Record Title

Part 3–Chain-Of-Title Problems

>> By Chuck Karayan

This is the third 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; in part two we examined the Record Title Acts; and in part three we 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.

When the legislatures adopt a statutory plan and discuss the philosophical differences between various proposals they also try to anticipate the attendant problems. It seems that they did so in this case because so many of them adopted Race-Notice Statutes. None the less, there are remaining issues involving "untimely" recording, the mechanics of the systems, improper recording and indexing, and "dormant rights".

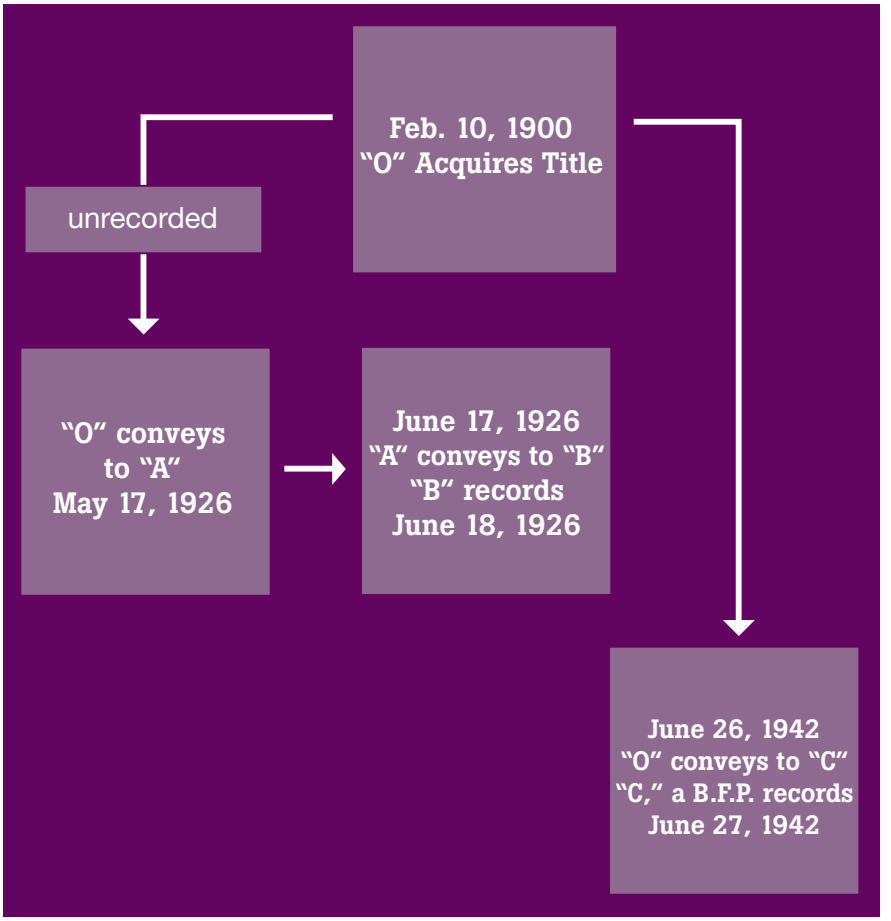
Historically many grantees saved their deed at home, often in the family Bible with other important documents. When the legislatures adopted Recording Acts they did not nullify unrecorded deeds, but they did create a strong incentive to record them. While most did not, some legislatures included additional requirements with regard to the recording process.

The overwhelming majority of land record systems are maintained at the 'county government' level, and the most common 'legislative addition' is that the document be recorded in the county where the land is located. This eminently reasonable requirement minimizes the effort of someone searching the records and increases the probable validity of their effort. Because of this legislative addition the duty of the title searcher does not extend beyond the county where the land is located. But even in jurisdictions where there is no such statutory requirement, it is unlikely that a court would find that a deed constituted constructive notice to a subsequent grantee if it was recorded in a different county.

All human endeavors contain error, public officials being no exception. This raises the question: What if the deed is recorded in the proper county but the public official indexes it incorrectly so that a diligent search will not discover it? While the courts are split on this subject, they have generally divided along lines paralleling the type of recording act used in their state. In the 'race jurisdictions', where the focus is upon actual recording, improper indexing rarely causes a prior grantee to loose their senior status–notice is not an issue under a 'race statute'. In 'notice' and 'race-notice jurisdictions', where the focus is on providing subsequent grantees with an opportunity to avoid problems, they are rarely charged with constructive notice of incorrectly indexed deeds. In these jurisdictions all grantees would be well advised to independently validate the proper indexing of their deed.

