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THE APPLICATION OF THE TITLE EXAMINATION STANDARDS TO OIL AND GAS TITLE OPINIONS

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I. INTRODUCTION

The purpose of this presentation is to bring together some of the thought processes between the intellectual reasoning of the Title Examination Standards and the practical aspects of oil and gas title examination.

A. Reasons for Examination of Title

The first practical question is why the title is being examined. Although this is not purported to be an exhaustive list, I have examined oil and gas titles for the following purposes:

1. Client has acquired oil and gas leases and has a certain number of days to approve payment of lease bonuses (Lease Acquisition or Original Title Opinion);
2. Client is proposing to drill a well and is preparing to pool other leasehold owners and unleased mineral owners and allocate costs for the well (Drilling Opinion);
3. Client, as operator, has completed a well and is preparing to disburse proceeds (Division Order Title Opinion);
4. Client, as first purchaser, is preparing to disburse proceeds (Division Order Title Opinion);
5. Client is purchasing producing (or non-producing) property (Purchase Opinion);
6. Bank client is lending money secured by producing (or non-producing) property (Mortgagee Title Opinion).

The Title Examination Standards do not distinguish between the various types of opinions (or even between surface and

mineral opinions) and it is unwise for the title examiner to take a different approach. A defect is a defect regardless of the purpose of the opinion, and the proper distinction is determining the curative steps to solve a particular problem. On the other hand, it is practical to know the purpose of the opinion and your comments and requirements can be worded accordingly. For example, it is not unusual to preface a requirement with the words, "For the purpose of this Lease Acquisition Opinion, you may be willing to rely on an affidavit of death and heirship." This serves both the practical need of the client and warns the client that more curative steps may be required at a later time. I would feel uncomfortable not mentioning a problem at all at the lease acquisition stage of the drilling program knowing later that I would require curative steps before allowing the payment of proceeds. The purpose of the lease acquisition is for the eventual economic realization of the leases taken, and the client may not understand why a requirement only surfaces at the division order title opinion stage.

B. Distinctions Between Various Opinions

1. Lease Acquisition or Original Title Opinion. The normal sequence of events is that your client has acquired oil and gas leases based on an ownership done by a landman or lease broker. Subsequently, abstracts have been gathered and your first advice to the client is whether to honor the money drafts which have

been sent for the payment of lease bonuses. Normally, the client will ask if there are any "big title problems" connected with a person's interest. It is appropriate to take into consideration the amount of acreage involved on a particular lease as well as the degree of the problem involved. It is unusual that the landman or lease broker has completely missed the ownership of a potential lessor, but that is always a possibility that must be considered. Additionally, your client should be made aware of any encumbrances, liens, mortgages, etc. which affect his lessor's title. This is the best time to obtain subordinations of mortgages, affidavits of possession and tenant disclaimers, as well as inquiring as to whether previous oil and gas leases appear to have expired in the absence of production. There is usually not time to do judicial determinations of death and heirship, probate proceedings or quiet title suits. However, it is a good time to inquire into the facts as to whether these proceedings are likely to be concluded successfully.

2. Drilling Opinion. The lease bonuses have been paid and the client is now proposing to drill a well and is preparing to pool other leasehold owners and unleased mineral owners and to allocate the costs of the well. Normally, a pooling application list will be taken from the original title opinion, and one concern is to advise the client if all potential owners of the right to drill are included on his list of pooling applicants. For purposes of precautionary pooling, it is also advisable to

include a list of parties whose interest may be in doubt and is unsettled. In addition, your client should be interested in the mortgagees of various working interest owners as a consideration for pooling.

It is also important to take into consideration problems involving the ownership of the surface where the proposed well will be located, including easements and rights-of-way. Your client will also begin providing specific curative materials for the requirements connected with his own interest or that of his own lessor.

3. Division Order Title Opinion. (either for operator or first purchaser) The true nightmare of a title examiner has taken place. The well has been successfully completed and the well is producing in paying quantities. Any mistake that you have made will not be obliterated by a "dry hole." The payment of proceeds is now governed by 52 O.S. §540 which says:

> The proceeds derived from the sale of oil and gas production from any oil or gas well shall be paid to persons legally entitled thereto, commencing no later than six (6) months after the date of first sale, and thereafter no later than sixty (60) days after the end of the calendar month within which subsequent production is sold.

The statute further allows:

> Provided, however, that in those instances where such proceeds cannot be paid because the title thereto is not marketable, the purchasers of such production shall cause all proceeds due such interest to earn interest at the rate of six percent (6%) per annum, until

> such time that the title to such interest has been perfected. Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association.

Suddenly, an entirely different standard of title is used. No longer are affidavits and suppositions to be substituted for properly executed and recorded disclaimers and quit claim deeds. Affidavits of heirship no longer are substituted for judicial determinations of death and heirship or proper probate or administration proceedings. The then current Title Examination Standards of the Oklahoma Bar Association will be used as the guide for the proper determination of title. This statute is the only place that I know of in the Oklahoma Statutes where the Title Examination Standards are mentioned and it seems to incorporate not only the existing Title Examination Standards as a benchmark of title, but also provides that the criteria of marketability can be changed by the adoption of future Title Examination Standards.

This discussion must then closely parallel that of Title Examination Standard 4.1 - Marketable Title Defined (hereafter, specific Title Examination Standards shall be referred to as "TES" followed by the section number) in the discourse as to what constitutes marketable title. However, don't be too alarmed. From a practical standpoint, especially where the operator is the entity disbursing proceeds of production, many of the same presumptions are made which are made at the other stages of title

examination. Affidavits of death and heirship are often accepted by the operator in the place of judicial proceedings. Long possession histories are substituted by the operator for quiet title decrees. In many cases, indemnifying language in division orders are substituted for many potential title defects and liberal use of the Marketable Record Title Act and Simplification of Land Titles Act are used to determine the marketability of title. These decisions are matters involving the business judgment of the client.

Other matters are considered for the first time. Mortgages from lessors which were subordinated to leases must be reconsidered with regard to payment of proceeds. Mortgages from leasehold owners must be considered. Operating agreements, well completion reports and pooling elections must be considered in order to make determinations as to the final disbursement of proceeds. Although not required by the statutes or the Title Examination Standards, most clients also require executed division orders before disbursing proceeds.

4. Purchase Opinion. When the client is purchasing producing property, special consideration should be given to the type of purchase which is taking place. Often there are a large number of leases and/or producing properties which have different degrees of value to the client. It is advisable to break down the allocation of the purchase price into three or four categories of properties. While a full examination of title may be

important in one category, it may well be that a less strict examination will be desired for a different category of property. Upon proper inquiry of the client, you often realize that the purchase price is justified by the inclusion of only certain properties and many of the other properties carry little or no allocated weight to the entire purchase price. The cost of examination of a low priority property may be more than that property is actually worth. One advantage in the purchase of producing properties is that there are normally fairly recent title opinions available which can be examined and updated through abstract examination or tract index examination.

There is another consideration for the purchase opinion. It is common upon the acceptance of a purchase offer, that the purchaser will have a certain number of days to examine title and notify the seller in writing of any objections or title defects. Normally the standards to be used are the then existing Title Examination Standards. However, the criteria to be employed is becoming more commonly defined as what a reasonable and prudent person engaged in the business of ownership, development, operation or production of oil and gas properties or the purchase of production therefrom would use in order to disburse revenues in accordance with the title which has been offered. This is a more appropriate standard in the purchase of producing properties. The most important question the purchasing client wants to know is whether the seller is receiving revenue. If so, it "must" be

that the title is acceptable to the current purchaser of production and is probably going to be acceptable to your purchaser-client. There is even some argument that a lesser standard can be forced upon a purchaser even when a strict "marketable title" standard is used in the purchase agreement.

5. Mortgagee Title Opinion. Situations where the bank client has been offered oil and gas property (usually leasehold interests) to secure a promissory note normally fall into two categories and the scope of examination depends upon the category.

a. The first is where the borrower is purchasing oil and gas leases (producing property) and has asked the bank to finance all or part of the transaction. The title examination will be similar to that of a Purchase Opinion with consideration being given to the weight of various categories of property, and may involve updating previous title opinions and determining who is actually receiving revenue. The bank should have its own standards of acceptable title and should not rely on the standards which may be acceptable to the purchaser. It is not uncommon for a conflict to develop between the bank and the borrower, especially where the borrower has agreed to pay for the expenses of the examination of title on behalf of the bank. Since this purchase will often involve a distressed seller, special consideration should be given to mortgages, liens and lawsuits which may affect the seller's interest.

b. A second category is where the borrower is offering additional collateral to further secure an existing loan which has fallen into arrears. Normally, the bank is not too excited about paying additional expenses of title examination and will often rely upon the representations of the borrower as to what his monthly revenue has been from various properties. I try to get a bank client to categorize the property offered and at least do a limited examination of the high priority properties. This property is usually offered to the bank in order to get the bank to forebear an immediate foreclosure and the bank is taking the property knowing that an eventual foreclosure is probably going to be necessary. It is not uncommon to find that the interest of this borrower is heavily encumbered and may be subject to the priorities of third parties.

II. AUTHORITATIVENESS OF TITLE EXAMINATION STANDARDS

A. Introduction

In the subsections below I will briefly highlight the reasons for the substantial weight given by Oklahoma's real property title attorneys to the Standards.

The development of these Standards is carried out (1) to facilitate title transfers by resolving issues upon which there may be a difference of opinion within the Bar (which cannot be solved by a review of the current law) by adopting the customary position followed by the vast majority of practicing title attor-

neys (so long as the custom being adopted is not contrary to existing law), and (2) to collect title curative authority in one place.

B. Standards Approval Procedure and Custom

Revised or new Standards are developed after extensive research and discussion, and then are submitted each year by the Title Examination Standards Committee ("Committee") of the Real Property Section ("Section") of the Oklahoma Bar Association ("OBA") to the Section at its annual meeting which is held at the same time and location as the annual meeting of the OBA. After the Section and the OBA House of Delegates approve the revised or new Standards they are officially published as the Appendix to Chapter 1 of Title 16 (i.e., "Conveyances") of the Oklahoma Statutes.

In order to encourage pre-adoption comment by the members of the OBA at large, the proposed revised and new Standards are published in the end-of-the-month issue of the Oklahoma Bar Journal one to two months prior to the annual meeting of the OBA. After the annual OBA meeting those revised and new Standards which received final approval from both the Section and the OBA House of Delegates are incorporated into the existing Standards and published in the Section's "Title Examination Standards Handbook". This Handbook contains all of the Standards including recent revisions or additions. It is published annually by the Section as soon as practically possible after the annual OBA

meeting, and is provided free of charge to all Section members and is sold for a nominal price to other people. The O.S.A. will include the most recent Standards in the next revised pocketpart.

This development, notice and approval process promotes vigorous analysis, discussion and debate on the Standards before adoption so that once they are adopted the Standards can reasonably be called the official "custom" or "standard" within the profession.

C. Standards as a Mini-Brief on the Law

These Standards are developed and founded on an exhaustive analysis of existing statutes, case law, major treatises, other states' statutes and cases and uniform national "standards". Such authorities are studied, discussed and then set out in the "Authority" part of each Standard. Consequently, a title attorney can conduct research on a title question by beginning with a review of the language of a particular Standard itself and then by reviewing the cited authority. The Standards can thus act as a mini-brief or mini-treatise.

To the extent that a particular Standard is based directly on the express wording of existing Oklahoma Statutes and/or Oklahoma cases, it is obviously controlling on all parties.

D. Statutory Standard for Minerals

As mentioned above, the State Legislature has expressed its confidence in the Standards in clear terms by providing that,

at least as to minerals:

> Further provided, that any delay in determining the persons legally entitled to an interest in such proceeds from production caused by unmarketable title to such interest shall not affect payments to persons whose title is marketable. Provided, however, that in those instances where such proceeds cannot be paid because the title thereto is not marketable, the purchasers of such production shall cause all proceeds due such interest to earn interest at the rate of six percent (6%) per annum, until such time as the title to such interest has been perfected. Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association. (emphasis added) 52 O.S. § 540A.

It should be noted that the State Legislature has only expressly provided for such Standards to apply in the above specified situation. Therefore, it cannot be presumed that the courts will find that there was legislative intent to automatically apply the Standards to every surface or other mineral conveyance or transaction.

E. Oklahoma Supreme Court and Oklahoma Attorney General Support for Standards

The Oklahoma Supreme Court expressed its confidence in the Standards when Justice Lavender stated, for the Court:

> The foregoing Title Examination Standards (16 O.S. 1981, Ch. 1, App.) were adopted by the House of Delegates of the Oklahoma Bar Association on November 29, 1962, as a result

> of an extensive study of established standards for determining a marketable or merchantable title to real property under the law of Oklahoma. While said Title Examination Standards are not binding upon this Court, by reason of the research and careful study prior to their adoption and by reason of their general acceptance among the members of the bar of this state since their adoption, we deem such Title Examination Standards and the annotations cited in support thereof to be persuasive. (emphasis added)

Knowles v. Freeman, Okl., 649 P.2d 532 (1982).

And while the Attorney General's ("A.G.'s") Office found that "Title examination standards are not state statutes and, are not promulgated by the Legislature", the AG also found that the "Title examination standards are adopted by the Oklahoma Bar Association through its House of Delegates and are published as a part of the Oklahoma Statutes Annotated by the West Publishing Company as a convenience to the title examiners" and that "The title examination standards are uniform interpretations for the application of the law that attorneys should use when examining titles." [AG Opin. #79-230 (Aug. 31, 1979)].

F. Standards Adopted in the Contract

The parties to a real estate or oil and gas transaction can mutually agree that the Standards will be used in determining the acceptability of the title being offered.

G. Warnings in using Standards

There are several dangers to avoid when using the Standards, including the following:

1. Incomplete review of the body and especially the notes portion of the Standard by the examiner, and

2. Failure of the examiner to keep abreast of changes in statutes and cases since the last revisions to a Standard were made.

These two areas of concern (i.e., incomplete review and failure to remain current) can be eliminated only by the conscientious efforts of the examining attorney.

Drafting and legal research errors by the Committee sometimes arise despite the Committee's most diligent efforts. Such errors can be avoided only by the efforts of (1) the Committee to be correct or to remain silent on an issue and (2) the real property oriented members of the State Bar at large to challenge defective Standards. Hopefully, such challenges to proposed Standards will be made in advance of their final adoption by the OBA House of Delegates at their annual meeting.

III. STANDARDS AND CURATIVE ACTS

Several current (i.e., 1986) Oklahoma Title Examination Standards and several Oklahoma curative acts have been selected and are discussed below. The discussion is formated as follows: 15 different TES Standards are dealt with in numerical order and each discussion of a Standard is subdivided into 3 parts. These subparts are (1) the actual language of the particular Standard and related notes, (2) a background discussion of the Standard's creation and underlying authority and (3) a discussion of the practical aspects of applying the particular Standard.

A. TES 3.3 AFFIDAVITS

1. Standard (adopted 1986, no amendments)

3.3 Affidavits

While an affidavit recorded after October 31, 1985, which satisfies the conditions of 16 O.S.A. § 82 is not a substitute for a judicial proceeding or any other statutory procedure, it does give notice and may be relied upon for interpretation or clarification purposes in determining the marketability of title, unless the examiner has reason to suspect the personal knowledge, competency or veracity of the affiant.

Comment: In the course of examination of titles, there are frequently matters which create some doubt in the mind of the title examiner but are not of a nature which would require a judicial proceeding to cure the defect. In such cases, affidavits may be relied upon. For example, where no indication is given in a conveyance of real property as to the marital status of the grantor, an affidavit that the grantor was not married at the time of the conveyance should be relied on for purposes of marketability. On the other hand, an affidavit of heirship cannot take the place of a judicial determination of heirship. Of course, such an affidavit of heirship would give notice of persons purported to be heirs.

History: The standard as stated above was recommended by the Report of the 1986 Title Examination Standards Committee, 57 O.B.J. 2677 (1986). It was approved by the Real Property Section, November 19, 1986, and adopted by the House of Delegates, November 20, 1986. For the statement of the Standard previously, see 56 O.B.J. 2535 (1985).

2. Background

Affidavits setting forth facts about title matters have been filed in the land records for many years but there was no authority allowing their filing and making their filing constructive notice of their contents [Wilson v. Shasta Oil Co., 171 Okla. 467, 43 P.2d 769 (1935); Crater v. Wallace, 193 Okla. 32, 140 P.2d 1018 (1943)]. In fact, any taking of an affidavit without specific statutory authority was a crime (21 O.S. §541). However, effective November 1, 1985, 16 O.S. §§82-85 became effective and it provided:

a. authority allowing filing of record an affidavit in the local land records,
b. that the affidavit should be acknowledged,
c. that the affidavit provided notice (i.e., constructive notice) of the matters covered therein,
d. that the affidavit did not take the place of a judicial proceeding, judgment, decree or title standard,
e. that the affidavit could cover:
   (1) age,
   (2) sex,
   (3) birth,
   (4) death,
   (5) relationship,
   (6) family history,

(7) heirship,
(8) names,
(9) identities of parties (individual, corporate, partnership or trust),
(10) identity of officers of corporations,
(11) membership of partnerships, joint ventures or other incorporated associations,
(12) identities of trustees and terms of service,
(13) history of organization of corporations, partnerships, joint ventures and trusts,
(14) marital status,
(15) possession,
(16) residence,
(17) service in Armed Forces, and
(18) conflicts in recorded instruments.

f. that the affidavit must include a legal description of the real property affected, and

g. that any person giving a false affidavit would be guilty of perjury and liable for actual and punitive damages.

Since the statute expressly stated that an affidavit cannot replace a formal proceeding, the impact of this statute is principally (1) to cloud title by giving notice of outstanding claims and (2) to preserve factual information which some, but not necessarily all, examiners might choose to rely upon but which is usually lost in the file of an earlier title examiner. Discussions have arisen on an irregular basis within the Real Property Section about how to give such filed affidavits some weight, perhaps as a presumption, after being filed of record for a long time, such as 10 years.

It should be noted that there is no authority given in this statute for the filing of an affidavit concerning the homestead or non-homestead nature of a tract of real property.

3. Practicalities

The full impact of Standard 3.3 is not yet known. Even

without statutory authority, abstracts and county records have contained affidavits covering the same areas as those mentioned in the statute. These affidavits are immensely helpful in the work of a title examiner. An affidavit of death and heirship can tie together breaks in the chain of title and explain the proper ownership percentage which could only be explained by a probate or administration proceeding in their place. Depending on how your title opinion is being used, one client may be willing to rely upon such an affidavit for all purposes. Another client in a different situation may be willing to rely upon an affidavit of heirship to support the payment of lease bonuses, but may require judicial proceedings before incurring the expense of drilling a well or the risk of disbursing proceeds of production.

Only time will tell whether these statutorily approved affidavits will have more dignity than the ones used previously. However, from a practical standpoint, when a title examiner sees an affidavit, it tells him part of the overall title story regardless of how defectively drafted or recorded the document may be. One practical question the title examiner will have to face in the future is how to handle affidavits which were not properly executed, acknowledged and recorded, but are still contained in the county records. Another question is how much reliance can be put on the affidavits when an affidavit usually is self-serving, such as a member of a family explaining the family history and heirship in lieu of a Decree of Distribution,

or a property owner stating that he is in possession of property, or a grantor of a deed stating that he was unmarried at the time of execution of the deed. For example, an oil and gas title examiner reviews many unrecorded affidavits of possession. These are usually self-serving statements of possession by the record owner and often contain the apparent inconsistency of an out-of-county or out-of-state acknowledgment coupled with a statment that the affiant is in possession of the property.

