

**A REALISTIC APPROACH TO IDENTIFYING  
AND CURING ANCIENT TITLE PROBLEMS**

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## **I. INTRODUCTION**

### **A. Definition of Ancient Title Problems**

The author was invited to write a paper on ancient title problems that are incurred with some regularity in the examination of fee simple titles for oil and gas drilling purposes. Unfortunately, no definitions of “ancient title problems” came with the invitation. Accordingly, the author surveyed several title attorneys as well as reviewed the leading writers on the subject, most notably the Honorable Fred Lange and his Land Titles in the Texas Practice Series (the first edition, not the updated edition) to attempt to arrive at a consensus definition of ancient title problems. Though by no means an exhaustive definition, for purposes of this paper, “ancient title problems” will be defined as: 1) the actions of one or more persons or a naturally occurring event, 2) which causes a break in the chain of title and/or results in the call for curative materials by the examining attorney and 3) which occurred prior to 1925 (a purely arbitrary date). The author recognizes that these same activities may take place later than 1925 in a given chain of title. It is the combination of the date and the acts (as hereinafter defined) that allow the activity to be classified as an ancient title problem.

### **B. Purpose of Paper**

The mere definition of an ancient title problem ie its causation and factual setting, is alone not worth much. This paper sets forth an initial set of facts which give rise to an “ancient title problem”, analyzes in detail the law surrounding the title problem and then sets forth a proposed curative solution to the problem.

Ultimately, it is the author’s opinion that all title problems are curable. That is, under the standard definition of marketable title, any title can be cured. However, monetary costs and time may not allow for a complete and risk free cure. Risk decisions will have to be made by the proper management authorities premised on the associated legal curative rules as applied to the facts of the specific situation.

### **B. The Starting Point - Marketable Title**

Ancient title problems cannot be analyzed, cured or waived, without an understanding of the title standard their cure or waiver is attempting to satisfy. In Texas, fee simple title opinions, and specifically the underlying title requirements found in such opinions, are written so that satisfaction of **all** title requirements will yield a “fee simple marketable title” for the tract of land under examination.

Marketable title has been a defined legal term in Texas jurisprudence since the 1920's. (Lund v. Emerson, 204 S. W. 2d. 639 (Tex. Civ. App. - 1947, no writ hist.); Owens v. Jackson, 35 S. W. 2d. 186 (Tex. Civ. App. - 1931, writ dism'd w.o.j.); Texas Auto Co. v. Arbetter, 1 S. W. 2d. 334 (Tex. Civ. App. - 1927, writ dism'd w.o.j.); Austin v. Carter, 296 S. W. 649 (Tex. Civ. App. - 1927, writ dism'd) and Alling v. Vander Stucken, 194 S. W. 443 (Tex. Civ. App. - 1917, writ ref'd)). A “marketable title” is a title based solely on instruments of conveyance properly filed of record and is defined as that title which is reasonably free from such doubt that a prudent man, with knowledge of all of the salient facts and circumstances surrounding the title and their legal significance, would be willing to accept. An objection (read title requirement) to a marketable title is based on serious and reasonable doubts by the title examiner concerning the title that would induce a prudent man to hesitate in accepting a title affected by them. (Lund v. Emerson, 204 S. W. 2d. 639 (Tex. Civ. App. - 1947, no writ hist.); Owens v. Jackson, 35

S. W. 2d. 186 (Tex. Civ. App. - 1931, writ dismiss'd w.o.j.); Texas Auto Co. v. Arbetter, 1 S. W. 2d. 334 (Tex. Civ. App. - 1927, writ dismiss'd w.o.j.); Austin v. Carter, 296 S. W. 649 (Tex. Civ. App. - 1927, writ dismiss'd) and Alling v. Vander Stucken, 194 S. W. 443 (Tex. Civ. App. - 1917, writ ref'd).

A title is not marketable if: 1) there is a reasonable chance that a third party could raise an issue concerning the validity of the title to the estate against the apparent owner (for instance, a claim of adverse possession) or 2) parol evidence is necessary to remove any doubt as to the validity and/or sufficiency of the owner's title (for instance, an affidavit of heirship to reflect a deceased's owners heirs-at-law) or 3) title rests upon a presumption of fact which, in the event of a suit contesting title, would probably become an issue of fact to be decided by a jury (for instance, whether additions to a tract of land occurred by accretion or avulsion) or 4) the record discloses outstanding interests in other parties that could reasonably subject the owner to litigation or compel such owner to resort to parol evidence to defend the title against the outstanding claims (for instance, a fee simple title with an outstanding, unreleased oil and gas lease is not a marketable title). (Lund v. Emerson, 204 S. W. 2d. 639 (Tex. Civ. App. - 1947, no writ hist.); Owens v. Jackson, 35 S. W. 2d. 186 (Tex. Civ. App. - 1931, writ dismiss'd w.o.j.); Texas Auto Co. v. Arbetter, 1 S. W. 2d. 334 (Tex. Civ. App. - 1927, writ dismiss'd w.o.j.); Austin v. Carter, 296 S. W. 649 (Tex. Civ. App. - 1927, writ dismiss'd) and Alling v. Vander Stucken, 194 S. W. 443 (Tex. Civ. App. - 1917, writ ref'd)). All title opinions in Texas should be written in accordance with this legal standard. The following "ancient title problems" each impact, in some way, the marketable title to a given tract of land.

## **II. PATENTS**

### **A. Facts**

#### **1. Fact Situation One**

The Mexican Government awarded a grant of land on March 1, 1827 to Ben Phillips, Jack Morrison and Fred Smith. The grant was duly recorded in the General Land Office after Texas gained its independence. A hand written copy of the patent was later recorded in the Ft. Bend County Deed Records. The copy of the land grant in the General Land Office has written on it in the margin that Fred Smith returned to Tennessee without fulfilling his residency/work requirement as called for under Mexican Law. The copy of the land grant on file in Ft. Bend County does not contain the marginal notation.

#### **2. Fact Situation Two**

Two patents are issued with a river as the natural boundary between the two grants. Many years later, a dam is built upriver from the two grants and the river goes from 3400 feet from bank to bank to less than 20 feet. It takes less than one month for the river to decrease in size to its present width. After the river's size is decreased, the State of Texas leased the lands included in old bed for oil and gas purposes. Oil and gas were discovered and production established. In the early 1990's, the adjoining landowners filed suit, asserting title to all lands save and except those actually within the now greatly reduced river bank.

#### **3. Fact Situation Three**

A land grant was issued in 1804 by the Spanish government. The present owner of the lands claims

that the land grant went to a point in conflict with claims of the State of Texas to lands thought to be submerged lands and historically claimed and leased by the State of Texas. The owner does not allege that the lands now claimed were accretions but rather that they were, at the time of the grant, a part of said grant and were properly described in the title document.

### **B. Spanish, Mexican and Early Texas Grants**

Spanish, Mexican and early Texas grants appear to fit under two general substantive classifications. The first are land grants that were issued with conditions precedent. That is, some of the early land grants were not and could not be issued unless and until specific conditions precedent had been performed. The case of Hancock v. McKinney, 7 Tex. 384 (Sup. Ct. - 1851) stated the rule that the “ultimate final title to the land had not been and could not be delivered until the conditions were performed. The mere concession in these cases did not confer on the grantee any right of property, but simply a permission to occupy, and a claim upon the Government for a title, to be delivered after the performance of the conditions. The fee remained in the grantor. The conditions were conditions precedent, and until performed, there was no obligation resting upon the Government to deliver the final title or confirm the grant.” Hancock v. McKinney, 7 Tex. 384 (Sup. Ct. - 1851) at Page 449.

