The Scope of Title Examination in West Virginia: Can Reasonable Minds Differ

John W. Fisher II
West Virginia University College of Law, john.fisher@mail.wvu.edu

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# WEST VIRGINIA LAW REVIEW

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## THE SCOPE OF TITLE EXAMINATION IN WEST VIRGINIA: CAN REASONABLE MINDS DIFFER?

**JOHN W. FISHER, II*  

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* Professor of Law West Virginia University College of Law, A.B., 1964, West Virginia University; J.D., 1967, West Virginia University.  

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I. INTRODUCTION

As part of the sabbatical reaccreditation of the West Virginia University College of Law in 1993, the College mailed an extensive questionnaire to its graduates.\(^1\) A principle objective of the questionnaire

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\(^1\) Survey of 1,077 alumni of the West Virginia University College of Law (Sept. 1, 1993) (on file with author).

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was to gain information about the practice of graduates which would assist in curriculum decisions. From the survey, the College learned that 31% of the respondents were engaged in solo, private practice and 57% practiced in private firms of 10 lawyers or less. Of the respondents, 51% reported they were engaged in some type of real estate practice, while 12.8% reported that they specialized in the real estate area. The number of attorneys reporting some real estate practice was second only to the number engaged in some form of corporate practice (52%) and was one of only four categories with a response of 50% or higher. The 12.8% who reported that they specialized in real estate was fourth behind plaintiff’s personal injury (16.9%), defendant’s personal injury (15.3%), and insurance (13.9%). Since 76% of the survey responses came from lawyers practicing in West Virginia, these results, with respect to real estate practice, confirm that in West Virginia, as opposed to those states in which title insurance companies have preempted the residential title market, title work remains a very important area of substantive law.

In essence, title work involves looking through the appropriate records in search of the unexpected in hopes that you will not find it. The search of the records can be time consuming, complicated by numerous factors and variables which the attorney cannot foresee or control. Therefore, when an attorney begins a title examination, she or he can only guess as to how long it will take to complete the task, and since most residential home buyers “need” to know how much the title work will cost, lawyers frequently perform title examinations for an agreed sum as opposed to an hourly rate. Therefore, title work further complicates one of the daily tasks facing a lawyer — balancing the available number of hours between his or her clients’ needs. Abraham Lincoln’s often quoted remark that a “Lawyer’s time is his stock in trade” is well illustrated through title work. A “complete” title examination includes “running” the title back to the patent, the original grant from the “state.” Because of the time considerations, as well as

2. Id.
3. Id. (reporting as follows: plaintiff personal injury 50%; commercial 50%; real estate 51%; corporate 52%).
4. Id.
other considerations, it is essentially unheard of for lawyers checking title to residential property to “run the title back to the patent.” In most residential purchases, the policies of the lending institution and the title insurance company establish how far “back” the title must be run. Therefore, checking title for a period of time which is less than from patent to present is a widespread practice based upon a variety of practical considerations which balance the cost of the title examination against the risk that something may have occurred before the “cut off” date of the title examination, which will, as a practical matter, significantly adversely affect the possessory enjoyment of the “owner” or the lender’s security interest. However, since neither the courts nor the legislature have “authorized” the title examiner to stop the title examination short of the patent, a “defect” in the title created prior to the period of time covered by the title search still affects the current ownership interest even though neither the current owner nor his or her attorney had actual knowledge of the “defect”. For example, assume the title examination covered a period of sixty years, and that eighty-five years ago a previous owner, by a properly recorded deed, conveyed all the oil and gas under the property. The severance of the oil and gas from the surface is valid and the present “owner” does not own the oil and gas even though the attorney did not discover the severance deed in the title examination. The legal explanation is that “the law” treats the current owner as having “constructive notice” of the severance because the severance deed is in the chain of title. Constructive notice is imputed even though neither the current owner nor his or her attorney ever had “actual knowledge” of the severance. This example illustrates that the perimeters of a title examination are established by what “knowledge” the law imputes to the purchaser of real property. Therefore, the title attorney’s task is to search the records to discover all information that “the law” deems the purchaser to possess and to also make certain that the client understands and appreciates that the law charges the purchaser with certain information or knowledge which is not found in “the records” in the courthouse. For instance, what is learned by a “view” of the land. Therefore, this Article focuses on the substantive law which affects the “scope” or perimeters of a title examination. The purpose of a title examination is to discover and review those documents to which the substantial body of real property law may be relevant.
II. THE RECORDING ACTS

A. In the Beginning

As "modern" property law began to take shape in feudal England, there were no recording laws. The lack of recording laws, however, did not preclude disputes between conflicting claims to land. To resolve these conflicts, a set of principles developed based on the concept of "first in time, first in right."

As the quote in the footnote taken from the American Law of Property reflects, and the discussion in the following section of the American Law of Property, section 17.2, illustrates, the "first in time, first in right" concept is an over-simplification of the common law rule, but for present purposes it is sufficient. Therefore, in discussing title examinations the distinction between "recordable interests" and "nonrecordable interests" is of fundamental importance. If a "recordable interest" is involved, the recording statutes are applicable, and in the event a recordable interest is not recorded, a subsequent bona fide

5. 4 AMERICAN LAW OF PROPERTY § 17.1, at 523-25 (1952) (Stating:
[In the period prior to the enactment of recording statutes, rules originated for the determination of priorities. For lack of recording acts in other than York and Middlesex Counties, these remain in force in the balance of England as to all lands to which title has not been registered under the Torrens System. They are in force in the United States except as they have been suspended or modified by statute. Conflicting claims not covered by statute fall into three classifications, all covered by the general law rule that the first in time is first in right, re-enforced by the equity maxim that equity follows the law. The three situations to which the rule is applied are (a) conflicts between legal interests, (b) conflicts between equitable interests, and (c) conflicts between a legal interest and an equitable interest. It is followed literally as to item c; also, except as hereinafter noted [i.e. in section 17.2] as to item b, and there appears no reason why this should not be the case. As to item c, the rules prevails when the earlier right is legal and the second equitable. But when the earlier right is equitable, the courts allow it priority in the event only that the holder of the later legal interest acquired it with notice, or did not pay value for it; if the holder of the later legal claim is a purchaser for value without notice of the earlier equitable right or interest, the equitable doctrine of bona fide purchaser prevails and it is the later claim which is protected. The exception has given rise to the common statement that as between two conflicting claims, one equitable and one legal, the legal claim will prevail, though the exceptions noted show that this is not strictly correct].
purchaser for value may take free of that interest. For example, in a notice jurisdiction, if O leases the oil and gas under Blackacre to A who does not record, and then subsequent to the oil and gas lease, O conveys Blackacre to B, a bona fide purchaser for value, B, will take “free” of the oil and gas lease. However, if the earlier interest is a “nonrecordable interest,” then reliance on the records in the “record room” affords no protection and the purchaser takes subject to the nonrecordable interest even though the purchaser had no actual or constructive knowledge and was not even placed on inquiry notice. “Short term” leases are common examples of nonrecordable interests in real property.6

It is, therefore, important to keep in mind that if the right involved is a nonrecordable right, the recording acts do not apply, and the general common law principle of “first in time, first in right” is used to determine priority between the competing interests; conversely, if recordable rights are involved, the analysis of the respective property interests will be resolved within the framework of the recording acts and the courts’ interpretation of those statutes.

It should also be noted that neither the statute of frauds nor the recording acts apply to rights which are “created” by the operation of law such as adverse possession;7 perspective easements;8 ways of necessity;9 and implied easements.10

B. Classifying the Early Recording Acts

Scholars who have studied the evolution of the modern recording acts in our country have traced their origins to an April, 1634, ordinance enacted in the Massachusetts Bay Colony. Six years later, on

6. See W. VA. CODE § 40-1-8 (Supp. 1995) (stating that: a lease concerning a recordable interest is one “for a term of more . . . than five years,” or one “of any duration under which the whole or any part of the corpus of the estate may be taken, destroyed, or consumed, except for domestic use.”).
October 7, 1640, the General Court of the Massachusetts Bay Colony passed a law which is very similar to the present law in Massachusetts.\textsuperscript{11} The Massachusetts Bay Colony Act of 1640 declared that no conveyance should be of force against any other person except the grantor and his or her heirs unless recorded.\textsuperscript{12} Other colonies followed this approach and by the time of the American Revolution, the Massachusetts approach, that a conveyance was good against the grantor and his or her heirs upon delivery and was good as to all others after being recorded, was the most prevalent form of "recording act" in the colonies.\textsuperscript{13} Under the literal reading of these early acts, the date of recording was the sole test of priority. Therefore, as between successive grantees of the same land from a common grantor, the matter was determined solely by a race to the registry. Chronologically these were the "first type" of recording acts, and today they are classified as the "race type."\textsuperscript{14}

The second type of recording acts evolved from the first, initially by judicial decision. In spite of the literal reading of the "race" statute, courts were reluctant to give priority to a subsequent purchaser, who although having recorded first, had knowledge of the earlier unrecorded conveyance. Typically, legislatures amended the "race" statute to exclude from the protection of the recording acts the "exception" the court had recognized, and to "exclude from the race to registry a subsequent purchaser who ha[d] notice of the prior conveyance."\textsuperscript{15} These statutes are now classified as "notice types."\textsuperscript{16} Since recording first is not necessary to prevail against the "earlier" unrecorded interest in a notice jurisdiction, the incentive to the subsequent bona fide purchaser to record promptly is to protect the title she or he acquired from "another" subsequent purchaser.\textsuperscript{17}

\textsuperscript{11} 4 AMERICAN LAW OF PROPERTY § 17.4, at 528 (1952).
\textsuperscript{12} Id.
\textsuperscript{13} Id. at 535.
\textsuperscript{14} Id. at 539.
\textsuperscript{15} Id. at 540.
\textsuperscript{16} Id. In a "notice" jurisdiction, if O conveys Blackacre to A and then later conveys Blackacre to B, a BFP for value, B prevails over A, if B had no "notice" of the earlier conveyance when B acquired title and purchased for value. In a "pure notice" jurisdiction B wins, even if A records before B.
\textsuperscript{17} Id. at 540.
The third basic group of acts are ones, which, by their express terms, protect the subsequent purchaser who is without notice and who records first. These acts are described as “race notice.”18

C. The West Virginia Statutes

The cornerstones of “modern” conveyancing are the statutes of frauds and the recording acts. The statute of frauds defines which transactions must be in writing to be enforceable between the parties thereto and the degree of “formality” required of the writing. The recording acts identify those instruments which must be recorded in order to be valid against certain “types” of persons or entities. In West Virginia, the provisions of the statutes of frauds pertaining to real estate are set forth in Article 1, Chapter 36 of the West Virginia Code.19 Section 36-1-3 provides:

No contract for the sale of land, or the lease thereof for more than one year, shall be enforceable unless the contract or some note or memorandum thereof be in writing and signed by the party to be charged thereby, or by his agent. But the consideration need not be set forth or expressed in the writing, and it may be proved by other evidence.20

While a discussion of the ramifications of the statute of frauds on title examinations is beyond the scope of this article, it is noted in passing that the judicially developed exception to the statute of frauds known as the doctrine of part performance has become a part of title examination jurisprudence. The doctrine of part performance assumes the existence of a definite and certain agreement between the parties. What is lacking is the written manifestation of that agreement.21 Once the

18. Id. In a “race notice” jurisdiction, if O conveys Blackacre to A and then later conveys Blackacre to B, B will prevail if B is without ‘notice’ of the O to A conveyance, gives value, and B records before A.
19. The original statute of frauds was enacted in England in 1677. In West Virginia, the portions of the original statute of frauds involving real estate were included in the sections of the Code dealing with estates in property, while the provisions concerning wills are found in Article 1, Chapter 41 of the West Virginia Code. Other provisions of the original statute of frauds are found in Section 55-1-1. W. VA. CODE § 55-1-1 (1994).
21. “To justify the relief of specific performance of a parol agreement relating to real
"contract" has been established, there must be partial performance of the contract. Traditionally, part performance has involved the vendee taking possession and paying all or part of the purchase price or possession plus making valuable improvements.\textsuperscript{22}

Whereas West Virginia Code Section 36-1-3 requires that certain types of transactions be in writing and signed by the party to be charged to be enforceable, Section 36-1-1 requires the formalities of a deed or will for the creation of certain interests. Section 36-1-1 provides:

No estate of inheritance or freehold, or for a term of more than five years, in lands, or any other interest or term therein of any duration under which the whole or any part of the corpus of the estate may be taken, destroyed, or consumed, except for domestic use, shall be created or conveyed unless by deed or will.\textsuperscript{23}

While the term "deed" has a recognized legal connotation as it pertains to real property, the word "deed", as used in this Section of the Code, has received little judicial attention. In \textit{Arbaugh v. Raines},\textsuperscript{24} the court discussed an agreement involving an oil and gas lease and posed the question of whether any interest in the leasehold estate was transferred. After quoting Section 36-1-1, the court said "Suffice [it] to

\begin{footnotesize}
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  \item estate, three things, as the books say, must concur: First, the agreement relied on must be certain and definite in its terms; second, the acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved; third, the agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation." Wegmann v. Clark, 118 S.E. 517, 521 (W. Va. 1923) (citations omitted).
  \item 22. "Certain acts of part performance of verbal agreements for the sale of real estate have always been recognized in equity as taking a case out of the strict application of the statute of frauds. Code, 36-1-3. For example, payments of purchase money, in whole or in part, accompanied by possession of the land sold; or possession thereof, coupled with the placing of valuable improvements thereon by the purchaser, have always been held to justify a decree for the specific performance of a verbal agreement to convey real estate. Other instances could be mentioned. Courts proceed on the general theory that, in such circumstances, to permit a vendor to evade his agreement would, in a sense, be to permit the practice of fraud by him against the vendee, and equity has always avoided such result." Callaham v. First Nat'l Bank of Hinton, 30 S.E.2d 735, 738 (W. Va. 1944).
  \item 23. W. VA. CODE § 36-1-1 (1985).
  \item 24. 184 S.E.2d 620 (W. Va. 1971).
\end{itemize}
\end{footnotesize}
say that the agreement referred to above is neither a deed nor [a] will. No words of transfer or conveyance are contained therein. It could not, therefore, convey an interest in the lessee’s estate.

In the *Arbaugh* case, Raines had leased the oil and gas under a tract of land, and sold 1/32 shares in the well for $250 each. In explaining the agreement, the court said:

The agreement between these parties reflects a practice common in the area of oil and gas development. A lessee obtains a lease which he retains as his own property. In order to get funds with which to produce oil or gas, he sells shares in a proposed well to be drilled on his leasehold estate. The money from the sale of such shares is pooled to pay for the costs of drilling the well, and, if the venture is successful, the shareholders divide the profits from the production of that well. That they are entitled to nothing more, so far as the leasehold estate is concerned, is demonstrated by the fact that if the lessee drilled another well on such leased land, in which they had no financial interest, they would receive no part of the profits from such well. In the instant case C.D. Raines merely sold shares in the well. He did not sell an interest in his leasehold estate and, if another well produced oil or gas thereon, these plaintiffs would not be entitled to share in the profits therefrom.

In addition to the discussion in the *Arbaugh* case that a deed requires words of transfer, further guidance as to the definition of a “deed” is found in Article 3, Chapter 36 of the Code. Section 36-3-1 provides that a “seal, or any symbol or word intended to have the effect of a seal, shall not be necessary to give validity to any deed”, while Section 36-3-3 provides that affixing a seal to any instrument conveying an interest in land, “shall not give to such instrument any additional force or effect . . . than such instrument would have if it were unsealed.” Perhaps most significantly, Section 36-3-4, which abolishes the distinction between various types of common law conveyances, reads in part: “Any instrument which shows on its face a present intent to pass the title to, or any interest, present or future, in real property, shall, if properly executed and delivered, be given effect

25. Id. at 623.
26. Id. at 622.
27. Id. at 624.
according to its manifest intent." Furthermore, Section 36-3-6 provides that consideration does not need to be set forth in order to have a valid deed.

Therefore, assuming a writing which satisfies the requirements of Sections 36-1-1 and 36-1-3, the next question is which written instruments must be recorded in order to afford the parties to those instruments protection under the recording acts. Keep in mind, the transfer of an interest is binding between the parties when the "deed" is "delivered" — the recording is to protect the title to the acquired interest from those who are subsequent in time and protected under the recording acts.

In resolving conflicts between competing interests in real property, the threshold question is whether the recording acts apply. If the recording acts do not apply, then the respective rights are resolved by the common law principle of "first in time, first in right."

D. The West Virginia Recording Acts: The Aegis Afforded BFP's for Value

In West Virginia, the recording acts applicable to real property are found in West Virginia Code Sections 40-1-8 and -9. Section 40-1-8 applies to contracts involving the sale or lease of certain interests in real estate. Section 40-1-8 provides:

Any contract in writing made in respect to real estate or goods and chattels in consideration of marriage; or any contract in writing made for the conveyance or sale of real estate, or an interest or term therein of

30. W. VA. CODE § 36-3-4 (1985). The full text of this statute provides:
All distinctions in legal effect between deeds of grant, deeds of bargain and sale, deeds of lease and release, and deeds of covenant to stand seized, are hereby abolished. Any instrument which shows on its face a present intent to pass the title to, or any interest, present or future, in real property, shall, if properly executed and delivered, be given effect according to its manifest intent. No instrument purporting to convey land, or any interest therein, shall fail of effect merely for lack of conformity with the language of sections five, six, seven, eight or nine [§§ 36-3-5, 36-3-6, 36-3-7, 36-3-8 or 36-3-9] of this article.

Id.

more than five years, or any other interest or term therein, of any duration, under which the whole or any part of the corpus of the estate may be taken, destroyed, or consumed, except for domestic use, shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract were a deed conveying the estate or interest embraced in the contract. In lieu of the recording of a lease pursuant to this section, there may be recorded with like effect a memorandum of such lease, executed by all persons who are parties to the lease and acknowledged in the manner to entitle a conveyance to be recorded. A memorandum of lease thus entitled to be recorded shall contain at least the following information with respect to the lease: The name of the lessor and the name of the lessee and the addresses of such parties as set forth in the lease; a reference to the lease, with its date of execution; a description of the leased premises in the form contained in the lease; the term of the lease, with the date of commencement and the date of termination of such term, and if there is a right of extension or renewal, the maximum period for which, or date to which, the lease may be extended, or the number of times or date to which it may be renewed and the date or dates on which such rights of extension or renewal are exercisable. Such memorandum shall constitute notice of only the information contained therein.\(^\text{32}\)

In one of its early decisions, in *Pack v. Hansbarger*,\(^\text{33}\) the court noted that the West Virginia statute is based upon a Virginia statute which became effective on July 1, 1850, and was copied, without alteration or amendment, into the West Virginia Code.\(^\text{34}\) However, the Virginia statute was in fact an amendment to an earlier commonwealth statute.\(^\text{35}\) In *Pack*, the court explained the amendment of the statute to include contracts for the sale of real estate (*i.e.*, to make them recordable rights) as follows:

The amendment of the statute so as to include contracts in writing for the conveyance or sale of real estate for a term greater than five years, may have been induced by the decision of the Court of Appeals in the case of *Withers v. Carter et al.*, 4, Gratt. 407. The effect of the amendment was to place such written contracts unrecorded upon the same footing, as to creditors and purchasers for valuable consideration without notice, as unrecorded deeds. This being so, then every unrecorded or unregistered con-


\(^{33}\) 17 W. Va. 313 (1880).

\(^{34}\) *Id.* at 334-35.

