SELECTED TITLE EXAMINATION ISSUES

By:

KRAETTLI Q. EPPERSON
Attorney-at-Law

COOK & EPPERSON
6520 N. Western, Suite 300
Oklahoma City, Oklahoma 73116
(405) 842-7545
Fax: 840-9890

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AUTHOR'S BIOGRAPHY

KRAETTLI Q. EPPERSON

POSITION: Partner with the law firm of Cook & Epperson, Oklahoma City, Oklahoma

PRACTICE: Real Property Litigation; Real Estate Acquisition and Leases; Corporate Records Management

EDUCATION: University of Oklahoma [B.A. (Poli.Sci.) 1971];
State University of New York at Stony Brook [M.S. (Urban and Policy Sciences) 1974]; and
Oklahoma City University [J.D. (Law) 1978].

MEMBERSHIPS: Oklahoma County, Oklahoma State and American Bar Associations.

POSITIONS: ABA Conveyancing Committee (current project chairman);
OBA Real Property Law Section (current member, current director, former chairman);
OBA Title Examination Standards Committee (current chairman);
The Oklahoma City Title Attorneys Association (current member, former president, former director);and
The Oklahoma City Commercial Law Attorneys Association (current member).

SPECIAL EXPERIENCE: Oklahoma City University School of Law adjunct professor: "Oklahoma Land Titles" course (1982-present); and
previously served as title examiner and commercial loan closer with Lawyers Title of Oklahoma City, Inc., Oklahoma City, Oklahoma, and as General Counsel of American First Land Title Insurance Co. (now American Guaranty Title Co.) of Oklahoma City, Oklahoma.

PUBLICATIONS: "*Corporate Attest, Seal Still Needed For Real Estate Documents*", Oklahoma Banker (February 4, 1994);
"*Federal Money Judgment Liens Under the Federal Debt Collection Procedure Act: A 40-yr. Super-Lien*" Consumer Finance Law Quarterly Report Vol. 47, No.4 (Fall 1993);
"*Local Real Property Recordings Required for Federal Money Judgments*," 63 Oklahoma Bar Journal 2697, (September 30, 1992);
"*Title Examination Standards in America: A Status Report*," Probate and Property, ABA Real Property, Probate and Trust Magazine, Sept./Oct. 1990 (Co-author);
"*Oklahoma Title Examination Standards and Curative Acts Relating to Oil and Gas Interests*," 24 Tulsa Law Journal 548 (Summer 1989) (Co-author).

SPECIAL HONORS: Who's Who in American Law, Sixth, Seventh and Eighth Editions (1990-1991, 1991-1992, and 1992-1993);
Who's Who of Emerging Leaders in America, 4th Edition, 1991-1992;
Oklahoma Bar Association 1990 Earl Sneed Continuing Legal Education Award; and
Oklahoma Bar Association 1990 Golden Gavel Award: Title Examination Standards Committee.

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A. EXAMINING ATTORNEY'S RESPONSIBILITIES

1. GENERAL RESPONSIBILITY

The Attorney who undertakes to examine a title to real property as part of a sale or a loan transaction has a significant responsibility. As noted in Patton:

§45. Importance of Title Examination

In distinction from the abstracter's duty to search the records and to merely report the facts as he finds them, it is the province of the attorney to examine these facts either from the abstract or, using it as a guide, from the records themselves, and to formulate a legal opinion thereon. He is therefore commonly called a title examiner (in distinction from a searcher or abstracter of the records, though, if he is a lawyer admitted to practice in the state, he may be both abstracter and examiner). Having received an abstract which he considers to be "good and sufficient," or to otherwise satisfy his client's contract upon the subject, the latter is now ready to examine the title. This is of great importance, for the reason that, aside from covenants of warranty, all questions of title after acceptance of conveyance are at the risk of the vendee. His only protection against defects is to investigate the title beforehand, or to look to the express warranties of his vendor's conveyance afterwards. He wishes to know, therefore, before completing his purchase, that the title is not only free from defects which would be covered by the warranties of his deed, but also free from those minor defects for which he would have no recourse but which would make it unmarketable on a resale. (emphasis added)

§52. Responsibility of Examining Attorney

Though an attorney must be held to have undertaken to use a reasonable degree of care or skill, and to possess to a reasonable extent the knowledge requisite to a proper performance of his duties, and will be held liable to his client for injury resulting as a proximate consequent from the want of such knowledge and skill, or from a failure to exercise such care, he is not a guarantor of the titles which he approves and is only liable for negligence or misconduct in their examination. He cannot be held for damages resulting from an opinion rendered in good faith which proves to be erroneous either as to the law or as to its application to the particular facts involved. He is of course liable for injury arising from his negligence, such as omitting in his report to a purchaser liens shown in the abstract, or in certifying in his report to others as to the subsistence of a lien which has ceased to exist or which never attached. But, unless there are circumstances to take the case out of the general rule, his liability, like that of an abstracter, extends only to those by whom he has been employed.

Aside however from the financial responsibility to a client for any loss resulting from negligence or lack or knowledge and skill, a title examiner feels the same personal responsibility for making a complete and accurate title report which is implicit in the

relationship of a lawyer and his client. As in almost no other field of the practice of law, carefulness is the prime requisite. Knowledge of the subject is a close second. Skill then comes with experience. Knowledge alone is not substitute for the latter, the same in title examination as in playing a musical instrument, speaking a foreign language, or using new tools and machines. Given equal knowledge of real property law, an attorney well versed in trial procedure may be as inadequately equipped to examine a title as may an examiner to conduct a jury trial. The two lines of practice require different types of skill; and the latter, in both cases, is acquired mainly from experience.

In addition to studying the matters contained infra relating to title in his own state and supra in relation to methods of examination, each reader is urged to supplement his familiarity with this text by reading any local work which may have been prepared for his state and any list of standards which have been adopted by the lawyers of his state or district. He should procure an index of the curative and limitation acts applicable to titles in his state, either a published list where that is possible, or one prepared and kept up by himself. (emphasis added)

2. PRIVITY WITH TITLE EXAMINERS

Obviously both the inside address of the title opinion and the limiting language, elsewhere in the opinion, designating the sole persons allowed to rely on the opinion, are proper places to expressly show to whom the opinion is addressed.

However, even where the opinion is addressed to a specific person or entity, it is possible that under all the circumstances surrounding the transaction, the attorney who is representing the lender and rendering an opinion to the lender, might also be held to be the attorney for the borrower as well.

As noted in an Oklahoma case considered by the 10th Circuit U.S. Court of Appeals, Vanguard Production, Inc. v. Martin, 894 F.2d 375 (10th Cir. 1990):

> The Oklahoma Supreme Court replied that the pledgee's complaints stated a cause of action under Oklahoma law. Privity of contract does not apply to tort actions under Oklahoma law. *See Keel v. Titan Constr. Corp.*, 639 P.2d 1228, 1232 (Okla. 1981). The *Bradford* court stated that to determine an attorney's negligence the jury must determine whether the attorney's conduct was "*the conduct of an ordinarily prudent man based*

> *upon the dangers he should reasonably foresee* TO THE PLAINTIFF OR ONE IN HIS POSITION *in view of all the circumstances of the case* such as to bring the plaintiff within the orbit of defendant's liability." Id. at 191 (emphasis in original).
>
> ***
>
> In our view a contract for legal services is a contract for services giving rise to the duty of workmanlike performance. The record in this case reveals extensive communications between the attorneys, Martin and Morgan, and the purchaser, Vanguard, concerning the title opinion. The record also shows that all parties, including Martin, Morgan, Vanguard, and Glenfed, were concerned about the Texas Rose Petroleum suit. Thus, we find that an ordinarily prudent attorney in the position of the defendants would reasonably have apprehended that Vanguard was among the class of nonclients which, as a natural and probable consequence of the attorneys' actions in preparing the title opinion for Glenfed, could be injured. Thus, we hold that the defendants owed a duty of ordinary care, *Bradford*, 653 P.2d at 190, and workmanlike performance, *Keel*, 639 P.2d at 1231, to Vanguard in the performance of their contract for legal services with Glenfed. We stress that our holding only addresses the question of the duty of the defendants owed to Vanguard and not the question of whether Martin's, Morgan's and Ames, Ashabranner's acts were the proximate cause of Vanguard's injuries. See *Bradford*, 653 P.2d at 190-91; *Keel*, 639 P.2d at 1232. (emphasis added)

An interesting Oklahoma Court of Appeals case was rendered in 1991, American Title Ins. v. M-H Enterprises, 815 P.2d 1219 (Okl. App. 1991), and it was held therein that a buyer of real property can sue the title insurer for negligence, even if the erroneous title insurance policy only runs in favor of the buyer's lender. This rule applied where: (1) no abstract was prepared, (2) an attorney's title examination was not secured and (3) the insurer/abstractor missed a recorded first mortgage.

The message in these two cases is that a party that conducted the title search and examination was held potentially liable for an error in such effort to a third party to whom the

abstractor, and title examiner and insurer had no reason to expect to be liable. This liability might arise, even though the attorney or insurer specifically directed her opinion or policy to only one of the multiple participants.

3. STATUTE OF LIMITATIONS ON TITLE OPINIONS

In terms of the nature of (i.e., tort vs. contract), and the statute of limitations on, attorneys' errors in examination of title, it should be noted that the Oklahoma Supreme Court in 1985 held:

> In Oklahoma, an action for malpractice, whether medical or legal, though based on a contract of employment, is an action in tort and is governed by the two-year statute of limitations at 12 O.S.A. 1981, § 95 Third. (*Seanor v. Browne*, 154 Okl. 222, 7 P.2d 627 (1932)). This limitation period begins to run from the date the negligent act occurred or from the date the plaintiff should have known of the act complained of. (*McCarroll v. Doctors General Hospital*, 664 P.2d 382 (Okl. 1983)). The period may be tolled, however, by concealment by the attorney of the negligent acts which injured the client. This Court has previously held, in *Kansas City Life Insurance Co. v. Nipper*, 174 Okl. 634, 51 P.2d 741 (1935) that:
>
> One relying on fraudulent concealment to toll the statute of limitation must not only show that he did not know facts constituting a cause of action, but that he exercised reasonable diligence to ascertain such facts.
> (emphasis added)

(Funnell v. Jones, 737 P.2d 105 (Okla. 1985))

However, in 1993 the Oklahoma Supreme Court "clarified" their holding in Funnell by declaring:

> Appellees argue the instant case should be controlled by *Funnell v. Jones*, 737 P.2d 105 (Okla. 1985), *cert. denied*, 484 U.S. 853, 108 S.Ct. 158, 98 L.Ed.2d 113 (1987), a case where we applied the two year tort limitation period to a legal malpractice case. Appellees' reliance on *Funnell* is misplaced. The opinion in

Funnell gives no indication a separate contract theory was alleged there or that the plaintiffs there attempted to rely on the three year limitation period for oral contracts. Thus, our statement in *Funnell* to the effect an action for malpractice, whether legal or medical, though based on a contract of employment, is an action in tort, must be taken in the context it was made, to wit: determining whether the two year limitation for torts was tolled based on allegations of fraudulent concealment on the part of defendant attorneys and that no acts alleged against defendants occurred within the two years immediately preceding filing of the lawsuit. *Id.* at 107-108. We did not decide in *Funnell* a proceeding against a lawyer or law firm is limited *only* to a proceeding based in tort no matter what the allegations of a petition brought against the lawyer or law firm. We have never so held and, in fact, to so rule would be tantamount to treating lawyers differently than we have treated other professions, something we refuse to do.

We have held a party may bring a claim based in both tort and contract against a professional and that such action may arise from the same set of facts. *Flint Ridge Development Company, Inc. v. Benham-Blair and Affiliates, Inc.*, 775 P.2d 797, 799-801 (Okla. 1989) (architectural, engineering and construction supervision services). In essence, the holding of *Flint Ridge* is *if* the alleged contract of employment merely incorporates by reference or by implication a general standard of skill or care which a defendant would be bound independent of the contract a tort case is presented governed by the tort limitation period. *Id.* at 799-801. However, where the parties have spelled out the performance promised by defendant and defendant commits to the performance without reference to and irrespective of any general standard, a contract theory would be viable, regardless of any negligence on the part of a professional defendant. *Id.* As pertinent here, the specific promise alleged or reasonably inferred from the petition and documents attached thereto was to search the records of the County Clerk for an approximate nine (9) year period and report those records on file affecting the title for loan purposes. Simply, if this was the promised obligation a contractual theory of liability is appropriate which is governed by the three year limitation period applicable to oral contracts. (emphasis added)

(Great Plains Federal Savings & Loan v. Dabney, 846 P.2d 1088 (Okla. 1993))

B. SELECTED CURATIVE ACTS AND TITLE STANDARDS

1. BACKGROUND AND AUTHORITY OF STANDARDS

The first set of Statewide Standards was adopted in 1938 by the Connecticut Bar Association. On November 16, 1946 the General Assembly and House of Delegates of the Oklahoma Bar Association ("OBA") approved 21 Title Examination Standards ("Standards") for the first time in state history. 17 O.B.J. 1751. Of these 21, there were 10 without any specific citation of authority expressly listed. There are currently over 100 Standards in Oklahoma, and about 13 of these have no specific citation of authority (i.e., no citation of supporting Oklahoma statutes or case law).

In Oklahoma, new and revised Standards are developed and considered each year at 9 monthly Title Examination Standards Committee ("Standards Committee") meetings held from January to September. These proposals are then presented annually by the Standards Committee to the OBA Real Property Section ("Section") at the Section's annual meeting, usually held in November of each year. Immediately thereafter, the Section forwards to the OBA House of Delegates ("House"), for the House's consideration and approval, on the day following the Section meeting, any new or revised Standards which were approved at the Section's meeting.

These Oklahoma Standards have received acceptance from the Oklahoma Supreme Court which has held:

> While [the Oklahoma] 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 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, 649 P.2d 532, 535 (Okla. 1982).

The Standards become binding between the parties:

(1) IF the parties' contract incorporates the Standards as the measure of the required quality of title, for example:

(a) Standard 2.2 REFERENCE TO TITLE STANDARDS provides: "It is often practicable and highly desirable that, in substance, the following language be included in contracts for a sale of real estate: 'It is mutually understood and agreed that no matter shall be construed as an encumbrance or defect in title so long as the same is not so construed under the real estate title examination standards of the Oklahoma Bar Association where applicable;'" and

(b) the Oklahoma City Metropolitan Board of Realtors standard contract provides: "7. TITLE EVIDENCE: Seller shall furnish Buyer title evidence covering the Property, which shows marketable title vested in Seller according to the title standards adopted by the Oklahoma Bar Association. . .", or

(2) IF proceeds from the sale of oil or gas production are being held up due to an allegedly unmarketable title [52 O.S. 570.10.D.2a; also see: Hull, et al. v. Sun Refining, 789 P.2d 1272 (Okla. 1990) ("Marketable title is determined under §540 [now §570.10] pursuant to the Oklahoma Bar Association's title examination standards.")].

In these two instances, the parties might be subject to suits to specifically enforce or to rescind their contracts, to seek damages, or to pay increased interest (i.e., 6% v. 12%), as appropriate, with the Court's decision being based on the "marketability" of title as measured,

in part, by the Standards.

2. IMPETUS FOR STANDARDS: PROBLEMS WITH SEEKING PERFECT TITLE

The title examiner is required, as a first step, to determine what quality of title is being sought by her client-buyer or client-lender before undertaking the examination. According to Am Jur 2d:

> *An agreement to sell and convey land is in legal effect an agreement to sell a title to the land, and in the absence of any provision in the contract indicating the character of the title provided for, the law implies an undertaking of the part of the vendor to make and convey a good or marketable title to the purchaser. A contract to sell and convey real estate ordinarily requires a conveyance of the fee simple free and clear of all liens and encumbrances. There is authority that the right to the vendee under an executory contract to a good title is a right given by law rather than one growing out of the agreement of the parties, and that he may insist on having a good title, not because it is stipulated for by the agreement, but on his general right to require it. In this respect, the terms "good title," "marketable title," and "perfect title" are regarded as synonymous and indicative of the same character of title. To constitute such a title, its validity must be clear. There can be no reasonable doubt as to any fact or point of law upon which its validity depends. As is sometimes said, a marketable title must be one which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence.* (77 Am Jur 2d §115 Title of Vendor: Generally; Obligation to furnish good or marketable title)

> *While, in the absence of any provisions in a contract for the sale of land indicating the character of the title to be conveyed, the law implies an obligation or undertaking on the part of the vendor to convey or tender a good and marketable title, if the contract expressly stipulates as to the character of the title to be furnished by the vendor, the courts give effect thereto and require that the title offered conform to that stipulation, it is immaterial that it may in fact be a good or marketable title. A contract to convey a specific title is not fulfilled by conveying another and different title. On the other hand, when the title which the vendor offers or tenders conforms to the character of title stipulated in*

the contract of sale, the vendee is bound to accept it although the title may not be good or marketable within the meaning of the obligation or undertaking to furnish such a title which the law would have implied in the absence of any stipulation. Refusal to accept title tendered in accordance with the terms of sale constitutes a breach by the purchaser of land of his contract to purchase. If a contract for the purchase of real estate calls for nothing more than marketable title, the courts cannot substitute a different contract therefor. (77 Am Jur 2d §123 Special Provisions as to character of title: Generally.)

The terminology which is used to define the quality of title to real property has apparently changed over time. Patton notes:

In the early law courts, titles as between vendor and purchaser were either good or bad; there was no middle ground. No matter how subject to doubt a purchaser might prove the title to be, he was under obligation to take it, unless he could prove that it was absolutely bad. But the courts of equity coined the expression "marketable title," to designate a title not necessarily perfect, or even good, in the law sense, but so free from all fair and reasonable doubts that they would compel a purchaser to accept it in a suit for specific performance. Conversely, an unmarketable title might be either one that was bad, or one with such a material defect as would cause a reasonable doubt in the mind of a reasonable, prudent, and intelligent person, and cause him to refuse to take the property at its full or fair value. Therefore the term "unmarketable title" includes both "bad titles" and "doubtful titles." Though originally there might have been a difference between a "good title" and a "marketable title," now the terms are used interchangeably. Other equivalent terms appear in the notes. A perfect record title may not be marketable, because of apparent defects, which cause reasonable doubts concerning its validity, and a good or marketable title may be far from perfect, because of hidden defects. In fact, under either the English system of unrecorded conveyances, or under the system afforded by our recording acts, "it is impossible in the nature of things that there should be a mathematical certainty of a good title." While examiners should be cautious in advising clients as to the acceptance of a title, neither should they frighten them by advertizing these relatively infrequent dangers; and they must remember that a purchaser cannot legally demand a title which is absolutely free from all suspicion or possible defect. He

may require only such a title as prudent men, well advised as to the facts and their legal bearings, would be willing to accept. Many courts further hold that a doubt sufficient to impair the chdracter of marketableness must be such as will affect the selling value of the property or interfere with the making of a sale.

If unmarketable, the doubt which makes it so may be based upon an uncertainty either as to a fact or as to the law. If objection is made because of doubt upon a question of law, this does not make the title unmarketable unless the question is fairly debatable -- one upon which the judicial mind would hesitate before deciding it. Likewise as to a question of fact, there must be a real uncertainty or a difficulty of ascertainment if the matter is to affect marketability. A fact which is readily ascertainable and which may be readily and easily shown at any time does not make title unmarketable. For instance, where a railway company reserved a right of way for its road as ***now*** *located and constructed or hereafter to be constructed, the easement depended on the fact of the* ***then*** *location of the line; and as the evidence showed that no line had then been located, and as the matter could be easily and readily proved at any time, the clause did not make plaintiff's title unmarketable. But where there are known facts which cast doubt upon a title so that the person holding it may be exposed to good-faith litigation, it is not marketable.*

Recorded muniments form so generally the proofs of title in this country, that the courts of several jurisdictions hold not only that a good or marketable title must have the attributes of that term as used by the equity courts, but also that it must be fairly deducible of record. This phase of the matter will be considered further in the ensuing section.

Determination of questions as to the marketability of titles is peculiarly within the province of counsel for buyer or mortgagee. Counsel for the owner will not only endeavor to remedy the condition of the title as to any requirements which he concedes to be proper, but usually finds it easier to do so than to contest the matter, even as to matters not so conceded. In the main it is only when compliance is impossible or when time for compliance is lacking or has passed that the question reaches the courts. Even then a decision is not always possible. This is because courts usually will not undertake to determine doubtful questions

> *involving the rights of others who are not parties to the action.* (Rufford G. Patton and Carroll G. Patton, Patton on Titles, 2nd Edition (herein "Patton"): §46. Classification of Vendor Titles)

In essence, it appears that "marketable title" means (1) the record affirmatively shows a solid chain of title and (2) the record does not show any claims in the form of liens or encumbrances. This "good record title" can be backed up by the delivery of a deed to the vendee containing sufficient warranties to ensure that the vendor must make the title "good in fact", if non-record defects or liens/encumbrances surface later.

However, to the extent a contract provision providing that one must have and must convey marketable title is interpreted to require title to be free from "all reasonable doubt" it opens the door to differences of opinion between reasonable persons. As noted in Bayse:

> *Time cures certain errors in conveyancing by means of statutes of limitations. The healing effect of curative legislation removes other defects of conveyancing. But operation of these kinds of legislation neither defines nor declares what constitutes a marketable title. The usual definition of a marketable title is one which is free from all reasonable doubt. This negative approach is not now satisfactory, for it is a rare title concerning which an examiner cannot entertain some doubt with respect to some transaction in its history.* (Paul E. Bayse, Clearing Land Titles (herein "Bayse"): §8. Legislation)

It is this preoccupation with looking for a defect -- any defect -- whether substantive or merely a technical one, that causes the system to bog down. If there are hundreds or even thousands of potential examiners within a community, there is also the possibility of there being a wide range of examination attitudes and conclusions. In "Increasing Land Marketability Through Uniform Title Standards", 39 Va.L.Rev. 1 (1953), John C. Payne, (herein "Increasing Marketability") the problems caused by each examiner exercising unbridled discretion are noted:

When the examiner, upon the basis of these decisions, has found that the present vendor can convey a title which is good in fact, he must then ask whether the title has the additional characteristic of marketability. What constitutes a marketable title? Here again legal definitions are subordinate to functional meaning. What the purchaser of land wants is a title which not only can be defended but which can be presented to another examiner with the certainty that it will be unobjectionable. It is small comfort to the owner that he has not been disseized if he is unable to sell or mortgage. If one and the same examiner passed all titles in a given locality, the title which the examiner considered good as a practical matter would, of course, also be merchantable. But such is not the case, and the present examiner must anticipate that his client will in the future attempt to either sell or mortgage and that the same title will come under the scrutiny of some other examiner. In each of the decisions which an examiner has made in determining the validity of a title he has had to exercise sound legal and practical judgment. Will a second examiner, vested with the same wide discretion, reach the same conclusion? If his conclusion is different and he rejects the title, the professional reputation of the first examiner will be impaired and his client may suffer substantial financial loss. Faced with this uncertainty, many examiners have adopted a solution which emphasizes individual security rather than the general facility of land transfers. This is the practice known as "construing against title," or more picturesquely, as "flyspecking." These terms indicate that the examiner indulges in a minimum of presumptions of law and fact, demands full search of title in every instance, and places no reliance upon the statute of limitations. As a consequence he considers all errors of record as substantial. The result of even a ***single examiner*** *in a community adopting this practice is to set up an increasingly vicious spiral of technical objections to titles which are practically good in fact. Examiner* ***A*** *rejects a title on technical grounds. Thereafter, Examiner* ***B****, to whom the same problem is presented, feels compelled to reject any title presented to him which exhibits a similar defect. Examiner* ***A*** *is thereupon confirmed in the wisdom of his initial decision, and resolves to be even more strict in the future. It is sometimes said that the practice of construing against title reduces an entire bar to the standards of its most timorous member. This is an understatement, for the net effect is an extremity obtained only by mutual goading.*

The consequences of construing against title are iniquitous, and

the practice itself is ridiculous in that it is predicated upon a theoretical perfection unobtainable under our present system of record land titles. Many titles which are practically unassailable become unmarketable or the owners are put to expense and delay in rectifying formal defects. Examiners are subjected to much extra labor without commensurate compensation, and the transfer of land is retarded. As long as we tolerate periodic re-examination of the same series of non-conclusive records by different examiners, each vested with very wide discretion, there is no remedy for these difficulties. However, some of the most oppressive results may be avoided by the simple device of agreements made by examiners in advance as to the general standards which they will apply to all titles which they examine. Such agreements may extend to: (1) the duration of search; (2) the effect of lapse of time upon defects of record; (3) the presumptions of fact which will ordinarily be indulged in by the examiner; (4) the law applicable to particular situations; and (5) relations between examiners and between examiners and the public. Where agreements are made by title examiners within a particular local area having a single set of land records, such agreements may extend even further and may embrace the total effect of particular specific records. For example, it may be agreed that certain base titles are good and will not thereafter be examined or that specific legal proceedings, normally notorious foreclosures and receivership actions, will be conclusively deemed effective. Although such agreements may not be legally binding upon the courts, they may go far toward dispelling the fear that if one examiner waives an apparent defect of title it may be deemed a cloud upon the title by a subsequent examiner. The result is an increase in the marketability of land and a reduction of the labor imposed upon the proponent of the title. The obvious utility of such an arrangement has led to the adoption of uniform standards for the examination of titles by an increasing number of bar associations.

