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## Application of Standards for Title Examination to Conveyances by Strangers to Title

Charles G. Kepler

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Conflicting interests between appropriators of underground water could be largely eliminated by requiring the potential underground water users to obtain permits for an appropriation from the State Engineer *before* drilling a well. The permit would be granted after it was determined that there was sufficient water available for beneficial use of the applicant, and that the well was to be reasonably deep. Such an addition to the law would solidify the property rights of the underground appropriators, as well as secure the rights of surface appropriators of water as against the underground users. Such an amendment would conform with the general purpose of protecting the water resources of the state, in that they might be developed to supply the greatest amount of beneficial use to the greatest number of irrigators. The data to be obtained from the drilling of wells would soon demonstrate the boundaries and capacities of underground basins, and use of the water will determine the recharge capacity. Thus the permit to be issued in advance of the drilling of a well would be an effective brake on the overdevelopment of a water producing area to the detriment of the prior appropriator.

ROBERT N. CHAFFIN

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#### APPLICATION OF STANDARDS FOR TITLE EXAMINATION TO CONVEYANCES BY STRANGERS TO TITLE

The WYOMING STATE BAR has adopted *Standards For Title Examination*<sup>1</sup> in order to achieve uniformity of treatment in minor errors of record title among title examiners.<sup>2</sup> The ambiguity in meaning of *Standard No. Four* leads to a confusion which defeats the purpose for which the Standards have been adopted. The Standard states:

“Stranger to Title—Instrument By.

Problem: If a deed or encumbrance appears in the chain of title executed by one who has no record interest, is such a deed or encumbrance to be considered a defect in the title?

Answer: No.”

“Chain of title” has been defined as those “successive conveyances commencing with the patent from the government or some other source and including the

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1. (1947) 1 Wyoming Law Journal 32. Standards adopted at the 1946 meeting of the State Bar Association. “The pioneer state in state wide formulation of standards was Connecticut which published its standards in 1937. The Real Estate section of the American Bar Association in 1938 sponsored a movement for adoption of such standards in all states where the title opinion method is employed. Kansas and Colorado and a number of other states have followed Connecticut’s example and the move is spreading.” (1945) 24 Neb. L. Rev. 120. Texas and Nebraska have adopted similar standards. See (1945) 8 Tex. B. J. 550; (1945) 24 Neb. L. Rev. 120.
  2. “Your Committee believes that lawyers generally, in examining Abstracts of Title, require minor defects in instruments to be corrected because they know that in time other lawyers may examine the same Abstract of Title, and are likely to require these minor defects to be corrected, notwithstanding the fact that they do not constitute any real hazard with respect to the merchantability of the title. “Your Committee believes that the formulation and adoption of set of standards for Title Examination by the Wyoming State Bar will serve to greatly alleviate if not dispense with entirely the vicious circle which arises from this situation.” Report, *Committee on Standards For Title Examination*. (1947) 1 WYOMING LAW JOURNAL 31.

conveyances to the one claiming title.<sup>3</sup> This, or some similar definition, is the accepted meaning of the term.<sup>4</sup> A "Stranger" to a title normally refers to a grantor whose conveyance would not appear in such a chain. The use of "Stranger" in the title when considered with the Problem of *Standard No. Four* presents an impossible situation. When confronted by such an anomalous statement the title examiner will be forced to cast about for a meaning behind the Standard, and in at least one interpretation there is a question whether or not the Standard presents a true condition of the law in this State. Thus it is contended that *Standard No. Four* defeats the purpose for which it was designed by the Bar.

One possible explanation is that "chain of title" is not used in its generally accepted meaning but refers to what usually is termed "abstract of title".<sup>5</sup> If "chain of title" is used in this sense, it would eliminate the ambiguity in meaning of the standard; and it would include any conveyance that appears in the abstract regardless of whether the grantor has a record interest or not. Such situations present a problem that frequently arises in title examination.<sup>6</sup> The abstractor uncovers a conveyance, executed by a person that has no apparent record title, that reports to give an interest in the property.