For example, land grants in certain instances were only issued to married men with families. “Under this Act patents could have been issued only to heads of families for homestead purposes, and since the Constitution of 1869 limited land grants to a single man to 80 acres...” (Smith v. Temple Lumber Company, 323 S. W. 2d. 172 (CCA - 1959, writ ref’d. n.r.e.) at Page 176. A grant of acreage to a single man which was intended to be made to a married man with a family was void. “That which is void is without vitality or legal effect.” Smith v. Thornhill, 25 S. W. 2d. 597 (Comm. Of App. - 1930) at Page 600. Or, better stated, “No title can be valid which has been acquired against law...A patent ‘which has been fraudulantly (sic) obtained, or issued against law, is void’” Hancock v. McKinney at Page 440 Once the determination was made that condition precedent had been complied with and the land grant was issued, the title was a perfect title in the grantee and the sovereign had no title remaining in it. Hancock v. McKinney, 7 Tex. 384 (Sup. Ct. - 1851)

Typical conditions precedent required to be fulfilled prior to the issuance of a patent can be found in the underlying law in effect at the time of the grant. “The statutes in force in the Republic of Texas before the introduction of the common law are to be construed in light of the Mexican civil law, and the validity and legal effect of contracts and of grants of land made before the adoption of the common law must be determined according to the civil law in effect at the time of the grants...From these authorities it is plain, we think, that whatever title, rights, and privileges the inhabitants of Texas received by virtue of land grants from the Spanish and Mexican governments, which were a part of the realty itself or were easements or servitudes in connection wherewith, remained intact, notwithstanding the change in sovereignty and the subsequent adoption of the common law as a rule of decision.” Miller v. Letzerich, 49 S. W. 2d. 404 (S. Ct. -1932) at Page 408. Thus, the title examiner will have to know what the law was at the time of the grant and whether the grant depended on the performance of a condition precedent OR a condition subsequent.

Other land grants, depending on the law in existence at the time of the grant, required the performance of certain conditions subsequent for the title to be perfected. If the condition subsequent was not performed, the title conveyed, if any, could be voided by the sovereign. However, where there was no evidence that the sovereign acted to void the grant, then, as between the grantee and any third parties, the grantee’s title was good. Flores v. Hovel, 125 S. W. 606 (CCA - 1910, no writ hist.)

### **C. Patents**

Patents, as distinguished from early land grants, were instruments issued by the Republic or State of Texas whereby land was granted or conveyed by the Republic/State to a grantee. Patents are subject to the same rules as all written conveyances. That is, they must comply with the Statute of Frauds and adequately identify the grantor, grantee, the estate being conveyed and properly describe the lands made the basis of the patent for them to be valid. Compliance with the Statute of Frauds can be deemed, even as a matter of law, where a considerable period of time has passed and the State and all surrounding landowners have acquiesced in the title as located on the ground. Harris v. O'Connor, 185 S. W. 2d. 993 (Tex. Civ. App. - 1944, no writ hist.) “Exactness was difficult of attainment and should not be insisted upon, to the destruction of right...This answer is justified by over one hundred years acquiescence by the Governments of Coahuila and Texas, the Republic of Texas, and the State of Texas; not only by acquiescence, but by numerous other particular acts, particularly by the State of Texas, attesting that the aforesaid line is as before stated, thus is such line established as a matter of law. Any other holding would impugn (sic) the fidelity and integrity of each Attorney General holding office in the State of Texas, and so as to the Land Commissioners.” Harris v. O'Connor at Pages 1014-1015.

Early in the history of Texas, the Acts of 1836 and 1837 required that all patents should be in the name of the Republic of Texas, under the seal of the office and signed by the president and countersigned by the commissioner of the general land office. The Act of May 5, 1846 provided that the patent should be attested by the seal of the State. These minimal patent requirements have been continued to date. After the patent is drafted, but before it is delivered to the patentee, it must be registered in the land office’s patent book. ( Natural Resources Code §51.001 et seq (Vernon 1985))

If a patent is not issued according to law, and was not authorized by law nor made under color of law, it is void and those claiming under it acquire no title or right. State v. Sneed, 181 S. W. 2d. 983 (Tex. Civ. App. - 1944)

“A patent passes to the patentee the legal title to the land in so far as the State is concerned. The patentee is invested with a title which is good against all persons who cannot show a superior preexisting right. The patent is subject to attack only by the State or by one having a right to the land which is prior or superior to that of the patentee.” Patterson v. Peel, 149 S. W. 2d. 284 (Tex. Civ. App. - 1941, writ ref’d.) at Page 285 “The rule is \*\*\* that a patent is not void by reason of irregularity which does not appear upon its face, and that, in the absence of fraud, the judgment of the Commissioner of the General Land Office upon the qualifications of a patentee is conclusive.” State v. Humble Oil & Refining Company, 187 S. W. 2d. 93 (Tex. Civ. App. - 1945, writ ref’d.) at Page 108

### **D. General Land Office**

The General Land Office is the official custodian of public records pertaining to public lands traceable back to the Spanish and Mexican Grants. It is the starting point for the origin of all private titles in Texas since land must have first been severed from the sovereign before it can privately owned. Stated another way, absent a voluntary conveyance of title out of the sovereign, no individual may mature title against the state via adverse possession. Harris v. O'Connor, 185 S. W. 2d. 993 (Tex. Civ. App. - 1944, writ ref’d)

Patents are only required to be recorded in the General Land Office. Once recorded in the General Land Office, their recordation is notice to the world of the patent's existence. Mathews v. Caldwell, 258 S. W. 2d. 810 (Comm. Of App. - 1924). Any attendant documents which may assist in the interpretation of a patent (or early land grant) may not be filed for record in the General Land Office unless such deposition has been authorized by law. Landry v. Robinson, 219 S. W. 2d. 819 (Sup. Ct. - 1920)

### **E. Boundaries on Rivers and Tidal Lands**

Two cases stand as pivotal cases in recent real property litigation. The first, Brainard v. State of Texas, 12 S. W. 3d. 6 (Sup. Ct. - 1999), addresses the newly announced principle of "artificial accretion" in river cases. The second case, The John G. and Stella Kenedy Memorial Foundation v. State of Texas, 994 S. W. 2d. 285 (Tex. Civ. App. - 1999) addresses the ownership of lands west of the intracoastal waterway and lying between Padre Island and the mainland ("mud flats"). Both cases directly address the ancient title problems of boundary location in grants/conveyances bordering on a river or tidal lands

Rivers - Generally (and the author does mean generally - this subject can and should be made the basis for an entire paper), grants made since 1837 on streams that are less than 30 feet wide and which are not navigable in fact, and where said streams are included as the boundary between two tracts (or grants), will vest the riparian owner with title to the center of the stream. City of Victoria v. Schoot, 29 S. W. 681 (Tex. Civ. App. - 1895, no writ hist.) and Dutton v. Vierling, 152 S. W. 450 (Tex. Civ. App. - 1912, no writ hist.) Where a stream, which is a boundary, suddenly abandons its old bed and seeks a new bed, such change of channel does not change the boundary ie it remains as it was (avulsion). Siddall v. Hudson, 206 S. W. 381 (Tex. Civ. App. - 1918, writ dismissed) and Ross v. Green, 139 S. W. 2d. (Sup. Ct. - 1940). If the stream changes its course (and bed) gradually and imperceptibly, the boundaries of the riparian owners change with the shifting stream (accretion). Tyler v. Gonzales, 189 S. W. 2d. 519 (Tex. Civ. App. - 1945, writ refused.) Grants made prior to 1837 on all perennial streams, regardless of navigability or width, reserved title in the bed to the state. State v. Grubstake Investment Ass'n, 297 S. W. 202 (Sup. Ct. - 1927)

Against the backdrop of the foregoing very general rules of real property, the Brainard case was decided. The case involved the building of a dam across the Canadian River with the resultant decrease in size of the river from approximately 3400 feet to a little over 20-40 feet in width. The issue was where was the boundary of the riparian owners: 1) where the original bed of the river was located prior to the construction of the dam or 2) where the bed of the river was located as of the time of the filing of the suit? The court decided that the causation of the change in the width of the actual bed of the river was due to what it termed "artificial accretion" ie the building of the dam. The court held that the artificial accretion did not in any way interfere with the change in the boundaries and held, as a matter of law, that the new bed of the river was "...on and along the bank at the average or mean level attained by the waters in the periods when they reach and wash the bank without overflowing it... This boundary line is defined as 'a gradient of the flowing water in the river,' located halfway between the lowest level where the flowing water first touches the bank and the highest point where the water reaches the top of the bank without overflowing it." Brainard v. State of Texas at Page 16.