\(^{35}\) *Id.* at 335.
tract in writing for the conveyance or sale of real estate for a greater term than five years since the 1st day of July, 1850, is void as to creditors and purchasers for valuable consideration, without notice, the same as an unrecorded or unregistered deed conveying such real estate, or term, is now and would have been under the statute, and as it was before the amendment.  

In tracing the origins of this Section of the recording acts, the court in Pack provided some insight as to why the provisions concerning contracts evolved as part of West Virginia Code Section 40-1-8, as opposed to Section 40-1-9, and were incorporated by reference into Section 40-1-9. In addition, the Pack decision also provided one of the earliest policy discussions of the recording acts in our state.

As noted above, a written contract described in West Virginia Code Section 40-1-8 "shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract were a deed conveying the estate or interest embraced in the contract." Therefore, under the provisions of Section 40-1-8, the contracts described therein are equated to a deed for recording purposes, that is, such contracts become "recordable."

The significance of being a "recordable interest" is that until it is recorded, those who are described in West Virginia Code Section 40-1-9 can take "free" of the unrecorded interest. In effect the provisions of Section 40-1-9 alter the common law rule, to the extent that it applies, of "first in time, first in right." Section 40-1-9 provides:

Every such contract, every deed conveying any such estate or term, and every deed of gift, or trust deed or mortgage, conveying real estate shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract, deed, trust deed or mortgage may be.

36. Id. at 335-36.
38. W. VA. CODE § 40-1-9 (1982). See also W. VA. CODE § 39-1-2 (1982) (Setting forth the requirements for an instrument to be recordable as follows:
The clerk of the county court of any county in which any deed, contract, power of attorney, or other writing is to be, or may be, recorded, shall admit the same to record in his office, as to any person whose name is signed thereto, when it shall
Although the Supreme Court of Appeals of West Virginia has never used the label "notice" to describe this statute, it is clear from its decisions that West Virginia is a "notice" jurisdiction as to "purchasers." This classification has been recognized by the American Law of Property which includes West Virginia on its list of the twenty-five (25) states with notice statutes.\(^4^0\) Patton on Titles also classifies West Virginia as a "notice type" jurisdiction,\(^4^1\) and Dean Clyde Colson, in his 1954 law review article entitled Limits of Title Search Under the West Virginia Recording Act, concurred in this classification.\(^4^2\) Dean Colson stated: "As between two successive grantees from the same grantor, it is abundantly clear from the West Virginia cases that priority depends not upon priority of recording but solely upon whether the second grantee at the time he became a purchaser had actual or constructive notice of the prior conveyance."\(^4^3\) The two West Virginia cases cited by Dean Colson in support of this statement are Alexander v. Andrews\(^4^4\) and Cross v. Riddle.\(^4^5\)

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have been acknowledged by him, or proved by two witnesses as to him, before such clerk of the county court.

But notwithstanding such acknowledgement or proof, such clerk shall not admit to record any contract, deed, deed of trust, mortgage or other instrument that secures the payment of any debt, unless such contract, deed, deed of trust, mortgage, or other instrument sets forth therein who, at the time of the execution and delivery thereof, is the beneficial owner of the debt secured thereby, and where he resides: Provided, however, that in the case of a mortgage or a deed of trust securing an issue of negotiable notes or bonds exceeding five in number and payable to bearer, it shall not be necessary that the mortgage or deed of trust show who are the beneficial owners of such notes or bonds, but in such case such mortgage or deed of trust shall show the name and address of the person or corporation with or by whom the notes or bonds have been, or are to be, first negotiated.)

39. The West Virginia statute as to creditors will be discussed below.
40. \(4\) American Law of Property § 17.5, at 540 nn.37 & 38, 545 n.63 (1952).
41. RUFFORD G. PATTON & CARROLL G PATTON, PATTON ON TITLES § 9 n.19 (2d ed. 1957) [hereinafter PATTON].
42. Clyde L. Colson, Limits of Title Search Under the West Virginia Recording Act, 56 W. Va. L. Rev. 20 (1954) [hereinafter Colson].
43. Colson, supra note 42, at 24.
44. 64 S.E.2d 487 (W. Va. 1951).
45. 177 S.E. 870 (W. Va. 1934).
The feature that distinguishes a notice jurisdiction from race and race-notice jurisdictions is that the subsequent purchaser’s rights are determined at the time of the “conveyance transaction” based upon notice or the lack thereof. Whether the prior grantee or the subsequent grantee “records” first is not material. This point is well illustrated in Cross v. Riddell. In that case, the Crosses executed a deed of trust on their farm to secure a bank loan in the amount of $3,000. The loan became delinquent and the trustee was directed to sell the property. Riddell, at the urging of a friend, made sufficient payments on the loan to stop the sale. For making the payments, Riddell was given an absolute deed to the farm by the Crosses. Riddell made additional payments on the bank loan and then sold the farm to Farkas by a deed dated October 12, 1932. In that deed, Farkas assumed the existing debt to the bank and agreed to pay Riddell an additional $1,500. The Riddell-to-Farkas deed was recorded on October 22, 1932. When the Crosses refused to move from the land, Farkas brought an unlawful detainer action against them. The Crosses defended the unlawful detainer action by claiming they had a “declaration of trust” agreement with Riddell which provided that they had until March 1, 1933, to repay Riddell all she had expended and redeem the farm. In agreeing with Farkas that she was an innocent purchaser for value, the court said:

At the time of her purchase [(October 12, 1932)], the title, so far as the records in the county clerk’s office revealed, was in Fay Riddell. The fact that the undated declaration of trust was recorded two days prior to October 22nd, the date that Mrs. Farkas actually recorded her deed, has no

46. Id.
47. Cross, 177 S.E. at 870.
48. Id.
49. Id.
50. Id. at 870-71.
51. Id. at 871.
52. Id.
53. Cross, 177 S.E. at 871.
54. Id.
55. Id. Riddell denied any such agreement and further denied that she signed the paper presented at the trial. Id.
bearing on the latter's title, if she was an innocent purchaser for value at the time of the delivery of the deed.\textsuperscript{56}

One of the most informative of the West Virginia recording cases is Alexander v. Andrews.\textsuperscript{57} Alexander interprets and explains the application of West Virginia Code Section 40-1-9 and sets forth the burden of proof thereunder. In Alexander, Thomas A. and Mary J. Alexander, husband and wife, were the owners of the real estate in question.\textsuperscript{58} On April 25, 1946, Mary died and devised her interest to her son, Charles B. Alexander.\textsuperscript{59} On May 8, 1946, Thomas A. Alexander, executed, acknowledged, and presumably delivered a deed for his one-half interest in the real estate to Sarah R. Andrews, his daughter.\textsuperscript{60} The deed to Sarah was not recorded until July 8, 1946.\textsuperscript{61} Notwithstanding the May 8 deed to his daughter, on May 14, 1946, Thomas A. Alexander, executed, acknowledged, and delivered a deed for his interest in the same real estate to his son, Charles B. Alexander.\textsuperscript{62} The deed to Charles was recorded on May 14, 1946.\textsuperscript{63} Prior to the May 14 conveyance, the property in question had been occupied by Charles and after the May 14 conveyance, the grantor, Thomas, lived on the property with his son until Thomas' death in October, 1948.\textsuperscript{64} Charles de-

\textsuperscript{56} Id. (emphasis added). As to the presence of the Crosses on the land constituting inquiry notice, the court said:

If the presence of the Crosses on the property was sufficient to put Mrs. Farkas on notice, and make further inquiry necessary concerning the Crosses' interest, Mrs. Farkas' rights could be affected only to the extent of the Crosses' interest therein, which, according to the latter, was the right to redeem prior to March 1, 1933. The Crosses do not show that a tender was ever made to Fay Riddell, as provided for in the alleged "declaration of trust"; or that they were prevented from so doing by any fraud upon the part of either Mrs. Riddell or Mrs. Farkas. And, according to the Crosses' own testimony, the date for redemption had passed long prior to the institution of this suit.

\textsuperscript{57} Id. (citations omitted).
\textsuperscript{58} Id. at 488.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Alexander, 64 S.E.2d at 488-89.
\textsuperscript{63} Id. at 489.
\textsuperscript{64} Id.
As part of its decision, the court explained the effect of the recording acts upon the common law principle of "first in time, first in right" as follows:

It is well to state at this time that the validity of the deed from Thomas A. Alexander to Sarah R. Andrews, dated May 8, 1946, as of the date of its execution, is not questioned. It follows, therefore, that if the said deed had been recorded prior to the 14th day of May, 1946, when the plaintiff obtained a deed for the same property, plaintiff would have taken nothing by his deed. When Thomas A. Alexander executed the deed of May 8, 1946, he parted with all of his right title and interest in the property conveyed, and thereafter had no interest therein which he could convey. But our recording Act, Code, 40-1-9, makes a perfectly valid and effective conveyance void as to creditors and subsequent purchasers for valuable consideration without notice, until such deed is duly admitted to record in the county wherein the property conveyed is situated; and, therefore, while the grantor has nothing to convey, when he executes a subsequent deed for the same property, to a different party, then by force of this statute, his grantee in the subsequent deed gets title to the land in cases where the grantee in the first deed fails to record his deed before the second deed is executed, and where the grantee in the second deed can qualify as a purchaser for value and without notice of the first deed. Probably the explanation for this illogical result is that the first purchaser, who fails to record his deed, is charged with fault in a situation where one of two persons must suffer loss, in which situation it seems just, and our statute, in effect, provides that the loss must fall upon the person who has committed a fault in failing to record his deed, and by his fault has created a situation where a subsequent innocent purchaser is induced to part with his money and thereby suffer a loss which the grantee in the first deed could have prevented. Aside from the statute, a bona fide purchaser for value and without notice is a favorite with a court of equity.66

After quoting West Virginia Code Section 40-1-9, the court continued:

65. Id.
66. Id. at 490 (citations omitted) (emphasis added).
It is clear that if the plaintiff in this case purchased the real estate here involved, without notice of the execution of the prior deed, and paid in full a valuable consideration for his deed, he is entitled under the statute to the relief prayed for; but he must meet the conditions which give him the right to such relief. The first and most important condition is that at the time he accepts his conveyance and becomes a complete purchaser he has had no notice, actual or constructive, of the existence of a former deed to another person for the same property. In this case, if the former deed had been recorded prior to the May 14, 1946 deed, the question of actual notice would not be involved, because the recordation furnished what is termed constructive notice thereof. In this case, however, admittedly the deed of May 8, 1946, to Sarah R. Andrews, had not been recorded at the time plaintiff took his deed on May 14, 1946. On that point of the case the only question involved is whether plaintiff had actual notice of the existence of such deed, or notice of matters and things which called upon him to make inquiry before becoming the purchaser of the property involved.

The other necessary conditions are that he must pay a valuable consideration; the transaction upon which the second purchaser relies must be bonafide; must have been completed; and the entire purchase price paid.67

Since the issue of "notice" is determinative, the burden of proof in a notice jurisdiction is important. In addressing this issue, the Alexander court stated:

[O]n the question of burden of proof, it seems to us that once a person, who it is claimed has had notice, denies the same, then the burden of proof shifts and the person who asserts that notice has been had must establish the facts and circumstances which clearly indicate notice, which, of course, under the statute, would in a case such as is now before us, prevent him from receiving the benefits of the statute quoted above [(W. Va. Code § 40-1-9)].68

In applying the law with respect to the burden of proof to the facts of the case, the court concluded that there was nothing in the record to show that Charles had notice or should have been on inquiry as to the May 8 deed to his sister.69

67. Id.
68. Alexander, 64 S.E.2d at 491.
69. The court stated:
Having determined that Charles was without notice of the earlier deed, the court turned to the issue of whether Charles was a "purchaser." While there was conflicting evidence, the court concluded that consideration given by Charles was $1000 in cash and an agreement to take care of and provide for his father's burial.\textsuperscript{70} The market value of the property in question in May of 1946 was stipulated to be $7,700.\textsuperscript{71} In discussing the term "purchaser" as used in the recording acts, the court established the definition of value as follows:

We do not understand that to place a person in a position to take the benefit of the recording statute there must be paid as consideration what would be termed the full value of the property. We think that what is required is a consideration which would sustain a conveyance in the ordinary transaction where consideration becomes important. Of course, in the absence of creditors, a person may convey his property on whatever terms he chooses; but in a transaction such as is now before us, we think a reasonably adequate consideration should be paid by a subsequent grantee, before the person who claims under the first deed may be deprived of the benefit of his conveyance. We are of the opinion that the consideration shown here is sufficient to give to the plaintiff the benefit of Code, 40-1-9, had it been paid in full at the time the grantee in the May 14, 1946, deed first received notice of the former deed.\textsuperscript{72}

\textsuperscript{70} Id. at 492.
\textsuperscript{71} Id. at 493.
\textsuperscript{72} Id.
The final issue in the case involved the fact that the entire consideration was not paid on the date of the conveyance. Charles' agreement to care for his father and provide for his burial extended into the future, and Thomas lived for two and one-half years after delivery of the deed. The significance of this fact was reflected by the court quoting from one of its earlier decisions as follows: "To be protected by section 5, chapter 74, of the Code [(Code, 40-1-9)], against a prior unrecorded deed, one must be a complete purchaser, must have had no notice of the prior contract or deed, and have paid all the purchase money for the land purchased by him."73

The court explained Charles' failure to qualify as a "complete purchaser" as follows:

We are of the opinion that the record shows that $1,000 was paid by the plaintiff to his father at or before the conveyance of May 14, 1946, and we think the record shows there was an agreement between the parties to that deed that the plaintiff would take care of his father and see that he had a suitable burial. However, unless it be from May 8, 1946 to July 8, 1946, when the Sarah R. Andrews deed was recorded, that part of the consideration had not been paid, and, therefore, the transaction had not been completed by the full payment of the purchase money. Assuming for the sake of argument that the plaintiff undertook to take care of his father during his lifetime, and provided for his burial, it would be no different than if he had executed a note or notes for given amounts to make up a reasonably adequate consideration for the conveyance.

On the subject of consideration, we are of the opinion that the plaintiff in order to receive the benefit of the statute must have paid a reasonably adequate one. We have a stipulation in the record that the value of the one-half interest in the property here involved, as of May, 1946, was $3,850. We do not think the $1,000 cash payment was an adequate consideration, and it is clear that the other elements of consideration which were necessary to make the deed valid in the circumstances were not paid at the date of the conveyance to the plaintiff.

We must appraise the rights of the plaintiff as they existed immediately prior to the recordation of the deed of May 8, 1946 to Sarah R. Andrews. Code, 40-1-9, provides that: "Every such contract, * * * shall be void as to creditors, and subsequent purchasers for valuable consideration

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73. Id. at 494 (quoting United Fuel Gas Co. v. Morley Oil and Gas Co., 131 S.E. 716 (W. Va. 1926)).
without notice, until and except from the time that it is duly admitted to record in the county wherein the property * * * may be."

The plaintiff having obtained a legal advantage through the failure of Sarah R. Andrews to record her deed of May 8, 1946, promptly lost that advantage when said deed was recorded on July 8, 1946. The very terms of the statute force that conclusion. Therefore, after the deed of May 8, 1946, was recorded, it became effective for all purposes, and the grantee in the subsequent deed of May 14, not having completed his purchase, could obtain no rights based upon the payments thereafter made. His rights, whatever they are, must be based upon his situation on the date when he first had actual or constructive notice of the deed of May 8, 1946. He says that he did not have actual notice thereof until one or one and one-half years after he received his deed, but we think this immaterial because he received constructive notice thereof on July 8, 1946, when the first deed was recorded. 74

In summary, the Alexander case held that Charles had no notice, either actual or constructive, of the earlier deed to his sister at the time his father delivered the deed to him and under the recording acts Charles was, therefore, protected to the extent he paid consideration at the time of the delivery of his deed. However, Charles was charged with constructive notice when his sister recorded her earlier deed for the same real estate on July 8, 1946. Therefore, after July 8, 1946, Charles was no longer protected as a purchaser without notice under the recording acts.

E. The West Virginia Recording Acts: "Notice" is Not a Hindrance to "Creditors"

While West Virginia is a "notice" jurisdiction as to "purchasers," under our statutes, notice of an unrecorded deed is not relevant as to "creditors." The distinction, in this respect, between purchasers and creditors is based upon the wording of Section 40-1-9. The statute reads:

Every such contract, every deed conveying any such estate or term, and every deed of gift, or trust deed or mortgage, conveying real estate shall be void, as to creditors, and subsequent purchasers for valuable consider-

74. Id. at 494.
ation without notice, until and except from the time that it is duly admit-
ted to record in the county wherein the property embraced in such con-
tract, deed, trust deed or mortgage may be.75

It was established very early that the words "for valuable consider-
ation without notice" applied only to "subsequent purchasers" and not
to "creditors." The court, in Syllabus Point 2 of Delaplain & Son v. 
Wilkinson & Co., stated:

It is immaterial whether the creditor has notice or not, when the debt was
contracted. The statute declares it void as to all creditors, without discrimi-
nating as it does in the clause touching purchasers, in respect to notice.76

The difference under the statute between a "purchaser" and a "creditor"
is summarized in Acadian Coal & Lumber Co. v. Brooks Run Lumber
Co.,77 as follows:

[A lien creditor's] status is fixed by the record, and not by actual notice,
while a purchaser is bound by actual notice, and, if he has such notice or
notice of facts sufficient to put him upon inquiry, it is immaterial whether
the instrument of which he has such notice is recorded or not.78

In this respect, it is noted that a judgment becomes a lien against
real estate as provided by, and from the time set forth in, West Virgini-


76. 17 W. Va. 242, 244, Syl. Pt. 2 (1880). The court in Abney v. Ohio Lumber &
Mining Co., 32 S.E. 256, 256 (W. Va. 1898), stated the same principle in Syllabus Point 4
as follows: "An unrecorded deed is void as to creditors, whether they have notice or not,
but it will be good against purchasers with notice, or who have not purchased for valuable
consideration."
77. 107 S.E. 422 (W. Va. 1921).
78. Id. at 426.
79. W. VA. CODE § 38-3-6 (1985). The full text of this statute provides:

Every judgment for money rendered in this State, other than by confession in
vacation, shall be a lien on all the real estate of or to which the defendant in
such judgment is or becomes possessed or entitled, at or after the date of such
judgment, or if it was rendered in court, at or after the commencement of the
term at which it was so rendered, if the cause was in such condition that a judg-
ment might have been rendered on the first day of the term; but if from the na-
ture of the case judgment could not have been rendered at the commencement of the
term, such judgment shall be a lien only on or after the date on which such
as against a "purchaser of real estate for valuable consideration without notice, unless it is docketed in accordance with Section 38-3-5.

The construction of these sections is illustrated by the case Cooper v. Cooper. In Cooper, attorneys were representing the defendant in a lawsuit alleging alienation of affection. The attorneys accepted a note secured by a deed of trust on their client's property to insure the payment of their attorney fees for their representation of the defendant in the alienation of affection suit and in several other suits. The deed of trust was recorded on October 14, 1953, and a judgment was returned in favor of the plaintiff against the defendant in the alienation of affection case on November 17, 1953 which under the statute, Sec-

judgment or decree could have been rendered and not from the commencement of the term; but this section shall not prevent the lien of a judgment or decrees from relating back to the first day of the term merely because the case shall be set for trial or hearing on a later day of the term, if such case was matured and ready for hearing at the commencement of the term, not merely because an office judgment in a case matured and docketed at the commencement of the term does not become final until a later day of the term. A judgment by confession in vacation shall also be a lien upon such real estate, but only from the time of day at which such judgment is confessed. Such lien shall continue so long as such judgment remains valid and enforceable, and has not been released or otherwise discharged.

