

Record Title

Part 2—Land Record Systems

>> By Chuck Karayan

This is the second of a three part series examining Record Title which essentially was the subject of both of Curtis Brown’s books (Boundary Control and Legal Principles, and Evidence and Procedures for Boundary Location). Black’s Law Dictionary defines Record Title as: title to real property evinced by one or more instruments duly entered in the public land records system. In part one we looked at the historical evolution of record title; part two will be a detailed examination of the Record Title Acts; and part three will address problems within the chain-of-title. Every aspect of Record Title discussed can have a direct bearing on the surveyor’s professional boundary opinion.

Real Property is the basis of wealth and the “quiet and peaceful ownership” of it is one of the prime purposes of modern Real Property law. In part one we saw how the legislature moved society from oral contracts to written contracts, specifically from title transfers via livery-of-seisin to transfers by deeds. The legislature subsequently established land record systems providing for the recordation and retrieval of those written instruments as well as priority amongst them in the event of conflict.

One of the legislative intents in adopting a recording act was to encourage universal recordation of deeds, thereby avoiding the problem of “innocent third party purchasers”. The various state legislatures adopted one of three approaches. No matter which type of statute was adopted, a grantee who fails to record their deed runs the risk of losing their “senior status” to a subsequent (“junior”) conveyee. And, no matter which type of statute was adopted (race/notice/race-notice), an unrecorded deed is valid with regard to everyone

To be held the owner, subsequent conveyees MUST	“Pure” Race (few states)	Race-Notice (most states)	“Pure” Notice (some states)
Take title without NOTICE	NO	YES	YES
Be a “B.F.P.”	NO	YES	YES
RECORD first	YES	YES	NO

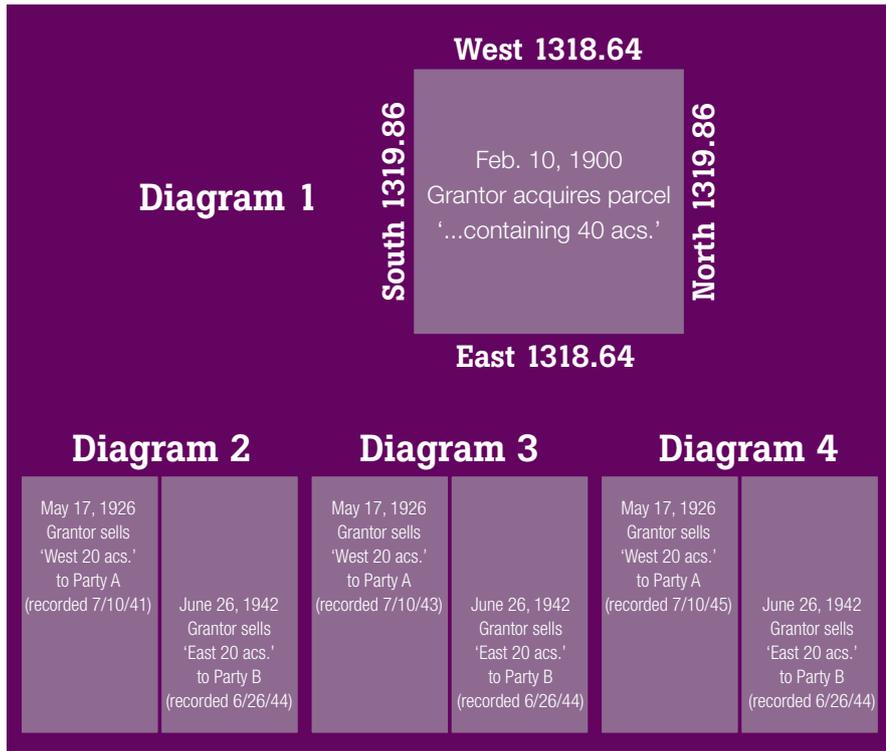
other than a subsequent conveyee who is protected by the recording act.

A “Notice Statute” focuses on the public knowledge of previous conveyances which is gained by recording them. Under these statutes a subsequent conveyee who is denied such information (by non-recordation) is given preference over the prior conveyee who caused the problem. A “Race Statute” focuses on the act of recordation (the desired goal). Under these statutes preference is given to the conveyee (prior or subsequent) who records first, i.e., wins the “race to the courthouse”. A “Race-Notice Statute” adopts both approaches. Under these statutes preference is given to a subsequent purchaser who records before the prior conveyee.

Fundamentally there are three elements which have a potential affect upon the applicability of the statute: (1) “Notice” or the lack thereof by the subsequent conveyee; (2) The financial relationship

between the subsequent conveyee and the grantor; and, (3) the sequence of recordation, if any, by the conveyee(s). The graphic left shows these elements and their significance under each type of statute. A detailed discussion of the elements follows.

Other than in a “race jurisdiction”, if the subsequent conveyee is to be given priority over the previous conveyee he or she must have taken title *without notice* of the prior conveyed rights. One of the legislative provisions in each jurisdiction is that everyone is charged with constructive notice of all recorded documents. Since the law assumes that the recorded rights of the prior conveyee were ‘known’ by the subsequent conveyee they could not be inadvertently harmed, therefore the common law priority of “First in Time, First in Right” should be maintained. The argument also applies when the subsequent conveyee has actual notice



descriptions, thereby creating gaps and/or overlaps. While the Recording Acts have no application with regard to gaps, they will control the boundary resolution regarding an overlap.

