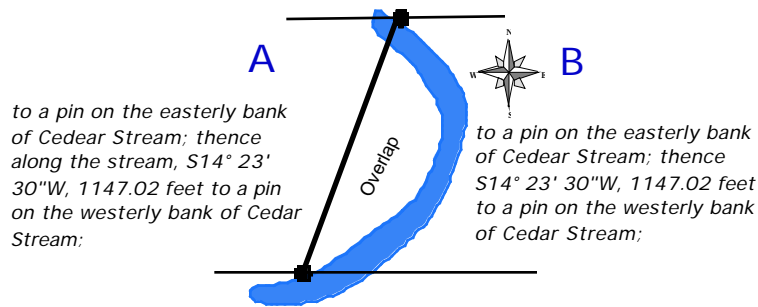


Senior Title
by
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Recently, I presented to surveyors a problem similar to the following:



Most surveyors quickly deduced that senior title determines which boundary controls (stream or straight line). In the discussion that followed, many, if not most surveyors did not know how to properly determine senior title. Contrary to what many surveyors believe, a person can convey good title to property that the person previously conveyed to another.

Senior title is NOT determined by the first conveyance out of a common grantor. Senior title is determined according to the recording act adopted by the state. All recording acts fall within one of three categories or types: Race, Notice, and Race-Notice. A table at the end of this article displays the type of recording act adopted by each state. This article explains how each type of recording act works.

Types of Recording Acts

RACE – Under a Race statute, the bona-fide (for value) purchaser to first record a deed from a common grantor has senior title. Senior title is determined by the person who wins the race to the courthouse. Under a Race statute, a person could take a deed for property the person already knows has been conveyed and still obtain senior title so long as the person records their deed first.

NOTICE — Under a Notice statute, the last bona-fide purchaser to be conveyed the property from a common grantor without notice of an

earlier conveyance has senior title. Under a Notice statute, the later conveyance takes seniority over the previous conveyance until such time as there is effective notice to potential purchasers of an earlier conveyance. Recording provides effective notice and terminates further claims for senior title. However, recording does not fix the senior title among several conveyances already made. The last person to be conveyed the property without effective notice of an earlier conveyance has the senior title.

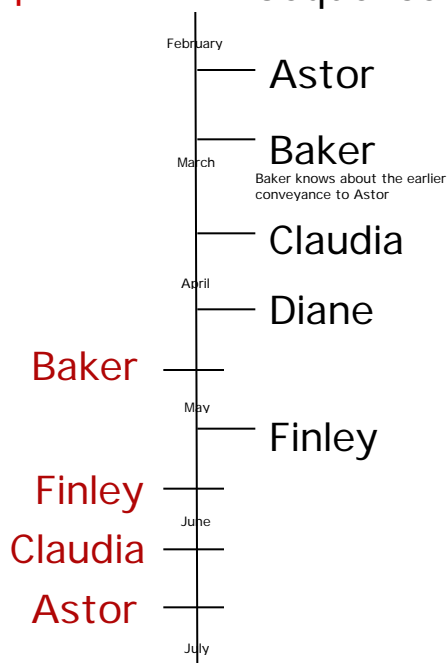
RACE-NOTICE — The bona-fide purchaser to first record their deed after being conveyed the property without notice of an earlier conveyance has senior title. Race-Notice gives the senior title to the first innocent purchaser to record their deed.

Example

All three types of recording acts recognize the possibility that a common grantor can convey good title to property that they've already conveyed previously to some other person. (If the grantor does so knowingly, the grantor may be liable under criminal law for fraud. If the grantor does so negligently, the grantor may be liable under civil law for breach of warranty.)

Recording Sequence

Execution Sequence



Consider the following example to illustrate the different results that would occur using the same fact pattern by applying the different types of recording statutes.

In the example illustrated by the diagram, a person conveys the same property to five different people in the sequence shown (Astor, Baker, Claudia, Diane and Finley). Baker knew about the earlier conveyance to Astor before he purchased the property because Astor told him that he purchased the property.

Without considering the applicable recording statute, Astor would have senior title. Astor was the first to be conveyed the property. Logic would suggest there was nothing left for the grantor to convey to Baker, Claudia, Diane or Finley after conveying the property to Astor.

Under the recording statutes, the sequence of the conveyances becomes irrelevant. Under a Race statute, the first person to record their deed has senior title. The first person to record was Baker. A Race statute does not penalize Baker because he knew about the earlier conveyance to Astor when he purchased the same property conveyed previously to Astor.

Under a Notice statute, the last person to be conveyed the property without notice of an earlier conveyance has the senior title. Put in other words, the determination of senior title under a Notice statute is to resolve which among several deeds from a common grantor was executed last but prior to the first deed recorded (or notice given). Consequently, Diane has senior title to the property even though she is the fourth person to be conveyed the same property from a common grantor. She was the last person to be conveyed the property without notice of an earlier conveyance. Whether Diane eventually records her deed is irrelevant to the seniority of her title.

Under a Race-Notice statute, Claudia has senior title. She was unaware of an earlier conveyance when she purchased the property and she was the first person to record her deed from the group of purchasers who had no knowledge of an earlier conveyance. (Both Baker and Finley had notice of earlier conveyances before they were conveyed the property.) From the example, a general rule of thumb for the resolution of senior title under Race-Notice is to determine which among several uninformed purchasers from a common grantor recorded their deed first.