Title examiners will have to be aware of this case as it pertains to rivers which are boundaries of lands under examination. The full and complete history of the river (including whether it is navigable in fact, its average width from cut bank to cut bank and the reasons for various changes in the banks of the river as the same affect the lands under examination) since the date of grant, will have to be obtained and reviewed in light of the rules of the case before a determination of boundary can be made. In the author's opinion, absent a final judicial determination on the issue, no marketable title can be delivered on a tract

under examination abutting a river since there may be facts and circumstances, not of record, which could significantly impact the exact boundary (and quantum of acreage) of the lands under examination.

Mud Flat Lands - The Kenedy Memorial Foundation case sets forth general principles of boundary location law which title examiners must be aware of where the tract under examination may have, as one of its boundaries, a seaward line which is, or was, at one time, subject to the ebb and flow of the tide. The case involved a claim by the plaintiffs to certain mud flats lying west of the intracoastal canal and claimed to have been included in the original grant of the lands. That is, the plaintiffs claimed that title to lands granted in 1804 and 1834 included certain mud flats traditionally claimed by the State of Texas. The evidence showed that the surveyors' descriptions called for the grants to go from a metes and bounds description to the shore of the Laguna Madre and thence with its meanders. The issue presented to the court was to determine exactly what lands were intended to be granted by the sovereign and were those lands properly described. (Again, the rules governing this type of grant are voluminous and not recited in detail in this article)

The court stated that the intent of the original grantor (Spain or Mexico) governs and that the survey made at the time of the grant controls if it can be located on the ground. The court cited the general rule, for shoreline grants made by Spain or Mexico, that the line of mean higher high tide, as defined by tidal gages should be utilized (where there are two high tides, the lower tide is disregarded). For all grants made thereafter, the line of mean high tide should be utilized (where there are two tides, they should be averaged). The court also stated the rule that, in some cases, evidence other than tidal information may be more appropriate in determining the shoreline.

This case turned on factual issues as found by the jury. Its principles and lesson to the title examiner is that, even 200 years later, the boundaries of a given tract of land bordering on the seashore can be at issue. Title examiners will have to be aware of this case as it pertains to lands bounded in part by the seashore. The full and complete history of the lands (including whether any accretion or reliction has taken place and any actions taken by man in changing the boundaries such as canals or spoil banks) will have to be examined since the date of grant, and reviewed in light of the rules of the case before a determination of boundary can be made. In the author's opinion, absent a final judicial determination on the issue, no marketable title can be delivered on a tract abutting a body of water potentially subject to the ebb and flow of the tides since there may be facts and circumstances, not of record, which could significantly impact the exact boundary (and quantum of acreage) of the lands under examination.

## **F. Curative Actions**

### **1. Fact Situation One**

The fact situation set out above actually took place in the early 1990's in Ft. Bend County, Texas. Since no case was filed nor legal decision reached, the author has only the following information furnished to him by the Ft. Bend County Clerk.

An oil company wanted to drill on Blackacre. It commissioned a fee simple title opinion for Blackacre. One of the title requirements was to obtain a copy of the Mexican land grant on file with the General Land Office despite the fact that a handwritten copy of same was of record in the Ft. Bend County Deed Records. The copy of the land grant obtained from the General Land Office did, in fact, have noted in the margin that one of the original grantees had not performed his work/residence

requirements (condition subsequent) and had in fact returned to Tennessee. The marginal notation was evidently construed by the General Land Office as an affirmative action, on the part of the sovereign (Mexico), negating the title of the non-complying party (undivided 1/3 interest).

After discovery of the marginal notation, the State of Texas, as successor-in-interest to Mexico, declared that an undivided 1/3 interest in the entire survey was and had always been owned by the State of Texas. A constitutional amendment was passed allowing the re-vesting of the title to the surface estate. However, title today to the mineral estate (1/3) remains in the State of Texas.

Curative Action - There is no curative action which can be taken! Once the sovereign had properly declared the title to the undivided 1/3 interest to be forfeited, it thereafter remained vested in the sovereign.

Each fee simple title opinion issued should require that a copy of the complete patent/land grant file in the General Land Office be obtained and reviewed to confirm that all of the sovereign's title to the survey in question has been properly conveyed. Marketable title cannot be assured until this action has been taken. **This should not be a waiveable requirement.** Any problems with the file, such as marginal notations or other communications found in the file, should be noted by the title examiner. Where such title problems exist, marketable title cannot be assured without confirmatory litigation.

## 2. Fact Situation Two

As indicated above, the fact situation very closely parallels the facts in the Brainard case. Without any findings of fact (since the case came to the court on summary judgment), the court held, apparently as a matter of law, that not only did an act of man (building a dam) cause the river to shrink in size but also that the time it took for the river to dramatically reduce in size was due to accretion as distinguished from avulsion.

Curative Action - Where a river is a boundary between two grants or two tracts of land, and the lands under examination border on said river, the issues of the date of the grant (Spain, Mexico, Republic or State of Texas), the average size of the river from cut bank to cut bank, the history of the changes in the river over time from the date of the grant forward and why those changes took place should be obtained and furnished to the title examiner to review in light of this case and the rules set out above. Where the facts indicate significant changes in the river's course and bank size over the intervening years (and, in the author's opinion, such facts will almost always be discovered), to confirm fee simple marketable title in the client it will be necessary to file and secure a judicial finding as to the boundary and quantum of acreage for the lands under examination. Without a judicial finding on such matters, there will always exist factual matters outside of the record which could, in all probability, subject the fee simple title holder to litigation.

## 3. Fact Situation Three

This fact situation also closely parallels the Kenedy Memorial Foundation case. The true issue before the court in that case was where did the original surveyor locate the exterior lines of the grant where it met the mud flats in the Laguna Madre. This issue was being litigated in the 1990's, almost 200 years after the dates of the grants made the basis of the litigation.

Curative Action - As with grants bordering on a river, the issues of the date of the grant (Spain, Mexico, Republic or State of Texas), whether the mud flat or landward boundary borders on waters were subject to the ebb and flow of the tide, the history of the changes in the land/water boundary over time from the date of the grant forward and why those changes took place should be obtained and furnished to the title examiner to review. Where the facts indicate significant changes in the land/water boundary over the intervening years (and, in the author's opinion, such facts will almost always be discovered), to confirm fee simple marketable title in the client it will be necessary to file and secure a judicial finding as to the boundary and quantum of acreage for the lands under examination. Without a judicial finding on such matters, there will always exist factual matters outside of the record which could, in all probability, subject the fee simple title holder to litigation.

### **III. RECORDATION LAWS**

#### **A. Facts**

##### **1. Fact Situation One**

A purchases an undivided  $\frac{1}{2}$  mineral interest in Blackacre. He personally takes his deed to the County Clerk's office in which the lands are located and delivers the mineral deed to an assistant county clerk. He tenders the proper recording fee and has a file number issued for his mineral deed. However, his deed is not indexed. Big Oil Company takes a lease from A's grantor, drills for and discovers oil in paying quantities. A discovers that the well has been drilled and approaches Big Oil Company requesting that he be treated as a working interest owner in the well. Big Oil Company refuses A's request, citing that it was a good faith purchaser for value without notice of A's ownership.

