REAL PROPERTY QUESTION CORNER:

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# *WHO SUFFERS IF THE COUNTY CLERK MIS-INDEXES A CONVEYANCE OR A MONEY JUDGMENT?*

***(two part article)***

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*(Part I of a two month-- II Part Article)*

## *WHO SUFFERS IF THE COUNTY CLERK MIS-INDEXES A CONVEYANCE OR A MONEY JUDGMENT?*

What advice would you give your client (either the first filing party or the second filing party) in the following circumstances:

{Hint: Remember the "first in time, first in right" rule}

1. Owner#1 is the holder of title to Blackacre and grants a lease to Tenant#1.
2. Tenant#1 files the lease with the County Clerk, but the County Clerk mis-transcribes the terms of the lease, making the recorded version of the lease have terms with a higher rental rate than found on the original document.
3. Owner#1 conveys Blackacre to Owner#2, including the rights under the recorded lease.
4. Owner#2 sues Tenant#1 to collect the rent, at the higher rate as shown on the recorded version of the lease, and to appoint a receiver to collect and hold such rentals.
5. Tenant#1 claims that it did all that the recording act required when it filed the original lease with the County Clerk, and that the tenant should not suffer due to the fault of the County Clerk.
6. Owner#2 claims that she has the right, as a subsequent purchaser, to rely upon the recorded version of the lease.

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According to Hodges v. Simpson, 1922 OK 8, 213 P. 737, (opinion by Elting):

1. The Oklahoma recording act provides: "Every conveyance of real property acknowledged or approved and certified and recorded as prescribed by law from the time it is filed with the register of deeds for recording, is constructive notice of the contents thereof to subsequent purchasers,

mortgagees, or creditors." (¶0) [Section 1155, Revised Laws 1910; now 16 O.S.§16]

2. The plaintiff, Owner#2, contended: "She had a right to rely upon the record and that she was only bound by the lease as shown by the record, and that her rights under the lease were as shown by the record…". (¶6)

3. The plaintiff further argued that the Tenant#1 "and those whose rights attached to the land under him and the lease were bound by the acts and negligence of the recorder in recording the lease in the manner in which it was recorded…".(¶6)

4. There were two lines of authority: "One line of authority holds that where one has an instrument and it is in proper form, entitling it to be filed or recorded, and he has delivered the same to the recording officer, the holder of the instrument has performed all that the law requires of him, and that he is not responsible for, neither is he estopped by, any mistakes made by the recording officer in recording said instrument." (¶7)

5. "There is another line of authority holding that the delivery of the instrument to the recording officer is not sufficient, and that the failure of the officer to properly perform his duties and correctly record the instrument can be attributed to the holder of the instrument and those claiming under him, and that a subsequent purchaser has a right to rely upon the record as made." (¶7)

6. The trial court ruled for the Tenant#1 and against the Owner#2. The Oklahoma Supreme Court affirmed the trial court, following two prior Oklahoma Supreme Court cases, which adopted a holding from a Mississippi Court that had stated: "we range ourselves with the minority, and hold that a grantee fully acquits himself of all duty imposed by law when he lodges the instrument with the proper officer for record." (¶7) [see the following additional cases where an innocent purchaser lost its argument that it relied on the record containing mistakes by the clerk: Covington v. Fisher, 1908 OK 187, 97 P. 615 (second lender lost when the clerk indexed the first mortgage correctly but recorded (transcribed) it incorrectly as the

southwest quarter instead of the northwest quarter), and Dabney v. Hathaway, 1915 OK 672, 152 P. 77 (buyer lost when clerk incorrectly indexed a chattel mortgage as a miscellaneous record)]

