The Perils of Quitclaims

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A. The Texas Recording System[1]

1. Common Law Background

At common law, title is conveyed upon the execution of a document evidencing an intention to convey, executed by the grantor and legally delivered to a grantee. "At common law in England, there was no system of registration or recording, and the rule between claimants of the same title was found in the maxim 'prior in tempore potior est in jure,' which means, he who is first in time has the better right." 45 AM. JUR. 435; 23 R.C.L. 170; 2 MERRILL ON NOTICE § 921. That is still the law except as abrogated by statute. "So thoroughly has the recording office entered into our legal system that lawyers and judges alike tend to refer to notice by record as though it were a common law principle without reference to the statutes upon which it rests. Yet because the foundation is statutory, and because difference in phraseology may involve variance in interpretation and application, we need to remember constantly that the necessity for recordation**,** as well as its effect, is a creature of ordinance, and that without the command of our omnisapient representatives in legislature assembled no one is required to place his title upon record in order to preserve it. In a number of instances statutes which merely authorize or permit the recording of particular instruments have been construed not to make such recording essential to the protection of property interests arising thereunder." 2 MERRILL ON NOTICE § 921. "Our system of registration was unknown to the common law." *Ball v. Norton*, 238 S.W. 889, 890 (Tex. Comm'n App. 1922).

2. Types of Recording Statutes

Three basic types of recording systems are recognized in the United States: race, notice, and race-notice. The race system provides that a purchaser or lienholder who is second in time of conveyance prevails if she records first, regardless of whether she has notice of other unrecorded interests.

The notice system protects a subsequent purchaser or lienholder who acquires an interest without notice of a prior unrecorded conveyance or lien. Under the notice system, the subsequent purchaser or lienholder is not required to file for record to protect an interest against a prior grantee or lienholder but should nevertheless promptly record to gain protection against a subsequent purchaser or lienholder without notice. Under the Texas notice recording statute, a prior grantee may be divested by her grantor who again conveys the property to a second grantee, so long as the second grantee is an innocent purchaser paying valuable consideration and is not on notice (actual, constructive or inquiry) of the first conveyance. TEX. PROP. CODE ANN. § 13.001. This statute does not require the junior grantee to record to prevail over the senior grantee.

[1] This Section A is purloined, with permission, from the draft of Texas Title Standard 4.40 "Notice Recording System" penned by James L. Gosdin and George A. Snell, III for the Title Standards Joint Editorial Board of the Section of Real Estate, Probate and Trust Law and The Oil, Gas and Energy Resources Law Section of the State Bar of Texas.

Under the race-notice system, the subsequent purchaser or lienholder must acquire an interest without notice of the prior unrecorded interest and must also file for record before recordation of that prior unrecorded interest.

3. **How Notice Works**

Under the notice system, if the subsequent (junior) instrument is executed and delivered before the prior (senior) instrument is filed for record and if the subsequent purchaser or lienholder pays value and has no notice of the prior instrument, then the junior instrument prevails regardless of whether the junior instrument is filed before the senior instrument. In other words, the grantee under the subsequent (junior) instrument will prevail. *Houston Oil Co. v. Kimball*, 122 S.W. 533 (Tex. 1910); *Watkins v. Edwards*, 23 Tex. 443 (1859); *White v. McGregor*, 50 S.W. 564 (Tex. 1899); *Penny v. Adams*, 420 S.W. 2d 820 (Tex. Civ. App.—Tyler 1967, writ ref'd); *Matthews v. Houston Oil Co.*, 299 S.W. 450 (Tex. Civ. App.—Beaumont 1927, no writ); *Raposa v. Johnson*, 693 S.W.2d 403 (Tex. App.—Ft. Worth 1985, writ ref'd n.r.e.). For example, assume that Homeowner grants an oil and gas lease on February 1 to A, who does not file for record. Thereafter, Homeowner gives another lease to B, a bona fide purchaser on February 5. B prevails over A without regard to whether either A or B records. And, under Texas case law, if A assigned his lease to C on February 10, B would also prevail over C even if B has not recorded. *Houston Oil Co. v. Kimball*, 122 S.W. 533 (Tex. 1910). However, if Homeowner, on February 15, granted a third oil and gas lease to D for value, who took without notice of B's lease (and assuming that B has still not recorded), D would prevail over B.

Filing and Recording

"An instrument filed with a county clerk for recording is considered recorded from the time that the instrument is filed." TEX. LOCAL GOV'T CODE ANN. § 191.003. However, a paper document filed for record concerning real or personal property may not be validly recorded or serve as notice of the paper document unless (1) the paper document contains an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law, or (2) on or after September 1, 2007, the paper document is attached as an exhibit to a paper affidavit or other document that has an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law. TEX. PROP. CODE ANN. § 12.0011. An original signature is not required for an electronic document that complies with the requirements of Chapter 15, Texas Property Code Annotated (Uniform Real Property Electronic Recording Act); Chapter 195, Texas Local Government Code Annotated (electronic filing of records); Chapter 322, Texas Business and Commerce Code Annotated (Uniform Electronic Transactions Act); "or other applicable law." TEX. PROP. CODE ANN. § 12.0011. *See* Standard 4.120. If made as provided by law, a certified copy, when recorded, has the same effect as the original. TEX. LOCAL GOV'T CODE ANN. § 191.005.

An instrument meeting the requirements of the preceding paragraph imparts constructive notice upon filing. An instrument is filed "when deposited for that purpose in the county clerk's office, together with the proper recording fees." *Jones v.*

McCorquodale, 218 S.W. 59, 61 (Tex. Civ. App.—Galveston 1919, writ ref'd); TEX. LOCAL GOV'T CODE ANN. § 191.003. "The county clerk [is] not authorized to 'impose additional requirements' for filing or recording a legal paper such as the removal of irrelevant notations." *Ready Cable, Inc. v. RJP Southern Comfort Homes, Inc.*, 295 S.W.3d 763 (Tex. App.—Austin 2009, no pet.) (the phrase "unofficial document" on the top of an exhibit was an irrelevant notation); TEX. LOCAL GOV'T CODE ANN. §191.007(k).

B. Introduction to Quitclaims

The Texas recording statute provides in part:

> (a) A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.
>
> (b) The unrecorded instrument is binding. . . on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.[2]

So if A grants Blackacre to B and B fails to record and A then grants Blackacre to C, as between B and C, C wins if he paid valuable consideration and was without notice of B's claim, whether or not C records. The quitclaim[3] issue—whether a particular instrument is a quitclaim and the legal consequences of that determination on the grantee's status under the recording statute (and on other legal and equitable rights of the grantee)—arises because it has a bearing on whether C had notice of B's claim.[4] "A quitclaim deed does not of itself establish any title in those holding under it. The quitclaim passes the interest of the grantor in the property, and for the quitclaim to be a conveyance, title in the grantor must be shown."[5]

In Texas, the grantee of a quitclaim probably takes with notice of all defects in his grantor's title, including all equitable claims and unrecorded deeds in existence before the delivery of the quitclaim deed to the grantee. The reasons the rule in Texas is not entirely clear are:

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2 TEX. PROP. CODE § 13.001(a), (b).

3 A quitclaim deed is generally understood to be "[a] deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid." BLACK'S LAW DICTIONARY 424 (7th ed. 1999).

4 The recording statute supplements, but does not replace, the common-law bona fide purchaser doctrine, which predates the recording statute. Steven C. Hailey, *The Recording Statute in Texas (and the Innocent Purchaser Doctrine)*, 2001 MORTGAGE LENDING INSTITUTE § I.E (2005). The bona fide purchaser doctrine may apply in certain transactions that fall outside the scope of the recording statute. *Id.* However, because the elements of the bona fide purchaser doctrine are functionally identical to the elements of the recording statute, this paper will treat the bona fide purchaser doctrine and the recording statute as being synonymous.

5 *McMahon v. Fender*, 350 S.W. 2d 239, 240 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.).

- Texas occupies a minority position on the issue and, in some respects, stands alone.[6] As a result the cases reinterpret the law on nearly a case-by-case basis, creating, as one commentator described it, "a morass of confusion."[7]

- The Texas Supreme Court tried to clarify the issue in 1963—but with an ill-defined set of facts on an issue not addressed by the appellate court and with an unclear opinion.[8] As a result, that case has been cited only once for its principal holding and, in the citing case, the other line of cases was not mentioned, but the result seems consistent with both lines of cases.[9]

- The other, but not directly contrary, line of cases,[10] dating to 1870, has continued to spawn descendants which universally ignore the 1963 Texas Supreme Court decision.[11]

The quitclaim issue is relevant to all conveyances and security transactions affecting real estate, including mineral interests and leaseholds. Because many modern assignments and mortgages of oil and gas leases contain quitclaim-type granting language (e.g., "all of assignor's/mortgagor's right, title and interest") and disclaim warranties,[12] the quitclaim issue is particularly relevant to Texas oil and gas attorneys and their clients.

