrument in writing that conveys real estate, any estate or interest created by an oil and gas Lease, or whereby any real estate may be affected, proved or acknowledged and certified in the manner hereinbefore prescribed may be recorded in the office of the Register of Deeds of the county in which such real estate is situated...

Kan.Stat.Ann. § 58-2222 Same; Filing Imparts Notice.

> Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the register of deeds for record, depart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice.

Kan.Stat.Ann. § 58-2223 (Unrecorded instrument valid only between parties having actual notice)

> No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the Register of Deeds for record. (Adopted ______, last amended 1976.)

Leading Cases:

Luthi v. Evans, 223 Kan. 622, 576 P.2d 1064 (1978).

Louisiana (Race Type)

La.R.S.9:2721-9:2759 - The Public Records Doctrine

La.Rs.9:2721

> No sale, contract, counter letter, lien, mortgage, judgment, surface lease, oil, gas or mineral lease or other instrument of writing relating to or affecting immoveable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the Parish Recorder of the parish where the land or immoveable is situated; and neither secret claims or equities nor other matters outside the

public records shall be binding on or affect such third parties.

La.Rs.9:2722

Third persons or third parties so protected by and entitled to rely upon the registry laws of Louisiana now in force and effect and as set forth in this chapter are hereby redefined to be and to include any third person or third party dealing with any such immovable or immovable property or acquiring a real or personal right therein as a purchaser, mortgagee, grantee or vendee of servitude or royalty rights, or as lessee in any surface lease or leases or as lessee in any oil, gas or mineral lease and all other third persons or third parties acquiring any real or personal right, privilege or permit relating to or affecting immovable property." (Adopted 1950, last amended _______.)

Leading Cases:

Michigan (Race-Notice Type)

MCLA 565.29; MSA 26.547 (paraphrased)

Unrecorded or after-recorded conveyances are void as against subsequent purchasers in good faith and for a valuable consideration, as against a party whose instrument of conveyance is first duly recorded. The fact that the first recorded conveyance is in the form of a quitclaim deed, or contains language of quitclaim or release, shall not affect the issue of good faith.

Leading Cases:

MISSISSIPPI (Race-Notice State)

Miss. Code Ann. § 89-5-1. Recording instruments; conveyances, acknowledgment, priority.

A conveyance of land shall not be good against a purchaser for a valuable consideration without notice, or any creditor, unless it be acknowledged by the party who executed it, or be proved by one or more of the subscribing witnesses to it that such party signed and delivered the same as his or her voluntary act before some officer authorized to take such acknowledgment or proof; and a certificate of such acknowledgment or proof shall be written upon or under the conveyance, and be signed by the officer before whom it was made, and be lodged with the clerk of the chancery court of the county in which the lands are situated to be recorded; but after filing with the clerk, the priority of time of filing shall determine the priority of all conveyances of the same land as between the several holders of such conveyances.

Miss. Code Ann. § 89-5-3. Conveyances, mortgages; void if not lodged for record.

All bargains and sales, and all other conveyances whatsoever of lands, whether made for passing an estate of freehold or inheritance, or for a term of years; and all instruments of settlement upon marriage wherein land, money, or other personalty should be settled or covenanted to be left or paid at the death of the party, or otherwise; and all deeds of trust and mortgages whatsoever, shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they be acknowledged or proved and lodged with the clerk of the chancery court of the proper county, to be recorded in the same manner that other conveyances are required to be acknowledged or proved and recorded. Failure to file such instrument with the clerk for record shall prevent any claim

of priority by the holder of such instrument over any similar recorded instrument affecting the same property, to the end that with reference to all instruments which may be filed for record under this section, the priority thereof shall be governed by the priority in time of the filing of the several instruments, in the absence of actual notice. But as between the parties and their heirs, and as to all subsequent purchasers with notice or without valuable consideration, said instruments shall nevertheless be valid and binding.