##### **2. Fact Situation Two**

A purchases an undivided  $\frac{1}{2}$  mineral interest in Blackacre. He personally takes his deed to the County Clerk's office in which the lands are located and delivers the mineral deed to an assistant county clerk. He tenders the proper recording fee and has a file number issued for his mineral deed. However, his deed is not indexed nor is it recorded in the official books of the County Clerk's office. Big Oil Company takes a lease from A's grantor, drills for and discovers oil in paying quantities. A discovers that the well has been drilled and approaches Big Oil Company requesting that he be treated as a working interest owner in the well. Big Oil Company refuses A's request, citing that it was a good faith purchaser for value without notice of A's ownership.

##### **3. Fact Situation Three**

A and B own Blackacre. A conveys Blackacre to C by general warranty deed which is duly recorded. C goes into possession of Blackacre for a period of 5 years and then sues B, alleging that it has matured limitation title to Blackacre by adverse possession.

#### **B. Documents Filed With the County Clerk, recorded BUT Improperly Indexed or Recorded**

The exact time and date of recordation of an instrument can be very important when establishing priorities between claimants under a multitude of scenarios. Even more important, what happens where, by clerical error, the document presented to the county clerk's office is either not recorded OR not

indexed? The following rules have been developed by Texas courts, interpreting the recording statutes of Texas over time. (NOTE: Under Title 3 of the Property Code, Chapter 11.004, the county clerk is required, within a reasonable time after delivery, to correctly record any instrument authorized to be recorded. The clerk is to record the instruments relating to the same property in the order the instruments are filed and to provide and keep the indexes required by law)

Instrument(s) are considered filed when they are placed in the hands of the county clerk or proper officer even though no file mark has yet been placed on such instrument(s). J. M. Guffey Petroleum Co. v. Hooks, 106 S. W. 690 (Tex. Civ. App. - 1907, writ ref'd.) and Jones v. MacCorquodale, 218 S. W. 59 (Tex. Civ. App. - 1919, writ ref'd.)

The date of filing of an instrument(s) is the date of the delivery of such instrument(s) to the county clerk (or proper officer) and his acceptance of that instrument for record in his office. - Maddux v. Booth, 108 S. W. 2d. 329 (Tex. Civ. App. - 1937, no writ hist.)

The filing of an instrument operates as notice to subsequent purchasers and such effect is not lost by reason of the fact that a deed remained unrecorded for a long time because the party filing same failed to pay the fees for recording. Carlisle & Co. v King, 133 S. W. 241 (Sup. Ct. - 1910).

If the clerk accepts the instrument and retains it in his custody pending payment of the fees, the instrument is filed for record and operates to give notice to all persons of its existence. In the case of American Exch. Nat. Bank of Dallas v. Colonial Trust Co., 186 S. W. 361 (Tex. Civ. App. - 1916, no writ hist.), a deed of trust was mailed to the county clerk's office and received on May 29, 1914. The deputy clerk initially noted on the instrument that date and that same was filed for record. However, the deputy clerk thereafter deleted the indorsement since the recording fees had not been enclosed with the deed of trust but kept possession of the instrument. The deed of trust was eventually returned to the mortgagee since the necessary recording fees were not forwarded within the time period required by the clerk's office. The instrument was re-recorded on June 9, 1914. An abstract of judgment covering and pertaining to the mortgagor and the mortgaged lands was filed for record on June 2, 1914. Since the county clerk received and retained the deed of trust in his official custody, the instrument was deemed to have been filed on the earlier date of acceptance of the instrument for recordation.

Even if an instrument is not actually filed or recorded, is recorded in the wrong book or mis-indexed or not indexed, the depositing of the instrument with the county clerk is deemed as the filing of same and the instrument will stand as recorded as against third parties. David v. Roe, 271 S. W. 196 (Tex. Civ. App. - 1925, writ dismiss'd.)

### **C. Duty to Research Chain of Title After Title Passes**

A purchaser of a tract of land is charged with all notice of all instruments affecting his chain of title and which have been properly filed for record in the county clerk's office where the lands are wholly or partially located. Carlisle & Co. v King, 133 S. W. 241 (Sup. Ct. - 1910) and American Exch. Nat. Bank of Dallas v. Colonial Trust Co., 186 S. W. 361 (Tex. Civ. App. - 1916, no writ hist.). **HOWEVER**, the filing of an instrument with the office of county clerk is only notice **to those who are bound to search for the document and which are in his chain of title.** That is, once a party acquires title to an interest in a tract of land, it is no longer required to continually inspect the county deed records to be sure that there are no documents which have been filed subsequent to his acquisition of title which could affect

or impact his quality or quantity of title. “The general rule is that the registry of an instrument conveying property is notice only to those bound to search for it, such as subsequent purchasers under the grantor in a deed...” Herd v. Wade, 63 S. W. 2d. 253 (Tex. Civ. App. - 1933, writ ref’d.) at Page 258. Owners of an interest in a tract of land are not required to make a search to see if there was a recorded void instrument to their property nor is the recording of an instrument by one not in their chain of title constructive notice of same. Barrera v. Ruiz, 308 S. W. 2d. 579 (Tex. Civ. App. - 1958, no writ hist.); Campsey v. Jack County Oil & Gas Association, 328 S. W. 2d. 912 (Tex. Civ. App. - 1959, writ ref’d n.r.e.); Spiller v. Woodard, 809 S. W. 2d. 624 (Tex. Civ. App. - 1991, no writ hist.) Portman v. Earnhart, 343 S. W. 2d. 294 (Tex. Civ. App. - 1960, writ ref’d n.r.e.)

It should be noted that there is another line of cases which appear to directly contradict the foregoing rule concerning the duty of an owner of an interest in a tract of land to continually update and review the status of his record title. It can be found in the very recent case of Thedford v. Union Oil Company of California, 3 S. W. 3d. 609 (Tex. Civ. App. - 1999). The facts in that case parallel the facts for Fact Situation Three. That is, the possessory cotenant died intestate, his interest in the lands at issue passing to and vesting in certain intestate heirs. Said intestate heirs never sold or otherwise conveyed their interests nor did they ever affirmatively assert any interest in the lands. The possessory cotenant sold its interest to a third party, who in turn re-sold the land to numerous persons over time.

The court looked at the deed the possessory cotenant utilized to convey the lands at issue for the first time. It cited a line of cases which hold that “...When a party obtains title to property from one cotenant through an instrument purporting to convey the entire title to the land, such a conveyance constitutes ouster and amounts to disseizin of the nonparticipating cotenant, especially when the grantee is a stranger to the cotenants (Citing cases)...” Thedford v. Union Oil Company of California, 3 S. W. 3d. 609 (Tex. Civ. App. - 1999) at Page 614.

There appears to be no question but that the deed at issue was executed and recorded after the death of the cotenant. Title to his interest vested immediately in his heirs under the laws of intestate succession. The issue presented is whether the intestate heirs had a duty to continually search the records for the recordation of a deed such as the one executed by the possessory cotenant. This case holds that “Further, under these facts, the evidence conclusively shows that any cotenancy was repudiated, if not by the original conveyance to Berry, then by the following conveyances to individuals and oil companies who continuously possessed and developed the Walling Survey...” Thedford v. Union Oil Company of California, 3 S. W. 3d. 609 (Tex. Civ. App. - 1999) at Page 614. Apparently, this decision, and those cited in the case, hold that the non-possessory cotenant(s) are required to continually search the records of the pertinent county clerk’s office or else be held to a holding, as a matter of law, that their cotenancy was repudiated by the conveyance (and filing of same) from the possessory cotenant to a third party where such conveyance purports to convey the entire fee simple interest. After repudiation, the grantee or its heirs, successors or assigns must then hold the land in adverse possession for the requisite period of time (5 or 10 years)

## **D. Curative Actions**

### **1. Fact Situation One and Two**

Both of the above fact situations look at different aspects of the same problem. In Fact Situation One, the mineral deed is filed but not indexed; in Fact Situation Two the mineral deed is neither filed nor

indexed. According to the law in Texas regarding when an instrument is recorded, both mineral deeds were properly recorded and stood as constructive notice to Big Oil Company. Big Oil Company is in a quandary: how could it have found either instrument since neither were indexed?