Id.

80. W. VA. CODE § 38-3-7 (1985). The full text of this statute provides:

No judgment shall be a lien as against a purchaser of real estate for valuable consideration without notice, unless it be docketed according to the fifth section [§38-3-5] of this article, in the county wherein such real estate is, before a deed therefor to such purchaser is delivered for record to the clerk of the county court [county commission] of such county; nor shall such judgment, though it be docketed as aforesaid, be a lien, after ten years from its date as against such a purchaser who purchases after such ten years, unless within such ten years an execution shall have issued on such judgment and such execution or a copy thereof be filed in the office of such clerk, or, unless such purchaser have actual notice of the fact that such execution was issued, though it was not so filed; nor shall such judgment, though it be docketed as aforesaid, and though one or more executions shall have issued thereon and shall have been filed as aforesaid, be a lien, after ten years from the date of the last execution so filed, as against such a purchaser who purchases after such ten years, unless such purchaser have notice of the issuing of an execution within ten years preceding the date of such purchase.

Id. (emphasis added).

81. 98 S.E.2d 769 (W. Va. 1957).
82. Id. at 770.
83. Id.
tion 38-3-6, became effective on September 2, 1953, the first day of
the September 1953 term of court.84 The plaintiff thus became a judg-
ment creditor against the defendant, and the court held this judgment
prevailed over the attorneys deed of trust because the attorneys had
actual notice that the plaintiff's claim could result in a judgment and
its resulting lien.85 Since the attorneys had actual notice, the plaintiff's
judgment lien, which related back to the first day of the term, took
priority over the attorneys' deed of trust.86 The applicable law was
succinctly stated in the earlier case of Richardson v. White87 as fol-
lows: "[the statute], relating to judgment liens, was enacted for the
protection of purchasers for a valuable consideration without notice,
and has no application as between the judgment creditor and his debt-
or".88

F. The West Virginia Recording Acts: While “Mortgagees” are “Pur-
chasers” Under the Statutes, Not All “Creditors” are “Creditors”

As the above discussion illustrates, under the West Virginia record-
ing acts, it can make a difference whether one is considered a “pur-
chaser” or a “creditor.” As the Alexander case establishes, to be a
“purchaser” one must pay “a reasonably adequate consideration,”89 and
to be fully protected under the statutes, must be a “complete purchas-
er,” that is, pay the full amount of the reasonably adequate consider-
ation.90 Also, in contrast with sales transactions covered by the Uni-
form Commercial Code (U.C.C.) where a “pre-existing debt” is deemed
sufficient,91 the law in West Virginia prior to the adoption of the

84. Id. at 771.
85. Id. at 772.
86. Id. at 773.
87. 127 S.E. 636 (W. Va. 1925).
88. Id. (syllabus of the court).
89. 64 S.E.2d at 493.
90. In Alexander, the court recognized that Charles was protected to the extent he paid
consideration, the $1,000 cash and the sum expended taking care of his father until July 8,
1946, when the deed to his sister was recorded. 64 S.E.2d at 494.
91. The Uniform Commercial Code defines “value” as follows:
Except as otherwise provided with respect to negotiable instruments and bank col-
lections (Sections 3-303, 4-208 and 4-209) a person gives “value” for rights if he

https://researchrepository.wvu.edu/wvlr/vol98/iss2/4
U.C.C. was that "to constitute one a bona fide purchaser he must[,] at the time he consummates the transaction[,] advance a new and valid consideration . . . ." Similar to the sole syllabus point of London & Lancashire Indemnity Co. of America v. Cromwell, the court stated that "[u]nder the recording acts, a past consideration, alone, is not a valuable consideration for the assignment of a chose in action, other than a negotiable instrument." Since the U.C.C. does not apply to real estate transactions, this aspect of the law remains unchanged.

It is well-established in West Virginia that for the purpose of the recording laws, a party secured by a deed of trust or mortgage is considered a "purchaser." In Weinberg v. Rempe the court expressed the law in unambiguous language:

A deed of trust unrecorded is void as against subsequent purchasers without notice. A deed of trust creditor is held to be entitled as a purchaser within the purview and meaning of the said 5th section of said ch. 74 of the Code. A mortgagee is also a purchaser within the sense of the said 5th section.

Perhaps it is helpful to think of such a secured transaction as one in which the party who loans the money in effect "purchases" a security interest in the collateral to secure the repayment of the loan.

It is equally well established that under the recording acts, the term "creditors" does not include all "creditors." In Moore v. Tearney, the plaintiff contended that the unrecorded deed from Hurst to Tearney was void as to all creditors including general creditors. The

acquires them . . . (b) as security for or in total or partial satisfaction of a pre-existing claim; . . . .

U.C.C. § 1-201(44) (1961).

93. 190 S.E. 337 (W. Va. 1937).
94. Id. at 337 (syllabus of the court).
95. 15 W. Va. 829 (1879).
96. The referenced 5th section of chapter 74 was the predecessor to present West Virginia Code Section 40-1-9.
97. Weinberg, 15 W. Va. at 858 (citation omitted). See also Duncan v. Custard, 24 W. Va. 730 (1884).
98. 57 S.E. 263, 264 (W. Va. 1907).
court's response to this argument was succinctly stated in Syllabus Point 1 as follows:

The class of creditors intended to be protected by section 3103 Code 1906 [(present day West Virginia Code Section 40-1-9)], against an unrecorded deed, are not general creditors, but such creditors as have a lien upon or a right to charge with their debts or demands the property conveyed by such deed.99

The law is further illustrated in Birch River Boom & Lumber Co. v. Glendon Boom & Lumber Co.100 which involved "creditors" rights against an unrecorded deed of trust. In that case, the court stated:

The creditors protected by that statute [(Section 5 of Chapter 74, now West Virginia Code Section 40-1-9)] are lien creditors, having right to charge the property directly by execution, attachment or otherwise, not holders of mere personal demands or claims. The section applies to both real and personal property. As applied to real estate, it protects only lien creditors.101

Finally as to the terms "creditors" and "purchasers" it is provided by statute that:

The words creditors and purchasers, where used in this chapter, shall not be restricted to the protection of creditors of, and purchasers from, the grantor, but shall extend to and embrace all creditors and purchasers who, but for the deed or writing, would have had title to the property conveyed, or a right to subject it to their debts.102

III. ESTABLISHING THE CHAIN OF TITLE

As noted in the introduction, the only way to perform a "complete" title examination is to trace the title of each tract back to the patent. The time and, therefore, the expense to perform such a "com-

99. Id. at 263, Syl. Pt. 1.
100. 76 S.E. 972 (W. Va. 1912).
101. Id. at 974. Prior to 1963, West Virginia Code Section 40-1-9 applied to deeds of trust or mortgages conveying "real estate, goods and chattels." Goods and chattels were removed from this section in 1963 with the adoption of the U.C.C.
Plete" title examination makes such title work impractical in most residential and maybe commercial transactions. Therefore, once the attorney makes a decision not to trace the title to the patent, the next question is how far back in time should the attorney check title? At best, the answer to this question is no more than a "rule of thumb." As a practical matter, since most purchasers of a residence need to obtain a purchase money loan, traditionally the local bank's standards for title certification have established the minimum time period. However, with the increased number of loans now being packaged and sold on the secondary market, the requirements for such loans, including title insurance, have had a major impact on "local" title work.

In 1960, Professor Lewis M. Simes prepared Model Title Standards under the auspices of the University of Michigan Law School and the Section of Real Property, Probate and Trust Law of the American Bar Association. Based upon the assumption that the Model Marketable Title Act was in force, Standard 4.2 adopted an unbroken chain of title extending back at least forty years. In West Virginia, most title insurance companies and lending institutions require a sixty-year search which originates from a general warranty deed.

Thus, for purposes of discussion, assume that a title examination covering sixty years from the present date to a general warranty deed is sufficient to satisfy the financial institution lending the money and the residential title insurance company. While sixty years may be sufficient for the lending institution's loan documentation purposes, it is important to stress that it may not be sufficient to adequately represent and advise a client as to matters that may be very important to him or her. For example, in many, if not most, parts of the state, coal, oil, and gas were frequently "severed" from the surface beginning in the late 1800s. In certain areas of the state the severance of oil and gas and certain seams of coal was essentially completed by the 1920s. Not only is the extent of the ownership of the "corpus" usually of importance to the present owner, but the nature and extent of the "mining

103. Lewis M. Simes, Model Title Standards 24 (1960).
104. Although the author has no empirical data to support the statement, based upon conversation with a number of lawyers who are engaged in a substantial amount of title work, sixty years appears to be a common, acceptable rule of thumb.
rights" associated with the severance is normally important to the current "surface owner." In addition, a variety of rights-of-way or easements may have been created more than sixty years ago. Obviously, if the subject property is burdened by easements, the easement could materially affect the utilization of the servient estate. These two examples illustrate the types of transactions which commonly may have occurred in West Virginia more than sixty years ago, and if they are within the tract’s chain of title, could affect the property.  

Perhaps the appropriate suggestion of how far back one should run a title is that the sixty years required by title insurance companies and many local banks should be viewed as the minimum period of time and that various "local factors" may either justify or necessitate that the title be run back even further in order to adequately advise the client as to matters that may be important to him or her. Obviously, it is this issue which has provided some of the impetus for marketable title statutes.  

105. On February 20, 1995, House Bill 2562 (HB 2562), a bill patterned after the Uniform Marketable Title Act was introduced in the West Virginia House of Delegates and referred to the Committee on the Judiciary. H. 2562, 73d Leg., 1st Reg. Sess. (1995). The marketable title period provided for in the draft legislation was thirty years. Id. Consideration of the bill by the committee was delayed so that careful consideration could be given to the effect such a bill would have on all property interests in West Virginia.  

106. It may be sufficient to advise the client that in that particular portion of the county within which s/he seeks to purchase, the coal was severed in the 1910s and 1920s, and that the severance deeds generally granted extensive mining rights with no obligation to provide support of the surface, and that since the title examination stopped in the 1930s, the client should assume such a severance has occurred and that extensive mining rights were granted. If the client desires, "additional" title work could be performed to verify this assumption and provide a precise statement of the mining rights.  

107. H. 2562, 73d Leg., 1st Reg. Sess. (1995) (Proposing an amendment to Chapter 36 of the Code to be known as the Uniform Marketable Title Act. The proposal did not pass, but was recommended for study and for policy impact consideration.).
IV. TITLE TRANSFER

There are basically three ways\textsuperscript{108} that the title to real property is transferred or acquired. The most common transfer is by deed. The other principal method of transfer is when the owner dies and the property passes at his or her death by either testate or intestate succession.\textsuperscript{109} Finally, and although not nearly as common as the other two, title to property can be acquired by the operation of law through adverse possession.\textsuperscript{110}

A. Deeds

1. In General

Since a deed is the most common link in a chain of title, both the form and contents of the deed are important to the title examiner. The\textit{ American Law of Property} states that:

To be effective as a legal conveyance without reformation a deed must have a grantor, grantee, words of grant, description of the land involved, and signature of the grantor; also, in some states or as to certain types of deeds, a seal, attestation, acknowledgement, or all of them. . . . A deed may be a very informal instrument and yet be perfectly good so long as it contains items which the courts will construe as constituting these . . . essentials.\textsuperscript{111}

\textsuperscript{108} It is recognized that the sovereign and certain corporations are given the right to acquire private property pursuant to eminent domain. See W. VA. CONST. art. III, § 9; Articles 1 and 2, Chapter 54 of the West Virginia Code.

\textsuperscript{109} See infra Part IX.A. for a discussion of the issues facing the title examiner when title to land has passed by reason of death of the owner.

\textsuperscript{110} A discussion of adverse possession is beyond the scope of this article. Essentially, adverse possession involves the passage of time set forth in the statute of limitation for entry upon or recovery of lands (W. VA. CODE §§ 55-2-1, -1a, -3, -4 (1994)) and the presence of certain elements established by the courts. A helpful discussion of the elements of adverse possession is found in Core v. Faupel, 24 W. Va. 238 (1884); and Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524 (W. Va. 1977).

\textsuperscript{111} 3 AMERICAN LAW OF PROPERTY § 12.38, at 279.
West Virginia has provided statutory guidance as to both content and form for deeds. One of the things the statutes have done is to abolish the distinctions in legal effect of various types of deeds which developed and evolved as part of the English common law and were brought to this country in the colonial period. The statute abolishing common law forms of deeds stresses intent over form.

The statute states:

All distinctions in legal effect between deeds of grant, deeds of bargain and sale, deeds of lease and release, and deeds of covenant to stand seized, are hereby abolished. Any instrument which shows on its face a present intent to pass the title to, or any interest, present or future, in real property, shall, if properly executed and delivered, be given effect according to its manifest intent. No instrument purporting to convey land, or any interest therein, shall fail of effect merely for lack of conformity with the language of sections five, six, seven, eight or nine of this article.112

In lieu of the "wordy" common law forms of deeds, the statutes provide a "bare bones" deed form.113

Another illustration of the emphasis on "intent" over "form" is found in a companion section which abolishes the necessity of the "seal" on such instruments. By statute, the need to affix a seal to a deed, deed of trust, mortgage, or other conveyance has been abolished in West Virginia114 and the affixing of a seal to an instrument does not give such instrument any additional force or effect.115 The "seal"

113. See W. VA. CODE § 36-3-5 (1985) (Providing:
A deed may be made in the following form, or to the same effect: "This deed made the . . . . . . day of . . . . . . , in the year . . . . . . , between (here insert names of parties), witnesseth: That in consideration of (here state the consideration), the said . . . . . . . . . . . . . . . . . grants unto the said . . . . . . . . . . . . . . . . . all, etc. (Here describe the property, and insert covenants or any other provisions.) Witness the following signature.).
In addition to the form deed in this Section, Section 36-3-8 sets forth a deed of lease and Section 36-3-9 provides a form deed for use by a sheriff or special commissioner. W. VA. CODE § 36-3-8, -9 (1982). A form trustee's deed is found in Section 38-1-6. W. VA. CODE § 38-1-6 (1985).
referred to in these sections is the "family seal" imprinted on documents at common law, and its successors, which evolved to nothing more than the word "seal" after the signature line on some documents. 116

While the above discussion illustrates the emphasis on intent over form, 117 the contents of deeds are obviously very important. It is customary to include within the deed the date, and "in the absence of evidence to the contrary, deeds are presumed to have been executed on the day of their date." 118

2. Granting Words

One of the essential requirements of a deed is the manifestation of intention to transfer an estate or interest in land. The deed must have operative words such as "do hereby grant and convey." This requirement is expressed in Freundenberger Oil Co. v. Simmons 119 as follows: "Operative words manifesting intent to transfer the property are absolutely essential to the conveyance of title. The intent must be disclosed by the words of the deed, not the mere acts of the parties." 120

116. The notarial seal as part of an acknowledgement is required by statute. W. VA. CODE § 39-1-10 (1982). The seal discussed in West Virginia Section 39-1A-2 is not the seal referred to in Sections 36-3-1, -2, and -3.

117. In Parson v. Baltimore Bldg. & Loan Ass'n, 29 S.E. 999 (W. Va. 1898), the court was presented with the question of whether an "agreement" was a deed. The "agreement" labeled itself a deed and was signed, sealed, and acknowledged. The agreement concerned a party wall and provided that the expense of the wall would be a covenant running with the land and not a personal obligation of the person not building the wall.

In holding the instrument a deed, the court noted it was "a mutual exchange of an interest or easement in real estate" and explained, "[t]o make a good deed, a writing need not be in any particular form or words, so the intention thereof is clear, and it is signed, sealed, and delivered." Id. at 1000. As to the agreement before the court, the court found the "intention of the parties and the interest acquired and conveyed are plainly written on the face of this instrument, and therefore it must be regarded as a good deed for the purposes executed, and properly admitted to record." Id.

118. Dulin v. Ohio River R.R., 80 S.E. 145, 146 (W. Va. 1913). Syllabus Point 4 states: "Prima facie, the date of a deed is the day of its execution, notwithstanding it was acknowledged at a later date." Id. at 145, Syl. Pt. 4.

119. 83 S.E. 995 (W. Va. 1914).

120. Id. at 995, Syl. Pt. 9. See also Erwin v. Bethlehem Steel Corp., 62 S.E.2d 337 (W. Va. 1950). In Uhl v. Ohio River R.R., 41 S.E. 340 (W. Va. 1902), the court ex-
Where appropriate, operative words manifesting an intent to transfer are contained in the deed, the deed will convey the grantor's entire interest unless a contrary intent is expressed. In a recent decision, the Supreme Court of Appeals of West Virginia affirmed the "plain meaning" of this statute as follows:

In *Freudenberger Oil Co. v. Simmons*, we noted that under *W. Va. Code* 36-1-11 [1923] a deed conveying land, in absence of an exception to the contrary, passes the entire interest of the grantor. Syl. pt. 1, *Freudenberger* states:

A deed conveying lands, unless an exception is made therein, conveys all the estate, right, title, and interest whatever, both at law and in equity, of the grantor in and to such lands.

The statute, however, does not expand the grant of a "mere easement" into a "fee simple." In *Uhl v. Ohio River Railroad*, the railroad argued that the conveyance of a fifty foot right of way conferred upon it a right of absolute fee simple estate in the very corpus of the soil carrying with it all minerals including the right to extract oil. The

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Deeds have orderly parts, technical words of precise legal signification, and in times gone by those parts and words, and the strict rule of construction of them, have been rigorously observed, often defeating the manifest intention. Modern construction, however, has leaned towards the intention, overriding mere form and technical words, and nowadays it may be said that the intention must rule the construction in deeds as well as in wills. For instance, deeds generally require the word "grant," or the words "bargain and sell," or some technical word suitable to the character of the conveyance. Such is formal conveyancing. But the word "convey" is now held to be equivalent to the word "grant," even at common law. 41 S.E. at 343-44 (citations omitted). *See also Chapman v. Charter*, 34 S.E. 768 (W. Va. 1899).

When any real property is conveyed or devised to any person, and no words of limitation are used in the conveyance or devise, such conveyance or devise shall be construed to pass the fee simple, or the whole estate or interest, legal or equitable, which the testator or grantor had power to dispose of, in such real property, unless a contrary intention shall appear in the conveyance or will.).


123. 41 S.E. 340 (W. Va. 1902).