C. The Rule – If We Forget *Bryan v. Thomas*

The rule in Texas is that the grantee under a quitclaim conveyance cannot avail himself of the defense of an innocent purchaser without notice; instead, he is deemed to take only whatever title the grantor had at the time of the conveyance subject to all defects thereto and adverse legal and equitable claims thereon and is deemed to be on notice of all outstanding legal or equitable unrecorded title in favor of third parties at the time the quitclaim instrument was delivered to him.[13] Furthermore, a subsequent grantee in a chain of title that includes a

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6 *See infra* § C and n.20.

7 F. Walter Conrad, *Property—Deeds—Notice—Quitclaim Redefined in a Restricted Manner for the Purposes of Notice under the Recording Acts.* Bryan v. Thomas, 365 S.W.2d 628 (Tex. 1963), 41 TEX. L. REV. 939, 940 (1963).

8 *See infra* § F.1. and §F.4.

9 *Ibid.*

10 A line which culminated in *Cook v. Smith*, 174 S.W. 1094 (Tex. 1915)

11 *See infra* §§ C and E.

12 *See* George A. Snell III, *Basic Conveyancing Rules for Mineral Deeds and Assignments of Oil and Gas Leases, Part 2: Understanding Assignments of Oil and Gas Leases*, 19TH ANNUAL ADVANCED OIL, GAS & ENERGY RESOURCES LAW COURSE § IV.B (2001).

13 *Woodward v. Ortiz*, 237 S.W.2d 286, 291-292 (Tex. 1951); *Simonds v. Stanolind Oil & Gas Co.*, 114 S.W.2d 226, 234 (Tex. 1938); *Cook v. Smith*, 174 S.W. 1094, 1095-96 (Tex. 1915); *Rodgers v. Burchard*, 34 Tex. 441, 1871 WL 7425, at *8 (Tex. 1870); *Kidwell v. Black*, 104 S.W.3d 686, 691 (Tex. App.—Fort Worth 2003, pet. denied); *see Harrison v. Boring*, 44 Tex. 255, 1875 WL 7685, at *5-6 (Tex. 1875) (holding that, to defend as a bona fide purchaser, the purchaser must show a bona fide purchase of the absolute right to the land in contradistinction to that of the title or chance of title, for valuable consideration and without notice of adverse

quitclaim, no matter how remote, takes subject to any unknown and unrecorded interests that were outstanding at the time the quitclaim was executed.[14] The notice to which the grantee is subject is not just inquiry notice but is notice as to all claims. In *Tate v. Kramer*, 1 Tex. Civ. App. 427, 23 S.W. 255 (Tex. Civ. App. 1892), the court held as follows:

> Finding that Neely is in the same attitude of a vendee in a quitclaim, he is required to take notice of *all other claims to the land*. He cannot say he knew of one, the tax title bought in by himself, and therefore did not know of the equitable title in the plaintiffs. His position is that of one having notice of all titles. The question is not one of being merely put upon inquiry; the notice is absolute and conclusive as to all claims.[15]

The rationale for the rule is patent: the taker under a quitclaim instrument takes only such title as the grantor had at the time of the conveyance—i.e., he takes only the grantor's "chance of title."[16] A quitclaim, in effect, places the grantee on notice of such adverse claims as actually exist, thus rendering him a purchaser with notice who is not protected under the recording statute.[17] It has been explained as follows:

A warranty deed to land conveys property; a quitclaim deed conveys the grantor's rights in that property, if any.[18]

> A quitclaim vendee cannot be an innocent purchaser, because it serves him with notice that he is only purchasing the chance of title – such title as the vendor has, and no more. Such notice, or any notice of the fact that there is a better title, excludes good faith from the transaction. To be an innocent purchaser the vendee must in good faith pay a valuable consideration, without notice of outstanding legal or equitable rights.[19]

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claims); 63 TEX. JUR. 3D REAL ESTATE SALES § 314; 5 TEX. PRAC., LAND TITLES AND TITLE EXAMINATION § 31.5 (3d ed.).

[14] *Houston Oil Co. v. Niles*, 255 S.W. 604, 609-610 (Tex. Comm'n App. 1923, judgm't adopted and holding approved); *see also Kirby Lumber Corporation v. Williams*, 124 F. Supp. 456 (E.D. Tex. 1954); *Straus v. Shamblin et al.*, 120 S.W.2d 598 (Tex. Civ. App. 1938); *Biggs v Poling*, 134 S.W.2d 801 (Tex. Civ. App. 1939).

[15] *Tate v. Kramer*, 1 Tex. Civ. App. 427, 434, 23 S.W. 255 (Tex. Civ. App. 1892) (emphasis in original).

[16] *See Woodward v. Ortiz*, 237 S.W.2d 286, 291-292 (Tex. 1951); *Hunter v. Eastham*, 69 S.W. 66, 68 (Tex. 1902); *White v. Dupree*, 40 S.W. 962, 964-965 (Tex. 1897); 63 TEX. JUR. 3D REAL ESTATE SALES § 314; 5 TEX. PRAC., LAND TITLES AND TITLE EXAMINATION § 31.5 (3d ed.).

[17] *See Geodyne Energy Income Production P'ship I-E v. Newton Corp.*, 161 S.W.3d 482, 487 (Tex. 2005) ("A quitclaim deed conveys upon its face doubts about the grantor's interest; any buyer is necessarily put on inquiry as to those doubts."); *Barksdale v. Benskin*, 194 S.W. 402, 405 (Tex. Civ. App.—San Antonio 1917), *rev'd on other grounds*, 246 S.W. 360 (Tex. Comm'n App. 1923, judgm't adopted and holding approved) ("A quitclaim deed requires the grantee to ascertain for himself the true estate actually conveyed, and to take notice of recorded and unrecorded defects and equities."); 63 TEX. JUR. 3D REAL ESTATE SALES § 314. *Black v. Washington Mutual Bank*, 318 S.W. 3d 414 (Tex. Civ. App.—Houston [1st Dist] 2010, no writ)

[18] *Geodyne Energy Income Production P'ship I-E v. Newton Corp.*, 161 S.W.3d 482, 486 (Tex. 2005).

[19] *Tate v. Kramer,* 23 S.W. 255, 1Tex.Civ.App. 427 (1892).

Texas is in the minority of states subscribing to this rule.[20]

A prior equitable title of which the grantee of a quitclaim is deemed to have notice, is an enforceable right to have legal title transferred to the holder of the equity which arises when performance under the particular contract occurs, such as payment of the purchase price.[21]

D. Necessary Effects of a Quitclaim

Because the grantee under a quitclaim is on notice of defects in the grantor's title there are certain other consequences that Texas courts have found to flow from that conclusion.

1. ***Conveys Current Title.*** A quitclaim conveys the current title of the grantor.[22]

2. ***Secret Equities.*** One claiming under or through a quitclaim deed may be a bona fide purchaser of the title of the grantor free of the secret equities of the grantor, but not of secret equities of others.

In the *Meacham*[23] case Halley told Meacham that her 10 acre oil and gas lease had expired and insisted that she sign a release of the lease. In fact, the lease was held by production, had not expired, and the instrument Meachan signed was a quitclaim in favor of Halley but the court found that Halley had not committed fraud but had expressed a non-actionable legal conclusion. Halley had previously leased the 10 acres (and other land) to Estill. Estill then sold the lease to Weaver with Weaver paying a valuable consideration and without notice of Meacham's claim. Holding that the quitclaim was not notice of the fraud perpetrated against the grantor, the court stated the rule as follows:

> It may not be doubted that a quitclaim conveys only such interest or title as the grantor had, nor that in Texas reliance on a quitclaim will not support the plea of innocent purchase as against claims adverse to that of the quitclaiming grantor… But this is not to say, as appellant would have us do, that one cannot be an innocent purchaser of property as against secret claims of the quit claimant. Both reason and authority are to the contrary. The very statement of the effect, on a plea of innocent purchase, of the existence in the chain of title of a quitclaim deed, refutes appellant's claim that a quitclaim reserves to the grantor the right, as against persons who bought in reliance upon it, to undo what he has done, unsay what he has said…. In Texas, it is settled law that one claiming under or through a quitclaim deed may be a bona fide purchaser of the title of the grantor free of the

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[20] Annotation, *Grantee or Mortgagee by Quitclaim Deed or Mortgage in Quitclaim Form as within Protection of Recording Laws*, 59 ALR 632 § II (1929 & 2009 Supp.); *Bryan v. Thomas*, 365 S.W.2d 628, 629 (Tex. 1963); *Moore v. Swift*, 67 S.W. 1065, 1066 (Tex. Civ. App. 1902, no writ). See also G. Roland Love, "Quitclaims* Texas and Beyond", State Bar of Texas 27th Annual Advanced Real Estate Drafting Course, March 10 – 11, 2016, Chapter 3, Page 6, where the author lists decisions on the issue in other states.