In Diagram 1 Grantor is shown acquiring his farmstead on February 10, 1900. His deed utilized a metes description which also stated that it contained “40 acres”. Calculations show that Grantor’s property actually contained 39.95+ acres. In Diagrams 2, 3 & 4 (left) grantor is shown selling the “West 20 acres” to Party A on May 17, 1926; and, the “East 20 acres” to Party B on June 26, 1942. Party B’s description overlaps Party A’s description by 1.50+ feet. Under American common law Party A would own 20.00 acres and Party B would own the remaining 19.95+ acres; grantor could not sell what he did not own, and Party A (who is first in time) would be senior (first in right).

However, neither party recorded their deed in a timely manner. Party B waited 2 years to record his/her deed; Party A waited between 15 and 19 years (Diagrams 2, 3 & 4). These delays cause the recording statute to become a factor in deciding the “senior rights” between A and B. Depending upon the circumstances, and the type of recording act adopted, Party B may own 20 acres while Party A may own only 19.95+ acres!

Disregarding the more than 15 year gap between Party A’s acquisition and recordation (Diagram 2), he/she is the owner of 20 acres under all types of recording acts. Since Party B’s acquisition occurred after Party A recorded his/her deed there is no issue of “Notice” or “Race”. Party A was at risk of losing his/her senior status for more than 15 years, but because the deed was recorded on July 10, 1941 (prior to B’s conveyance), A’s risk ended and he/she is the true owner of 20 acres.

In Diagram 3 the situation is different. Here, Party A delayed more than 17 years, recording his/her deed on July 10, 1943. When Party B acquired title on June 26, 1942 A’s deed had not yet been recorded. Under a “Notice Statute” Party B would be the owner of 20 acres and Party A would own 19.95+ acres. However, Party B also failed to record in a timely manner (2 years after his/her conveyance and almost 1 year after A’s recordation). Therefore, under either a “Race Statute” or a “Race-Notice Statute” Party A would own 20 acres and Party B would own 19.95 acres (because Party A recorded first).

of the prior conveyee’s rights—even if that deed is unrecorded. Moreover, if the facts of the situation would have caused a reasonable person to ask questions that ultimately would have lead to the subsequent conveyee knowing about the prior rights, they will be charged with inquiry notice—even if they did not ask those questions. The recording acts merely require that title be taken *without notice*, constructive, actual or inquiry; but notice is not an issue in a race jurisdiction.

Also other than in a “race jurisdiction” if the subsequent conveyee is to be given priority over the previous conveyee he or she must have been a *bona fide purchaser*. The common law has a long history of protecting innocent purchasers from fraud and unreasonable loss. The recording act requirement that to be given priority the subsequent conveyee be a *bona fide purchaser* (B.F.P.) is an aspect of that protection. If the subsequent conveyance is a gift or a sham it is not entitled to the protection of the act. For a subsequent conveyee to be seen as a B.F.P. they must have paid a “reasonable price”, but that does not mean that they must have paid “fair market value”. A purchaser of realty at a tax execution or distress sale, for example, may be a B.F.P. even though they acquired ‘a bargain’. On the other

hand payment of a “token” price does not qualify a subsequent conveyee as a B.F.P. In a race jurisdiction being a B.F.P. is not an issue.

Other than in a “notice jurisdiction”, if the subsequent conveyee is to be given priority over the previous conveyee he or she must have recorded first. In a notice jurisdiction the subsequent conveyee is given priority whether or not they record; but, failure to do so leaves them at risk to a third conveyee.

Application of these statutes can involve conveyance of all of grantor’s estate or just a portion of it. They also apply to conveyances of easements and other rights as well as financial documents (mortgages, trust deeds, liens, etc.). Most commonly grantors have inadvertently described identical portions to grantees at different times. And, this condition usually arises when “legal descriptions” were prepared by someone other than a professional surveyor. The scrivener believed that a quantity (distance, direction or area) used in grantor’s acquisition deed was empirically correct. If it was not, this mistaken belief would not affect the first conveyed portion of grantor’s estate; but it would make a difference with regard to subsequent conveyances. Relying on this mistaken belief the scrivener “calculated” data to be used in the subsequent

The scenario in Diagram 4 is changed. Party A waited over 19 years to record. Under a “Notice Statute” Party B would own 20 acres because he/she acquired title without Notice of A’s rights. Under a “Race Statute” he/she would own 20 acres by virtue of recording first (June 26, 1944 vs. July 10, 1945). And since both conditions apply, B would own 20 acres under a “Race-Notice Statute” as well (assuming “B” is a B.F.P.).

Each of the race, notice and race-notice statutes utilizes the fundamental elements in the general manner described. If the practicing surveyor only needed to be aware of the nine options described, this “in depth discussion” would be over. But that is not the case; in Part Three we will examine situations where the “statutory ideal” and the “reality” do not match, as well as the legislative and judicial responses to the ‘mis-match’. *AS*

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