7. This appellate court quoted favorably from 23 Ruling Case Law 27, section 90, which stated: "where a grantee has duly deposited his deed with the proper officer for record, he has performed his whole duty, and consequently the subsequent mistake or neglect of the recorder will not affect him,…and no duty rests on the grantee to see that the recorder makes the record correctly. From the moment the instrument is duly filed with the recording officer, according to this view, it is notice of what it contains, and not of what the recording officer may make it show on the record,…. This rule is especially applicable under statutes which provide that an instrument shall be operative as a record from the time it is filed of record. To hold otherwise under a statute of that kind would practically destroy the operation of the clause, [which intends on] making the instrument effective as notice as soon as it is deposited for record." (¶12)

8. The appellate court noted: "The language of our statute on recordation seems to be the same as that of the statutes discussed in the provision of R.C.L. heretofore quoted." (¶14)

9. While the facts of these cases generally dealt with recording (transcribing) errors rather than indexing errors, the rule being pronounced covers both filing (indexing) and recording (transcribing).

10. Conclusion: Tenant#1 wins, and Owner#2 loses.

[NOTE: Next month, in Part II, the discussion of whether the filing party or an innocent subsequent purchaser or encumbrancer prevails continues; notice that the court in Hodges rejects the argument by Owner#2 that the filing party is bound by the mistake of the clerk.]

*(Part II of a two month-- II Part Article)*

## *WHO SUFFERS IF THE COUNTY CLERK MIS-INDEXES A DEED OR A MONEY JUDGMENT?*

What advice would you give your client (either the first filing party or the second filing party) in the following circumstances:

{Hint: Remember the "first in time, first in right" rule}

1. Judgment Creditor#1 presents a certified copy of a money judgment, as required by the then current version of 12 O.S.§706, to the County Clerk for filing in the county land records as a lien. There are multiple judgment debtors listed in the judgment, who are all jointly and severally liable.

2. The County Clerk files such judgment alphabetically against only one of the judgment debtors (Debtor#1), but not against any of the other debtors, such as Debtor#2.

3. Then Debtor#2, as Owner#1, conveys Blackacre to Owner#2; then Owner#2 conveys Blackacre to Owner#3; then Owner#3 mortgages Blackacre to Lender#1.

4. Then Judgment Creditor#1 institutes an action against Owner#2, Owner#3, and Lender#1 as defendants to determine their respective rights, asking the court to rule that all of the defendants' rights are subject and inferior to the lien of Judgment Creditor#1.

5. Owner#2 asserts that "without knowledge of [Judgment Creditor#1's] prior attempt to perfect a judgment lien on the property which forms the subject matter of this litigation, [Owner#2] took title to the property by warranty deed executed by [Owner#1] on September 30, 1981." (¶2)

6. Judgment Creditor#1 asserted in response that "its act of presentment of the Oklahoma District Court judgment to the office of the Cherokee County clerk and the literal stamping of 'filed' on the document constituted adequate

statutory notice filing so as to perfect a judgment lien against the property of [Owner#1] located in Cherokee County relating back to July 8, 1981." (¶2)

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According to Will Rogers Bank and Trust Company v. First National Bank of Tahlequah, 1985 OK 100, 710 P.2d 752 (opinion by Wilson):

1. "The trial court disagreed [with Judgment Creditor#1] and granted summary judgment to the [Owner#2]." Consequently, the trial court also dismissed the actions by the Judgment Creditor#1 against Owner#3 and Lender#1. (¶2)

2. The appellate court stated: "The issue presented is whether, absent any active fault on the part of a judgment creditor, failure to properly record and index a creditor's money judgment under the name of the judgment debtor vitiates the filing as to third parties who, without notice, purchase the realty in another county." [where the attempted filing occurred] (¶1)

3. The Supreme Court affirmed the trial court and held: "We are of the opinion that misindexed judgments can not be considered as properly filed within the meaning of 12 O.S. 1981§706 and do not, therefore, perfect judgment liens provided by that statute." (¶1)

4. The courts did not refer at all to the earlier case of Hodges, 1922 OK 8, 213 P. 737, (or Covington or Dabney), but instead focused on a case interpreting the pre-1978 judgment lien statute, which required both "filing" and "docketing". §706 was amended in 1978 and such amended language was the applicable language when this judgment was filed. Such amended language expressly omitted the requirement for "docketing", leaving only a mandate for "filing" before the judgment lien would come into existence. (¶4, footnote 3)

5. In both Hodges and in Will Rogers, the argument was presented that subsequent purchasers and encumbrancers would be unaware of a mis-indexed document, if the County Clerk made an indexing mistake.