> **"Some state courts have held that ... purchasers who take by quitclaim do so subject to unrecorded prior conveyances; other states have held that merely using a quitclaim deed put the ... purchaser on inquiry notice."**

The above discussion has been predicated upon the traditional "grantor-grantee" indexing system used in the vast majority of counties. Under the "grantor-grantee" method a sequential tabulation of documents using the names of the parties is employed. There is also a "grantee-grantor" index which allows the searcher to track the parcel ownership backward in time thereby producing



a chain-of-title from the parcel's creation to its present record title ownership. While out-of-sequence index errors have occurred, more often problems arise from the misspelling of a party's name or the complete omission of the document from the index.

A "tract book" indexing system uses mapping of adjacent parcels with all documents pertaining to a particular tract being indexed to specific parcels without regard to the names of the buyer and seller. In those counties using a "tract book" indexing system the 'relative equity' between claimants may be different than under a "grantor-grantee" indexing system. The advent of computers and LIS/GIS software have greatly increased the use of "tract book" indexing. The technology has reduced the initial cost of establishing such systems, but they are still more expensive to create and maintain than simple index books. The public-agency personnel must be trained, leading to higher salaries and increased operating cost. On the other hand, increased efficiency leads to long-term cost savings. Since these systems still constitute 'the exception rather than the rule' appellate court decisions generally seem to have assumed "grantor-grantee" indexing. The above discussion should be read in that light and adjusted as appropriate.

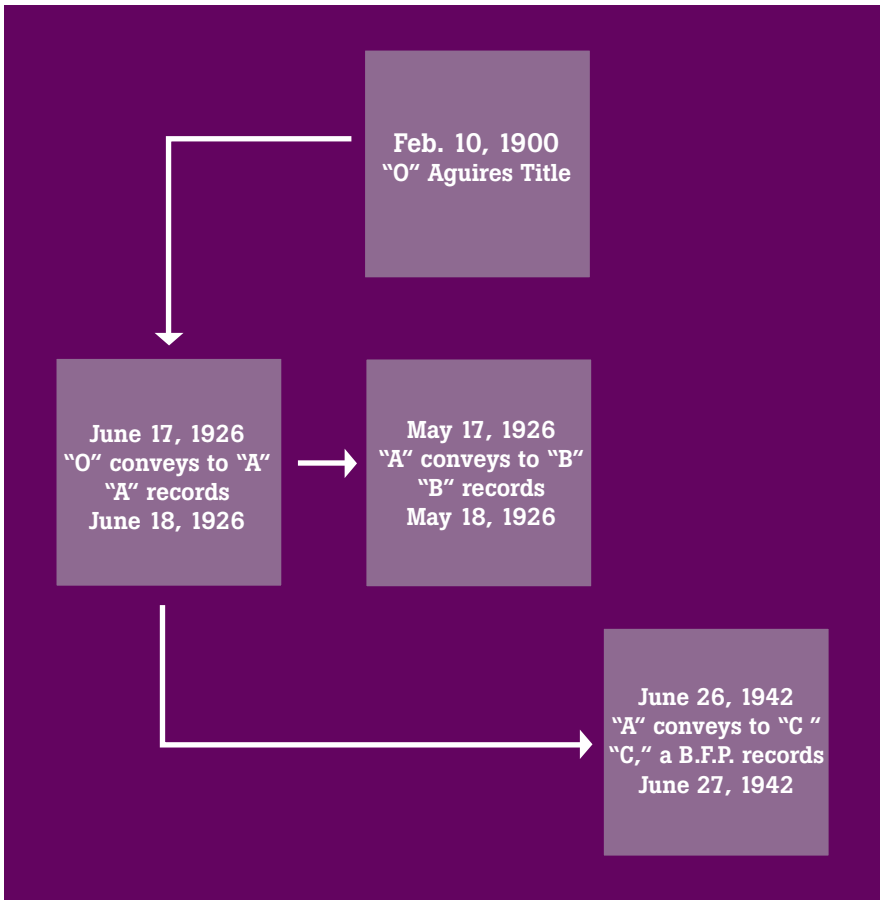
Another of the 'legislative additions', although far less common, involved Notarization and/or Witnessing. In jurisdictions with these or other requirements as a condition of recordation, some otherwise valid deeds may not (legally) be recorded. Despite such prohibitions, some non-compliant deeds have made their way into the 'record books'. The courts have been split on this subject, both within and across jurisdictional lines. Some courts have held that what the statute prohibited could not be recognized by the court; therefore (constructive) notice was not achieved. Other courts have ruled that prohibition aside, reality could not be ignored; therefore (actual) notice was achieved. And, a few courts, loath to approve something which the legislature had prohibited, and wishing to acknowledge the reality, have held that subsequent grantees who found prohibited documents were put on (inquiry) notice thereby.