The problems arising from this search for perfect title impact the examiner and their clients in several ways:

1. The legal fees charged to the public are higher because each examination for a parcel must always go back all the way to sovereignty (or, in some states, back to the root of title);

2. The costs to cure minor defects are often relatively large compared to the risk being extinguished;

3. The unexpected costs to remedy problems already existing when the vendor came into title, which were waived by the vendor's attorney, are certainly not welcomed by the public; and

4. The prior examiner looks inept and/or the subsequent examiner looks unreasonable, when a preexisting defect is waived by one attorney and "caught" by the next.

(John C. Payne, "The Why, What and How of Uniform Title Standards", 7 Ala.L.Rev. 25 (1954) (herein "The Why of Standards")).

In addition, friction and lowering of professional cooperation increase between the title examining members of the bar as they take shots at each others work. This process of adopting an increasingly conservative and cautious approach to examination of titles creates a downward spiral. As noted in Bayse:

> *Examiners themselves are human and will react in different ways to the same factual situation. Some are more conservative than others. Even though one examiner feels that a given irregularity will not affect the marketability of a title as a practical matter, he is hesitant to express his opinion of marketability when he knows that another examiner in the same community may have occasion to pass upon the title at a later time and would undoubtedly be more conservative and hold it to be unmarketable. Under these circumstances he is inclined to be more conservative himself and declare the title to be unmarketable. People do not like to be required to incur expense and effort to correct defects which do not in a practical sense jeopardize a title when they have already been advised that their title is marketable. The public becomes impatient with a system that permits such conservative attitudes.*
>
> *If the same examiner passed judgment upon all title transactions,*

> *this situation would remain dormant. Unfortunately such is not the case. Or if all examiners would hold the same opinion as to specific irregularities in titles, this complication would not arise. But this also is not the case. The result in many communities has been greatly depressive, sometimes tragic.* (Bayse: §7. Real Estate Standards)

The State of Oklahoma apparently has one of the most strict standards for "marketable title" which was caused by the language of several Oklahoma Supreme Court cases. The current title standard in Oklahoma which incorporates the court's holdings provides:

> ***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."*

Other states apparently utilize more of an "apparently perfect" test as their measuring stick. There is an effort underway within the Standards Committee of the Section to revisit the long list of State cases dealing with marketability of title to ask whether a Standard calling for a more "prima facie" approach, rather than a "perfect" approach, would be supported by a re-reading of the cases.

In response to this obvious need to avoid procedures that alienated the public and caused distance to grow between examiners, a movement began and mushroomed in a couple of decades throughout the country to adopt uniform title examination standards. Such standards were adopted first in local communities by the practicing bar and then on a statewide basis. Although there is some competition among local bars for the place of honor, it appears that the local bar of Livingston County, Illinois adopted a set of 14 standards on April 7, 1923.

Thereafter, in 1933 or 1934, the Gage County Nebraska Bar Association formulated 32 title standards. The Connecticut Bar, in 1938, became the first state to have statewide standards by adopting a set of 50. ("Increasing Marketability")

3. CURATIVE ACTS

The following 2 sets of Title Examination Standards include those covering the two most significant Curative Acts, the Marketable Record Title Act and the Simplification of Land Titles Act.

a. Simplification of Land Titles Act

(1) Standards

18.1 REMEDIAL EFFECT

The Simplification of Land Titles Act, 16 O.S.A. §§61-63, 66 (§§64-65 repealed effective April 10, 1980), is remedial in character and should be relied upon with respect to such claims or imperfections of title as fall within its scope.

Authority: 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: 1. 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 v. Bailey 268 P.2d 868 (Okla. 1954), reading a requirement for adverse possession into the tax recording statute, is not applicable.

2. 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, 16 O.S.A. §§61-63, 66 (§§64-65 repealed effective April 10, 1980), 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 or personal representative'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 of such person, who was 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.

Authority: 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, 16 O.S.A. §§61-63, 66 (§§64-65 repealed effective April 10, 1980), 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.

Authority: 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, 16 O.S.A. §§61-63, 66 (§§64-65 repealed effective April 10, 1980), includes a recorded warranty deed, deed, quitclaim 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. §61(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. §61(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 2164. 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.

Authority: 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 (10) 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 (1) 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 the 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 or personal representatives, 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 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).
Comment: 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 a decree of distribution made by the court having jurisdiction of the settlement of a testate decedent's estate, entered after due notice and hearing, is conclusive, in the absence of fraud, mistake or collusion, as to the rights of 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 "Comment". 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 paragraph "B." of the standard, 54 O.B.J. 2379, 2383 (1983). The recommendation was approved by the Real Property Section on November 3, 1983, and adopted by the House of Delegates on 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 a person who acquired the land as a gift or for a nominal consideration) even with actual or constructive notice of any defect listed in Standard 18.2 above.

The applicability of the Act to severed mineral interests was discussed but not decided by the Oklahoma Court of Appeals in Clark v. Powell, 52 Okla. B.J. 2584 (Okla. Ct. App. 1981), modified 53 Okla. B.J. 738 (Okla. Ct. App. 1982), withdrawn 53 Okla. B.J. 879 (Okla. Ct. App. 1982). Clark 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 to the probate decree reserved a one-third mineral interest in one of three children. In its modification of the decision, the court of appeals held that although the judgments relied upon would ordinarily qualify for protection under the Act, the Act did not apply to the facts of the case.

The facts which disqualified the judgments from protection were that (1) the one-third mineral interest was a severed mineral interest and thereby free of the operation of the Act, (2) the probate court had no jurisdiction over any interest not held by the deceased at the time of death, and (3) the quiet title suit court had no jurisdiction over the owner of the one-third

severed mineral interest because it was a default judgment and no allegations of adverse possession of the minerals were made.

The court of appeals also said, in regard to the parties attempting to rely on the Act, "None are 'purchasers of value' within the meaning of the Act." The opinion was allowed to stand but was subsequently withdrawn from publication. This suggests that 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 that have been recorded for more than ten years. If a final decree is recorded for less than ten years, full probate or administration proceedings should be examined before relying on the final decree. At the anniversary of the tenth year of recordation, Standard 18 allows the examiner to rely on the validity of the final decree assuming other aspects of the statutes are met. Standard 18 is also useful in examining other court decrees that have been recorded for 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.

b. Marketable Record Title Act

(1) Standards

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.

Authority: 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 & 574 (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); "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., "Marketable Title Statutes", 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: A previous caveat to this standard expressed the possibility that the federal courts might consider the Marketable Record Title Act to be a statute of limitations within the meaning of §2 of the Act of April 12, 1926, 44 Stat. 239. If those courts should so hold, then the Marketable Record Title Act's provisions could be relied upon to have barred remedies to protect interests held by restricted Indians of the Five Civilized Tribes.

The Oklahoma Supreme Court held in Mobbs v. City of Lehigh, 655 P.2d 547, 551 (Okla. 1982) that the Marketable Record Title Act was not a statute of limitations. The Court said that, unlike a statute of limitations which barred the remedy, the Marketable Record Title Act had as its target the right itself.

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 Report, 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 Authority, 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.

The 1988 Report of the Title Examination Standards Committee, 59 O.B.J. 3098, 3104-06 (1988) proposed substituting a new "Caveat" to reflect the decision in the Mobbs case cited therein. The proposal was approved by the Real Property Section December 8, 1988 and adopted by the House of Delegates, December 9, 1988.

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.

Authority: 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 Record 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.

Authority: 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."

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-year period deleted, 30 years substituted, and dates in "Comment" corrected to agree with 30-year 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.

Authority: 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 A's 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 A 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 X's 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 A's 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-year period deleted, 30 years substituted, and dates in "Comment" corrected to agree with 30-year 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.

Authority: 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 B's 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 C's 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 B's 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 C's 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. C's 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-year period deleted, 30 years substituted, and dates

in "Comment" corrected to agree with 30-year 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.

Authority: 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 Y's 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 X's 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-year period deleted, 30 years substituted, and dates in "Comment" corrected to agree with 30-year 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 such possessory owner's claim.

Authority: 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 were 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 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-year period deleted, 30 years substituted, and dates in "Comment" corrected to agree with 30-year 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.

Authority: 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 X's 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-year period deleted, 30 years substituted, and dates in "Comment" corrected to agree with 30-year 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.

Authority: 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 C's one-third interest to X in fee simple, the deed being at once recorded. This does not help C any. C's interest, having been 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 has a marketable record title, 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 Z's root of title, and B's title 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-year period deleted, 30 years substituted, and dates in "Comment" corrected to agree with 30-year 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 a 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.

Authority: 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 has 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-year period deleted, 30 years substituted, and dates in "Comment" corrected to agree with 30-year 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.

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

Similar Standard: Neb., 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 (30) 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 (30) 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 (30) 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-year period deleted, 30 years substituted, and dates in "Comment" corrected to agree with 30-year 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 (40) year period to thirty (30) years, effective July 1, 1972. If the thirty (30) 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.

Authority: 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 the owner has recorded no instruments or other title transactions during the preceding thirty (30) 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 (30) 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 (1970). Tense of verbs in last clause of third sentence changed by editor, 1978; "Authority" 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." and "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." and "E." need be shown.

The abstractor 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."

Authority: 16 O.S.A. §§71-80, 46 O.S.A. §203, and Oklahoma Title Examination Standard 13.7.

Comment: 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, mechanic 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 abstractor 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-year 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 that destroys most claims or defects of title before the root of title. The root of title is an instrument "purporting to divest" that is in a chain of title and that has been of record for at least thirty years.

A title examiner must look for and review the following instruments prior to a 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 that 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 a chain of title back to and including the root of title; and (j) instruments relating to Indian titles.

In Anderson v. Pickering, 541 P.2d 1361 (Okla. App. 1975) the Oklahoma Court of Appeals stated that there is no authority for requiring a vendee to purchase real property when title is defective. The court further explained that although the "Merchantable Title Act" -- really the Marketable Record Title Act -- provides a statutory method for quieting title, it is not self-executing nor a perfect remedy applicable in every case. However, as one article has noted, it appears that the Anderson decision is premised on the fact 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 decision of the Oklahoma Supreme Court, Mobbs v. City of Lehigh, 655 P.2d

547 (Okla. 1982) expressly assumed the Act was constitutional, but the court also stated that "[w]e intimate no view on the constitutionality of the Act because its validity was not framed as an issue in the trial court". Mobbs held that under the operation of the Act, a void tax deed could be a valid root of title because its defective nature was not "inherent" but rather was a "transmission" problem.

It was hoped that the applicability of this Act to Indian land would be upheld if it were determined to be a statute of limitations and not an extinguishment statute. However, the Mobbs decision ended this possibility by declaring the Act to be an extinguishment statute.

If one is an oil and gas title examiner, one must be especially cautious to look behind the root of title first to determine title ownership to any mineral or royalty interest which has been severed, and second to identify unreleased leases with indefinite or unexpired terms. Therefore, the Act is only helpful to the mineral examiner to the extent that a surface and mineral estate remain together and unsevered.

Standard 19.13 allows and encourages abstractors to prepare thirty-year root of title abstracts conforming to the Act. A proposal to repeal Standard 19.13 was presented by the Standards Committee to the Real Property Section in 1986 at the Section's annual meeting, but the repeal proposal was defeated. Repeal of this Standard would not have affected the statute, but would have discouraged abstractors and examiners from making and relying on such "short" abstracts.

(3) Practicalities

The following discussion does not address all the examples accompanying Standard 19, but includes some general comments concerning the applicability of the Act as well as some

situations where the Act and the Standards are useful.

While there are differences of opinion among title examiners, as to whether to start at the front or back of an abstract, even if the examiner examines 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 record will have to be at least briefly examined back to sovereignty. Only after full consideration of all the instruments can the examiner apply the Act to a certain sequence. Most examiners have never seen a "short abstract" prepared pursuant to Standard 19.13 and might even feel uncomfortable if such an abstract was presented to them for examination. The examiner should not question the constitutionality of the Act even though the issue of constitutionality has not been determined by the Oklahoma Supreme Court. An examiner should not rely on the Act without advising that there is some case authority that the statute is not self-executing, but must be accompanied by a quiet title action. The Act cannot be used in dealing with severed minerals. The Act should not be relied upon without mentioning it is subject to the rights of persons in possession of the property.

The following are five situations in which the Act and Standards are very useful. The first situation is when a record owner has an interest which 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 on the Simplification of Land Titles Act previously discussed. Second, the Act comes into play when a patent from the Commissioners of the Land Office is issued after the extinguishment of a prior certificate of purchase. It is not unusual to see a certificate of purchase issued to one party, followed by another certificate of purchase issued to another party together with a Commissioners of the Land Office patent that

has been recorded more than thirty years. The Act can then be relied upon, and no further inquiry into the proper extinguishment of the certificate of purchase is necessary.

Third, in regard to tax deeds, the case of Mobbs v. City of Lehigh, id, is authority for the proposition that a tax deed can be relied upon as a valid root of title without inquiring into the validity of the proceedings leading to the tax deed. Fourth, an examiner can rely upon deeds recorded more than thirty years in which the grantors purport to be the sole heirs of the record owner. And fifth, relying on dicta in the Mobbs case, an examiner should be fairly comfortable with a "stray" or "wild" deed as a "root" which has been of record more than thirty years.

4. CURATIVE STANDARDS

The following 4 Title Examination Standards include those used most often to overlook and ignore title defects that might otherwise require expensive and time-consuming curative work.

a. Standard 6.1: Defects in or Omission of Acknowledgments in Instrument of Record

(1) Standard

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 Paragraph C herein, 16 O.S.A. §15.

C. Such an instrument which has not been acknowledged or which contains a defective acknowledgment 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 five (5) years, 16 O.S.A. §§27a & 39a.

History: Adopted December 4, 1981. Proposed by Report of the 1981 Title Examination Standards Committee, 52 O.B.J. 2723, 2724 (1981). Approved by Real Property Section and adopted by House of Delegates, 53 O.B.J. 257-58 (1982). The title examination standard which, prior to December 4, 1981, bore the number 6.1 has been renumbered 2.3.

In 1988, the Oklahoma Legislature amended 16 O.S.A. §27a by changing from ten (10) to five (5) years the period of time for which an instrument must have been of record to validate its recording if it is not acknowledged or has a defective acknowledgment. This amendment made it possible to combine "C" and "D" of the standard as it was formerly. These changes were proposed in the 1988 Report of the Title Examination Standards Committee, 59 O.B.J. 3098, 3100 (1988). The Real Property Section approved the amendments, December 8, 1988 and the House of Delegates adopted the amended standard, December 9, 1988.

During the consideration of the 1988 proposal to amend this standard, the Committee directed the editor, if the proposal were adopted, to record in the History that the Committee had considered the proposition that the Oklahoma Legislature's 1988 amendment to §27a applied to acknowledgments generally and was not limited to acknowledgments by corporations only. The Committee accepted that proposition as valid and therefore amended this standard applying to acknowledgments generally.

(2) Background

Standard 6.1 summarizes existing statutes concerning acknowledgments. 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. Formerly, the curative periods were five years, if the form was defective, and ten years, if either the facts were defective or the acknowledgment itself was omitted in part or in full. As of November 1, 1988, both kinds of defects are cured after the document is of record for five years.

It should be noted that at least a few practicing real property attorneys have taken the position that, absent estoppel or other arguments, an acknowledgment is necessary to the validity of a corporate conveyance even as between the parties. The support for this position is derived from a combination of the language in Sections 15, 92 and 95 of Title 16 of the

Oklahoma Statutes and the Oklahoma Supreme Court case of Bentley v. Zelma Oil Co. The introductory language of Section 15 states that "[e]xcept as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed." (emphasis added) Section 92 provides that every instrument affecting real estate and acknowledged by a corporation shall be valid. Section 95 requires that every deed executed by a corporation must be acknowledged by the officer or person signing for the corporation. In Bentley v. Zelma Oil Co., the court held that a contract from a corporation which affected real estate was invalid because it was not acknowledged in substantial compliance with what is now Section 95.

(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, only normally, the practical approach is to assume that the subsequent purchaser accepts as valid the otherwise defectively acknowledged instrument.

b. 7.1 Marital Interests: Definition; Applicability Of Standards; Bar or Presumption of Their Non-Existence

(1) Standard

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 Title Examination Standards Committee, see Committee Report, 54 O.B.J. 2379 (1983), approved by the Real Property Section, November 3, 1983, and adopted by the 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

The Oklahoma Constitution and Section 4 of Title 16 of the Oklahoma Statutes protect the family homestead by restricting the record owner's right to convey said homestead. During the first ten years that 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 possibility of a marital interest.

On any instrument relating to a tract of land being conveyed, mortgaged, or leased, the marital

status should be noted and the instrument should be executed by the spouse if married.

(3) Practicalities

The practical approach to both 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 she is conveying, mortgaging, leasing, etc., her marital status should be noted and the instrument should be executed by her spouse if she 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. One or both spouses can have their names placed on a deed or other instrument by use of a power of attorney, even if being exercised by the other spouse rather than by a third party.

c. 9.2 Execution Defects [Note: See APPENDIX A]

(1) Standard

Any corporation deed, mortgage or other instrument affecting real property which has been on record in the county clerk's office for five (5) 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 five (5) years must have the name of the corporation subscribed thereto either by an Attorney in Fact, or by the President or any 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 Register 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 §§403-404 (2d ed. 1957) and Flick, Abstract and Title Practice §1292 (2nd ed. 1958).

Comment: The Legislature's repeal in 1986 of 1947 Okla. Sess. Laws, p. 186, §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.

Such evidence becomes conclusive after five (5) years, 16 O.S.A. §27a.

A dissolved domestic corporation continues to exist for three (3) 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.

History: Adopted as 33, December 1959, 30 O.B.A.J. 2091, 2092 (1957). Statutory citation in first group of "Authorities" changed to "6 O.S.A. §414" from "6 O.S.A. §108(f)" to reflect statutory amendment, December 3, 1966, Resolution No. 4, 1966 Real Property Committee, 37 O.B.A.J. 2382, 2383 (1966) and adopted by House of Delegates, id. at 2538, 2539. Substantial changes in second paragraph of standard recommended by 1983 Title Examination Standards Committee, 54 O.B.J. 2379, 2381-82 (1983), approved by Real Property Section, November 3, 1983, and adopted by House of Delegates, November 4, 1983. The final "Comment" was added by the Real Property Section before its approval.

In 1986, the Oklahoma Legislature revised Title 18. As a result, the 1987 Title Examination Standards Committee recommended changing many of the statutory citations included in this standard. It was also recommended that the fifth (now sixth) paragraph of the body of the standard be amended to reflect the change in significance of the subject matter of that paragraph prior to and after the 1986 amendments, 58 O.B.J. 2839, 2842 (1987). These recommendations were approved by the Real Property Section, November 12, 1987, and adopted by the House of Delegates, November 13, 1987.

The 1988 amendment to 16 O.S.A. §27a changing from ten (10) to five (5) years the period of recordation necessary to cure defective corporation executions, acknowledgments, recordings or certificates of recording was reflected in the proposal in the 1988 Report of the Title Examination Standards Committee, 59 O.B.J. 3098, 3102-03 (1988) to conform this standard to the amended statute. The Real Property Section approved the proposal, December 8, 1988 and the House of Delegates adopted it, December 9, 1988.

(2) Background

If an instrument relating to real property is executed on behalf of a corporation, there are certain formalities which must be observed in order for the conveyance to be valid and recordable. By statute, the instrument must be signed by an attorney-in-fact or by a president or vice-president [or, as of September 1, 1994, by the board chairman]. 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 unsettled whether an "Assistant Vice-President" is the equivalent of a president or vice-president. However, it should be noted that the language of Section 93 of Title 16 of the Oklahoma Statutes was changed from "a vice president" to "any vice president", effective June 24, 1987. This change increases the likelihood that an "Assistant Vice President" is not acceptable.

Unless the instrument is executed by an attorney-in-fact, the statute requires an attestation by a secretary, assistant secretary or clerk of the corporation, or in the case of a bank, by a secretary, assistant secretary, clerk, cashier, or assistant cashier. The corporate seal must also be attached. [However, as of September 1, 1994, the need for an attest and a seal was eliminated.]

Some practicing attorneys think that a conveyance by a corporation must be acknowledged for it to be valid between the parties and to be recordable. Since, according to statute, documents cannot be accepted by the county clerk for filing without an acknowledgment, this omission is not likely to occur.

(3) Practicalities

This is another Standard which allows the title to improve with the passage of time. Certain listed execution defects in instruments which have been of record for more than five 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, record, or certificate of recording. If the instrument has been on record for less than five 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 executed and attested in the same manner as any other deed or conveyance and filed in the office of the county clerk before the executed instrument becomes effective. There is not a five-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 will become effective, but it also must be recorded before the executed instrument is recorded. The minority view advances the proposition that there is no relation back, and that the only proper cure is to have the instrument itself recorded again after the power of attorney is recorded. Finally, as previously mentioned, some attorneys believe that a corporate conveyance must be acknowledged for it to be valid even between the parties.

d. 13.8 Unenforceable Mortgages and Marketable Title

(1) Standard

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).

Caveat: The examiner should be aware that the above Standard may not apply to mortgages, which are part of a nationwide federal program, in which the United States Government, or one of its agencies, is the mortgagee. See United States v. Ward, 985 F.2d 500 (10th Cir. 1993).

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. The 1994 Report of the Title Examination Standards Committee recommended adding the Caveat to this standard. 65 O.B.A.J. 3334 (10/22/94). The Committee's recommendation was approved by the Real Property Section on November 17, 1994, and adopted by the House of Delegates on November 18, 1994.

(2) Background

In order to avoid costly legal actions to extinguish ancient unreleased mortgages, the legislature enacted Title 46, Section 301 of the Oklahoma Statutes. Absent contrary notice as provided in the statute, Section 301 allows title examiners to ignore recorded mortgages with expressed maturity dates 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 Title 46, Section 301 of the Oklahoma Statutes led to a discussion of what date is "the date of the last maturing obligation" under that statute. Title 12A, Section 3-122(1)(b) of the Oklahoma Statutes provides that in the case of a demand instrument, a cause of action against a maker or acceptor accrues upon its date, or if no date is stated, on the date issued. Therefore, Standard 13.8 was revised to show that a mortgage relating to a demand note is extinguished ten years after its execution date. [§ 3-122(1)(b) was repealed in 1992 and this repeal is under study right now as to whether a change to the Standard is necessary.]

(3) Practicalities

Standard 13.8 is probably more practically useful than any other Standard. A base abstract will normally include a patent, a few deeds, some oil and gas leases, easements, and mortgages and releases with many potential defects in relation thereto. According to Title 46, Section 301 of the Oklahoma Statutes many of these mortgages will be unenforceable.

However, one cautionary statement is necessary. Old mortgages are usually shown only in "abstracted" versions (i.e., retyped and excerpted, but not photocopied) without the due date, although it is not stated whether the due date is not shown on the actual instrument. For example, if you examine an abstracted version of a 1955 30-year mortgage and no due date is shown by the abstractor, the examiner cannot be sure that the instrument itself actually contained no due date unless the abstractor specifically states such in the abstracted version. If the 1955 mortgage does not contain a due date, the mortgage may be ignored in 1985. If the due date is 1985, for example, appears on the instrument but is not shown by the abstractor, the mortgage cannot be ignored until 1995; therefore, it is appropriate to secure a copy of the

mortgage and determine the presence or absence of the due date.

C. NEWEST CHANGES TO TITLE STANDARDS: REVISED, NEW AND PENDING STANDARDS FOR 1995 (NOV. 18, 1994) AND 1996

The revised Standards and new Standards, discussed below, were considered and approved by the Standards Committee during the January-September 1994 period. The proposed changes and additions were then published in the Oklahoma Bar Journal in October 1994, and were then considered and approved by the Section at its annual meeting on Thursday, November 17, 1994. They were thereafter considered and approved by the OBA House of Delegates on Friday, November 18, 1994. These changes and additions became effective immediately on November 18, 1994. A notice of the House's approval of the proposed new and revised Standards was published in the Oklahoma Bar Journal after the November 1994 meeting.

The new TES Handbook (in an off-white cover), containing the revised version of these Standards, was printed and mailed to all 1994 Section members during the first week of January 1995.

Possible revisions and additional new Standards which are under current discussion are listed below, also. Recently enacted HB 2783 is of particular interest.

HB2783 was enacted by the Oklahoma State Legislature as of September 1, 1994. This bill affected several real property title issues and might affect existing Standards, including: changing the requirements for corporate execution of real property documents, and making certain court-related orders and instruments, and affidavits relative to real property, constitute rebuttal presumptions of the facts contained therein. (A copy of an article exploring the ramifications of HB2783 is attached hereto as APPENDIX A.)

1. **REVISED STANDARDS FOR 1995 (Nov. 18, 1994)**

a. **8.1 Termination of Joint Tenancy Estates and Life Estates**

(1) Old Standard

8.1 TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES

A. The termination of the interest of a deceased joint tenant or life tenant may be conclusively established by one of the following methods:

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

2. By a valid judicial finding of the death of the joint tenant or life tenant in any action brought in a court of record, or

3. By filing an affidavit that satisfies 58 O.S.A. § 912.

B. Certified copies of letters testamentary or letters of administration for the estate of the deceased joint tenant or lief tenant are prima facie evidence of the death of that tenant.

C. A waiver or release of the Oklahoma estate tax lien for the joint tenant or life tenant must be obtained unless:

1. A district court has ruled pursuant to 58 O.S.A. § 282.1 that there is no estate tax liability,

2. The joint tenant or life tenant has been dead more than ten years, or

3. The sole surviving joint tenant or remainder interest holder is the surviving spouse of the deceased joint tenant or sole life tenant.