[21] *See Johnson v. Wood*, 157 S.W.2d 146, 148 (Tex. 1941); *Neeley v. Intercity Mgmt. Corp.*, 623 S.W.2d 942, 950-951 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

[22] *Winningham v. Dyo*, 48 S.W.2d 600 (Tex. Com. App. 1932).

[23] *Meacham v. Halley*, 103 F.2d 967 (5th Cir. 1939).

secret equities of the grantor, but not of secret equities of others, or where the grantor has conveyed to another by prior unregistered instrument.[24]

3. ***After-Acquired Title.*** The general rule with respect to conveyances of land or of a specified right or interest is that a subsequently acquired interest in that land or in that specified right or interest would pass instantly to the grantee under the doctrine of after-acquired title. The doctrine of after-acquired title does not apply to conveyances that are quitclaims.[25]

In *Rogers v. Ricane Enterprises, Inc.*, 884 S.W.2d 763 (Tex. 1994), the issue was whether the grantor could be estopped from asserting a claim to the disputed property against his grantee based on the doctrine of after-acquired title.[26] In Texas, the grantor of a quitclaim instrument is not estopped from asserting after-acquired title against his grantee.

The deed in *Ricane* provided that the grantor granted, conveyed, sold, assigned, and transferred to the grantee "all of the right, title and interest" of the grantor in a described oil and gas lease "without warranty of any kind, either expressed or implied."[27] The Texas Supreme Court held that this instrument was "the essence of a quitclaim deed."[28] Since the grantor had no title to the lease, the deed passed no title to the grantee.[29] And because the deed was a quitclaim,

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[24] *Id*. at 970. The dissent by Justice McCord was to the effect that the representations by Halley were actionable fraud.

[25] *Renfrow v. Lineberry*, 271 S.W.2d 440 (Tex. Civ. App. —El Paso 1954) holding, in part, as follows: since the quitclaim deeds from Jones to McNutt and from McNutt to Ball are purely quitclaim deeds, purporting to convey and conveying only the right, title and interest of the grantors in and to the property in question, and not the property itself, they are insufficient to invoke the doctrine of after-acquired property and therefore the title acquired by Jones to the property in question at the foreclosure sale did not pass to McNutt and from McNutt to J. C. Ball, and therefore J. C. Ball had no title to the property involved in this suit.

Clark v. Gauntt, 138 Tex. 558, 161 S.W.2d 270 (Tex. Com. App. 1942) which said, at 138 Tex. 558, 563: "Defendant in error makes the contention that if it is conceded that the after-acquired title doctrine has no application to the case, the language used in the granting clause of the deed of trust, "all my right, title and interest", was broad enough to include and did include both the interest that the grantor then owned by inheritance from her mother and also the interest that she expected to inherit from her father. The contention cannot be sustained, because when [Defendant in error] executed the deed of trust her father was still alive and as his expectant heir she had no existing interest, right or title in his interest in the property. She had only an expectancy of inheritance, which, although it is carelessly referred to in some of the decisions as a right, is nothing more than a hope or a possibility of title. One cannot maintain a suit for the enforcement or adjudication of a right in property that he expects to inherit, because he has no present right or interest in the property."

[26] *Rogers v. Ricane Enterprises, Inc.*, 884 S.W.2d 763, 769 n.5 (Tex. 1994). Although the defendants in the case were never able to show that the original quitclaim grantor came into title, the court, in finding the instrument in question to be a quitclaim, implied that it would not have mattered if defendants had shown after acquired title because it will not flow to the grantee in a quitclaim.

[27] *Rogers v. Ricane Enterprises, Inc.*, 884 S.W.2d 763, 769 (Tex. 1994).

[28] *Ibid.* (citing the definition of quitclaim deed in Black's Law Dictionary, *Porter v. Wilson*, 389 S.W.2d 650, 655-56 (Tex. 1965), and *Cook v. Smith*, 174 S.W. 1094, 1095-1096 (Tex. 1915)).

[29] *Ibid.*

the doctrine of after-acquired title did not apply, and thus the grantor was not barred from claiming title to the lease allegedly acquired after his execution of the quitclaim.[30]

4. **Estoppel by deed.** Estoppel by deed, which states that a purported transfer of land that the transferor does not own becomes enforceable and takes place automatically if the land is later acquired, can never apply if the transfer was by quitclaim.[31]

E. Statutorily Implied Covenants

Section 5.023 (Implied Covenants) of the Texas Property Code reads as follows:

> (a) Unless the conveyance expressly provides otherwise, the use of "grant" or "convey" in a conveyance of an estate of inheritance or fee simple implies only that the grantor and the grantor's heirs covenant to the grantee and the grantee's heirs or assigns:
>
> (1) that prior to the execution of the conveyance the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee; and
>
> (2) that at the time of the execution of the conveyance the estate is free from encumbrances.
>
> (b) An implied covenant under this section may be the basis for a lawsuit as if it had been expressed in the conveyance.[32]

In the case of *Baldwin v. Drew*,[33] Tom Moore inherited 1,579 acres in Liberty County from his father, D.D. Moore. Tom Moore executed a general warranty deed to Tom M. Drew conveying the land. Tom M. Drew conveyed the land, by the instrument in question, to Jacob C. Baldwin. The conveyance recited consideration and did

> grant, sell, convey, and quitclaim unto … Baldwin … [the land]. It being understood that the intention of this instrument is to convey to the grantee all land in either of the leagues … which was at any time owned or claimed or stood in the name of D.D. More … To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto … Baldwin … And I hereby bind myself, my heirs … to warrant and forever defend … [T]he consideration …, the sum of $200, has been this day paid in cash, and the further sum of $300, as evidenced by the promissory note of said grantee

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30 *Ibid.*

31 *Gilbert Kerlin et al. v. Sauceda*, 263 S.W. 3d, 920 (Tex. 2008)

32 TEX. PROP. CODE § 5.023.

33 *Baldwin v. Drew*, 180 S.W. 614 (Tex. Civ. App. 1915).

> of even date herewith … due two years after date, with interest … and a vendor's lien is expressly retained ….[34]

Tom Moore notified Baldwin that the land had been conveyed to Tom M. Drew in trust and had not been paid for, that Moore was the owner and not to pay the note to Tom M. Drew. Drew sued Baldwin. At the time of the Drew to Baldwin conveyance, there were unpaid taxes due to Liberty County. The trial court found in favor of Drew. Baldwin appealed saying that the use of the words "grant" and "convey" "carried in themselves an implied covenant on the part of the plaintiff that, previous to the time of the execution of such conveyance the grantor had not conveyed the same estate to any other person … and that such estate was at the time of the execution of such conveyance free from incumbrances, which included the unpaid taxes."[35]

The Texas statute in effect at the time is substantively the same as the current Section 5.023 of the Texas Property Code. The court explained as follows:

> Under the common law, conveyances are classified, first, as original or primary conveyances, which are those by means whereof the benefit or estate is created or first arises; and, second, derivative or secondary conveyances, whereby the benefit or estate originally created is enlarged, restricted, transferred, or extinguished… If a deed purports and is intended to convey only the right, title, and interest in the land, as distinguished from the land itself, it is strictly speaking a quitclaim deed. The words used in the ordinary form of a quitclaim at common law are "remise, release, and forever quitclaim all the right, title, and interest of the party making the deed … A quitclaim deed has with us the same effect as a release at common law… Therefore, as a conveyance, it must fall in the second classification, and is of a dignity less than a conveyance of an estate of inheritance or an estate in fee, and for this reason the statute does not apply to a strictly quitclaim deed.[36]

As to whether this specific conveyance was a quitclaim, the Court of Appeals remanded for a new trial after concluding (i) the court could not take judicial notice that the $500 was an inadequate consideration, and (ii) the use of the word "quitclaim" does not make the deed any less a conveyance or restrict it so as to make it upon its face convey no more than the interest of the grantor in the property.

1. **Statute of Limitations/Adverse Possession**

A quitclaim will support title under the five year adverse possession statute but only with respect to the interest actually transferred:

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[34] *Id.* at 615 (emphasis added).