In summary, the use of affidavits after the introduction of Standard 3.3 will be treated the same by the careful title examiner as before. He will explain to his client that an affidavit is only as good as the person behind the affidavit and would be hard to defend if the information is in fact not true.

B. TES 4.1 MARKETABLE TITLE DEFINED

1. Standard (adopted 1946; last amended 1965)

4.1 Marketable Title Defined

All title examinations should be made on the basis of marketability as defined by the Supreme Court, to-wit:

"A marketable or merchantable title is synonymous with a perfect title or clear title of record; and is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record."

Cross Reference: See Standard 19.1.

Authorities: Pearce v. Freeman, 122 Okla. 285, 254 P. 719 (1927); Hausam v. Gray, 129 Okla. 13, 263 P. 109 (1928); Campbell v. Harsh, 31 Okla. 436, 122 P. 127 (1912); Jennings v. New York Petroleum Royalty Corp., 169 Okla. 528, 43 P.2d 762 (1934); Tull v. Milligan, 173 Okla. 131, 48 P.2d 835 (1935); Seyfer v. Robinson, 93 Okla. 156, 219 P. 902 (1923); Tucker v. Thaves, 50 Okla. 691, 151 P. 598 (1915); Ammerman v. Karnowski, 109 Okla. 156, 234 P. 774 (1924); Wilson v. Shasta Oil Co., 171 Okla. 467, 43 P.2d 769 (1935); Empire Gas & Fuel Co. v. Stern, 15 F. 2d 323 (1926); Leedy v. Ellis County Fair Ass'n, 188 Okla. 348, 110 P.2d 1099 (1941); Hanlon v. McLain, 206 Okla. 227, 242 P.2d 732 (1952); Gordon v. Holman, 207 Okla. 496, 250 P.2d 875 (1952); Hawkins v. Johnson, 203 Okla. 398, 222 P.2d 511 (1950); Koutsky v. Park Nat'l Bank, 167 Okla. 373, 29 P.2d 962 (1934); Davidson v. Roberson, 92 Okla. 161, 218 P. 878 (1923).

History: Adopted as 11, November 16, 1946, 17 O.B.A.J. 1729 (1946), printed, *id.* at 1751-1752; became 1 on renumbering in 1948, 19 O.B.A.J. 223 (1948) at which time the *Leedy* case was added to the cited authority. On November 30, 1960, the last five cases cited were added, 1960 Proceedings of the Annual Meeting of the Oklahoma Bar Association at 20. Cross reference added, December 2, 1965. Resolution No. 2, 1965 Real Property Committee, 36 O.B.A.J. 2094 (1965) & 2182. Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437 (1966).

2. Background

This Standard creates a common basis for examination of

title to both surface and mineral interests. The Standard simply presents the Oklahoma Supreme Court's definition of marketable or merchantable title and urges that, in the absence of any other express agreement between the parties, all examining attorneys should examine their titles based on this particular level of quality of title. Further, the Standard emphasizes and affirms the use of this general definition for the terms "marketable" or "merchantable" title whenever either of these terms is expressly used by the parties.

3. Practicalities

Standard 4.1 defines "marketable title" and there is no discussion regarding the purpose for which the title examiner is examining title. On a day-to-day basis, "marketable title" means different things in oil and gas practice than in the area of residential real estate or commercial lending; however, how many oil and gas title examiners would feel comfortable explaining to his client that his title opinion did not include certain comments and requirements that he would like to have made but omitted because the oil and gas practice requires a "less perfect title." Most examiners have come to the conclusion that an examiner best not make a decision for his client as to the degree of marketability required in an opinion. While Standard 4.1 is good as a case citation for many authorities defining marketable title, it does not affect the day-to-day examination of title. Once the title has been examined and all defects and potential

defects have been brought to the attention of the client, the Standards may be helpful in determining the curative steps required depending on the purpose of the title opinion. A lessee acquiring leases may require less certainty of title than the first purchaser who is disbursing proceeds. This has nothing to do with the marketability of title, but does involve the economics and time involved in acquiring leases in competition with other lessees and time constraints in making title considerations, etc.

C. TES 4.2 OIL AND GAS LEASES

1. Standard (adopted 1947; last amended 1987)

4.2 OIL AND GAS LEASES

The recording of a certificate supplied by the Corporation Commission under 17 O.S.A. §§167 & 168, reflecting no production and no exceptions, renders a title marketable as against an unreleased oil and gas lease or a mineral or royalty conveyance or reservation for a term of years and as long thereafter as there is production, the primary term of which has expired prior to the date of the certificate, if the certificate covers all of the land described in the lease, mineral or royalty conveyance or reservation, as well as any additional land which may have been spaced or unitized by either the Corporation Commission or by recorded declaration pursuant to the lease or other recorded instrument as of the date of the expiration of the primary term.

Comment: Said Act originally applied only to oil and gas leases, as did the standard as originally adopted October 1947. The Act was amended in 1951 so as to cover term mineral conveyances, as well as oil and gas leases; and the standard was then amended in November 1954. By said Act, such certificates constitute prima facie evidence that no such oil and gas lease or term mineral conveyance is in force which, if not refuted, will support a decree for specific performance of a contract to deliver a marketable title. The facts in Wilson v. Shasta Oil Co., 171 Okla. 467, 43 P.2d 769 (1935), disclose that the Court only held proof to establish marketability cannot be shown by affidavit of nondevelopment. Beatty v. Baxter, 208 Okla. 686, 258 P.2d 626 (1953), is deemed not to affect prima facie marketability as provided for in the statute.

Note: This standard does not apply to Osage County, where oil and gas operations are not under the control and supervision of the Corporation Commission.

Caveat: The Corporation Commission has been known to issue clear certificates of non-development when in fact a well has been drilled and not plugged; therefore, the cautious attorney will also advise his clients to satisfy themselves there is no well nor production upon any of said property and that the lease is not being kept alive by in lieu royalty payments or production not reported to the Corporation Commission. The examiner should also be aware that the documents evidencing spacing or unitization may either be unrecorded or only appear in the records of the Corporation Commission.

2. Background

The purpose of this Standard is to identify and encourage the use of a reliable means for a title examiner to determine that an oil and gas lease, a mineral or royalty conveyance, or a reservation of a term of years which would continue beyond its primary term for as long thereafter as there is production, has in fact expired. The mechanism is the use of a certification of the fact of non-development of a lease tract by a knowledgeable third party, namely the Corporation Commission. 17 O.S. §§167-168 makes such certificate constitute prima facie evidence of the actual state of production.

The 1987 change to the Standard is the insertion of the phrase "reflecting no production and no exceptions". This insertion is intended to prevent an inexperienced examiner from reading this Standard and concluding that the existence of a certificate of non-development establishes marketable title, in spite of the fact that such certificate shows production or exceptions on its face.

3. Practicalities

This Standard is more helpful in the curing of title than in the initial examination by the title examiner. Usually, not enough information is provided in the abstract to cover the situations you most often encounter.

An examiner is likely to see many old oil and gas leases whose primary terms have expired in the absence of production.

Standard 4.2 can be helpful in determining whether these leases may create a cloud on title. However, caution must be used because many times these leases cover large tracts of lands, requiring the abstracter to include a certificate of non-development on all the lands in the leases and any other lands spaced or unitized with those lands. Seldom does the abstracter give you enough information for use of this Standard with old leases.

With respect to private unitization agreements, it has been brought to my attention that the only way to insure that the lease has not been extended would be to do a title check on all lands covered by the lease to determine that all unitization agreements have been considered.

Regarding more current oil and gas leases whose primary terms have expired in the absence of production, the cautious approach would be to allow time between the expiration date of the lease and the effective date of the certificate of non-development. Close attention should be paid to lease terms that would permit the lessee to complete the drilling of a well which was commenced during the primary term and other lease terms which may excuse delayed drilling. Subsequent top leases may be one excuse for delay of drilling on the original lease.

The practical approach is to provide your client a list of all the unreleased oil and gas leases, with complete descriptions. It can be a waste of time to chain old oil and gas leases

to determine a list of current owners when the client intends to use the certificate of non-development approach instead of acquiring releases from those current owners. As a practical matter, once it becomes apparent there are a number of old leases which have not been released, or an inordinate amount of time is being spent on the chaining of their ownership, it may be wise to make one general requirement covering all of these leases, specifying the actual descriptions necessary to be covered by certificates of non-development, cautioning the client that additional lands spaced or unitized must be included.

There is an important caveat to TES 4.2 which should be brought to the client's attention (see above). Remind the client that the Oklahoma Corporation Commission records can be incorrect and that the client has the responsibility to inquire and assure themselves that there is not production on the lands, no royalty payments are being made in lieu of production and that the possession affidavits of the lands include existing oil and gas wells.

As stated above, the change to the 1987 Standards is to prevent an inexperienced title examiner from relying on a Certificate of Non-Development which shows existing wells or other exceptions.

D. TES 6.1 DEFECTS IN OR OMISSION OF ACKNOWLEDGMENTS

1. Standard (adopted 1981; no amendments)

6.1 Defects in or Omission of Acknowledgments in Instrument of Record

With respect to instruments relating to interests in real estate:

A. The validity of such instruments as between the parties thereto, is not dependent upon acknowledgments, 16 O.S.A. § 15.

B. As against subsequent purchasers for value, in the absence of other notice to such purchasers, such instruments, are not valid unless acknowledged and recorded, except as provided in C and D herein, 16 O.S.A. § 15.

C. Such an instrument containing an acknowledgment which is defective in form, shall be considered valid notwithstanding such defect, and shall not be deemed to impair marketability, provided such instrument has been recorded for a period of not less than 5 years, 16 O.S.A. § 39a.

D. Such an instrument which has not been acknowledged or which contains an acknowledgment which is defective in some manner other than in form shall be considered valid notwithstanding such omission or defect, and shall not be deemed to impair marketability, provided such instrument has been recorded for a period of not less than 10 years, 16 O.S.A. § 27a.

History: Adopted December 4, 1981. Proposed by Report of the 1981 Title Examination Standards Committee, 52 O.B.J. 2723, 2724. Approved by Real Property Section and adopted by House of Delegates, 53 O.B.J. 257-58. The Title Examination Standard which prior to December 4, 1981 bore the number 6.1 has been renumbered 2.3.

2. Background

This Standard simply summarizes existing statutes concerning acknowledgments (i.e., 16 O.S. §§15, 27a and 39a). Such statutes declare that acknowledgments are not necessary to the validity of instruments between the parties, and they make instruments with defective or omitted acknowledgments valid for constructive notice purposes after they have been of record for several years. The curative periods are 5 years if the form is defective and 10 years if the facts are defective or if the acknowledgment itself is omitted in part or in full.

It should be noted that at least a few practicing real property attorneys have taken the position that an acknowledgment is necessary to the validity of a corporate conveyance as between the parties (absent estoppel or other arguments). The support

for this position comes from the introductory language of 16 O.S. §15 which states that:

> Except as hereinabove provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease or other instrument relating to real estate other than a lease for a period not exceeding one (1) year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided; (emphasis added)

taken together with 16 O.S. §92 which provides:

> Every instrument affecting real estate or authorizing the execution of any deed, mortgage or other instrument relating thereto, executed and acknowledged by a corporation or its attorney-in-fact in substantial compliance with this chapter, shall be valid and binding upon the grantor, notwithstanding any omission or irregularity in the proceedings of such corporation or any of its officers or members, and without reference to any provision in its constitution or bylaws; (emphasis added)

and 16 O.S. §95 which provides:

> Every deed, or other instrument affecting real estate, executed by a corporation, must be acknowledged by the officer or person subscribing the name of the corporation thereto.

* * *

and an Oklahoma Supreme Court case which held that a particular contract from a corporation, "being an instrument affecting real estate ..., [was] also invalid because not acknowledged in

substantial compliance with Section 1188, Rev. Laws 1910" [now 16 O.S. §95] Bentley v. Zelma Oil Co., 76 Okla. 116, 184 P. 131 (1919).

3. Practicalities

Standard 6.1 can save the title examiner time and allows title to improve with the passage of time. From a practical standpoint, defects that occur that are not covered by the Standards are noted and correction instruments are requested. The problem of intervening purchasers must be dealt with on a case-by-case basis, but normally, the practical approach is to assume that the subsequent purchaser recognizes the defectively acknowledged instrument.

E. TES 6.2 OMISSIONS AND INCONSISTENCIES IN INSTRUMENTS AND ACKNOWLEDGMENTS

1. Standard (adopted 1947; last amended 1961)

6.2 Omissions and Inconsistencies in Instruments and Acknowledgments

Omission of the date of execution from a conveyance or other instrument affecting the title does not, in itself, impair marketability. Even if the date of execution is of peculiar significance, an undated instrument will be presumed to have been timely executed if the dates of acknowledgment and recordation, and other circumstances of record, support that presumption.

An acknowledgment taken by a notary public in another state which does not show the expiration of the notary's commission is not invalid for that reason.

Inconsistencies in recitals or indications of dates, as between dates of execution, attestation, acknowledgment, or recordation, do not, in themselves, impair marketability. Absent a peculiar significance of one of the dates, a proper sequence of formalities will be presumed notwithstanding such inconsistencies.

Authorities: R. & C. Patton, Titles §§ 350, 353, 359 & 364 (2d ed. 1957); P. Basye, Clearing Land Titles §§ 233-236 & 247-249 (1953); 26 C.J.S., *Deeds* §§ 22a. & f., & 53a; May v. Archer, 302 P.2d 768 (Okla.1956); Maynard v. Hustead, 185 Okla. 20, 90 P.2d 30 (1939); Scott v. Scott, 111 Okla. 96, 238 P. 468 (1925).

1 C.J.S. *Acknowledgments* § 876; Annot., 29 A.L.R. 980 (1928); Kansas City & S.E. Ry. Co., v. Kansas City & S.W. Ry. Co., 129 Mo. 62, 31 S.W. 451 (1895); Sheridan County v. McKinney, 79 Neb. 220, 112 N.W. 329 (1907); (See also acknowledgment curative statutes).

Comment: An indication of the date of execution is not essential for any purpose. It is a recital, like other recitals; important, if the date is in issue; helpful, in any case; presumptively correct, but subject to rebuttal or explanation. The same is true of the date of attestation and, generally, of acknowledgment. The only crucial date, that of delivery, is not normally found in the instrument. Hence, omission of the date from one of an ordinary series of conveyances may be disregarded. Even though a special importance attaches to the date of execution, as in the case of a power of attorney, a presumption of timely execution (e. g., in proper sequence in relation to other instruments) should be indulged if supported by other dates and circumstances of record.

As recitals of dates may be omitted or explained; are notoriously inaccurate; and are more generally in error than are the actual sequences of formalities; inconsistencies in the indicated dates of formalities (e. g., acknowledgment dated prior to execution; execution dated subsequent to indicated date of recordation) should be disregarded. Further, the inconsistency or impossibility of a recited date should not be regarded as vitiating the particular formality involved. An act curative of the formality will eliminate any question as to its date. If, however, under the circumstances indicated by the record, a peculiar significance attaches to any of the dates (e. g., priorities; important presumption) inconsistency or impossibility should not be disregarded.

History: Second paragaraph of standard and second paragaraph of citations adopted as B, October 31, 1947, 18 O.B.A.J. 1750 (1947); became 6 on renumbering, 19 O.B.A.J. 223, 224 (1948); enlarged and adopted as 6.2, December 2, 1961, 32 O.B.A.J. 2280 (1961), printed, *id.* at 1866-67, 1921-22, 1970-71 & 2030-31, *see also id.* at 1425-26.

2. Background

The date of delivery of a conveyance to the grantee is the effective date of the instrument, in the absence of an expressed delay set out on the face of the document. "A deed, in the absence of a contrary statutory position, takes effect from the date of its delivery, not from the time of its record or

date, or signing and acknowledgment, ..." May v. Archer, 302 P.2d 768,771 (Okla. 1956).

Therefore, errors in other dates recited on the face of an instrument, such as the execution or acknowledgment, usually have no effect by themselves on the marketability of the title.

3. Practicalities

This Standard provides comfort to the examiner not to get too excited over the sequence of events where it appears an instrument was dated after it was acknowledged. It is not uncommon for a date to have been omitted either on the instrument or the acknowledgment. This Standard states that even if the date of execution is of peculiar significance, an undated instrument will be presumed to have been timely executed if the date of acknowledgment and recordation support that presumption.

The third paragraph of the Standard involves inconsistencies in the recitals on instruments. Absent a peculiar significance of one of the dates, a proper sequence of formalities will be presumed notwithstanding such inconsistencies.

The comments following the Standard are helpful in putting the "date" issue in proper perspective. The date of execution is seen as a recital and presumptively correct, subject to rebuttal or correction. The same is true of the attestation and the acknowledgment. The only crucial date is the date of delivery, which is not even mentioned in the instrument.

F. TES 7.1 MARITAL INTERESTS: DEFINITION, APPLICABILITY OF STANDARDS; BAR OR PRESUMPTION OF THEIR NON-EXISTENCE

1. Standard (adopted 1947; last amended 1984)

7.1 Martial Interests: Definition; Applicability of Standards; Bar Or Presumption of Their Non-Existence

The term "Marital Interest", as used in this chapter, means the rights and restrictions placed by law upon an individual landowner's ability to convey or encumber the homestead and the protections afforded to the landowner's spouse therein.

Severed minerals cannot be impressed with homestead character and therefore, the standards contained in this chapter are inapplicable to instruments relating solely to previously severed mineral interests.

Marketability of Title is not impaired by the possibility of an outstanding marital interest in the spouse of any former owner whose title has passed by instrument or instruments which have been of record in the office of the county clerk of the county in which the property is located for not less than ten (10) years after the date of recording, where no legal action shall have been instituted during said ten (10) year period in any court of record, having jurisdiction, seeking to cancel, avoid or invalidate such instrument or instruments on the ground or grounds that the property constituted the homestead of the party or parties involved.

Authority: 16 O.S.A. § 4.

Comment: See Title Examination Standard 21.1 as to use of powers of attorney.

History: Adopted as A., October 31, 1947, 18 O.B.A.J. 1750 (1947); became 7 on renumbering in 1948, 19 O.B.A.J. 224 (1948). An amended standard, proposed by the 1970 Real Property Committee's Supplemental Report as Exhibit A, 41 O.B.A.J. 2676 (1970) was approved by the Real Property Section on December 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971). It substantially modifies the previous standard of the same number. The Comment was added on the recommendation of the 1983 Committee on Title Examination Standards, see Committee Report, 54 O.B.J. 2379 (1983), approval by Real Property Section, November 3, 1983 and adoption by House of Delegates, November 4, 1983.

The first two paragraphs were proposed as additions by the Report of the Title Examination Standards Committee, 55 O.B.J. 1871 (1984) and were approved by the Real Property Section, November 1, 1984 and adopted by the House of Delegates, November 2, 1984.