For the purpose of illustration, let us assume that we are examining an abstract of title conveying Blackacre from the original source, the United States Government, through successive owners to include A, B, C, and D; and that we are interested to see if D can convey a good title to E. The abstract shows a conveyance of Blackacre from X to Y. X, it appears, does not have record interest in the land. A conclusion that such an instrument leaves no cloud is no doubt true when the examiner is certain that X lacks claim to title. The situation could arise in several ways. X might have owned the property adjoining Blackacre and in his conveyance to Y he might have made a mistake in the description purporting to convey Blackacre instead of the land he owned.<sup>7</sup> On the other hand, X might be an out and out swindler trying to sell that which he does not own.<sup>8</sup> Such conveyances do not create cloud on titles and the Standard is cor-

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3. *Capper v. Poulsen*, (1926) 321 Ill. 480, 481, 152 N. E. 587, 588.

4. *Cf. Maturi v. Fay*, (1924) 96 N. J. Eq. 472, 126 Atl. 170; *Havis v. Thorne Inv. Co.*, (Tex. Civ. App. 1932) 46 S. W. (2d) 329, 332.

5. An abstract of title has been defined as "a memorandum or concise statement of conveyances and incumbrances which appear on the public records affecting title to real property." *Nicholson v. Lieber*, (Tex. Civ. App. 1913) 153 S. W. 641, 644.

6. "A difficulty in the recording system is that a deed may show up out of the void,—that is, the man who executes it does not himself appear as a grantee of record or an heir or devisee." 3 Glenn, *Mortgages* (1st ed. 1943) sec. 37, p. 1522; *Cf. Texas Lumber Mfg. Co. v. Branch*, (C. C. A. 5th Cir. 1894) 60 F. 201; *Pearce v. Smith*, (1900) 126 Ala. 116, 28 So. 37; *Oliphant v. Burns*, (1895) 146 N. Y. 218; 40 N. E. 980; *Advance Thresher Co. v. Esteb*, (1902) 41 Or. 469, 69 Pac. 447.

7. A is the owner of Lot 1 in Block 2 of a certain town, and X is the owner of Lot 2 in Block 1 of the same town. X in conveying his property to Y makes out a deed or mortgage that has the lot and block numbers reversed and Y records this instrument. This conveyance will show up in an Abstract of A's lot even though X discovers his mistake and makes a corrective deed or mortgage.

8. *Cf. Wack v. Collingswood Extension Realty Co.*, (1933) 114 N. J. Eq. 253, 168 Atl. 639. (R, a realty company, which owned the fee of the property in litigation, conveyed its interest to S. Subsequently R mortgaged the property to W, the plaintiff. Later R again received the fee from J who had received it from S. On the same day R conveyed the fee to M, one of the defendants. All instruments were recorded.)

rect in assuming that in such situations a suit to remove it is an unnecessary expense. But suppose that the examiner is not certain that X's interest was unfounded, or in fact, finds that X did have claim to title which he has passed on to Y. Is the Standard's conclusion still correct?<sup>9</sup>

X's claim to title could be based on one of several things. (1) He could claim under a patent from the United States government issued prior to A's patent but not recorded. (2) B, before he conveyed the fee to C, could have given X a mortgage on Blackacre, the mortgage not being recorded.<sup>10</sup> (3) Before C obtained title he could have purported to convey an interest to X, and then subsequently grant the fee to D.<sup>11</sup> These are but a few of the ways X could have gained claim to title even though he failed to record his interest. The statutes in most jurisdictions provide that the recording of conveyances give at least constructive notice to all subsequent purchasers.<sup>12</sup> However, in most jurisdictions the courts have limited these statutes to apply only to instruments in the "chain of title" (used in its accepted meaning). The rule is generally stated that recorded instruments outside the chain of title are not notice to subsequent purchasers.<sup>13</sup> The courts reason that such limitation to the statutes are necessary to relieve a searcher of the terrific burden of uncovering conveyances to which the grantor-grantee indexes give no readily available reference.<sup>14</sup> Under such a limitation the conveyance from X to Y, even though recorded, would not give constructive notice to D's predecessors in title and D would take free of such recorded conveyances.<sup>15</sup> These limitations that are followed in most jurisdictions would make the conclusion of *Standard No. Four* correct even though X did have a legitimate claim to title.