Curative Action - It has always been the policy of the author to have the abstractor, usually a landman (or the author himself) re-run the title to the lands under examination in the local abstract plant, when available. The abstract plant is set up geographically and, if properly maintained, will have a reference to every instrument which affects the title to the survey in which it is filed. This is the only method the author is familiar which could lead to the location of any instruments which may have been filed but not indexed or indexed improperly.

There is simply no way to find instruments that were never recorded (and therefore never indexed) in the county deed records. The only curative action that can be taken, on the part of the examining attorney, is to place an exception to title opinion coverage for instruments not filed in the deed records or not indexed/mis-indexed.

## **2. Fact Situation Three**

Frankly, under the cases above discussed, it is a toss-up whether C prevails against B. Under what the author considers the better reasoned theory, B was not required to research his title to see if A conveyed or attempted to convey the full fee simple interest in Blackacre to a third party. Without additional acts of repudiation by C, B should prevail.

However, under the Thedford case, there is an argument that B would prevail since A, the possessory cotenant, did purport to convey all of Blackacre to C.

Curative Action - Where there is a conveyance by the possessory cotenant which purports to convey all of the lands, a stipulation of interest document, with words of grant, should be obtained from both the non-possessory cotenant and the grantee of the deed. If both agree that the cotenancy is still in force and effect, there should be no further title problems regarding the deed. However, if the grantee refuses to recognize the title of the non-possessory cotenant, the only way to assure marketable title to the tract of land under examination is to seek a judicial determination of the effect of the deed.

## **V. NATURE OF ADVERSE POSSESSION**

### **A. Facts**

#### **1. Fact Situation One**

H and W both die intestate in 1908. They owned Blackacre as their community property. They leave four heirs at law; A, B, C and D. A actually moves into his parents' house, farms the land and pays taxes until his death in 1942. His son thereafter goes into possession of Blackacre, farming same and paying all taxes until his intestate death in 1989, leaving one daughter surviving him. His daughter and her family thereafter went into possession of Blackacre, paying all taxes and farming same up to the present time.

#### **2. Fact Situation Two**

Blackacre is patented to A in 1890. No conveyance is made by A but there is a conveyance made by B and C, the purported heirs of A, to D in 1901. No heirship information is available in the county deed records. The next conveyance made is by E (no known relation to D) to F in 1915. There are thus two breaks in the early chain of title; in 1901 and again in 1915. Thereafter, F remains in possession of Blackacre, selling ½ of the mineral estate in 1940 to M. Title remains regular thereafter until the present.

### **3. Fact Situation Three**

Attorney Jones examines title to Blackacre. One of the title requirements in her title opinion is to obtain an affidavit of use and occupancy. A personal inspection of Blackacre reflects that a very old cemetery is located on approximately 1 acre of land. No record of a conveyance into said any of the deceased persons can be found in the county's deed records nor is there a public dedication of the cemetery. It is fenced (which fence is in an extreme state of disrepair) and the grave markers are still in place. Attorney Jones must advise her client if the heirs of the deceased persons own any mineral interest thereunder.

### **4. Fact Situation Four**

Attorney Jones examines title to Blackacre. One of the title requirements in her title opinion is to obtain an affidavit of use and occupancy. A personal inspection of Blackacre reflects that a railroad is located on a 100 foot wide kept area. No record of a conveyance into said railroad can be found in the county's deed records. Attorney Jones must advise her client if the railroad owns any mineral interest thereunder.

## **B. Specific Adverse Possession Rules of Law**

### **1. Cotenants**

Generally, where a conveyance is made to two or more persons, in the absence of a statement to the contrary found in the instrument, Texas law will presume that the conveyance was made to each grantee in equal, undivided interests as a tenant in common (Wooley v. West, 391 S. W. 2d. 157 (Tex. Civ. App. - 1965, writ ref'd n. r.e.) Cotenancy can also arise from the death of the survivor of a husband or wife, where an interest in real property devolves by intestate succession to the heirs-at-law. One cotenant may lease its interest in a tract of land without the consent of its other cotenant(s). Each lessee thereafter becomes a cotenant with the other cotenant(s) or their lessees. Wilson v. Superior Oil Company, 274 S. W. 2d. 947 (Tex. Civ. App. - writ ref'd n.r.e.) Any cotenant or its lessee may commence drilling for oil and gas on the leased premises without the consent of the other cotenant(s). Powell v. Johnson, 170 S. W. 2d. 273 (Tex. Civ. App. - 1943, aff'd)

Each cotenant has a co-equal right of possession in all of the tract of land in which it owns an undivided interest. Southern Pine Lumber Company v. Hart, 340 S. W. 2d. 775 (Sup. Ct. - 1960). Generally, drilling and production by one cotenant is considered permissive by the other cotenant(s) and is not construed as adverse to the non-drilling cotenants since each cotenant has the co-equal right of possession, including the right to drill for oil and gas without the other cotenant(s)' permission. White v. Smyth, 214 S. W. 2d. 967 (Sup. Ct. - 1953) However, a mixed question of law and fact may arise, in an adverse possession case by and between cotenants, where the drilling and production of oil and gas was carried on for the statutory period of time (usually 10 years), no royalties were tendered to the out of

possession cotenant(s) and the entry by the producing cotenant is in denial of the out of possession cotenant's co-equal right of possession of the mineral estate. Humble Oil & Refining Company v. Kishi, 291 S. W. 538 (Comm. of App. - 1927)

Texas law requires that the adverse possession by one cotenant be of such unequivocal notoriety that the out of possession cotenant(s) will be presumed to have notice of such adverse right in the possessory cotenant. Todd v. Bruner, 365 S. W. 2d. 155 (Sup. Ct. - 1963) The acts of possession of the possessory cotenant must sufficiently apprise the other cotenant(s) and persons in the general community that the possessory cotenant was claiming the sole and exclusive right to appropriate all of the land to its own use in hostile claim of the true owner. Todd v. Bruner, 365 S. W. 2d. 155 (Sup. Ct. - 1963) and Southern Pine Lumber Company v. Hart, 340 S. W. 2d. 775 (Sup. Ct. - 1960) That is, possession of a tract of land, or an interest therein (such as the mineral estate), in the absence of other evidence to the contrary, is not considered as adverse to the out of possession cotenant(s). Instead, such possession is presumed to be in right of common title. Henderson v. Herrington, 366 S. W. 2d. 667 (Tex. Civ. App. - 1963, writ ref'd n.r.e.) and Walton v. Hardy, 401 S. W. 2d. 614 (Tex. Civ. App. - 1966, writ ref'd n.r.e.) In summary, the large, glaring issue that arises in situations where one cotenant is in possession of a given tract of land, where nothing has been said to the other cotenant(s) which would constitute an obvious ouster and repudiation of their title, is whether there are any legal theories which will quiet title in the possessory cotenant at some point in time, especially where the possession commenced long ago.