124. *Id.* at 341.
court rejected this argument and as to the application of this statute to this situation the court said: "It is hardly worth while to refer to the argument that our statute law governs the case." 125 The court cited to the statute form of deed and then quoted this section and stated that it applies provided the deed does convey the land itself; but, if it convey only an easement, or other particular, limited, or restricted estate, it is not so. The word "grant" in the form referred to must have a thing for it to operate upon, a thing in the objective case; and its operation is limited to the thing specified as granted, the thing shown by the whole deed to have been intended to be granted, and, if that is only a right of way, the word "grant" passes that only. 126

Related to Section 36-1-11, is Section 36-3-10, which provides that "[e]very deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges, and appurtenances of every kind belonging to the lands therein embraced." 127 Again, at a very early date in the state's history, the court held "[t]he statute, declaring that a deed, unless an exception be contained in it, shall be construed to include appurtenances, does not apply to the creation of easements, but to the transfer of those already existing." 128

3. Parties and Signatures

As one would anticipate, "[a] deed must have parties, grantor and grantee." 129 While the deed must have a grantor and grantee, there is some latitude in the manner in which these parties must be named. In Roberts v. Huntington Development & Gas Co., 130 the court responded to the argument that an instrument failed to convey title because it failed to name grantees by holding that although the "deed" did not specifically and particularly set forth the identity of the grantees, their

125. Id. at 344.
126. Id.
130. 109 S.E. 348 (W. Va. 1921).
identity was obvious by way of the language of the instrument. In so holding, the court quoted, with approval, *Devlin on Deeds*, which states: "The fact that a grantee is not described by name will not affect the validity of a deed, if the designation or description be sufficient to distinguish the person intended from the rest of the world."\(^{131}\) Similarly, the court, in Syllabus Point 3 of *Blake v. Hendrick*,\(^{132}\) said:

> It is not essential that the grantor or grantee be formally named in the granting clause of a deed, if by taking the whole instrument together, they be sufficiently designated or described as to distinguish them from the rest of the world, and there is no uncertainty as to the identity of either party.\(^{133}\)

While there may be some leeway in the manner of identifying the parties, the law is well-established that unless a party is "named" in the deed as a grantor, that party’s signature at the end of the deed will not convey that party’s interest in the land which is the subject of the deed. In *Adams v. Medsker*,\(^{134}\) the deed was intended to convey the land from the heirs of the decedent to a single heir. In the deed in question, *Thomas Lyons and wife* were named as grantors, but they did not execute the instrument.\(^{135}\) However, *Morgan Lyons and wife*, who were not mentioned as grantors, executed the instrument, and their signatures were acknowledged.\(^{136}\) In deciding whether the interests of either Thomas or Morgan and their respective spouses were conveyed by this instrument, the court stated:

I have no hesitation in deciding that said deed did not convey the interest of Morgan Lyons. While he signed and acknowledged it as his deed, he is nowhere mentioned in it or made a party to it. . . . It is elementary law that every deed must have a grantor as well as a grantee. . . . And no one can be a party who is not mentioned or referred to therein. The mere signing and acknowledging it, when there are grantors named in it, is insufficient to make the person so signing it a party to it, even though it

\(^{131}\) *Id.* at 352 (quoting 1 *DEVLIN ON DEEDS* § 184).

\(^{132}\) 120 S.E. 906 (W. Va. 1924).

\(^{133}\) *Id.* at 906, Syl. Pt. 3.

\(^{134}\) 25 W. Va. 127 (1884).

\(^{135}\) *Id.* at 128-29.

\(^{136}\) *Id.*
appeared by extrinsic evidence that he intended thereby to make it his deed.\textsuperscript{137}

As to Thomas, the court found his failure to sign the deed prevented it from passing title to his interest.\textsuperscript{138}

In deeds in which there are multiple grantors, the court, in \emph{Parrish v. Pancake},\textsuperscript{139} held that where a deed lists several grantors, but only some of those grantors listed execute and acknowledge the deed, the instrument is effective and valid to pass title of those grantors executing and acknowledging it if their intention was to pass title. As to those named as grantors who do not execute the deed, their interest does not transfer.\textsuperscript{140}

4. Consideration

While consideration does not need to be recited in the deed in order to have a valid conveyance,\textsuperscript{141} the recital of consideration and acknowledgement of its receipt has legal significance. This is illustrated by the case of \emph{Farrar v. Young}.\textsuperscript{142} In \emph{Farrar}, the sons of the decedent attempted to set aside a deed their father made during his lifetime to his granddaughter.\textsuperscript{143} The deed in question recited that "for and in consideration of the sum of One Dollar ($1.00), and other good and valuable consideration, cash in hand paid by the parties of the second

\begin{footnotesize}
\textsuperscript{137} Id. at 130-31.
\textsuperscript{138} Id. at 131.
\textsuperscript{139} 215 S.E.2d 659 (W. Va. 1975).
\textsuperscript{140} Id. at 664.
\textsuperscript{141} W. VA. CODE § 36-3-6 (1985) (Providing:
If a deed of real property is in other respects valid, it shall not fail for want of a payment of consideration, or the recital of a consideration in the deed. No resulting or other trust in favor of the grantor in such deed shall arise from the mere fact that no consideration was paid or recited, if no trust was in fact intended. The foregoing provisions of this section shall not affect in any manner the right of any party to the deed, or any other person, to have such conveyance set aside for fraud, or because of any other circumstance which would render such conveyance invalid as to such person.).
\textsuperscript{142} 216 S.E.2d 575 (W. Va. 1975).
\textsuperscript{143} Id. at 576-77.
\end{footnotesize}
part unto the party of the first part, the receipt of which is hereby acknowledged * * *."\(^{144}\) As to the recital in the deed, the court said:

> It has consistently been held by this Court that the recital in a deed of the payment of consideration, irrespective of the amount thereof, is *prima facie* evidence of such payment and of the sufficiency of such consideration. In *Lovett v. Eastern Oil Company*, it was specifically held that the recital of one dollar constitutes valuable consideration for the conveyance of land.

> There having been a recital, in the subject deed, of the payment and receipt of consideration and there having been no offer of evidence that the recited consideration was not paid or that there was any fraud involved, we hold that as a matter of law good and valuable consideration supporting the subject conveyance has been paid.\(^{145}\)

While Syllabus Point 3 of the *Farrar* decision states: "Mere inadequacy of consideration is not in itself sufficient to justify a court of equity in setting aside a deed[,]"\(^{146}\) the court qualified this absolute statement in *McElwain v. Wells*\(^{147}\) in acknowledging that had the consideration been "grossly inadequate" and enough to "shock a court's conscience" it might look past the recital in the deed.\(^{148}\)

5. Description

A deed which does not ascertain a legally adequate description is fatally defective. As the court said in *Meadow River Lumber Co. v. Smith*:\(^{149}\) "A purported conveyance of land is void, if the description of the parcel attempted to be conveyed is so indefinite as not to be capable of being made certain by extrinsic evidence."\(^{150}\)

Whether a deed contains a sufficient description of the property to be conveyed is by its nature very fact specific. The "definition" of

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144. *Id.* at 577 (quoting from subject deed).
145. *Id.* at 577-78 (citations omitted).
146. *Id.* at 575, Syl. Pt. 3.
147. 322 S.E.2d 482 (W. Va. 1984).
148. *Id.* at 485.
149. 1 S.E.2d 169 (W. Va. 1939).
150. *Id.* at 169, Syl. Pt. 1.
what constitutes a “sufficient description” in a deed was stated before the turn of the century as follows:

The main object of a description of the land sold or conveyed, in a deed of conveyance, or in a contract of sale, is not in and of itself to identify the land sold,151 that it rarely does or can do without helping evidence, but to furnish the means of identification, and when this is done it is sufficient. That is certain which can thus be made certain.151

In reaffirming this general statement, the court in Harper v. Pauley152 explained that the written description contained in the contract or deed must provide the “key” or “foundation” words before extrinsic evidence can be received to aid in the identification of the particular property.153 The following passage from Harper provides insight into the “key” or “foundation” words the court seeks:

The particular description in the writing involved in the instant proceeding does no more than mention a tract of land containing a certain number of acres situated on a certain stream. No “key” or “foundation” word or phrase is contained therein. The writing contained no reference to any other instrument; no reference to the land by any name or designation; no reference to any owner, or source of title; no reference to any occupancy at the date of the writing, or at any other date; and no reference to any adjoining tract or tracts of land. The decisions of this Court clearly hold that “key” or “foundation” words or phrases can not be supplied by extrinsic evidence.154

Just as a deed without a sufficient description is void for uncertainty,155 an easement in a deed must be expressed in certain and definite language in order to be valid. In Highway Properties v. Dollar Savings Bank,156 the court held an easement across adjacent property void because of uncertainty. The purported easement was “reserved” in

152. 81 S.E.2d 728 (W. Va. 1953).
153. The Harper decision provides a helpful summary of a number of “description cases” which, as stated above, tend to be fact specific.
154. 81 S.E.2d at 736.
156. 431 S.E.2d 95 (W. Va. 1993).
a deed to Fayette Square as follows: "It is agreed and understood that there is common parking and rights-of-way or easements in, to and across all parcels for ingress and egress from and to all other parcels." 157 The court in *Highway Properties* noted: "In order to create an exception or reservation in a deed which would reduce a grant in a conveyance clause which is clear, correct and conventional, such exception or reservation must be expressed in certain and definite language." 158 As to the language in the deed to Fayette Square, the court explained that "[n]one of the easement language identified the location or width of the easements on the land. The description contained nothing that would serve to specify in the slightest degree any means of geographically locating the easement on the property." 159 Finally, the court explained:

It should be noted that these rules regarding the sufficiency of the description of an easement contained in a deed apply only to the initial conveyance. The fact that subsequent deeds may refer generally to exceptions and reservations of record or may make no such references does not diminish the validity of the original easement if it previously was described adequately. The reason for this rule is because a purchaser of real property is on notice as to those matters which are contained in the chain of title to the property. 160

6. Exceptions and Reservations

As the court explained in *Erwin v. Bethlehem Steel Corp.*, 161 "[t]hough technically there is a distinction between an exception and a reservation, they are often regarded as synonymous." 162 The technical distinction between these two terms was explained in *Malamphy v. Potomac Edison Co.*, 163 as follows:

157. *Id.* at 97 (quoting from deed to Fayette Square).
158. *Id.* at 98 (quoting from *Hall v. Hartley*, 119 S.E.2d 759, Syl. Pt. 2 (W. Va. 1961)).
159. *Id.*
160. *Id.* at 100.
162. *Id.* at 345.
An exception is language by which "* * * the grantor withdraws from the operation of the conveyance that which is in existence, and included under the terms of the grant." A reservation "is something arising out of the thing granted, not then in esse, or some new thing created or reserved, issuing or coming out of the thing granted, and not a part of the thing itself, nor of anything issuing out of another thing."\(^1\)

The court in Malomphy continued, "[n]otwithstanding that the language in a deed of conveyance may be phrased as a 'reservation,' such language may be regarded and treated as an exception if it is necessary in order to carry out the plain purposes of the parties to the instrument."\(^2\)

Once there has been a valid exception created, the exception is binding upon subsequent grantees in the chain of title even though deeds subsequent to the deed in which the exception was first made do not reference it.\(^3\) Finally, just as a deed must contain an adequate description of the property conveyed or an easement must be sufficiently described to be valid, "'[a]n exception in a deed conveying land must describe the thing excepted with legal certainty, so as to be ascertained, else the thing sought to be excepted will pass to the grantee.'"\(^4\)

7. Acknowledgement

While a proper acknowledgement is essential to make a deed a "recordable" instrument, a proper acknowledgement is not necessary for a deed to transfer title. As the court explained in McElwain v.

\(^1\) Id. at 758 (citations omitted). In Freeport Coal Co. v. Valley Point Mining Co., 90 S.E.2d 296, 299 (W. Va. 1955), the court quoted Lord Coke's distinction between an exception and reservation: "note a diversity between an exception (which is ever of part of the thing granted and of a thing in esse) and a reservation, which is always of a thing not in esse, but newly created, or reserved out of the land or tenement demised."

\(^2\) Malomphy, 83 S.E.2d at 758.

\(^3\) "A right or interest reserved in a conveyance will be effective as against all who deraign title through the grantee, although the reservation is not expressed in subsequent deeds." Malomphy, 83 S.E.2d at 759 (citation omitted). See also Highway Properties v. Dollar Sav. Bank, 431 S.E.2d 95 (W. Va. 1993).

Wells, while an acknowledgement under section 39-1-2 is a prerequisite for recording, it

adds nothing to the validity of a deed as between the parties and others who know about it. A defect in acknowledgement "does not detract from the force of the deed in making effective the conveyance intended to be made thereby." Even an unrecorded deed is good against a grantor and his heirs . . . .

In other words, the significance of the acknowledgement relates not to the transfer of title but rather to the protection of the title transferred by the deed. This aspect of law is well-summarized by the court in South Penn Oil Co. v. Blue Creek Development Co. Syllabus Point 2 reads: "A deed containing a certificate of acknowledgement unsigned by the notary, by whom the acknowledgement purports to have been taken, and not otherwise proven, is not a recordable paper." Syllabus Point 3 states:

The admission of a deed and an unsigned certificate of acknowledgement thereon to record, by the clerk of the county court, and transcribing it into the record book, does not constitute such deed a part of the record, so as to affect a subsequent purchaser of the land thereby conveyed with constructive notice thereof.

Since a valid acknowledgement is necessary for an instrument to be recordable, what constitutes a valid acknowledgement is important. The subject is primarily one of statutory regulation. The conditions under which the clerk of the county commission shall admit documents to record are set forth in Section 39-1-2. Form acknowledgements are provided in Sections 39-1-4, -4a, -5, -8, and -9, while Section 39-

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169. Id. at 483 (citation omitted).
170. 88 S.E. 1029 (W. Va. 1916).
171. Id. at 1029, Syl. Pt. 2.
172. Id. at 1029, Syl. Pt. 3; see also Ihrig v. Ihrig, 88 S.E. 1010 (W. Va. 1916).
173. W. VA. CODE § 39-1-2 (1982) (providing, in part: "The clerk of the county [commission] of any county in which any deed, contract, power of attorney, or other writing is to be, or may be, recorded, shall admit the same to record in his office, as to any person whose name is signed thereto, when it shall have been acknowledged by him, or proved by two witnesses as to him, before such clerk of the county [commission]").
1-3 defines who may take an acknowledgement. As to the necessity of an official seal, Section 39-1-10 provides: "If any acknowledgement be before a notary without this State, he shall certify the same under his official seal."\(^{174}\) In 1971, West Virginia adopted the Uniform Recognition of Acknowledgement Act,\(^{175}\) and in 1994, the curative statute as to defective acknowledgements found in Section 37-11-2 was amended to change the elapsed time period from ten years to five years.\(^{176}\) Finally, in 1984, West Virginia adopted the Uniform Notary Act.\(^{177}\) While the Uniform Acts and form certificates have significantly reduced the likelihood of defective acknowledgements, mistakes in acknowledgement still occur. Obviously, an acknowledgement would be "defective" if taken by a person who has not been appointed pursuant to the statutory provision\(^{178}\) or whose term has expired.\(^{179}\) An acknowledgement would also be "defective" if a notary without West Virginia failed to affix the official seal\(^{180}\) or all of those named in the instrument as parties and who sign the instrument are not named in the acknowledgment.

Finally, in West Virginia, it has long been recognized that a party to an instrument should not serve as a notary of that instrument. In 1883, the court in Tavenner v. Barrett,\(^{181}\) held that where a trustee in a deed of trust acknowledged the signatures of the grantors in the deed of trust, the acknowledgement was defective, and the recordation was, therefore, improper. "[T]he fact that it may be copied upon the book of records will not operate as constructive notice to [a] subsequent purchaser."\(^{182}\) The decision in Tavenner was followed in subsequent cases\(^{183}\) until 1992, when it was overruled by the court in Galloway

177. Chapter 29C of the West Virginia Code.
179. W. VA. CODE § 29C-2-102 (1993) ("Notaries may perform notarial acts in any part of this state for a term of ten years, unless sooner removed.").
180. See W. VA. CODE § 39-1-10 (1982).
181. 21 W. Va. 656 (1883).
182. Id. at 688.
v. Cinello. In Galloway, the attorney, who was the trustee in the deed of trust, notarized the deed conveying the property and the deed of trust securing the balance of the purchase price. When the purchaser of the property (the grantors in the deed of trust) filed for bankruptcy, the question before the bankruptcy court was whether the seller had a perfected security interest. The West Virginia Supreme Court of Appeals said the bankruptcy court ruled, based upon the Tavenner case, that the seller (secured party under the deed of trust) "had no security interest in the property." Actually the United States Bankruptcy Judge held "the Court is of the opinion that the defendants have an unperfected security interest in the subject property." Following an appeal of the bankruptcy court's decision to the United States District Court for the Northern District of West Virginia, the question was certified to the Supreme Court of Appeals of West Virginia.

It is submitted that upon careful reading, the Galloway decision misconstrued existing West Virginia law. For example, the court in Galloway stated: "The principal legal authority relied upon by the bankruptcy court was Tavenner v. Barrett, where we invalidated a deed of trust because its trustee had also notarized the instrument." As noted above, in Tavenner, the court's holding only invalidated the acknowledgement, not the instrument itself. The authorities which the Tavenner court adopted as their own, expressed this point as follows:

The want of a proper acknowledgement does not however invalidate the deed (of one sui juris) but only goes to the effect of the record. If not acknowledged or proved, its record is not provided for by law, and the fact that it may be copied upon the book of records will not operate as constructive notice to subsequent purchaser. The deed however is good as between the parties, (being sui juris) and should prevail against subsequent deeds to those who had actual notice of its existence.

185. Id. at 877.
186. Id.
188. Galloway, 423 S.E.2d at 877 (citation omitted).
189. 21 W. Va. at 688 (citations omitted).
As to other cases which followed Tavenner, the Galloway court said:

For example, in Central Trust Co. v. Cook, which involved another acknowledgement of a deed of trust by the trustee-notary, we merely cited Tavenner and concluded in Syllabus Point 2: “An acknowledgement of a trust deed by the grantors before the trustee as a notary public is invalid.”

Similarly, in Dixon v. Harper Coal & Coke Co., a mortgage company had its deed of trust declared invalid because the trustee acknowledged the instrument.190

The above quoted syllabus from Central Trust Co. correctly states that the acknowledgement is invalid, and the court in Dixon actually said: “Such an acknowledgement is invalid, and the recordation of the deed does not entitle the claim of the Bellaire Company to the priority accorded it by the court.”191 Therefore, under the existing law, the bankruptcy court’s decision correctly stated that the deed of trust in Galloway constituted an unperfected security interest. While the deed of trust was valid between the parties, the fact that the trustee served as notary only invalidated the acknowledgement, as opposed to the instrument, and without a proper acknowledgement, the instrument was not recordable. Since it was not “recordable,” it did not serve as constructive notice. Therefore, the bankruptcy trustee, under the provisions of Bankruptcy Code Section 544(a)192 had priority over the deed of trust which was not a recordable instrument because of the defective acknowledgement. The question before the bankruptcy court was not the validity of the deed of trust between the parties, but rather its priority under bankruptcy law. As noted above, the West Virginia Supreme Court of Appeals in Galloway said existing law invalidated the deed of trust when in fact existing law invalidated only the acknowledgement. In Galloway, after overruling Tavenner, the court explained the issue should be resolved by an analysis under the Uniform Notary

190. Galloway, 423 S.E.2d at 878 (citations omitted).
191. 130 S.E. at 666 (emphasis added).
192. 11 U.S.C. § 544(a) (1994) (providing: “The trustee [in bankruptcy] shall have, as of the commencement of the case . . . the rights and powers of . . . (3)a bona fide purchaser of real property . . . from the debtor . . . that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case . . . .”).
Act.\textsuperscript{193} Pursuant to the analysis, the court first determined that the notary had a disqualifying interest in the instrument because he was named as trustee in the deed of trust which he “acknowledged.” The court continued:

Where the notary has a disqualifying interest, the next question is the bearing this defect has on the validity of the instrument. We decline to follow the \textit{per se} rule of \textit{Tavenner} and its progeny, which automatically voids a deed of trust because the trustee has acted as its notary. Such a rule can be unduly harsh, as illustrated by the facts of this case . . . . If the primary purpose of the rule is to shield the parties from potential wrongdoing or fraud, then the focus of the inquiry should be shifted in this direction.\textsuperscript{194}

The court then held that a notary’s disqualifying interest can result in voiding an instrument, and

\[\text{[In deciding whether to void the instrument, a court should consider whether an improper benefit was obtained by the notary or any party to the instrument, as well as whether any harm flowed from the transaction. To the extent that \textit{Tavenner} and related cases state or imply the contrary, they are overruled.}\textsuperscript{195}\]

The court stated the burden of proof should be on the notary or any party supporting the instrument to uphold its validity.\textsuperscript{196} The court concluded \textit{Galloway} by stating that if the federal district court upheld the bankruptcy court’s decision, then the notary’s negligent act of taking the acknowledgement of the deed of trust, in which he was named as trustee, proximately caused Ms. Cinello to lose her status as a secured creditor.\textsuperscript{197}

The court in \textit{Galloway} should have focused on whether it was negligent for an attorney to take an acknowledgement of the deed of trust in which he was named as trustee because it made the deed of trust “unrecordable” and caused it to lose its priority under the bank-

\textsuperscript{193} Chapter 29C of the West Virginia Code.
\textsuperscript{194} \textit{Galloway}, 423 S.E.2d at 879.
\textsuperscript{195} \textit{Id.} at 880.
\textsuperscript{196} \textit{Id.}
\textsuperscript{197} \textit{Id.}
ruptcy law. Such a decision, would have been consistent with existing law, and reached the same result set forth above. However, the court opted to discuss Tavenner and its progeny apparently under a mistaken opinion as to their holdings, for example, stating that the instrument was invalid as opposed to the acknowledgement.\textsuperscript{198}

It is submitted that the issue the court needed to address in Galloway was whether a notary who is named as trustee in a deed of trust has a disqualifying interest under Section 29C-3-102. If the answer is “yes,” then the acknowledgement is defective and the instrument is not recordable and the bankruptcy trustee has priority under Section 544 of the Bankruptcy Code. In such case, the attorney could be held liable for negligence. If it is not a disqualifying interest, then the acknowledgement is valid and the recorded deed of trust is recognized as a perfected security interest. Hopefully, the court will revisit the issue and until then the title examiner should continue to assume, notwithstanding the language in Galloway,\textsuperscript{199} that Tavenner represents relevant law (that the instrument is valid between the parties but it is not recordable so as to provide constructive notice).