Authority: 58 O.S.A. §§ 23, 133, 282.1, 911 and 912, 60 O.S.A. §§ 36.1 and 74, and 68 O.S.A. §§ 881 and 815.

Comment: Title 58 O.S.A. § 912 is a procedural statute, and may be applied retroactively because it does not affect substantive rights; See Texas County Irr. & Water v. Oklahoma Water., 803 P.2d 1119 (Okla. 1990), and Shelby-Downard Asphalt Co., v. Enyart, 67 Okla. 237, 170 P. 708 (1918). The death of a joint tenant or a life tenant may be conclusively established under §912 regardless of the date of death and regardless of the date of filing of the affidavit.

The marketability of the title of the surviving spouse may be impaired by the lien

of Oklahoma estate tax if the death occurred before November 1, 1984, unless such tax has been barred by the 10-year statute of limitations under 68 O.S.A. § 811. Marketability is not impaired by such tax lien if the surviving spouse filed an affidavit between October 1, 1980, and October 31, 1984, that recited that no Oklahoma estate tax was due.

History: The 1992 Report of the Title Examination Standards Committee proposed the substantial revision and simplification of this standard in response to major changes in 1992 to 58 O.S.A. § 912. The Committee recommended that the standard should no longer be bifurcated into separate headings for non-judicial termination of joint tenancies and judicial termination of joint tenancies and life estates, since the 1992 amendment of § 912 amendment of § 912 permits the termination by affidavit both of joint tenancies composed of persons other than two spouses and of life estates. The Committee also recommended omission of the former standard's differing requirements for affidavit forms based upon the death on which the affidavits were made, since, under the 1992 amendment of § 912, the effectiveness of the affidavit form is controlled by the date the affidavit is filed rather than the date the affidavit was made, 63 O.B.J. 2903, 2905 (10-17-92). These recommendations were approved by the Real Property Law Section, November 12, 1992, and adopted by the House of Delegates, November 13, 1992.

(2) Revised Standard

8.1 TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES

A. The termination of the interest of a deceased joint tenant or life tenant may be conclusively established by one of the following methods:

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

2. By a judicial finding of the death of the joint tenant or life tenant in any action brought in a court of record, or

3. By filing documents that satisfy 58 O.S.A. § 912C.

B. Certified copies of letters testamentary or letters of administration for the estate of the deceased joint tenant or life tenant are prima facie evidence of the death of that tenant.

C. A waiver or release of the Oklahoma estate tax lien for the joint tenant or life tenant must be obtained unless:

1. A district court has ruled pursuant to 58 O.S.A. § 282.1 that there is no estate tax liability.

2. The joint tenant or life tenant has been dead more than ten years, or

3. The sole surviving joint tenant or remainder interest holder is the surviving spouse of the deceased joint tenant or sole life tenant.

Authority: 58 O.S.A. §§ 23, 133, 911 and 912; 60 O.S.A. §§ 36.1 and 74[].

Comment: Title 58 O.S.A. § 912 is a procedural statute, and may be applied retroactively because it does not affect substantive rights; See Opin. Atty. Gen. 74-271 (February 10, 1975), Texas Country Irr. & Water v. Okla. Water, 803 P.2d 1119 (Okla. 1990), and Shelby-Downard Asphalt Co. v. Enyart, 67 Okla. 237, 170 P. 708 (1918). The death of a joint tenant or a life tenant may be conclusively established under § 912 regardless of the date of death and regardless of the date of filing of the affidavit.

The marketability of the title of the surviving spouse may be impaired by the lien of Oklahoma estate tax if the death occurred before November 1, 1984, unless such tax has been barred by the 10-year statute of limitations under 68 O.S.A. § 811. Marketability is not impaired by such tax lien if the surviving spouse filed an affidavit between October 1, 1980, and October 31, 1984, that recited that no Oklahoma estate tax was due.

The marketability of title may also be impaired by the lien of Federal estate tax. See Title Standard No. 17.2.

(3) Discussion

In the Revised Standard the deletions are shown by empty brackets (i.e., [ ]) and additions are underlined.

The Committee Minutes provide this description of the changes:

> *Marty Postic, on behalf of Gary Clark who was unable to be present, presented a second revised draft of existing Standard 8.1. The changes on the draft included narrowing the citation to statutes in Paragraph A3, deleting all of Paragraph C and adding a caveat concerning impairment of marketability due to federal and Oklahoma estate tax liens. Additionally, an opinion of the attorney general, 74-271 (February 10, 1975), was added to the citation of authority in the comment portion of the standard. Initially it was moved and seconded to approve the revision. Upon additional discussion, it was noted that no substantive change in the law had occurred since the last revision of the standard. The motion to approve was then withdrawn and a second motion made and seconded which limited changes in the existing standard to revision of the citation to statutory authority in Paragraph A.3., addition of the Attorney General's opinion in the comment, and to add language concerning impairment of marketability due to federal estate tax lien as a third paragraph of the comment. Although reservations were still expressed concerning the retention*

of Paragraph C.3., all of existing Paragraph C was retained without revision. The motion passed and the revisions to the existing standard were approved.

b. 13.8 Unenforceable Mortgages and Marketable Title.

(1) Old Standard

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 secured 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) Revised Standard

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).

Caveat: The examiner should be aware that the above Standard may not apply to mortgages, which are part of a nationwide federal program, in which the United States

Government, or one of its agencies, is the mortgagee. See United States v. Ward, 985 F.2d 500 (10th Cir. 1993).

(3) Discussion

The addition of a Caveat to this Standard was the only change. The Caveat was added to warn the examiner that the 10th Circuit U.S. Court of Appeals held in United States v. Ward, 985 F.2d 500 (10th Cir. 1993), that the lien of a real estate mortgage, created as part of a loan program involving direct funding by a federal agency (e.g., FmHA), does not expire until satisfied, even if the personal obligation arising from the underlying promissory note has become unenforceable due to the passage of time.

See the article by Kraettli Q. Epperson, discussing this Ward case, at APPENDIX B.

c. 17.1 The General Federal Tax Lien

(1) Old Standard

17.1 THE GENERAL FEDERAL TAX LIEN

NOTE: Although the special estate and gift tax liens are treated in Standards 17.2, 17.3 and 17.4, respectively, it is important to remember that such special tax liens are separate liens and are in addition to the general tax lien.

The examiner should determine whether the amendment, effective November 6, 1990, by the Omnibus Budget Reconciliation Act of 1990, of 28 U.S.C. § 6502, which changed the length of the general federal tax lien from six (6) years to ten (10) years, has affected the duration of the effectiveness of a Notice of Federal Tax Lien appearing in a chain of title.

A. SCOPE.

Any federal tax, with any applicable interest, penalties and costs, without notice and from the time of assessment, is a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to the person liable to pay the tax. Although the lien is effective as of the time of assessment, an enforceable general federal tax lien arises only when the following three events have occurred: (1) a tax assessment is made; (2) the taxpayer is given proper notice of the assessment and demand for payment; and (3) the taxpayer fails to pay the assessed taxes within ten (10) days after notice of assessment and demand for payment. Until the lien is satisfied or becomes unenforceable by reason of lapse

of time, it is superior to most other liens, except that the lien is not valid as to any purchaser, holder of a security interest, mechanic's lienor or judgment lien creditor until notice thereof has been filed for record in the office of the county clerk in which the land is located.

Authority: 26 U.S.C.A. §§ 6321, 6322 & 6323.

Comment: 1. Property subject to the general federal tax lien includes, but is not limited to, the taxpayer's interest in:

a. After-acquired property, 42 O.S.A. § 8; Glass City Bank of Jeanette, Pa. v. United States, 326 U.S. 265, 66 S.Ct. 108, 90 L.Ed. 56 (1945).

b. Property held in joint tenancy, 60 O.S.A. 1961 § 74, United States v. Brandenburg, 106 F.Supp. 82 (S.D. Cal. 1952).

c. Homestead property, Tillery v. Parks, 630 F.2d 775 (10th Cir. 1980)(federal tax liens arising solely through the tax liability of one spouse may attach to the interest in the homestead of both spouses) and United States v. Rodgers, 461 U.S. 677, 103 S.Ct. 2132, 76 L.Ed. 236 (1983).

2. Since November 2, 1966, the general federal tax lien is not prior to the situations outlined in paragraphs 2(a), (c), (d), (e) and 3 of the Comments adopted in 1962 and is not prior to those interests set out in 26 U.S.C.A. § 6323(b) and (c). Title 26 U.S.C.A. § 6323(b) provides, in part, that even if notice of lien has been filed, the general federal tax lien will not be valid against (1) real property to the extent it is subject to local liens for taxes, special assessments and charges for services provided by a government owned public utility, (2) mechanic's lien for repairs on a personal residence but only to a maximum amount of $1,000 and only in a building containing not more than four dwelling units and (3) attorney's liens to the extent an attorney holds a lien or contract enforceable against a judgment or of the amount. Title 26 U.S.C.A. § 6323(c) provides, in part, a temporary priority for certain types of commercial financing for 45 days after a tax lien is filed. The relative priority of general federal tax liens against commercial transaction and financing agreements is fixed by 26 U.S.C.A. § 6323(c).

3. The general federal tax lien does not have priority over a purchase money mortgage, United States v. New Orleans R.R., 79 U.S. (12 Wall.) 362, 20 L.Ed. 434 (1870); Troyer v. Mundy, 60 F.2d 818 (8th Cir. 1932).

4. The general federal tax lien is not effective against any purchaser, holder of a security interest, mechanic's lienor or judgment lien creditor until notice thereof has been properly filed.

a. From 1913 to 1925, federal tax lien notices in Oklahoma were required to be filed in the office of the United States District Court for the judicial district in

which the land was located, Act of March 4, 1913, 37 Stat. 1016, now 26 U.S.C.A. § 6323(f)(l)(A)(i).

b. Subsequent to February 14, 1925, notices in Oklahoma have been and are required to be filed in the office of the county clerk of the county in which the land is located, 26 U.S.C.A. § 6323(f)(l)(A)(i); 68 O.S.A. § 24301(a).

c. It is not necessary that the notice contain a description of the land thereby affected, Treas. Reg. § 301.6323(f)-1(c); United States v. Union Central Life Insurance Co., 368 U.S. 291, 82 S.Ct. 349, 7 L.Ed. 2d 294 (1961). Note that 19 O.S.A. § 298 refers to conveyances, etc., but does not pertain to federal tax liens.

d. Actual knowledge of the assessment of the general federal tax lien does not deprive a purchaser, holder of a security interest, mechanic's lien or judgment lien creditor of priority until the notice of the lien is filed, United States v. Beaver Run Coal Co., 99 F.2d 610 (3d Cir. 1938). Some courts, though, intimate that actual knowledge may take the place of filing of notice. See annotation at 2 L.Ed. 2d 1845. However, actual knowledge affects the priorities as to securities, motor vehicles, personal property purchased in casual sales, insurance policy loans, passbook loans and commercial transaction financing under the provisions of 26 U.S.C.A. §§ 6323(b)(1), (2), (4), (9), (10) and 6323(c)(1).

5. A trustee in bankruptcy is a "judgment creditor" under the terms of 26 U.S.C.A. § 6323, United States v. Speers, 382 U.S. 266, 86 S.Ct. 411, 15 L.Ed. 2d 314 (1965).

B. DURATION.

The general federal tax lien continues until it is satisfied or becomes unenforceable by reason of lapse of time. The expiration of six (6) years after assessment will ordinarily bar enforcement, but the expiration of said statutory period may be extended for various reasons. It should not be concluded that a lien has become unenforceable from the mere fact that six (6) years have elapsed since the date of assessment.

Authority: 26 U.S.C.A. §§ 6322, 6502, 6503.

Comment: The effective period of a lien may be extended. For example, the effective period may have been extended or suspended; (1) by written agreement with the taxpayer, 26 U.S.C.A. § 6502(a); (2) by waiver of the statute of limitation by the taxpayer pending acceptance or rejection by the government of a compromise offer; (3) for the period during which assessment or use of creditors' process was prohibited (and while a related proceeding is on the docket of the Tax Court) and for sixty (60) days thereafter, 26 U.S.C.A. § 6503(a)(1); (4) for the period during which assets of the taxpayer were in the control or custody of any court and for six (6) months thereafter, 26 U.S.C.A. § 6503(b); (5) for the period during which collection is hindered or delayed by the fact that the taxpayer is outside of the United States, if such absence is continuous for a period of at least six months (such period not to expire

until six (6) months after the date of return to the United States), 26 U.S.C.A. § 6503(c); (6) for the period, not in excess of two years, from the date of instituting bankruptcy or receivership proceedings to thirty (30) days after the notice from the receiver or other fiduciary is given, 26 U.S.G.A. § 6872; (7) for the period equal to the period from the date property of a third party is wrongfully seized or received by the Secretary to the date of the Secretary returns the property or the date on which a judgment secured pursuant to 26 U.S.C.A. § 7426 with respect to such property becomes final, and for thirty (30 days thereafter, 26 U.S.C.A. § 6503(f); (8) as to estate taxes, for the period of any extension of time for payment granted under the provisions of 26 U.S.C.A. § 6161(a)(2) or (b)(2) or under the provisions of 26 U.S.C.A. §§ 6163 or 6166, see 26 U.S.C.A. § 6503(d); or (9) as to Title 11 cases, for the period during which the Secretary is prohibited by reason of such case from making the assessment and for sixty (60) days thereafter, 26 U.S.C.A. § 6503(i).

Various statutory provisions also suspend the running of time on account of military service, 50 U.S.C.A. App. § 573 (Soldiers' and Sailors' Civil Relief Act); 26 U.S.C.A. § 7508. The period during which a tax may be collected by levy is not extended or curtailed by reason of a judgment against the taxpayer, 26 U.S.C.A. § 6502(a).

However, in order to maintain the enforceability of the general federal tax lien from the date of assessment, a notice of lien must be refiled within the one-year period ending thirty (30) days after the expiration of the six-year period. If the notice of lien is not refiled during this period, the lien will only be effective from the date of filing.

C. RELEASE AND DISCHARGE.

A certificate of release, discharge, subordination or non-attachment of any internal revenue lien generally may be relied upon by a bona fide purchaser, holder of a security interest, mechanic's lien or judgment lien creditor for value, as conclusive that the entire lien has been released or that the lands described in the certificate have been discharged from the tax lien.

Authority: 26 U.S.C.A. § 6325(f).

Comment: 1. The issuance of such a certificate is not conclusive in all cases that the lien is extinguished. The certificate may be revoked for reasons cited in 26 U.S.C.A. § 6325(f)(2). It is not conclusive that the tax liability has been paid and, in the hands of the taxpayer, such property may still be subject to a lien upon notice and refiling, 26 U.S.C.A. § 6325(f)(3). Reliance by the taxpayer upon such certificate is a mistake of law by which the government may not be estopped, Miller v. Commissioner, 23 T.C. 565 (1954), aff'd., 231 F.2d 8 (5th Cir. 1956). In the hands of a transferee as defined in 26 U.S.C.A. § 6901, the property may still be subject to tax liability, Commissioner v. Angier Corp., 50 F.2d 887 (1st Cir. 1931), cert. denied, 284 U.S. 673, 52 S.Ct. 129, 76 L.Ed. 569 (1931).

2. A certificate of release of a lien may be issued if either of the conditions set forth

in 265 U.S.C.A. § 6325 (a)(1) or (2) is met.

3. A certificate of discharge of property may be issued if any one of the conditions set forth in 26 U.S.C.A. § 6325(b)(1), (2) or (3) is met.

4. A certificate of subordination may be issued if the conditions set forth in 26 U.S.C.A. § 6325(d)(1), (2) or (3) is met.

5. A certificate of non-attachment may be issued where, because of a confusion of names or otherwise, a notice of lien has been filed, and the lien is clouding title to property belonging to a person other than the taxpayer, 26 U.S.C.A. §6325(e).

History: This standard was reworked completely and its adoption recommended by the Report of the Title Examination Standards Committee, 57 O.B.J. 2677, 2682-85 (1986). It was approved by the Real Property Section, November 20, 1986, and adopted by the House of Delegates, November 21, 1986.

(2) Revised Standard

17.1 THE GENERAL FEDERAL TAX LIEN

[Opening Note unchanged; second prefatory note relating to possible effect of Omnibus Budget Reconciliation Act of 1990 deleted in view of amendment to Standard to include the Act's extension of the tax lien period.]

[Paragraph A. Scope, unchanged except for the addition of Comment 6]:

6. Note United States v. McDermott, 507 U.S. ____, 113 S.Ct. ____, 123 L.Ed. 2d 128 (1993), in which a federal tax lien was held to have priority over a previously filed judgment lien with respect to taxpayer's real property acquired after the filing of both liens.

B. DURATION.

The general federal tax lien continues until it is satisfied or becomes unenforceable by reason of lapse of time.

The limitation period for such liens is generally as follows:

*1. **Liens Assessed Prior to November 5, 1990***

a. The limitation period for liens assessed prior to November 5, 1990 is six years and thirty days from the date of assessment. As to those liens for which the limitation period of six years and thirty days from date of assessment had run as of November 5, 1990, and

for which the lien period had not been extended, suspended or renewed, the lien shall be deemed to have expired.

b. As to those liens for which the limitation period of six years and thirty days from date of assessment had not run as of November 5, 1990, the lien period shall be ten years and thirty days from date of the original tax assessment.

2. ***Liens Assessed On or After November 5, 1990***

As to those liens filed on or after November 5, 1990, the lien period shall be ten years and 30 days from the date of assessment.

Authority: 26 U.S.C.A. §§6322, 6502 & 6503.

Caveat: The elapse of the applicable statutory period for the general federal tax lien does not, in itself, constitute conclusive evidence that the lien has expired. The examiner should be aware of the various methods, set out in the statute, by which the applicable limitation period may be extended or suspended, and the general federal tax lien may be renewed. Examples of some of these methods are set out below.

Comment: The effective period of a lien may be extended, and the running of such period may be suspended. For example, the effective period may have been extended or suspended: (1) by written agreement with the taxpayer, 26 U.S.C.A. §6502(a); (2) by waiver of the statute of limitation by the taxpayer pending acceptance or rejection by the government of a compromise offer; (3) for the period during which assessment or use of creditors' process was prohibited (and while a related proceeding is on the docket of the Tax Court) and for sixty (60) days thereafter, 26 U.S.C.A. §6503(a)(1); (4) for the period during which assets of the taxpayer were in the control or custody of any court and for six (6) months thereafter, 26 U.S.C.A. §6503(b); (5) for the period during which collection is hindered or delayed by the fact that the taxpayer is outside of the United States, if such absence is continuous for a period of at least six months (such period not to expire until six (6) months after the date of return to the United States), 26 U.S.C.A. §6503(c); (6) for the period, not in excess of two years, from the date of instituting bankruptcy or receivership proceedings to thirty (30) days after the notice from the receiver or other fiduciary is given, 26 U.S.C.A. §6872; (7) for the period equal to the period from the date property of a third party is wrongfully seized or received by the Secretary to the date the Secretary returns the property or the date on which a judgment secured pursuant to 26 U.S.C.A. §7426 with respect to such property becomes final, and for thirty (30) days thereafter, 26 U.S.C.A. §6503(f); (8) as to estate taxes, for the period of any extension of time for payment granted under the provisions of 26 U.S.C.A. §6161(a)(2) or (b)(2) or under the provisions of 26 U.S.C.A. §§6163 or 6166, see 26 U.S.C.A. §6503(d); or (9) as to Title 11 cases, for the period during which the Secretary is prohibited by reason of such case from making the assessment and for sixty (60) days thereafter, 26 U.S.C.A. §6503(h).

Various statutory provisions also suspend the running of time on account of military

service, 50 U.S.C.A. App. §573 (Soldiers' and Sailors' Civil Relief Act); 26 U.S.C.A. §7508. The period during which a tax may be collected by levy is not extended or curtailed by reason of a judgment against the taxpayer, 26 U.S.C.A. §6502(a).

A general federal tax lien may be renewed by refiling the Notice of Federal Tax Lien. In order to maintain the enforceability of the lien from date of assessment through the renewal period, a notice of lien must be refiled within the one-year period ending thirty days after the expiration of the applicable six or ten year period discussed above. If the Notice of Federal Tax Lien is not refiled during this period, the lien shall be deemed to have expired at the end of the applicable limitation period. Provisions exist in the statute for a second and subsequent renewal of the lien period by a second refiling of the notice of lien within the time periods set out in the statute. 26 U.S.C.A. §6323 (g).

Caveat: A notice of lien may be refiled after the last refile date stated on the face of the notice of lien, in instances in which the limitation period on collection after assessment has not expired. In such instances, the notice of lien refiled after the last stated refiling date shall be effective from the date of such refiling. 26 U.S.C.A. §6325(f)(2).

C. RELEASE AND DISCHARGE.

A certificate of release, discharge, subordination or non-attachment of any internal revenue lien generally may be relied upon by a bona fide purchaser, holder of a security interest, mechanic's lien or judgment lien creditor for value, as conclusive that the entire lien has been released or that the lands described in the certificate have been discharged from the tax lien.

Authority: 26 U.S.C.A. §6325(f).

Comment: 1. The issuance of such a certificate is not conclusive in all cases that the lien is extinguished. The certificate may be revoked for reasons cited in 26 U.S.C.A. §6325(f)(2). It is not conclusive that the tax liability has been paid and, in the hands of the taxpayer, such property may still be subject to a lien upon notice and refiling, 26 U.S.C.A. §6325(f)(3). Reliance by the taxpayer upon such certificate is a mistake of law by which the government may not be estopped, Miller v. Commissioner, 23 T.C. 565 (1954), aff'd., 231 F.2d 8 (5th Cir. 1956). In the hands of a transferee as defined in 26 U.S.C.A. §6901, the property may still be subject to tax liability, Commissioner v. Angier Corp., 50 F.2d 887 (1st Cir. 1931), cert. denied, 284 U.S. 673, 52 S.Ct. 129, 76 L.Ed. 569 (1931).

2. A certificate of release of a lien may be issued if either of the conditions set forth in 26 U.S.C.A. §6325(a)(1) or (2) is met.

3. A certificate of discharge of property may be issued if any one of the conditions set forth in 26 U.S.C.A. §6325(b)(1), (2) or (3) is met.

4. A certificate of subordination may be issued if the conditions set forth in 26 U.S.C.A.

§6325(d)(1), (2) or (3) is met.

5. A certificate of non-attachment may be issued where, because of a confusion of names or otherwise, a notice of lien has been filed, and the lien is clouding title to property belonging to a person other than the taxpayer, 26 U.S.C.A. §6325(e).

History: This standard was reworked completely and its adoption recommended by the Report of the Title Examination Standards Committee, 57 O.B.J. 2677, 2682-85 (1986). It was approved by the Real Property Section, November 20, 1986, and adopted by the House of Delegates, November 21, 1986. The 1994 Report of the Title Examination Standards Committee recommended amending Section B of the standard to reflect 1990 amendments to the Internal Revenue Code and adding Comment 6 to Section A. 65 O.B.A.J. 3334 (10/22/94). The Committee's recommendation was approved by the Real Property Section on November 17, 1994, and adopted by the House of Delegates on November 18, 1994.

(3) Discussion

The major change in this Standard was to revise Part B "DURATION" to specify that the 6-year tax lien statute of limitations changed, as of November 5, 1990, to a new 10-year limitation period.

In addition, the process to renew a Notice of Federal Tax Lien is described in greater detail in the Comment portion.

d. 21.1 Validity of Instruments Executed By Attorney-In-Fact

(1) Old Standard

21.1 VALIDITY OF INSTRUMENT EXECUTED BY ATTORNEY-IN-FACT

Any instrument affecting real estate executed by an attorney-in-fact duly appointed and empowered is acceptable to vest marketable title in the grantee, unless:

A. The power of attorney was not executed, acknowledged and recorded in the manner required by law; or

B. A revocation of the power of attorney by either the principal or a conservator, guardian or other fiduciary of the principal appointed by a court of the principal's domicile has been recorded in the same office in which the instrument containing the power of attorney was recorded; or

C. The power of attorney has otherwise terminated by law, and such matter either appears in the abstract or is in the personal knowledge of the examiner.

Authority: 16 O.S.A. §§3 and 21; 58 O.S.A. §§1071 et seq.

Comment: The death, disability or incapacity of a principal who has previously executed a written power of attorney, whether durable or otherwise, does not revoke or terminate the agency as to the attorney-in-fact who, without actual knowledge of the death, disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and successors in interest, 58 O.S.A. §1075. The prior Caveat to the Standard has been deleted.

(2) Revised Standard

21.1 VALIDITY OF INSTRUMENT EXECUTED BY ATTORNEY-IN-FACT

A. An instrument affecting title to real estate executed by an attorney-in-fact duly appointed and empowered, and not subject to the provisions of paragraphs B or C below, is acceptable to vest marketable title in the grantee, if:

1. the power of attorney, other than a durable power of attorney, was executed, acknowledged and recorded in the manner required by law; or

2. the power of attorney is a durable power of attorney and, (1) if executed prior to September 1, 1992, was executed pursuant to the provisions of 58 O.S.A. §§ 1051 through 1062, or the Uniform Durable Power of Attorney Act and recorded in the manner required by law; or (2) if established on or after September 1, 1992, was executed pursuant to the provisions of the Uniform Durable Power of Attorney Act and recorded in the manner required by law.

B. An instrument that otherwise conforms with the provisions of paragraph A, above fails to vest title in the grantee if a revocation of the power of attorney executed by either (1) the principal or (2) a conservator, guardian or other fiduciary of the principal appointed by a court of the principal's domicile has been recorded in the same office in which the instrument containing the power of attorney was recorded.