In fact, there are two significant exceptions to the general rule concerning the nature of the possession of one cotenant and the maturing of limitation title against the out of possession cotenant(s). For purposes of this paper, the first exception will be denominated as "*extended adverse possession*". Extended adverse possession concerns the long, uninterrupted possession of a tract of land by one cotenant as evidence of repudiation of the title of the non-possessory cotenant(s) coupled with adverse possession as required under the limitation title statutes hereinafter identified. The second exception is known as the "*theory of lost deed*" and involves the imposition of a legal inference, under certain circumstances, that a deed was made by and between the possessory cotenant and non-possessory cotenant(s), which deed was subsequently lost. Both theories attempt to confirm title in the possessory cotenant where possession has been for a significant period of time. The following is a review of the significant cases and principles of both theories which can lead to the curing of ancient title problems dealing with cotenants.

### **1. Extended Adverse Possession**

The following four cases set forth not only the theory of extended adverse possession but also the exception to the application of the theory. The cases are reviewed in the order in which they were rendered.

Mills v. Vinson, 342 S. W. 2d. 33 (Tex. Civ. App. - 1960, writ ref'd n.r.e.) is a case in which one cotenant went into possession of a tract of land in 1902 and continued in possession until 1958, paying all taxes and actually occupying same for 56 years. The court cites the rule that "possession, payment of taxes, the sale of timber and claim of ownership alone are not sufficient in cotenancy cases to support the acquisition of title to land by adverse possession by one cotenant against another." Mills v. Vinson at Page 40. Quoting further, the court then set forth the following rule. "It is not necessary that actual notice of an adverse holding and disseizin be brought home to a cotenant when the adverse occupancy and claim of title is so long-continued, open, notorious, exclusive and inconsistent with the existence of title in

others, except the occupant, that the law will raise and inference of notice to the cotenant out of possession; or the jury may rightfully presume such notice.” Mills v. Vinson at Page 41. The court likens exclusive, long possession as constituting presumptive notice to the out of possession cotenants of the hostile character of the possessory cotenant’s occupancy of the tract at issue.

Tex-Wis Company v. Johnson, 534 S. W. 2d. 895 (Sup. Ct. - 1976) is a case which further elaborates indirectly on the extended adverse possession theory set out in Mills v. Vinson, above cited. Factually, the plaintiffs (adverse claimants) were found to have been in actual possession of the tract at issue for a period of 24 years from and after the date of the foreclosure sale of the tract to defendant’s predecessor in title. The court reaffirmed the general rule that holding over by a party after execution of a deed or rendition of a judgment usually deems that party to be deemed a permissive tenant. However, long, continued, notorious possession which is exclusive and inconsistent with the title in others, except the occupant, can raise a presumption of notice of repudiation to the out of possession owner’s title or the jury may infer one. The court must look to the amount of time that the occupant was in possession of the lands at issue (24 years) and decide whether such length of time is sufficient to constitute notice to the out of possession record owner of the adverse possession of the claimant. The court then notes that the adverse claimant must then remain in possession for the statutory period of time (10 years for a naked trespass) from and after the expiration of the notice period to mature limitation title.

Evans v. Covington, 795 S. W. 2d. 806 (Tex. Civ. App. - 1990, no writ hist.) applies the above rules and finds, under the facts, that the adverse claimant did not prove factually that its occupancy constituted notice of its adverse possession. The adverse claimant had purchased the interests of the former owner’s children in the tract at issue and then entered into possession. The owner’s widow, and owner of an undivided ½ interest in the tract, sold her interest to a third party. The adverse claimant was in actual possession of the land from 1970 until the filing of the suit in 1987. The jury found, and the court affirmed, that possession of the land for 7 years (remembering that the claimant would have to satisfy the 5 or 10 year statute) did not constitute notice and adverse possession of the lands at issue.

Spiller v. Woodard, 809 S. W. 2d. 624 (Tex. Civ. App. - 1991, no writ hist.) also interpreted the theory of extended adverse possession as notice of the repudiation of the non-possessory cotenant’s title by the occupying cotenant. Factually, ½ of the interest in the tract at issue was vested of record in the plaintiffs and the other ½ vested of record in the defendants. The defendants went into possession in 1917 but such possession was not exclusive. The record reflected that the plaintiffs had twice joined in the execution of surface easements, the last time in 1953. Adverse possession, if it took place at all (claim was made under the five year statute), commenced after long, uninterrupted possession of the lands at issue by the defendants from and after 1953 plus five additional years of adverse possession (per the statute) thereafter. The court held, under the evidence, that the defendants had not established long, continued, exclusive possession since 1953 that would constitute the finding of an inference of repudiation of plaintiffs’ title.

These four cases, taken together, establish a methodology for establishing marketable title to a given tract of land upon proof of: 1) long, continued, uninterrupted and notorious possession by one cotenant; 2) actual adverse possession under the relevant statute (5 or 10 year statute) from and after the expiration of sufficient time of possession under 1) constituting the imposition of an inference of repudiation of the out of possession cotenant’s title. One can conclude from the cases that possession under 1) must be for at least 24 years (Tex-Wis Company v. Johnson, 534 S. W. 2d. 895 (Sup. Ct. - 1976)) with adverse possession commencing for the requisite statutory period of time thereafter.

However, marketable title cannot be established without the use of judicial intervention since an affirmative factual finding in favor of the possessory cotenant on points 1) and 2) is required before title can be vested in the possessory cotenant. - See **V - Trespass to Try Title - The Ultimate Cure**.

## **2. Theory of Lost or Presumed Deed**

The theory of “lost deed” or “presumed deed”, although appearing in the section dealing with adverse possession, is decidedly not a theory dealing with adverse possession. The elements giving rise to the cause of action are so similar, however, that the author has chosen to place this theory as an alternative method of curing ancient title problems dealing with cotenants.

The theory of lost deed is based on the proposition that it is “...not inconsistent with human experience for one really owning property of value to assert no claim thereto, but to acquiesce for a long period of time in an unfounded, hostile claim, the rule is sound which permits the inference that an apparent owner has parted with his title from evidence, first, of a long-asserted and open claim, adverse to that of the apparent owner; second, of a non-claim by the apparent owner; and third, of acquiescence by the apparent owner in the adverse claim.” (Page v. Pan American Petroleum Corporation, 381 S. W. 2d. 949 (Tex. Civ. App. - 1967, writ ref’d n.r.e. at Page 952). Note, however, no compliance with the adverse possession statutes is required for the imposition of such inferences.

The court also addressed the issue of whether the presumption of a grant or deed arising from the long continued possession and occupancy of the tract at issue was a presumption of fact or law and subject to rebuttal ie whether the issue should be left to the trier of fact. The court concluded that, where “the record clearly presents a situation where, in the total absence of any facts to the contrary, reasonable minds could reach no other conclusion but that the long continued and undisturbed possession and claims of title, acquiesced in by plaintiffs’ ancestor from whom they claim for over fifty years and by his descendants for another sixty years, could be explained only by the presumption of an unrecorded conveyance, the court will presume such a conveyance as a matter of law.” (Page v. Pan American Petroleum Corporation, 381 S. W. 2d. 949 (Tex. Civ. App. - 1967, writ ref’d n.r.e.) at Page 953. This theory was followed in the case of Humphries v. Texas Gulf Sulphur Company, 393 F. 2d. 69 (5<sup>th</sup> Cir - 1968) and Peregoy v. Amoco Production Company, 929 F. 2d. 196 (5<sup>th</sup> Cir - 1991).

Essentially, at trial, the theory of lost deed allows for the imposition, especially where a considerable amount of time has passed and all persons with any possible knowledge of what transpired in the past concerning possession and claims of ownership are deceased, of a legal, irrebutable presumption that title passed to the possessory party, for instance a cotenant, via a deed that was not recorded and has since been lost.