LEADING CASE:

An owner in possession by himself or by his tenants is not affected by § 89-5-1, his actual possession being all of the notice necessary to any prospective purchaser. Gulf Refining Co. v. Travis, 29 So. 2d 100 (1947), sugg. of error overr. 30 So. 2d 398.

Montana (Race-Notice Type)

Mont. Code Ann. § 70-21-201. What may be recorded - Recording copy in another county.

Any instrument or judgment affecting the title to or possession of real property may be recorded under this part... (Adopted 1919).

Mont. Code Ann. § 70-21-203 - Acknowledgements of instruments required - Exceptions

Before an instrument can be recorded, unless it belongs to the class provided for in either...., it's execution must be acknowledged by the person executing it or...proved by a subscribing witness or as provided in 1-5-302 and 1-5-303 and the acknowledgement or proof certified in the manner prescribed by Title 1, Chapter 5, Parts 1-3.

Mont. Code Ann. § 70-21-302 - Recording as constructive notice - Effect of recording copy in another county

Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law, from the time it is filed with the county clerk of record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees...(Adopted 1887).

Mont. Code Ann. § 70-21-304 - Conveyance void as against other conveyance recorded first

Every conveyance of real property, other than a lease for a term not exceeding one year, is void against any subsequent purchaser or encumbrancer...in good faith and for a valuable consideration whose conveyance is first duly recorded. (Adopted 1887).(Emphasis added - this phrase makes this statute race-notice.)

New Mexico (Notice Type)

N.M. Stat. Ann. 14-9-1 (Recording Deeds, Mortgages and Patents)

All deeds, mortgages, United States patents and other writings affecting the title to real estate, shall be recorded in the office of the county clerk of the county or counties in which the real estate affected thereby is situated.

N.M. Stat. Ann. 14-9-2 (Constructive Notice of Contents)

Such records shall be notice to all the world of the existence and contents of the instrument so recorded from the time of recording. (Adopted 1886.)

N.M. Stat. Ann. 14-9-3 (Unrecorded Instruments; Effect)

> No deed, mortgage or other instrument in writing not recorded in accordance with § 14-9-1 N.M.S.A. 1978 shall affect the title or rights to, in any real estate, of any purchaser, mortgagee in good faith or judgment lien creditor, without knowledge of the existence of such unrecorded instruments. Possession alone based on an unrecorded Executory Real Estate Contract shall not be construed against any subsequent purchaser, mortgagee in good faith or judgment lien creditor either to impute knowledge of or to impose the duty to inquire about the possession or the provisions of the instruments. (Adopted ______, last amended 1990.)

Leading Cases:

Angle v. Slayton, 102 N.M. 521, 697 P.2d 940 (1985).
Cano v. Lovato, 105 N.M. 522, 734 P.2d 762 (1987).
Citizens Bank v. Hodges, 107 N.M. 329, 757 P.2d 799 (1988).

North Dakota (Race-Notice Type)

N.D. Cent. Code § 47-19-41 - Effect of not Recording - Priority of First Record - Constructive Notice - Limitation and Validation

> Every conveyance of real estate not recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any part or portion thereof, whose conveyance, whether in the form of a warranty deed, or deed of bargain and sale, or deed of quitclaim and release, of the form in common use or otherwise, first is deposited with the proper officer for record and subsequently recorded, whether entitled to record or not...against the person in whose name the title to such land appears of record, prior to the recording of such conveyance. The fact that such first deposited and recorded conveyance of such subsequent purchaser for a valuable consideration is in the form, or contains the terms, of a deed of quitclaim and release aforesaid, shall not affect the question of good faith of the subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof...The record of all instruments whether or not the same were entitled to be recorded shall be deemed valid and sufficient as the legal record thereof. (Adopted 1877.) (Interestingly, derived from the California Civil Code § 1214.)

Leading Cases:

Oklahoma - (Notice Type - interpreted as Race Notice)

16 Okla.Stat.Ann., § 16

> Every conveyance of real property acknowledged or proved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers or creditors.