V. NOTICE — DO YOU KNOW WHAT YOU “KNOW”?

A. Actual Notice

Under the recording act, the “notice” that will deprive the purchaser of his or her protection may be of several types. Obviously “actual notice” constitutes “notice” under the recording act.\textsuperscript{200} Actual knowl-

\textsuperscript{198} This is succinctly illustrated by the following comment by the court: While this section [(West Virginia Code Section 29C-3-102)] states that a notary with a disqualifying interest “may not legally perform any notarial act in connection with the transaction,” it does not address the validity of a document acknowledged before a notary with a disqualifying interest. No provision in the Act deals with this question.

\textit{Id.} at 879.

\textsuperscript{199} “To the extent that Tavenner v. Barrett, supra, and related cases state or imply the contrary, they are overruled.” 423 S.E.2d at 880.

\textsuperscript{200} BLACK'S LAW DICTIONARY 1061 (6th ed. 1990) (Defining “actual notice” as follows:}
knowledge is "notice". For example, in *Gullett v. Burton*,201 the court held that the discovery of a deed during the course of a title examination constitutes actual notice on the part of a purchaser, so as to deny the purchaser the status of being a bona fide purchaser without notice under the recording act. Similarly, the knowledge of an agent for the purchaser is imputed to the principal. This concept of agency law is illustrated by Syllabus Point 1 of *George v. Stansbury*202 as follows:

Where a subsequent purchaser for value obtains a deed for land through an agent, and the agent, while negotiating therefore, is informed that the land has already been sold and conveyed to another, such notice to the agent is notice to his principal, and, though the subsequent purchaser's deed be first recorded, it will not take priority over the deed first made, and it may be cancelled and set aside by a court of equity in a proper proceeding for that purpose.203

B. Inquiry Notice

Related to "actual notice" (subjectively known by the individual), is "inquiry notice". One of the most significant discussions of inquiry notice in the state is found in *Pocahontas Tanning Co. v. St. Lawrence Boom & Manufacturing Co.*204 The law of that decision is succinctly stated in Syllabus Points 1 through 4 as follows:

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Actual notice has been defined as notice expressly and actually given, and brought home to the party directly. The term "actual notice", however, is generally given a wider meaning as embracing two classes, express and implied; the former includes all knowledge of a degree above that which depends upon collateral inference, or which imposes upon the party the further duty of inquiry; the latter imputes knowledge to the party because he is shown to be conscious of having the means of knowledge. In this sense, actual notice is such notice as is positively proved to have been given to a party directly and personally, or such as he is presumed to have received personally because the evidence within his knowledge was sufficient to put him upon inquiry.

201. 345 S.E.2d 323 (W. Va. 1986).
203. *Id.* at 598, Syl. Pt. 1.
204. 60 S.E. 890 (W. Va. 1908).
1. Whatever is sufficient to direct the attention of a purchaser to prior rights and equities of third parties, so as to put him on inquiry into ascertaining their nature, will operate as notice.

2. A party is not entitled to protection as a bona fide purchaser, without notice, unless he looks to every part of the title he is purchasing, neglecting no source of information respecting it which common prudence suggests.

3. That which fairly puts a party on inquiry is regarded as sufficient notice, if the means of knowledge are at hand; and a purchaser, having sufficient knowledge to put him on inquiry, or being informed of circumstances which ought to lead to such inquiry, is deemed to be sufficiently notified to deprive him of the character of an innocent purchaser.

4. If one has knowledge or information of facts sufficient to put a prudent man on inquiry, as to the existence of some right or title in conflict with that which he is about to purchase, he is bound to prosecute the same, and to ascertain the extent of such prior right; and, if he wholly neglects to make inquiry, or, having begun it, fails to prosecute it in reasonable manner, the law will charge him with knowledge of all facts that such inquiry would have afforded.\footnote{205}

\footnote{205. \textit{Id.} In addition to the language in the syllabi, the following excerpts from the decision are instructive:}

... A purchaser is bound to take notice of all recitals in the deed through which the title is derived, and is affected with notice of every matter or thing stated in the several conveyances constituting his chain of title. All such statements and recitals are sufficient to raise an inquiry, and the corresponding duty is thrust upon the purchaser to investigate and fully explore everything to which his attention is thereby directed.

60 S.E. at 893 (quoting \textit{Warvelle on Vendors} § 263). The court also quoted from an earlier decision, \textit{Cain v. Cox}, 23 W. Va. 594 (1884), as follows: “One is considered a purchaser for valuable consideration with notice of another’s equity whenever he has such notice of such facts as would put him on inquiry, for the law imputes to a person knowledge of facts, of which the exercise of common prudence and ordinary diligence must have apprised him.” 60 S.E. at 894. Finally, the court adopted the following rule:

... Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. Caveat emptor is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a bona fide purchaser. He is bound not only by \textit{actual}, but also by \textit{constructive} notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing on their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice.
The principles of inquiry notice articulated in *Pocahontas Tanning Co.* have been followed in a number of subsequent cases including the more recent ones of *Gullett v. Burton,* 206 *Eagle Gas Co. v. Doran & Associates, Inc.* 207 and *Highway Properties v. Dollar Savings Bank.* 208

C. Duty to Take a View

Related to “inquiry notice” is the duty to take a view. This well-established principle of law is expressed in *Bailey v. Banther* 209 as follows:

A purchaser of real estate, contracting with a claimant not in possession, is put on inquiry by the fact that another is in possession of the property; and if he takes a conveyance from such claimant, he is charged in favor of the person so in possession with all the information such inquiry would have disclosed if diligently pursued . . . .

The defense of innocent purchaser is not available as a defense against one in actual possession holding under a prior equitable title, from the same vendor. The law imputes to such subsequent purchaser knowledge of all the rights which an inquiry of the purchaser in possession or those holding under him might disclose.

The law imputes to a purchaser of real estate, or an interest in real estate, all information which would be conveyed to him by an actual view of the premises. 210

A case which is helpful in understanding the recording acts, including the duty to take a view, is *Weekly v. Hardesty.* 211 Hardesty owned 154 acres out of which she sold two parcels consisting of 18

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Id. at 894 (emphasis added) (quoting Burwell’s Adm’ts v. Fauber, 61 Va. (21 Gratt.) 446 (1871)).


208. 431 S.E.2d 95 (W. Va. 1993).


210. Id. at 181 (citation omitted). See also Gullett v. Burton, 345 S.E.2d 323 (W. Va. 1986); Mills v. McLanahan, 73 S.E. 927 (W. Va. 1912); Smith v. Owens, 59 S.E. 762 (W. Va. 1907).

211. 35 S.E. 880 (W. Va. 1900).
acres and 53 acres to McCown. McCown took possession of the premises under her deed of April, 1893, but did not record her deed. Weekly subsequently purchased these parcels from McCown. However, rather than McCown giving Weekly a deed for these parcels, Hardesty gave Weekly a deed for the property (dated March 8, 1894) and allegedly McCown’s unrecorded deed was destroyed. Weekly immediately took possession of the parcels, but did not record his deed until April 5, 1894. On March 9, 1894, Hardesty executed a deed of trust covering the entire 154 acres (including the parcels conveyed to Weekly the day before) to Brown. Brown’s deed of trust was recorded on March 12, 1894, before Weekly’s deed was put of record. On March 10, 1894, a judgment in favor of Armstrong was docketed, thereby, creating a lien on Hardesty’s property. Weekly challenged the deed of trust and judgment lien as clouds on his title.

Restated in chronological order, the facts are as follows: March 8, 1894, Hardesty conveys two parcels adverse of the 154-acre parcel to Weekly and Weekly enters into possession; March 9, 1894, Hardesty grants to Brown a deed of trust on all 154 acres; March 10, 1894, Armstrong’s judgment was docketed; March 12, 1894, Brown’s deed of trust was recorded; April 5, 1894, Weekley’s deed was recorded. The court, on appeal, upheld the judgment as a lien against the entire 154-acre tract and directed the sale of the residue still owned by Mrs. Hardesty to satisfy the Armstrong judgment. However, the court reversed the lower court’s holding that the deed of trust was valid as to the entire tract of 154 acres. The court explained that Weekly’s possession (the court said it did not matter whether Weekly or McCown, as Weekly’s “grantor,” was in actual possession):

212. *Id.* at 880.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. 35 S.E. at 880.
218. *Id.* at 880.
219. *Id.*
220. *Id.*
221. *Id.* at 882.
[I]s notice to the world of the right of the party in possession, because actual possession is just as much notice to purchasers as a recorded deed, as shown at large in Ellison v. Torpin, where the authorities are collected. If the Hardestys had made a deed to McCown, though it was not recorded, McCown’s possession was notice to Brown of rights under it. Though Weekly’s deed was not recorded, his possession under McCown was notice to Brown protecting Weekly’s rights derived from McCown. But such possession was not notice to the judgment creditor Armstrong, because he is a creditor, whose right is paramount to that of any purchaser, whether the creditor have notice of the purchase or not, unless the purchase is recorded.\textsuperscript{222}

The same concept was followed in \textit{Page v. Westfield Pharmacy, Inc.},\textsuperscript{223} where the court held that possession by a lessee was sufficient “notice” to charge a purchaser of the property subject to a lease with knowledge of the existence of an option to renew the lease. The court reasoned that:

"A person in possession of real estate is sufficient notice to a purchaser, contracting with a claimant of such real estate not in possession, to put him on inquiry, and if he takes a conveyance from such claimant, he will be charged in favor of the person so in possession with all the information such inquiry would have given him if diligently pursued.”

"The law not only imposes the duty upon a purchaser to make such investigation, but imputes to him notice of all facts which such inquiry would have disclosed, and of all the rights of those in possession, depriving him of the defense of an innocent purchaser."\textsuperscript{224}

An important “exception” to the general rule that possession places a purchaser on inquiry is found in \textit{Martin v. Thomas}.\textsuperscript{225} Thomas owned seven-tenths of 244 acres with the remaining three-tenths being owned by the heirs of Corbin.\textsuperscript{226} These heirs conveyed their interests to Brown, who, in turn, conveyed his interest to Martin.\textsuperscript{227} Martin brought suit to partition the acreage, which Thomas defended on the
basis that he owned all interest in the realty. Thomas claimed title to the Corbin heirs' three-tenths under an unrecorded contract entered into between himself and an agent of the heirs. While Thomas did not assert that Martin had actual notice of the executory contract, he did contend that he (Thomas) had entered into possession of the premises prior to the execution of the deed to Brown, Martin's grantor, and that such possession should have placed Brown and Martin upon notice of his rights under the contract. The court stated,

[t]his raises the question whether when one of several coparceners is in possession, and others not themselves in actual possession, and that one in possession makes an executory contract to purchase the shares of those others, such possession of that one is constructive notice to the world of his purchase, so as to warn all persons from purchasing the shares of those purchasers not in possession themselves.

The court cited to authority for the premise that in order for possession to effect notice to a purchaser, "the possession must be inconsistent with the apparent or record title of the grantor, else it will not be sufficient to put upon the purchaser the duty of making further inquiry; the reason being that in such case the possession is presumed to be under the grantor's title." The court found that as a holder of one-half of the interest in the premises on his own behalf, as well as an heir of Corbin, and a purchaser of an interest of another heir of Corbin, Thomas's possession was not inconsistent with the title of record or that of the remaining non-possessory heirs of Corbin. As a tenant in common (coparcener) with respect to the real estate, Thomas's possession was insufficient to place a subsequent bona fide purchaser of the remaining Corbin heirs' interests upon inquiry notice. The court's holding is reflected in Syllabus Points 3 and 4. Syllabus Point 3 states: "To make possession of land notice to subsequent purchasers, such possession must be inconsistent with the occupant's ap-

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228. Id.
229. Id.
230. Id.
231. 49 S.E. at 119.
232. Id. at 119-20 (quoting 23 THE AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 506 (2d ed. 1896)).
233. Id. at 120.
parent or record title, because such possession will be presumed to be under such title, rather than under another right.\textsuperscript{234} Syllabus Point 4 reads: "The mere sole possession of one coparcener or tenant in common is not notice to subsequent purchasers of shares of other coparceners or tenants in common of the right of such occupant to those shares under a prior unrecorded purchase of them by such occupant."\textsuperscript{235}

\textbf{D. Constructive Notice}

\textit{Black's Law Dictionary} defines constructive notice as:

Such notice as is implied or imputed by law, usually on the basis that the information is a part of a public record or file, as in the case of notice of documents which have been recorded in the appropriate registry of deeds or probate. Notice with which a person is charged by reason of the notorious nature of the thing to be noticed, as contrasted with actual notice of such thing. That which the law regards as sufficient to give notice and is regarded as a substitute for actual notice.\textsuperscript{236}

In essence, "constructive notice" is that which the law treats one as knowing, even though, as a subjective fact, one does not. Again, the case of \textit{Pocahontas Tanning Co. v. St. Lawrence Boom Manufacturing Co.}\textsuperscript{237} serves as a benchmark. Syllabus Point 2, quoted above, is expanded on by the court in its decision when it quotes an earlier Virginia case\textsuperscript{238} as follows:

Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. Caveat emptor is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a bona fide purchaser. He is bound not only by actual, but also by constructive, notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing on their face, or to the knowledge of which anything there

\begin{footnotesize}
\begin{itemize}
\item 234. Id. at 118, Syl. Pt. 3.
\item 235. Id. at 118, Syl. Pt. 4.
\item 237. 60 S.E. 890 (W. Va. 1908).
\item 238. Burwell's Adm'rs v. Fauber, 61 Va. (21 Gratt.) 446 (1871).
\end{itemize}
\end{footnotesize}
appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice.\textsuperscript{239}

The law expressed in \textit{Pocahontas Tanning Co.} has been followed in numerous cases, including the recent decision in \textit{Highway Properties v. Dollar Savings Bank},\textsuperscript{240} and is often expressed as a purchaser is charged with notice of what appears in his or her chain of title.

Once a bona fide purchaser (BFP) acquires good title to property, the BFP can transfer good title to a subsequent grantee even though the subsequent grantee has notice, actual or constructive, of the prior right.

For example, assume that O conveys to A and A does not record; then O conveys to B, who is a bona fide purchaser for value without notice of O’s conveyance to A. In a notice jurisdiction, B prevails over A. In order to “protect” B, B is able to convey good title to C, a disinterested third party “even though C knows” of O’s conveyance to A. As the court in \textit{King v. Porter}\textsuperscript{241} explained: “A purchaser with notice from a purchaser without notice is protected in his title. If it were otherwise an innocent purchaser might be deprived of the benefit of disposing of his estate.”\textsuperscript{242}

VI. THE CHAIN OF TITLE — ARE YOU MISSING ANY LINKS?

Given the fact that a purchaser is deemed to have constructive notice of that which appears in his or her chain of title, it becomes important to define “chain of title;” to clarify at what moment in time an instrument is “recorded;” and what constitutes a recordable instrument. As discussed above, West Virginia Code Section 39-1-2 defines the conditions under which the county clerk shall admit deeds, contracts, and other instruments to record.\textsuperscript{243} To serve as constructive no-

\begin{itemize}
  \item \textsuperscript{239} \textit{Pocahontas Tanning Co.}, 60 S.E. at 894 (quoting \textit{Burwell’s Adm’rs}).
  \item \textsuperscript{240} 431 S.E. 95 (W. Va. 1993). \textit{See also James v. Lawson}, 136 S.E. 851 (W. Va. 1927); Smith v. Owens, 59 S.E. 762 (W. Va. 1907).
  \item \textsuperscript{241} 71 S.E. 202 (W. Va. 1911).
  \item \textsuperscript{242} \textit{Id.} at 204. \textit{See also Colson, supra note 42, at 37; PATRON, supra note 41, § 15.}
  \item \textsuperscript{243} Note that the second paragraph of the statute specifically prohibits the clerk from
\end{itemize}
practice the instrument must be "recordable." As the court in *South Penn Oil Co. V. Blue Creek Development Co.*,\(^{244}\) said:

> It is established law that the copying into the records of an unrecordable deed is not such a recordation thereof as will affect a subsequent bona fide purchaser of the land thereby conveyed with notice. The record does not operate as a constructive notice, unless the instrument is duly executed, and properly acknowledged or proved, so as to entitle it to be recorded.\(^{245}\)

If an instrument is recordable, it is recorded and therefore becomes constructive notice when it is given to the clerk for recordation. This principal is set forth in *Bank of Marlinton v. McLaughlin*\(^{246}\) in Syllabus Point 5 as follows: "A recordable deed or deed of trust lodged in the county clerk's office for recordation is constructive notice under Code, 40-1-8, notwithstanding the misprision of the clerk in failing to spread it upon the records of his office."\(^{247}\) Furthermore, the destruction of the record after it is recorded does not alter the fact that it constitutes constructive notice. In Syllabus Point 3 of *Wethered v. Conrad*,\(^{248}\) the court stated: "A grantee, who deposits his deed with the clerk of the county court for recordation, is thereby protected under the recording act. Even though the record may be thereafter destroyed, it does not cease to be notice to those intended to be thereby affected."\(^{249}\)

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admitting to record any instrument "that secures the payment of any debt, unless such . . . instrument sets forth therein who, at the time of the execution and delivery thereof, is the beneficial owner of the debt secured thereby, and where he resides . . . ." W. VA. CODE § 39-1-2 (1982). However, in Belknap v. Shock, 24 S.E.2d 457 (W. Va. 1943), the court held these requirements not applicable to acknowledgements pursuant to Section 39-1-3.