## **3. Breaks in the Early Chain of Title**

It is not unusual for a title examiner to make the following title requirement: “I note several early breaks in the chain of title to Examined Lands. Due to their early appearance in the chain of title, there appears to be little risk that any title claim could be made today as a result of said title breaks. However, in an abundance of caution, you should secure an affidavit of adverse possession for ...” - Either reflecting title by adverse possession in the next owner under the 5, 10 or 25 year statutes after all of the breaks in the chain of title have occurred or confirming title by adverse possession in the present owner of the lands under examination under said statutes.

The author has always been unclear whether such a title requirement is advising the client to obtain sufficient factual information that title by adverse possession under all three statutes of limitation can be perfected or that satisfaction of only one of the limitation statutes is required. More importantly, if the break in the title is early enough, all persons who could give such an affidavit of adverse possession are probably deceased. So, how is the affidavit to be obtained?

Equally important is the issue of which party is the examiner attempting to confirm title in ie the first fee simple owner immediately after the breaks in the chain of title or the present owner. Many of the title opinions reviewed by the author over the last 25+ years do not state the exact date from which the affidavit is to track the adverse nature of the possession of a record title owner. Other title opinions specifically only ask for confirmation of adverse possession for the immediate past 25 years of the ownership of the lands under examination.

Preliminarily, no title by adverse possession is a marketable title. (Lund v. Emerson, 204 S. W. 2d. 639 (Tex. Civ. App. - 1947, no writ hist.); Owens v. Jackson, 35 S. W. 2d. 186 (Tex. Civ. App. - 1931, writ dismiss'd w.o.j.); Texas Auto Co. v. Arbetter, 1 S. W. 2d. 334 (Tex. Civ. App. - 1927, writ dismiss'd w.o.j.); Austin v. Carter, 296 S. W. 649 (Tex. Civ. App. - 1927, writ dismiss'd) and Alling v. Vander Stucken, 194 S. W. 443 (Tex. Civ. App. - 1917, writ ref'd)) That is, there is always the possibility that a third party could raise a legal issue concerning ownership and subject the owner to probable litigation. It is not that the claimant would be successful which deems the title un-marketable. Rather, it is the probability of litigation (to prove the facts and circumstances constituting adverse possession) that causes the title un-marketable.(See **I.B.** above)

In **Fact Situation Two** herein, confirming title in F (realizing that without judicial confirmation of the title, such would not be a marketable title) utilizing the adverse possession statutes would not in any way confirm title to the mineral estate owned by M; M's title arising prior to the limitation title, if any, of F. It appears that the better reasoned theory for confirmation of limitation title, where there are early breaks in the chain of title, is to first determine if there were any mineral severances. If there were any mineral severances, limitation title should be reviewed and, at a minimum, a risk decision made, based on an accurate adverse possession affidavit, that limitation title appeared to be vested in the owner who made the mineral severance. If there are no mineral severances in the chain of title, confirmation of limitation title in the present owner(s), although not a marketable title, will assure a client that there is at least "defensible title" (a title which is less than a marketable title and which still runs the risk of being contested) to the tract of land under examination.

Affidavits of adverse possession should review the 5 year, 10 year and 25 year statutes and the facts which support a limitation title thereunder. Their general requirements, which should find **factual** support (as distinguished from legal conclusions) in the affidavits of adverse possession, are as follows:

Five Year Statute - The five year statute is satisfied if the adverse claimant adversely possesses the property, cultivates, uses or enjoys the property, pays the applicable taxes and claims the property under a duly registered deed. Tex. Civ. Prac. & Rems Code Ann. §16.025 (Vernon 1985).

Ten Year Statute - The ten year statute is satisfied if a person holds peaceable and adverse possession via cultivation, use or enjoyment of same for a period of ten years. Tex. Civ. Prac. & Rems Code Ann. §16.026 (Vernon 1985) "Adverse possession" is defined as "...an actual and visible

appropriation of real property, commenced and continued under a claim of right that is inconsistent with and hostile to the claim of another person.” Tex. Civ. Prac. & Rems Code Ann. §16.021 (Vernon 1985)

Twenty-Five Year Statute - The twenty-five year statute (without deed) will vest limitation title in the claimant where such person has held the land in peaceable and adverse possession and has cultivated, used or enjoyed same. Tex. Civ. Prac. & Rems Code Ann. §16.027 (Vernon 1985) The twenty-five year statute (with deed) will vest limitation title in the claimant where such person has held peaceable and adverse possession in good faith and under a deed or other instrument purporting to convey the property that has been recorded in the pertinent county deed records where the land is located. Tex. Civ. Prac. & Rems Code Ann. §16.028 (Vernon 1985) Either statute vests limitation title in and to the adverse claimant within such period of time regardless of whether the person(s) against whom limitation title is sought were under any legal disabilities such as minority or mental illness.

#### **4. Cemeteries - Not Dedicated of Record**

The law is less than clear on the status of the title to a plot located within a cemetery where the cemetery has not been dedicated of record (such as in a church yard or on private property for use by the owners thereof). It is even murkier where the interment is accomplished without any deed to the deceased or one of its family members.

Generally, an interest in land does pass to and vest in a purchaser of a burial lot but it is not an ordinary fee simple interest (where there is a deed). Oak Park Cemetery, Inc. v. Donaldson, 148 S. W. 2d. 994 (Tex. Civ. App. - 1940, writ dism'd.) The burial plot, once acquired, may only be used for burial purposes. Peterson v. Stolz, 269 S. W. 2d. 113 (Tex. Civ. App. - 1925, writ ref'd) and Oak Park Cemetery, Inc. v. Donaldson, 148 S. W. 2d. 994 (Tex. Civ. App. - 1940, writ dism'd.) If the cemetery should become wholly abandoned or unfit as a burial place, or be condemned and all bodies removed, the potential power to sell the underlying plots would again arise free from any restrictions. However, as long as the land is used as a cemetery (bodies are buried, whether it is an active cemetery or not), the rights of the owner(s) therein remain restricted to cemetery purposes. Baker v. Hazel-Fain Oil Co., 219 S. W. 874 (Tex. Civ. App. - 1920, writ ref'd)

The question becomes, what estate in land passes to and vests in the heirs of the deceased who was buried in a cemetery where there was no public dedication of same and no conveyance to the deceased AND the deceased owned no other interest in the lands save and except the burial plot? In the author's opinion, the largest estate that could have been “conveyed” to the deceased, presumably prior to his or her death, was a license. Usually, if the conveyance were only a license or permission, the death of the licensor would revoke it. However, where the parol license is executed or coupled with an interest, under a definite contract with performance upon one side, the case is taken out of the Statute of Frauds by part performance, and equity will enforce the licensee's rights in case of attempted revocation. T. & St. L. Ry. Co. v. Jarrell, 60 Tex. 267 (Sup. Ct. - 1883) and Evans v. Gulf, C & S. F. Ry. Co., 28 S. W. 903 (Tex. Civ. App. - 1894, no writ hist.)

In all likelihood, a parol contract for the burial of a person in a cemetery cannot be proven today. What can be proven was that the body was buried as part performance of a verbal license on the part of the deceased (or his family). A request, in a suit brought to confirm the interests “conveyed” to the deceased, should be made for: 1) a factual finding on the issue of a verbal agreement or, in the alternative, 2) a finding by the court as a matter of law (much like the theory of lost or presumed deed

discussed above) that, given the long amount of time, reasonable persons could but conclude that the burial of one or more persons in a cemetery was pursuant to a verbal agreement. Assuming that the foregoing can be proven, all heirs of the deceased persons buried in the cemetery can accrue to no greater than a license therein, such being not an interest in the land but rather permission for one to do some act or acts on the land of the one granting the right. Settegast v. Foley Bros. Dry Goods Co., 270 S. W. 1014 (Comm. of App. - 1925) Once the purpose for which the license was granted ceases, the license is revoked (property no longer used as a cemetery and the bodies are removed).