Leading Cases: While the Oklahoma statute does not identify "innocent purchasers for value", the Oklahoma Supreme Court in Oklahoma State Bank of v. Barnett, 65 Okla. 74, 162 P.2d 1124, construed the statute to include the concept of the equitable doctrine of BFP. Also see Williams v. McCann, 385 P.2d 788 (Okla. 1963).

Texas (Notice Type)

Article 6627, V.A.T.S. When sales, etc., to be void unless registered (previous statute)

All bargains, sales and other conveyances whatever, of any land...and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowledge or proved and filed with the clerk to be recorded as required by law; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall be valid and binding. (Adopted 1840.)

§ 13.001, Texas Property Code. Validity of unrecorded instrument

(a) A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.

(b) The unrecorded instrument is binding on a party to the instrument, on the party's heirs, and on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.

(c) This section does not apply to a financing statement, a security agreement filed as a financing statement, or a continuation statement filed for record under the Business and Commerce Code. (Adopted effective January 1, 1984.)

§ 13.002, Texas Property Code - Effect of Recorded Instrument

An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument. (Adopted effective January 1, 1984.)

Leading Cases:

White v. McGregor, 92 Tex. 556, 50 S.W. 564 (1899);
Houston Oil Co. v. Kimball, 103 Tex. 94, 122 S.W. 533 and 124 S.W. 85 (1909).
Breen v. Morehead, 104 Tex. 254, 136 S.W. 1047 (1911);
Delay v. Truitt, 182 S.W. 732 (Tex.Civ.App.-Amarillo 1916, writ ref'd.)

Utah (Race-Notice Type)

Utah Code Ann. § 57-3-2 - Record Imparts Notice - Change in Interest Rate - Validity of Instrument - Notice of Unnamed Interest - Conveyance by Grantee

(1) Each document executed, acknowledged and certified, in the manner prescribed by this title, each original document or certified copy of a document complying with § 57-4a-3, whether or not acknowledged, each copy of a notice of location complying with § 40-1-4, and each financing statement complying with § 70A-9-402, whether or not acknowledged shall, from the time of filing with the appropriate county recorder, impart notice to all persons of their contents...

(2) This section does affect the validity of a document with respect to the parties to the document and all other parties who have notice of the document.

(3) The fact that a recorded document cites only a nominal consideration, names the grantee as trustee, or otherwise purports to be in trust without naming beneficiaries or stating the terms of the trust does not charge any third person with notice of any interest of the grantor

or of the interest of any other person not named in the document.

(4) The grantee in a recorded document may convey the interest granted to him free and clear of all claims not disclosed in the document in which he appears as grantee or in any other document recorded in accordance with this title that sets forth the name of the beneficiaries, specifies the interest claimed, and describes the real property subject to the interest.

Utah Code Ann. § 57-3-3 - Effect of Failure to Record

Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if:

(a) The subsequent purchaser purchased the property in good faith and for a valuable consideration; and

(b) The subsequent purchaser's document is first duly recorded.

(Adopted 1898, last amended _______.)

Leading Cases:

Horman v. Clark, 744 P.2d 1014 (Utah Ct. App. 1987)
Federal Land Bank v. Pace, 87 Utah 156, 48 P.2d 480, 102 A.L.R. 819 (1935).

Wyoming (Race-Notice Type)

Wyo. Stat. Ann. 34-1-120. Unrecorded Conveyance Void as to Subsequent Purchasers Recording First

Every conveyance of real estate in within this state, hereafter made, which shall not be recorded as required by law, shall be void, as against any subsequent purchaser or purchasers in good faith and for a valuable consideration of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

Wyo. Stat. Ann. 34-1-121. Recorded Instrument as Notice to Subsequent Purchaser; Recordation of Instruments issued by United States or State of Wyoming

(a) Each and every deed, mortgage, instrument or conveyance touching any interest in lands, made and recorded, according to the provisions of this chapter, shall be notice to and take precedence of any subsequent purchaser or purchasers from the time of the delivery of any instrument at the office of the register of deeds (county clerk) for record. ...

(Adopted 1882, last amended _______.)