2. Background

Article XII §2 of the Oklahoma Constitution provides:

> The homestead of the family shall be, and is hereby protected from forced sale for the payments of debts, except for the purchase money therefor or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law; Provided, Nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein; nor prevent the sale thereof on foreclosure to satisfy any such mortgage. (emphasis added)

and 16 O.S. §4 provides:

> No deed, mortgage, or conveyance of real estate or any interest in real estate, other

than a lease for a period not to exceed one (1) year, shall be valid unless in writing and subscribed by the grantors. No deed, mortgage, or contract affecting the homestead exempt by law, except a lease for a period not exceeding one (1) year, shall be valid unless in writing and subscribed by both husband and wife, if both are living and not divorced, or legally separated, except as otherwise provided for by law. Nonjoinder of the spouse shall not invalidate the purchase of a home with mortgage loan insurance furnished by the Veteran's Administration or written contracts and real estate mortgages executed by the spouse of a person who is certified by the United States Department of Defense to be a prisoner of war or missing in action. A deed affecting the homestead shall be valid without the signature of the spouse of the grantor, and the spouse shall be deemed to have consented thereto, when said deed has been recorded in the office of the county clerk of the county in which the real estate is located for a period of ten (10) years prior to a date six (6) months after May 25, 1953, and thereafter when the same shall have been so recorded for a period of ten (10) years, and no action shall have been instituted within said time in any court of record having jurisdiction seeking to cancel, avoid, or invalidate such deed by reason of the alleged homestead character of the real estate at the time of such conveyance. (emphasis added)

It is well settled that no homestead interest can attach to a severed mineral interest. Therefore, it is unnecessary to have either a recital of marital status or a joinder of spouse on a mineral deed or mineral lease, if such mineral interest was previously severed from the surface interest.

3. Practicalities

Combined with Standard 7.2.

G. TES 7.2 MARITAL INTERESTS AND MARKETABLE TITLE

1. Standard (adopted 1983; last amended 1986)

7.2 Marital Interests and Marketable Title

Except as otherwise provided in Standard 7.1, no deed, mortgage or other conveyance by an individual grantor shall be approved as sufficient to vest marketable title in the grantee unless:

(a) the body of the instrument contains the grantor's recitation to the effect that the individual grantor is unmarried;

or

(b) an affidavit made and recorded pursuant to 16 O.S.A. § 82 recites that the individual grantor was unmarried at the date of such conveyance;

or

(c) the individual grantor's spouse, identified as such in the body of the instrument, subscribes the instrument as a grantor;

or

(d) the grantee is the spouse of the individual grantor and that fact is recited by the grantor in the body of the instrument.

Comment: There is no question that an instrument relating to the homestead is void unless subscribed by both husband and wife. The word "void" should be emphasized. Grenard v. McMahan, 441 P.2d 950 (Okla. 1968). It is also settled that husband and wife must execute the same instrument, separately executed separate instruments being both void, Thomas v. James, 84 Okla. 91, 202 P. 499 (1921). Joinder by husband and wife must be required in all cases due to the impossibility of ascertaining from the record whether the property was or was not homestead or whether the transaction is one of those specifically permitted by statute, see 16 O.S.A. §§ 4, 6, 7 and Okla. Const. art. XII, § 2. It is essential that the distinction between a valid conveyance and a conveyance vesting marketable title be made when consulting this standard. See Title Examination Standard 4.1.

Another rather settled point is that one may not rely upon recitations either in the instrument or in a separate affidavit, to the effect that the property was not in fact homestead. Such a recitation by the grantor may be strong evidence when the issue is litigated, but cannot be relied upon for the purpose of establishing marketability, Hensley v. Fletcher, 172 Okla. 19, 44 P.2d 63 (1935).

Although the distinction may seem tenuous, the examiner may rely upon the grantor's recitation to the effect that he is unmarried. This may have its foundation in Payne v. Allen, 178 Okla. 328, 62 P.2d 1227 (1936), wherein the Court in its syllabus said, "the recitation . . . . . is conclusive . . . . . in the absence of proof to the contrary". (Emphasis supplied.) Perhaps the recitation of one's marital status is a recital of that person's identity, see Title Examination Standard 5.3. Or perhaps this recitation must be relied upon due to the lack of any alternative.

Caveat: The recitation may not be relied upon if, upon "proper inquiry", the purchaser could have determined otherwise, Keel v. Jones, 413 P.2d 549 (Okla. 1966).

It is not clear whether or not the spouse of the individual owner/grantor must be named in the granting clause as a grantor. Until the matter is clarified, the title examiner must so require. The case of Melson v. Sneed, 188 Okla. 388, 109 P.2d 509 (1940), so "assumed" but specifically did not so "decide".

Definitions of the word "subscribe" may be found in various sources, but the cases seem to uphold or invalidate instruments because husband and wife did or did not "sign" or "join", without distinguishing between the two words or reconciling them with the word "subscribe". See Atkinson v. Barr, 428 P.2d 316 (Okla. 1967); Grenard v. McMahon, 441 P.2d 950 (Okla. 1968).

One may convey to his spouse without the grantee/spouse's joinder as a grantor, but prudence would dictate that the grantor/spouse identify himself in the body of the deed as the spouse of the grantee/spouse. This would appear to be a reliable recital and comparable with a recital by a grantor that he is unmarried. See Brooks v. Butler, 184 Okla. 414, 87 P.2d 1902 (1939) and Title Examination Standard 5.3.

History: Adopted, November 4, 1983 by House of Delegates on recommendation of the 1983 Committee on Title Examination Standards, 54 O.B.J. 2379-80 (1983), and approval of the Real Property Section, November 3, 1983. Section (b) added to the Standard by recommendation in the Report of the 1986 Title Examination Standards Committee, 57 O.B.J. 2677-78 (1986), approval of the Real Property Section, November 20, 1986 and adoption by the House of Delegates, November 21, 1986. See "Comment" to Standard 3.3.

2. Background

It is made clear in the Oklahoma Constitution and Statutes (quoted and cited above in the discussion of TES 7.1) that the marital homestead cannot be conveyed without the joinder of both spouses on the same instrument. In fact, a conveyance without such joinder is void according to case law in Oklahoma. Grenard v. McMahan, 441 P.2d 950 (Okla. 1968).

Since the homestead nature of a tract of land cannot be determined by any recordable means, other than a lawsuit, it is necessary to have a recital of marital status and joinder of spouse, if married, accompanying every conveyance, except for a conveyance of previously severed minerals. Therefore, from a title examination standpoint, the authority granted under 16 O.S. §13, which states:

> The husband or wife may convey, mortgage or make any contract relating to any real estate, other than the homestead, belonging to him or her, as the case may be, without being joined by the other in such conveyance, mortgage or contract,

is rendered useless. The provisions of 16 O.S. §§6 & 7 allowing conveyance of the homestead by one of the spouses if abandoned for a year, or if the non-joining spouse is incapacitated, are similarly useless, in the absence of a properly recorded court order.

However, there are three instances where the title examiner may encounter a conveyance without a joinder by both spouses. They are:

1. The grantor is not married (i.e., single, divorced or widowed);

2. The grantor failed to have the spouse join and the land was not homestead property when conveyed; and

3. The grantee is the "non-joining" spouse.

If the grantor is not married, he or she obviously cannot have their spouse join in the conveyance. While a recital in the conveyance by the grantor that the land is not "homestead" cannot be relied on for marketability purposes [Hensley v. Fletcher, 172 Okla. 19, 44 P.2d 63 (1935)], it is generally accepted that there is no alternative to relying on a recital of the grantor that he or she is unmarried. However, any person (other than a subsequent innocent purchaser) who fails to make reasonable inquiry is charged with notice of a non-joining spouse's claim [Keel v. Jones, 413 P.2d 549 (Okla. 1966)].

If the grantor simply failed to have the other spouse join in the conveyance, a corrective instrument must be executed by both spouses and filed of record.

If the grantee is the non-joining spouse, it is self-evident that it would be redundant for the non-joining spouse to join in a conveyance to himself or herself.

START Many spouses may not desire to be responsible for a general or limited warranty or for the other representations usually made in a conveyance, if the title to a parcel of land is owned solely by their spouse. Therefore, it might be appropriate for the party drafting the conveyance to modify the language to

limit the non-title holder's participation in a conveyance without representation or warranty their "homestead interest, if any."

3. Practicalities

The practical approach to TES 7.1 and 7.2 is simple. During the first ten years an instrument is recorded, close attention is given to potential homestead restrictions; after ten years, the problem completely disappears if no legal action has been instituted seeking to cancel, avoid or invalidate the conveyance. Any instrument which has been recorded less than ten years should be examined closely for the consideration of the marital interest. If the grantor, mortgagor, lessor, etc., owns a surface interest in the tract of land he is conveying, mortgaging, leasing, etc., his marital status should be noted and the instrument should be executed by his spouse if he is married. If there is a defect in this execution, it should be emphasized to your client that a correction deed or ratification of the prior instrument itself will be void unless the husband and wife execute the same instrument to correct the defective instrument.

The types of conveyances which are acceptable include the following:

a. conveyance executed by husband and wife with a recitation that they are husband and wife,
b. conveyance executed by John Doe with a recitation that John Doe is single or unmarried,
c. conveyance executed by John Doe without recitation followed by an affidavit properly executed and recorded, reciting the individual grantor was unmarried at the date of such conveyance,

d. conveyance where the grantee is the spouse of the individual grantor and that fact is recited by the grantor in the body of the instrument.

Particular situations which are not acceptable include the following:

a. conveyance from "Mary Smith, dealing in her sole and separate property,"
b. conveyance from "John Doe, a married man,"
c. conveyance from "John Doe, a married man, dealing in his sole and separate property,"
d. conveyance from "John Doe," with further recitation that the property is not the homestead of the grantor,
e. conveyance from "John Doe and Mary Doe," but it is not recited that they are husband and wife.

It is the situation where the grantor was aware of the possible homestead restriction and has included words on the instrument that the property "is not the homestead property" or "is the grantor's sole and separate property" that causes the most trouble for title examiners. Your requirement that the joinder of the spouse is necessary is usually not believed. However, the comment to TES 7.2 makes it clear that while such a recitation may be strong evidence when the issue is litigated, it cannot be relied upon for the purpose of establishing marketability.

As a practical matter, your attention is directed to the caveat regarding the grantor's recitation that he is unmarried. The caveat states, "The recitation may not be relied upon if, upon 'proper inquiry,' the purchaser could have determined otherwise, Keel v. Jones, 413 P.2d 549 (Okla. 1966)." If this caveat is cautioning the title examiner to do a "due diligence" inquiry

to determine if the grantor is in fact unmarried, subparagraphs A. and B. of TES 7.2 will lose their effectiveness. It more likely means that if the abstract itself includes evidence that the grantor was in fact married on the date of conveyance or the logical inference from other instruments was that the grantor was married, the examiner may not blindly rely upon an incorrect recitation.

H. TES 8.1 TERMINATION OF JOINT TENANCIES AND LIFE ESTATES

1. Standard (adopted 1981; last amended 1987)

8.1 TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES

In the event of the death of a life tenant or a joint tenant, the death is a fact which must have been established by one of the following methods and such showing in the abstract shall satisfy the rule on marketability.

A. NON-JUDICIAL TERMINATION OF JOINT TENANCY ESTATES.

Where a joint tenancy estate in real property was held only by a husband and wife, the death of one of the joint tenants and the termination of the joint tenancy thereby may have been evidenced, to the extent permitted by statute from time to time from and after August 16, 1974, by the filing, in the office of the county clerk in the county in which the joint tenancy property is located, of an affidavit made by the surviving joint tenant meeting the requirements of 58 O.S.A. §912 in effect at the date of such filing:

1. Affidavit filed prior to November 1, 1983. In the case of an affidavit filed prior to November 1, 1983, only a single tract of real property, any portion of which was held as homestead by husband and wife as joint tenants, could be the subject of the affidavit and the following must have been filed with the affidavit:

a. A certified copy of the certificate of death of the joint tenant issued by the State Department of Public Health of Oklahoma or the comparable agency of the place of the death of said joint tenant; and

b. Either:

i. Prior to October 1, 1975. Certification by the County Treasurer of the county wherein the property is located that all or a portion of the tract described was claimed as homestead by the affiant and the decedent in the year of decedent's death, and describing such real property and a complete list of all real property owned by decedent; or

ii. On or after October 1, 1975. Certification by the county assessor of the county wherein the property is located, that all or part of the tract described was allowed as homestead to the affiant and the decedent in the year of decedent's death; and

c. Either:

i. Prior to October 1, 1980. In the case of an affidavit filed before October 1, 1980, a waiver or release of the state estate tax lien, unless made unnecessary by the ten (10) year statute of limitations; or

ii. On or after October 1, 1980. In the case of an affidavit filed on or after October 1, 1980, if such property was included in an estate where taxes were due under the provisions of 68 O.S.A. §804, a waiver or release of the estate tax lien by the Oklahoma Tax Commission as to such deceased person and property unless made unnecessary by the ten (10) year statute of limitations; provided that, if no such taxes were due, then neither was required and the affidavit must so state, pursuant to 1980 Okla. Sess. Laws, ch. 286, §2 and 68 O.S.A. §815(d) effective October 1, 1980.

2. Affidavit filed on or after November 1, 1983 and prior to November 1, 1984. In the case of an affidavit filed on or after November 1, 1983, and prior to November 1, 1984, any real property which was held by husband and wife as joint tenants could be the subject of the affidavit and the following must have been filed with the affidavit:

a. A certified copy of the certificate of death of the joint tenant issued by the State Department of Health of Oklahoma or the comparable agency of the place of the death of said joint tenant; and,

b. If such property was included in an estate where taxes were due under the provisions of 68 O.S.A. §804, a waiver or release of the estate tax lien by the Oklahoma Tax Commission as to such deceased person and property unless made unnecessary by the ten (10) year statute of limitations; provided that, if such taxes were not due, the affidavit shall so state, pursuant to 1983 Okla. Sess. Laws, ch. 20, §1, effective November 1, 1983 and 68 O.S.A. §815(d).

3. Affidavit filed on or after November 1, 1984. In the case of an affidavit filed on or after November 1, 1984, any real property which was held by husband and wife as joint tenants could be the subject of the affidavit and the following must have been filed with the affidavit:

a. Either:

i. For an Affidavit filed prior to November 1, 1986. A certified copy of the certificate of death of the deceased joint tenant issued by the State Department of Health or the comparable agency of the place of death of said joint tenant; or

ii. For an Affidavit filed on or after November 1, 1986. A certified copy of the certificate of death of the joint tenant issued by the State Department of Public Health of Oklahoma or a court clerk as prescribed in 63 O.S.A. §1-307 or the comparable agency of the place of the death of said joint tenant, 58 O.S.A. §912(1) as amended, effective November 1, 1986; and

b. Either:

i. Where death occurred prior to November 1, 1984. A waiver or release by the Oklahoma Tax Commission of the estate tax lien must be filed with an affidavit which is filed on or after November 1, 1984, with respect to a joint tenant who died prior to November 1, 1984, unless such waiver or release is made unnecessary by the ten (10) year statute of limitations, 58 O.S.A. §912 & 68 O.S.A. §811(d), both as amended, effective November 1, 1984; or

ii. Where death occurred on or after November 1, 1984. No tax clearance documentation is required, and no recitation regarding estate tax liability need be contained in the affidavit.

Title 58 O.S.A. §912 is a procedural statute, and an affidavit filed pursuant thereto may be relied upon as evidence of the death of a joint tenant irrespective of the date of death if such statute is otherwise applicable, even though the death may have occurred prior to the effective date of 58 O.S.A. §912; provided that the merchantability of the title of the surviving spouse may be impaired by the estate tax lien under the circumstances noted in paragraph 3 b. i., above unless a waiver or release has been filed, if necessary.

B. JUDICIAL TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES.

In all other instances, the death is a fact which must be judicially determined by any of the following proceedings:

1. By proceeding in the district court as provided in 58 O.S.A. §911; or

2. In connection with an action brought in any court of record, where the court makes a valid judicial finding of death of the person having the interest as a life tenant or a joint tenant; or

3. With respect only to joint tenancy estates, if the estate of the decedent was probated on other property, by showing the letters testamentary or of administration, 60 O.S.A. §74.

A waiver or release of the estate tax lien as to such joint tenant or life tenant must be obtained with any of said proceedings, unless the district court in which the estate of the decedent was probated enters an order pursuant to 58 O.S.A. §282.1, effective October 1, 1980, adjudicating that there is no estate tax liability, or unless made unnecessary by the ten (10) year statute of limitations or by 68 O.S.A. §811(d), effective November 1, 1984.

Comment: 68 O.S.A. §811(d) was amended effective November 1, 1984. The pertinent amendment provides that no estate tax lien shall attach to any property passing to a surviving spouse, either through the estate of the deceased or by joint tenancy. The text of the statute does not clearly make it retroactive to deaths occurring prior to November 1, 1984, and should not be considered to be retroactive at this time. For this reason, it is necessary to obtain estate tax clearances where the deceased joint tenant died prior to November 1, 1984, even though 58 O.S.A. §912 as amended effective November 1, 1984, makes no such requirement. Such statute may be utilized, on or after November 1, 1984, together with the appropriate tax clearances, to terminate a joint tenancy where the deceased joint tenant died prior to November 1, 1984.

2. Background

At the instant of death of a joint tenant or life tenant there is not a transfer of title to the survivors or remaindermen. Instead, there is an instantaneous extinguishment of any claim of interest by the deceased or their estate against the subject interest. If title to the land is held in joint tenancy, or as a life estate, the fact that a joint tenant or life tenant has died can be determined by a court (i.e., 58 O.S. §911 or 60 O.S. §74).

In an effort to speed up the determination of death of a joint tenant (but not a life tenant) and to reduce the related expenses, an affidavit process has been established by the state legislature. Under this system, an affidavit from the surviving joint tenant -- with a legal description included -- is filed of record in the local land records.

Over the years, since the inception of this affidavit system, the ability to use an affidavit has expanded from the situation where the joint tenants are husband and wife and only one tract is involved which must be the homestead, to the stage where the affidavit can cover multiple tracts of homestead and non-homestead property as long as title was held by husband and wife.

The format of the Standard helps distinguish which requirements must be met over the years. By statute, the affidavit has had to have certain informational documents attached to

it before it would constitute satisfactory evidence of a joint tenant's death. These attachments have always included a certified copy of the death certificate. Through a certain date, you needed a certification of the homestead nature of the property by the local county treasurer. And through certain other dates you needed either a waiver of estate tax, release of estate tax or a self-serving recital of no estate tax being due. For deaths occurring on or after November 1, 1984, no estate tax can arise on joint tenancy property and, therefore, no documentation or self-serving recital concerning estate tax liability is needed thereafter.

The use of affidavits to render title marketable is a concept which made several members of the Title Examination Standards Committee of the OBA ("TES Committee") uncomfortable. However, TES 8.1 was approved in reliance on that portion of the express language of 58 O.S. §912 which provides:

> The filing of such documents shall constitute conclusive evidence of the death of such joint tenant and the termination of said joint tenancy. The title of such real estate shall be deemed merchantable unless otherwise defective.

The question has arisen whether anyone other than the surviving joint tenant can sign the subject affidavit. While there is not any case law in Oklahoma on point, the TES Committee has unofficially suggested that the statute should be interpreted literally with the result that an attorney-in-fact and a personal

I. TES 9.2 EXECUTION DEFECTS

1. Standard (adopted 1957; last amended 1987)

9.2 EXECUTION DEFECTS

Any corporation deed, mortgage or other instrument affecting real property which has been on record in the county clerk's office for ten (10) years or more and which is defective because of: (1) the failure of the proper corporate officer to sign; (2) the absence of the corporate seal; (3) the lack of an acknowledgment; or (4) any defect in the execution, acknowledgment, recording or certificate of recording, should be accepted without requirement, 16 O.S.A. §27a.