6. In Hodges, the Oklahoma Supreme Court adopted the following rule: "One line of authority holds that where one has an instrument and it is in proper form, entitling it to be filed or recorded, and he has delivered the same to the recording officer, the holder of the instrument has performed all that the law requires of him, and that he is not responsible for, neither is he estopped by, any mistakes made by the recording officer in recording said instrument." (¶7)

7. However, in Will Rogers, the Oklahoma Supreme Court interpreted the exact same statutory term (found in both 16 O.S.§16 and 12 O.S.§706), which only called for "filing" in the County Clerk's office, in the opposite way: "It has long been established that a judgment for money only does not become a lien on the realty of a judgment creditor unless and until it is duly entered on the judgment docket of the county in which the realty is located. [cite omitted; NOTE: citation is to a pre-1978 case relying on the pre-1978 statutory language] We believe this to be the better rule. We remain unpursuaded by Appellant's urgings that the Oklahoma legislature by its revision of §706 in 1978 intended to require only the physical delivery of an in personam money judgment to the county clerk's office to secure a lien upon the judgment creditor's real property in that county. The very reason for requiring any filing in the office of the county clerk of any county is to give notice to the world….it behooves, the county clerk to properly record or index the document as an incident of his or her statutory filing obligation. Filing, within the meaning of §706, includes proper recordation of the subject matter in a manner so as to render orderly the retrieval of necessary information." (¶4)

8. In addition to the problems of having two contradictory precedential rulings on the books, making it impossible for title examiners and clients to know the owners' rights, there are two other problems with this Will Rogers decision.

9. First, the court cannot summarily ignore actions by the Legislature in changing existing law. See: Curtis v. Bd. Of Educ., 1995 OK 119, ¶9, 914 P.2d 656: "This Court has consistently held that the Legislature will never be presumed to have done a vain and useless act in promulgating a statute."

10. Second, according to the facts in Will Rogers: "Relying upon title examination and abstract, the First National Bank of Tahlequah [Owner#2], in turn, sold the property to Hal H. Harris. [Owner#3]" (¶2). If the buyers had the benefit of an abstract and title opinion, then – unless the abstractor made the exact same indexing mistake as the county clerk, which is highly unlikely –the subsequent buyers knew of the filed judgment. This is because, by statute, such abstract is never based on the county clerk records, but must be based on the abstract company's own indexing of the actual document itself. According to 1 O.S.§28, each abstractor: "shall have for use in such business an independent set of abstract books or other system of indexes compiled from the instruments of record affecting real estate in the office of the county clerk, and not copied from the indexes in said office,...".

11. The Oklahoma Supreme Court is urged to reconsider this matter, when similar facts are presented, and, in order to avoid the continuation of an obviously inconsistent pair of rulings, to expressly overturn the holding of either Hodges (and Covington and Dabney), or Will Rogers.

12. Additional arguments might be made when this matter resurfaces: The filing party can argue that he should not be bound by the errors of the county clerk, because the subsequent buyer or encumbrancer can protect themselves by securing an abstract, title opinion, and title insurance. However, the filing party who obviously knows of his own filing could check the accuracy of the indexing made by the County Clerk by either personally checking the indexes or by paying an abstractor to do so.

13. In addition, it should be noted that the County Clerk is not responsible for his indexing errors. Board of County Com'rs of Tulsa County v. Guaranty Loan & Inv. Corp. of Tulsa, Inc., 1972 OK 78, 497 P.2d 423: "The index did not show a certain real estate mortgagee which had been filed in his office on June 26, 1968. Plaintiff examined the index on January 20, 1970, and in

reliance thereon made a loan to the owner of the real estate." (¶2) Decision was in favor of the County Clerk having no liability.