244. 88 S.E. 1029 (W. Va. 1916).

245. *Id.* at 1030 (citations omitted). *See also* Cox v. Wayt, 26 W. Va. 807 (1885); Clarksburg Casket Co. v. Valley Undertaking Co., 94 S.E. 549 (W. Va. 1917); Ihrig v. Ihrig, 88 S.E. 1010 (W. Va. 1916).

246. 17 S.E.2d 213 (W. Va. 1941).

247. *Id.* at 213, Syl. Pt. 5.

248. 80 S.E. 953 (W. Va. 1914).

249. *Id.* at 953.
A. Babble for the Ivory Tower or Sound and Prudent Advice?

Black’s Law Dictionary defines a chain of title as a “[r]ecord of successive conveyances, or other forms of alienation, affecting a particular parcel of land, arranged consecutively, from the government or original source of title down to the present holder.”250 It is generally accepted by “title lawyers” that since the law imputes to them constructive notice of recorded conveyances by an “owner” between the time an individual acquired title to property and the out-conveyance which completes the link in the chain of title, they have a duty to examine the records for “out-conveyances” between those two dates. In other words, if A acquired title to Blackacre in 1970 and sold Blackacre in 1980, the title examiner needs to determine what A did as “owner” of Blackacre which could affect title thereto. Obviously, the title examiner must be concerned with “conveyances” (deeds conveying all or a portion of Blackacre, easements across Blackacre, security interests given in Blackacre, and other similar deeds) which are contained in the grantor index under A’s name between 1970 and 1980. However, what about a deed made by A for Blackacre in 1960, before she or he acquired title to Blackacre. The question is important because, as between the parties to the deed, West Virginia recognizes the concept of estoppel by deed of warranty deeds. The concept of estoppel by deed is stated in Syllabus Point 5 of Johnston v. Terry251 as follows:

One who conveys real estate by a deed containing a covenant warranting generally the title to the property conveyed, and who at the date of such deed has no title, or a defective title thereto, is estopped from thereafter asserting, as against his grantee, or his grantee’s successor in title, any title to such lands which he, the grantor, may acquire subsequent to the date of said deed.252

251. 36 S.E.2d 489 (W. Va. 1945).
252. Id. at 490, Syll. Pt. 5. It should be noted that estoppel by deed applies only to warranty deeds. In Egnor v. Roberts, 191 S.E. 532 (W. Va. 1937), the court made several observations relevant to this discussion. The “deed” in Egnor contained no warranties, and as to a deed without warranties, the court said:
A grant of land is a mere transfer of such title or right thereto as the grantor, at the time of the grant, may hold or have, absolutely or contingently.
While West Virginia recognizes the concept of estoppel by deed, by statute (West Virginia Code Section 40-1-15), its application is, in essence, limited to the parties to the warranty deed and the grantee’s successor in title. That is, estoppel by deed does not apply against “purchasers” from the grantor. Section 40-1-15 reads:

A purchaser shall not, under this article, or articles one [§ 38-1-1 et seq.], two [§ 38-2-1 et seq.] and eleven [§ 38-11-1 et seq.], chapter thirty-eight of this Code, be affected by the record of a deed or contract made by a person under whom his title is not derived; nor by the record of a deed or contract made by any person under whom the title of such purchaser is derived, if it was made by such person, and was recorded, before he acquired the legal title.253

The statute, therefore, resolves two separate questions of importance to title attorneys. First, it provides that a purchaser is not on constructive notice of recorded instruments in which the “grantor” is a “stranger” to the chain of title. For example, if O is the owner of Blackacre, and X, who is a “stranger” to the chain of title of Blackacre, “grants” Blackacre to Z, and Z “records” the deed, a purchaser from O “shall not . . . be affected by [that] deed . . . .”254

Certainly, a grant does not contain an assertion of title in the grantor, or imply a covenant with the grantee, to warrant the land. . . . A conveyance without warranty by mere estoppel cuts off the assertion of any title or claim which the grantor had at the time of the conveyance, but it will not operate to pass to the grantee any title afterwards acquired by the grantor.

Egnot, 191 S.E. at 534 (citations omitted).
253. W. Va. CODE § 40-1-15 (1982). In one of the early decisions applying this statute, Hoult v. Donahue, 21 W. Va. 294 (1883), the court explained the statute as follows: This provision of the code was first introduced in the revision of 1849, and in a note by the revisors it appears that the first part of the section was adopted to carry into effect the views of Chancellor Kent in Murray v. Ballou, 1 Johns. Ch. 574, that a purchaser is not required to take notice of a record by a person under whom his title is not derived. And the second part was framed to settle the doctrine of constructive notice affirmed by a divided court in Doswell v. Buchanan, 3 Leigh 365.

Hoult, 21 W. Va. at 299.
254. Hoult, 21 W. Va. at 299.
Second, and as noted above, the statute also limits the application of estoppel by deed to the parties to the deed, by restricting its application to purchasers from the grantor. For example, O is the owner of Blackacre. While O is the owner, A executes and delivers to B a warranty deed to Blackacre which B records. Subsequent to the A to B deed, O conveys Blackacre to A. Under estoppel by deed, the title A acquired inures to the benefit of B under the A to B warranty deed. A title examiner would be able to find the A to B deed indexed under A’s name in a grantor index if the title examiner looked under A’s name in the grantor index for the period of time preceding the date on which A acquired title from O. However, because of the provisions of Section 40-1-15, a purchaser “shall not . . . be affected . . . by the record of a deed or contract made by any person under whom the title of such purchaser is derived, if it was made by such person, and was recorded, before he acquired the legal title.”255 In other words, the purchaser is not held to have “constructive notice” of such a deed because the effect of Section 40-1-15 is to make the A to B deed outside of the chain of title. Therefore, with the “protection” afforded by Section 40-1-15, the title examiner can begin checking or “adversing” each owner in the grantor index beginning on the date that person became the owner of legal title to the property.256

Obviously, the time period from when the individual acquired legal title to the time that person conveyed title to the property is within the “chain of title.” The next question which arises is does a title examiner have any duty to examine the records for the period of time after the recording of a deed out of a grantor which apparently provides a link in the chain of title. To illustrate, O, the owner, conveys Blackacre, which is vacant property, to A; A does not record. One year later, O conveys Blackacre to B who has knowledge of the O to A conveyance; B records. One year later, A records. In a notice jurisdiction, such as West Virginia, as between A and B, A’s title prevails over B’s because B had notice of the O to A conveyance and B’s recording before A’s recording gives no validity to B’s deed. However, a title examiner

256. It is not clear how the statute would apply to a situation when an individual owned the property twice.
looking under O’s name in a grantor index, would find O’s conveyance to B first. If the title examiner stopped looking under O’s name at that point in time, she or he would not discover the later recorded O to A deed, which in a notice jurisdiction provides superior title to Blackacre (since B had notice of the O to A deed). Is the recorded deed from O to A constructive notice to a person who is negotiating with B for the purchase of Blackacre? If the answer is yes, then B’s attorney must search in O’s name in the grantor index past the recorded conveyance of O to B to find the O to A deed. This very question was raised by Dean Clyde L. Colson in a 1954 law review article.257

Dean Colson began his article with the following observation:

There is a serious question whether the limited search customarily made by title examiners in West Virginia is a safe one, both with respect to the interests of the prospective purchaser, and also with respect to the possible liability of the examiner for having negligently failed to discover recorded instruments which are or may be a cloud on title. Everyone is agreed that there must be a search of the records from the date each grantor in the chain of title acquired his title down to the date when it appears that by an instrument of record he has transferred the title. The difference of opinion centers around the question whether it is necessary to carry on the search in the name of a grantor after he appears to have conveyed record title. In actual practice no such additional search is made and the lawyers of the state seem to be of almost unanimous opinion that no such search is necessary. An attempt will be made in this article to show that the customary practice is not safe, at least so long as the question remains undecided in West Virginia. In this connection we shall so far as possible avoid discussions of what the law should be. We are more interested in trying to determine what the law is under our statutes and decisions, and what risks a title examiner may be taking under the present West Virginia practice, when he ignores certain questions which so far as we have been able to discover are still unanswered in this state.258

In the following pages, Dean Colson “reasoned” through examples to establish that in a pure notice jurisdiction the first recorded deed does not always prevail over the later recorded deed. After noting that it is clear from the language in Cross v. Riddell259 that West Virginia

257. Colson, supra note 42. In Dean Colson’s article, he provides factual scenarios which more fully illustrate and discuss the simplified example set forth above.
258. Id. at 20.
259. 177 S.E. 870 (W. Va. 1934). Dean Colson stated: “[a]s between two successive
is a pure notice jurisdiction, Dean Colson stated that a construction of statute which gives priority to the grantee of the first recorded deed over the second recorded would turn our statute into a race-notice statute.\textsuperscript{260} In essence, Dean Colson noted that the holdings of our court have established that West Virginia recording laws are “pure notice” acts; that the application of “notice” principles to factual situations establishes that the first recorded deed does not necessarily take priority over a later recorded deed; and since the court has not specifically addressed the question of whether a purchaser from the grantee of a first-record deed is held to have constructive notice of the later-recorded deed, the lawyer needs to search under each owner’s name in the grantors’ index to the present.

Dean Colson concluded his article by stating:

\[\text{[I]}\text{t seems too clear for argument that so long as it remains an open question whether such a recorded deed gives constructive notice, any lawyer who fails to bring down to date the search under the name of each grantor, which is the only way C’s [(in the above example A’s)] deed can be discovered, is taking a chance which in fairness to his client he ought not to take.}\]

That consideration alone should settle the matter, but the lawyer should also weigh the possibility that he may come under personal liability to his client for failure to make a reasonably careful and diligent search of the record. It is too clear for argument that a diligent search would bring C’s [(A’s)] deed to light. It is no answer to say that this situation will arise so infrequently as to justify the lawyer in taking this calculated risk. Though willing to assume the personal risk involved, loyalty to the interests of his client should preclude any such gamble. Unless and until our court or the legislature makes it clear that there is no necessity for making a broader search than is ordinarily made by the practicing lawyer, Patton’s advice, when he was discussing the first problem posed above, is eminently sound:

\[\ldots \text{is a purchaser from C on notice of any rights B may have as against C? Though some courts hold that he is thus placed upon inquiry and charged with notice of any facts which the inquiry would reveal, other courts hold that a purchaser is under no obligation to search the records}\]

\textsuperscript{260} Colson, supra note 42, at 24.

Colson, supra note 42, at 38.
for conveyances from any particular grantor recorded subsequent to that from which the purchaser's vendor derains title; that any such subsequently recorded conveyance is outside the chain of title and does not afford constructive notice. In states having no decision on the subject, the only safe course for an examiner is to treat as a cloud on the title any conflicting deed dated prior to, but recorded after, a deed from the same grantor appearing in the vendor's chain of title.  

It has been more than forty years since Dean Colson's article appeared in the *West Virginia Law Review*. A new generation of lawyers has entered practice; thousands of titles have been examined and title opinions rendered. 

*Patton on Titles* is now in its second edition, and the case necessary to decide the issue raised by Dean Colson has still not been decided in West Virginia. However, the logical application of a notice recording act to such facts remains uncontested, the soundness of Dean Colson's reasoning remains unchallenged, and the wisdom of his advice remains unchanged.


262. While the particular question has not been answered in West Virginia, there is some precedent holding a grantee has constructive notice of the subsequent recording of a prior deed. In Alexander v. Andrews, 64 S.E.2d 487 (W. Va. 1951), the court held that the "subsequent purchaser" (i.e., the grantor's son) who recorded first, had constructive notice of the "prior deed" (i.e., the deed to his sister, which was earlier in time but not recorded when he "purchased" his father's interest in the property) as of the date it (his sister's deed) was recorded. In other words, the subsequent "purchaser" without notice who recorded first, but who had not paid the entire purchase price was held to have constructive notice of the recording of the first in time deed so as to deprive the "subsequent purchaser" of the status of being a "full" purchaser.

263. See *Patton*, supra note 41, § 71, at 235-37 (Reading as follows:
§71 Effect as Notice of the Subsequent Record of an Earlier Deed by the Vendor's Grantor

A further phase of the question is as to whether the record of an earlier deed from a common grantor after the record of a deed upon which a vendor's title is based places a purchaser upon inquiry as to whether the later grantee purchased with knowledge of the earlier conveyance. To illustrate: A deeds to B, who does not record the deed; later A deeds to C who does record his deed; thereafter the deed of A to B is recorded; is a purchaser from C on notice of any rights B may have as against C? Though some courts hold that he is thus placed upon inquiry and charged with notice of any facts which the inquiry would reveal, other courts hold that a purchaser is under no obligation to
B. Deeds From Common Grantors — More Babble or Good Advice?

Assume that O is the owner of Blackacre, a tract containing 100 acres, and O sells 20 acres of Blackacre to A and in the deed to A makes a covenant with A which restricts the use of the rest of O’s remaining 80 Acres of Blackacre (or grants an easement over the remaining 80 acres). Assume O sells another 20 acres of Blackacre to B and also makes a covenant with B which restricts the use of the remaining 60 acres of Blackacre; similar conveyances are made to C and D. O then sells the remaining 20 acres of Blackacre to E and the deed to E makes no mention of the restriction (or easement) encumbering Blackacre created by the covenants in the conveyances to A, B, C and D. Obviously, E must be concerned with the previous out-conveyances from O as they relate to description. E must assure there are no overlaps in description with the parcel conveyed to E, and that the sum of the parts does not exceed the whole. Is E also charged with constructive notice of the contents of the deeds out from O so as to be bound by the restrictive covenants (or easements) therein; thus, affecting the use of Blackacre? This question is sometimes phrased as whether the deeds out from a common grantor are within E’s chain of title?

While there are at least two West Virginia cases which have apparently raised this issue, there does not appear to be a definitive answer to the question. The first case to apparently delve into the issue is Cole v. Seamonds.264 A simplified statement of the facts is that Browning, the owner of the surface, conveyed to Cole and Crane 156 acres less 2 acres which Browning reserved.265 Cole and Crane were the owners of the minerals underlying the 156 acres and in exchange for the 154 acres of surface, Cole and Crane released the two acres

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265. Id. at 747.
reserved by Browning from the operation of any rights for mining purposes. In consideration for the release of mining rights, Browning covenanted to use the surface of the 2 acres for residence and agricultural purposes only,

"and covenant and agree for themselves, their executors, administrators, and assigns, not to conduct or suffer to be conducted on said 2 acres of surface any mercantile business, and that no intoxicating drinks of any character are to be sold or kept thereon; and this covenant shall run with said 2 acres of surface land."267

Approximately two years later, the Brownings conveyed one-sixth of an acre of the two acres to Seamonds, their daughter, without any reservation, exception, or limitation except that she should not sell and convey the parcel without their consent.268 Seamonds contended that she did not have actual knowledge of the restriction contained in the deed from Browning to Cole and Crane (the deed in which Browning conveyed 154 of the 156 acres, reserving the 2 acres of the surface).269 Subsequently, Seamonds rented a building on the one-sixth acre to M.A. Hindy who operated a general mercantile store and another building to Nick Gemerous, who used it to sell hot dogs and soft drinks.270 Cole and Crane sought an injunction alleging these activities to be in violation of the restrictions contained in the deed from Browning to them.271 For reasons that can perhaps be best summarized as involving the relationship between coal companies and their employees in the earlier part of this century, the court held the covenant to be a personal covenant between the original grantor and grantee. For present purposes, Syllabus Point 4 is relevant and states:

Actual notice of such restrictive covenants is not essential. Such constructive notice as is afforded by a duly recorded instrument in the vendee's chain of title is sufficient.272

266. Id.
267. Id. at 747-48 (quoting from subject deed).
268. Id. at 748.
269. Id.
270. Id.
271. Id.
272. Id. at 747, Syl. Pt. 4.
Syllabus Point 4 is supported by the following language within the decision: "And the authorities are uniform in holding that actual notice of the restriction is not essential, but that constructive notice is sufficient."\textsuperscript{273} In addition, the court noted that while such equitable servitudes are most frequently imposed on the land conveyed to the grantee, "the principle is the same where the grantor covenants to restrict the use of land retained by him for the benefit of the land conveyed to his grantee."\textsuperscript{274} Thus, the court in \textit{Cole} recognized that the retained land can be subject to restrictions placed upon its use by conveyances to a grantee and that "actual notice" of the restriction is not necessary. Unfortunately, the court did not define "chain of title" as used in Syllabus Point 4. However, the discussion in \textit{Cole} seems to suggest that a subsequent grantee would have constructive notice of the deed out from the common grantor.\textsuperscript{275}

The second case which could possibly shed some light on the issue is \textit{McIntosh v. Vail}\textsuperscript{276} Again, the case is disposed of by holding that the covenant involved was a personal covenant. The provision in question involved production of oil and gas and the payment of "one full sixteenth (1/16) of the oil and gas produced and marketed from said lands."\textsuperscript{277} However, within the decision, the court stated, "We have heretofore noted that the covenant burdened the estate reserved, and it is well to note also that this court, adhering to the English or minority rule in this country, is committed to the doctrine that, except as between landlord and tenant, no burden can be imposed on land by a grantor's covenant so as to bind a subsequent grantee of the covenantor."\textsuperscript{278} The case cited by the court for this proposition\textsuperscript{279} had also been resolved on the basis that the covenant was personal as

\textsuperscript{273} \textit{Id.} at 750.
\textsuperscript{274} \textit{Id.}
\textsuperscript{275} "O" conveyed 156 acres of surface to Browning; Browning conveyed 154 acres of surface to Cole and Crane and in this deed Browning covenanted as to the use of the remaining 2 acres (the deed out from the common grantor); Browning conveys 1/6 of an acre of the remaining two acres to Seamond, the subsequent grantee. 104 S.E. at 748.
\textsuperscript{276} 28 S.E.2d 607 (W. Va. 1943).
\textsuperscript{277} \textit{Id.} at 608.
\textsuperscript{278} \textit{Id.} at 613.
opposed to a covenant real running with the land. In addition, the
court in McIntosh did not cite or discuss its earlier decision in Cole
which was inconsistent with its discussions in the case it was deciding.
Therefore, the dictum in West Virginia provides no meaningful guid-
ance for title lawyers.

On a national level, there exists a split of authority on this issue. Cases from
the various states have been collected and discussed in an
American Law Reports (A.L.R.) annotation in which the author of the
annotation states:

The weight of authority is to the effect that if a deed or a contract
for the conveyance of one parcel of land, with a covenant or easement af-
fecting another parcel of land owned by the same grantor, is duly record-
ed, the record is constructive notice to a subsequent purchaser of the latter
parcel. The rule is based generally upon the principle that a grantee is
chargeable with notice of everything affecting his title which could be
discovered by an examination of the records of the deeds or other
muniments of title of his grantor.280

As noted above, the dictum in the Cole decision appears consistent
with the majority position. However, in McIntosh, the court in dictum
said it followed the minority position which is discussed in the A.L.R.
annotation as follows: “Minority rule. There is authority, however, for
the view that the record of a deed is not constructive notice of a cove-
nant or restriction therein, to a subsequent purchaser from the same
grantor of another parcel of land which is affected by the covenant or
restriction.”281

Given the uncertainty as to the law on this issue, the advice of
Dean Colson regarding the duty to check each grantor forward to the
present would also seem applicable here — that is, until this issue is
resolved in West Virginia, the prudent course for title attorneys in
West Virginia is to assume that purchasers will be held to have con-

280. Annotation, Record of deed or contract for conveyance of one parcel with cove-
nant or easement affecting another parcel owned by grantor as constructive notice to subse-
quent purchaser or encumbrancer of latter parcel, 16 A.L.R. 1013 (1922). See also 20 AM.
281. 16 A.L.R. at 1015.
constructive notice of such conveyances. Assuming the purchaser is deemed to have constructive notice of such out-conveyances, the title examiner would need to check each out-conveyance from common grantors for covenants, easements, or any other language which could affect the retained land of the grantor. Since, in many titles the out conveyance from common grantors must be checked for description purposes, the additional "work" is not as great as it may first appear.