Such instruments recorded less than ten years must have the name of the corporation subscribed thereto either by an Attorney in Fact; or by the President or a Vice-President, and, unless executed by an Attorney in Fact, must be attested by the Secretary, an Assistant Secretary or a Clerk of such corporation, or by the Secretary, an Assistant Secretary, Clerk, Cashier or Assistant Cashier in case of a bank, with the corporate seal attached, 16 O.S.A. §§91-94, 6 O.S.A. §414(F), 6 O.S.A. §104, and 12 U.S.C.A. §24(5)&(6). The Power of Attorney authorizing an Attorney in Fact to act on behalf of a corporation must be executed and attested in the same manner as a deed or other conveyance, and must be filed in the office of the County Clerk before the executed instrument becomes effective; provided, however, that any Power of Attorney promulgated by an agency of the Government of the United States shall be deemed sufficiently recorded for purposes of this standard if the promulgation thereof shall be published in the Federal Registry of the Government of the United States and any instrument executed pursuant to said Power of Attorney recites the specific reference to said publication, 16 O.S.A. §20. A showing of the authority of the Board of Directors to execute such instrument is not necessary, 18 O.S.A. §§1015, 1016(4) & 1018.

Comment: It is immaterial from an examiner's standpoint that the corporation acquired real estate by an ultra vires act. R. & C. Patton, Titles §401 (2d ed. 1957).

Every Oklahoma corporation has authority to acquire, encumber and sell property subject only to the limitations in Okla. Const. art. XXII, §2 and 18 O.S.A. §1020. See 18 O.S.A. §1016(4).

Any corporation, foreign or domestic, which has conveyed real property by instrument signed, acknowledged, attested and sealed as required in 16 O.S.A. §§93-95, and which has received the consideration therefor, cannot assert as a defense its lack of authority to sell said property, 18 O.S.A. §1018, 16 O.S.A. §92 and 16 O.S.A. §11.

An instrument executed by a corporation with its seal attached prior to November 1, 1986, is prima facie evidence that such instrument was the act of the corporation, that it was executed and signed by persons who were its officers or agents acting by authority of the board of directors and that the seal is the corporate seal and was affixed by authorized persons, 1947 Okla. Sess. Laws, p.185, §242. A corporate instrument executed, attested, sealed and acknowledged in proper form on or after November 1, 1986, should be presumed, in the absence of actual or constructive knowledge to the contrary, to have been duly authorized, signed by authorized officers and affixed with the genuine seal by proper authority, 18 O.S.A. §1018, R. & C. Patton, Titles §§403 and 404 (2d ed. 1957), Flick, Abstract and Title Practice §1292 (2d ed. 1958).

Comment: The Legislature's repeal in 1986 of 18 O.S.A. 1981 §1.242 as a part of the complete revision of Title 18 does not appear to have been intended to require thereafter proof of record of corporate and officer authority, etc.

A dissolved domestic corporation continues to exist for three years (or a longer period if directed by a district court) for the purpose of winding up its affairs, 18 O.S.A. §1099.

Comment: See Title Examination Standard 6.5 as to documents executed outside the State of Oklahoma.

2. Background

If an instrument relating to real property is executed on behalf of a corporation, there are certain formalities to be observed for the conveyance to be valid and recordable.

By statute (i.e., 16 O.S. §93) the execution (i.e., the signing) must be by an attorney-in-fact or by a president or vice-president. Although the practice varies around the state, it is generally agreed that a person holding the title of "Senior Vice-President" or "Executive Vice-President" is the equivalent of a president or vice-president. It is also generally agreed that an "Assistant Vice-President" is not equivalent to a president or vice-president.

By statute (i.e, 16 O.S. §94), unless the instrument is executed by an attorney-in-fact, the attestation must be by a secretary, assistant secretary or clerk of the corporation, or by a secretary, assistant secretary, clerk, cashier or assistant cashier in the case of a bank. The corporate seal must also be attached.

Some practicing attorneys hold that a corporate conveyance must be acknowledged for it to be valid between the parties and to be recordable. Since documents can not be accepted

-- by statute -- by the county clerk for filing without an acknowledgment, this omission is not likely to occur (16 O.S. §§15, 92 & 95 and see TES 6.1 above).

One of the 1987 changes involved changing the text of the free-standing paragraph concerning the prima facie nature of an instrument which has a corporate seal affixed. Prior to November 1, 1986, the affixing of such a seal was prima facie evidence of an authority but after that date such execution is only "presumed" to be an authorized act. The other 1987 change involved the addition of a clarifying parenthetical clause stating "(or a longer period if directed by a district court)".

3. Practicalities

This is another Standard which allows your title to improve with the passage of time. Certain execution defects for instruments which have been on record for more than ten years can be accepted without requirement. These defects include the failure of the proper corporate officer to sign, the absence of the corporate seal, the lack of acknowledgment or any defect in the execution, acknowledgment, recording or certificate of recording. If the instrument has been on record for less than ten years, it must adhere strictly to the requirements for execution, attestation, and acknowledgment. Instruments which are defective should be corrected and properly recorded.

A special problem occurs with the execution by an attorney-in-fact. First of all, a power of attorney must be exe-

cuted and attested in the same manner as any other deed or conveyance and must be filed in the office of the county clerk before the executed instrument becomes effective. There is not a ten year presumption of validity for an instrument executed by an attorney-in-fact where the power of attorney is not recorded in the county records. There is a minority view that not only must the power of attorney be recorded before the executed instrument becomes effective, but it also must be recorded prior to the executed instrument being recorded. The minority view stands for the proposition that there is no relation back and the only proper cure is to have the instrument itself recorded again after the power of attorney is recorded.

Finally, as discussed in Part 2 above, there are some attorneys who believe that a corporate conveyance must be acknowledged for it to be valid even between the parties. The impact of this will affect operating agreements which typically are not executed and acknowledged in the same manner as a corporate deed.

J. TES 9.4 RECITAL OF IDENTITY OR SUCCESSORSHIP

1. Standard (adopted 1980; last amended 1987)

9.4 RECITAL OF IDENTITY OR SUCCESSORSHIP

Absent the recording of the certificate required by 18 O.S.A. §1001, a recital of identity, contained in a title document of record properly executed, attested and sealed by a corporation whose identity is recited or which recites that it is the successor by merger, corporate change of name, or was formerly known by another name may be relied upon unless there is some reason disclosed of record to doubt the truth of the recital.

Authority: 18 O.S.A. §1001 (as amended effective November 1, 1987) & §1088.

Comment: While there seems to be no exact precedent for this standard, it is justified as a parallel to Standard 5.3 and as an extension of Standard 9.1.

2. Background

The Oklahoma Statutes make it clear in 18 O.S. §1.167 that in the event of a merger or consolidation of corporations:

> [a]ll rights, property and assets of every kind and character belonging to any or each of the constituent corporations shall be deemed to be transferred to and vested in such surviving or resulting corporation without any further act or deed whatsoever, ... neither the rights of creditors nor any liens upon the property of any such corporations shall be impaired by such merger or consolidation.

This language was kept in substantially the same form in 18 O.S. §1088 when the General Corporation Act was enacted as of November 1, 1986.

There is no express statutory authority allowing a title examiner to rely on a self-serving recital of successorship in a conveyance. It should be noted that certificates of merger from secretaries of state have often been encountered in abstracts and

relied upon by examiners in prior years; however, there is apparently no legal authority allowing an examiner to rely on this certificate giving constructive notice to third parties. However, authority of sorts was granted for the filing of and reliance on certain merger documents, in particular, (1) the affidavit statute was passed in 1985 allowing the filing of affidavits covering the "history of the organization of corporations" and (2) a recent amendment was made, effective November 1, 1987, to the General Business Corporation Act whereby a certificate of merger or consolidation must be filed in the local land records where the surviving or resulting corporation has title to real property (see 18 O.S. §1144).

The 1987 change to this Standard was made by adding an introductory clause stating "Absent the recording of the certificate required by 18 O.S.A. §1001 [really §1144]," to reflect this certificate being filed pursuant to 18 O.S. §1144.

3. Practicalities

This Standard is helpful to the examiner in allowing him to rely upon the recital of identity of a corporate successor by merger or corporate change of name in dealing with corporate conveyances. The only warning is that it may be relied upon unless there is some reason disclosed of record to doubt the truth of the recital. Conveyances which make a recital of identity or successorship can make the opinion less cluttered by a long list of presumptions of corporate identities.

K. TES 10.1 CONVEYANCES TO AND BY PARTNERS

1. Standard (adopted 1946; last amended 1966)

10.1 Conveyances to and by Partnerships

Under the Uniform Partnership Act, enacted by the 1955 Legislature, which became effective on June 3, 1955, a partnership constitutes a separate entity authorized to take, hold and convey real estate, 54 O.S.A. §§ 208-210. H.B. 698, enacted by the 1965 Legislature, amending Sections 208 (3) and 210 (1), validates conveyances to and from partnerships executed prior to June 3, 1955, unless such conveyances are invalid for reasons other than lack of legal capacity or because the partnership was not at the time a legal entity.

Such conveyances to a partnership using the partnership firm or trade name as grantee of real property or any interest therein, and conveyances by a partnership in the partnership firm or trade name as grantor of real property or any interest therein held in the partnership firm or trade name, should not be rejected or questioned on the basis that a partnership was not a legal entity having capacity to take or convey title to real property or an interest therein.

Authorities: 54 O.S.A. §§ 208-210.

History: Adopted as 17, November 16, 1946, 17 O.B.A.J. 1729 (1946), printed, *id.* at 1753; became 19 on renumbering in 1948, 19 O.B.A.J. 223, 226 (1948); amended December 8, 1955, 27 O.B.A.J. 176 (1956). Substantially amended December 2, 1965. Resolution No. 8, 1965 Real Property Committee, 36 O.B.A.J. 2094 & 2182 (1965), and Exhibit E, *id.* at 2098 & 2186. Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437, 438 (1966).

2. Background

The legislature has the authority to define whether a fictional "person", such as a corporation, can be treated as a real person. Until June 3, 1955, a partnership was not a separate entity but instead was a group of individuals holding title to real property as individual tenants in common, Sanguine v. Wallace, 234 P.2d 394,397 (Okla. 1951).

After June 3, 1955, a partnership can and must hold title in the name of the partnership itself. Any partner can be relied on to validly convey or encumber the title as the agent of all the other partners, absent express restrictions on such authority being filed of record (see 54 O.S. §§208-210).

3. Practicalities

This Standard validates any conveyance to a partnership both before and after the effective date of the statute.

L. TES 10.2 IDENTITY OF PARTNERS OF FICTITIOUS NAME PARTNERSHIP

1. Standard (adopted 1946; last amended 1986)

10.2 Identity of Partners of Fictitious Name Partnership

Identity of partners of fictitious name partnership may be established by reference to the latest certificate of fictitious name partnership filed in the office of the county clerk in the county in which the land is located as of the date of conveyance in the partnership name. If the certificate of fictitious name has not been filed in the county where the land is located, a certified copy of the certificate of fictitious name partnership filed in the office of the county clerk of the county of the principal place of business of the partnership, or a copy of the current articles of partnership, should be examined.

Authorities: 54 O.S.A. §§81-86.

History: Adopted as 17, November 16, 1946, 17 O.B.A.J. 1729 (1946), printed, *id.* at 1753; became 19 on renumbering in 1948, 19 O.B.A.J. 223, 226 (1948); amended December 8, 1955, 27 O.B.A.J. 176 (1956). Substantially amended December 2, 1965. Resolution No. 8, 1965 Real Property Committee, 36 O.B.A.J. 2094 & 2182 (1965), and Exhibit E, id. at 2098 & 2186. Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437, 438 (1966). Further amendments proposed by the 1985 Report of the Title Examination Standards Committee, 56 O.B.J. 2537 (1985), proposal amended by Real Property Section, November 14, 1985 and adopted by House of Delegates, as amended by the Section, November 15, 1985, 86 O.B.J. 5 (1986).

2. Background

The names of the members of a Fictitious Name Partnership are by definition not disclosed by the name itself. Therefore, the title examiner is unable to determine whether the person signing and acknowledging a conveyancing instrument, covering partnership real property, is a member of the partnership.

The acknowledgment for an individual as an individual must be based on "personal knowledge" or "satisfactory evidence" that "the person appearing before the officer and making the acknowledgment is the person whose true signature is on the instrument" (49 O.S. §111). However, it is inadequate to know that "Sally Smith" is really "Sally Smith," if the real question is whether "Sally Smith" is a current general partner of "XYZ, a partnership."

Title 54, O.S. §81 provides in part:

> [e]very partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file for recording with the county clerk of the county or subdivision in which its principal place of business is stated, a certificate, stating the names in full of all the members of such partnership, and their places of residence, together with proof of publication ...

Any Fictitious Name Partnership failing to make such a filing and publication cannot maintain any lawsuit concerning an account or contract entered into in the name of the partnership until such filing and publication is completed.

If this type of partnership holds title to real property outside the county where its principal place of business is located, and no certificate has been filed in the county where the property is located, the title examiner will need to get a copy of such a certificate from the county clerk where the business is located or get a copy of the then current articles of partnership from the partnership itself, identifying the names of the general partners.

3. Practicalities

This Standard is useful in advising your client where to find the identity of the partners of a Fictitious Name Partnership when such identity is important to the marketability of title.

M. TES 12.5 MONEY JUDGMENTS FILED AGAINST AN OIL AND GAS LEASEHOLD INTEREST

1. Standard (adopted 1986; no amendments)

12.5 Money Judgments Filed Against An Oil and Gas Leasehold Interest

The interest vested in the owner of an oil and gas leasehold estate is not "real estate" within the meaning of 12 O.S.A. § 706; therefore, a money judgment filed in the office of the county clerk of the county in which the oil and gas leasehold is located does not create a lien on said oil and gas leasehold.

Authorities: First National Bank of Healdton v. Dunlap, Okla. 254 P. 729 (1927); Hinds v. Phillips Petroleum Company, 591 P. 2d 697 (Okla. 1979).

History: This Standard was recommended by the 1986 Report of the Title Examination Standards Committee, 57 O.B.J. 2677, 2682 (1986). It was approved by the Real Property Section, November 20, 1986 and adopted by the House of Delegates, November 21, 1986

2. Background

The Oklahoma Supreme Court has held that in regard to the term "real estate" used in §690 C.O.S. 1921 (now 12 O.S. §706):

> But the statute [§690 C.O.S. 1921] provides that the judgment creditor shall have a lien upon "real estate" owned by the judgment debtor in the county. The plaintiff in error would have this court go to the extent of holding that all and every kind of estate recognized in the law, which one, individual or corporate, may have in real property is itself real estate within the meaning of said section. While unquestionably such an oil and gas lease creates an interest or an estate in the realty, that interest or estate is not "real estate" in the sense in which the said section 690, supra, uses this terminology. It would unquestionably be within the power of the legislative body to make a judgment a lien upon every conceivable estate recognized by the law as capable of being owned by the natural as well as corporate persons. But the statute relied upon as fixing the lien upon the interest of the defendant Dunlap in the realty created by the oil and gas lease does not go to that extent.

First National Bank of Healdton v. Dunlap, 254 P. 279,290 (Okla. 1927).

Title 12 O.S. §706(A), using the same term "real estate" without further definition, provides:

> A. Judgments of courts of record of this state and of the United States shall be liens on the real estate of the judgment debtor within a county after a certified copy of such judgment has been filed in the office of the county clerk in that county. No judgment, whether rendered by a court of the state or of the United States, shall be a lien on the real estate of a judgment debtor in any county until it has been filed in this manner. Execution shall be issued only from the court in which the judgment is rendered.

In 1979, the Oklahoma Supreme Court cited and then summarized First National Bank as follows: "A judgment lien will not attach to an oil and gas lease." Hinds v. Phillips Petroleum Co., 591 P.2d 697,699n.5 (Okla. 1979).

3. Practicalities

This Standard which was adopted in 1986 brought the cases cited above into full view of title examiners. It is well settled that a money judgment filed with the county clerk does not create a lien on an oil and gas leasehold. It is not necessary, therefore, to use the same approach against a leasehold estate as would be used against a surface or mineral interest owner in the property. Until an actual execution is made on the leasehold estate, the estate could be sold to an owner with knowledge of the money judgment prior to the institution of an execution for sale. This is particularly useful in

the Purchase Opinion, where a money judgment is filed against the seller's name.

N. TES 13.8 UNENFORCEABLE MORTGAGES AND MARKETABLE TITLE

1. Standard (adopted 1980; last amended 1986)

13.8 Unenforceable Mortgages And Marketable Title

A. No mortgage, contract for deed or deed of trust barred under the provisions of 46 O.S.A. § 301 shall constitute a defect in determining marketable record title.

B. A mortgage, contract for deed or deed of trust showing on its face that it secures a debt payable on demand shall be deemed to be due on the date of its execution. Thus, the date of execution shall be deemed to be "the date of the last maturing obligation" for the purpose of 46 O.S.A. § 301, unless an extension has been filed of record pursuant to such statute.

Authority: 12A O.S.A. §§ 3-122(2).

History: The Standard was recommended by the 1980 Title Examination Standards Committee, 51 O.B.J. 2726, 2727 (1980). It was approved by the Real Property Section, December 3, 1980 and adopted by the House of Delegates, December 5, 1980. The second paragraph of the Standard was recommended by the Report of the 1986 Title Examination Standards Committee, 57 O.B.J. 2677, 2682 (1986). It was approved by the Real Property Section, November 20, 1986 and adopted by the House of Delegates, November 21, 1986.

2. Background

In order to avoid costly legal actions to extinguish ancient but unreleased mortgages,the legislature enacted 46 O.S. §301. Absent contrary notice as provided in the statute, this statute allows title examiners to ignore recorded mortgages with expressed maturity dates set out on their faces if they are over ten years past such maturity date. Recorded mortgages with no expressed maturity date can be ignored if they have been recorded for over thirty years at the time of examination.

A question by a title examiner about the extinguishment date for mortgages relating to "demand notes" under 46 O.S. §301 led to a discussion of what date is "the date of the last maturing obligation" under that statute. 12 O.S. §122(1)(b) provides:

> (1) A cause of action against a maker or an acceptor accrues:
>
> * * *
>
> (b) in the case of a demand instrument upon its date or, if no date is stated, on the date of issue.

Therefore, the Standard was revised to show a mortgage relating to a demand note being extinguished ten years after its execution date.

3. Practicalities

This Standard is probably used in a practical sense more than any other Standard. A base abstract will normally include a patent, a few deeds, some oil and gas leases, an easement or two and many mortgages and releases with many potential defects in relation thereto. According to 46 O.S. §301 many of these mortgages will be unenforceable.

One cautionary statement is necessary. Old mortgages are usually shown only in abstracted versions but the due date is not shown, although it is not stated that the due date is not shown on the actual instrument. For example, if you examine an abstracted version of a 1955 mortgage and no due date is shown by the abstracter, are you sure that the abstracter would have included a due date of 1985? If the 1955 mortgage does not contain a due date, the mortgage may be ignored in 1985. If the due date of 1985 appears on the instrument but is not shown by the abstracter, you could not ignore this instrument until 1995 unless you independently acquire a copy of the mortgage and determine the due date or absence thereof.

O. TES 18.1 - 18.6 SIMPLIFICATION OF LAND TITLES ACT

1. Standard (adopted 1962; last amended 1983)

18.1 Remedial Effect

The Simplification of Land Titles Act is remedial in character and should be relied upon with respect to such claims or imperfections of title as fall within its scope.

Authorities: Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941); Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800, 71 A.L.R. 2d 816 (1957); L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 271 (1960); P. Basye, Clearing Land Titles § 374 (1953), & § 182 (1962 Pock. Part); R. & C. Patton, Titles § 563 (2d ed. 1957); Ashabranner, *An Introduction to Oklahoma's First Comprehensive Land Title Simplification Law*, 14 Okla. L. Rev. 516 (1961).