A cautionary note regarding quitclaim deeds: Grantor does not convey title but merely remises his/her right, title and/or interest–whatever that may be–in favor of the grantee. Grantor may pass fee simple absolute, nothing, or something in-between; there are no warranties, covenants or other title assurances contained in a quitclaim deed other than those explicitly stated. Some state courts have held that subsequent purchasers who take by quitclaim do so subject to unrecorded prior conveyances; other states have held that merely using a quitclaim deed put the subsequent purchaser on inquiry notice. In most states however, a subsequent grantee's notice is not affected by the type of deed used.

Many state legislatures have addressed some of the problems which have arisen under the recording statutes by passing "curative acts". Under these laws documents which have been deposited and resided within recording systems for a specified number of years are cured of minor defects (generally, maters of form and/or format) and are deemed to be "duly recorded". The required "age" of the document varies from state to state and sometimes with regard to the type of problem. Not all jurisdictions have a "curative act" and some have more than one.

For a surveyor conducting a title search or constructing a chain-of-title the 'curative acts' do not reduce the required effort. What the curative acts do accomplish is removing doubts about the effectiveness of certain documents due to form and/or format questions. Some state legislatures have also addressed doubts about the substance of certain documents. Today many have adopted a "Marketable Record Title Act", which is a Statute of Limitation pertaining to dormant (antiquated, outmoded) rights which encumber property and impede its development/use. Typically these statutes apply to rights created in documents recorded at least 30 to 50 years ago, and which have not been re-conveyed or mentioned in any subsequently recorded document.

Rights, titles and/or interests which are not being utilized and appear merely in



the historical record of a parcels chain-of-title constitute a "cloud" which often militates against a title insurer or lender participating in a project. The state legislatures have declared that such "vacant lots" are contrary to the best interests of society as a whole and therefore have adopted a public policy seeking to limit the effect of such "clouds on the title". The Marketable Record Title Act is a legislative attempt to balance that policy against the Real Property Law concept regarding the permanence of ownership.

Marketable title acts allow the record title holder of "dormant" rights to maintain their efficacy by periodically filing a document reasserting their ownership. These more current documents prevent the record right from falling within the purview of the limitation statute and thereby being extinguished. Many of the legislative acts exempt estates which are in actual possession of the title holder and/or which are being currently assessed taxes by local government. These exemptions are assumed to at least put a subsequent grantee, insurer or lender on inquiry notice of the prior right and obviate at least part of the need to extinguish them.

One of the primary goals in adopting a recording act was to encourage universal recordation. Implicitly, and in modern practice, recordation would occur near the time of delivery (which is when transfer of title actual occurs). In most jurisdictions there is a statutory presumption of delivery by virtue of recordation. But historically, deeds have not always been recorded in a 'timely manner'. When recordation is delayed in terms of conveyance, the priorities established by the adopted recording act may become crucial.

Complete title searches produce a chain-of-title, e.g. a sequential listing of all recorded transfers of right, title and/or interest affecting a parcel from its time of creation (as a discrete unit of property) to the present day. Each successive document forms a "link in the chain", with each grantor having previously been the grantee. The title searcher works in reverse chronological order, going back and forth between the grantor-grantee index and the grantee-grantor index. If an "out" deed conveying grantors ownership is recorded prior to the deed by which he/she acquired that ownership (the "in" deed) even a diligent and expert title searcher will not find it by working backwards in time. Recorded title documents which convey "out" but lack a foundational recorded document conveying "in" are referred to as being wild and do not charge a subsequent grantee with constructive notice, as documents within the chain-of-title do.

In a Notice Jurisdiction "C" is the owner since "B's" deed is wild and "C" had no notice.