VII. DOES TIME CURE ALL LIENS AGAINST TITLE?

A. Deeds of Trust and Mortgages

After the chain of title has been established, the title examiner must check individuals or entities which owned the property for conveyances which may affect the quality or quantity of title. The period of time which needs to be checked for each owner has been discussed above. Also keep in mind that while deeds of trust or mortgages are indexed and spread on the record in most counties in indices and books separate and apart from "deeds," under the recording acts, the secured parties under deeds of trust or mortgages are considered "purchasers" and not "creditors." It is also important to keep in mind that the statute of limitation on vendor's liens, deeds of trust, and mortgages which was first adopted in 1921, has been held not to apply ret-

282. Colson, supra note 42, at 38.
283. W. VA. CODE § 55-2-5 (1994) (Providing:
No lien reserved on the face of any conveyance of real estate, or lien created by any trust deed or mortgage on real estate, shall be valid or binding as a lien on such real estate, after the expiration of twenty years from the date on which the debt or obligation secured thereby becomes due, unless suit to enforce the same shall have been instituted prior to the expiration of such period. If any debt or obligation incurred or maturing subsequent to the debt or obligation secured by a lien reserved on the face of any conveyance of real estate, or lien created by any trust deed or mortgage on real estate, be also secured, in whole or in part, by the same lien, such lien shall continue to be valid and binding as a lien on such real estate for a period of twenty years from the date on which such subsequent debt or obligation secured by such lien becomes due, but not thereafter unless suit to enforce the same shall have been instituted prior to the expiration of such period. No extension of the original time of payment of such debt or obligation, or renewal of any note or other evidence of indebtedness secured by such lien, or provision for such extension or renewal in such conveyance, trust deed or mort-
roactively in spite of the statute’s express language. In *Le Sage v. Switzer*, the court was asked to apply this twenty-year statute of limitation to a deed of trust which had been given in 1909. In refusing to bar a sale under the deed of trust, the court explained the parties had agreed to the proposal to borrow the money under the law as it existed in 1909 and the creditor was entitled to have the contract enforced according to that law. The court stated, “A subsequent law, such as that of 1921, limiting the life of a deed of trust, would patently change (impair) the terms of the deed of trust herein, and therefore would violate the Constitution [of the United States].” Perhaps the most helpful discussion of the statute is found in *McClintic v. Dunbar Land Co.* *McClintic* involved a vendor’s lien reserved in a conveyance dated November 26, 1919, to pay six notes payable in one, two, three, four and five years. In *McClintic*, the court noted that in contrast to a procedural ban typical of statute of limitations, Section 55-2-5

went farther than merely to create a procedural limitation. Each made the lien invalid. That must mean invalid for all purposes. An ordinary statute of limitation must be pleaded by the party against whom the claim is

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gage, shall operate to extend the limitation of twenty years hereinbefore provided: Provided, that the lien reserved or created as aforesaid shall continue to be valid and be enforceable, if, prior to the expiration of the original period of limitations, the vendor or the mortgagee or the trustee or beneficiary, or their successors or assigns, shall execute and cause to be recorded in the office where the lien instrument was recorded an affidavit setting forth the unpaid balance of the debt and interest secured by such lien instrument. Upon the filing of such affidavit the lien of the lien instrument shall continue and be enforceable for an additional period of twenty years from the date of the filing of such affidavit unless sooner released, and the clerk of the court shall cause the extension affidavit to be recorded and indexed in the same manner as the lien instrument and shall note the fact of filing such extension affidavit on the margin of the page where such lien instrument is recorded. Such affidavit shall recite the book and page of recordation of the deed, deed of trust or mortgage. The provisions of this section shall apply, with like effect, to every such lien now existing, as well as to every such lien hereafter reserved or created.

284. 182 S.E. 797 (W. Va. 1935).
285. Id. at 800.
286. Id. at 798-99.
287. 33 S.E.2d 593 (W. Va. 1945).
288. Id. at 593.
urged, otherwise it will be ignored. But a lien expressly made invalid by the Legislature has no force or effect whatever, and can never be made the basis of a decree or judgment. Under ordinary statutes of limitations, suits or actions on notes representing the money secured by a lien are at the option of the maker of the note barred at the end of the period named, leaving only the lien reserved on the face of the deed to secure the notes. When that lien is declared invalid, nothing of value is left. The original right is absolutely destroyed. For this reason, we think the Act of 1921, and the subsequent Code provision, amounted to more than a procedural statute of limitation, and in so far as they operate retroactively are unconstitutional and void.\textsuperscript{289}

It is important to note that Section 55-2-5 applies to the lien created by the security instrument (vendor’s liens,\textsuperscript{290} trust deeds, or mortgages on real estate). The obligation to pay is based on the note, the personal obligation of the maker; the security interest is to provide the land as the collateral to assure the payment of the note. The note, as a separate legal instrument, has a distinct and separate statute of limitations from that found in Section 55-2-5. If a note meets the requirements of a negotiable instrument,\textsuperscript{291} the statute of limitation is six years.\textsuperscript{292} If the “note” fails to meet the requirements of a negotiable instrument and is, therefore, considered to be a “contract” between the parties, the 10 year statute of limitation set forth in Section 55-2-6 would be applicable. Therefore, it is possible to have a case in which the statute of

\textsuperscript{289} Id. at 597. The holding is succinctly expressed in the case’s sole Syllabus Point as follows:

Chapter 65, Acts of the Legislature, 1921, as amended by Code, 55-2-5, is unconstitutional and void, so far as the same operates retroactively. The retroactive provision of the statute as it now exists operates to impair the obligations of contracts in violation of Section 10 of Article I of the Constitution of the United States, and Section 4 of Article III of the Constitution of this State.

\textit{Id.} at 593 (syllabus of the court). \textit{See also} Kuhn v. Shreeve, 89 S.E.2d 685 (W. Va. 1955).

\textsuperscript{290} See W. VA. CODE § 38-1-1 (1985) (Providing:

If any person convey real estate, or any interest, legal or equitable, therein, and the purchase money or any part thereof remain unpaid at the time of the conveyance, he shall not thereby have a lien for such unpaid purchase money unless such lien is expressly reserved on the face of the conveyance. A vendor’s lien may be enforced by a suit in equity.

\textsuperscript{291} \textit{See generally} W. VA. CODE §§ 46-3-101 to -805 (amended and reenacted in 1993).

\textsuperscript{292} W. VA. CODE § 46-3-118 (1993).
limitation has expired on the note but has not "run" against the security instrument. In Morgan v. Farmington Coal & Coke Co., the court discussed whether the fact that the statute of limitation had expired on the "notes" would bar a suit to enforce the vendor's lien which secured the notes. In Morgan, the notes had been assigned by the original payee to the plaintiff. In holding that the suit on the vendor's lien could proceed, the court said: "It is also well settled that the right to enforce the lien thus assigned exists after the remedy at law for the collection of the debt has been lost by limitation." The court further rejected the defendant's argument that any equities which could have been asserted in a suit on the notes could be asserted against the lien. Defendants argument was based on a South Carolina decision. In rejecting the reasoning of the South Carolina court, the West Virginia court said:

We cannot see that the remedy on the lien would be changed in character because the note itself could not be enforced. The loss of the remedy on the note would not change the character of the debt or lien which secured it. The theory by which the holder of the note after it is barred by limitation can proceed to enforce the lien securing it is that the creditor has two remedies and we cannot see that the loss of one remedy would change the other and make it less effective.

In the event there is more than one deed of trust (mortgage) or lien on the property and a foreclosure occurs, it is important to remember that the purchaser in the "foreclosure" obtains a title that is free and clear of all mortgages or other liens junior or subordinate to the mortgage being foreclosed. The corollary of this principle is that the purchaser at a foreclosure of a junior mortgage takes subject to the rights of more senior mortgages or liens. In other words, a foreclosure sale puts the purchaser at that sale in the shoes of the "mortgagor" as of the time the mortgage being foreclosed was executed. The fact

293. 124 S.E. 591 (W. Va. 1924).
294. Id. at 597.
295. Id.
297. Morgan, 124 S.E. at 597. Since a deficiency judgment is brought on the note, there could not be a deficiency judgment if proceeds of the sale under the security instrument do not satisfy the "debt."
298. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 1.1, at
that a purchaser at a foreclosure under a second priority deed of trust steps into the shoes of the "mortgagor" at the time the deed of trust was executed, is illustrated by the recent decision in \textit{Young v. Sodaro}.\footnote{299} In \textit{Young}, the purchaser of property foreclosed under a second deed of trust sought to pay off the note of the first deed of trust holder.\footnote{300} There was no prepayment provision in the note secured by the first deed of trust and the holder refused payment.\footnote{301} The note provided for interest at 14\% per annum.\footnote{302} The Supreme Court of Appeals of West Virginia held that, absent prepayment provisions in the note, the debtor, absent statutory authority or contractual rights, has no right to prepay the promissory note secured by the deed of trust.\footnote{303}

\section*{B. Liens Other Than Consensual Collateral Security Interests}

In addition to the matters set forth above with respect to that which a purchaser is "deemed to know" because of information in his or her chain of title, there are a number of liens which can attach to real property and affect the quality of title. Therefore, in order to perform a thorough title search, the title examiner must determine whether any such liens exist. While there are various aspects of these liens which are important, the only issue pertaining to such liens which will be considered in this Article is the period of time a title lawyer must examine the appropriate records in order to determine whether a valid lien exists. While it is recognized that many clerks now maintain general lien indices, and that such indices make this aspect of title work more efficient, for the purposes of discussion, and to illustrate the period of time a title lawyer would need to examine the relevant index as a part of the search, each lien will be treated as if it were indexed separately.

\begin{footnotesize}
\footnote{1-5 (3d ed. 1994).}
\footnote{299. 456 S.E.2d 31 (W. Va. 1995).}
\footnote{300. \textit{Id.} at 31.}
\footnote{301. \textit{Id.}}
\footnote{302. \textit{Id.}}
\footnote{303. \textit{Id.} at 35.}
\end{footnotesize}
1. Judgments

Under statutory law,

[e]very judgment for money rendered in this State . . . shall be a lien on
all the real estate of or to which the defendant in such judgment is or
becomes possessed or entitled, at or after the date of such judgment . . . .
Such lien shall continue so long as such judgment remains valid and en-
forceable, and has not been released or otherwise discharged. 304

While the lien created by Section 38-3-6 is effective as of the date of
judgment, it is not valid against a purchaser for valuable consideration
without notice or other lien creditors until it is “docketed” pursuant to
Section 38-3-5, and, unless the judgment is “extended” by writ of
execution, the judgment lien is subject to a ten year statute of limita-
tion. 305

Since a judgment attaches to after-acquired property, the period
before an individual acquires title to real property is relevant, and since
the lien is valid for ten years, any individual who has owned the prop-
erty within ten years of the present date must be checked in the judg-
ment docket. 306 Obviously, if an individual conveyed the real estate

305. See W. VA. CODE § 38-3-7 (1985) (Providing:
    No judgment shall be a lien as against a purchaser of real estate for valuable
consideration without notice, unless it be docketed according to the fifth section
[(§ 38-3-5)] of this article, in the county wherein such real estate is, before a deed
therefor to such purchaser is delivered for record to the clerk of the county court
[county commission] of such county; nor shall such judgment, though it be docketed
as aforesaid, be a lien, after ten years from its date as against such a purchaser
who purchases after such ten years, unless within such ten years an execution shall
have issued on such judgment and such execution or a copy thereof be filed in the
office of such clerk, or, unless such purchaser have actual notice of the fact that
such execution was issued, though it was not so filed; nor shall such judgment,
though it be docketed as aforesaid, and though one or more executions shall have
issued thereon and shall have been filed as aforesaid, be a lien, after ten years
from the date of the last execution so filed, as against such a purchaser who pur-
chases after such ten years, unless such purchaser have notice of the issuing of an
execution within ten years preceding the date of such purchase.).
before the judgment is entered against him or her, such judgment would not attach to the conveyed property.

2. Executions

For present purposes, the writ of execution is relevant for two reasons. First, if the judgment creditor wishes to file a judgment creditor suit immediately (i.e., within two years) after obtaining the judgment, the issuance of the writ of execution is a prerequisite to such a suit. If more than two years has passed since the entry of judgment, then the issuance and return of the execution is not required.

In Jarvis v. Porterfield, the court explained these alternatives as follows:

In a number of cases this Court has examined the wording of this statute. It has concluded that it creates two categories of creditors suits. The first category is composed of those suits conducted within two years after the date of the judgment giving rise to the creditor’s lien. The second category consists of those suits conducted more than two years after the date of the judgment giving rise to the judgment lien.

The Court has uniformly indicated that in the first category of suits, those conducted less than two years after the date of the judgment giving rise to the judgment lien, the issuance and return of an execution (a fieri facias) is a condition precedent to a circuit court’s obtaining jurisdiction to enforce the judgment lien . . . .

The purpose of this rule is to require the judgment creditor first to make a bona fide effort to obtain satisfaction of his debt by proceeding legally against the judgment debtor’s personalty before allowing him to

308. See W. Va. CODE § 38-3-9 (1985) (Providing:

The lien of a judgment may be enforced in a court of equity after an execution of fieri facias thereon has been duly returned to the office of the court or to the justice [magistrate] from which it issued showing by the return thereon that no property could be found from which such execution could be made: Provided, that such lien may be enforced in equity without such return when an execution or fieri facias has not issued within two years from the date of the judgment. If it appears to such court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree such real estate, or any part thereof, to be sold and the proceeds applied to the discharge of the judgment.);
309. 370 S.E.2d 620 (W. Va. 1988).
resort to the more drastic equitable remedy of forcing the sale of the judgment debtor's real estate. It is also intended to provide a mechanism to notify the judgment debtor within two years after entry of the judgment that his land will be sold unless he satisfies the judgment.\footnote{310}

The second purpose of the writ of execution is to "extend" or "keep alive" a judgment.\footnote{311} As noted above, a judgment is valid for ten years from its date, but it can be "renewed" if "within such ten years an execution shall have issued on such judgment and such execution or a copy thereof be filed in the office of such clerk."\footnote{312} Successive executions to perpetuate a judgment’s lien are possible subject to the limitations set forth in Section 38-3-18, which reads as follows:

On a judgment, execution may be issued within ten years after the date thereof. Where execution issues within ten years as aforesaid, other executions may be issued on such judgment within ten years from the return day of the last execution issued thereon, on which there is no return by an officer or which has been returned unsatisfied. An action, suit or scire facias may be brought upon a judgment where there has been a change of parties by death or otherwise at any time within ten years next after the date of the judgment; or within ten years from the return day of the last execution issued thereon on which there is no return by an officer or which has been returned unsatisfied. But if such action, suit or scire facias be against the personal representative of a decedent, it shall be brought within five years from the qualification of such representative.\footnote{313}

Therefore, under the applicable law, judgments obtained "years ago" could still constitute a valid lien against the land via successive executions within the ten-year periods. The title examiner will, therefore, need to check each individual entity whose name appears in the chain of title in the index for the execution docket for the preceding ten years. If an execution is not found within this ten-year period, the right to renew it has expired. If an execution is discovered within the ten years, then further investigation of the records will be necessary to determine whether the judgment was against the owner of the tract during a period of time in which it would become a lien against the

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310. \textit{Id.} at 620.
property, whether the judgment has since been paid or otherwise discharged, or whether some limitation contained in West Virginia Code Section 38-3-18 is applicable.

Assuming the title examiner finds no judgment within the ten-year period and no executions within the ten year period, the title examiner can report that there are no valid judgment liens against the subject property and that enforcement of any earlier judgment would be precluded by the applicable statute of limitation.

3. Mechanics’ Liens

The potential of mechanics’ liens creates special problems for title lawyers.314 While “mechanics’ liens” are frequently associated with “new construction,” the statutes apply to the erection, building, construction, alteration, removal or repair of “any building or other structure, or other improvement appurtenant to any building or other structure . . . .”315 With the specific inclusion of architects, surveyors, engineers, and landscape architects, there is now the potential for a mechanics’ lien in virtually every title examination.

While the clerk of the county commission is charged with the responsibility of maintaining a “Mechanic’s Lien Record,”316 under the law, the title lawyer cannot rely solely on this record and its index to protect his or her client. Under the applicable law, a “grace” period is provided between the completion of the work and the filing date. A brief review of the statute will be helpful in understanding the title lawyer’s dilemma.

Under Section 38-2-17, the lien attaches as of the date the “work” begins or the material is furnished317 and “shall have priority over

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314. As used in this Article, the term “mechanics’ lien” is intended to include the liens described in Sections 38-2-1 to -39. W. Va. Code §§ 38-2-1 to -39 (1985 & Supp. 1995). The term also includes the materialmen’s lien, the mechanics’ or laborers’ lien, as well as the lien of architects, surveyors, engineers and landscape architects, which were specifically addressed by a 1991 amendment to Article 2. W. Va. Code § 38-2-6a (Supp. 1995).
317. The lien attaches to the land if the contract is with the owner of the property. See
any other lien secured by a deed of trust or otherwise which is created subsequent to such date."318 Once the lien attaches to the property under Section 38-2-17, the lien can be perfected against subsequent purchasers and is valid against subsequent deeds of trust and other liens arising after that date.319 Since the statutes specifically provide that "[n]o payment by the owner to any contractor or subcontractor of any part or all of the contract price . . . shall affect, impair or limit the lien of the subcontractor, laborer, or materialman or furnisher of machinery or other necessary material or equipment . . . "320 proof of payment of the contractor does not assure that mechanics' liens will not be a problem.

While the lien attaches from when the first work on the land begins,321 the "clock" does not start to run on the requirement to give notice until the last of the work is performed or material is provided.322

319. Thom v. Barringer, 81 S.E. 846 (W. Va. 1914) (Syllabus Points 2 through 5 succinctly state this aspect of the law:

2. A mechanic's lien attaches and dates from the time the first work is done or the first materials are furnished under the contract giving rise to it
3. One purchasing premises on which buildings are in the process of erection must make inquiry and take notice of any mechanic's lien right that has attached prior to his purchase.
4. A conveyance of the property, or an incumbrance placed thereon after a mechanic's lien attaches by a beginning of performance under the contract, does not cut off or affect the right to the mechanic's lien for the whole, though a part of the execution of the contract is before and a part after the time of the conveyance or incumbrance.
5. When a mechanic's lien arises and attaches by reason of the beginning of performance under a contract with the owner, the lien is properly filed under Code 1906, ch. 75, sec. 2, though before the time the contract is completed and the lien is filed the owner who made the contract has conveyed the property to another.).
322. See W. VA. CODE § 38-2-16 (1985) (Providing:

For the purposes of this article, all materials furnished, all work done, and all services provided by any one person, firm or corporation, upon any one building or the improvements appurtenant thereto, or upon the real property whereon the same stands, or to which it may have been removed, shall be deemed and considered one contract, whether or not all of such material was bought at one time, or
In order to perfect a mechanics' lien, the mechanic or materialman must comply with the statutory requirements. If the work or material is provided by a subcontractor, or furnished or provided to a contractor or subcontractor, then such person or entity must give notice to the owner (or his authorized agent) within sixty days after the completion of the work or the furnishing of materials. If the contract is with the owner, or the materials are supplied “directly” to the owner, or the work is provided “directly” to the owner, the statute does not require notice be given to the owner because the owner is “aware” of those contractual obligations.