Comment: (a) The Simplification of Land Titles Act is similar to a recording statute. It is similar to the marketable title acts adopted in Michigan, Minnesota, Iowa and other states, which have been held constitutional on the grounds that the legislature which has the power to pass recording statutes originally, can amend or alter those statutes and require recording or the filing of a notice of claim to give notice of existing interests, and can extinguish claims of those who fail to re-record, Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941), Wichelman v. Messner, 250 Minn. 88, 83 N.W. 2d 800, 71 A.L.R.2d 816 (1957), L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation, 271 (1960), P. Basye, Clearing Land Titles, § 374 (1953), & § 186 (2d ed. 1970), R. & C. Patton, Titles, §563 (2d ed. 1957). In many situations the Simplification Act operates against defects made in the past by parties trying to complete the transaction correctly but who failed to do so in every detail. It will give effect to the intentions of the parties which were bona fide. Usually a full consideration was paid. To this extent the results will be those of a curative statute. A similar curative statute in Oklahoma, 16 O.S.A. § 4, has been held constitutional. Saak v. Hicks, 321 P.2d 425 (Okla. 1958). In a few situations the Act will operate against defects considered jurisdictional. In the past a statute of limitations with its requirements of adverse possession followed by a suit to quiet title was considered necessary to eliminate jurisdictional defects. The Simplification Act provides a new and additional method by invalidating the claim and creating marketable title unless claimant files notice of claim within the time provided in the act (or is in actual possession of the land). Since the Act protects the rights of claimants in actual possession as against a purchaser, the reasoning in Williams vs. Bailey 268 P.2d 868 (Okla. 1954), reading a requirement for adverse possession into the tax recording statute, is not applicable.

(b) Where a seller does not have a marketable title due to defects for which the Act affords protection to a "purchaser for value," and no notice has been filed as required by the Act, the attorney for the purchaser may advise the purchaser that a purchase for value will afford protection of the Act and that such a purchaser will acquire a valid and marketable title, provided no one is in possession claiming adversely to the seller.

History: The 1962 Real Property Committee Report recommended the adoption of this standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2162. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.

18.2 Protection Afforded by the Act

"The Simplification of Land Titles Act" protects any purchaser for value, with or without actual or constructive notice, from one claiming under a conveyance or decree recorded, or entered for ten (10) years or more in the county as against adverse claims arising out of:

(a) (1) Conveyances of incompetent persons unless the county or court records reflect a determination of incompetency or the appointment of a guardian, (2) corporate conveyances to an officer without authority, (3) conveyances executed under recorded power of attorney which has terminated for reasons not shown in the county records, (4) nondelivery of a conveyance;

(b) Guardian's, executor's, or administrator's conveyances approved or confirmed by the court as against (1) named wards, (2) the State of Oklahoma, or any other person claiming under the estate of a named decedent, the heirs, devisees, representatives, successors, assigns or creditors;

(c) Decrees of distribution or partition of a decedent's estate as against the estates of decedents, the heirs, devisees, successors, assigns or creditors. For decrees of distribution or partition which cover land in a county other than the county in which such decrees are entered and recorded, 16 O.S.A. § 62(c) (2) does not require that they also be recorded in the county in which the land is located;

(d) (1) Sheriff's or marshal's deeds executed pursuant to an order of court having jurisdiction over the land, (2) final judgments of courts determining and adjudicating ownership of land or partitioning same, (3) receiver's conveyances executed pursuant to an order of any court having jurisdiction, (4) trustee's conveyances referring to a trust agreement or named beneficiaries or indicating a trust where the agreement is not of record, (5) certificate tax deeds or resale tax deeds executed by the county treasurer, as against any person or the heirs, devisees, personal representatives, successors or assigns named as a defendant in the judgment preceding

the sheriff's or marshal's deed, or determining and adjudicating ownership of or partitioning land, or settlor, trustee or beneficiary of a trust, and owners or claimants of land subject to tax deeds, unless claimant is in possession of the land, either personally or by a tenant, or files a notice of claim prior to such purchase, or within "one year from October 27, 1961, the effective date of 16 O.S.A. §§ 61-66 or from October 1, 1973, the effective date of 16 O.S.A. § 62 as amended in 1973." The State of Oklahoma and its political subdivisions or a public service corporation or transmission company with facilities installed on, over, across or under the land are deemed to be in possession.

Authorities: 16 O.S.A. §§ 62 & 66.

History: The 1962 Real Property Committee Report recommended the adoption of this standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2163. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.

The 1980 Title Examination Standards Committee recommended changes in the Standard to reflect the broadening effect made in legislative changes of 1973 and 16 O.S.A. § 62, 51 O.B.J. 2726, 2728. The Real Property Section on December 3, 1980 made some changes in style but also deleted the word "county" before "court records" in (a) (1) and added the last sentence in (c). As amended the standard was approved by the Real Property Section, December 3, 1980 and adopted by the House of Delegates, December 5, 1980.

18.3 Purchaser for Value

"Purchaser for value" within the meaning of the Simplification of Land Titles Act, refers to one who has paid value in money or money's worth. It does not refer to a gift or transfer involving a nominal consideration.

Authorities: Noe v. Smith, 67 Okla. 211, 169 P. 1108, L.R.A. 1918C, 435 (1917); Exchange Bank of Perry v. Nichols, 196 Okla., 283, 164 P.2d 867 (1945).

Comment: The title acquired by a "purchaser for value" within the meaning of the Simplification of Land Titles Act will descend or may be devised or transferred without involving "value" and without loss of the benefits of the act.

History: The 1962 Real Property Committee Report recommended the adoption of this standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2164. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.

18.4 Conveyance of Record

"Conveyance of record" within the meaning of the Simplification of Land Titles Act includes a recorded warranty deed, deed, quit claim deed, mineral deed, mortgage, lease, oil and gas lease, contract of sale, easement, or right-of-way deed or agreement.

Authority: 16 O.S.A. § 62(a).

Comment: The definition of a conveyance of record should not be less than the definition of an interest in real estate in 16 O.S.A. § 62(a).

History: The 1962 Real Property Committee Report recommended the adoption of this standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2162. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.

18.5 Effective Date of the Act

The Simplification of Land Titles Act became effective October 27, 1961. Notices under the Act required to be filed within one (1) year from the effective date of the act must be filed for record in the county clerk's office in the county or counties where the land is situated on or before October 26, 1962.

Authorities: 16 O.S.A. §§ 62 & 63.

Comment: An adverse claimant may avoid the effects of the act by being in possession of the land, either personally or by tenant, or by filing the notice of claim required in Section 63, within ten years of the recording of the conveyance, or entry (or recording) of the decree under which the claim of valid and marketable title is to be made, or within one year of the effective date of the Act, whichever date occurs last. The filing of the notice of claim takes the interest or claim out from under the operation of the Act.

History: The 1962 Real Property Committee Report recommended the adoption of this standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2164. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.

18.6 Abstracting

Abstracting relating to court proceedings under Simplification of Land Titles Act, 16 O.S.A. § 62(b), (c), & (d), when the instruments have been entered or recorded for ten (10) years or more, as provided in the statute, shall be considered sufficient when there is shown the following in the abstract:

(a) In sales by guardians, executors or administrators, the deed and order confirming the sale.

(b) In probate and partition proceedings in district court, the final decree and estate tax clearance unless not required by 58 O.S.A. § 912(3) or 68 O.S.A. § 815(d) or unless the estate tax lien is barred.

(c) In general jurisdiction court sales under execution, the petition and other instruments, if any, showing defendants sued, the service upon defendants or their entry of appearance, the judgment, the deed and the court order directing the delivery thereof.

(d) In general jurisdiction court partitions, or adjudications of ownership, the petition and other instruments, if any, showing defendants sued, the service upon defendants or their entry of appearance, the final judgment, any deed on partition, and any court order directing the delivery thereof.

The abstractor can make in substance the following notation: "other proceedings herein omitted by reason of 16 O.S.A. § 61, et seq., and Title Examination Standards Chapter 18."

Authority: 16 O.S.A. § 62(a), (c) & (d).

Comments: The foregoing will disclose all showing needed under the applicable statutory provisions and the standards in this chapter.

Caveat: If the final decree is incomplete, uncertain, vague or ambiguous, the same is subject to Judicial interpretation notwithstanding the rule that decree of distribution of court having jurisdiction of settlement of testator's estate entered after due notice and hearing is conclusive in absence of fraud, mistake or collusion as to the rights of the parties interested in the estate to all portions of the estate thereby ordered and capable of being then distributed under the Will unless reversed or modified on appeal and such decree is not subject to collateral attack. In case the final decree is incomplete, uncertain, vague or ambiguous, the title examiner is justified in requiring a full transcript of such proceedings.

History: Adopted, December, 1964. Printed as Proposal No. 5 of the 1964 Real Property Committee, 35 O.B.A.J. 2045 (1964) and see Exhibit E, *id.* at 2050-51. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit C, 41 O.B.A.J. 2676-77 (1970), approved by the Real Property Section on December 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), a short paragraph was dropped from "Comments". Its sense was carried over and expanded into the "Caveat" which was added by the same action. The 1983 Report of the Title Examination Standards Committee recommended substantial change in "(b) of the standard, 54 O.B.J. 2379, 2383 (1983). The recommendation was approved by the Real Property Section, November 3, 1983 and adopted by the House of Delegates November 4, 1983.

2. Background

The Simplification of Land Titles Act allows the title examiner to ignore certain record title defects if they have been of record at least ten years.

The Act protects any purchaser for value (not as a gift or for a nominal consideration) even with actual or constructive notice of any defect listed in TES 18.2 above.

The applicability of the Act to severed mineral interests has been discussed but not decided in an Oklahoma Court of Appeals case which was modified and then withdrawn from publication. Clark v. Powell, 52 OBJ 2584 (Okla.App. 1981); 53 OBJ 879 (Okla.App. 1982); 53 OBJ 738 (Okla.App. 1982); and 53 OBJ 1356 (Okla.App. 1982).

The facts in the Clark case involved the application of the Act to validating a 1937 probate decree and a 1938 quiet title suit which covered both the surface and all minerals. A previous deed leading up to the probate decree reserved a 1/3 mineral interest in one of three children. The Court of Appeals said:

> The two judgments relied upon by appellants are, on their face, the type of muniment which ordinarily would qualify for the protection contemplated by the Act. However, we hold the Act does not apply to the facts of this case for several reasons.

53 OBJ 738,739 (Okla.App. 1982), and then the Court of Appeals went on to hold that the Act did not apply to the facts because:

a. The 1/3 mineral interest was a severed mineral interest and thereby free of the operation of the Act,
b. The probate court had no jurisdiction over interests not held by the deceased at the time of death, and
c. The quiet title suit court had no jurisdiction over the owner of the 1/3 severed mineral interest because it was a default judgment (albeit with notice) and no allegations of adverse possession of the minerals were alleged.

The Court of Appeals also said, in regard to the parties attempting to rely on the Act, "None are 'purchasers for value' within the meaning of the Act."

It should be kept in mind that this opinion was allowed to stand but was withdrawn from publication, which might mean the Oklahoma Supreme Court agreed with the result but not necessarily the reasoning.

Therefore, one can conclude that before this Act can apply to surface or minerals, severed or not, there must be an intervening "purchaser for value."

3. Practicalities

The most practical use of this Standard involves final decrees or decrees of distribution which have been recorded for more than ten years. If a final decree is recorded for less than ten years, you should require the examination of the full probate or administration proceedings before reliance on the final decree. At the anniversary of the tenth year of the final decree being recorded, TES 18 allows the examiner to rely on the validity of the final decree assuming that the other aspects of the statutes are met.

One ironical implication is that the oil and gas lessee may be protected although his lessor is not protected if that lessor is not a purchaser for value. The lessee asserts the marketability of his lease but may suspend the payment of proceeds to the lessor of that lease.

TES 18 is also helpful in examining other court decrees that have been recorded more than ten years. The title examiner must be careful that the adverse claimant is a named defendant to the court action and that there is an intervening purchaser for value.

P. TES 19.1 - 19.13 MARKETABLE RECORD TITLE ACT

1. Standard (adopted 1964; last amended 1982)

19.1 Remedial Effect

The Marketable Record Title Act is remedial in character and should be relied upon as a cure or remedy for such imperfections of title as fall within its scope.

Authorities: Marketable Record Title Act, 16 O.S.A. §§ 71-80; L. Simes & C. Taylor, Model Title Standards, Standard 4.1 at 24 (1960); P. Basye, Clearing Land Titles §§ 186 & 374 (2d ed. 1970); R. & C. Patton, Titles § 563 (2d ed. 1957); L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 253 (1960); L. Simes, *The Improvement of Conveyancing: Recent Developments*, 34 O.B.A.J. 2357 (1963), l.c. p. 2363; "Comment," Oklahoma Title Standard, 18.1. The following cases sustain the constitutionality of marketable title acts: Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941); Wichelman v. Messner, 250 Minn. 88, 83 N.W. 2d 800 (1957); Annot., 71 A.L.R. 2d 846 (1960); Opinion No. 67-444 of the Attorney General of Oklahoma, dated March 21, 1968, 39 O.B.A.J. 593-595 (1968).

Similar standards: Ill., 22; Iowa, 10.1; Mich., 1.1; Minn., 61; Nebr., 42; N. D. 1.13; S. D., 34; Wis. 4.

Caveat: Whether or not the provisions of the Marketable Record Title Act may be relied upon to cure or remedy such imperfections of title as fall within its scope, which imperfections occurred or arose during the time title to the land was in a tribe of Indians or held in trust by the United States for a tribe of Indians or a member or members thereof, or was restricted against alienation by treaty or by act of Congress, is a matter for determination by Congress or by a federal court in a case to which the United States is properly made a party. Until such determination, the Marketable Record Title Act should not be relied upon to cure or remedy such imperfections. See: Section 1, Oklahoma Enabling Act, § 134 Stat. 267 (1906); Okla. Const., art. I, § 3; W. Semple, Oklahoma Indian Land Titles, § 53 (1952). However, it is possible that the federal courts will consider the Marketable Title Act to be a statute of limitations within the meaning of the Act of April 12, 1926 with respect to the Five Civilized Tribes.

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2052. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). Last sentence of "Caveat" added December 2, 1965. Resolution No. 3, 1965 Real Property Committee, 36 O.B.A.J. 2094 & 2182 (1965). Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437 (1966). A.L.R. citation added to Authorities, December 3, 1966. Resolution No. 3, 1966 Real Property Committee, 37 O.B.A.J. 2382, 2383 (1966) and adopted by House of Delegates, 37 O.B.A.J. 2538, 2539 (1966). Opinion of Attorney General added December 1968 on recommendation of Real Property Committee, Resolution (2) printed at 39 O.B.A.J. 2308 (1968); adopted House of Delegates, 40 O.B.A.J. 585 (1969). Citation of Act amended by Editor, 1978, to agree with repeal of § 81, 1970 Okla. Sess. Laws, Ch. 92 § 5, see Minutes of House of Delegates for 1977, at 93-96.

19.2 Requisites of Marketable Record Title

A Marketable Record Title under the Marketable Record Title Act exists only where (1) A person has an unbroken chain of title of record extending back at least thirty (30) years; and (2) Nothing appears of record purporting to divest such person of title.

Note: See next two standards for a further statement regarding these two requirements.

Authorities: 16 O.S.A. §§ 71 & 72; L. Simes & C. Taylor, Model Title Standards, Standard 4.2, at 24 (1960). See 16 O.S.A. §§ 71, 72, 74, & 78 as to law which became effective on July 1, 1972.

Similar Standard: Mich., 1.2.

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2052. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit D, 41 O.B.A.J. 2676, 2677 (1970), approved by the Real Property Section on December 3, 1970 and adopted by the House of Delegates on December 4, 1970 the last sentence of the standard calling attention to the amendment shortening the period to thirty years was added. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, 41 O.B.A.J. 2676, 2679 (1970). The 1975 Report of the Real Property Section recommended change from "forty" to "thirty" and the deletion of the former last sentence of the Standard which referred to the amendment of the Marketable Title Act changing the period from forty to thirty years, 46 O.B.A.J. 2131, 2183, 2241, & 2317 (1975). Recommendation adopted by House of Delegates, Minutes of House, December 5, 1975, at 50.

19.3 Unbroken Chain of Title of Record

"An unbroken chain of title of record", within the meaning of the Marketable Record Title Act may consist of (1) A single conveyance or other title transaction which purports to create an interest and which has been a matter of public record for at least thirty (30) years; or (2) A connected series of conveyances or other title transactions of public record in which the root of title has been a matter of public record for at least thirty (30) years.

Amended in 1978.

Authorities: 16 O.S.A. § 71(a) & (b); L. Simes & C. Taylor, Model Title Standards, Standard 4.3, at 25 (1960). Similar Standard: Mich., 1.3.

Comment: Assume A is the grantee in a deed recorded in 1915 and that nothing affecting the described land has been recorded since then. In 1945 A has an "unbroken chain of title of record." Instead of a conveyance, the title transaction may be a decree of a district court or court of general jurisdiction, which was entered in the court records in 1915. Likewise, in 1945, A has an "unbroken chain of title of record." [SIC]

Instead of having only a single link, A's chain of title may contain two or more links. Thus, suppose X is the grantee in a deed recorded in 1915; and X conveyed to Y by deed recorded in 1925; Y conveyed to A by deed recorded in 1940. In 1945 A has an "unbroken chain of title of record." Any or all of these links may consist of decrees of a district court or court of general jurisdiction instead of deeds of conveyance.

The significant time from which the thirty-year record title begins is not the delivery of the instrument, but the date of its recording. Suppose the deed to A is delivered in 1915 but recorded in 1925. A will not have an "unbroken chain of title of record" until 1955.

Decrees of a court in a county other than where the land lies do not constitute a root of title until recorded in the county in which the land lies.

For a definition of "root of title" see Marketable Record Title Act, 16 O.S.A. § 78(e).

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2053. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal of the 1970 Real Property Committee's Supplemental Report printed as Exhibit E, 41 O.B.A.J. 2676, 2678 (1970). Approved by the Real Property Section on December 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), the last sentence of the standard shortening the period to thirty years was added. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, 41 O.B.A.J. 2676, 2679 (1970). All references to prior 40 years period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30 years period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

19.4 Matters Purporting to Divest

Matters "purporting to divest" within the meaning of the Marketable Record Title Act are those matters appearing of record which, if taken at face value, warrant the inference that the interest has been divested.

Authorities: 16 O.S.A. § 72(d); L. Simes & C. Taylor, Model Title Standards, Standard 4.4, at 26-27 (1960). Similar Standard: Mich., 1.4.

Comment: The obvious case of a recorded instrument purporting to divest is a conveyance to another person. A is the grantee in a deed recorded in 1915. The record shows a conveyance of the same tract by A to B in 1925. Then B deeds to X in 1957. Although B had a thirty-year record chain of title in 1945, the deed to X purports to divest it, and B thereafter does not have a title.

A recorded instrument may also purport to divest even though there is not a complete chain of record title connecting the grantee in the divesting instrument with the thirty-year chain. Suppose A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. A deed of the same land was recorded in 1925, from X to Y, which recites that A died intestate in 1921 and that X is his only heir. There is nothing else on record indicating that X is A's heir. The deed recorded in 1925 is one "purporting to divest" within the terms of the Act. This is the conclusion to be reached whether the recital of heirship is true or not.

Or suppose, again, that A is the last grantee in a chain of title, the last deed of which was recorded in 1915. A deed to the same land from X to Y was recorded in 1925, which contains the following recital: "being the same land heretofore conveyed to me by A." There is no instrument on record from A to X. This instrument is nevertheless one "purporting to divest," within the terms of the Act.