C. An instrument that otherwise conforms with the provisions of paragraph A, above fails to vest title in the grantee if the power of attorney has otherwise terminated by law, and such termination either appears in the abstract or is in the personal knowledge of the examiner.

Authority: 16 O.S.A. §§ 3 and 21; 58 O.S.A. §§ 1071 et seq.

Comment: The death, disability or incapacity of a principal who has previously executed a written power of attorney, whether durable or otherwise, does not revoke or terminate the agency as to the attorney-in-fact who, without actual knowledge of the death, disability or incapacity of the principal, acts in good faith under the power. Any cation so taken, unless otherwise invalid or unenforceable, binds the principal and successors in interest, 58 O.S.A. § 1075.

A power of attorney executed in another state shall be considered valid for purposes of the Uniform Durable Power of Attorney Act if the power of attorney and the execution of the power of attorney substantially comply with the requirements of the Uniform Durable Power of Attorney Act.

The prior Caveat to the Standard has been deleted.

(3) Discussion

This Standard was revised to state the issues in a positive rather than a negative format. In addition, the Standard was reorganized to separate the provisions dealing with durable and non-durable powers of attorney. A foreign power of attorney is acceptable if it complies with our uniform Act, and a comment was added to this Standard explaining this situation.

2. NEW STANDARDS FOR 1995 (Nov. 18, 1994)

a. 6.6 Short-Form Acknowledgments

(1) New Standard

6.6 SHORT-FORM ACKNOWLEDGMENTS

The use of the appropriate "short-form" acknowledgment, authorized by the Uniform Law on Notarial Acts, within an instrument appearing of record, in lieu of any applicable "long-form" acknowledgments authorized by law shall not be deemed to be a title defect. 49 O.S.A. § 111 et seq., 49 O.S.A. § 120.

NOTE: The "long-form" acknowledgments include, among others, those appearing in 16 O.S.A. § 33, 16 O.S.A. § 95 and 16 O.S.A. §42.

(2) Discussion

The introduction of "short-form" acknowledgments is not a new phenomenon. The "short form" existed in Oklahoma in 1969, at 49 O.S. §§ 101 to 109. On November 1, 1985 the Legislature adopted the Uniform Law on Notarial Acts at 49 O.S. §§ 111 to 121 ("Uniform Law"). Later amendments occurred on September 1, 1990 and September 1, 1992.

However, the so-called "long form" acknowledgement statutes, which are scattered around the statutes, were only supplemented and not repealed by the adoption of the Uniform Law. 49 O.S. § 120 provides:

> *A notarial act performed prior to November 1, 1985, is not affected by the provisions of the Uniform Law on Notarial Acts. The Uniform Law on Notarial Acts provides an additional method of proving notarial acts. Nothing in the Uniform Law on Notarial Acts diminishes or invalidates the recognition accorded to notarial acts by other laws or regulations of this state.*

The continued existence of such "long form" acknowledgments, coupled with semi-mandatory language dictating the use of such "long form" version when executing certain real property documents has caused some title attorneys to reject instruments, such as deeds and

mortgages, using the "short form" acknowledgment.

The statutory language at 16 O.S. §§ 33 & 95 prescribes a form for the text of a "long form" for an individual and a corporate acknowledgment, respectively. However, the "short form" law provides at §118(B):

> *B. A certificate of a notarial act is sufficient if it meets the requirements of subsection A of this section and it:*
>
> *1. is in the short form set forth in Section 9 of this act;*
> *2. is in a form otherwise prescribed by the law of this state;*
> *3. is in a form prescribed by the laws or regulations applicable in the place in which the notarial act was performed; or*
> *4. sets forth the actions of the notarial officer and those are sufficient to meet the requirements of the designated notarial act.*

Also, the Oklahoma Attorney General (No. 74-251) has opined that the use of the "short form" is acceptable in every instance that a "long form" was suitable. In addition, the common practice among examining attorneys is to accept such a "short form".

Hence, this standard practice by attorneys of accepting "short forms" is being officially recognized by the adoption of this new Standard. (NOTE: Effective September 1, 1994, under HB 2783, 16 O.S. § 95 has been changed to expressly allow the use of the "short form" corporate acknowledgment on real estate documents.)

b. 16.6 Conveyances By a Religious Association

(1) New Standard

16.6 CONVEYANCES BY A RELIGIOUS ASSOCIATION.

A Conveyance from a grantor which the examiner concludes to be a religious association, may be approved if:

(a) The conveyance recites that the grantor is a corporation and is executed in proper corporate form; or

(b) Alternative articles for religious association are of record for the grantor and the conveyance is executed in conformity therewith.

All other religious associations are considered to be unincorporated charitable associations and title must be vested in a legal entity capable of holding title in trust for the religious association prior to its conveyance.

Authority: 18 O.S. §§ 543, 562, 1002.
Jones v. Alpine Investments, Inc., 764 P.2d 513 (Okl. 1987)
Richardson v. Harsha, 98 P. 897 (Okl. 1908)

(2) Discussion

The form of the execution on a conveyance of an interest in real property by a religious association has been the source of numerous discussions over the years among title examiners. Two older articles which took a look at the issue include:

1. "Leases or Purchases of Real Property Owned by: (a) Voluntary Unincorporated Non-Profit Associations and (b) Unincorporated Religious Societies", by Arnold T. Fleig, 40 OBJ 976, and

2. "Church Titles Are Not Made In Heaven", by Woodrow W. Adams, presented to the OCTAA, October 4, 1963.

Another more recent article has been prepared and was presented to the Oklahoma City Title Attorneys Association on October 14, 1994 by Diane Moershel, an Oklahoma City

attorney. The article is entitled "More Than a Matter of Faith: Examining Conveyances by Churches."

As is made clear in Ms. Moershel's article, and in the new Standard: (1) religious associations can choose to incorporate, and then to execute documents relating to real property in the same manner as any other corporation, (2)religious associations can adopt non-corporate alternative incorporation articles and, once these articles are placed "of record", their specified execution procedures can be discovered by the title examiner and compared to the instrument being reviewed, or (3) other "non-corporate" religious associations must -- as any other unincorporated association would need to do -- utilize an existing recognized legal entity to act as trustee for the group. Ongoing efforts are underway by the Committee to draft a Standard describing acceptable ways for a religious association to receive title through a trustee and then to reconvey it, especially where there are successor trustees.

c. Chapter 25: Limited Liability Companies

(1) New Standard

25.1 LIMITED LIABILITY COMPANIES MAY OWN PROPERTY

Limited liability companies are capable of holding title to real property in Oklahoma from and after September 1, 1992.

Authority: 18 O.S. § 2003.

25.2 IDENTITY OF MANAGER OF LIMITED LIABILITY COMPANY

If a person acknowledges in proper form in a recorded instrument that such person executed the instrument as a manager on behalf of a limited liability company, the title examiner may presume that the person held the position of a manager of the limited liability company. Person is defined in 18 O.S. § 2001 as an individual, a general partnership, a limited partnership, a limited liability company, a trust, an estate, an association, a corporation or any other legal or commercial entity.

Authority: 18 O.S. §§ 2001, 2005, 2006; 49 O.S. §§ 112, 113, 118; 12 O.S. § 2902.

25.3 AUTHORITY OF MANAGER TO ACT FOR LIMITED LIABILITY COMPANY

The examiner, in the absence of evidence to the contrary, may presume that a manager of a limited liability company was authorized to act on behalf of the company if the manager executes and acknowledges in proper form a recorded instrument for apparently carrying on the business of the limited liability company.

Comment: The Oklahoma Limited Liability Company Act was enacted on September 1, 1992, authorized the Articles of Organization to include a statement of restrictions on the authority of the manager. This provision was deleted by Laws 1993, c. 366, § 3, eff. September 1, 1993. The Committee was unable to reach a consensus whether the filing of the Articles of Organization with such restrictions constitutes constructive notice of the restrictions on the authority of the manager. If a recorded instrument is executed by a domestic limited liability company before September 1, 1993, the examiner should consider whether it is necessary to review a copy of the Articles of Organization filed with the Secretary of State to determine whether these articles contain a statement of restrictions on the authority of the manager.

Authority: 18 O.S. § 2005, 2019, 2042; Laws 1992, c. 148, § 6, eff. Sept. 1, 1992.

25.4 CONVEYANCE OF PROPERTY HELD IN NAME OF LIMITED LIABILITY COMPANY OR ITS MEMBERS OR MANAGERS

A. Property acquired by the limited liability company and held in the name of the company may be conveyed in the name of the company.

B. If property is conveyed to a person as a member or manager without reference to a named limited liability company, that person may execute a subsequent conveyance in the same capacity.

C. If property is conveyed to a person as a member or manager with reference to a named limited liability company, that person may execute a subsequent conveyance in the same capacity.

Authority: 18 O.S. § 2019.1.

25.5 NO MARITAL RIGHTS IN PROPERTY OWNED BY LIMITED LIABILITY COMPANY

No homestead or other marital rights attach to the interest of a manager or member in specific property owned by a limited liability company.

Authority: 18 O.S. § 2032.

25.6 ASSETS OF LIMITED LIABILITY COMPANY NOT SUBJECT TO EXECUTION FOR DEBTS OF MANAGERS OR MEMBERS

Specific property owned by a limited liability company is not subject to execution on a claim, judgment or lien against a member or manager of the company.

Authority: 18 O.S., §§ 2032, 2034.

25.7 LIMITED LIABILITY COMPANY DEEMED TO BE LEGALLY IN EXISTENCE

If a recorded instrument is executed and acknowledged in proper form on behalf of a limited liability company, the title examiner may presume that the limited liability company was legally in existence when the instrument was executed.

Authority: 18 O.S. § 2039.

25.8 FOREIGN LIMITED LIABILITY COMPANIES DEEMED TO BE LAWFULLY ORGANIZED AND REGISTERED TO DO BUSINESS

If a recorded instrument is executed and acknowledged in proper form on behalf

of a foreign limited liability company, the title examiner may presume that the company was properly formed in the jurisdiction in which it was organized and that it was registered to do business in this state when the instrument was executed.

Authority: 18 O.S. §§ 2042, 2043, 2048, 2049.

(2) Discussion

As of September 1, 1992, limited liability companies became statutorily recognized in Oklahoma as entities capable of holding and conveying title to real property. (See 18 O.S. § 2000 et seq. -- amended as of September 1, 1993). By statute, a limited liability company is an "unincorporated association."

Attorneys representing buyers and lenders, who are about to accept deeds and mortgages from a limited liability company, can and should ask for documentation beyond the sparse essential set of instruments identified in these title examination standards. A subsequent examiner will be assuming that the transactional attorney performed her due diligence and that the resulting set of recorded documents reflect prima facie evidence of a properly conducted transaction.

The two most relevant statutes for the title examiner are 18 O.S. § 2019: Manager as Agent of Limited Liability Company - Unauthorized acts- Property Transactions (initially enacted as of September 1, 1992 and amended on September 1, 1993) and 18 O.S. § 2019.1: Title to property - Transfer (initially enacted as of September 1, 1993).

These two statutes provide as follows:

18 O.S. § 2019 MANAGER AS AGENT OF LIMITED LIABILITY COMPANY - UNAUTHORIZED ACTS - PROPERTY TRANSACTIONS

A. Every manager is an agent of the limited liability company for the purpose of its business, and the act of every manager, including the execution in the limited liability company name of any instrument for apparently carrying on the

business of the limited liability company of which he is a manger, binds the limited liability company, unless the manager so acting lacks the authority to act for the limited liability company in the particular matter, and the person with whom he is dealing has knowledge, of the fact that he has no such authority. The unauthorized acts of the manager shall bind the limited liability company as to persons acting in good faith who have no knowledge of the fact that the manager had no such authority.

B. Subject to the provisions of subsection A of this section and Section 30 of this act, instruments and documents providing for the acquisition, mortgage, or disposition of real or personal property of the limited liability company shall be valid and binding upon the limited liability company if executed by one or more of its managers.

§ 2019.1 TITLE TO PROPERTY - TRANSFER

A. Title to property of the limited liability company that is held in the name of the limited liability company may be transferred by an instrument of transfer executed by any manager in the name of the limited liability company.

B. Title to property of the limited liability property that is held in the name of one or more members or managers with an indication in the instrument transferring title to the property to them of their capacity as members or managers of a limited liability company or of the existence of a limited liability company, even if the name of the limited liability company is not indicated, may be transferred by an instrument of transfer executed by the persons in whose name title is held.

C. Property transferred under subsections A or B of this section may be recovered by the limited liability company if it proves that the act of the person executing the instrument of transfer did not bind the limited liability company under Section 2019 of Title 18 of the Oklahoma Statutes, unless the property has been transferred by the initial transferee or a person claiming through the initial transferee to a subsequent transferee who gives value without having notice that the person who executed the instrument of initial transfer lacked authority to bind the limited liability company.

D. Title to property of the limited liability company that is held in the name of one or more persons other than the limited liability company without an indication in the instrument transferring title to the property to them of their capacity as members or managers of a limited liability company or of the existence of a limited liability company, may be transferred free of any claims of the limited liability company or the members by the person in whose name title is held to a transferee who gives value without having notice that it is property of a limited liability company.

For a further discussion of these issues, also see the Oklahoma Bar Journal article (65

OBJ 1112) published March 26, 1994, entitled "Limited Liability Companies In Real Estate Titles: What Requirements Should The Examiner Make?", by Donald F. Heath, Jr.

3. PENDING STANDARDS

TITLE EXAMINATION STANDARDS COMMITTEE
of the
Real Property Law Section of the O.B.A.

1995 Agenda as of March 9, 1995

===STATUS OF TOPICS===

Sub-Committee	Std.	Status	Description
			PENDING
			(MARCH)
Heath Astle Flagler Muratet Rogers Van Laanen	4.1	Mar 95/ Draft	MARKETABLE TITLE DEFINED - Considering changing the definition of "Marketable Title" to be based on something other than "perfect title".
Wimbish	17.1	Mar 95/ Draft	THE GENERAL FEDERAL TAX LIEN - Does the Tillery case say a federal tax lien affects the whole homestead interest or just the taxpayer's portion? (per Phil Thompson)
Beaumont Postic Muratet Struckle	22.1	Mar 95/ Report	POWERS OF TRUSTEE - Do homestead rights continue after homestead real property is put into a grantor revocable trust?
Postic Richie Flagler Muratet Struckle	22.2	Mar 95/ Report	TITLE TO PROPERTY HELD UNDER AN EXPRESS PRIVATE TRUST - Due to changes in 60 O.S.A.§§175.6(a), 175.6(b) and 171, can express private trusts hold and convey title in the name of the trust (not in the name of the trustee) and, if so, what must the title examiner look for in the abstract?
Struckle Postic Cleverdon Williams	NEW (22.4)	Mar 95/ Draft	REVOCABLE TRUSTS - Adding a Standard about ensuring all estate tax issues are resolved if a successor trustee grants an interest in real property.
Astle Rheinberger Lower Heath Kempf	NEW	Mar 95/ Report	CONVEYANCING CHANGES: CORP. EXECUTION, PRIMA FACIE, AFFIDAVITS - What is the impact of HB 2783 on various Standards, especially its retroactive impact and its effect on corporate executions, jurisdictional issues and the increased uses of affidavits? (TES: 3.3, 5.1, 9.1, 9.2, 9.4)
			PENDING (CON'T)
			(APRIL)

Moershel Durbin Rheinberger Chapman	NEW (22.5)	Apr 95/ Report	BUSINESS TRUSTS - Whether and how Business Trusts can hold and convey title to real property.

----------(JUNE)----------

Durbin Moershel Flagler Chapman	16.6	June 95/ Report	CONVEYANCES ON BEHALF OF A RELIGIOUS ASSOCIATION - How to handle conveyances from a "trustee" & from a "successor trustee".

UNSCHEDULED

Butler Struckle	8.1		TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES - Is a tax release necessary on all life estates, e.g., non-retained life estates? (per David Butler)
Beaumont McEachin Struckle	12.3		CHILD SUPPORT ARREARAGE LIENS PURSUANT TO 43 O.S.A. §135 - Clarify caveat calling for notice and an opportunity for a hearing.
Astle Wimbish Lower	13.3		RELEASE -- CORRECTION OR RE-RECORDED MORTGAGE - Evaluate possible ambiguity about which instrument is meant by "corrected instrument".
Rosser Rheinberger	13.8		UNENFORCEABLE MORTGAGES AND MARKETABLE TITLE - What is the impact of the repeal in 1992 of 12A O.S.A. § 3-122 on the extinguishment of the mortgage lien of demand notes? (per Kathy Hood)
Astle Lower	16.4		ENDORSEMENTS UPON DEEDS OF LOT SPLIT APPROVAL... - After a small tract is severed, and becomes acceptable by approval or by passage of time, does the description for the remaining balance of the tract become impliedly acceptable?
Rheinberger Lower	16.4		ENDORSEMENT UPON DEEDS OF LOT SPLIT APPROVAL... - Whether TES 16.4(A)(1) & (A)(d) cure platted lot splits. Whether 11 O.S. § 47-116 affects OKC deed approval. (per Scott Spradling)
Beaumont	20.2		BANKRUPTCIES ON OR AFTER October 1, 1979 - General update to track new statutes
Nowinski Myles Beaumont Gossett	20.2		BANKRUPTCIES ON OR AFTER OCTOBER 1, 1979 - What documentation must the examining attorney review to determine if the stay has been properly annulled retroactively under 11 U.S.C. §362(d)? Thereafter, are acts done in violation of the stay prior to the order of annulment validated (i.e., void versus voidable)?

UNSCHEDULED (CON'T)

Butler Wimbish Rogers Heath	Ch.19		MARKETABLE RECORD TITLE ACT - Should this Standard be revised to reflect our position on stray deeds? or vice versus? The "stray deed" issue may be affected by pending legislation.
Wimbish	NEW		SPECIAL JUDGES SIGNING REAL PROPERTY ORDERS - Are Special Judges authorized by State Statute and/or local rules to sign both contested and uncontested real property orders?
Lower Postic Van Laanen	NEW		CONVEYANCES FROM ONE-PERSON CORPORATION - Can a President or Vice President also act as Secretary and attest/seal their own signature? What is the retroactive impact of HB2783 on this issue?
Van Laanen Epperson Muratet	NEW		CONVEYANCES BY DISSOLVED OR SUSPENDED CORPORATIONS - (1) Under what conditions, and by following what procedures, can a corporation that was dissolved more than 3 years ago execute a correction deed or disclaimer of interest, and (2) can a corporation which is currently suspended (usually for non-payment of franchise taxes) convey legal/marketable/valid title? If this topic turns out not to be appropriate as a Standard, an article will probably be prepared.
Butler	NEW		STANDARDS REORGANIZATION - Should some Standards be moved into different Chapters?

REJECTED

_____	14.1	Jan 95/ Rejected	MECHANICS' AND MATERIALMEN'S LIENS - Is a Lis Pendens filing essential to keep an M & M Lien alive beyond 1 year? (per Jim Webber)
Beaumont Butler	17.1	Jan 95/ Rejected	THE GENERAL FEDERAL TAX LIEN - Paragraph A.4.d, which states that a b.f.p. with actual notice of an unrecorded tax lien, takes free of a tax lien, even if the b.f.p. has actual notice of an unrecorded tax lien, may have been affected by a change in 26 U.S.C. §6323.H.6.
_____	NEW	Jan 95/ Rejected	HANDBOOK FORM - Should we change the Standards Handbook to a loose leaf form and only replace changed pages each year? (per David Petty)

4. 1995 T.E.S. COMMITTEE MEMBERSHIP

(See APPENDIX C)

5. THE (O.C.U.) NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER: STATES WITH T.E.S. (List & Map)

(See APPENDIX D)

D. THE CHANGING DEFINITION OF "MARKETABLE TITLE"

(See the unpublished article entitled "Perfect Title in Oklahoma: An Oxymoron", 12-9-94, by Donald F. Heath, Jr., at APPENDIX E)

APPENDICES:

A. "House Bill 2783: Changes For the Title Examiner", John Frederick Kempf, Jr. (11-17-94)

B. "A Brief Analysis of U.S.A. v. Ward, 985 F.2d 500 (10th Cir. 1993)", Kraettli Q. Epperson (1-20-94)

C. Oklahoma T.E.S. Committee List (2-10-95)

D. States With Title Examination Standards: List & Map (3-24-95)

E. "Perfect Title In Oklahoma: An Oxymoron", Donald F. Heath, Jr. (12-9-94)

APPENDIX A

"House Bill 2783: Changes For the Title Examiner",
John Frederick Kempf, Jr. (11-17-94)

HOUSE BILL 2783

CHANGES FOR THE TITLE EXAMINER

John Frederick Kempf, Jr.
Pate & Payne, P.C.
P.O. Box 1907
Oklahoma City, OK 73101-1907
(405) 235-4211

Oklahoma City Mineral Lawyers Society
Presented November 17, 1994

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HOUSE BILL 2783
CHANGES FOR THE TITLE EXAMINER

A. Introduction

The rules which title examiners and title insurance companies have followed for years have undergone some dramatic changes under Oklahoma's House Bill 2783 (1994 Okla. Sess. Law Serv. Ch. 238) which became effective September 1, 1994. In many ways, the duties of a title examiner have been potentially simplified. In other instances, burdens of risk may have been shifted. In still other ways, it remains to be seen how this Bill will or should change the way title examinations are approached in Oklahoma.

The initial draft of the Bill which was presented to the Oklahoma Legislature was drafted by Donald F. Heath, Jr.,[1] a member of the Oklahoma City Title Attorneys Association and the Oklahoma City Mineral Lawyers Society. The author acknowledges with thanks Mr. Heath's comments and insights as to the Bill.[2] The Bill was passed with only a few minor modifications. House Bill 2783 was based on §§2-301, 2-305, and 2-307 of the Uniform Simplification of Land Transfers Act ("USOLTA").[3]

What do the proponents of H.B. 2783 hope to gain by passage of this Bill? The USOLTA, after which H.B. 2783 was modeled, is a model Act approved by the National Conference of Commissioners on Uniform State Laws, and the American Bar Association, as part of an effort to standardize real property law in the same manner as the Uniform Commercial Code standardized personal property law. Among the goals sought by its drafter's were, goals of unifying and modernizing state real property laws, simplifying the language of such laws, and simplifying and reducing the cost of real estate

transfers. It was further hoped that with uniform state real property laws, national policies could be developed for the secondary mortgage market, thus encouraging broader lending by financial institutions, stimulating the national housing market, and reducing the overall cost of land transfers in general.[4] The particular changes under H.B. 2783, which were borrowed from the USOLTA, were designed to reform Oklahoma conveyances of real property so that the conveyancer, insofar as possible, may rely on the record title alone.[5]

Mr. Heath notes that the particular changes by this Bill will simplify land transactions by liberalizing the execution requirements for corporations and banks, and will also create presumptions of fact to satisfy technical defects in title. He states that it will reduce the cost of land transactions and will expedite distribution of oil and gas proceeds by eliminating standardized and proforma requirements routinely made by title examiners, which have little or no substance in this day and age.[6] Indeed, change is slow to be accepted by attorneys in general, and particularly with regard to title lawyers who have had the luxury of suffering through relatively few major or dynamic changes in the law of real property, which has long established roots in both statutory and common law. Most title examiners have learned their trade through a predecessor generation of attorneys who were able to pass on basically the same set of examination rules as they used before. Now, as title examiners, we are challenged by some changes in our long-standing routine. Admittedly, it was time for a change

as to laws which had the title examiner making routine and mundane requirements, which added little substance to a given title transaction, but often caused delay and expense for the parties to that transaction. On the other hand, substantive changes arising out of this Bill will have to be carefully considered by not only the title examiner, but the public at large. Those changes may effectively shift the risk of loss of title from a seller, title examiner or title insurer, to either the purchaser, or a third party who believes himself to own an interest in the property, but whose title is not clearly reflected on the face of the recorded chain of title.

In familiarizing ourselves with H.B. 2783, we will find that there is already an existing foundation in Oklahoma law for many of the changes which have now been assembled in a singular statute. This is particularly true with regard to a number of the presumptions which can be made with regard to recorded instruments under H.B. 2783. Prior to the Bill's adoption, Oklahoma had several curative acts which allowed certain execution and acknowledgment defects, and other indefinite title situations of record to ripen into cured defects and established <u>conclusive presumptions</u>, sufficient to be protected under such curative Acts as the Oklahoma Simplification of Land Titles Act, 16 O.S. §61, et seq., ("SLTA"), the Oklahoma Market Record Title Act, 16 O.S. §71, et seq., ("MRTA"), the Limitations on Power of Foreclosure Act, 46 O.S. §301, ("LPFA"), and 16 O.S. 1988, §27a. Each of these curative statutes are designed to complete imperfect transactions

after a stated period of time, create statutes of limitations, and establish conditions for adverse possession to prevent and bar stale demands or ancient unasserted rights.[7] Each of these statutes allow a title to be cured and perfected into a marketable title under certain circumstances, but only after a waiting period has lapsed. Under H.B. 2783, documents may be filed prior to the lapse of those periods, which as recorded instruments, will be immediately presumed to be true, correct and valid. However, such documents are only prima facie evidence of such facts, and are subject to being rebutted. Thus, unlike a title which has ripened under the aforesaid curative Acts, these facts will not be deemed conclusive, but only prima facie evidence of those facts.

The primary changes created by H.B. 2783 can be summarized as follows:

1. Instruments executed by a bank or a corporation affecting title to real property may now be executed by not only a president or vice president, but also by a chairman or vice chairman of the board of said entity.