Notice of the “mechanics’ lien” (whether the contract is with the owner, contractor, or subcontractor) must be filed in the office of the clerk of the county commission within ninety days after completing the work or furnishing the materials or providing the services. There is, therefore, a period of ninety days from when the date on which the last work or services were performed or materials were furnished in which to file notices of the existence of the lien. Obviously, until the notice is filed there is no record of this lien in the clerk’s office. However, as explained above, the lien attached to the land when the “work began” and is valid against subsequent deeds of trust or deeds of conveyance. Also, keep in mind that such liens are applicable to all work or services to improve the real estate and are not restricted to “new construction.” The “final step” in perfecting the lien is the filing of suit to enforce the lien authorized in the mechanics’ lien statute. Suit must be filed within six months of the filing of the notice of the lien in the clerk’s office. If the lien is established in the suit, the

under one general agreement or otherwise, and whether or not all of such work, labor or services provided, was contracted for at one time or otherwise.).

327. Biddle Concrete Co. v. McOlvin, 111 S.E. 843 (W. Va. 1922).
330. See W. VA. CODE § 38-2-34 (1985) (Providing:

Unless a suit in chancery to enforce any lien authorized by this article is commenced within six months after the person desiring to avail himself thereof
court shall order a sale of the property on which the lien is established, and in addition, the court can give a personal decree in favor of the creditors. While the title examiner must check the appropriate index for notice of the “mechanics’ lien,” it is the ninety days between the cessation of work, services, or the providing of materials and the last day for filing of the notice of the lien in the clerk’s office that creates the challenge for title attorneys. Assuming the owner has not availed himself or herself of the statutory protection, there are essentially three solutions as to how the purchaser can be protected. First, the title lawyer can establish as a fact that there are no “potential” mechanic or materialman liens, that is, that there has been no work, services, or materials provided relevant to the subject real estate within the preceding ninety days. Second, if there has been work, services, or materials furnished within the preceding ninety days, the attorney can determine that all of those who could possibly assert mechanics’ or materialmen’s liens have in fact been paid in full or that sufficient funds are escrowed to satisfy all potential claims. Third, the attorney could obtain a waiver of lien from all of those who have the right to assert such a lien. As part of the work in the record room, the title examiner needs to check the index for mechanics’ liens for the current owner and prior owners for a sufficient period of time to assure that there are no perfected mechanics’ liens. As noted above, a law suit is necessary to “perfect” the mechanics’ lien and normally the filing of a lis pendens is necessary to provide constructive notice of a pending law suit. However, under the lis pendens statute:

[Where] the lien, right or interest asserted is based upon a judgment, decree, claim, contract or other instrument which has been docketed or recorded according to law in the office of the clerk of the county [commis-

sion] of the county wherein the real estate is situated, and has thus become a matter of public record, the failure to file the notice herein mentioned [lis pendens] shall not operate to defeat the enforcement of such lien, right or interest in the real estate as against such pendente lite purchaser or encumbrancer.\footnote{334}

In \textit{Rardin v. Rardin},\footnote{335} a case which involved an unrecorded judgment, the court explained the basis for the proviso in Section 55-11-2 as follows:

Section 13, ch. 139, Code [the predecessor to section 55-11-2], limiting the scope of the common law rule of lis pendens in this state, requires recordation of formal notice of the pendency of the suit only where the proceeding is one to subject real estate to the payment of any debt or liability, and where no previous lien shall have been acquired thereon in some one or more of the methods prescribed by law. In the absence of either or both of these requirements the statute does not apply, and the common law rule, requiring no formal notice, governs.\footnote{336}

Since there is no statute of limitation on how long a lawsuit may remain pending once it has been filed, there is no simple answer as to how far back or how many “owners” one needs to check in the mechanics’ lien index. Obviously the current owner, and a sufficient number of prior owners, would need to be checked to assure that the record has been examined for a period that extends past the time period in which a pending law suit could have been filed to enforce the mechanics’ lien.\footnote{337}

\footnote{334. W. VA. CODE § 55-11-2 (1994).}
\footnote{335. 102 S.E. 295 (W. Va. 1919).}
\footnote{336. \textit{Id.} at 295, Syl. Pt. 4.}
\footnote{337. While there is no “statute of limitation” on how long a lawsuit may remain pending, there are provisions which allow pending lawsuits to be dismissed for failure to prosecute. \textit{See} W. VA. R. CT. P. 41(b) (1994); W. VA. CODE § 56-8-9 (1994). \textit{See also} W. VA. CODE § 38-2-37 (1994) (explaining how an order can be obtained requiring the clerk to execute a release when the lienholder refuses).}
4. Lis Pendens

The records affecting the title to real estate are maintained in the office of the clerk of the county commission. However, there may be occasion in which the outcome of a lawsuit which has been filed with the clerk of an appropriate court can affect the title to real estate. Therefore, a method of alerting a purchaser of land that there is a pending lawsuit which may affect the title to the subject real estate is needed. The lis pendens record is designed to bridge this informational gap. The requirements of the lis pendens notice are set forth in Section 55-11-2 as follows:

Whenever any person shall commence a suit, action, attachment, or other proceeding, whether at law or in equity, to enforce any lien upon, right to, or interest in designated real estate, the pendency of such suit, action, attachment or other proceeding shall not operate a constructive notice thereof to any pendente lite purchaser or encumbrancer of such real estate for a valuable consideration and without notice, until such person shall file for recordation with the clerk of the county [commission] of each county where the real estate sought to be affected is situated, a memorandum or notice of the pendency of such suit, action, attachment or other proceeding, stating the title of the cause, the court in which it is pending, the names of all the parties to such proceeding, a description of the real estate to be affected, the nature of the lien, right or interest sought to be enforced against the same, and the name of the person whose estate therein is intended to be affected: Provided, however, that where the lien, right or interest asserted is based upon a judgment, decree, claim, contract or other instrument which has been docketed or recorded according to law in the office of the clerk of the county [commission] of the county wherein the real estate is situated, and has thus become a matter of public record, the failure to file the notice herein mentioned shall not operate to defeat the enforcement of such lien, right or interest in the real estate as against such pendente lite purchaser or encumbrancer.

The clerk of every such county [commission] shall, without delay, record such memorandum or notice in the "lis pendens record," note upon the record the day and hour when such notice was filed for recordation, and index the same in the names of the parties.

338. See W. VA. CODE § 55-11-1 (1994) (Providing:
There shall be kept in the office of the clerk of the county [commission] of each county of this State a book to be called the "lis pendens record," which shall be a public record.).
339. W. VA. CODE § 55-11-2 (1994). The lis pendens notice for eminent domain pro-
If a party seeks a lien of attachment on real estate, $340$
"[t]he plaintiff shall have a lien upon any real estate of the defendant
levied upon under an attachment, from the time of the suing out of the
attachment, but such lien may be defeated by a sale of such real estate to
a purchaser for value without notice before the filing, by the plaintiff, of
a notice of lis pendens under the provisions of article eleven chapter fifty-
five of this Code." $341$

The constructive notice created by filing the lis pendens is valid for
ten years, and can be renewed and extended for an additional ten years
by filing, within the ten-year period, a notice which satisfies the re-
quirements of Section 55-11-2. $342$

Therefore, a title examiner’s task in examining the lis pendens
record would be similar to that discussed above under executions
(check each owner for the preceding ten-year period, because any lis
pendens filed before that time, and not extended, would no longer
constitute constructive notice). If the lis pendens has been “renewed,”
the filing necessary for the renewal must be within the preceding ten-
year period.

5. Federal, State and Local Taxes (Excluding Real Estate Taxes)

Our code requires the clerk of the county commission to maintain
a federal tax lien docket and provides that such liens shall not be valid
as against any mortgagee, purchaser, or judgment creditor until notice
shall be filed. $343$

$342$ See W. VA. CODE § 55-11-3 (1994) (Providing:
Constructive notice of the pendency of a suit, action, attachment or other
proceeding, arising from the filing for recordation of a notice or memorandum in
accordance with the provisions of section two [§ 55-11-2] of this article, shall
continue to operate as constructive notice thereof to any pendente lite purchaser or
encumbrancer of the real estate affected, for a period of ten years next after the
date when such notice was filed for recordation. Where constructive notice arises
as aforesaid, that notice may be renewed or extended for additional ten-year peri-
ods by the filing for recordation, as provided in section two [(§ 55-11-2)] of this
article, a similar memorandum or notice of lis pendens within ten years from the
date of recordation of the last such memorandum or notice.).
$343$ See W. VA. CODE § 38-10-1 (1985) (Providing, in part:
A similar provision exists for liens in favor of the State of West Virginia, or any political subdivision thereof, or any municipality.\textsuperscript{344}

If the property is served by a public service district,\textsuperscript{345} Section 16-13A-9 provides, in part, that "[a]ll delinquent fees, notes and charges of the district for either water facilities, sewer facilities or gas facilities are liens on the premises served of equal dignity, rank and priority with the lien on such premises of state, county, school and municipal taxes."\textsuperscript{346} Because Section 16-13A-3 provides, in part that "[f]rom and after the date of the adoption of the order creating any public service district, it is a public corporation and political subdivision of the state, but without any power to levy or collect ad valorem..."
taxes, the above provision of Section 38-10C-1 would be applicable, and the public service lien would have to be docketed to be enforceable as against a purchaser of the real estate for valuable consideration, without notice.

These sections provide for "docketing" or "filing" of notice of various governmental liens so as to provide constructive notice. Typically the statute of limitations are set forth for each such lien as part of the "substantive" law of the lien.

VIII. RELEASES

Whenever a lien against real estate has been discharged, a release of the lien should be recorded in the office of the clerk of the county commission where the lien is recorded so that the records will reflect the discharge of the obligation. Form releases are provided in the statutes. Whenever a release is presented to the clerk of the county commission, the statute provides:

The clerk . . . shall record and properly index all releases and assignments admitted to record in his office . . . in a well-bound book to be kept exclusively for the purpose, and, when any such instrument is recorded, he shall note the fact on the margin of the record or docket of the lien affected or discharged thereby, with a reference to the book and page where such release or assignment is recorded.

348. For example, under W. VA. CODE § 11-10-12(a) (1995), the various state taxes identified in Section 11-10-3 shall be a lien upon the real and personal property of the taxpayer." Furthermore, "[t]he lien created by this section shall continue until the liability for the tax, additions to tax, penalties and interest is satisfied or upon the expiration of ten years from the date the tax, additions to tax, penalties and interest are due and payable under section eight [(Section 11-10-8)] of this article or the date the tax return is filed, whichever is later.

W. VA. CODE § 11-10-12(b) (1995).
It is not uncommon for title examiners to rely upon the notation in the margin of the record or docket provided for in Section 38-12-9 as establishing the lien is properly released. However, since the task of noting the release of the lien involves more than a purely ministerial function on the part of the clerk, the title examiner should examine the release itself as part of the title examination. For example, the attorney should confirm that the release is a full release as opposed to a partial or limited release, that the release is executed by the proper person or if it is executed in a representative capacity, that it is by an official with the authority to execute such releases, that it is properly acknowledged, and that it properly describes the lien released.

IX. MISCELLANEOUS

While the most common link in the chain of title is the deed, the quasi-judicial proceeding involving the administration of an estate and a variety of other judicial proceedings may also constitute links in the chain of title. In each such situation, the question of whether the proceeding conformed and complied with the applicable law becomes the concern of the title attorney. A detailed discussion of the various proceedings is beyond the scope of this Article, but the following should help to illustrate the relevance of the substantive law of such proceedings to a title examination.

A. Estates

Among the matters of concern in the administration of an estate as a link in a chain of title is to correctly identify the successor in title to the property. Obviously, if the person dies testate, the provisions of the will are important and whether the will is valid and properly executed

is of concern. 354 If the person dies intestate, then the relevant statutes of descent are important. 355

In addition to the statutory changes of 1957, 1992, and 1993 in the law of intestate succession, 356 there have been a number of judicial decisions which have impacted this area of the law. In 1969, the court adopted the concept of equitable adoption, 357 a concept which recognizes an "equitable" adoption where there has been no formal adoption pursuant to statutory provisions. 358 Even though the court has not specifically dealt with the concept of equitable adoption in the context of title examinations, it is a legal concept that the title examiner must be aware of and consider in determining the "heirs" of those who die owning real property. 359 Also, the title attorney must keep in mind that the court, in Adkins v. McEldowney, 360 followed the United States Supreme Court decision in Trimble v. Gordon, 361 by holding that "Code, 42-1-5 must be applied to permit illegitimate children to inherit from both father and mother." 362 In Williamson v. Gane, 363

359. See generally King v. Riffee, 309 S.E.2d 85 (W. Va. 1983), Syllabus Point 2 of which holds:

An adoptive child's entitlements to inheritance under the laws of intestate succession are governed by the statute on intestate succession in effect at the time of the death of the ancestor from whom he might inherit and not by the laws of intestate succession in effect at the time of his adoption.

See also Morgan v. Mayes, 296 S.E.2d 34 (W. Va. 1982); Transamerica Occidental Life Ins. Co. v. Burke, 368 S.E.2d 301, Syl. Pt. 2 (W. Va. 1988) (construing a will, the court said "[t]he term 'children' ordinarily does not include stepchildren, but it may include stepchildren when a contrary intent is found from additional language or circumstances").
362. Adkins, 280 S.E.2d at 233.
the majority of the court declared "Adkins v. McEldowney, is fully retroactive where there has been no justifiable and detrimental reliance upon the law invalidated therein; where the subject property has not been transferred to an innocent purchaser for value; or where the estate administration is subject to further resolution."364

As a practical matter, in most situations, the attorney examining title must rely on the affidavit of heirs.365 However, if the executor or administrator, or some other credible person, fails to provide accurate information, then the affidavit of heirs will not correctly reflect the successors to the decedent’s real property. As the above brief summary should illustrate, the "law’s" definition of heirs may not be the same as a lay person’s understanding of "heirs," and typically it is a lay person who responds to the questions necessary to complete the affidavit of heirs.

In comparison to the problem that may exist in determining a decedent’s heirs, other aspects of the administration of the estate are fairly straight forward. The attorney should ascertain that the subject property was included in the appraisal of the decedent’s estate.366 Since real estate of the decedent may be subject to the payment of his or her debts,367 it is important that the estate has been properly administered so that those who may be creditors of the estate have been provided the opportunity to submit their claims and have the validity of the claim resolved.368

Since estate taxes constitute a lien against the decedents real estate,369 it is important to determine that any taxes due on the estate have been paid or it has been determined that there are no taxes due.370 Finally, one problem which may exist in a testamentary situation is

364. Id. at 318 (citation omitted) (syllabus of the court).
370. See generally W. Va. Code §§ 11-11-1 to -42 (1995). Section 11-11-17(a) provides that the tax shall be a lien for ten years after the decedent’s death and Section 11-11-17(d) provides for the issuance of a release when the tax has been paid or it is determined that there is no tax due. See W. Va. Code § 11-11-17a (1995) (respecting a nonresident
where the "personal representative" sold the property but was not devised the property in the will. Since real property passes directly to the devisee or heir upon the decedent's death, an executor does not have title to the property to convey. A 1987 amendment to Section 44-8-1 has helped to alleviate this problem for wills which became effective after June 12, 1987.  

B. Judicial Proceedings

There are also occasions in which judicial proceedings may constitute a link in the chain of title. Among the more common are partition, 372 judgment creditors' suits, 373 and summary proceedings for the sale or lease of a property interest owned by one under a disability or legal incapacity. 374 In such cases, the title attorney needs to determine that the proceeding comports with the requirement of the statutes.

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371. In 1987, the legislature added the last two paragraphs to Section 44-8-1. The statute, in its entirety, reads as follows:

Real estate devised to be sold shall, if no person other than the executor be appointed for the purpose, be sold and conveyed by the executor, and the proceeds of sale, or the rents and profits of any real estate which the executor is authorized by the will to receive, shall be received by the executor who qualifies, or by his successor. If none qualify, or the one qualifying shall die, resign, or be removed before the trust is executed or completed, the administrator with the will annexed shall sell or convey the lands so devised to be sold, and receive the proceeds of sale, or the rents and profits aforesaid, as an executor might have done.

When any will heretofore or hereafter executed gives to the executor named therein the power to sell the testator's real estate, which has not been theretofore specifically devised therein, the executor may sell any such real estate unless otherwise provided in said will. If such will directs the sale of testator's real estate but names no executor, or names an executor and the executor dies, resigns or becomes incapable of acting, and an administrator with the will annexed is appointed, the administrator with the will annexed may sell such real estate as aforesaid.

Nothing in this section shall be deemed or construed so as to invalidate any conveyance made prior to the effective date [(June 12, 1987)] of the amendments thereto adopted by the Legislature as its regular session held in the year one thousand nine hundred eighty-seven.

W. VA. CODE 44-8-1 (1994).


373. See generally W. VA. CODE §§ 38-3-1 to -19 (1985).

In order to make this determination, the attorney usually examines the original file in the office of the clerk of circuit court (or appropriate clerk's office). Two inquiries are common to all of these proceedings. First, the examiner needs to be sure the court in which the action was brought had jurisdiction over the proceedings. And second, that all parties essential to the proceedings were properly before the court, that is, that there was a valid service of process or consent to the jurisdiction of the court.

Similarly, if the link in the chain of title is a "foreclosure" pursuant to a deed of trust, compliance with, first, the provisions of the statute,375 including the appointment of a substitute trustee,376 and second, the trust instrument, is necessary.

C. Delinquent and Nonentered (Forfeited) Land

As title attorneys know, the "law" requires that the owner of real property have "his land entered for taxation on the landbooks of the appropriate county, have himself charged with the taxes due thereon, and pay the same."377 Failure to fulfill these obligations can ultimately result in the "owners" losing title to the property by way of the state's enforcement of these obligations. Therefore, an essential part of a title examination is to assure that the subject property has been properly entered upon the landbooks to prevent "forfeiture," and that the taxes have been paid to prevent delinquency. Robert Louis Shuman, a member of the West Virginia University College of Law Class of 1996, served as my research assistant on this Article, and has written a companion article which discusses the delinquent and nonentered land statutes with respect to a title examination. In addition to being a member of the West Virginia Law Review, Mr. Shuman has considerable experience "in the record room" under the supervision of his grandfather, Robert L. Shuman, and his father, Stephen K. Shuman,
both experienced title attorneys in Monongalia County. It is our intent that our two articles be read *pari materia*.

X. CONCLUSION

Since the purpose of a title examination is to discover those “defects” which affect the quality or quantity of the present owners’ interest, the scope of the title search is dictated by what knowledge or information the “law” imputes to those interested in the property or what interests or rights the “law” deems as superior to the interest acquired by a purchaser of the property. Except for the few noted issues where neither the court nor the legislature has clearly addressed what is considered within the “chain of title,” the current law in West Virginia provides reasonably clear answers and guidance. Therefore, it is probable that to the extent there is any discussion of issue raised herein, the discussion will focus on whether a matter is “practical” and not whether it is “necessary.” Hopefully, the above dissertation will assist those concerned with title work to make an informed decision on how to use the available time in the best interest of his or her clients.