[35] *Id.* at 616.

[36] *Ibid.* (emphasis added).

> A quitclaim deed requires the grantee to ascertain for himself the true estate actually conveyed, and to take notice of recorded and unrecorded defects and equities. A claim of five-year limitation under a duly registered quitclaim deed is an adverse claim of only that estate, interest, or right actually owned by the grantor at the time he executed the deed.[37]

To avoid misunderstanding, a quitclaim deed will not support a claim under the five-year limitation rule except as to the interest actually transferred. In *Barksdale v. Benskin*, however, the grantor had received a lease from his predecessor in title; while not directly so held, it appears that the court was saying that the instrument in question was sufficient to convey the leasehold interest but not title to the fee under the five-year limitation rule.

2. **Cured by a Subsequent Deed?**

There is logic in the proposition that once the grantee, who is placed on notice of prior defects by receiving a quitclaim, has conveyed the property by a deed to a subsequent purchaser for value and without notice, that subsequent purchaser might think himself protected in full. Not so fast. In *Houston Oil Co. v. Niles*, 255 S.W. 604 (Tex. Com. App. 1923), the court wrote:

> It is earnestly insisted, however, that although it is now the established law of this state that one claiming under a quitclaim deed to himself or to his immediate grantor is not protected as an innocent purchaser, nevertheless such protection does extend to one where the quitclaim deed appears to have been to a remote grantor. It is further contended that, even if such quitclaim to a remote grantor would be sufficient to put all grantees thereunder upon notice of an outstanding title or defect in the title of the grantor in the quitclaim deed, such remote grantee is only required to use reasonable diligence to ascertain the existence of such outstanding title or defect, and upon exercising such diligence he is protected, if his inquiries are ineffectual…. The first of these contentions seems to be well established in the federal courts and in a number of other state courts.... A careful review of the Texas Supreme Court cases upon this question will, we think, conclusively demonstrate that all the contentions of the

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[37] *Barskdale v. Benskin et al.*, 194 S.W. 402 (Tex. Civ. App. San Antonio 1917). See also *Porter v. Wilson*, 389 S.W.2d 650 (Tex. 1965). This notion should be contrasted with the situation in which a grantor owns no interest in the property but conveys it by a non-quitclaim deed in *Rosborough v. Cook* et al., 194 S.W. 131, 108 Tex. 364 (Tex. 1917):

> To support limitation under the five years statute, it is not necessary that the deed, under which the claim is made, convey any title. The grantor may be wholly barren of any vestige of title; the deed may therefore pass no semblance of title; yet, if it describes and purports to convey the land and tested by itself is upon its face a good deed, it meets the requirement [under the 5 year statute of limitations].

> defendants have been foreclosed adversely to those contentions by a long line of decisions….[38]

The Texas approach seems to be unique and no other states say "that the existence of a quitclaim in a chain of title automatically causes doubt on that chain of title." [39] Eight states (Wyoming, Virginia, Rhode Island, North Dakota, Minnesota, Florida, Michigan, and Maine) have mandated a contrary result by statute while courts in Nebraska, Georgia, Illinois, California, and New Mexico have interpreted state law to accomplish the same result.[40]

3. **Sales by Administrators, Sheriff's Deed, and Heirs.**

The rule seems to be that, if the proceedings show an intent to convey the land of the intestate, rather than the mere chance of title, the use of "all right and title" will not limit the conveyance. In *White v. Dupree*, the Texas Supreme Court said the following:

> But what is clearly decided in the case cited [*Taylor v. Harrison,* 47 Tex. 454 (Tex. 1877)] is that whether a purchaser at an administrator's sale, without actual or implied notice of a prior unrecorded deed, can claim protection against the previous conveyance, does not depend upon the form of the deed; but that if it appears from the whole transaction that it was the purpose to sell, and the intention of the purchaser to buy, the land itself, and not a mere claim upon it or a chance of title, he may be an innocent purchaser. It can hardly be said to be the duty of an administrator, when he knows of a defect in the title of his intestate, to conceal the fact, and to sell to an innocent purchaser, to the injury of the grantee in a prior conveyance. But when the apparent title is in the estate, and no defect in that title is known, we think it the duty of the court to order the sale, and of the administrator to sell and convey the land in such manner as to protect the purchaser against an unknown and unrecorded title; not for the reason that any injury to the estate would result in case the title was defective, but because it is essential that purchasers should be able to rely upon the recorded title, in order that property to which the estate may have a perfect right may bring a fair price. It is necessary to protect the rights of creditors for whose benefit the land is sold. It being to the interest of the estate and of its creditors that the property should be sold according to the apparent title, when no defect is known, it is the duty of the court so to order it sold, and of the administrator to sell it, and it should be presumed that such was the intention, unless it

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[38] *Houston Oil Co. v. Niles*, 255 S.W. 604, 609 (Tex. Com. App. 1923); *see also Kirby Lumber Corporation v. Williams*, 124 F. Supp. 456 (E.D. Tex. 1954); *Straus v. Shamblin et al.*, 120 S.W.2d 598 (Tex. Civ. App. 1938); *Biggs v Poling*, 134 S.W.2d 801 (Tex. Civ. App. 1939).

[39] G. Roland Love, "Quitclaims* Texas and Beyond", State Bar of Texas 27th Annual Advanced Real Estate Drafting Course, March 10 – 11, 2016, Chapter 3, Page 6.

[40] *Id*., 6-7.

> affirmatively appear [sic] from the proceedings that it was merely a doubtful title or a chance of title which was sold.[41]

Sales by a sheriff's deed do not seem to fare as well. In *Smith v. Morris and Co.*, 694 S.W.2d 37 (Tex. App.—Corpus Christi 1985), a case in which the parties had stipulated that each party was a bona fide purchaser for value, the court rejected the stipulation and held as follows:

> Contrary to the parties' stipulation that appellant was "a bona fide purchaser for value," the proper legal conclusion to be drawn from the facts of the case is that appellant was not a bona fide purchaser for value without notice and was not entitled to the protection afforded a bona fide purchaser for value without notice. Appellant claimed title through a sheriff's deed, which only conveyed to appellant "all the rights, title, interest and claim of the said John Montalvo" in and to the subject property. We hold that, in our fact situation, the sheriff's deed was in the nature of a quitclaim deed.[42]

But see a legislative change to this rule cited in Section E.4. below.

Grants by a group of heirs can, at times, be given special consideration when identifying the type of conveyance. In *Moore v. Swift*, 67 SW. 1065 (Tex. Civ. App. 1902), the court held as follows:

> If, as held by some authorities, the adequacy of price paid and the surrounding circumstances may be taken into consideration in determining the nature of the transaction and the intent of the parties ... then it is fairly made to appear that Swift bought the land, and not the mere chance of title. It is undisputed that he paid full value for the land. This fact of itself tends to show that he intended to buy a good title. Against this is the fact that in the conveying clause the grantors undertook to convey only their right, title, and interest. But this does not necessarily militate against the construction adopted by the trial court. To the instrument in question there were six grantors. They conveyed as heirs of the decedent, Jane Mast. Their interests were doubtless undivided, and it was not especially significant of a purpose to convey only a chance of title that they used the words, "all our and each of our right, title, claim, and interest," etc.[43]

4. **Statutory Exceptions.**

(a) *Right of Redemption*.

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41 *White v. Dupree*, 40 S.W. 962, 964-65 (Tex. 1897).

42 *Smith v. Morris*, 694 S.W.2d 37, 39 (Tex. App.—Corpus Christi 1985).

43 *Moore v. Swift*, 67 SW. 1065, 1066 (Tex. Civ. App. 1902).

A grantee of an assignment based on redemption under the Texas Tax Code is protected:

> A quitclaim deed to an owner redeeming property under this section is not notice of an unrecorded instrument. The grantee of a quitclaim deed and a successor or assign of the grantee may be a bona fide purchaser in good faith for value under recording laws.[44]

(b) *Execution Sales*.