Suppose that in 1915, A was the last grantee in a recorded chain of title, the deed to him being recorded in that year. A deed of the same land was recorded in 1925, signed: "A by B, attorney-in-fact." Even though there is no power of attorney on record, and even though the recital is untrue, the instrument is one "purporting to divest" within the terms of the Act.

Suppose that A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. In 1955 there was recorded a deed to Y from X, a stranger to the title, which recited that X and his predecessors have been "in continuous, open, notorious and adverse possession of said land as against all the world for the preceding thirty years." This is an instrument "purporting to divest" A of his interest, within the terms of the Act.

On the other hand, an inconsistent deed on record, is not one "purporting to divest" within the terms of the Act, if nothing on the record purports to connect it with the thirty-year chain of title. The following fact situations illustrate this.

A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. A warranty deed of the same land from X to Y was recorded in 1925. The latter deed is not one "purporting to divest" within the terms of the Act.

A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. A mortgage from X to Y of the same land, containing covenants of warranty, is recorded in 1925. The mortgage is not an instrument "purporting to divest" within the terms of the Act.

Although the recorded instruments in the last two illustrations are not instruments "purporting to divest" the thirty-year title, they are not necessarily nullities. The marketable record title can be subject to interests, if any, arising from such instruments. 16 O.S.A. § 72(d).

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2053-54. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). All references to prior 40 years period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30 years period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

19.5 Interests or Defects in the Thirty-year Chain

If the recorded title transaction which constitutes the root of title, or any subsequent instrument in the chain of record title required for a marketable record title under the terms of the act, creates interests in third parties or creates defects in the record chain of title, then the marketable record title is subject to such interests and defects.

Authorities: 16 O.S.A. § 72(a) & (d); L. Simes & C. Taylor, Model Title Standards, Standard 4.6, at 28-29 (1960). Similar Standard: Mich., 1.8.

Comment: This standard is explainable by the following illustrations.

(1) In 1915 a deed was recorded conveying land from A, the owner in fee simple absolute, to "B and his heirs so long as the land is used for residence purposes," thus creating a determinable fee in B and reserving a possibility of reverter in A. In 1925 a deed was recorded from B to C and his heirs "so long as the land is used for residence purposes, this conveyance being subject to a possibility of reverter in A." In 1945, C has a marketable record title, to a determinable fee, which is subject to A's possibility of reverter.

(2) Suppose, however, that in 1915 a deed was recorded conveying a certain tract of land from A, the owner in fee simple absolute, to "B and his heirs so long as the land is used for residence purposes"; and suppose, also, that in 1918 a deed was recorded by B to C and his heirs, conveying the same tract in fee simple absolute, in which no mention was made of any special limitation or of A's possibility of reverter. There being no other instruments of record in 1948, C has a marketable record title in fee simple absolute. His root of title is the deed from B to C and not the deed from A to B; and there are no interests in third parties or defects created by the "muniments of which such chain of record title is formed."

A general reference to interests prior to the root of title is not sufficient unless specific identification is made to a recorded title transaction. 16 O.S.A. § 72(a).

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2054-55. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). All references to prior 40 years period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30 years period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

19.6 Filing of Notice

A marketable record title is subject to any interest preserved by filing a notice of claim in accordance with the terms of Sections 74 and 75 of the Marketable Record Title Act.

Authorities: 16 O.S.A. §§ 74 & 75; L. Simes & C. Taylor, Model Title Standards, Standard 4.7 at 29-30 (1960).

Comment: Suppose A was the grantee in a chain of record title of a tract of land, a deed to which was recorded in 1900. In 1902 a mortgage of the same land from A to X was recorded. In 1906 a mortgage of the same land from A to Y was recorded. In 1918 a deed of the same land from A to B in fee simple absolute was recorded, which made no mention of the mortgages. In 1947 Y recorded a notice of his mortgage, as provided in Sections 74 and 75 of the Act. X did not record any notice. In 1948 B had a marketable record title, which is subject to Y's mortgage, but not to X's mortgage. B's root of title is the 1918 deed. Therefore X and Y had until 1948 to record a notice for the purpose of preserving their interests. If X had filed a notice after 1948, it would have been a nullity, since his interest was already extinguished.

The filing of a notice may be a nullity not only because it comes too late, but also because it concerns a subject matter not within the scope of the statute. Thus, recorded notices of real estate commissions claimed or other charges which do not constitute liens on the property have no effect under the Act. 16 O.S.A. § 72(b).

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2055-56. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). All references to prior 40 years period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30 years period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

19.7 Thirty-year Possession in Lieu of Filing Notice.

If an owner of a possessory interest in land under a recorded title transaction (1) Has been in possession of such land for a period of thirty (30) years or more after the recording of such instrument, and (2) Such owner is still in possession of the land, any Marketable Record Title, based upon an independent chain of title, is subject to the title of such possessory owner, even though such possessory owner has failed to record any notice of his claim.

Authorities: 16 O.S.A. §§ 72(d) & 74(b); L. Simes & C. Taylor, Model Title Standards, Standard 4.8, at 30-31 (1960).

Comment: The kind of situation which gives rise to this standard is suggested by the following illustration. A was the last grantee in a chain of record title to a tract of land, by a deed recorded in 1915. There was no subsequent instruments of record in this chain of title. A has been in possession of the land since 1915 and continues in possession, but has never filed any notice as provided in Section 74 of the Marketable Record Title Act. A deed of the same land, unconnected with A's Chain of title, from X to Y, was recorded in 1916; no other instruments with respect to this land appearing of record, Y has a marketable record title in 1946. But by the terms of Section 74(b), it is subject to A's marketable record title. On the other hand, A had a marketable record title in 1945, but in 1946, according to Section 72(d), it is subject to Y's marketable record title. Thus, the relative rights of A and of Y are determined independently of the Act, since the interest of each is subject to the other's deed. A's interest being prior in time, and Y's deed being merely a "wild deed," under common law principles A's title should prevail.

Under 16 O.S.A. § 74(b), possession cannot be "tacked" to eliminate the necessity of recording a notice of claim.

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2056. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit F, 41 O.B.A.J. 2676, 2678 (1970), approved by the Real Property Section on Dec. 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), the last sentence of the standard in its previous form calling attention to the amendment shortening the period to thirty years was added. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). Subsequently all references to prior 40 years period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30 years period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

19.8 Effect of Adverse Possession

A marketable record title is subject to any title by adverse possession which accrues at any time subsequent to the effective date of the root of title, but not to any title by adverse possession which accrued prior to the effective date of the root of title.

Authorities: 16 O.S.A. §§ 72(c) & 73; L. Simes & C. Taylor, Model Title Standards, Standard 4.9, at 31 (1960).

Comment: (Assume the period for title by adverse possession is 15 years.)

(1) A is the grantee of a tract of land in a deed which was recorded in 1900. In the same year, X entered into possession, claiming adversely to all the world, and continued such adverse possession until 1916. In 1917, a deed conveying the same land from A to B was recorded. No other instruments concerning the land appearing of record, B has a marketable record title in 1947, which extinguished X's title by adverse possession acquired in 1915.

(2) Suppose A is the grantee of a tract of land in a deed which was recorded in 1915. In 1941 X entered into possession, claiming adversely to all the world, and continued such adverse possession until the present time. No other instruments concerning the land appearing of record, in 1945 A had a marketable record title, but it was subject to X's adverse possession and when his period for title by adverse possession was completed in 1956, A's title was subject to X's title by adverse possession.

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2056-57. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). All references to prior 40 years period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30 years period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

19.9 Effect of Recording Title Transaction During Thirty-Year Period

The recording of a title transaction subsequent to the effective date of the root of title has the same effect in preserving any interest conveyed as the filing of the notice provided for in Section 74 of the act.

Authorities: 16 O.S.A. § 72(d); L. Simes & C. Taylor, Model Title Standards, Standard 4.10, at 32-33 (1960).

Comment: This standard is operative both where there are claims under a single chain of title and where there are two or more independent chains of title. The following illustrations show how it operates.

(1) Suppose A is the grantee of a tract of land in a deed which was recorded in 1900. A mortgage of this land executed by A to X was recorded in 1905. In 1910 a deed conveying the land from A to B was recorded, this deed making no reference to the mortgage to X. In 1939 an instrument assigning X's mortgage to Y was recorded. In 1940 B had a marketable record title. But it was subject to the mortgage held by Y because the assignment of the mortgage was recorded less than thirty years after the effective date of B's root of title. If, however, Y had recorded the assignment in 1941 the mortgage would already have been extinguished in 1940 by B's marketable title; and recording the assignment in 1941 would not revive it.

(2) Suppose a tract of land was conveyed to A, B, and C as tenants in common, the deed being recorded in 1900. Then in 1905, A and B conveyed the entire tract in fee simple to D and the deed was at once recorded. In 1925 D conveyed to E in fee simple, and the deed was at once recorded. No mention of C's interest was made in either the 1905 or 1925 deeds. Nothing further appearing of record, E had a marketable record title to the entire tract in 1935. This extinguished C's undivided one-third interest.

(3) Suppose the same facts, but assume also that in 1936 C conveyed his one-third interest to X in fee simple, the deed being at once recorded. This does not help him any. His interest, being extinguished in 1935, is not revived by this conveyance.

(4) Suppose A, being the grantee in a regular chain of record title, conveyed to B in fee simple in 1900, the deed being at once recorded. Then in 1905 X, a stranger to the title, conveyed to Y in fee simple, and the deed was at once recorded. In 1925 Y conveyed to Z in fee simple and the deed was at once recorded. Then suppose in 1927, B conveyed to C in fee simple, the deed being at once recorded. In 1935 Z and C each have marketable record titles, but each is subject to the other. Hence neither extinguishes the other, and the relative rights of the parties are determined independently of the Act. C's title, therefore, should prevail.

(5) Suppose, however, that the facts were the same except that B conveyed to C in 1937 instead of 1927. In that case, Z's marketable record title extinguished B's title in 1935, thirty years after the effective date of his root of title, and it is not revived by the conveyance in 1937.

History: Adopted, December 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2057-58. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). All references to prior 40 years period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30 years period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

19.10 Quitclaim Deed or Testamentary Residuary Clause in Thirty-Year Chain

A Recorded Quitclaim Deed or Residuary Clause in Probated Will can be a root of title or a link in a chain of title, for purposes of a thirty-year Record Title under the Marketable Record Title Act.

Authorities: 16 O.S.A. §§ 71 & 78(e) & (f); L. Simes & C. Taylor, Model Title Standards, Standard 4.11, at 33-34 (1960).
Related Standards: Mich., 1.3; Neb., 52.

Comment: The Marketable Record Title Act defines "root of title" as a title transaction "purporting to create the interest claimed." See Section 78(e). "Title transaction" is defined to include a variety of transactions, among which are title by quitclaim deed, by will and by descent. See Section 78(f).

A quitclaim deed can be a root of title to the interest it purports to create. Suppose there is a break in the chain of title, and the first instrument after the break is a quitclaim deed. Assume that the first recorded instrument in the chain of title is a patent from the United States to A, recorded in 1890, and that the next is a warranty deed from A to B in fee simple, recorded in 1910. Then in 1915, there is a quitclaim deed from C to D purporting to convey "the above described land" to D in fee simple. Further assume that there are no other recorded title transactions or notices after this deed, and that D is in possession, claiming to be the owner in fee simple. Under the Marketable Record Title Act, the 1915 deed is the root of title and purports to create a fee simple in D. Therefore, in 1945 D had a good title in fee simple.

Clearly the quitclaim deed can be a link in a chain of record title under the provisions of the Act. See Sections 71 and 78(f). If it can be an effective link, it must necessarily follow that it can be an effective "root" to the interest it purports to create.

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 and see Exhibit H, *id.* at 2058. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182. As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit G, 41 O.B.A.J. 2676, 2678 (1970), approved by the Real Property Section on Dec. 3, 1970 and adopted by the House of Delegates on Dec. 4, 1970, 42 O.B.A.J. 706 (1971), the last sentence of the standard in its previous form calling attention to the amendment shortening the period to thirty years was added. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). All references to prior 40 years period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30 years period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

19.11 Thirty-year Abstract

The Marketable Record Title Act has not eliminated the necessity of furnishing an abstract of title for a period in excess of thirty (30) years.

Authorities: 16 O.S.A. § 76; L. Simes § C. Taylor, Model Title Standards, Standard 4.12, at 35 (1960).
Similar Standard: Nebr., 44.

Comment: Section 76 of the Act names several interests which are not barred by the Act, to-wit: the interest of a lessor as a reversioner; mineral or royalty interests; easements created by a written instrument; subdivision agreements; interests of the U. S., etc. These record interests may not be determined by an examination of the abstract for a period of no more than thirty years.

Furthermore, in all cases, the abstract must go back to the conveyance or other title transaction which is the "root of title"; and it will rarely occur that this instrument was recorded precisely thirty years prior to the present time. In nearly every case the period, from the recording of the "root of title" to the present, will be somewhat more than thirty years.

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2058-59. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit H, 41 O.B.A.J. 2676, 2678 (1970), approved by the Real Property Section on December 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706, the last sentence of the standard making it clear that the amendment to the Marketable Record Title Act will not eliminate the necessity of furnishing an abstract of title in excess of thirty years after July 1, 1972 was added. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). All references to prior 40 years period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30 years period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

19.12 Effective Date of the Act

The Marketable Record Title Act became effective September 13, 1963. The two year period for filing notices of claim under Section 74 expired September 13, 1965. The Act was amended March 27, 1970, by reducing the forty year period to thirty (30) years, effective July 1, 1972. If the thirty year period expired prior to March 27, 1970, such period was extended to July 1, 1972 and notices of claim could be filed to and including that date.

Authorities: As to the original "forty years" statute, 1963 Okla. Sess. Laws, Ch. 31, §§ 4, 5 & 11. As to the present "thirty years" statute, 16 O.S.A. §§ 74 & 75 and 1970 Okla. Sess. Laws, Ch. 92, § 7.

Comment: Remainders, long term mortgages and other non-possessory interests prior to the root of title should be reviewed to see if a notice of claim is required. Also if the owner is out of possession and he has recorded no instruments or other title transactions during the preceding thirty years consideration should be given to filing a notice of claim.

Prior non-possessory interests may be preserved by reference in an instrument or other title transaction recorded subsequent to the root of title. But the reference must specifically identify a recorded transaction. A general reference is not sufficient. 16 O.S.A. § 72(a).

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2059. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182. As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). Approved by the Real Property Section on December 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), this standard was modified to reflect the amendment shortening the period to thirty years. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, Exhibit I, 41 O.B.A.J. 2676, 2679. Tense of verbs in last clause of third sentence changed by Editor, 1978; "Authorities" amended to indicate where prior and current statutes may be found by Editor, 1978, see Minutes of House of Delegates for 1977, at 93-96.

19.13 Abstracting

Abstracting under the Marketable Record Title Act shall be sufficient when the following is shown in the abstract:

(a) The patent, grant or other conveyance from the government.

(b) The following title transactions occurring prior to the first conveyance or other title transaction in (c) below: easements or interests in the nature of an easement; unreleased leases with indefinite terms such as oil and gas leases; unreleased leases with terms which have not expired; instruments or proceedings pertaining to bankruptcies; use restrictions or area agreements which are part of a plan for subdivision development; any right, title or interest of the United States.

(c) The conveyance or other title transaction constituting the root of title to the interest claimed, together with all conveyances and other title transactions of any character subsequent to said conveyance or other title transaction; or if there be a mineral severance prior to said conveyance or other title transaction, then the first conveyance or other title transaction prior to said mineral severance, together with all conveyances and other title transactions of any character subsequent to said conveyance or other title transaction.

(d) Conveyances, title transactions and other instruments recorded prior to the conveyance or other title transaction in (c) which are specifically identified in said conveyance or other title transaction or any subsequent instrument shown in the abstract.

(e) Any deed imposing restrictions upon alienation without prior consent of the Secretary of the Interior or a federal agency, for example, a Carny Lacher deed.

(f) Where title stems from a tribe of Indians or from a patent where the United States holds title in trust for an Indian the abstract shall contain all recorded instruments from inception of title other than treaties except (1) where there is an Unallotted Land Deed or where a Patent is to a Freedman or Inter-Married White member of the Five Civilized Tribes, in which event only the Patent and the material under (b) (c) (d) (e) need be shown; and (2) Where a Patent is from the Osage Nation to an individual and there is of record a conveyance from the allottee and a Certificate of Competency, only the Patent, the conveyance from the allottee, the Certificate of Competency, certificate as to degree of blood of the allottee and the material under (b) (c) (d) (e) need be shown.

The abstracter shall state on the caption page and in the certificate of an abstract compiled under this standard:

"This abstract is compiled in accordance with Oklahoma Title Standard No. 19.13 under 16 O.S.A. §§ 71-80."

Authorities: 16 O.S.A. §§ 71-80, 46 O.S.A. § 203, and Oklahoma Title Examination Standard 13.7.
Comments: 1. The purpose of this Standard is to simplify title examination and reduce the size of abstracts.

2. Deeds, mortgages, affidavits, caveats, notices, estoppel agreements, powers of attorney, tax liens, mechanics liens, judgments and foreign executions recorded prior to the first conveyance or other title transaction in (c) and not referred to therein or subsequent thereto and also probate, divorce, foreclosure, partition, and quiet title actions concluded prior to the first conveyance or other title transaction in (c) are to be omitted from the abstract.

3. Interests and defects prior to the first conveyance or other title transaction in (c) are not to be shown unless specifically identified. The book and page of the recording of a prior mortgage is required to be in any subsequent deed or mortgage to give notice of such prior mortgage, 46 O.S.A. § 203 and Title Standard 13.7. Specific identification of other instruments requires either the book and page of recording or the date and place of recording or such other information as will enable the abstracter to locate the instrument of record.

4. Abstracting under this Standard should also be in conformity with Title Standard 18.6.

History: Adopted December 5, 1969. Resolution No. 1, 1969 Real Property Committee 40 O.B.A.J. 2405 (1969) and Exhibit A, *id.* at 2406-2407. Approved by Real Property Section and adopted by House of Delegates, 41 O.B.A.J. 287 (1970). Citation of act amended by Editor, 1978, to agree with repeal of § 81, 1970 Okla. Sess. Laws, Ch. 92, § 5, reference to prior 40 years period deleted and 30 years substituted, see Minutes of House of Delegates for 1977, pages 93-96.

Amended December 3, 1982. Amendment proposed by Report of 1982 Title Examination Standards Committee, 53 O.B.J. 2731, 2734-35 (1982). Proposal amended by Real Property Section, December 2, 1982 and approved as amended. Adopted as amended by House of Delegates.

2. Background

The Act underlying these Standards is an extinguishment statute (or, according to some authorities, a statute of limitation) which destroys most claims or defects of title behind the Root-of-Title. The Root-of-Title is the instrument purporting to divest which is in your chain of title and which has been of record at least thirty years.

You must look for and review the following instruments prior to the Root-of-Title:

a. Patent, grant or other conveyance from the government;
b. Easements or interests in the nature of an easement;
c. Unreleased leases with indefinite terms such as oil and gas leases;
d. Unreleased leases with terms which have not expired;
e. Instruments or proceedings pertaining to bankruptcies;
f. Use restrictions or area agreements which are part of a plan for subdivision development;
g. Any right, title or interest of the United States;
h. Severed mineral and royalty interests;
i. Instruments expressly identified in other instruments falling within your chain of title back to and including your Root-of-Title; and
j. Instruments relating to Indian Titles.