2. The old requirements that instruments executed by banks or corporations affecting real property have a corporate seal affixed, and that they be attested, have been abolished.

3. Recorded affidavits relating to real estate have been increased in their significance from mere notice of the statements contained therein, to now create a rebuttable presumption that the facts stated therein are true insofar as they relate to the subject property.

4. The Bill resolves the occasional dispute over whether or not corporate acknowledgements must use the short acknowledgment form or the long form, with the Bill permitting either form to be used on corporation documents affecting title.

5. The Bill creates a list of twelve (12) topics on which recorded, and signed (but not necessarily acknowledged) instruments will be deemed to create a rebuttable presumption in relation to real property titles.

Attached is a copy of the complete text of H.B. 2783.

B. Review of Changes Under Act

1. CHAIRMAN AND VICE CHAIRMAN CAN SIGN FOR BANKS AND CORPORATIONS.

In the past, banks had to convey real estate by instruments subscribed by the bank's attorney-in-fact, president or vice-president.[8] Likewise, instruments affecting real estate executed by corporations were previously required to be signed by an attorney-in-fact, president or "any" vice president of the corporation.[9] H.B. 2783 amended 6 O.S. 1992, §414F and 16 O.S. §§93 and 95 to allow instruments affecting real property of either banks or corporations to be executed by their attorney-in-fact, president, vice president, chairman or vice chairman of the board of directors.[10] It is noted that H.B. 2783 took out the reference to "any" vice president, and now merely refers to "an attorney-in-fact, vice president, chairman or vice chairman . . .". It is unclear as to the significance, if any, of not including the word "any" before "vice president" in H.B. 2783.[11] Allowing such instruments to be executed by a chairman or vice chairman of the

board is consistent with the general corporation statute 18 O.S. 1991, §1007A(2)(a), which generally allows any instruments signed on behalf of a corporation to be signed by the chairman or vice chairman of the board, or by the president or vice president. Thus, we can look forward to seeing corporate instruments affecting real property signed by the vice chairman or chairman of the board, in addition to other authorized officers or attorneys-in-fact.

2. ABOLITION OF REQUIREMENTS FOR CORPORATE SEAL AND ATTESTATION.

Prior to H.B. 2783, by statute, instruments affecting real property executed by a bank, unless executed by their attorney-in-fact, had to be attested by the cashier, assistant cashier, secretary or assistant secretary, with the seal of the bank affixed.[12] Likewise, by statute, a corporation executing an instrument affecting real property, unless executed by its attorney-in-fact, had to be signed by the president or vice president, and attested by the secretary, assistant secretary or clerk of the corporation, with the corporate seal affixed.[13]

Other than serving as technical statutory requirements for the execution of instruments, the value of the statutory requirements of attestation and the affixing of a corporate seal has been waning in recent years. Under the old Oklahoma Business Corporation Act, (before it was replaced by the Oklahoma General Corporation Act in 1986), 18 O.S. 1947, §1.242 provided that affixing the corporate seal to an instrument allowed the instrument to be viewed as prima facie evidence that such instrument was the act of the corporation, that it was duly executed and signed by the persons who were

officers or agents of the corporation acting by authority given to them by the board of directors, that the seal was the duly adopted seal of the corporation, that it was affixed by a person authorized to do so, and such instrument could be admissible in evidence without further proof of execution.[14] When the Oklahoma General Corporation Act was adopted in 1986, and the Business Corporation Act repealed, no similar provision was adopted to replace the old 18 O.S. §1.242, dealing with the evidentiary effect of the affixing of a corporate seal. Thus, other than technical statutory requirements under Titles 6 and 16 on conveyances of real property, there was no other apparent reason for the affixing of a corporate seal.

These technical requirements fell under scrutiny when the boom went bust in the 1980's, and various oil and gas well liens were filed by corporations who failed to follow the technical requirements of corporate attestation, seal and acknowledgement. When mechanic's and materialman's liens and oil and gas well liens began to be challenged for the lack of compliance with these technical requirements,[15] the Oklahoma Legislature abolished any possible need for those technical requirements in relation to the filing and releasing of lien statements by adopting 16 O.S. §96. Since the adoption of that statute there appear to have been few complaints about the change.

Against this background, it appears there was little purpose being served by these technical requirements. There was no longer a legal presumption created by affixing the corporate seal. The

General Corporation Act still allows corporations to have and use a corporate seal,[16] but there appears to be little significance left for the corporate seal under these circumstances. By abolishing the attestation and corporate seal requirements, H.B. 2783 will eliminate a constant title requirement made by title examiners who were forced to examine poor quality copies of corporate instruments, without knowing whether or not the corporate seal was affixed. This should also eliminate the occasional disputes Oklahoma title examiners have with out of state attorneys who did not understand why Oklahoma title attorneys were requiring them to have their client re-execute instruments, have them attested, and have a corporate seal affixed. Oklahoma's change appears to be in accord with the majority of the states, who have also abolished such requirements for the affixing of corporate seals and attestation.[17] This should also eliminate the occasional differences which have occurred when national banks took the position that they were not required to affix corporate seals or attestation on Oklahoma real property instruments, since they were governed by federal statutes, which did not have such requirements for national banks.

3. GREATER IMPACT OF RECORDED AFFIDAVITS.

House Bill 2783 amended 16 O.S. 1991, §82, which previously stated that recorded and acknowledged affidavits would be notice of matters covered therein, relating to title to real property. The old §82 also specifically stated as follows:

> "The affidavit shall not take the place of a judicial proceeding, judgment, decree, or title standards."

Under the amended §82, under House Bill 2783 (Sec. 3), affidavits now create a rebuttable presumption that the facts stated in the recorded affidavit are true insofar as they relate to the real estate, its use, or its ownership. It is noteworthy that the amended §82 removed the previous statutory provision that affidavits would not take the place of a judicial proceeding, judgment, decree or title standards. Thus, arguably one can infer that when one encounters an intestate succession situation in an abstract, and there appears to have been no probate, a title examiner may be permitted to rely on an affidavit of death, heirship and intestacy in lieu of a judicial probate or quiet title proceeding. H.B. 2783's author believes that amended §82 makes an affidavit prima facie evidence of the facts stated therein, and that the statute authorizes the use of affidavits to show intestate succession and the homestead character of the property.[18]

If affidavits can be used as prima facie evidence of such things as the determination of death and intestate succession, then our current Oklahoma Title Standard 3.3 is clearly outdated. Current Title Standard 3.3 indicates that while affidavits are not substitutes for certain types of judicial proceedings, judgments, decrees or title standards, they are a practical and proven means of assisting anyone examining title in understanding various facts or circumstances relating to property, ownership, and the persons who have relations to either.

Under our current Oklahoma Title Standard 3.3, referring to the old version of 16 O.S. §82, states that affidavits 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".

Under the amended §82, it provides:

> "Section 82. An affidavit covering matters named in section 83 of this title may be recorded in the office of the county clerk in the county in which the real property is situated. There shall be a rebuttable presumption that facts stated in a recorded affidavit are true as they relate to real estate, its use, or its ownership."[19]

16 O.S. 1985, §83, provides:

> "Section 83. Matters to Which Affidavit May Relate.
>
> The affidavit may relate to the following matters: age, sex, birth, death, relationship, family history, heirship, names, and identity of parties, whether individual, corporate, partnership or trust; identities of officers of corporations; membership of partnerships, joint venture and other unincorporated associations; identities of trustees of trusts, and their respective terms of services; history of the organization of corporations, partnerships, joint ventures, and trusts; marital status; possession; residence; service in the armed forces; and conflicts and ambiguities in descriptions of land in recorded instruments."

Thus, not only do affidavits of this type become notice, but they now have a rebuttable presumption that they are true and correct. Beyond the creation of prima facie evidence of such facts, this author questions whether or not such affidavits can rise the level of valid substitutes for judicial determinations. First, the amended §82 does not expressly authorize the use of affidavits as such substitutes. Rather, it merely raises the level

of affidavits from notice of possible facts, to prima facie evidence that those facts are true, subject to the ability of a party to rebut same. In trying to determine whether or not one has a valid marketable title, i.e., a perfect or clear title of record, an examiner generally feels reasonably safe in relying on a final judicial determination or final decree as being determinative of the facts stated therein. An affidavit, on the other hand, creates merely a presumption, which can be changed and refuted at a later time with appropriate rebuttable evidence. Thus, an affidavit does not have the same conclusive effect as does a judicial determination.

Should we fear a rash of false affidavits being filed to cloud or attempt to deprive parties of their record title? Probably not. Oklahoma still has a statute to prevent parties from recklessly making false affidavits. 16 O.S. §85 provides that one making a false affidavit is not only guilty of perjury, but may be liable for actual damages caused by the false affidavit, as well as punitive damages, costs and attorneys fees. (16 O.S. §85.) Likewise, under Oklahoma's MRTA, 16 O.S. §79, persons are prohibited from filing false notices under that Act, and upon doing so, shall be liable for costs, attorneys fees and damages. Arguably these civil and criminal penalties should provide sufficient protection against the misuse of false affidavits, which now have a stronger impact then they did before.

Suppose one encounters a title where the last record owner appears to have died, and other family members appear to be acting

with regard to his real property interests. As the title examiner, you learn the decedent has died intestate, but his estate has never been probated. Under the old statute, an affidavit stating that he died intestate, and identifying his lawful heirs, could be notice of those facts, and could be relied upon for clarification purposes. Absent suspicions by the examiner as to the affiant's knowledge, competency or veracity, the affidavit would go as far as the notice, and that was all. Under the revised §82, such an affidavit would arguably still not be a substitute for a judicial determination of the death and heirship of the decedent. However, such an affidavit could be relied upon as prima facie evidence of the facts stated therein. While it might not create "marketable title" in the heirs, it might serve as a basis for creating a stronger defensible title in them.

Arguably an instance where this change could assist examiners is with regard to instruments affecting real property executed by one person, without reference to their marital status. Arguably such ambiguities could be cleared up at a later date by an affidavit signed not only by the grantor of the instrument, whose status was unknown to the examiner, but also by a third party who may have personal knowledge as to the situation. Thus, suppose a father and widower executed a deed to his property without identifying his marital status at the time of the conveyance. At a later date, the ambiguity could arguably be cleared up by an affidavit from the adult child of the grantor, who could verify the marital status of the father as of the time of the conveyance

through an affidavit. That affidavit would be prima facie evidence of the father's marital status of the time the instrument was executed. Under the old §82, such an affidavit may be notice of those facts, which would have to be weighed by the title examiner in relation to the witness signing the affidavit. Under the new Act, there is a prima facie presumption that the facts are true, as stated in the affidavit, and the examiner's burden is eased to that extent.

4. NOW EITHER CORPORATE ACKNOWLEDGEMENT FORM CAN BE USED.

Unchanged by House Bill 2783 is 16 O.S. §26, regarding the importance of having instruments affecting real property acknowledged, to-wit:

> "Section 26. Acknowledgement Before Recording.
>
> No deed, mortgage or other instrument affecting the real estate shall be received for record or recorded unless executed and acknowledged in substantial compliance with this Chapter; and the recording of any such instrument not so executed and acknowledged shall not be effective for any purpose."

Although an unacknowledged deed may be good and binding as between the parties,[20] an unacknowledged instrument affecting real property may not be sufficient to charge third parties with constructive notice of the instrument.[21] To insure that one's instrument relating to real property does constitute constructive notice to third parties, the statutes stress the importance of having a valid acknowledgement.

In recent years, there have been occasional instances where Oklahoma title examiners have differed over which individual and

corporate acknowledgement forms should be used. 16 O.S. §33 provides what is commonly referred to as the "long form" for individual, acknowledgements, and 16 O.S. §95 provides the "long form" for corporate acknowledgments. Each of those two (2) statutes sets forth a longer acknowledgement format, preceded by the words "An acknowledgement . . . must be substantially in the following form . . .". Notwithstanding those words, in 49 O.S. §119, the Legislature approved the "short form" forms for acknowledgement, and stated that such notarial acts are sufficient for the respective purposes indicated. While the majority of title attorneys appear to have approved either form of acknowledgment, the restrictive language in the statutes under Title 16 allowed occasional disputes as to which acknowledgement form was needed. Under Section 5 of H.B. 2783, 16 O.S. §95 was amended so that either form may now be used for corporate acknowledgements only. House Bill 2783 did not change the language in 16 O.S. §33, dealing with acknowledgements by individuals. If there was a valid issue as to short form versus long form as to corporations and individuals before the Bill, that debate may continue with regard to individual acknowledgements only. It should be noted that under 16 O.S. 1988, §27a, an instrument relating to real property which is not acknowledged, or which contains a defect in acknowledgement shall become valid notwithstanding those defects after it has been recorded for five (5) years.

5. CHANGES IN PRESUMPTIONS FOR TITLE PURPOSES.

Perhaps the most dynamic set of changes, and possibly the most controversial set of changes under House Bill 2783 are set forth in Section 2 of the Bill, which is a new statute, 16 O.S. §53. This Section creates and assembles a set of rebuttable presumptions which can be made with regard to recorded, signed documents relating to title to real property. This statute effectively assembles in one place a statutory basis for a series of legal presumptions, many of which are already recognized as a part of Oklahoma law.[22] A few of the newly created presumptions should give each title examiner some reason for serious reflection.

The presumptions created under H.B. 2783 are "presumptions of law", as distinguished from "presumptions of fact". A "presumption of law" is a mandatory deduction which the law expressly directs to be made from the particular facts. A "presumption of fact" is synonymous with that mental process by which the existence of one fact is inferred from proof of some other fact or facts with which experience shows it is usually associated by succession or co-existence.[23]

First, it is important to note that this statute deals only with prima facie presumptions, any one of which can be rebutted. These presumptions are not conclusive. A "Presumption" is a rule of law, statutory or judicial, by which the finding of a basic fact gives rise to the existence of a presumed fact, until the presumption is rebutted. In a contested matter, a legal presumption is to be treated as evidence which entitles the party

relying on the presumption to prevail unless the fact finder determines that other evidence to rebut the presumption has been sufficient to overcome the presumption. The standard for rebuttal evidence sufficient to overcome the presumption is "evidence so clear and convincing that reasonable minds would agree that it is true".[24] In looking at certain recorded instruments, the title examiner is thus called upon to make certain presumptions as a matter of law from the face of the instrument, absent other and conflicting information from recorded documents, or the examiner's having personal knowledge of facts which would rebut that presumption. These presumptions shift the burden of proof from the proponent of a recorded document to one trying to rebut the presumptions the document creates.

It should be noted that a presumption is not a hard and fast fact, but a "presumed fact", until other evidence rebuts that presumption. This is different from presumed facts which mature into legally defendable and conclusive facts, under Oklahoma's various curative title Acts.[25] For example, under the new presumptions under 16 O.S. §53A(2), there is a presumption of law that a person executing a recorded instrument was not incompetent at the time of executing same. This is a current rebuttable presumption. However, under the SLTA, one claiming under a conveyance from a person which has been recorded for ten (10) years or more is permanently protected by the curative provisions of 16 O.S. §62A, which effectively cuts off the ability of an individual to challenge such a Deed due to the incompetency of the apparent

signatory. It is important not to confuse the rebuttable presumptions under the new Bill with presumptions which have ripened into legally enforceable and unrebuttable facts under the curative title Acts, which include not only the SLTA, but also the MRTA, 16 O.S. §71-80, and the LPFA, 46 O.S. §301. It should be noted that under these Acts, facts which were once a presumption have, by the passage of time, ripened into conclusive presumptions, and are no longer rebuttable. The lack of finality in a rebuttable presumption should give a title examiner cause for concern, if his opinion is based upon rebuttable presumptions.

In addition to the aforementioned curative statutes, Oklahoma also has 16 O.S. §27a (See: Endnote for text.),[26] which cures a variety of defects in the execution of instruments relating to real estate after they have been of record for five (5) years. After they have been of record for five (5) years, without record objection or record interference, a conclusive presumption arises that the instrument shall be treated as if it were fully and properly executed in all respects as to the identified statutory defects, notwithstanding such defects. Here again, this statute allows the defects and questions of validity to be resolved after the instrument has been of record for five (5) years, but not until. H.B. 2783 creates rebuttable presumptions which, if they had ripened into conclusive presumptions, would cure a similar group of defects. However, the presumptions under H.B. 2783 are rebuttable.

The following is a review of the specific rebuttable presumptions allowed under 16 O.S. §53A, relating to "recorded, signed documents relating to title", to-wit:

> §53A The document is genuine and was executed as the voluntary act of the person purporting to execute it.
>
> (2) The person executing the document and the person on whose behalf it is executed are the persons they are purported to be and the person executing it was neither incompetent nor a minor at any relevant time.
>
> (3) Delivery occurred notwithstanding a lapse of time between dates on the document and the date of recording.
>
> (4) Any necessary consideration was given.
>
> (5) The grantee, transferee, or beneficiary of an interest created or claimed by the document acted in good faith at all relevant times up to and including the time of the record.
>
> (6) A person purporting to act as an attorney-in-fact pursuant to a recorded power of attorney held the position he purported to hold and acted within the scope of his authority. It shall also be presumed that the principal was alive and was neither incompetent nor a minor at any relevant time.
>
> (7) A person purporting to act as:
>
> (A) one of the officers listed in Section 93 of Title 16 of the Oklahoma Statutes on behalf of a corporation,
>
> (B) a partner of a general partnership,
>
> (C) a manager of a limited liability company,
>
> (D) a trustee of a trust,
>
> (E) any officer or member of the board of trustees of a religious corporation,
>
> (F) a court-appointed trustee, receiver, personal representative, guardian, conservator, or other fiduciary, or

(G) an officer or member of any other entity,

held the position he purported to hold, acted within the scope of his authority (unless limitations of authority were previously filed of record and indexed against the property in question), and the authorization satisfied all requirements of law.

(8) All entities that are parties to the document are in good standing in this jurisdiction of organization.

(9) If the document purports to be executed pursuant to or to be a final determination in a judicial or administrative proceeding, or to be executed pursuant to a power of eminent domain, the court, official body, or condemnor was acting within its jurisdiction and all steps required for the execution of the title document were taken.

(10) Recitals and other statements of fact in a conveyance are true if the matter stated was relevant to the purpose of the document.

(11) Persons named in, signing, or acknowledging the document and persons named in, signing, or acknowledging another related document in a chain of title are identical, if the persons appear in those conveyances under identical names, or under variants thereof,

(A) commonly recognized abbreviations, contractions, initials, or colloquial or other equivalents,

(B) first or middle names or initials,

(C) simple transpositions that produce substantially similar pronunciations,

(D) articles or prepositions in names or titles,

(E) descriptions of entities as corporations, companies or abbreviations or contractions of either, or

(F) name suffixes, such as Senior or Junior, unless other information appears of record indicating that they are different persons, and

(12) All other requirements for its execution, delivery and validity have been satisfied.

Among the benefits to the title examiner in these presumptions is a more liberal allowance that various persons referenced in instruments are who they appear to be, that they have the authority to act for and on behalf of the party for whom they sign, and that the instruments are generally valid, as presented. It is noted that §53A allows these presumptions to be applied to "recorded signed documents relating to title", without reference to a requirement that such instruments be acknowledged. Several of the presumptions created herein are likewise created by an acknowledged instrument, by the statutory presumptions created by an acknowledgement.[27] Section 53A(10) creates a presumption that recitals and other statements of fact in a conveyance are true if the matter stated was relevant to the purpose of the document. Again, these presumptions arise whether the instrument is acknowledged, verified or notarized, or not. Thus, even in an unsworn and unacknowledged instrument, such statements would appear to rise to the same level of presumptive fact as a sworn affidavit under 16 O.S. §82, as amended by H.B. 2783. Presumptions under §53A present rebuttable facts, which may be relied upon until they are rebutted by other evidence. In the case of a conveyance, the burden of proof to prove something other than what is reflected by the record title would be effectively shifted to a purchaser, if these presumptions are allowed to serve as a basis for finding marketable title. As discussed further below, the most controversial issue raised by H.B. 2783 is whether or not these

rebuttable presumptions can be relied upon to establish marketable title. The Bill's author has suggested that they can.[28]

C. Issues for the Title Examiner

In some ways, H.B. 2783 may have greatly simplified some of the past challenges to a title examiner. In addition, it has the potential to eliminate certain boiler plate requirements which many of us have included in our title opinions, which have been technical in nature, but have often been addressed at great expense to the client. Until we, as lawyers, have had an opportunity to evaluate and work with the new concepts introduced under this Bill, a title examiner may wish to exercise considerable caution in the use of this Act in conjunction with title examinations. The following is a survey of certain issues, questions and concerns to be considered in conjunction with this new Bill.

1. How does this affect the concept of "marketable title"?

Oklahoma Title Standard 4.1 provides as follows:

> "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 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 deductible of record.' "

If our current standard envisions a "perfect title or clear title of record; and is one free from apparent defects, grave doubts and litigious uncertainty, . . ." then one must ask how far can an examiner rely upon the legal presumptions created by 16 O.S. §53.

Should one approve a title as marketable based on rebuttable presumptions?

The Bill's author has suggested that these presumptions may be relied upon to establish marketable title, stating:

> "The presumptions under the Bill are rebuttable - they merely shift the burden of proof to the purchaser. They enhance the power of the record by minimizing the need to produce unrecorded evidence to prove title. A chain of title based on these presumptions is marketable and will support a suit for specific performance requiring the purchaser to accept the title. The owner of a title based on these presumptions can quiet his title in a district court action. Evidence conflicting with any presumption can be ignored unless it is sufficient to overcome the prima facie presumption. This is consistent with 12 O.S. §3004 in the Oklahoma Evidence Code."[29] (emphasis added)

If the presumptions created under §53A were conclusive presumptions, the presumptions would be unrebuttable, and could be relied upon to support a suit for specific performance requiring the purchaser to accept the title based on same. However, the ability of one to require specific performance on the rebuttable presumptions of §53A may support a suit for specific performance in reliance on those rebuttable UNLESS AND UNTIL they are rebutted. While arguably, a majority of such rebuttable facts would ultimately not be rebutted in a Court of law, that possibility is not known unless and until evidence conflicting with the presumption is presented sufficient to overcome the prima facie presumptions. Generally, in a contested matter, that will not be known until the prima facie evidence is presented in Court, the potential opponent has had the opportunity to be heard, and has

either defaulted, or failed to produce sufficient evidence to overcome the prima facie presumption. However, if, in response to the prima facie evidence, the opposing party does present evidence sufficient to rebut the prima facie presumptions, the title may suddenly be rendered unmarketable, despite the presumptions. Thus, it could be argued that there is a "grave doubt and litigious uncertainty" which attaches to the reliance on these rebuttable presumptions, until such time as the presumptions become unrebuttable. Otherwise, one relying on the apparent marketable title is subject to being subsequently divested of an otherwise apparent marketable title, once the rebuttable presumption has been rebutted.

Consider the following example which could occur if presumptions under §53A(9) are relied upon to establish marketable title:

Suppose in the course of examination of a chain of title, the abstract reflects a Sheriff's Deed which purports to have been executed pursuant to a Sheriff's Sale in a foreclosure case, which was purportedly against defendants X, Y and Z. The abstract contains no foreclosure decree, no Order Confirming Sale, and nothing further relating to the foreclosure case itself. You rely on newly adopted 16 O.S. §53A(9), which creates a presumption that the Sheriff's Deed was executed pursuant to an Order of a Court who was acting within its jurisdiction, and that all steps required for the execution of a valid Sheriff's Deed were taken. Using that presumption, and having nothing in the record abstract to rebut

that presumption, you approve the Sheriff's Deed, and use same as a foundation in the chain of title for several subsequent conveyances, of title to the property. You render your title opinion stating that the current owner, Mr. O, has marketable title based upon your examination of the abstract. Your client, the purchaser of the property from Mr. O, relies on your title opinion, pays the purchase price and begins to move into the property. When your client, the purchaser, finds defendant X still living in the property in question, your client explains that he is the new owner of the property. Defendant X responds that he has never been given any notice of a foreclosure action against either he or his property, and does not know Mr. O. Upon subsequent review of the transcript of the foreclosure case, you find that the record supports his story, and defendant X was never served in the case. At that point, defendant X is still the owner of whatever interest he had in the property prior to the Sheriff's Deed. Your client, has a title which is inferior to the title of defendant X, despite your previous opinion that Mr. O had marketable title. At that point, your client philosophically poses the question "What is a marketable title? I had one yesterday, but today I do not."

This last example shows how reliance on these presumptions by a title examiner could leave clients deeply frustrated, and could likewise cause attorneys to not only lose clients, but also be exposed to claims, whether founded or unfounded, by clients who thought they were getting a good and defendable title, only to find that the opinion they relied upon was based upon presumptions which

ultimately proved not to be the true facts. Thus we are left with the questions: Should we rely on these rebuttable presumptions to establish marketable title? If so, should we amend the definition we have used for a marketable title in Oklahoma? Perhaps our definition of marketable title should be changed to be a "title which is synonymous with a perfect or clear title of record, and one free from apparent defects, grave doubts and litigious uncertainty, SUBJECT TO SUBSEQUENT REBUTTAL PRESUMPTIONS RELIED UPON UNDER 16 O.S. §§53 AND 82, and consists of both legal and equitable title fairly deductible of record". Alternatively, in defining what is a marketable title, is it appropriate for the title examiner to rely upon those of the rebuttable presumptions under H.B. 2783 which have a higher degree of probability of being true, without the further inquiry which has traditionally been made in title examinations prior to the adoption of this Bill? If so, a decision has to be made as to which presumptions have a greater probability of being true, and which have more risk that they may be rebuttable. Arguably, though these presumptions may serve as stronger evidence than before, except for technical requirements, these presumptions should not be relied upon alone to support a "perfect marketable title", since the presumptions can be rebutted, and a purported marketable title could thus become unmarketable. Of all of the new §53 presumptions, this author believes a purchaser may be exposed to considerable risk if the examiner relies on a deed pursuant to §53A(9), without examining a transcript of proceedings which are less than ten (10) years old.