An officer executing a deed upon and execution sale uses a form of quitclaim. The grantee under such a grant is protected:

> The purchaser of property sold under execution is considered to be an innocent purchaser without notice if the purchaser would have been considered an innocent purchaser without notice had the sale been made voluntarily and in person by the defendant.[45]

F. The Test for Determining Whether an Instrument is a Quitclaim

Whether a particular instrument is a quitclaim depends on whether, viewing the instrument as a whole, the instrument conveys the land itself or a mere chance of title.[46] A deed of realty is distinguished from a quitclaim based upon whether the instrument:

> assumes to convey the property described and upon its face has that effect, or merely professes to convey the grantor's title to the property. If, according to the face of the instrument, its operation is to convey the property itself, it is a deed. If, on the other hand, it purports to convey no more than the title of the grantor, it is only a quitclaim deed.[47]

The intent is to be determined from the four corners of the instrument.[48] The instrument should be considered as a whole, and should be given effect as a conveyance of the land if it discloses a purpose to convey the property itself although some of its characteristics may be those of a quitclaim.[49] The instrument in dispute in *Cook v. Smith*, 174 S.W. 1094 (Tex. 1915) had a granting clause in the form of "all my right, title and interest" in certain described property.[50] It had a habendum clause to the effect that the grantee should have and hold "the said premises" so

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44 Texas Tax Code § 34.21(j)

45 Tex. Civ. Prac. & Rem. Code §34.046. The Texas Legislature passed this curative statute shortly after the *Smith v Morris and Company* case.

46 *Cook v. Smith*, 174 S.W. 1094, 1095 (Tex. 1915); *Rogers v. Ricane*, 884 S.W.2d 763, 769 (Tex. 1994); *see* TEX. JUR. 3D DEEDS § 76; TEX. JUR. 3D REAL ESTATE SALES § 316.

47 *Cook v. Smith*, 174 S.W. at 1095.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

that neither the grantor nor his heirs nor any person claiming under them should have any claim on or right in the premises.[51] The court concluded that the foregoing language, standing alone, constituted a quitclaim.[52] Following the description of the property, however, the deed contained the following: "and it is my intention to convey to the said . . . all the real estate *that I own* in said town . . ., whether it is set out above or not."[53] Apparently seizing on the "that I own" language as an assertion of ownership, the court held that this language was sufficient to make the instrument a conveyance of the land rather than one of the mere chance of title, and that the grantee was thus a bona fide purchaser for value who took free of an earlier executed but later recorded deed in favor of a third party.[54] The *Cook v. Smith* test for determining whether an instrument is a quitclaim was reaffirmed by the Texas Supreme Court in *Porter v. Wilson*, 389 S.W.2d 650, 654 (Tex. 1965) and *Geodyne Energy Income Production Partnership I-E v. Newton Corp.*, 161 S.W.3d 482, 486 (Tex. 2005).[55]

G. Subsequent Opinions Muddy the Waters

1. *Bryan v. Thomas*, 365 S.W.2d 628 (Tex. 1963)

In 1924 B. Bryan became the record owner of an undivided 1/2 of the minerals in a 100 acre tract.[56] An unrecorded ledger showed that three parties, B. Bryan, C. Bryan and Johnson, jointly owned the 1/2 undivided interest, each owning a 1/3 undivided interest in the 1/2 undivided interest (i.e., each owning a 1/6 undivided interest in the minerals).[57] In August 1936 B. Bryan conveyed a 1/12 mineral interest to C. Bryan.[58] In December 1936 B. Bryan conveyed a 1/12 mineral interest to Johnson.[59] These conveyances were promptly recorded in the deed records.[60]

In 1960, by the instrument in question, the heirs of B. Bryan conveyed the 100 acre tract to Thomas.[61] C. Bryan, his children, and the heirs of Johnson sued Thomas to determine what Thomas got.[62] The court of appeals dealt with only one of four issues (whether a 1/12 mineral interest or a 1/12 x 1/8 royalty was conveyed by the 1936

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51 *Ibid.*

52 *Ibid.*

53 *Id.* at 1096 (emphasis added).

54 *Ibid.*

55 *See* 5 TEX. PRAC., LAND TITLES AND TITLE EXAMINATION § 31.10 for examples of instruments that have been construed as quitclaims rather than deeds; *see id.* § 31.11 for examples of instruments that have been construed as deeds rather than quitclaims.

56 *Bryan v. Thomas*, 365 S.W.2d 628, 628 (Tex. 1963).

57 *Id.* at 629.

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 *Id.* at 628.

62 *Ibid.*

conveyance from B. Bryan to C. Bryan) and did not articulate the other three issues.[63] The Texas Supreme Court did not clearly explain the issues, but we surmise that the heirs of C. Bryan and Johnson claimed that Thomas received only 1/3 of B. Bryan's original record 1/2 (i.e., 1/6), not 1/3, with C. Bryan and Johnson each having 1/6, not 1/12. Thomas, of course, contended that the conveyance to him was of 1/3 (1/2 – 1/12 – 1/12), not 1/6 and that, under the Texas recording act, he cut off any prior unrecorded claims of C. Bryan, Johnson, or their heirs.

The deed from B. Bryan's heirs to Thomas states

> . . . that the grantors "have granted, sold, conveyed, assigned and delivered and by these presents do grant, sell, convey, assign and deliver unto the said grantee *all of our undivided interest* in and to all of the oil, gas and other minerals in and under and that may be produced from the following described land situated in Hunt County, Texas, ..." The deed also grants to Thomas the right of ingress and egress at all times for the purpose of mining, drilling and exploring said land for oil, gas and other minerals and removing the same therefrom. It provides that the grantee shall own all gas and other minerals in and under said lands, together with all royalties and rentals that might be provided in future oil and gas leases, and concludes with the usual habendum and general warranty clauses.[64]

The Texas Supreme Court held that this instrument was "more than a quitclaim deed."[65]

Going a step further, Justice Culver wrote for the Court:

> To remove the question from speculation and doubt we now hold that the grantee in a deed which purports to convey all of the grantor's undivided interest in a particular tract of land, *if otherwise entitled*, will be accorded the protection of a bona fide purchaser [emphasis added] .[66]

Contrary to its intention, the Court inadvertently introduced more confusion into the law through this ambiguous statement. What did the Court mean by this statement, and, in particular, by the phrase "if otherwise entitled"? The phrase "if otherwise entitled" could refer to the grantee's satisfaction of the elements of the recording statute. Under this interpretation, the Court can be understood as establishing a blanket rule that any deed which purports to convey "all of the grantor's undivided interest in a particular tract of land" is to be construed as a deed to land, not a quitclaim, for purposes of the grantee's entitlement to recording act protection, even if, viewed as a whole, the

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63 *See Bryan v. Thomas*, 359 S.W.2d 131, 132 (Tex. Civ. App.—Texarkana 1962).

64 *Bryan v. Thomas*, 365 S.W.2d 628, 630 (Tex. 1963) (emphasis added).

65 *Id. See also Rogers v. Ricane Enterprises, Inc.*, 884 S.W.2d 763 (Tex. 1994).

66 *Ibid*. (emphasis added).

instrument would be a quitclaim under the *Cook v. Smith* test.[67] Justice Smith's characterization, in his concurrence, of the majority opinion as "announcing new theories and new law" and holding "contrary to the well-settled rule governing the construction of deeds similar to the one involved in the present case" indicates that he understood the majority opinion to be a major departure from precedent.[68]

On the other hand, the phrase "if otherwise entitled" could instead refer to the deed's satisfaction of the elements of the *Cook v. Smith* test for whether an instrument is a deed to land or a mere quitclaim. Under this interpretation, the Court can be understood as merely highlighting that the usage of quitclaim-type granting language (such as "all of my undivided interest" or "all my right, title and interest") in an instrument does not necessarily make the instrument a quitclaim for purposes of the recording act; rather, the grantee of such an instrument will be accorded recording act protection if the grantee is "otherwise entitled" to such protection under the *Cook v. Smith* test—i.e., if, viewing the instrument as a whole, it conveys the land itself rather than a mere chance of title. This latter interpretation is supported by the Court's assertion that its decision in *Bryan v. Thomas* "found full support in *Cook v. Smith*" (*see supra* § E).[69] This interpretation is similar to the one advanced by F. Walter Conrad in his note in the October 1963 issue of the Texas Law Review:

> The court in the instant case apparently did not intend to confine its opinion to deeds involving only the phrase "undivided interest" but rather addressed itself to all deeds combining quitclaim language, such as "all my right, title and interest," with a general warranty clause or words of conveyance normally found in warranty deeds. The court said in effect that if an instrument contains such dual elements it will not be regarded as a quitclaim. This redefinition means that grantees claiming under the deed, immediate or remote, may rely on the recording acts. Although the present case does not extend the protection of the recording acts to grantees in a quitclaim deed, it does decrease the number of deeds that will be considered quitclaim by restricting the definition of a quitclaim deed in relation to the recording acts. *Houston Oil Co. v. Niles*, 255 S.W. 604 (Tex. Comm'n App. 1923, opinion adopted), which precludes protection of the recording acts to all subsequent grantees in a chain of title containing a quitclaim, even if to a remote grantor, will henceforth be applicable only if the quitclaim is unmistakably an instrument of that character.[70]

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[67] *See, e.g.*, George A. Snell III, *Basic Conveyancing Rules for Mineral Deeds and Assignments of Oil and Gas Leases, Part 2: Understanding Assignments of Oil and Gas Leases*, 19TH ANNUAL ADVANCED OIL, GAS & ENERGY RESOURCES LAW COURSE § IV.B (2001).