## **5. Railroads - No Conveyance of Record**

This section of the paper does not address the distinction in specific grants of record and whether they are grants of an easement or fee simple grants (See Texas Practice Series, Volume 4, Section 383 (1961 Edition)). The legal issue addressed herein is what estate passes to and vests in a railroad where it constructs its railroad bed and rails with no conveyance of record into it.

It is generally held that, where a railroad enters onto a tract of land, without permission, constructs its railroad and possesses the lands for the time required under the limitation statutes (10 year statute - Tex. Civ. Prac. & Rems Code Ann. §16.026 (Vernon 1985)), it will only accrue to an easement. Galveston, H. & S. A. Ry. Co. v. McIver, 245 S. W. 463 (Tex. Civ. App. - 1922, writ dismissed.) That is "...; and, if it had so proceeded, the right it thereby acquired, under the express provisions of Revised Statutes, Art. 6532, would not have included the fee simple estate in the property, but would have been limited to a right of way for railroad purposes only..." Galveston, H. & S. A. Ry. Co. v. McIver, 245 S. W. 463 (Tex. Civ. App. - 1922, writ dismissed.) at Page 464

The case of Capps v. Texas & P. Ry. Co., 50 S. W. 643 (Tex. Civ. App. - 1899, no writ hist.) holds that, where the railroad enters onto a tract of land with verbal permission of the landowner and retains adverse possession for the statutory period of time (10 year statute), it only acquires an easement. Stated another way, whether permissive or not, where a railroad enters into possession of a tract of land and uses that land for right of way purposes only, it can only acquire an easement by prescription and not a fee simple interest in said tract of land.

### **C. Curative Actions**

#### **1. Fact Situation One**

A, B, C and D and their heirs were cotenants in Blackacre, each owning an undivided 1/4 interest therein. Does the ultimate heir of A own all of Blackacre today under either of the above theories (extended adverse possession or theory of lost deed)?

Curative Action - No answer to the foregoing question can be made by the examining attorney without a risk caveat. That is, once the facts and circumstances concerning A and his heirs' possession of Blackacre is obtained, and assuming that A and his heirs intended to adversely possess Blackacre, it will be up to the client, with advice and counsel from its title attorney, to determine if a risk decision will be made to treat A's heirs as the fee simple owners of Blackacre. Only if a judicial decision is obtained can the client be assured of who owns the fee simple title to Blackacre.

#### **2. Fact Situation Two**

E, an apparent naked trespasser, exercised dominion and control over Blackacre by conveying same to F in 1915. F conveyed an undivided ½ mineral interest in Blackacre to M in 1940. As between F and M, M will prevail on its claim to the ownership of a ½ mineral interest in Blackacre. The problem is can F, through its possession, perfect limitation title to Blackacre, thereby cutting off any potential claim to Blackacre by D or any additional heirs of A?

Curative Action - Again, no answer to the foregoing question can be made by the examining attorney without a risk caveat. That is, once the facts and circumstances concerning F's possession of Blackacre is obtained, and assuming that F (and his heirs) intended to adversely possess Blackacre as against D and any additional heirs of A, it will be up to the client, with advice and counsel from its title attorney, to determine if a risk decision will be made to treat F's heirs as the fee simple owners of surface estate and F's heirs and M's heirs as the fee simple owners of the mineral estate of Blackacre. Only if a judicial decision is obtained can the client be assured of who owns the fee simple title to Blackacre.

### **3. Fact Situation Three**

Under the rules set out above, the occupants have, at best, a license to occupy the lands used for cemetery purposes. This license will continue until as long as the property is used for cemetery purposes.

Curative Action - Marketable title to the fee simple estate cannot be delivered as long as the rights of the owners of the licenses continue to occupy the cemetery. However, as long as the surface estate, including the subsurface used for burial purposes, is not disturbed in any manner, it does appear that a risk decision can be made by the client that the mineral estate under the cemetery is owned by and can be leased by the owner of the fee simple estate. Only if a judicial decision is obtained can the client be assured of who owns the fee simple title to Blackacre.

### **4. Fact Situation Four**

Under the rules set out above, the largest estate the railroad could accrue to is an easement. Although an exception to marketable title, Attorney Jones can assure her client that the fee simple title owner does indeed own the mineral estate and may lease the same under the railroad. However, the oil and gas operations conducted on Blackacre may not interfere with nor injure the railroad operations.

Curative Action - Again, no answer to the foregoing question can be made by the examining attorney without a risk caveat. That is, once the facts and circumstances concerning the railroad's possession of its right-of-way is obtained, it will be up to the client, with advice and counsel from its title attorney, to determine if a risk decision will be made and treating the railroad bed as an easement only. Only if a judicial decision is obtained can the client be assured of who owns the fee simple title to Blackacre.

## **V. TRESPASS TO TRY TITLE - THE ULTIMATE CURE**

All of the curative actions above described require the obtaining of information and review of same by the examining attorney. The information obtained is subject to being challenged by interested parties and is not conclusive nor binding on any third party without judicial intervention. Even with the delivery of the called for information, the examining attorney cannot render a final supplemental title opinion which recites that marketable title is vested in the parties enumerated in the ownership section of the title opinion. That is, as long as the factual information remains judicially un-confirmed, there still remains a

risk of litigation based on 1) a reasonable chance that a third party could raise an issue concerning the validity of the title to the estate against the apparent owner or 2) the quality of the parol evidence necessary to remove any doubt as to the validity and/or sufficiency of the owner's title could be contested or 3) the presumption of fact which, in the event of a suit contesting title, would probably become an issue of fact to be decided by a jury would still remain or 4) the record discloses outstanding interests in other parties that could reasonably subject the owner to litigation or compel such owner to resort to parol evidence to defend the title against the outstanding claims. In Texas, the only judicial method of confirming marketable title in and to a tract of land, where there are outstanding title problems that render the title un-marketable, is to utilize the trespass to try title statute ( Property Code §22.001 et seq (Vernon 1985))

The purpose of this cause of action is to provide the exclusive method of vesting title to real property. Hill v. Preston, 34 S. W. 2d. 780 (Sup. Ct. - 1931). The cause of action provides a procedure whereby all claimants to the title may be adjudicated and possession vested ("title as against the world"). El Paso v. Long, 209 S. W. 2d. 950 (Tex. Civ. App. - 1947, writ ref'd n.r.e.) and Slattery v. Adams, 279 S. W. 2d. 445 (Tex. Civ. App. - 1955, no writ hist.) Any final judgment rendered in such an action is conclusive as to the title and right of possession against all persons claiming from, through or under the person(s) against whom the judgment is rendered. That is, the judgment is conclusive of all adjudicated claims to the land or claims that could have been set up by the losing party. Zapeda v. Rahn, 48 S. W. 212 (Tex. Civ. App. - 1898, writ ref'd.) and Pennington v. Pennington, 145 S. W. 2d. 688 (Tex. Civ. App. - 1940, no writ hist.)

In the author's limited experience, trespass to try title actions were still utilized by some oil and gas companies to confirm title as late as the early 1970's where the examining attorney could not deliver an opinion confirming marketable title and no fact witness could provide the type or quality of evidence upon which to base such an opinion Rather than risk loss of some or all of the title to the mineral estate, many larger oil companies routinely filed trespass to try title cases to eliminate all risk accruing from unresolved ancient title problems. Sometime in the early 1970's this procedure was replaced with a more aggressive "risk-based" analysis by management. Title suits to confirm title in the oil company's lessor reduced to almost zero as management assumed more and more risk on title issues.

The question is, as it has been for the last 25 years, how much risk is an oil company willing to assume when the quality of the title it received from its lessor is not a marketable title? There is no answer to the question save a continuing title risk analysis, on a company by company basis, when viewed in light of company/industry wide title failures and the law, as applied to ancient title problems, by an ever changing Texas court system.

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