An exception to this limitation was established in Wyoming in the case of *Balch v. Arnold*.<sup>16</sup> The defendant claimed under a recorded mortgage executed by one Bird prior to his gaining title by mesne patent from the government. The plaintiff claimed under a recorded mortgage executed by the same Bird after he had gained title. The Court held that the recorded mortgage of the defendant was notice to the plaintiff and that the plaintiff took subject to it. Although the Court recognized the limitation placed on the recording statutes in most states, it pointed out that Wyoming law required an "abstract book" (tract

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9. A closely related problem is whether the notice to an agent, abstractor or title examiner in this case, is notice to the purchaser. For a good discussion see 5 Tiffany, *Real Property* (3rd ed. 1939) Sec. 1286 p. 55.
  10. *Simonson v. Wenzel*, (1914) 27 N. D. 638, 147 N. W. 804, L. R. A. 1918 C, 780; *Bernardy v. Colonial & United States Mortg. Co.*, (1904) 17 S. D. 637, 98 N. W. 166.
  11. *McCusker v. McEvey*, (1870) 9 R. I. 528, 11 Am. Rep. 295; *Wack v. Collingswood Extension Realty Co.*, (1933) 114 N. J. Eq. 253, 168 Atl. 639.
  12. 5 Tiffany, *Real Property* (3rd ed. 1939) sec. 1262, p. 12; *Wyo. Rev. Stat.* 1931 sec. 97-134; *Calif. Civ. Code* (1941), sec. 1213; *Ill. Stat.* (1941), Ch. 30 sec. 29; *N. Y. Real Property L.* (McKinney, 1941) sec. 291; *Code of Ohio* (1940) sec. 8542-3.
  13. 5 Tiffany, *Real Property* (3rd ed. 1939) sec. 1265, p. 21; *Bingham v. Kirkland*, (1881) 34 N. J. Eq. 229; *Builders Sash and Door Co. v. Joyner*, (1921) 182 N. C. 518, 109 S. E. 259, 25 A. L. R. 81.
  14. "When one link in the chain of title is wanting there is no clue to guide the purchaser in his search to the next succeeding link by which the chain is continued." *Losey v. Simpson*, (1856) 11 N. J. Eq. 246, 249.
  15. *Losey v. Simpson*, (1856) 11 N. J. Eq. 246.
  16. (1899) 9 *Wyo.* 17, 59 *Pac.* 434.

index) to be kept in each county<sup>17</sup> and that such a book would make available to intending purchasers information concerning all transfers effecting the land. The Court said:

"In the light of these provisions, the words of the statute that 'each and every such deed, mortgage, or conveyance, touching any interest in lands, made and recorded according to the provisions of this chapter, shall be notice to, and take precedence of, any subsequent purchaser or purchasers from the time of delivering said instrument at the office of the register of deeds for record,' can not be held to apply only to conveyances recorded subsequent to the acquisition of title by the purchaser's grantor. The failure under such circumstances to search further than the vesting of the legal title in the purchaser's grantor would be such inexcusable negligence as to amount to a willful refusal to receive any information as to the rights of interests of other claimants."

The question in our present consideration is whether this case can be interpreted to mean that in Wyoming the presence of the tract index makes all recorded conveyances notice to subsequent purchasers regardless of whether the conveyance is in the chain of title or not; or, if the decision changes the general rule only in similar fact situations. The answer is not clear since there seems to have been no further cases on the point. However, the reason for the limitation in the first place, as has been pointed out, was to prevent the hardship on subsequent purchasers of searching for instruments that would not be readily found through the use of the grantor-grantee indexes. The tract index eliminates this hardship as Justice Corn pointed out in the *Balch* case; and since the reason for the limitation disappears, there is no reason why Wyoming should recognize such limitations. It might be logical to assume in view of our Statutes and the *Balch* case that constructive notice is given to subsequent purchasers by *all* recorded instruments.<sup>18</sup>

A similar view has been taken by the Supreme Court of South Dakota whose statutory provisions for the registration of instruments is similar to that of Wyo-