[68] *See Bryan v. Thomas*, 365, S.W.2d at 631 (Smith, J., concurring).

[69] *See Bryan v. Thomas*, 365 S.W.2d at 630.

[70] F. Walter Conrad, *Property—Deeds—Notice—Quitclaim Redefined in a Restricted Manner for the Purposes of Notice under the Recording Acts.* Bryan v. Thomas, 365 S.W.2d 628 (Tex. 1963), 41 TEX. L. REV. 939, 941-42 (1963).

Justice Smith pointed out in a concurring opinion that the result in *Bryan v. Thomas* was compelled because C. Bryan and his children and the heirs of Johnson failed to prove their title:

> Therefore, the question of innocent purchaser need not be decided. The Court has unnecessarily passed upon the question, and more than that has held contrary to the well-settled rule governing the construction of deeds similar to the one involved in the present case. Another thing, the Court apparently is charging Thomas with the burden of proving that he was an innocent purchaser. The burden of proof is always with the party asserting an equitable title. In this case, the burden of proof was with Petitioners, W.C. Bryan et al., and not Thomas. Bryan et al. failed to offer any evidence to show that Thomas was not an innocent purchaser. For that reason, if none other, Thomas should recover.[71]

The holding of *Bryan v. Thomas* on the quitclaim issue has been cited only once, in *Penny v. Adams*, 420 S.W.2d 820 (Tex. Civ. App.—Tyler 1967, writ ref'd). Without citing *Cook v. Smith*, the Tyler Court of Appeals in *Penny* held that a conveyance that probably would have been entitled to recording act protection under the *Cook v. Smith* test was entitled to protection under *Bryan v. Thomas*.[72] Apparently, in the *Rogers v. Ricane* case,[73] the defendants argued the applicability of *Bryan v. Thomas*, but the court disregarded that argument in its opinion.

2. Geodyne Energy Income Production Partnership I-E v. Newton Corp., 161 S.W.3d 482 (Tex. 2005)

The quitclaim issue arose in another context in *Geodyne Energy Income Production Partnership I-E v. Newton Corp.*, 161 S.W.3d 482 (Tex. 2005). The grantee sued the grantor for misrepresentation under the Texas Securities Act because the lease purportedly assigned had expired.[74] The assignment in question

> (1) conveyed . . . "all of [Assignor's] right, title and interest" in the described lease "AS IS AND WHERE IS, WITHOUT WARRANTY OF MERCHANTABILITY," (2) provided that "this Assignment hereby conveys to Assignee . . . all of Assignor's right, title and interest on the effective date hereof in and to the Property," and (3) concluded in the habendum clause that the assignment was "WITHOUT WARRANTY OF TITLE, EITHER EXPRESS OR IMPLIED."[75]

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71 *Bryan v. Thomas*, 365, S.W.2d at 631 (Smith, J., concurring).

72 *See Penny v. Adams*, 420 S.W.2d 820, 821 (Tex. Civ. App.—Tyler 1967, writ ref'd).

73 *Rogers v. Ricane Enterprises, Inc.*, 884 S.W.2d 763 (Tex. 1994); *see supra* § D.3.

74 *Geodyne Energy Income Production Partnership I-E v. Newton Corp.*, 161 S.W.3d 482, 484-85 (Tex. 2005)

75 *Id.* at 486-487.

The Texas Supreme Court, professing to apply the *Cook v. Smith* test,[76] held that this assignment was a quitclaim as a matter of law.[77] One of the reasons the Court gave for its holding was that the assignment did not state "the nature or percentage interest that was being conveyed."[78] However, the Court did not say whether failure to state the percentage of the interest being conveyed in an instrument is determinative of its characterization as a quitclaim or a deed to land. Accordingly, the Court rejected the grantee's argument that the quitclaim deed was a misrepresentation that the lease was valid and opined that "a quitclaim deed *without warranty of title* cannot be a warranty (or 'misrepresentation') of title."[79]

3. ***Enerlex,* Inc. *v. Amerada Hess, Inc.*, 302 S.W.3d 351 (Tex. App.—Eastland 2009, no pet.)**

The mineral deed at issue in *Enerlex, Inc. v. Amerada Hess, Inc.*, 302 S.W.3d 351 (Tex. App.—Eastland 2009, no pet.), purported to convey "all right, title and interest" in several described tracts and contained a general warranty.[80] The Eastland Court of Appeals construed the deed as a quitclaim because it did not purport to convey any specific percentage interest in the tracts.[81] The court cited *Ricane* and *Geodyne* in support of its holding but failed to mention *Cook v. Smith* and *Bryan v. Thomas*.[82] Based on its construction of the deed as a quitclaim, the court held that the subsequent grantee could not be a bona fide purchaser.[83] Therefore, the subsequent grantee was not entitled to the protection of the recording acts, and the court awarded the property to the prior grantee even though the prior grantee had not recorded her deed at the time of the conveyance to the subsequent grantee.[84]

It is worth noting that, unlike the instruments in *Ricane* and *Geodyne*, the mineral deed in *Enerlex* contained a general warranty and was absent any "as is" or "without warranty" language.[85] Furthermore, the *Enerlex* deed purported to convey "*all* right, title, and interest" in the described land as opposed to "*my* right, title, and interest" or "all right, title, and interest *that I may own*".[86]

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76 *Id.* at 486 & n.13.

77 *Id.* at 487.

78 *Id.* at 486-487.

79 *Id.* at 487 (emphasis in original).

80 *Enerlex, Inc. v. Amerada Hess, Inc.*, 302 S.W.3d 351, 354 (Tex. App.—Eastland 2009, no pet.).

81 *Id.* at 355.

82 *Id.* at 354-355.

83 *Id.* at 355.

84 *Ibid.*

85 *See Ibid.*

86 *Id.* at 354 (emphasis in original).

Under *Enerlex*, it appears that any conveyance of the grantor's "right, title, and interest" in specified lands that does not quantify the interest being conveyed would be construed as a quitclaim, regardless of what the other provisions of the instrument say. This holding directly conflicts with *Bryan v. Thomas*, does not follow *Cook v. Smith*'s precept that instruments should be considered as a whole in determining whether they are quitclaims, and is, at best, an extension of *Ricane* and *Geodyne*. Therefore, the *Enerlex* holding potentially renders many oil and gas titles unmarketable and could become a basis to attack existing conveyances.

4. ***Jackson v. Wildflower Production Company, Inc.*, 2016 WL 6024387 ___ S.W.3d ___ (Tex. App.—Amarillo October 13, 2016). Still Active**

Fuller owned minerals in Wheeler County, Texas which he deeded to his three children, Rex Fuller, Ann Fuller Cope, and Jane Fuller Jackson. In 1977 the children executed a lease to W.R. Gray & Associates which assigned to Grace Petroleum and the interest was pooled. In 1990, their heirs executed a deed of trust. In 1993, the bank foreclosed. FBGA Financial Services, the bank's nominee and agent, purchased the property for the benefit of the bank.

After the foreclosure, the Jackson heirs agreed to purchase Jackson's undivided 1/12th interest from FBGA. On November 23, 1993, FBGA executed and delivered a quitclaim instrument entitled "Mineral Deed Without Warranty" to Jackson; it was recorded December 3, 1993. At the same time the bank was negotiating with Rex to purchase the same property and agreed to sell the property to Rex's company, Wildflower Production. On November 30, 1993, FBGA executed and delivered to Wildflower a "Mineral Deed Without Warranty" covering whatever property interest the bank acquired through foreclosure. It was recorded on December 14, 1993 and provided, in part, as follows:

> FBGA Services, Inc., ... does hereby grant, bargain, sell, convey, transfer, assign and deliver unto WILDFLOWER PRODUCTION COMPANY, INC., ... a portion of the Grantor's right, title, interest, estate, and every claim and demand, both at law and in equity, in and to that part of the oil, gas and other minerals in and under and that may be produced from the following described lands situated in Wheeler County, State of Texas, being more particularly described in Exhibit "A" attached hereto and made a part hereof for all purposes whatsoever, being that interest previously owned by [Ann Cope] … and [Jane Jackson] ..., together with the right of ingress and egress at all times for the purpose of mining, drilling, exploring, operating and developing said lands for oil, gas and other minerals, and storing, handling, transporting and marketing the same therefrom with the right to remove from said land all of Grantee's property and improvements.