Leading Cases:

Dame v. Mileski, 80 Wyo. 156, 340 P.2d 205 (1959).
Thomas v. Roth, 386 P.2d 926 (Wyo. 1963).

EXHIBIT B

THE SMART CHART

State	Class. by Friend	Class. by Powell	Class. by Patton	Tract or G/G Index	Void or Valid	Covers P or P&C	Glossary of Terms
AR	RN	-----	N	G/G	VA	P&C	*Powell - The Law of Real Property
CA	RN	-----	RN	G/G	VD	P&M	Patton - Patton on Land Titles
CO	RN?	N	N	G/G	VA	All TP	Void or Valid-See Recording Statute of Each State
KS	N	N	N	Tract	VA	P&M	P - Purchaser
LA	R	R	R	G/G	----	TP	C - Creditor
MI	RN	—--	RN	G/G	VD	P	M - Mortgages
MT	RN	RN	RN	G/G	VD	P&C	TP - Third Parties
NM	N	N	N	G/G	—	P,M,JLC	JLC-Judgment Lien Creditor
ND	RN	-----	N	Both	VD	P	*R-Race Type
							RN - Race-Notice type
OK	RN	-----	-----	Tract	----	P&C	N - Notice Type
TX	N	N	N	G/G	VD	P&C	
UT	RN	RN	RN	Both	VD	P	
Wy	RN	RN	RN	Tract	VD	P	

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Extension of Time or Forbearance to Sue as Consideration constituting Mortgagee Bona Fide Purchaser, 39 A.L.R.2d 1088

Failure properly to index Conveyance or Mortgage of Realty as affecting Constructive Notice, 63 A.L.R. 1057

Forged Deed or Bond for Title as constituting Color of Title, 68 A.L.R.2d 452

Improper Insertion or Omission of Middle Initial of One's Name as affecting Constructive Notice from Public Record, 122 A.L.R. 909

Knowledge of Notice of Inadequacy of Consideration for Conveyance in Chain of Title as affecting Bona Fide Status of Purchaser, 42 A.L.R.2d 1088

Length of Period of Possession before Accrual of Rights of Person sought to be affected by Notice as affecting the Rule regarding Constructive Notice from Possession of Real Property, 105 A.L.R. 892

Liability of Officer Charged with Duty of Keeping Record of Instruments affecting Title to or Interest in Property for Mistakes or Defects in respect to Records, 94 A.L.R. 1303

Necessity that Mortgage covering Oil and Gas Lease be recorded as Real Estate Mortgage, and/or filed or recorded as Chattel Mortgage, 34 A.L.R.2d 902

Neglect or Fault of Recording or Filing Officer as affecting Consequences of Failure Properly to Record or File Instrument affecting Property, 70 A.L.R. 595

Occupancy of Premises by both Record Owner and Another as Notice of Title or Interest of Latter, 2 A.L.R.2d 857

Pleading Bona Fide Purchase of Real Property as Defense, 33 A.L.R.2d 1322

Presumptive or Circumstantial Evidence to establish Missing Link in Chain of Title, 64 A.L.R. 1333

Presumption or Burden of Proof as to whether or not Instrument affecting Title to Property is Recorded, 53 A.L.R. 668

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Priority between Devisee under Devise pursuant to Testator's Agreement and Third Person claiming under or through Testator's Unrecorded Deed, 7 A.L.R.2d 541

Record as charging One with Constructive Notice of Provisions of Extrinsic Instrument referred to in the Recorded Instrument, 82 A.L.R. 312

Record of Deed or Contract for Conveyance of One Parcel with Covenant or Easement Affecting another Parcel owned by Grantor as Constructive Notice to Subsequent Purchaser or Encumbrancer of Latter Parcel, 16 A.L.R. 1013

Record of Instrument which comprises or includes an Interest or Right that is not a Proper Subject of Record, 3 A.L.R.2d 577

Record of Instrument without Sufficient Acknowledgement as Notice, 59 A.L.R.2d 1299

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Provisions of Extrinsic Instrument referred to therein, 89 A.L.R.3d 901

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