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17. Wyo. Comp. Stat. 1945 sec. 27-712. "FORM FOR RECORDING ABSTRACT OF LAND ENTRIES.—All abstract entries of land shall be made in a book, well bound and properly ruled, and at the head, lines shall describe the legal division of land, or subdivision, naming section, township and range, according to the United States surveys, when the same is so described in the instrument filed for record; and the book shall contain ruled parallel columns, in which respectively shall be entered, the name of the grantor or grantee, the mortgagor or mortgagee, or the parties thereto, the character of the instrument, the consideration stated in the instrument, date of instrument, date of filing in the clerk's office, description of the premises, and such other pertinent marginal remarks as will show whether such instrument was properly witnessed and acknowledged or not." (Italics added) Section 27-713 makes provisions for entry of town lots to be kept in a separate book but in the same manner as land entries.

18. This conclusion has been made by several Real Property authorities. Tiffany says: "This general rule, restricting the operation of the record as notice to subsequent purchasers, is obviously based upon the prevailing method of indexing their records by the names of the grantors and grantees, and it is readily conceivable that the introduction, in any particular community, of a method of indexing the records with reference to the property affected, might be regarded by the courts as grounds for abrogating the rule." He refers to the *Balch* case for authority. 5 Tiffany, Real Property (3rd ed. 1939) sec. 1265 p. 21; Cf. 3 Glenn, on Mortgages (1st ed. 1943) sec. 371.1 p. 1522.

ming.<sup>19</sup> The Court in *Bernardy v. Colonial and United States Mortg. Co.*<sup>20</sup> said that "under such a system, abstracts will reasonably show all the conveyances made of the property", and in the case of *Fullerton Lumber Co. v. Tinker*,<sup>21</sup> the Court said after quoting the statute providing for "numerical indexes" (tract indexes):

"It will be observed, from the reading of these sections, that a party purchasing real property is not only required to examine the indexes of the grantors and grantees, mortgagors and mortgagees, in his chain of title, but also required to examine the numerical index, to ascertain whether there are other conveyances or incumbrances affecting said property not in the chain of title."

In both cases the South Dakota Supreme Court held recorded conveyances constructive notice although not in the chain of title. So apparently in Wyoming and in South Dakota if the conveyances from X to Y were recorded in point of time prior to the recording of A's interest in example (1); or, prior in time to the recording of C's interest in example (2); or, prior in time to the recording of D's interest in example (3); such recording should give constructive notice to D's predecessors in title which would defeat D's title and the conveyance from X to Y would be more than a mere cloud on the title. Since this probably is the law in Wyoming, it is necessary first, for our examiner to make certain that X has no claim to title, and second, if X should have claim, to make certain that the conveyance from X to Y is not recorded prior to the conveyance from the common grantor (D and X's) to D's predecessors of title. In view of these facts the unqualified answer of "No" to *Standard No. Four* leaves doubt whether it is correct in all situations.<sup>22</sup> It would be wise if the Standards were changed to eliminate the ambiguity and to add a note to show that it refers only to cases where the "Stranger" lacks claim of title. If such is not done it is apt to discredit the balance of the Standards which reflect a worthy effort and a worthwhile aim.

CHARLES G. KEPLER

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#### DAMAGES FOR TRESPASS IN EXPLORING FOR OIL

The problem of determining the proper measure of damages where there have been exploratory trespass on oil lands usually presents itself in fact situations similar to the following: The trespasser enters on the land without permission of the owner and explores it. He either discovers oil or determines that the land is not oil bearing and then allows the results of his exploration to become known to the general public. The more controversial problem arises where the trespasser fails to discover oil and the land is thereby given the reputation of being non-productive of oil. Former potential buyers or lessees are no

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19. S. D. Rev. Pol. Code secs. 868-871.

20. (1904) 17 S. D. 637, 98 N. W. 166.

21. (1908) 22 S. D. 427, 118 N. W. 700, 18 Ann. Cas. 11.

22. Colorado has adopted an identical standard. (1946) 19 Rocky Mountain L. Rev. 66. This standard is probably an accurate guide in Colorado since their statutes do not provide for tract indexes.