In 2011 Linn Energy required both parties to agree to a stipulation of their respective interests. No agreement was reached and Wildflower sought a declaration that it owned the property and the earlier FBGA deed to Jackson was void because

Wildflower received its deed before Jackson recorded her deed. The trial court concluded that Wildflower had superior title and had acquired the property for value and without notice of the Jackson deed.

On appeal, Jackson argued that the Wildflower deed is, as a matter of law, a quitclaim deed and the trial court erred in finding otherwise.

The Court of Appeals did a thorough analysis (including a reference to this paper) and concluded that the Wildflower deed was a quitclaim and that Jackson prevailed. It started with a review of *Cook v Smith, Geodyne, and Enerlex* (above) and concluded that "if the instrument, taken as a whole, indicates the grantor's intent to merely transfer whatever interest the grantor may own, it will be treated as a quitclaim deed." After analyzing the Recording Acts and *Bryan v. Thomas* (above), it concluded that the Wildflower instrument "was poorly drafted," and while titled "Mineral Deed Without Warranty" the body of the instrument fails to discuss anything about whether "the conveyance is or is not covered by a warranty of title." The court found that it had many characteristics of a quitclaim such as, (i) the granting clause describes a "portion" of the grantor's "right, title and interest" in and to "part" of the oil and gas, (ii) it defines neither "portion" nor "part" conveyed; (iii) there is no express covenant of seisin or statement that the grantor owns the property, and (iv) conveys whatever "right, title, interest, estate, and every claim and demand, both at law and in equity" the grantor might own. The court described "the quintessential character of a quitclaim deed" as one in which "the grantor makes no covenant of seisin—no representation or claim of ownership." The court concluded as follows:

> Because the conveyance instrument from FBGA to Wildflower, when taken as a whole, (1) conveyed only "the Grantor's right, title, interest, and estate," (2) contained no covenant of seisin, (3) included no warranty of title, and (4) otherwise did not express an intent to convey the property itself, we conclude it to be a quitclaim deed. Furthermore, because the instrument in question is a quitclaim deed, as a matter of law, Wildflower cannot avail itself of the protection afforded an innocent purchaser for value, without notice. *See Hall*, 23 S.W.3d at 407 (holding that grantee received nothing more than a chance at title because it received only whatever right, title, interest, or claim grantor had, which was nothing); *Woodward*, 237 S.W.2d at 291 (stating purchaser under a quitclaim deed could not enjoy protection of an innocent purchaser); *Smith v. Morris and Co.*, 694 S.W.2d 37, 39 (Tex. App.–Corpus Christi 1985, writ re'd n.r.e.) (stating grantee in a quitclaim deed takes with notice of all defects in the grantor's title). Finally, because Wildflower is not entitled to the protections of an innocent purchaser for value, its interest in the property in controversy, if any, is subject to all existing claims.

Unlike *Enerlex*, the court in *Wildflower* cited both *Cox v Smith* and *Bryan v Thomas*. It distinguished *Bryan v Thomas* by noting that the court in that case said that the deed was more than a quitclaim and that the deed itself "purported to convey all of the grantor's interest in a particular tract of land and because the grantor warranted title to that property, the court found that the instrument fairly implied an intent to convey the

land itself …As a result, the instrument in *Bryan* was held not to be a quitclaim deed."[87] Although the court cited *Enerlex* for various general propositions it did not really distinguish the case. The failure to adopt *Bryan's* general statement that all such language would be accorded Recording Act protection may be attributed to the fact that other courts addressing the issue just do not cite *Bryan* and certainly do not cite it for the proposition advanced. Perhaps the Amarillo court did not wish to be the first to decide that Quitclaims are protected without a more recent and more broadly applied precedent.

H. But It Has a General Warranty

The presence of a general warranty in an instrument may be viewed as an indication of intent to convey the land itself rather than a mere chance of title, and vice versa.[88] But the presence or absence of a general warranty, in and of itself, is not determinative of whether the instrument is a quitclaim or a deed to land.[89]

1. Covenants of Seisin

A declaration of a right to convey tends to exclude treatment as a quitclaim. As stated in *Childress v. Siler*, 272 S.W.2d 417 (Tex. Civ. App.—Waco 1954):

> A quitclaim is an instrument which purports to transfer only the "right, title and interest" of the grantor, as distinguished from other types of deeds or assignments which evidence an intention on the part of the grantor to convey the property itself. A covenant in a deed or assignment to the effect (as in the case at bar) that [Appellants] "has good right and authority to sell and convey the same" evidences the intention on the part of Childress to convey the lease itself and not merely the grantor's title and interest therein. Whenever covenants of seisin or good right to convey are contained in a deed or lease or assignment of a lease they import an intention on the part of the grantor to do more than give a quitclaim; they import an intention to convey the land or the described interest in the land itself.[90]

2. The General Warranty

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[87] *Jackson v. Wildflower Production Company, Inc.*, 2016 WL 6024387 ___ S.W.3d ___ (Tex. App.—Amarillo October 13, 2016), at page 20.

[88] *White v. Dupree*, 40 S.W. 962, 964 (Tex. 1897); *see Bryan v. Thomas*, 365 S.W.2d at 630 (Tex. 1963) (citing a deed's general warranty clause as a factor in support of the court's conclusion that the deed was a conveyance of land, not a quitclaim); *Roberts v. Corbett*, 265 S.W.2d 127, 128 (Tex. Civ. App.—Galveston 1954) (same); *Geodyne*, 161 S.W.3d at 486-487 (Tex. 2005) (construing a deed without warranty of title as a quitclaim deed).

[89] *White v. Dupree*, 40 S.W. 962, 964-965 (Tex. 1897) (holding that an instrument which expressly disclaimed all warranties was *not* a quitclaim, notwithstanding the absence of warranties); *see Enerlex*, 302 S.W.3d at 355 (Tex. App.—Eastland 2009) (construing a deed containing a general warranty as a quitclaim).

[90] *Childress v. Siler*, 272 S.W.2d 417, 420 (Tex. Civ. App.—Waco 1954).

Having a general warranty or a special warranty does not usually result in converting a quitclaim to a deed. In *Harrison v. Boring*, 44 Tex. 255 (Tex. 1875), the court wrote that "the principle upon which such a special warranty in connection with such terms of conveyance does not prevent the deed from being a mere quit claim, is said to be that it refers to the estate or title sold and not to the land." Some earlier Texas law was contrary and it was, for a time, unsettled.[91] In *White v. Dupree*, 40 S.W. 962 (1897) it was explained as follows:

> Just here we may remark that, while a warranty may be looked to in order to determine whether the grantee may be an innocent purchaser or not, it is by no means conclusive. A grantor with an undisputed title may decline to warrant it, while one with a doubtful claim may be willing to covenant for the repayment of the purchase money and interest in case the title should fail. Covenants of warranty are mere matters of contract in reference to the title, and may or may not be incidents of the conveyance. The conveyance is complete without them. They may throw light upon it, but do not determine its character.[92]

The law seems to have gotten progressively stronger on this issue. As stated in *Stonum v. Schultz*, 138 S.W.2d 825 (Tex. Civ. App.—Galveston 1940), at 828:

> In other words, the appellants' efforts to overturn that holding rest upon their view that the covenants of general warranty in the deeds down under which they held relieve those deeds from being quitclaims, with the consequent legal effect given them by this court in the Miller case [*Miller v. Pullman,*72 S.W.2d 379 (Tex. Civ. App.—Galveston 1934)], and that such a definite credit should now be given them here, notwithstanding that prior classification of them. But it is not perceived how that may be done, when the law is equally well settled with us to the effect that such mere covenants of warranty amount at most to collateral contracts or undertakings between the parties thereto, and their privies, and neither constitute a part of the conveyance itself, nor strengthen or enlarge the title thereby conveyed[.][93]

Notwithstanding the heady conclusion reached in the preceding paragraph, there is reason to argue that the case of *Geodyne Energy Income Production Partnership I-E v. Newton Corp.*, 161 S.W.3d 482 (Tex. 2005) resurrects the argument that a warranty converts a quitclaim into a deed.

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91 In *Jenkins v. Adcock*, 27 S.W. 21, 23 (Tex. Civ. App. 1893), the court stated: "The clause of general warranty removes all doubt as to the character of the conveyance."

92 *White v. Dupree*, 40 S.W. 962, 964 (1897).