According to the Oklahoma Court of Appeals in Anderson v. Pickering, 541 P.2d 1361,1364 (Okla. 1975):

> The third contention, that the titles were merchantable by virtue of the Merchantable Title Act [sic], is not applicable here. The authorities which plaintiffs cite concern actions to quiet title. No authority has been found and none has been cited which would require a vendee to purchase real property where there is a defective title. The Merchantable Title Act provides a method through which title may be quieted statutorily. It is not self-executing, nor does it provide a perfect remedy for every instance.

However, as stated in an article by Henley Blair and Henry Rheinberger discussing this Anderson case [51 OBJ 2517 (November 1, 1980)], it appears that the court decided the case based on the premise that the sellers were trying to force the buyers to accept title based on adverse possession and not on marketable title created under the Act.

A later case by the Oklahoma Supreme Court expressly assumed the Act was constitutional but also expressly claimed "We intimate no view on the constitutionality of the Act because its validity was not framed as an issue in the trial court." Mobbs v. City of Lehigh, 655 P.2d 547 (Okla. 1982). This case held that, under the operation of the Act, a void tax deed could be a valid Root-of-Title since its defective nature is not "inherent" but rather is a "transmission" problem.

As mentioned above, the constitutionality of this Act has not been tested. There is general Oklahoma case law to the

effect that every statute is presumed to be valid and constitutional and binding on all parties as of the effective date of each statute and that such presumption continues until there is a judicial determination to the contrary (see TES 2.3).

The applicability of this Act to Indian Land can be upheld if it is determined to be a statute of limitations and not an extinguishment statute.

As an oil and gas title examiner, you must be especially cautious and look behind the Root-of-Title (1) to determine title ownership to any mineral or royalty interest which has been severed (2) to identify unreleased leases with indefinite or unexpired terms. Therefore, the Act is only helpful to the extent your surface and mineral estate remain together and unsevered.

TES 19.13 allows and encourages abstracters to prepare thirty year Root-of-Title abstracts conforming to the Act. A proposal to repeal TES 19.13 was presented by the TES Committee to the Real Property Section in 1986 at the Section's Annual meeting, but it was defeated. Repeal of this Standard would have left the statute unaffected but would have discouraged abstracters and examiners from making and relying on such "short" abstracts.

3. Practicalities

I have made no attempt to cover all the examples accompanying TES 19. Rather, I have made some general comments concerning the applicability of the Act and have included some

situations where the Act and the Standards are useful.

General Comments (not exhaustive)

a. I do not examine the title backwards from the most recent instrument to attempt to find a Root-of-Title recorded for more than thirty years. Every abstract or county records are examined from inception forward, and it is only after full consideration of all the instruments that I might apply the Act to a certain sequence.

b. I have never seen an abstract prepared pursuant to TES 19.13 and would feel uncomfortable if such an abstract was presented to me for examination.

c. I do not question the constitutionality of the Act even though the issue of constitutionality has not been determined by the Oklahoma Supreme Court.

d. I do not rely on the Act without advising my client that such reliance has been made and further advising there is some case authority that the statute is not self-executing, but must be accompanied by a quiet title action.

e. I do not use the Act in dealing with severed minerals.

f. I do not use the Act without mentioning it is subject to the rights of persons in possession of the property.

Situations where the Act and Standards are Useful

a. A record owner whose interest is the subject of a mortgage foreclosure followed by a sheriff's deed which has been

recorded more than thirty years. This situation is also reinforced by reliance by the Simplification of Land Titles Act previously discussed.

b. Patent from the Commissioners of the Land Office, State of Oklahoma, after the extinguishment of a prior certificate of purchase. It is not unusual to see a certificate of purchase issued to John Doe, followed by another certificate of purchase to Tom Jones and a Commissioners of the Land Office patent to Tom Jones which has been recorded more than thirty years. I would rely upon the Act and not require further inquiry into the proper extinguishment of the certificate of purchase to John Doe.

c. Tax Deed. In reliance of the case of Mobbs v. City of Lehigh (supra.), I rely on a tax deed as a valid Root-of-Title without inquiring into the validity of the proceedings leading to the tax deed.

d. Deeds from purported heirs. I rely upon deeds recorded more than thirty years in which the grantors purport to be the sole heirs of the record owner.

e. "Stray" or "Wild" Deeds. I am fairly comfortable with a 'stray' or 'wild' deed which has been of record more than thirty years, relying on dicta in the Mobbs case.

IV. NEW 1987 STANDARDS REVISIONS

The following pages contain the language for all of the revised Title Examination Standards which have been approved by the TES Committee and the Real Property Section, and which were adopted on November 13, 1987, by the OBA House of Delegates at the 1987 Annual OBA meeting.

MO:ML.1-72

1.2 TRANSCRIPTS OF COURT PROCEEDINGS

Transcripts of court proceedings affecting real estate certified by a court clerk or abstractor are equally satisfactory and should be accepted by the examining attorney.

Authorities: 20 O.S.A. §1005; 12 O.S.A. §§2902, 3001, 3002, 3003 & 3005; 28 O.S.A. §31; 19 O.S.A. §167; 74 O.S.A. §§227.14 & 227.29; Op. Atty. Gen. No. 80-95 (July 31, 1980); Arnold v. Board of Com'rs. of Creek County, 124 Okla. 42, 254 P. 31 (1926).

Comment: Court clerks are directed to retain or microfilm all records on file in their offices, 20 O.S.A. §1005, and are authorized to make certified copies of and authenticate such documents, 28 O.S.A. §31. Such certified or authenticated documents are admissible in evidence, 12 O.S.A. §§2902, 3001, 3003 & 3005.

Abstractors are required to be bonded or maintain errors and omissions insurance in specified amounts, 74 O.S.A. §227.14. Court clerks are required to be bonded under the county officers' blanket bond, 19 O.S.A. §167; Op. Atty. Gen. No. 80-95 (July 31, 1980). The five year statute of limitations applies to both bonds. The statute begins to run as to the court clerk's bond from the accrual of the cause of action, Arnold v. Board of Com'rs. of Creek County, supra. The statute begins to run as to the abstractor's bond or errors and omissions insurance from the date of issuance of the abstract certificate, 74 O.S.A. §227.29.

4.2 OIL AND GAS LEASES

The recording of a certificate supplied by the Corporation Commission under 17 O.S.A. §§167 & 168, reflecting no production and no exceptions, renders a title marketable as against an unreleased oil and gas lease or a mineral or royalty conveyance or reservation for a term of years and as long thereafter as there is production, the primary term of which has expired prior to the date of the certificate, if the certificate covers all of the land described in the lease, mineral or royalty conveyance or reservation, as well as any additional land which may have been spaced or unitized by either the Corporation Commission or by recorded declaration pursuant to the lease or other recorded instrument as of the date of the expiration of the primary term.

Comment: Said Act originally applied only to oil and gas leases, as did the standard as originally adopted October 1947. The Act was amended in 1951 so as to cover term mineral conveyances, as well as oil and gas leases; and the standard was then amended in November 1954. By said Act, such certificates constitute prima facie evidence that no such oil and gas lease or term mineral conveyance is in force which, if not refuted, will support a decree for specific performance of a contract to deliver a marketable title. The facts in Wilson v. Shasta Oil Co., 171 Okla. 467, 43 P.2d 769 (1935), disclose that the Court only held proof to establish marketability cannot be shown by affidavit of nondevelopment. Beatty v. Baxter, 208 Okla. 686, 258 P.2d 626 (1953), is deemed not to affect prima facie marketability as provided for in the statute.

Note: This standard does not apply to Osage County, where oil and gas operations are not under the control and supervision of the Corporation Commission.

Caveat: The Corporation Commission has been known to issue clear certificates of non-development when in fact a well has been drilled and not plugged; therefore, the cautious attorney will also advise his clients to satisfy themselves there is no well nor production upon any of said property and that the lease is not being kept alive by in lieu royalty payments or production not reported to the Corporation Commission. The examiner should also be aware that the documents evidencing spacing or unitization may either be unrecorded or only appear in the records of the Corporation Commission.

8.1 TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES

In the event of the death of a life tenant or a joint tenant, the death is a fact which must have been established by one of the following methods and such showing in the abstract shall satisfy the rule on marketability.

A. NON-JUDICIAL TERMINATION OF JOINT TENANCY ESTATES.

Where a joint tenancy estate in real property was held only by a husband and wife, the death of one of the joint tenants and the termination of the joint tenancy thereby may have been evidenced, to the extent permitted by statute from time to time from and after August 16, 1974, by the filing, in the office of the county clerk in the county in which the joint tenancy property is located, of an affidavit made by the surviving joint tenant meeting the requirements of 58 O.S.A. §912 in effect at the date of such filing:

1. Affidavit filed prior to November 1, 1983. In the case of an affidavit filed prior to November 1, 1983, only a single tract of real property, any portion of which was held as homestead by husband and wife as joint tenants, could be the subject of the affidavit and the following must have been filed with the affidavit:

a. A certified copy of the certificate of death of the joint tenant issued by the State Department of Public Health of Oklahoma or the comparable agency of the place of the death of said joint tenant; and

b. Either:

i. Prior to October 1, 1975. Certification by the County Treasurer of the county wherein the property is located that all or a portion of the tract described was claimed as homestead by the affiant and the decedent in the year of decedent's death, and describing such real property and a complete list of all real property owned by decedent; or

ii. On or after October 1, 1975. Certification by the county assessor of the county wherein the property is located, that all or part of the tract described was allowed as homestead to the affiant and the decedent in the year of decedent's death; and

c. Either:

i. Prior to October 1, 1980. In the case of an affidavit filed before October 1, 1980, a waiver or release of the state estate tax lien, unless made unnecessary by the ten (10) year statute of limitations; or

ii. On or after October 1, 1980. In the case of an affidavit filed on or after October 1, 1980, if such property was included in an estate where taxes were due under the provisions of 68 O.S.A. §804, a waiver or release of the estate tax lien by the Oklahoma Tax Commission as to such deceased person and property unless made unnecessary by the ten (10) year statute of limitations; provided that, if no such taxes were due, then neither was required and the affidavit must so state, pursuant to 1980 Okla. Sess. Laws, ch. 286, §2 and 68 O.S.A. §815(d) effective October 1, 1980.

2. Affidavit filed on or after November 1, 1983 and prior to November 1, 1984. In the case of an affidavit filed on or after November 1, 1983, and prior to November 1, 1984, any real property which was held by husband and wife as joint tenants could be the subject of the affidavit and the following must have been filed with the affidavit:

a. A certified copy of the certificate of death of the joint tenant issued by the State Department of Health of Oklahoma or the comparable agency of the place of the death of said joint tenant; and,

b. If such property was included in an estate where taxes were due under the provisions of 68 O.S.A. §804, a waiver or release of the estate tax lien by the Oklahoma Tax Commission as to such deceased person and property unless made unnecessary by the ten (10) year statute of limitations; provided that, if such taxes were not due, the affidavit shall so state, pursuant to 1983 Okla. Sess. Laws, ch. 20, §1, effective November 1, 1983 and 68 O.S.A. §815(d).

3. Affidavit filed on or after November 1, 1984. In the case of an affidavit filed on or after November 1, 1984, any real property which was held by husband and wife as joint tenants could be the subject of the affidavit and the following must have been filed with the affidavit:

a. Either:

i. For an Affidavit filed prior to November 1, 1986. A certified copy of the certificate of death of the deceased joint

tenant issued by the State Department of Health or the comparable agency of the place of death of said joint tenant; or

ii. For an Affidavit filed on or after November 1, 1986. A certified copy of the certificate of death of the joint tenant issued by the State Department of Public Health of Oklahoma or a court clerk as prescribed in 63 O.S.A. §1-307 or the comparable agency of the place of the death of said joint tenant, 58 O.S.A. §912(1) as amended, effective November 1, 1986; and

b. Either:

i. Where death occurred prior to November 1, 1984. A waiver or release by the Oklahoma Tax Commission of the estate tax lien must be filed with an affidavit which is filed on or after November 1, 1984, with respect to a joint tenant who died prior to November 1, 1984, unless such waiver or release is made unnecessary by the ten (10) year statute of limitations, 58 O.S.A. §912 & 68 O.S.A. §811(d), both as amended, effective November 1, 1984; or

ii. Where death occurred on or after November 1, 1984. No tax clearance documentation is required, and no recitation regarding estate tax liability need be contained in the affidavit.

Title 58 O.S.A. §912 is a procedural statute, and an affidavit filed pursuant thereto may be relied upon as evidence of the death of a joint tenant irrespective of the date of death if such statute is otherwise applicable, even though the death may have occurred prior to the effective date of 58 O.S.A. §912; provided that the merchantability of the title of the surviving spouse may be impaired by the estate tax lien under the circumstances noted in paragraph 3 b. i., above unless a waiver or release has been filed, if necessary.

B. JUDICIAL TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES.

In all other instances, the death is a fact which must be judicially determined by any of the following proceedings:

1. By proceeding in the district court as provided in 58 O.S.A. §911; or

2. In connection with an action brought in any court of record, where the court makes a valid judicial finding of death of the person having the interest as a life tenant or a joint tenant; or

3. With respect only to joint tenancy estates, if the estate of the decedent was probated on other property, by showing the letters testamentary or of administration, 60 O.S.A. §74.

A waiver or release of the estate tax lien as to such joint tenant or life tenant must be obtained with any of said proceedings, unless the district court in which the estate of the decedent was probated enters an order pursuant to 58 O.S.A. §282.1, effective October 1, 1980, adjudicating that there is no estate tax liability, or unless made unnecessary by the ten (10) year statute of limitations or by 68 O.S.A. §811(d), effective November 1, 1984.

Comment: 68 O.S.A. §811(d) was amended effective November 1, 1984. The pertinent amendment provides that no estate tax lien shall attach to any property passing to a surviving spouse, either through the estate of the deceased or by joint tenancy. The text of the statute does not clearly make it retroactive to deaths occurring prior to November 1, 1984, and should not be considered to be retroactive at this time. For this reason, it is necessary to obtain estate tax clearances where the deceased joint tenant died prior to November 1, 1984, even though 58 O.S.A. §912 as amended effective November 1, 1984, makes no such requirement. Such statute may be utilized, on or after November 1, 1984, together with the appropriate tax clearances, to terminate a joint tenancy where the deceased joint tenant died prior to November 1, 1984.

9.2 EXECUTION DEFECTS

Any corporation deed, mortgage or other instrument affecting real property which has been on record in the county clerk's office for ten (10) years or more and which is defective because of: (1) the failure of the proper corporate officer to sign; (2) the absence of the corporate seal; (3) the lack of an acknowledgment; or (4) any defect in the execution, acknowledgment, recording or certificate of recording, should be accepted without requirement, 16 O.S.A. §27a.

Such instruments recorded less than ten years must have the name of the corporation subscribed thereto either by an Attorney in Fact, or by the President or a Vice-President, and, unless executed by an Attorney in Fact, must be attested by the Secretary, an Assistant Secretary or a Clerk of such corporation, or by the Secretary, an Assistant Secretary, Clerk, Cashier or Assistant Cashier in case of a bank, with the corporate seal attached, 16 O.S.A. §§91-94, 6 O.S.A. §414(F), 6 O.S.A. §104, and 12 U.S.C.A. §24(5)&(6). The Power of Attorney authorizing an Attorney in Fact to act on behalf of a corporation must be executed and attested in the same manner as a deed or other conveyance, and must be filed in the office of the County Clerk before the executed instrument becomes effective; provided, however, that any Power of Attorney promulgated by an agency of the Government of the United States shall be deemed sufficiently recorded for purposes of this standard if the promulgation thereof shall be published in the Federal Registry of the Government of the United States and any instrument executed pursuant to said Power of Attorney recites the specific reference to said publication, 16 O.S.A. §20. A showing of the authority of the Board of Directors to execute such instrument is not necessary, 18 O.S.A. §§1015, 1016(4) & 1018.

> Comment: It is immaterial from an examiner's standpoint that the corporation acquired real estate by an ultra vires act. R. & C. Patton, Titles §401 (2d ed. 1957).

Every Oklahoma corporation has authority to acquire, encumber and sell property subject only to the limitations in Okla. Const. art. XXII, §2 and 18 O.S.A. §1020. See 18 O.S.A. §1016(4).

Any corporation, foreign or domestic, which has conveyed real property by instrument signed, acknowledged, attested and sealed as required in 16 O.S.A. §§93-95, and which has received the consideration therefor, cannot assert as a defense its lack of authority to sell said property, 18 O.S.A. §1018, 16 O.S.A. §92 and 16 O.S.A. §11.

An instrument executed by a corporation with its seal attached prior to November 1, 1986, is prima facie evidence that such instrument was the act of the corporation, that it was executed and signed by persons who were its officers or agents acting by authority of the board of directors and that the seal

is the corporate seal and was affixed by authorized persons, 1947 Okla. Sess. Laws, p.185, §242. A corporate instrument executed, attested, sealed and acknowledged in proper form on or after November 1, 1986, should be presumed, in the absence of actual or constructive knowledge to the contrary, to have been duly authorized, signed by authorized officers and affixed with the genuine seal by proper authority, 18 O.S.A. §1018, R. & C. Patton, Titles §§403 and 404 (2d ed. 1957), Flick, Abstract and Title Practice §1292 (2d ed. 1958).

Comment: The Legislature's repeal in 1986 of 18 O.S.A. 1981 §1.242 as a part of the complete revision of Title 18 does not appear to have been intended to require thereafter proof of record of corporate and officer authority, etc.

A dissolved domestic corporation continues to exist for three years (or a longer period if directed by a district court) for the purpose of winding up its affairs, 18 O.S.A. §1099.

Comment: See Title Examination Standard 6.5 as to documents executed outside the State of Oklahoma.

9.3. ATTESTATION

Standard repealed.

9.4 RECITAL OF IDENTITY OR SUCCESSORSHIP

Absent the recording of the certificate required by 18 O.S.A. §1001, a recital of identity, contained in a title document of record properly executed, attested and sealed by a corporation whose identity is recited or which recites that it is the successor by merger, corporate change of name, or was formerly known by another name may be relied upon unless there is some reason disclosed of record to doubt the truth of the recital.

Authority: 18 O.S.A. §1001 (as amended effective November 1, 1987) & §1088.

Comment: While there seems to be no exact precedent for this standard, it is justified as a parallel to Standard 5.3 and as an extension of Standard 9.1.

12.3 CHILD SUPPORT ARREARAGE LIENS PURSUANT TO 12 O.S.A. §1289.1

A lien against real property, then owned or subsequently acquired by a person owing an arrearage in child support payments, is created under the following circumstances:

A. Orders filed on or after October 1, 1985 but prior to May 15, 1986. By filing a certified copy of an order of a district court or an administrative order of the Department of Human Services evidencing an arrearage in child support payments with the clerk of the county in which such property is located, a lien, relating back in time to when the arrearage was reduced to judgment, is created which is superior to all other liens except the lien of a first mortgage.

Authority: 1985 Okla. Sess. Laws, ch. 297, §20.

Comment: The party authorized to release this lien is not identified by the statute creating said lien.

B. Orders filed on or after May 15, 1986. By filing a certified copy of an order of a district court or an administrative order of the Department of Human Services evidencing an arrearage in child support payments with the clerk of the county in which such property is located, a lien is created from the time the order is filed of record. The priority of this lien is established by the time that the order is filed of record.

Authority: 12 O.S.A. §1289.1.

Comment: Liens for arrearages in child support payments created by orders filed on or after May 15, 1986, may be released by the person entitled to the support or the Department of Human Services on behalf of its clients and recipients. For purposes of identifying the parties on whose behalf the Department of Human Services may release the above-described liens, a "recipient" is defined as a party who has assigned to the Department of Human Services his or her rights to support from another person in consideration of receiving aid to families with dependent children, 56 O.S.A. §237(C)(1), and "client" is defined as a party, not receiving aid to families with dependent children, who has applied to the Department of Human Services to collect his or her child support payments, 56 O.S.A. §237(D).