If the presumptions under §53A are allowed to be relied upon in establishing "marketable title", many title insurers may refuse to insure titles based upon a marketable title standards, because of the lack of finality associated with these presumptions.

2. What parts of H.B. 2783 can be given retroactive effect, and what parts must be given only prospective effect?

H.B. 2783, as adopted, contained no express provisions for any retroactive application of its provisions. Generally, a statute will not be applied retroactively if it alters the rights and duties under an existing contract, or if the result would be to impair an obligation of a contract unless such retroactive application is expressly intended by the Legislature.[30]

An exception to this rule exists for a remedial or procedural statute which does not create, enlarge, diminish or destroy vested rights. In that case, such statutes may be allowed to operate retroactively. In determining whether or not a statute is remedial or procedural in nature, a purely procedural change, for such purposes, is one that affects the remedy only, and not the right.[31] By definition, under the Oklahoma Evidence Code, a "presumption" is a rule of procedure.[32] Thus, arguably the presumptions under §53A and §82 could be given retroactive application to documents recorded prior to September 1, 1994. However, if the net result of that type of application is to deprive a property owner of his record property interests, based upon presumptions arising out of subsequent recorded instruments, which are later rebutted, those presumptions may become more than mere remedial or procedural in nature. Thus, it is, at best, questionable whether or not the

presumptions can be applied to documents recorded before September 1, 1994, the effective date of the Bill. Most of the presumptions have a remedial affect on recorded documents, and tentatively resolve technical defects in documents intended to be what they are. Arguably H.B. 2783 should be applied retroactively in these instances.

With regard to amended 6 O.S. §414F and 16 O.S. §§93 and 95, governing the manner and persons authorized to execute real property instruments on behalf of banks and corporations, the same set of issues exist, at least as to instruments recorded in the last five (5) years, and thus not cured by 16 O.S. §27a. Suppose a corporate mortgage is filed prior to the effective date of H.B. 2783, but has been recorded less than five (5) years, it is signed by the chairman, and has neither an attestation nor a corporate seal affixed. Then a different, but properly executed, mortgage from the same corporation is subsequently recorded. Under prior 16 O.S. §§16, 92, 93 and 94, the first deed may not constitute constructive notice, and may be subordinate to the second filed mortgage. If, by retroactively applying the remedial presumptions of amended 16 O.S. §93, these defects could be cured, the <u>substantive</u> rights of the parties could be altered. Under these facts, these amended Sections should <u>not</u> be applied retroactively. Instruments executed by such entities prior to the effective date of the Bill would still be bound by the laws in effect prior to the adoption of the Bill governing same. Prior to H.B. 2783, 16 O.S. §§92, 93 and 94 suggested that corporate instruments of conveyance

"must" be executed by an appropriate officer, with attestation and seal affixed to be valid and binding on the grantor as against third parties. Thus, arguably, instruments executed by banks or corporations prior to September 1, 1994, should still follow the technical statutory requirements of signature by appropriate representative, attestation and the affixing of a corporate seal, as per Oklahoma Title Standard 9.2, unless they have been of record for five (5) years. On the other hand, one attorney has adroitly pointed out that if a title examiner makes a requirement on a corporate deed filed before H.B. 2783, because the deed lacks a corporate seal, he would be requiring a new deed to be executed to correct the old. Using the current standards under H.B. 2783, the correction deed would likely not have a seal affixed either. No seal is currently required, since that requirement is now abolished.[33] For instruments executed on or after September 1, 1994, the requirements of seal and attestation have been abolished, and in addition to other officers, such instruments can be executed by the chairman or vice chairman of the board.

3. Impact on Oklahoma Title Standards.

A brief review of the Oklahoma Title Standards including the revisions adopted and effective November 5, 1993, and comparison of same with H.B. 2783, makes it clear that our Oklahoma Title Standards will need to be carefully reviewed and more often than not, will likely be impacted, if not changed, by this Act. A brief review of same by the author indicates that more than half of the current Title Standards will need to be modified to some extent to

incorporate the changes which have been created by this Bill. In conducting a title examination, when the examiner refers to his Title Examination Standards, the examiner should likewise review H.B. 2783 insofar as it may impact the title issue in question.

4. Shifting of Risk to the Purchaser.

If one relies on the changes under H.B. 2783, and gives an opinion that title appears marketable in someone based upon presumptions created under H.B. 2783, the examiner may be shifting the risk of title problems with the property from himself and the seller, to the purchaser. The Bill was intended to simplify the record titles to land, and to make it easier for a layman to purchase land and understand what he is purchasing, by relying solely on the record title, and the presumptions from same under H.B. 2783. Unfortunately, an unsuspecting layman who received an opinion saying that the last owner has "marketable title", but based on presumptions which are later rebutted, can only lead to frustration on the part of the purchaser with not only his lawyer, but also a legal system which allows such things to happen. At a minimum, an examiner who relies on such presumptions would be wise to make a comment in the title opinion as to the specific presumption or presumptions relied upon in the particular chain of title. This may likewise cause concern for mortgage lenders and title insurers. A title insurer, attempting to insure a "marketable title", will likely want a greater assurance that the "marketable title" is, in fact, a title which can be defended, rather than a title on which apparent title is one way, but could

later be determined to be in another, based upon the rebutting of a presumption originally relied upon at that time of the title examination. For the title insurer, this risk will not be shifted to the purchaser, unless a new or different type of title exception is created under the title insurance policy.

5. Should We No Longer Examine Court or Administrative Proceedings Leading Up to Title Transactions, Conveyances or Releases?

By the presumptions created under §53A(9), one would no longer need to look behind a Sheriff's Deed, Final Decree in a probate case, quiet title judgment, deed from a Personal Representative in a probate case, or other type of conveyance arising out of a judicial or administrative proceeding. The instrument, standing alone, creates the presumption that all is in order. If the instrument has been of record for ten (10) years or more, as was previously required under the SLTA, most jurisdictional defects will be cured. If the instrument has been recorded less than ten (10) years, there is only a presumption as to same. At a minimum, even if the entire transcript of proceedings is not examined, an examiner would be wise to at least examine the Court or administrative Order authorizing the instrument of conveyance to be ordered. This presumption may save clients expense in having to reproduce voluminous transcripts of court proceedings, and will save the title examiner the additional time otherwise required to review same, to determine the validity and affect of the instrument of conveyance arising out of that proceeding. However, if one chooses not to examine such proceedings, (e.g., foreclosure cases;

guardianship proceedings leading up to a sale of real property, etc.) an examiner should recognize that he or she is deciding not to look at a proceeding which has effectively deprived a previous owner of certain rights in the property, and has authorized a conveyance to place that former title into the name of a new and different owner. The author believes that there is considerable risk in allowing one presumption from the face of a single instrument that all steps were properly taken, and that the Court had jurisdiction, to allow such a series of events to occur, ultimately leading up to the single instrument which may now be included in the abstract.

6. May Affidavits Be Used As a Substitute for Judicial Decrees in Determining Death, Intestacy and Heirship?

Amended 16 O.S. §82 allows affidavits to serve as prima facie evidence of the facts stated therein. This creates a presumption of the truth of affidavits identifying the death, intestacy and lawful heir of decedent whose estate has not been probated. In amending §82, the Legislature removed the express prohibition against affidavits being substitutes for judicial proceedings, judgments or decrees. If the presumptions under H.B. 2783 are allowed to be relied upon for determining marketability of title, then an affidavit may possibly serve as a substitute for a judicial decree making that same determination. Under these circumstances, problems often encountered by mineral owners whose oil and gas proceeds are held up due to unmarketability of title under 52 O.S. §540, could have the solutions to their problems greatly simplified and the cost of resolving their problems greatly minimized. If it

is ultimately decided that one should not rely on certain presumptions under H.B. 2783 to establish marketable title, perhaps the standard of acceptable title under 52 O.S. §540 could be modified to meet a standard of either marketable title or a defendable title which relies upon presumptions created under H.B. 2783. The comment under current Oklahoma Title Standard 3.3 states: ". . . 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". Under amended 16 O.S. §82, the prohibition against using affidavits as a substitute for judicial decrees has been removed, and such affidavits now rise from the status of mere notice, to a presumption that the matters set forth therein are true and correct.

D. CONCLUSION

In many ways, House Bill 2783 has simplified many of our past unnecessary boiler plate comments and requirements. To that extent, it is should be a help to not only the title examiner, but to the clients who pay them to examine and deal with titles to real property. On the other hand, there are some changes under this Bill which will require considerable study and consideration before they are actively relied upon by the Oklahoma Bar Association in examining real property titles. The most immediate issue is how the Bill will affect, or possibly change, what we call "marketable title". Regardless of their legal effect, some of these changes may also create a variety of potential situations which could leave

clients unhappy, and could have potentially catastrophic impacts on certain title transactions for purchasers, mortgage lenders and title insurers. Until H.B. 2783 has been further analyzed and tested, reliance on particularly some of its presumptions should be approached with considerable caution.

ENDNOTES:

1. Donald F. Heath, Jr. is an attorney practicing in real property and oil and gas law in Norman. He serves as the Secretary/Budget Director of the Real Property Law Section of the O.P.a., and serves on the Title Examination Standards and Legislative Liaison Committees of the real property law section of the OBA. He is a member of the Oklahoma City Title Attorneys Association and the Oklahoma City Mineral Lawyers Association.

2. See: Mr. Heath's article "House Bill 2783: A Step Toward Simpler Land Titles," OBA Real Property Section Newsletter, Summer, 1994, p. 7.

3. Id. The Uniform Simplification of Land Transfers Act was approved by the National Conference of Commissioners on Uniform State Laws in 1976, as amended in 1977.

4. Taylor Mattis, "The Uniform Simplification of Land Transfers Act: Article II - Conveyancing and Recording", Vol. 1981, Southern Illinois University Law Journal, p. 511.

5. Id., pp. 539-540.

6. See: Heath, supra.

7. See: Oklahoma Title Standards 2.3, 18.1, et seq., and 19.1, et seq.

8. 6 O.S. 1992, §414F.

9. 16 O.S. 1987, §93.

10. H.B. 2783, §1F.

11. The author acknowledges with thanks this comment from Henry Rheinberger, of the firm Crowe and Dunlevy, in Oklahoma City. Mr. Rheinberger has worked with many of the issues addressed in H.B. 2783 through the Oklahoma Title Standards Committee of the Oklahoma Bar Association.

12. 6 O.S. 1992, §414F.

13. 16 O.S. §92, 93, 94 and 95.

14. 18 O.S. 1947, §142, repealed by laws 1986, c. 292, §160, eff. Nov. 1, 1986.

15. Davidson Country Oil Supply Co., Inc. v. Pioneer Oil and Gas Equipment Co., 689 P.2d 1279 (Okl. 1984).

16. 18 O.S. 1986, §1016(3).

17. See: Heath, supra, p. 7.

18. See: Heath, supra, pp. 8-9.

19. H.B. 2783, §3.

20. Ussery v. Driver, 231 P.2d 214 (Okl. 1925).

21. Smith v. Thompson, 402 P.2d 882 (Okl. 1965); Riddle v. Ellis, 281 P.2d 286 (Okl. 1929); Amarex, Inc. v. El Paso Natural Gas Co., 772 P.2d 905 (Okl. 1987).

22. Several examples of presumptions referenced under H.B. 2783, in newly adopted 16 O.S. §53, which have previously had a basis in Oklahoma law, are as follows: (1) §53A(2) presumes that a person executing the document is neither incompetent nor a minor. These are in accord with our existing Oklahoma Title Standards 23.1 on presumptions against minority, and 23.2, on presumptions that a grantor has the mental capacity to convey. (2) §53A(3) creates a presumption that delivery occurred notwithstanding a lapse of time between the dates on the document and the date of recording. This in accord with existing Oklahoma Title Standard 6.4 indicating an existing presumption to the same effect. (3) §53A(10) creates a presumption that recitals and other statements of fact in a conveyance are true if the matter stated was relevant to the purpose of the documents. Current Oklahoma Title Standard 9.4 provides recitals of succession by corporate merger or corporate name change contained in corporate conveyance instruments are presumed to be true and correct.

23. Smittel v. Ellingsworth, 373 P.2d 78 (Okl. 1962); Brown v. Oklahoma Transportation Co., 588 P.2d 595 (Okl. App. 1978).

24. Brown v. Oklahoma Transportation Co., 588 P.2d 595 (Okl. App. 1978); 12 O.S. §2301.

25. Mistletoe Express Service v. United Parcel Service, Inc., 674 P.2d 1 (Okl. 1983).

26. 16 O.S. 1988, §27a. Instruments Recorded For Five (5) Years Valid Notwithstanding Defects-Notice-Evidence. When any instrument of writing shall have been, or may hereafter be on record in the office of the county clerk of the proper county for the period of five (5) years, and there is a defect in such instrument because it has not been signed by the proper officer of any corporation, or because the corporate seal of the corporation has not been impressed on such instrument, or because the record does not show such seal, or because such instrument is not acknowledged, or because a deed or conveyance does not bear endorsement of approval by the appropriate governmental planning authority having jurisdiction, or because of any defect in the execution, acknowledgement, recording or certificate of recording the same, such instrument shall, from and after the expiration of five (5) years from the filing thereof for record, be valid as though such instrument had in the first instance, been in all respects duly executed, acknowledged, approved by the appropriate planning authority having jurisdiction, and certified, and such instrument shall, after the expiration of five (5) years from the filing of same for record, impart to subsequent purchaser, encumbrancers, and all other persons whomsoever, notice of such instrument of writing so far as and to the same extent that the same may then be recorded, copied or noted in such books of record, notwithstanding such defect. Such instrument, or the record thereof, or a duly-authenticated copy thereof shall be competent evidence without requiring the original to be produced or accounted for to the same extent that written instruments, duly executed and acknowledged, or the record thereof, are competent; provided, that nothing herein contained shall be construed to affect any rights acquired by grantees, assignees or encumbrancers subsequent to the filing of such instrument for record and prior to the expiration of five (5) years from the filing of such instrument for record.

27. See: 49 O.S. §112(2), and §113A.

28. See: Heath, supra, p. 9.

29. See: Heath, supra, p. 9.

30. Wickham v. Gulf Oil Co., 623 P.2d 613 (Okl. 1981).

31. Forest Oil Corp. v. Corporation Commission of Oklahoma, 807 P.2d 774 (Okl. 1990); Teel v. Public Service Co. of Oklahoma, 767 P.2d 391 (Okl. 1985), wherein the Court ruled that without express legislation, a statute may not be applied retroactively if it alters rights and duties under an existing contract, especially if the enactment would affect vested rights, or the legal character of past transactions would be prejudiced.

32. 12 O.S. §2301(1).

33. See: Endnote 11 above.

An Act

ENROLLED HOUSE
BILL NO. 2783

By: Davis of the House

and

Smith of the Senate

An Act relating to conveyances of real estate; amending 6 O.S. 1991, Section 414, as amended by Section 2, Chapter 295, O.S.L. 1992 (6 O.S. Supp. 1993, Section 414), which relates to acquisition and conveyance of real estate; authorizing certain chairman and vice-chairman to sign certain documents; deleting requirement of attestation by certain persons; creating certain presumptions regarding the evidentiary effect of certain recorded documents; providing for application of certain presumptions; amending 16 O.S. 1991, Section 82, 93 and 95, which relate to title affidavits and real estate deeds; modifying effect of certain affidavit; creating certain presumption for recorded affidavit; modifying certain corporate officers authorized to subscribe certain documents; modifying persons authorized to acknowledge certain corporate instruments; permitting use of certain acknowledgment forms; repealing 16 O.S. 1991, Sections 51, 52 and 94, which relate to presumptions of identity, marketability of title and manner of attestation; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 6 O.S. 1991, Section 414, as amended by Section 2, Chapter 295, O.S.L. 1992 (6 O.S. Supp. 1993, Section 414), is amended to read as follows:

Section 414. A. REAL ESTATE AND EQUIPMENT NECESSARY TO BANK'S OPERATION. A bank or trust company may purchase and hold real estate, equipment, furniture and fixtures necessary for the convenient transaction of its business, the cost of which shall not exceed its capital, surplus and undivided profits. This limitation may be exceeded upon written approval of the Commissioner. A bank or trust company may lease out to such tenants as it deems appropriate any portion of its banking house or premises not utilized in the conduct of its banking operations.

B. REAL ESTATE ACQUIRED IN SATISFACTION OF DEBT. A bank or trust company may purchase and hold real estate conveyed to it in satisfaction of debts previously contracted in good faith in the course of business. All such real estate shall be accounted for individually at the lower of the recorded investment in the loan satisfied or its fair market value on the date of the transfer. The recorded investment in the loan satisfied is the unpaid balance of the loan, increased by accrued and uncollected interest, unamortized premium, and loan acquisition costs, if any, and decreased by previous direct write down, finance charges and unamortized discount, if any.

C. REAL ESTATE ACQUIRED UNDER JUDGMENT, DECREE OR MORTGAGE FORECLOSURE. A bank or trust company may acquire and hold real estate such as it shall purchase at sale under judgment, decree or mortgage foreclosure, under securities held by it.

D. SALE OF REAL ESTATE ACQUIRED UNDER SUBSECTIONS B AND C. No real estate acquired in the cases contemplated in subsections B and C of this section shall be held for a longer time than five (5) years without the written approval of the Commissioner; provided, further, that if the term of the Commissioner expires within any extension period, it shall be necessary for the bank or trust company to secure the written approval of the succeeding Commissioner to continue to hold said real estate for a further period. Once the bank or trust company is no longer permitted to hold the real estate, the Commissioner shall require of the bank or trust company that the said real estate must be sold at a private or public sale within thirty (30) days of being informed of the Commissioner's requirement. For purposes of this section, ownership interests in oil, gas and other subsurface mineral rights other than mere leasehold interests shall be considered real estate; provided, however, notwithstanding the holding limitation of this section or any other provision contained herein, any bank or trust company which on October 15, 1982, held, directly or indirectly, any oil, gas and other subsurface mineral rights, other than mere leasehold interests, that since December 31, 1979, had not been valued on the books of such bank or trust company for more than a nominal amount, may continue to hold such subsurface rights or interests without limitation.

E. INVESTMENTS AND LOANS TO CORPORATION HOLDING BANK AND TRUST COMPANY PREMISES. Any bank or trust company organized under the laws of this state may invest its funds in the stocks, bonds, debentures or other such obligations of any corporation holding the premises of such bank or trust company, and may make loans to or upon the security of any such corporation, but the aggregate of all such investments and loans together with the investments provided for in subsection A of this section shall not exceed the capital, surplus and undivided profits. This limitation may be exceeded upon the written approval of the Commissioner.

F. CONVEYANCE OF REAL ESTATE. Every conveyance of real estate and every lease thereof for a term of one (1) year or more, made by a bank or trust company, must have the name of such bank or trust company subscribed thereto, either by an attorney-in-fact, ~~or by the~~ president ~~or a~~, vice-president, chairman or vice-chairman of the board of directors of such corporation~~, and such conveyance of real estate, except when executed by an attorney-in-fact, must be attested by the cashier, assistant cashier, secretary or assistant secretary of such corporation, with the seal of such corporation attached~~.

G. Nothing in this section shall preclude or limit in any manner, investments by a bank permitted under any other section of this Code.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 53 of Title 16, unless there is created a duplication in numbering, reads as follows:

EVIDENTIARY EFFECT OF RECORDED DOCUMENT

A. A recorded signed document relating to title to real estate creates a rebuttable presumption with respect to the title that:

1. The document is genuine and was executed as the voluntary act of the person purporting to execute it;

2. The person executing the document and the person on whose behalf it is executed are the persons they are purported to be and

the person executing it was neither incompetent nor a minor at any relevant time;

3. Delivery occurred notwithstanding a lapse of time between dates on the document and the date of recording;

4. Any necessary consideration was given;

5. The grantee, transferee, or beneficiary of an interest created or claimed by the document acted in good faith at all relevant times up to and including the time of the recording;

6. A person purporting to act as an attorney-in-fact pursuant to a recorded power of attorney held the position he purported to hold and acted within the scope of his authority. It shall also be presumed that the principal was alive and was neither incompetent nor a minor at any relevant time;

7. A person purporting to act as:

a. one of the officers listed in Section 93 of Title 16 of the Oklahoma Statutes on behalf of a corporation,

b. a partner of a general partnership,

c. a general partner of a limited partnership,

d. a manager of a limited liability company,

e. a trustee of a trust,

f. any officer or member of the board of trustees of a religious corporation,

g. a court-appointed trustee, receiver, personal representative, guardian, conservator, or other fiduciary, or

h. an officer or member of any other entity,

held the position he purported to hold, acted within the scope of his authority (unless limitations of authority were previously filed of record and indexed against the property in question), and the authorization satisfied all requirements of law;

8. All entities that are parties to the document are in good standing in their jurisdiction of organization;

9. If the document purports to be executed pursuant to or to be a final determination in a judicial or administrative proceeding, or to be executed pursuant to a power of eminent domain, the court, official body, or condemnor was acting within its jurisdiction and all steps required for the execution of the title document were taken;

10. Recitals and other statements of fact in a conveyance are true if the matter stated was relevant to the purpose of the document;

11. Persons named in, signing, or acknowledging the document and persons named in, signing, or acknowledging another related document in a chain of title are identical, if the persons appear in those conveyances under identical names, or under variants thereof, including inclusion, exclusion, or use of:

a. commonly recognized abbreviations, contractions, initials, or colloquial or other equivalents,

b. first or middle names or initials,

c. simple transpositions that produce substantially similar pronunciations,

d. articles or prepositions in names or titles,

e. descriptions of entities as corporations, companies or abbreviations or contractions of either, or

f. name suffixes, such as Senior or Junior, unless other information appears of record indicating that they are different persons; and

12. All other requirements for its execution, delivery, and validity have been satisfied.

B. The presumptions stated in subsection A of this section arise even if the document purports only to release a claim or convey any right, title, or interest of the person executing it or the person on whose behalf it is executed.

C. If presumptions created by subsection A of this section are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight, neither presumption applies.

SECTION 3. AMENDATORY 16 O.S. 1991, Section 82, is amended to read as follows:

Section 82. An affidavit covering matters named in Section ~~2 of this act, which may affect the title to real property, or any interest therein, in this state, made by any person having knowledge of such matters or competent to testify concerning them in open court,~~ 83 of this title may be recorded in the office of the county clerk in the county in which the real property is situated. ~~When acknowledged and recorded, the affidavit, or a certified copy of the affidavit, shall be notice of the matters covered therein, insofar as they affect the title to real property, or any interest therein. The affidavit shall not take the place of a judicial proceeding, judgment, decree or Title Standards~~ There shall be a rebuttable presumption that facts stated in a recorded affidavit are true as they relate to real estate, its use, or its ownership.

SECTION 4. AMENDATORY 16 O.S. 1991, Section 93, is amended to read as follows:

Section 93. Every deed~~,~~ or other instrument affecting real estate made by a corporation must have the name of such corporation subscribed thereto either by an attorney-in-fact ~~or by the~~, president ~~or any~~, vice-president, chairman or vice-chairman of the board of directors of such corporation~~, and when made by a public corporation the name of such corporation must be subscribed by the chief officer thereof~~.

SECTION 5. AMENDATORY 16 O.S. 1991, Section 95, is amended to read as follows:

Section 95. Every deed or other instrument affecting real estate, executed by a corporation, must be acknowledged by ~~the~~ an officer or ~~person~~ attorney-in-fact subscribing the name of the corporation thereto, which acknowledgment ~~must~~ may be in the form prescribed by Section 119 of Title 49 of the Oklahoma Statutes or substantially in the following form, to-wit:

State of Oklahoma,)
) ss.
_____ County.)

Before me, a ____ in and for said county and state, on this ____ day of ____ 191_, personally appeared ____, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its (attorney-in-fact, president, vice-president, chairman or vice-chairman of the board of directors or mayor, as the case may be) and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

SECTION 6. REPEALER 16 O.S. 1991, Sections 51, 52 and 94, are hereby repealed.

SECTION 7. This act shall become effective September 1, 1994.

Passed the House of Representatives the 17th day of May, 1994.

Jim R. Glover
Speaker Pro Tempore of the House of Representatives

Passed the Senate the 19th day of May, 1994.

Tony Jackson
ACTING President of the Senate

OFFICE OF THE GOVERNOR

Received by the Governor this 20th
day of May, 1994,
at 9:46, o'clock A. M.

By: Jo Chandler

Approved by the Governor of the State of Oklahoma the 25th day of
May, 1994, at 10:20, o'clock A. M.

David Walters
Governor of the State of Oklahoma

OFFICE OF THE SECRETARY OF STATE

Received by the Secretary of State this 25th
day of May, 1994,
at 5:04, o'clock P. M.