93 *Stonum v. Schultz*, 138 S.W.2d 825, 828 (Tex. Civ. App.—Galveston 1940) (internal citations omitted).

3. Premises

Some cases have held that using the word "premises" in the habendum clause means the "land" and would make the conveyance a deed, not a quitclaim.[94] That notion, however, has been repudiated.[95]

4. Consideration

Since courts look at the totality of the circumstances surrounding the execution of the instrument in question, several cases have seized upon inadequacy of consideration as a sign of a quitclaim. In *Tate v. Kramer*, 23 S.W. 255 (Tex. Civ. App. 1892), the court noted: "Neely's purchase from Mrs. Tate was on the 26th day of November, 1884 ...; he paid her $100 for the entire 1700 acres; he sold the land to Kramer and Hardt ... on the 19th of June 1886 for $3660."[96] Then the court said, "To be an innocent purchaser the vendee must in good faith pay a valuable consideration ...."[97] Similar holdings can be found in *Taylor v. Harrison*, 47 Tex. 454 (Tex. 1877), and *Harrison v. Boring*, 44 Tex. 255 (Tex. 1875).

I. The Mortgage Is Covered

The rules pertaining to the status of bona fide purchasers without notice apply with equal force to mortgagees and beneficiaries of a deed of trust. This is also true of the rules relating to the after-acquired title doctrine. A mortgagee or the beneficiary of a deed of trust, to burden prior unrecorded legal or equitable title in favor of third parties, must take his lien as a bona fide mortgagee without notice of such title claims.[98] A mortgagee is thus generally treated as a purchaser for purposes of the bona fide purchaser doctrine.[99] There are numerous cases involving the issue of what constitutes a bona fide mortgagee. All invariably rely on the principles applicable to a bona fide purchaser.[100] Therefore, the grantee of a quitclaim mortgage is probably not a bona fide mortgagee and not entitled to protection under the recording statute. For the same reason, a quitclaim mortgage is probably ineffective to grant a lien on any title acquired by the mortgagor after the execution of the quitclaim mortgage.

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94 *Garrett v. Christopher*, 12 S.W. 67, 67 (Tex. 1889).

95 *Cook v. Smith* 174 S.W. 1094, 1095 (Tex. 1915) (citing *Hunter v. Eastham*, 69 S.W. 66, 67-68 (Tex. 1902)).

96 *Tate v. Kramer*, 23 S.W. 255, 259 (Tex. Civ. App. 1892).

97 *Id.* at 260; *see also Finch v. Trent*, 22 S.W. 132 (Tex. Civ. App. 1893).

98 *Moran v. Adler*, 570 S.W.2d 883, 885 (Tex. 1978); *Gordy v. Morton*, 624 S.W.2d 705, 707 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Von Hutchins v. Pope*, 351 S.W.2d 642, 646 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.); *Graves v. Guaranty Bond State Bank*, 161 S.W.2d 118, 120 (Tex. Civ. App.—Texarkana 1942, no writ).

99 *See Kraus v. Haas*, 25 S.W. 1025, 1027 (Tex. Civ. App. 1894, writ denied).

100 *See, e.g.*, *McGahey v. Ford*, 563 S.W.2d 857, 863 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.) (pre-existing debt not valid consideration to support position as bona fide purchaser for value); *Tex. Life Ins. Co. v. Tex. Building Co.*, 307 S.W.2d 149, 152-153 (Tex. Civ. App.—Fort Worth 1957, no writ) (possession of land as notice to mortgagee of prior equitable claim of possessor).

J. **Texas Title Standards**.

Not being a legislative body, the Texas Title Standards Board describes, without recommendation, the Quitclaim issue as follows:[101]

> Quitclaim Deed: In Texas, the grantee of a quitclaim deed cannot qualify as a bona fide purchaser for value against unrecorded instruments and equities that existed at the time of the quitclaim, *Threadgill v. Bickerstaff*, 29 S.W.757 (Tex. 1895); *Rodgers v. Burchard*, 34 Tex. 441 (1870-71). The rationale is that the fact that a quitclaim deed was used, in and of itself, attests to the dubiousness of the title. See *Richardson v. Levi*, 3 S.W. 444, 447-48 (Tex. 1887). Although a quitclaim is fully effective to convey whatever interest the grantor owns in the property described in the deed, *Harrison Oil Co. v. Sherman*, 66 S.W.2d 701, 705 (Tex. Civ. App.—Beaumont 1933, writ ref'd), the grantee takes title subject to any outstanding interest or defect, whether or not recorded and whether or not the grantee is aware of it or has any means of discovering it. See, e.g., *Woodward v. Ortiz*, 237 S.W.2d 286, 291-92 (Tex. 1951). Moreover, in Texas not only is the grantee under a quitclaim deed subject to any outstanding claims or equities, all subsequent purchasers in his chain of title, however remote, are likewise subject to any unknown and unrecorded interests that were outstanding at the time of the quitclaim. *Houston Oil Co. v. Niles*, 255 S.W. 604, 609- 11 (Tex. Comm'n App. 1923, judgm't adopted). Any title dependent on a quitclaim as a link in the chain of title cannot be marketable title, since it might at any time be defeated by some unknown claimant. Accordingly, absent passage of time or other factors that may remove the practical risk, if the chain of title includes a quitclaim, then the examiner should advise the client of its existence in the chain of title and of its effect.

K. **Drafting Suggestions**

In many instances where the quitclaim issue arises, the assignor or grantor was trying to convey the property without being liable to the assignee or grantee under a covenant of title. In other words, the assignor/grantor does not want to be contractually liable to the assignee/grantee for title defects. As set out above, some courts emphasize the warranty and others de-emphasize it but all say that including a specific quantum of the estate will operate to keep the deed from being a quitclaim. Hence, conveying Blackacre or conveying an undivided ½ of Blackacre should save the conveyance, even if the assignor specifically disclaims any contractual warranties of title.

Another viable, but untested technique, to make sure the grantor's entire interest in the land is covered but that the conveyance not be a quitclaim, is to use a dual conveyance—the first part conveys a specific interest in a particular property, and the second part conveys, to the extent not previously conveyed, all of the grantor's or mortgagor's "undivided right, title, and interest" in the property.

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[101] Standard 4.90 of the Texas Title Standards, Appendix 2 to the Texas Property Code.

L. **Legislative Relief**.

A proposal for a legislative cure was circulated at a subcommittee of TLTA in 2014 in anticipation of the 2015 Legislative Session, but was rejected by the full TLTA legislative committee. Here was the proposal:

Tex. Prop. Code § 13.001

§13.001. Validity of Unrecorded Instrument.

(a) A conveyance of real property or an interest in real property or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.

(b) The unrecorded instrument is binding on a party to the instrument, on the party's heirs, and on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.

(c) This section does not apply to a financing statement, a security agreement filed as a financing statement, or a continuation statement filed for record under the Business & Commerce Code.

(d) A grantee for valuable consideration under a quitclaim deed may be a subsequent purchaser for a valuable consideration without notice.

Roland Love[102] has advocated as follows:

> The following proposed legislation attempts to address the negative implied notice placed on a grantee by a quitclaim through the court's blanket rule evoking dubiousness. It is similar to Michigan's statutory language, which directly addresses how the mere use of a quitclaim, without more, will not affect the good faith or notice of a subsequent grantee in a chain of title. The proposed statute would not only achieve the purpose for which recording statutes are passed – to protect bona fide purchasers - but would also add much needed legal certainty and objectivity to a chain of title analysis. Furthermore, any proposal should avoid use of "may" or language indicating permissible classification, as doing so does not provide any additional legal certainty. The default rule must be that the existence of a quitclaim deed in a chain of title does not affect one's status as a bona fide purchaser, and it should be the burden of the party so claiming that it should to prove otherwise
>
> TX Property Code § 13.001 – A Proposal
>
> (d) A prior recorded conveyance or transfer in a chain of title in the form of or containing the terms of a deed of quitclaim and release shall not affect the question of

[102] G. Roland Love, "Quitclaims* Texas and Beyond", State Bar of Texas 27th Annual Advanced Real Estate Drafting Course, March 10 – 11, 2016, Chapter 3, Page 8.

good faith of a subsequent purchaser, or be itself notice to such subsequent purchaser of any unrecorded conveyance of, transfer of, or encumbrance on the same real estate or any part thereof.

(based on Michigan, MCLS § 565.29, 2014). An alternative would be a simple adoption of the language of Texas Tax Code §34.21:

(d) A quitclaim deed is not notice of an unrecorded instrument or claim. The grantee of a quitclaim deed and a successor or assign of the grantee may be a bona fide purchaser in good faith for value under recording laws.