12.4 NOTICE REQUIREMENTS FOR EXECUTION SALES

A. NOTICE OF SALE.

1. On or after March 23, 1985. As to all sheriff's sales of real property upon general or special execution occurring on or after March 23, 1985, but prior to November 1, 1986, efforts must have been taken which were reasonably calculated to afford personal notice of the sale to those parties who had an interest or estate in the property sold and whose actual whereabouts were known or could have been ascertained with due diligence. The record of the proceedings should reflect that such steps have been taken.

Authorities: 12 O.S.A. §§757, 764; Cate v. Archon Oil Co., Inc., 695 P.2d 1352 (Okla. 1985); Bomford v. Socony Mobil Oil Co., 440 P.2d 713 (Okla. 1968); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, (1949); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, (1983).

Comment: The rule of Cate v. Archon Oil Co., supra, was made effective prospectively to all sales governed by 12 O.S.A. §§757, 764 after issuance of mandate, which occurred March 22, 1985.

2. On or after November 1, 1986. As to all sheriff's sales of real property upon general or special execution occurring on or after November 1, 1986, but prior to November 1, 1987, such sales shall be set aside on motion by the court to which the execution is returnable unless the party causing the execution to be issued:

a. Causes a written notice of sale containing the legal description of the property to be sold and the date, time and place where the property will be sold to be mailed, by first-class mail, postage prepaid, to:

i. The judgment debtor; and

ii. Any holder of an interest in the property to be sold; and

iii. All other persons of whom the party causing the execution to be issued has notice who claim a lien or any interest in the property;

at least ten (10) days prior to the date of the sale, if the names and addresses of such persons are known; and

b. Causes publication notice to be given in conformity with 12 O.S.A. §764(2); and

c. Files in the case an affidavit of proof of mailing and of publication or posting; and

d. Causes such sale to be held at least thirty (30) days after the date of first publication of the notice required in 12 O.S.A. §764(2).

The record of the proceedings should reflect that such steps have been taken.

Authorities: 12 O.S.A. §764; Cate v. Archon Oil Co., Inc., 695 P.2d 1352 (Okla. 1985); Bomford v. Socony Mobil Oil Co., 440 P.2d 713 (Okla. 1968); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, (1949); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, (1983).

Comment: 12 O.S.A. §764 was amended effective November 1, 1986, to provide the specific notice requirements set forth above.

3. On or after November 1, 1987. As to all sheriff's sales of real property upon general or special execution occurring on or after November 1, 1987, such sales shall be set aside on motion by the court to which the execution is returnable unless the party causing the execution to be issued:

a. Causes a written notice of sale, executed by the sheriff if executed on or after November 1, 1987, containing the legal description of the property to be sold and the date, time and place where the property will be sold to be mailed, by first-class mail, postage prepaid, to:

i. The judgment debtor; and

ii. Any holder of an interest of record in the property to be sold whose interest is sought to be extinguished, except mechanic's and materialmen's lien claimants, provided that the instrument evidencing such interest was filed prior to the filing of the notice of the pendency of the action; and

iii. Any mechanic's or materialmen's lien claimant whose lien claim has not expired, is sought to be extinguished and either:

(a) Has been perfected, either before or after the filing of the notice of the pendency of the action, or

(b) Has not been perfected, but of which the party causing the execution to be issued has notice;

at least ten (10) days prior to the date of the sale, if the names and addresses of such persons are known; and

b. Causes publication notice, executed by the sheriff if executed on or after November 1, 1987, to be given in conformity with 12 O.S.A. §764(2); and

c. Files in the case an affidavit of proof of mailing and of publication or posting; and

d. Causes such sale to be held at least thirty (30) days after the date of first publication of the notice required in 12 O.S.A. §764(2).

The record of the proceedings should reflect that such steps have been taken.

Authorities: 12 O.S.A. §§764, 2004.2; 42 O.S.A. Ch. 3; Cate v. Archon Oil Co., Inc., 695 P.2d 1352 (Okla. 1985); Bomford v. Socony Mobil Oil Co., 440 P.2d 713 (Okla. 1968); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, (1949); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, (1983).

Comment: (a) 12 O.S.A. §§764 and 2004.2 were amended effective November 1, 1987, to provide the specific notice requirements set forth above.

(b) 12 O.S.A. §766 authorizes an undersheriff or deputy sheriff to execute the notice required by 12 O.S.A. §764 as amended effective November 1, 1987.

Caveat: The issue of whether an execution sale of an oil and gas leasehold interest is a sale of real property or a sale of personal property has not been decided by the Oklahoma Supreme Court. See Cate v. Archon Oil Co., supra.

B. NOTICE OF CONFIRMATION OF SALE:

1. On or after November 1, 1986. As to all sheriff's sales of real property upon general or special execution, for which the writ of execution was returned on or after November 1, 1986, but prior to November 1, 1987, the party causing the execution to be issued shall:

a. Cause a written notice of hearing on the confirmation of the sale to be mailed, by first-class mail, postage prepaid, to the following persons and entities whose names and addresses are known:

i. The judgment debtor; and

ii. Any holder of record of an interest in the property; and

iii. All other persons of whom the party causing the execution to be issued has notice who claim a lien or any interest in the property;

at least ten (10) days before the hearing on the confirmation of sale; and

b. If the name or address of any such person is unknown, cause publication notice to be given in conformity with 12 O.S.A. §765(1); and

c. File in the case an affidavit of proof of mailing and, if required, of publication.

The record of the proceedings should reflect that such steps have been taken.

Authorities: 12 O.S.A. §765; Bomford v. Socony Mobil Oil Co., 440 P.2d 713 (Okla. 1968); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306; Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983).

Comment: 12 O.S.A. §765 was amended effective November 1, 1986, setting forth the specific notice requirements listed above.

2. On or after November 1, 1987. As to all sheriff's sales of real property upon general or special execution, for which the writ of execution was returned on or after November 1, 1987, the party causing the execution to be issued shall:

a. Cause a written notice of hearing on the confirmation of the sale to be mailed, by first-class mail, postage prepaid, to the following persons and entities whose names and addresses are known:

i. All persons to whom mailing of the notice of the execution sale was required to be made pursuant to 12 O.S.A. §764; and

ii. The high bidder at such sale;

at least ten (10) days before the hearing on the confirmation of sale; and

b. If the name or address of any such person is unknown, cause publication notice to be given in conformity with 12 O.S.A. §765(1); and

c. File in the case an affidavit of proof of mailing and, if required, of publication.

The record of the proceedings should reflect that such steps have been taken.

Authorities: 12 O.S.A. §§764, 765; Bomford v. Socony Mobil Oil Co., 440 P.2d 713 (Okla. 1968); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306; Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983).

Comment: 12 O.S.A. §§764, 765 and 2004.2 were amended effective November 1, 1987, setting forth the specific notice requirements and limitations thereon set forth above.

16.4 ENDORSEMENT UPON DEEDS OF LOT SPLIT APPROVAL (MINOR SUBDIVISIONS) BY ZONING AND LAND USE REGULATING BODY

Note: The title examiner may not rely upon the abstract to determine the necessity for lot split approval. The title examiner should determine whether the land is within a planning area and, if so, the effective date of the plan.

A. Within cities having a population over 200,000 and which have adopted a master plan as authorized by 11 O.S.A. §47-101 et seq., any deed recorded after the adoption of such plan, which

1. Conveys a tract of less than one entire platted lot, or

2. Conveys an unplatted tract described by federal survey or metes and bounds, consisting of five acres or less,

does not create marketable title unless

a. The deed bears a certificate of approval for lot split purposes by the cognizant planning agency, or

b. The legal description contained in the deed was previously approved by the cognizant planning agency and endorsed upon the first deed of record creating such lot split, or upon a certified copy thereof, or

c. The legal description contained in the deed was the subject of a prior deed, which prior deed was filed for record before the date of the annexation of the tract by such city, or

d. The legal description contained in the deed (covering all of the unplatted property acquired by the grantor in a single conveyance) was the subject of a prior deed which has been of record for at least five years, or

e. The deed (covering all of the unplatted property acquired by the grantor in a single conveyance) has been of record for at least five years.

Authority: 11 O.S.A. §47-101 et seq.; see §47-116.

Caveat: The exceptions provided for in subparagraphs "d." and "e." above do not apply to tracts within platted lots.

B. Within a county having within its boundaries more than fifty percent of the incorporated area of a city having a population of 180,000 or more, where such city and county have adopted a master plan as authorized by 19 O.S.A. §863.1 et seq., any deed which

1. Conveys a tract of less than one entire platted lot, or

2. Conveys an unplatted tract described by federal survey or metes and bounds, consisting of two and one-half acres or less,

shall not be considered valid unless

a. The deed bears a certificate of approval for lot split purposes by the cognizant planning agency, or

b. The legal description contained in the deed was previously approved by the cognizant planning agency and endorsed upon the first deed of record creating such lot split, or upon a certified copy thereof, or

c. The legal description contained in the deed was the subject of a prior deed, which prior deed was filed for record before June 10, 1963, or

d. The tract is situated within a municipality in such county which has not adopted a master plan at the time the first deed creating the lot split was filed for record.

Authority: 19 O.S.A. §863.1 et seq.; see §863.10

C. Within a county in which there is no city having a population of more than 200,000 and in which a municipality has adopted a comprehensive plan as authorized by 19 O.S.A. §866.1 et seq., any deed recorded after the adoption of such plan, of a tract within the jurisdictional territory of the cognizant planning agency, which deed

1. Conveys a tract of less than one entire platted lot, or

2. Conveys an unplatted tract described by federal survey or metes and bounds, consisting of ten acres or less,

shall not be considered valid unless filed for record before January 1, 1963, or unless

a. The deed bears a certificate of approval for lot split purposes by the cognizant planning agency, or

b. The legal description contained in the deed was previously approved by the cognizant planning agency and endorsed upon the first deed of record creating such lot split, or upon a certified copy thereof, or

c. The legal description contained in the deed was the subject of a prior deed, which prior deed was filed for record before the date of the adoption of such comprehensive plan, or

d. The tract is situated within a municipality in such county which has not adopted a comprehensive plan at the time the first deed creating the lot split was filed for record, or

e. The tract consists of more than two and one-half acres, such county is adjacent to a county which has adopted a master plan as authorized by 19 O.S.A. §863.1 et seq., and the cognizant planning agency has adopted its order or rule implementing the 1968 amendment to 19 O.S.A. §866.13. providing for lot split approval of conveyances of tracts of two and one-half acres or less.

Authority: 19 O.S.A. §866.1 et seq.; see §866.13.

Caveat: Since the "ten acre" rule of 19 O.S.A. §866.13 can be modified, the examiner should determine whether an order had been made on or after April 23, 1968 effecting such modification.

20.2 BANKRUPTCIES ON OR AFTER OCTOBER 1, 1979

With respect to bankruptcy proceedings commenced on or after October 1, 1979, where title to real property is held by a debtor at the time of the commencement of bankruptcy proceedings, the title examiner should be furnished with and review the following instruments (in addition to a copy or abstract of the bankruptcy petition):

A. Where the property is scheduled and claimed by the debtor as exempt, and no objection to such claim of exemption has been sustained by the bankruptcy court:

1. The Schedule of Real Property ("Schedule B-1") and the Schedule of Exempt Property ("Schedule B-4"), showing the claim of exemption for the property, or a copy or abstract of any other such claim of exemption by a dependent of the debtor on behalf of the debtor; and

2. A certificate by an abstracter or the appropriate bankruptcy court clerk, or other satisfactory evidence, that no objections to such claim of exemption have been filed; if such an objection has been so filed, the examiner should also be furnished with and review a copy or abstract of any order by the bankruptcy court overruling or otherwise resolving such objection.

Authorities: 11 U.S.C.A. §§521 & 522; Bankruptcy Rules 1002 & 1007; 3 L. King, Collier on Bankruptcy ¶522.26 (15th ed. 1984).

Comment: Title examiners should be aware that even though property is exempt, a mortgagee or other lien creditor may not commence or continue a foreclosure action against the debtor or obtain a conveyance from the debtor, so long as the automatic stay continues in effect. Unless relief from the automatic stay has been obtained as to the debtor (by final order of the bankruptcy court to permit the action), the stay continues until the earliest of (a) the closing of the bankruptcy case, (b) the dismissal of the bankruptcy case or (c), in a Chapter 7 case concerning an individual or, in a case under Chapter 9, 11, 12 or 13, the grant or denial of a discharge, 11 U.S.C.A. §362.

B. Where the property is affirmatively abandoned by the bankruptcy trustee or by a debtor in possession:

1. If abandoned by a bankruptcy trustee, a certified copy or abstract of the order by the bankruptcy court approving the trustee's qualifying bond, or (if a blanket bond has been filed pursuant to Bankruptcy Rule 2010) a certified copy or abstract of the trustee's acceptance of his election or appointment (except where deemed accepted pursuant to Rule 2008, on or after August 1, 1987); or if abandoned by a debtor in

possession, a certificate by an abstracter or by the appropriate bankruptcy court clerk, or other satisfactory evidence, that no trustee was appointed in the case; and

2. Either

a. A copy or an abstract of the notice by the trustee or debtor in possession, of his or her intention to abandon the property, and a certificate by an abstracter or the appropriate bankruptcy court clerk, or other satisfactory evidence, that no objections to such abandonment have been filed within the time allowed by such notice in accordance with the Rules of Bankruptcy Procedure and/or local court rules; or

b. If the abandonment is pursuant to a request of a party in interest, a copy or abstract of the order by the bankruptcy court authorizing or directing such abandonment, after such notice and hearing as required by the bankruptcy court, by the Bankruptcy Rules, and/or by local court rules.

Authorities: 11 U.S.C.A. §§102, 322 & 544; Bankruptcy Rules 2008 & 2010; 4 L. King id. ¶554.02.

Comment: Upon abandonment, control of the property abandoned reverts to the debtor. In such event, unless the automatic stay has terminated as described in the Comment following section A above, a mortgagee or other lien creditor must obtain relief from the automatic stay as to the debtor by final order of the bankruptcy court before either (1) foreclosing the debtor's interest or (2) obtaining a conveyance from the debtor, 11 U.S.C.A. §362.

C. Where non-exempt property is not administered before the closing of the bankruptcy case, and, unless otherwise ordered by the bankruptcy court, is therefore deemed abandoned:

1. A copy or abstract of the order discharging the trustee, if one has been appointed, and closing the estate; and

2. A copy or abstract of the bankruptcy proceedings showing that, or a certificate by an abstracter or the appropriate bankruptcy court clerk or other satisfactory evidence that, the property was scheduled by the debtor and was not administered at or before the closing of the case.

Authorities: 11 U.S.C.A. §§350 & 554; 4 L. King id. ¶554.02.

D. Where the property is sold by the bankruptcy trustee or by a debtor in possession (other than in the ordinary course of business of the debtor):

1. If sold by a bankruptcy trustee, a certified copy or abstract of the order by the bankruptcy court approving the trustee's qualifying bond, or (if a blanket bond has been filed pursuant to Bankruptcy Rule 2010) a certified copy or abstract of the trustee's acceptance of his election or appointment (except where deemed accepted pursuant to Rule 2008, on or after August 1, 1987); or if sold by the debtor in possession, a certificate by an abstracter or the appropriate bankruptcy court clerk, or other satisfactory evidence, that no trustee was appointed in the case as of the date of the conveyance;

2. A copy or abstract of the notice of such sale, in accordance with the Bankruptcy Code, the Bankruptcy Rules, and/or local court rules, or a copy or abstract of the order of the bankruptcy court authorizing a different form of notice or dispensing with such notice;

3. A copy or abstract of the bankruptcy proceedings showing that, or a certificate by an abstracter or the appropriate bankruptcy court clerk or other satisfactory evidence that, no objections to such sale were raised, or if such objections were raised, a copy or abstract of the order overruling such objections or otherwise authorizing the sale; and

4. A copy or abstract of the conveyance by the trustee or the debtor in possession.

Authorities: 11 U.S.C.A. §§102(1), 322, 363(b) & 1107; Bankruptcy Rules 2002, 2008, 2010 & 6004(e)(2); 2 L. King id ¶363.03

E. Where the property is sold in the ordinary course of business of the debtor, unless otherwise ordered by the court:

1. If the property is sold by the trustee:

a. A copy or abstract of the order by the bankruptcy court approving the trustee's qualifying bond or (if a blanket bond has been filed pursuant to Bankruptcy Rule 2010) a certified copy or abstract of the trustee's acceptance of his election or appointment (except where deemed accepted pursuant to Rule 2008, on or after August 1, 1987);

b. If, in a Chapter 11 case, a certificate by an abstracter or the appropriate bankruptcy court clerk, or other satisfactory evidence, that the bankruptcy court has not entered an order precluding the trustee from operating the debtor's business; and

c. A copy or abstract of the conveyance by the trustee.

2. If the property is sold by a debtor in possession, a certificate by an abstracter or the appropriate bankruptcy court clerk or other satisfactory evidence that no trustee was appointed in the case as of the date of the conveyance, and a copy or abstract of the conveyance by the debtor in possession.

Authorities: 11 U.S.C.A. §§363, 721, 1108 & 1304(b), Bankruptcy Rules 2008 & 2010; 2 L. King id. ¶363.04; 4 L. King id. ¶721.04(1); 5 L. King id. ¶¶1108.03 & 1304.01(3).

F. Where the property is sold free and clear of any interest in such property of any entity other than the bankruptcy estate:

1. The instruments described in Paragraphs D and E above, as appropriate; and

2. A copy or abstract of the bankruptcy proceedings showing that such entity's interest in the property attached to the proceeds of such sale, that such entity consented to the sale, or that such entity received notice of such sale (or, for sales on or after August 1, 1987, that such entity was served, in accordance with Bankruptcy Rule 7004, with notice of the motion for authority to sell the property free and clear of such interest, which notice included the date of the hearing on the motion and the time within which objections may be filed and served upon the trustee or debtor in possession) and raised no objection, or if an objection was raised, a copy or abstract of the order overruling such objection or otherwise authorizing the sale free and clear of such interest.

Authorities: 11 U.S.C.A. §363(f); Bankruptcy Rules 2002, 2010 & 6004; 2 L. King id. ¶363.07.

22.1 POWERS OF TRUSTEE

The trustee of an express trust has the power to grant, deed, convey, lease, grant easements upon, otherwise encumber and execute assignments or releases with respect to the real property or interest therein which is subject to the trust. A trustee's act is binding upon the trust and all beneficiaries thereof in favor of all purchasers or encumbrancers without actual knowledge of restrictions or limitations upon the trustee's powers by the terms of the trust and without constructive knowledge imposed by the trust instrument containing restrictions and limitations having been recorded in the county where the real estate is located.

Authority: 60 O.S.A. §§171 et seq., 175.7, and 175.45, and see 60 O.S.A. §175.24 for a listing of the extensive powers which a trustee has unless they have been denied to the trustee by the trust agreement or a subsequent order of a court; Linkletter v. Walker, 318 U.S. 618 (1965); Cox v. Broadway, Inc., 708 P.2d 1087 (Okla. 1985); In re Baumgardner, 711 P.2d 92 (Okla. 1985); Morris v. Meacham, 718 P.2d 1355 (Okla. 1986).

Comment: In a declaration of legislative intent enacted as part of the legislation, it is said that trusts are private instruments and therefore need not be recorded unless the trustor desires to put the public on notice of restriction on the trustee's powers.