By: Glo Henley

APPENDIX B

"A Brief Analysis of U.S.A. v. Ward, 985 F.2d 500 (10th Cir. 1993)",
Kraettli Q. Epperson (1-20-94)

A BRIEF ANALYSIS OF:
USA v. WARD, 985 F.2d 500 (10th Cir 1993)

By Kraettli Q. Epperson
Cook & Epperson
6520 N. Western
Oklahoma City, OK 73116
(405) 842-7545

Presented to:

The Oklahoma City Commercial and Banking Lawyers Group
Oklahoma City, Oklahoma

January 20, 1994

A. BACKGROUND:

The FmHA sought to foreclose its mortgage for over $1 million on a farm where the action was filed when the default under the obligation was over six years old.

The farmer sought either (1) to directly apply the six year federal statute of limitation [28 U.S.C. §2415(a)] to prohibit the foreclosure, or (2) to indirectly apply the same six year federal statute of limitation by invoking the state statute (42 O.S. §23) extinguishing the mortgage lien when the underlying principal obligation is unenforceable.

On September 25, 1979 notes and a mortgage were executed and delivered. In 1980 the indebtedness was accelerated. On November 14, 1983 an injunction was granted against all accelerations and foreclosures by FmHA until its loan deferral procedures were corrected. [Coleman v. Black, 580 F.Supp. 194 (D.N.D. 1984)] FmHA again accelerated the debt on July 16, 1990. Foreclosure was filed on May 15, 1991.

B. HOLDINGS:

1. PLAIN LANGUAGE.

a. The plain language of the statute does not apply to equitable actions such as a foreclosure. [28 U.S.C. §2415(a)]

b. "Time does not run against the sovereign" unless Congress has expressly expressed a statute of limitation. [United States v. John Hancock Mutual Life Insurance Co., 364 U.S. 301, 81 S.Ct. 1, 5 L.Ed.2d 1 (1960)]

c. Any statute of limitations running against the U.S. must be strictly construed. [Badaracco v. Commissioner, 464 U.S. 386, 104 S.Ct. 756, 78 L.Ed.2d 549 (1984)]

2. SEPARATE ACTION.

a. The right to foreclose a mortgage securing a debt is distinct from the right to bring an action for money damages on the note representing the debt. [Cracco v. Cox, 66 A.D.2d 447, 414 N.Y.S.2d 404 (1979)]

b. 28 U.S.C. §2415(a) may cut off a civil action on a note, but the government may still foreclose on the mortgage securing the debt. [Cooper, Curry v. Small Business Administration, 679 F.Supp. 966 (N.D.Cal. 1987); Gerrard v. United States Office of Education, 656 F.Supp. 570 (N.D.Cal. 1987); Westnau Land Corp. v. United States Small Business Administration, 785 F.Supp. 41 (E.D.N.Y. 1992); United States v. Freidus, 769 F.Supp. 1266 (S.D.N.Y. 1991); and United States

v. Cooper, 709 F.Supp. 905 (N.D.Iowa 1988)]

3. MONEY DAMAGES.

28 U.S.C. §2415(a), according to legislative history, was only intended to apply to money damages based on contract. [Cracco v. Cox, 66 A.D.2d 447, 414 N.Y.S.2d 404 (1979)]

4. OKLAHOMA FORECLOSURES.

a. A mortgage conveys only a lien interest in the property. [Teachers Insurance & Annuity Association of America v. Oklahoma Tower Associates, Ltd., 798 P.2d 618 (Okla. 1990)]

b. "Thus the government correctly explains, in Oklahoma, a mortgage foreclosure results in an action identified in §2415(c)", which states "Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property."

5. CONTRACT TERMS.

a. The "documents" (which documents?) signed by the farmer waived all "present and future State laws . . . prescribing any other statutes of limitations".

b. 42 O.S. §23 whereby "A lien is extinguished" is a "statute of limitation".

6. FEDERAL PROGRAMS.

a. "The basic reason why the Wards cannot prevail is that federal law governs issues involving the rights of the United States arising under nationwide federal programs." [United States v. Kimbell Foods, Inc., 440 U.S. 715, 725, 99 S.Ct. 1448, 1456-57, 59 L.Ed.2d 711 (1979); United States v. Bellard, 674 F.2d 330, 334 n.6 (5th Cir. 1982); and Cooper, Curry v. Small Business Administration, 679 F.Supp. 966 (N.D.Cal. 1987)]

C. IMPACT:

1. CURATIVE ACT: ANCIENT MORTGAGES.

The State statute allowing third parties to ignore all mortgage liens after they have been of record (without a recorded extension) for 10 years past their

maturity date (if shown) or 30 years past their recording date (if no maturity date is shown), 46 O.S. §301, and the related Title Standard no. 13.8 are apparently inapplicable to federal program mortgages.

2. CURATIVE ACT: ANCIENT FIXTURE FILING.

The State statute allowing third parties to treat all fixture filing as extinct after they have been of record for five years past their filing date (without a filed continuation), 12A O.S. §9-401A and §9-403, and the related Title Standard no. 13.9, are apparently inapplicable to federal program fixtures filings.

3. CURATIVE ACT: MARKETABLE RECORD TITLE ACT.

The State statute allowing third parties to ignore essentially all title defects and liens or encumbrances which are behind (i.e., older than) the 30 year "root of title" instrument (i.e., a deed or a decree), 16 O.S. §§71-80, and the related Title Standards no. 19.1 to 19.13, are apparently inapplicable to federal program mortgages.

4. COMMON LAW.

It is unclear whether it was argued that federal or state common law make the mortgage "incidental to" and "dependent on" the underlying debt. This gap was apparently created by the parties looking for positive statutory pronouncements. Therefore, this argument might arise in the future.

5. UNENFORCEABLE DEBTS.

The underlying principal obligation may become extinguished or unenforceable due to at least three causes: (a) satisfaction of the debt through payment, (b) discharge of the debt in bankruptcy and (c) debt becomes unenforceable due to the passage of time (i.e., statute of limitation). It appears that unless the underlying debt is satisfied or the lien is specifically discharged in bankruptcy, the mortgage lien continues indefinitely.

6. FEDERAL v. STATE.

This case continues the tension between state and federal authority over local real property issues. A similar issue concerns whether federal courts and U.S. Marshalls should conform to both state and federal mortgage foreclosure notice provisions. Currently all three federal districts in Oklahoma conform to both sets of rules -- after the Eastern District tried to ignore the State rules for a period of time. Another related matter concerns federal extension of State

redemption periods.

7. TYPES OF PROGRAMS.

An unanswered and haunting question is which kinds of mortgages fall into this perpetual lien category: Is every mortgage (or security agreement) to an entity with a "federal sounding" name included? What about sales of government owned property with carry-back mortgages made outside of any specific "program"? How much national loan program involvement is needed? What about federally guaranteed, but not federally funded activities?

APPENDIX C

Oklahoma T.E.S. Committee List (2-10-95)

1994 TITLE EXAMINATION STANDARDS COMMITTEE OF THE REAL PROPERTY LAW SECTION OF THE OKLAHOMA BAR ASSOCIATION
OFFICERS: CHAIR - Kraettli Q. Epperson; VICE CHAIR - Judi E. Beaumont; SECRETARY - Diane C. Moershel

Revised 10 February 95

NAME	PHONE	FAX					
Allen, Teddi Lewis			Eller & Detrich		2727 East 21st, Suite 200	Tulsa	74114
Allingham, Jane	918 583-1777	592-5809	Boesche, McDermott & Eskri	800 Oneok Plaza	100 West 5th Street	Tulsa	74103
Astle, Dale L.	918 587-6621	582-2228	Guaranty Abstract Company	320 S. Bolder	P. O. Box 3048	Tulsa	74101
Beaumont, Judi E.	918 591-8322	591-8362	Bank IV Trust Department		P.O. Box 2360	Tulsa	74101-2360
Butler, David C.	405 233-1456	233-9240	Crowley, Butler, Pickens		P. O. Box 3487	Enid	73702
Chapman, C. Hayden	405 232-3258	232-0552	First American Title Ins.		133 Northwest Eighth St	Oklahoma City	73102
Clark, Gary C.	918 592-5555	587-6152	Baker, Hoster, McSpadden	Suite 800, Kennedy Building	321 South Boston Avenue	Tulsa	74103
Cleverdon, Richard	918 583-9710	583-9033			606 S. Main	Tulsa	74119-1207
Durbin, Alan C.	405 272-9241	235-8786	Andrews, Davis		500 West Main, 5th Floor	Oklahoma City	73102
Epperson, Kraettli Q.	405 842-7545	840-9890	Cook & Epperson		6520 N. Western	Oklahoma City	73116
Flagler, Rita M.	405 321-7577	329-9795	Flagler & Flagler, P.C.		111 East Comanche	Norman	73069
Gossett, William A.	405 255-5600	255-5843	Bonney, Weaver, Corley	Ste. 300, Security Bank Bldg.	16 South Ninth Street	Duncan	73533
Hardwick, Martha M.	918 749-3313	742-1819			Post Office Box 35975	Tulsa	74153
Heath Jr., Donald F.	405 366-1700	366-1713			2419 Wilcox Drive	Norman	73069
Holland, Alfred J.	501 239-4012				P. O. Box 335	Paragould, AR	72451
Huddle, Robert L.	405 742-1115	624-4208	Office of General Counsel	Farmers Home Administration	2715 N. Crescent Drive	Stillwater	74075
Lower, Jeffrey D.	918 583-9500	583-9510	Lower, Struckle & Tolson	801 Reunion Center	9 East Fourth Street	Tulsa	74130
McEachin, Scott W.	918 254-8077	250-3958		Suite 311	7633 E. 63rd Place	Tulsa	74133-1272
Moershel, Diane C.	405 236-5938	236-5939		Suite 2270, Liberty Tower	100 North Broadway Avenue	Oklahoma City	73102
Muratet, Elizabeth R.	918 582-9201	586-8383	Gable & Gotwals	2000 Fourth Nat'l Bank Bldg.	515 South Boulder Ave.	Tulsa	74119
Myles, James L.	405 755-5048				11212 N. May, Suite 301-K	Oklahoma City	73120
Myles, John L.	405 232-2166	232-0005	Rogers, Abbott & Associates	Suite 500, Bank of OK Plaza	201 E. Robert S. Kerr Ave.	Oklahoma City	73102
Newton, G. W. (Bill)	918 749-7721	587-0102	Newton & O'Connor		15 W. 6th Street, Suite 2900	Tulsa	74119
Nowinski, Matthew J.	918 748-8998	742-7760	Law Associates, Inc.	Suite 199, London Square	5800 South Lewis Avenue	Tulsa	74105
Palomar, Joyce D.	405 325-4699	325-6282	College of Law	University of Oklahoma	300 Timberdell Road	Norman	73019
Postic Jr., Martin (Marty)	405 691-5080	691-6329	Postic & Bates		2212 Shadowlake Drive	Oklahoma City	73159
Rheinberger, Henry P.	405 235-7742	239-6651	Crowe & Dunlevy	1800 Mid-America Tower	20 North Broadway Avenue	Oklahoma City	73102
Richie, Mike	405 521-3839				1700 Westminster Place	Oklahoma City	73120
Roffers, Juley M.	918 585-8141	588-7873	Huffman, Arrington	Suite 1000, ONEOK Plaza	100 West Fifth Street	Tulsa	74103
Rogers, J. Neal	918 773-3024				P. O. Box 698	Vian	74962
Rosser IV, Malcolm E.	918 592-9800	592-9801	Crowe & Dunlevy	Suite 500	321 South Boston Avenue	Tulsa	74103
Struckle, Joe J.	918 584-8998	585-8496		801-G Philtower Building	427 South Boston Ave.	Tulsa	74103
Tack, Jr., James D.	405 236-5900	236-5907			2600 First Nat'l Center West	Oklahoma City	73102
Van Laanen, Erin	405-272-0211		Spradling, Alpern, Friot & Gum	Suite 700	101 Park Avenue	Oklahoma City	73102
Williams, Thomas E.	405-842-0999				8921 Oak Valley Dr.	Midwest City	73110
Wimbish, John B. (Jack)	918 494-3770	492-5264	Riddle, Wimbish & Crain	Suite 200, 5314 S. Yale Ave.	P. O. Box 35827	Tulsa	74153
Kempf, J. Fred	405 235-4211	232-3930	Pate & Payne		401 N. Hudson	Oklahoma City	73101-1907
HONORARY MEMBER(S):							
Opala, Hon. Marion P.	405 521-3839		Oklahoma Supreme Court	State Capitol Building	2300 N. Lincoln Boulevard	Oklahoma City	73105
Schuller, Stephen A.	918 583-8205	583-1226		1111 ParkCentre	525 S. Main Mall	Tulsa	74103

APPENDIX D

States With Title Examination Standards: List & Map (3-24-95)

THE NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER
INDEX OF TITLE EXAMINATION STANDARDS MATERIALS
AVAILABLE AT THE OKLAHOMA CITY UNIVERSITY SCHOOL OF LAW
(As of April 4, 1995)

	STATE	STANDARDS IN COLLECTION		UPDATES ORDERED	EXPECTED UPDATES
		PRE-1990	1990 & LATER		
1.	COLORADO		March 1, 1991	1995	-
2.	CONNECTICUT		March 17, 1993	-	1996
3.	FLORIDA		May 1, 1992	-	1995-96
4.	GEORGIA		June 18, 1994	-	-
5.	IOWA		July 1, 1993	1994	1995
6.	KANSAS		1990	1994	-
7.	MAINE		November 15, 1994	-	-
8.	MASSACHUSETTS		1993	1994	-
9.	MICHIGAN		August, 1992	1994	-
10.	MINNESOTA		June 25, 1993	1994	-
11.	MISSOURI	May 15, 1980		-	-
12.	NEBRASKA		1993	-	1996
13.	NEW HAMPSHIRE		1990 -	-	
14.	NEW YORK	January 30, 1976		-	May 1995
15.	NORTH DAKOTA		July, 1992	1994	-
16.	OHIO		May 18, 1994 -	-	
17.	OKLAHOMA		November 18, 1994	-	1995
18.	RHODE ISLAND		1993	1994	-
19.	SOUTH DAKOTA	July 1, 1988		-	-
20.	WYOMING	July 1, 1980		-	-
	FIRST TIME STANDARDS				
21.	ARKANSAS			-	June 1995
22.	TEXAS			-	Nov. 1995
23.	UTAH			-	1995
24.	VERMONT			-	Jan. 1996

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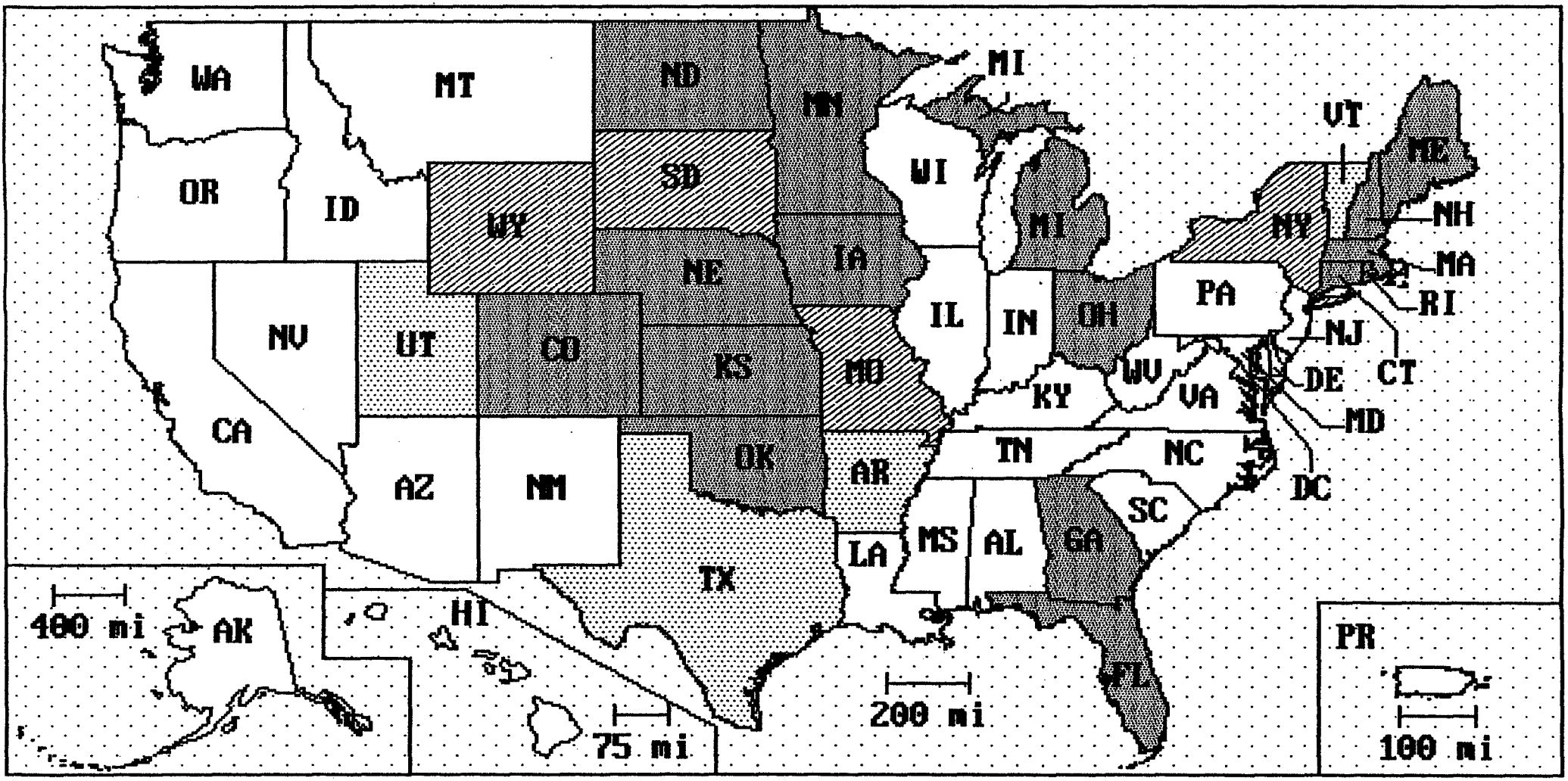
FOR MORE INFORMATION CONTACT:
CENTER DIRECTOR

KRAETTLI Q. EPPERSON
COOK & EPPERSON
6520 N. WESTERN, SUITE 300
OKLAHOMA CITY, OK 73116
(405) 842-7545
FAX (405) 840-9890

C:\WP51\KQE\TES\03-03-95.PAP(Last Revised April 4, 1995)

STATES WITH CURRENT (shaded), OLD (lines) & PROPOSED (dots) STANDARDS



APPENDIX E

"Perfect Title In Oklahoma: An Oxymoron",
Donald F. Heath, Jr. (12-9-94)

PERFECT TITLE IN OKLAHOMA: AN OXYMORON

Presented to
Oklahoma City Title Attorneys Association

By
Donald F. Heath, Jr.
2419 Wilcox Drive
Norman, Oklahoma
(405) 329-7781

December 9, 1994

PERFECT TITLE IN OKLAHOMA: AN OXYMORON

Marketable title in Oklahoma is often misdescribed as perfect title. Out-of-state attorneys mockingly refer to Oklahoma as the land where titles are perfect.

Standard 4.1 of the Oklahoma Bar Association's Title Examination Standards is partly to blame.[1] Standard 4.1 begins by declaring that the Oklahoma Supreme Court has defined marketable title as perfect title. The Standard fails to recognize that "perfect" title has no legal meaning. The Oklahoma Supreme Court has given it legal meaning only by holding that it, and other comparative terms such as "good title,"[2] are synonymous with marketable title.[3]

The second clause in Standard 4.1 properly recites that a marketable title means a title free from reasonable doubt. If perfection were the standard, titles would be required to be free from *any* doubt instead of *reasonable* doubt. Unfortunately, this is not as catchy as saying that marketable title means perfect title. It is like a rumor that has been repeated so often it is accepted as true.

Characterizing marketable title as perfect title plays into the hands of flyspeckers and scoundrels. Flyspeckers insist upon curing defects that pose little or no risk and require substantial expense to cure.

---

[1] 16 O.S., Ch. 1, App. provides as follows: "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.'"

[2] *Sipe v. Greenfield*, 244 P. 424, 116 Okla. 241 (1926).

[3] *Pearce v. Freeman*, 254 P. 719, 122 Okla. 285, 286 (1927).

Standard 4.1 is being used as a shield by first purchasers who have taken possession of hydrocarbons but refuse to pay the proceeds to the rightful owners.[4] Some purchasers allege that scarcely any oil and gas titles in Oklahoma are perfect. Based on this dubious premise, they deny liability for interest under 52 O.S. §570.10.

The sound bite that marketable title means perfect title does injustice to Oklahoma's progressive jurisprudence. Standard 4.1 should be shorn of the references to perfect title.

Good Title and Perfect Title

The Oklahoma Supreme Court has engaged in an extended discussion of perfect title and good title in only three cases: *Campbell v. Harsh* (1912)[5], *Sipe v. Greenfield* (1926) and *Pearce v. Freeman* (1927).

The contract for sale in the *Campbell* case required the seller to deliver an abstract showing "perfect" title.[6] The Court relied on two California cases in concluding that perfect title means nothing more than marketable title:

> In *Turner v. McDonald*, 76 Cal. 177, 18 P. 262 [1888], it is said: "A perfect title is one that is good and valid beyond all reasonable doubt." In *Sheehy v. Miles*, 93 Cal. 288, 28 P. 1046 [1892], it was held to be absolutely necessary, in order to fully satisfy the covenant of a perfect title, that the title should be free from litigation, palpable defects, and grave doubts, should consist of both legal and equitable title, and be fairly deducible of record.[7]

---

[4] Under 52 O.S. §570.10, first purchasers of oil and gas production must pay proceeds from the sale of production to the persons legally entitled thereto within certain time periods. Failure to timely remit proceeds creates additional liability for 12% interest if the owner has marketable title in accordance with the current title examination standards of the Oklahoma Bar Association.

[5] 122 P. 127, 31 Okla. 436, 441.

[6] The contract for sale required "delivery of a deed conveying good sufficient title to said premises, accompanied by an abstract of title, showing perfect title." 31 Okla. at 437.

[7] 31 Okla. at 441.

Ironically, the discussion of perfect title was dicta in the *Campbell* decision. The Court declined to rule on the quality of the seller's title. It found that the seller failed to satisfy the terms of the contract for sale because his title was based on an unrecorded affidavit of heirship. The Court adopted the holding from an Iowa case:[8] "One to whom an abstract showing a good title has been promised as a condition precedent is not bound to accept any evidence thereof, except that contained in the abstract."[9]

Sipe v. Greenfield[10] required the Court to interpret a contract for sale calling for a good title. The Court quoted extensively from *Thompson on Real Property*:[11]

> A good title means not merely a title valid in fact but a marketable title which can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for a loan of money. . . . In a contract to convey a good title the word "good" comprehends all that the word "clear" does, and the term "clear title" as used in such contract means that there are no incumbrances on the land.[12]

The Court held that a title was unmarketable because it was subject to an unreleased mortgage, though the seller had agreed to continue making payments on the underlying note.[13]

Pearce v. Freeman adopted the dicta from the *Campbell* decision as the standard for marketability in Oklahoma.[14] The Court reviewed authorities from several jurisdictions and

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[8] *Fagan v. Hook*, 134 Iowa 381, 105 N.W. 155, 157 (1905), *modified*, 111 N.W. 981 (1907).

[9] 31 Okla. at 442.

[10] 244 P. 424, 116 Okla. 241, 242 (1926).

[11] 5 George W. Thompson, *Commentaries on the Modern Law of Real Property* §4296-A (1924).

[12] 116 Okla. at 242.

[13] *Id.* at 242-243.

[14] 122 Okla. at 286-287.

concluded that perfect title, marketable title, and merchantable title were synonymous terms. It did not try to distinguish the Oklahoma statutes on real property from other jurisdictions. It is unclear why the Court explored the meaning of perfect title since the contract for sale provided for "good and merchantable" title. It is an unfortunate choice of words that the Court should have avoided. The Court adopted the following definition from the *Turner* case verbatim: "a title to be good 'should be free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles, and should be fairly deducible of record.'"[15]

This language has been cited as the definition of marketable title in Title Standard 4.1. Title Standard 4.1 prefaces this definition with the objectionable language that marketable title is synonymous with perfect title.

The *Pearce* Court applied this standard of marketability liberally. It held that a title was marketable, although it lacked a judicial determination of heirship for a four-year-old Indian allottee. The Court found that recitations of heirship in a quiet-title decree, in which the deceased allottee's parents were named defendants, "were a sufficient bridge over the hiatus in the chain of title caused by the death of the original allottee."[16] The Court decreed specific performance because the record showed the title was "reasonably good."[17]

In *Hawkins v. Wright*,[18] the Court noted that it had previously defined good title in *Sipe v. Greenfield* as "a marketable title, which can again be sold to a reasonable purchaser or

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[15] 18 P. at 264.

[16] 122 Okla. at 287.