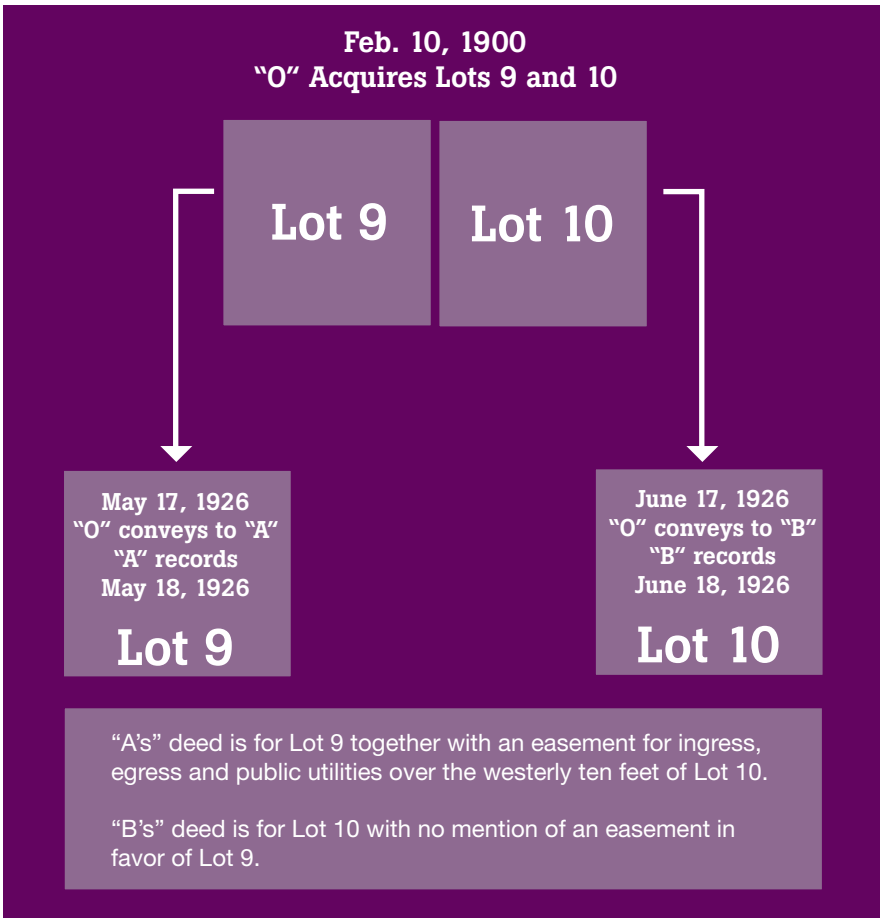
In a Race-Notice Jurisdiction "C" should win (and in the vast majority will) but there are some decisions which have held for "B" since that deed was recorded first. In all jurisdictions "O" and "A" would lose due to the concept of Estoppel by Deed (Grantor may not deny the rights of grantee under their deed).

The title conveyed by "O" on June 17, 1926 would pass directly through "A" to "B" by operation of law in virtually all jurisdictions; this concept is often referred to as After Acquired Title. On June 18, 1926 "B" would be able to maintain Quiet Title, Ejectment, etc. against all other claimants. On June 25, 1942 a title search would reveal the June 17, 1926 deed from "O" to "A" and no subsequent conveyance (out). Conflicts between a B.F.P. under the recording act and a claimant under the After Acquired Title doctrine have produced mixed results but most courts have held for "C".

A title search regarding Lot 10 on June 16, 1926 would reveal the February 10, 1900 "in" deed and no "out" deed. It would likely also reveal the May 17, 1926 deed for Lot 9, but that document would probably be considered irrelevant with regard to Lot 10.

The cases are split; some courts affirming the easement because "A" did everything that could be done, others extinguishing the easement because "B" had no notice of it.

All of the above examples are predicated on "grantor-grantee" rather than "track book" indexing. That and other factors may account for some of the apparent divergence amongst the courts. Well crafted descriptions could have prevented virtually all of the problems discussed.



Historically land ownership could only be evinced by possession. The traditional livery-of-seisin placed the buyer in possession as part of the transfer of ownership ceremony. The Statute of Frauds replaced oral evidence of ownership with written documentation. It must be borne in mind however that deeds and other written documents are merely evidence of title, e.g. they are only part of "all of the evidence" which the surveyor is responsible to gather and evaluate, albeit in most cases the foundation and usually the most significant part.

With time it became clear that society would be well served by a public land records system and the legislature adopted one of three types of Recording Act. While not mandating the recordation of deeds, these statutes created a very strong incentive to do so. The statutes also created a public repository for the preservation and retrieval of land title documents as well as establishing the priority of right which different grantees would have in the event of conflict.

Lawyers Title Opinions and Title Insurance Policies rest almost exclusively on the modern Record Title resulting from these two legislative acts (The Statute of Frauds and The Recording Act). Although not a perfect system it has produced a stable, reliable and efficient method of assurance for prospective purchasers. Many of the remaining problems have been addressed by additional legislation (such as "curative" and Marketable Title acts) and/or judicial decisions.

Despite the complexity of this subject, the surveyor should always keep in mind that real property ownership is the union of right, title, and interest therein.

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