Types of Notice

Both the Notice recording statute and Race-Notice recording statute hinge, in part, on whether the purchaser had notice of an earlier conveyance at the time the property was conveyed to the purchaser. Notice may be constructive (recording) or actual notice (e.g., word of mouth, possession) that a previous conveyance has occurred. Constructive notice arises when a deed has been properly recorded. Once a deed is recorded, it is an unshakable assumption that all people have knowledge of the deed's

contents. Actual notice arises from personal or reputed knowledge of the earlier transaction. Actual notice is reputed where a person has a duty to investigate and the investigation would have provided personal knowledge of the conveyance. As a result, when a person moves into possession of the property, they are said to provide notice to all people of their ownership. People have a duty to investigate property before purchasing it. As a result, building a fence around the property and moving into a residence on the property (actual notice) would provide notice as effective as recording the deed (constructive notice).

Notice can arise from other sources. Notice of an earlier conveyance may be provided in the description found in the later deed (e.g., “thence along lands previously conveyed to Samuel Wilkins...”). The common law also infers knowledge where there is close kinship between the competing purchasers (e.g. siblings).

Bona-fide Purchaser

The recording act only protects a person that purchases the property. Consequently, a contest between a purchaser and donee (e.g., property conveyed by will) will result in the purchaser having senior title regardless of the sequence of conveyancing and recording (only for acts not amounting to fraud). This limitation is why many conveyances among family members continue to recite “one dollar and other valuable consideration” (or similar words) when conveying property.

Closing

In closing, the surveyor should become familiar with the recording acts operative in their state. The failure to properly determine the senior title can have far reaching consequences for the surveyor’s client when there is overlapping title.

Senior title is never determined by the first person to be conveyed the property. Determining senior title requires research of the competing records back to a common source or grantor. An analysis is made of the deeds and situation surrounding the conveyances from the common grantor. As a general rule, senior title under Race and Race-Notice statutes will be determined by the first recording. Under a Notice statute, the

determination of senior title will hinge on identifying the last deed executed before the first recording was made.

Recording Acts by State

The following table was codified from a table prepared by Ray E. Sweat, *Race, Race-Notice And Notice Statutes: The American Recording System*, 3 Prob. and Prop. 27 (1989)

| State | Type | Statute | MO | N | 442.390 (Vernon 1986) |
|-------|---------|---------------------------|----|---------|---------------------------------------|
| AL | N | 35-4-90 (1975) | MT | R-N | 70-21-304 (1988) |
| AK | R-N | 34,15.260 (1962) | NE | R-N | 76-238 (1984) |
| AZ | N | 33-411 & 412 (1974)(1987) | NV | R- | 111.320 & 111.325 (Michie 1986) |
| AS | R | 18-40-102 (1987) | NH | N | 477:3-a (1983) |
| | N (mtg) | 14-15-404 (1987) | NJ | R-N | 46:22-1 (West 1937) |
| CA | R-N | 1214 (West 1982) | NM | N | 14-9-3 (1978) |
| CO | R-N | 38-35-109 (1987) | NY | R-N | 291 (McKinney 1988) |
| CN | N | 47-10 (West 1958) | NC | R | 47-18 (1984) |
| DE | R | 25 § 153 (1974) | ND | R-N | 47-19-41 (1978) |
| DC | R-N | 45-701 & 45-802 (1981) | OH | R-N | 5301.23 and 5301.25(A) (Baldwin 1986) |
| FL | N | 695.01 (West 1969) | OK | N | 16 § 16 (West 1986) |
| GA | R-N | 44-2-1 (1981) | OR | R-N | 93.640 (1987) |
| HI | R-N | 502-83 (1985) | PA | R-N | 21 § 351 (Purdon 1955) |
| ID | R-N | 55-812 (1988) | | R (Mtg) | 21 § 622 (Purdon 1955) |
| IL | N | 30 § 29 (1969) | RI | N | R.I. Gen. Laws Sec. 34-1-1 (1984) |
| IN | R-N | 32-1-2-11 (Burns 1980) | SC | N | 30-7-10 (Law. Co-op. 1976) |
| IA | N | 558.41 (West 1950) | SD | R-N | 43-28-17 (1983) |
| KS | N | 58-2222 & 2223 (1983) | TN | N | 66-5-106 (1982) |
| KY | N | 382.270 (Baldwin 1981) | TX | N | 13.001 (Vernon 1984) |
| LA | R | 9:2721 (West 1965) | UT | R-N | 57-3-3 (1988) |
| ME | N | 33 § 201 (West 1988) | VT | N | 27 §. 342 (1975) |
| MD | R-N | 3-101 (1988) | VA | N | 55-96 (1988) |
| MA | N | 183 § 4 (West 1988) | WA | R-N | 65.08.070 (1966) |
| MI | R-N | 26.547 (Callaghan 1984) | WV | N | 40-1-19 (1982) |
| MN | R-N | 507.34 (West 1988) | WI | R-N | 706-08 (West 1981) |
| MS | R-N | 89-5-5 (1972) | WY | R-N | 34-1-1-20 (1977) |