[17] *Id.*

[18] 226 P.2d 957, 961, 204 Okla. 955 (1951).

mortgaged to a person of reasonable prudence as security." The *Hawkins* court repeated that "the terms 'merchantable title', 'good title', 'perfect title', and 'marketable title' have been generally held to be synonymous."[19]

Good Title and Perfect Title are Vulgarisms

Our prime concern as title examiners is marketable title. It is thinking backwards to say that a marketable title is a good title or a perfect title. The cases on marketable title discuss good and perfect title only because the contracts for sale at issue used these terms. The Supreme Court held that these terms mean marketable title. A court in equity is only concerned whether the title is marketable, not whether it is good or perfect. A leading commentator ridiculed the use of the terms good and perfect title:

> For purposes of comparison only, titles are sometimes classified as bad, doubtful, good and perfect: the latter being also known as a marketable title, or one which a court of equity considers so clear that it will enforce its acceptance by a purchaser. A doubtful title on the contrary being one that the court will not go so far as to declare invalid, but only that it is subject to so much doubt that a purchaser ought not to be compelled to accept it. . . . It must be distinctly understood, however, that the foregoing classification represents merely convenient colloquialisms. The law knows nothing of "good" or "bad" titles. If fact, they cannot be said to have any legal existence. Title is simply title. A person is without title or he has title. His title may be perfect or impaired, but "bad" title is merely a vulgarism. Nor are there any degrees of comparison in titles, for "good" title suggests a "better," or, possibly, a "best."[20]

Thompson on Real Property, heavily relied upon by the Court in its discussion of good and perfect titles, says that there is no such thing as perfect title.[21] "Where the contract [for sale] calls

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[19] *Id.* at 961.

[20] George W. Warvelle, *A Practical Treatise on Abstracts and Examinations of Title to Real Property* §16 (1921).

[21] *Thompson on Real Property*, §4296a.

for [perfect] title, the purchaser is entitled to a title free from reasonable doubt and fairly deducible of record."[22] Good title and perfect title are relevant terms only if we are dealing with a contract for sale that uses these terms. Otherwise we should avoid them as vulgarisms and focus on the true object: marketable title.

Oklahoma Cases on Encumbrances

If we abandon this false concern with perfect title, we find that the body of Oklahoma case law that has developed on marketable title is practical and well reasoned. A review of this case law shows that marketable title has nothing to do with perfection or mathematical certainty.

Oklahoma courts are strict about liens and encumbrances; they require that the title be entirely free of liens and encumbrances to be marketable. Clear title, as used in a contract for sale, means that "there are no incumbrances on the land."[23] The purchaser may insist upon a recorded release of a mortgage or other encumbrance. Allegations that the underlying note has been paid are insufficient.[24] A mortgage that covers several tracts must be released as to the tract to be sold, despite whether the seller agrees to continue to make all payments on the underlying note.[25] The possibility that the mortgage might be foreclosed if the seller stops making payments casts a cloud on the title.[26] The Supreme Court has waffled on whether the seller may deliver a

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[22] *Id.*

[23] *Hawkins v. Wright,* 226 P.2d at 961.

[24] *Tucker v. Thraves,* 145 P. 784, 50 Okla. 691, 701-702 (1915); *Tull v. Milligan,* 48 P.2d 835, 842, 173 Okla. 131 (1935).

[25] *Sipe v. Greenfield,* 116 Okla. at 242-243; *Leedy v. Ellis County Fair Ass'n,* 110 P.2d 1099, 1101-1102, 188 Okla. 348 (1941).

[26] *Sipe v. Greenfield,* 116 Okla. at 241-242.

marketable title by paying off a mortgage with proceeds of the sale. Where the contract for sale expressly mentioned the mortgage, the Court held that the seller satisfied the contract by securing the bank's agreement to release the mortgage upon receiving the sale proceeds.[27] "To predicate a right of rescission on the part of [buyer], on such a ground, is too technical for serious consideration."[28] The Court distinguished this holding and refused to allow the mortgage to be paid from sale proceeds when the contract for sale required delivery of an abstract showing good and merchantable title and the contract failed to refer to an existing mortgage.[29] The Court apparently reversed itself by subsequently ruling that the seller produced a marketable title by providing for an escrow account to pay existing mortgages and delinquent taxes.[30]

Strict proof of the release of taxes is required. Specific performance will be denied if there are taxes due on the property.[31] The resale of property for delinquent taxes does not extinguish unpaid special assessments for paving, grading and sewers.[32]

Unreleased oil and gas leases are considered encumbrances that impair marketability.[33]The Supreme Court insists upon recorded releases because equity abhors a forfeiture and "slight

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[27] *Sparks v. Helmer,* 286 P. 306, 142 Okla. 219, 221 (1929).

[28] *Id.*

[29] *Hawkins v. Johnston,* 222 P.2d 511, 514, 203 Okla. 398 (1950).

[30] *Corvino v. 910 S. Boston Realty Co.,* 332 P.2d 15, 17-18 (1958).

[31] *Smalley v. Bond,* 218 P. 513, 92 Okla. 178, 181 (1923).

[32] *Perryman v. City Home Builders,* 248 P. 605, 121 Okla. 150, 153 (1926).

[33] *Jennings v. New York Petroleum Royalty Corp.*, 43 P.2d 762, 767-768, 169 Okla. 528 (1934).

circumstances are eagerly seized to avoid their enforcement."[34] Unreleased leases that must be judicially terminated expose the purchaser to an unreasonable risk of litigation. An early case held that an affidavit of nonproduction was insufficient to create a presumption that the lease had terminated.[35] Remedial legislation has partly overcome this objection. The filing of a certificate of nondevelopment from the Oklahoma Corporation Commission creates a presumption that the lease has terminated.[36] The Marketable Record Title Act[37] bars unreleased leases that predate a root of title.

The Supreme Court is less strict about physical encumbrances. If the buyer contracts for a title free of encumbrances, he can refuse to accept a title subject to easements and other physical encumbrances.[38] If, however, a pipeline easement is plainly visible and the buyer inspects the property before consummating the sale, the buyer cannot maintain a subsequent action to rescind the sale.[39]

Oklahoma Cases on Defects

While the Supreme Court requires that marketable titles be *entirely* free of liens and encumbrances, it will approve titles that are *reasonably* free of defects.

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[34] *Koutsky v. Park Nat'l Bank,* 29 P.2d 962, 966, 167 Okla. 373 (1934).

[35] *Wilson v. Shasta Oil Co.*, 43 P.2d 769, 772, 171 Okla. 467 (1935).

[36] Laws 1945, p.42, §2, now codified as 17 O.S. §168.

[37] 16 O.S. §71, et seq.

[38] *Matlock v. Wheeler,* 306 P.2d 325, 328 (Okla. 1957).

[39] *Id.* at 328.

Defective and incomplete probate proceedings have been fertile grounds for title litigation. *Campbell* found that the seller failed to comply with the contract for sale where the title was based on an unrecorded affidavit of intestate heirship.[40] The Court upheld an Indian title based on a missing probate where the Secretary of the Interior had approved a deed from the heirs.[41] The Court distinguished this case from *Campbell* because the contract for sale in *Campbell* required an abstract showing perfect title and the title was based on an unrecorded affidavit. *Pearce* also approved an Indian title based on a missing probate where a quiet-title judgment had been entered against the presumed heirs and the Secretary of the Interior had been served.[42] A defective acknowledgment in a probate petition produced an unmarketable title because certain procedural steps in probates are jurisdictional.[43] The admission of a foreign will to probate is insufficient to show marketable title in the heirs because the creditors could still enforce their liens in Oklahoma.[44] Similarly, even if a judicial determination of heirship has been rendered, title is not marketable until the final discharge is issued because of the possibility of creditors' claims.[45]

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[40] 31 Okla. at 440-444.

[41] *Davidson v. Roberson*, 218 P. 878, 92 Okla. 161, 164-165 (1923).

[42] 122 Okla. at 287.

[43] *Ammerman v. Karnowski*, 234 P. 774, 109 Okla. 156, 159 (1925).

[44] *Seyfer v. Robinson*, 291 P. 902, 93 Okla. 156, 157-158 (1923).

[45] *Hausam v. Gray*, 263 P. 109, 129 Okla. 13, 15 (1928).

Judgments are presumed valid. A final decree, without an attack, is prima facie evidence of the validity of the proceedings and must be presumed valid.[46] A quiet title judgment based on service by publication is presumed valid, although the statute for service by publication allows defendants to reopen the judgment for three years after the entry of the judgment.[47]

Marketability of title is not affected by a pending condemnation action.[48] The condemning authority can abandon the proceedings any time, and it has no vested right in the property until it pays the owner just compensation. The buyer has no loss because he is fully compensated for the property.[49]

A deed executed without joinder by the seller's spouse is objectionable unless compelling evidence is presented that the seller is divorced or the property is either nonhomestead or an abandoned homestead.[50] An Indian deed executed by a guardian without court approval is void.[51] A corporate deed executed without attestation and a seal can still convey marketable title if accompanied by a resolution of the stockholders approving the conveyance.[52]

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[46] *Watts v. Elmore,* 176 P.2d 220, 223, 198 Okla. 141 (1947).

[47] *Gordon v. Holman,* 259 P.2d 875, 876-877, 207 Okla. 496 (1952).

[48] *Nixon v. Marr,* 190 F. 913, 917 (8th Cir. 1911).

[49] 190 F. at 915-917.

[50] *Kneeland v. Hetzel,* 229 P. 218, 103 Okla. 3, 4, (1924).

[51] *Pittman v. Cottonwood School District No. 4,* 614 P.2d 582, 584 (C.A.Okla. 1980).

[52] *Corvino v. 910 S. Boston Realty Co.,* 332 P.2d at 17.

If the description in a deed mistakenly overlaps a neighboring tract, the misdescription clouds the title and will support an action for slander of title.[53]

Objections must be reasonable and based on facts, not speculation. The landowner of a riparian tract need not disprove the possibility of reappearing lands. He has no burden to negative every possibility that might weaken his claim.[54] The buyer must accept the title unless his objections are reasonable. A simple allegation of dissatisfaction with title is insufficient.[55]

Differing Standards of Marketability

The quality of title to be conveyed depends upon the terms of the contract for sale. Stricter standards are applied when the contract for sale calls for the seller to deliver the buyer an abstract showing marketable title. The buyer can reject the title if the defect in title can be cured only by evidence not appearing in the abstract.[56] The seller is under no obligation to furnish an abstract unless the contract for sale specifically requires him to do so.[57] If the contract for sale is silent as to the character of title required, the law implies that a marketable title in fee simple is intended.[58]

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[53] *McDowell v. Glasscock,* 672 P.2d 682 (C.A.Okla. 1983), rev'd on other grounds, *Turner Roofing & Sheet Metal, Inc. v. Stapleton,* 872 P.2d 927, 928 (Okla. 1994).

[54] *Littlefield v. Nelson,* 246 F.2d 956, 959 (10th Cir. 1957).

[55] *McCubbins v. Simpson,* 98 P.2d 49, 52, 186 Okla. 417 (1939).

[56] *Campbell,* 31 Okla. at 442-444; *Davidson v. Roberson,* 92 Okla. at 165-166.

[57] *Bartholomew v. Clausen,* 72 P.2d 718, 721, 181 Okla. 88 (1937); *Craig v. Chisholm,* 82 P.2d 986, 990, 183 Okla. 398 (1938).

[58] *Brady v. Bank of Commerce of Coweta,* 138 P. 1020, 41 Okla. 473, 476-477 (1914).

Warranties of title and indemnification agreements are irrelevant in judging the marketability of title. A quitclaim deed can convey marketable title; a covenant of warranty is not required.[59] Conversely, an offer of indemnify cannot overcome a defect in title.[60] Purchasers of oil and gas proceeds cannot require royalty owners to execute indemnification agreements.[61] Title must legitimately be at issue to allow the purchaser to escape liability for 12% interest under 52 O.S. §570.10 [formerly 52 O.S. §540].[62]

The contract for sale can provide for a third party to act as the final judge of title. If the contract requires that the title be acceptable to Buyer's attorney, then a good-faith opinion by Buyer's attorney is conclusive as to the quality of title, despite the actual marketability of the title.[63] The buyer is not bound to accept the property if his attorney acting in good faith disapproves the title.[64] The Supreme Court rejected a seller's argument that contracts for sale with these provisions are illusory contracts.[65] The Court held that the buyer is bound to accept the title unless his attorney presents reasonable objections.[66]

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[59] *Bayouth v. Howard,* 190 P.2d 793, 794, 199 Okla. 646 (1948).

[60] *Ammerman v. Karnowski,* 109 Okla. at 160.

[61] *Hull v. Sun Refining and Marketing Co.*, 789 P.2d 1272, 1278-1279 (Okla. 1990).

[62] *Id.* at 1277; *Quinlan v. Koch Oil Co.*, 25 F.3d 936, 940 (10th Cir. 1994).

[63] *Farm Land Mortgage Co. v. Wilde,* 136 P. 1078, 41 Okla. 45, 48-49 (1913); *Curtis v. Roberts,* 230 P. 916, 104 Okla. 172, 173 (1924).

[64] *Davis v. Indian Territory Co.*, 93 F.2d 976, 980 (10th Cir. 1937).

[65] *McCubbins v. Simpson,* 98 P.2d at 52, 53.

[66] *Id.*

Oklahoma Legislation Affecting Marketability of Title

The Supreme Court's requirements for marketable title are strikingly similar to the statutory terms of a warranty deed in R.L. 1910, §1162, now codified as 16 O.S. §19. Several cases discussed above involved contracts for sale that called for the delivery of a warranty deed conveying marketable title. The terms for a warranty deed, as provided in 16 O.S. §19, are: (i) "good right and full power to convey . . . an indefeasible estate in fee simple," (ii) "the same is clear of all encumbrances and liens," and (iii) a warranty of "quiet and peaceable possession thereof." The judicial definition of marketable title is essentially a restatement of these terms: a title entirely clear of liens and encumbrances and reasonably free of any defects that would subject the buyer to litigation to defend his title. There is only one significant difference between the statutory definition of a warranty deed and the judicial definition of marketable title—a covenant of warranty is not required in the latter.

The Conveyances Code, as enacted in 1910,[67] contained a few harsh provisions, which left the courts with little flexibility in evaluating the marketability of titles. Natural persons of legal age and corporations were originally the only entities that could hold legal title in Oklahoma.[68] Other entities have been authorized to hold title to property by piecemeal legislation. The courts have therefore condemned titles in joint ventures because they are not legal entities.[69] R.L. 1910, §1169, now codified as 16 O.S. §26, provides that defectively acknowledged instruments do not afford constructive notice of their contents. The courts have been forced to

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[67] R.L. 1910, §1140, et seq., now codified as 16 O.S. §1, et seq.

[68] R.L. 1910, §1140, now codified as 16 O.S. §1.

[69] See authorities collected at R. Cleverdon, *Ownership and Conveyancing of Land by Joint Adventurers Within the State of Oklahoma,* 52 O.B.J. 2137 (1981).

hold that such instruments are binding only on parties with actual notice.[70] Affidavits were viewed with antipathy because the Code failed to provide for the recording of affidavits.[71]

The Legislature in the past 40 years has enacted progressive legislation to clear land titles. A comprehensive listing of this legislation is beyond the scope of this paper, but the most significant legislation includes the following:

1. The Simplification of Land Titles Act,[72] which bars adverse claimants from raising certain defects in court proceedings more than 10 years old. This Act is to be "liberally construed to effect the legislative purpose of simplifying real estate transactions by permitting purchasers to rely upon the status of title as reflected by the county records and by the decrees and judgments of the aforementioned courts."[73]

2. The Marketable Record Title Act,[74] which bars claims that predate a root of title that has been recorded for at least 30 years. It is to be "liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in . . . this act."[75] Professor Bayse has described the Oklahoma Act as follows: "Fortified by this comprehensive Marketable Title Act, following the Model Act almost verbatim, the efforts of the Oklahoma Bar have now culminated in the most modern and enlightened legislation of its kind."[76]

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[70] *Smith v. Thompson*, 402 P.2d 882, 885 (Okla. 1965).

[71] The Legislature addressed this problem by authorizing the filing of affidavits concerning real property titles in Laws 1985, Ch. 233, codified as 16 O.S. §82, et seq. The use of affidavits was further liberalized by Laws 1994, Ch. 238, §3, which amends 16 O.S. §82.

[72] Laws 1961, p. 192, §1, et seq., now codified as 16 O.S. §61, et seq.

[73] Laws 1961, p. 194, §7, now codified as 16 O.S. §71.

[74] Laws 1963, c. 31, §1, et seq., now codified as 16 O.S. §71, et seq.

[75] Laws 1963, c. 31, §10, now codified as 16 O.S. §80.

[76] Paul E. Bayse, *Clearing Land Titles (2d Ed.)* §186, p. 446 (1970).

3. The Oklahoma Evidence Code,[77] which establishes evidentiary presumptions and liberalizes the rules for authenticating and identifying documents. Professor Whinery describes Oklahoma as "a forerunner in the legislative enactment of uniform acts in specific areas of evidence law calculated to improve the expeditious and efficient administration of justice."[78]

4. House Bill 2783[79] codifies rebuttable presumptions of fact supporting marketability. These presumptions arise from the mere act of filing an instrument of record. House Bill 2783 is based on Sections 2-301, 2-305 and 2-307 of the Uniform Simplification of Land Transfers Act.[80]

The Marketable Record Title Act is a radical Act. It extinguishes claims that predate a root of title, whether they are vested or contingent, possessory or non-possessory.[81] A co-tenant can lose his interest unless he preserves it by filing a notice within the 30-year period.[82] Contingent remaindermen and other future interest holders are stripped of their interests unless they preserve their claims by filing.[83] The Act abolishes the common-law protection for disabilities and reverses the common-law rule that stray instruments may be ignored by the title

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[77] Laws 1978, c. 285, §101, et seq., now codified as 12 O.S. §2101, et seq.

[78] 2 Leo H. Whinery, *Oklahoma Evidence, Commentary on the Law of Evidence,* §2.08 (1994).

[79] Laws 1994, Ch. 238, effective September 1, 1994.

[80] The Uniform Simplification of Land Transfers Act was approved by the National Conference of Commissioners on Uniform State Laws in 1976 and amended in 1977 and 1990.

[81] *Mobbs v. City of Lehigh,* 655 P.2d 547, 551 (Okla. 1982).

[82] See the second example in the Comments to Oklahoma Title Examination Standard 19.9, 16 O.S., Chap. 1, App.

[83] *ITT Rayonier, Inc. v. Wadsworth,* 346 So.2d 1004, 1011 (Fla. 1977).

examiner.[84] Forged deeds, which are nullities at common law, can serve as conduits of title if they predate a root of title.[85]

The repudiation of these common-law principles is justified by the need to clear the record of stale claims. The Supreme Court has recognized the beneficial effect of the Act:

> The purpose of the Act is to simplify and facilitate land title transactions by allowing persons to rely on a record title, subject only to certain statutory limitations. This is accomplished by eliminating those ancient defects and stale claims against the title to real property which are not properly preserved—to the end that the period of record search may be limited to relatively recent instruments.[86]

It is arguable that the judicial definition of marketable title has been superseded by the legislative definition of marketable record title in the Act.[87] The Supreme Court has not engaged

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[84] Justice Opala's dicta in the *Mobbs* case suggests that wild deeds can be a valid root of title. 655 P.2d at 552. This caused the Oklahoma Bar to revise Title Standard 3.1 on stray deeds. The standard previously reflected the common law rule that stray deeds may be ignored. After *Mobbs*, Standard 3.1 was revised to require the examiner to inquire and satisfy himself that the stray deed could not constitute a root of title.

[85] *Marshall v. Hollywood, Inc.*, 224 So.2d 743, 750-751 (Fla.App. 1969), *aff'd by* 236 So.2d 114, 119 (Fla. 1970).

[86] *Mobbs*, 655 P.2d at 551.

[87] 16 O.S. §71 defines marketable record title as follows:

> Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for thirty (30) years or more, shall be deemed to have a marketable record title to such interest as defined in Section 78 of this title, subject only to the matters stated in Section 72 of this title. A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than thirty (30) years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in
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> (a) the person claiming such interest, or

in an extended discussion of marketability since it rendered *Hawkins v. Wright,* 12 years before the enactment of the Marketable Record Title Act.

Definitions of Marketable Title in Other Jurisdictions

Professor Bayse has reviewed definitions of marketability from all jurisdictions. The two most prevalent definitions are similar to the definitions in *Pearce* (free from reasonable doubt) and *Sipe* (the quality of title that a reasonable buyer expects from a reasonable seller).[88] Professor Bayse has submitted that the Model Marketable Title Act,[89] which has been adopted by Oklahoma at 16 O.S. §71, contains the best existing definition:

> For a marketable title act to state in definite and positive terms what is to be exclusively considered in forming an opinion of land title marketability is a legislative quality of major significance; such positive statement automatically in itself extinguishes what is not to be exclusively considered, even though the act, for emphatic clarity, also states what specifically is to be extinguished. . . . [A prime virtue of the act is] the positive statement as to what does constitute marketability *after* old interests have been extinguished. This positive statement as to what *does* constitute marketability carries implications of great constructive value for the title examiner. With this positive statement the title examiner proceeds toward his goal with a tangible image rather than the indefiniteness that continues even in the presence of broad legislation that is confined to extinguishing. The tangible image is required for maximum efficiency.[90]

> (b) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest;
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> with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

[88] Bayse, *Clearing Land Titles* §371.

[89] Lewis M. Simes and Clarence B. Taylor, *The Improvement of Conveyancing by Legislation* (1960).

[90] *Id.* at §373.

Title Standard 4.1 Fails to Reflect These Legislative Developments

Title Standard 4.1 has remained unchanged since it was adopted by the O.B.A. in 1946. It quotes the definition of marketability from the *Pearce* case and prefaces this definition with the misstatement that marketable title is synonymous with perfect title. Perfect title has nothing to do with marketable title. Perfect title is a vulgarism that is at issue only if the contract for sale calls for perfect title. The standard might just as well say that good title and clean title are synonymous with marketable title. These terms also lack legal significance. The Oklahoma Supreme Court construes them as meaning marketable title. Title Standard 4.1 is defective because it shifts the focus from marketable title to perfect title.

This title standard also creates the mistaken impression that Oklahoma clings to a higher standard of marketability than other jurisdictions. Oklahoma's real property code is progressive and should be construed liberally. The Oklahoma Supreme Court has never suggested that Oklahoma has a higher standard of marketability than other states. Just the opposite is true. The Supreme Court in ruling on marketability has reviewed the law in other jurisdictions and followed it.

Title Standard 4.1 could be improved simply by deleting the reference to perfect title. This is a truer reading of *Pearce*. This revision still leaves us with a Standard that is little more than a headnote from a single case. The Standard could be expanded to include the definition of marketable title from *Sipe*: a title that can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence. If the Standard were modestly revised to reflect the body of case law on marketable title, it would provide that a marketable title is a title entirely free of liens and encumbrances and reasonably free of defects that would expose the buyer to litigation to defend

his title. Another option is to use the statutory definition of marketable record title as a base and add these judicial refinements.

Any of these changes would correct the defects in the existing standard. They would materially aid in disabusing the practicing Bar of the notion that a title must be perfect to be marketable. This would take the moron out of the oxymoron that marketable title means perfect title.

Conclusion

A more useful standard would go further. Instead of serving the limited educational purpose, it would reflect the shared values and practical experience of Oklahoma attorneys in evaluating titles.

Oklahoma attorneys tend to make requirements for all conceivable defects. The rationale is that the attorney's role is to point out all risks and let the client decide which requirements to satisfy and which to waive. This practice has developed in the past 25 years and is directly opposed to Model Title Standard 2.1, which provides: "Objections and requirements should be made only when the irregularities or defects reasonably can be expected to expose the purchaser or lender to the hazard of adverse claims or litigation."[91] The examining attorney is uniquely qualified to assess the impact of defects on the marketability of the title. Attorneys should be encouraged to segregate their requirements into those impairing marketability and those carrying less risk. The title attorney abdicates his responsibility to the client by rendering an opinion that is nothing more than a rote listing of technical defects. There should be more opinion in title opinions.

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[91] Lewis M. Simes and Clarence B. Taylor, *Model Title Standards* (1960).

Marketability is a concept based on the marketplace. Costs must be weighed. Experienced attorneys, in advising their clients which requirements to satisfy, consider several factors, such as the nature of the transaction, the size of the interest affected, the remoteness of any defects in title, the cost of curative action and the likelihood that the defects will expose the buyer to litigation to defend its title. Practical concerns should predominate.

Title standards should be adopted to recognize and encourage these practices. This will limit the role of the flyspecker, who quixotically seeks perfect title and insists on curing all conceivable defects. Unnecessary title curative generates work for attorneys without providing any benefit to the client. It increases the expenses of the parties and discourages land transactions.

perfect.brf

PROPOSED REVISION OF TITLE STANDARD 4.1
MARKETABLE TITLE

Oklahoma has recognized three definitions for marketable title:

A. The Marketable Record Title Act defines marketable record title as an unbroken chain of title based upon a root of title that has been of record for 30 or more years with nothing appearing of record that purports to divest such interest.

B. The Oklahoma Supreme Court has held that marketable title is a title free from apparent defects, grave doubts and litigious uncertainty. Commentators have referred to such titles as being free from reasonable doubt.

C. The Oklahoma Supreme Court has held that marketable title is the quality of title that a reasonable buyer expects from a reasonable seller.

The marketability of the title should be apparent from the record. A marketable title is entirely free of liens and encumbrances and reasonably free of other defects.

A title is either marketable or unmarketable. Title examiners should avoid using colloquialisms such as good, clear, clean or perfect title. These terms lack legal significance. If they appear in a contract for sale, they are deemed to be synonymous with marketable title.

Cross Reference: See Standard 19.1.

Authority: 16 O.S. §71, *et seq.*; *Campbell v. Harsh*, 31 Okla. 436, 122 P. 127 (1912); *Sipe v. Greenfield*, 116 Okla. 241, 244 P. 424 (1926); *Pearce v. Freeman*, 122 Okla. 285, 254 P. 719 (1927); *McCubbins v. Simpson*, 186 Okla. 417, 98 P.2d 49 (1939); *Hawkins v. Wright*, 204 Okla. 955, 226 P.2d 957 (1951).

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