REVISITING
AFTER ACQUIRED TITLE REVISITED

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In March 2004, Don Sinex and Susan Stanton prepared an article styled "After Acquired Title Revisited". The article revisited the well-established doctrine of after acquired title, and provided certain guidelines for the practitioner that encounters it. This article picks up where that last article left off, and addresses recent developments in after acquired title, as well as providing insight into the nature of the doctrine itself.

In an attempt to provide a thorough analysis of the issue, this article will address: (1) the background and current status of the doctrine; (2) the nature of the doctrine itself; (3) limitations on the application of the doctrine; and (4) the effects of the doctrine on purchasers and notice provisions.

I. BACKGROUND.

The doctrine of after acquired title holds that if a grantor purports to convey ownership of real property to which he does not have legal title at the time of the conveyance, but the grantor later acquires that title, it automatically vests in the grantee. The concept is simple enough: the doctrine does not allow a party the benefit of selling all of the property when that party does not own it all, and then saying "gotcha" when he receives the remainder of that interest. The remainder of that interest will go to the grantee, except in certain situations as discussed herein.

While the concept is fairly straightforward, the background of after acquired title is somewhat extensive. The doctrine of after acquired title in Texas was established in common law and evolved into its present form through the crucible of numerous cases. In certain circumstances, these cases either expanded, limited, or clarified the general rule, and delved into numerous areas of the law, including, among others, conveyances, recording acts, mortgages and deeds of trust, various real property liens, and oil and gas matters. As it evolved, the general rule estopped the grantor from claiming ownership of the after acquired interest as against his grantee. Under the rule, title to the after acquired interest passed to the grantee and the grantee's heirs and successors at the moment of the grantor's acquisition of such interest.[1]

Phrased another way, under the doctrine of after acquired title, when someone conveys land by warranty of title or in a way as to be estopped from disputing the title of his grantee, title which the grantor subsequently acquires to that land will pass "eo instante" to his warrantee, binding both the warrantor and subsequent purchasers from either party.[2] Possibly the most well known case dealing with this issue is Duhig v. Peavy-Moore Lumber Co., in which the Texas Supreme Court held:

> It is the general rule, supported by many authorities, that a deed purporting to convey a fee simple or a less definite estate in land and containing covenants of general

[1] Caswell v. Llano Oil Co., 36 S.W.2d 208, 211 (1931), citing Baldwin v. Root, 90 Tex. 546, 553, 40 S.W. 3, 6 (1897).
[2] Hardy v. Bennefield, 368 S.W.3d 643 (Tex.App. – Tyler 2012, no pet.).

> warranty will estop the grantor from asserting an after acquired title or interest in land, or the estate which the deed purports to convey, as against the grantee and those claiming under him.[3]

Texas courts have applied the doctrine of after acquired title somewhat liberally in certain aspects. While under Texas law, general warranty deeds expressly bind grantors to defend against title defects created by the grantors or any prior titleholder[4], the application of the after acquired title doctrine in Texas does not depend on the breach of a covenant to warrant title, but may be asserted in equity to find "sound justice."[5] The effect of this viewpoint is that courts do not require a conveyance instrument to contain an express covenant of warranty of title to support a claim of after acquired title. Rather, covenants of warranty may be implied from the face of the document or they may not be required at all. Words in an instrument that imply a claim of ownership of title or that show the grantor's clear intent to claim such ownership, together with the assumption that the grantor has the right to make the conveyance, are sufficient to apply the doctrine.[6] Texas courts have held that language in a deed stating the grantors are conveying a fee simple estate in land constitutes a recital that implies an assertion by the grantors that they are the owners of such land.[7] Given that they have asserted that they are the owners of such land, equity will estop them from denying such fact.[8]

Texas courts also appear to agree with other jurisdictions that the after acquired title doctrine could apply even if the deed contained "no warranty whatsoever", if the deed clearly showed the grantor meant to convey a specific estate.[9] Similarly, Texas courts will not permit a grantor who assumes to convey an estate to later assert against his grantee anything in contradiction of the conveyance instrument. The courts have applied the after acquired title doctrine to estop a grantor from defeating his grantee's after acquired title by claiming that he had no title to convey at the time of his conveyance to the grantee, or that no title passed with his deed, or that his deed had no effect.[10]

In addition to common law, the Texas Property Code assists those using implied covenants to support a claim of after acquired title. The statute provides that one can imply from the use of the words "grant" or "convey" in any conveyance that, unless expressly stated otherwise, the grantor did not convey the same estate to another prior to the present conveyance and that the estate is free from encumbrances at the time the estate is conveyed.[11]

It is also important to note that the

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[3] Duhig v. Peavy-Moore Lumber Co., 135 Tex. 503, 144 S.W.2d 878, 880 (1940).
[4] U. S. v. Lacy, 234 F. R. D. 140 (S. D. Tex. 2005).
[5] Lindsay v. Freeman, 83 Tex. 259, 18 S.W. 727, 729 (1892).
[6] Id.
[7] Blanton v. Bruce, 668 S.W.2d 908, 911-912 (Tex.App. – Eastland 1985, writ refused n.r.e.); Lindsay, 18 S.W. at 729.
[8] Land Title Bank & Trust Co. v. Witherspoon, 126 S.W.2d 71, 73 (Tex.Civ.App. - Amarillo 1939, no writ).
[9] Lindsay, 18 S.W. at 730, citing Hannon v. Christopher, 34 N.J. Eq. 459, 465 (1881).
[10] Duhig, 144 S.W.2d at 880; C. D. Shamburger Lumber Co. v. Bredthauer, 62 S.W.2d 603, 605 (Tex Civ.App. - Fort Worth 1933, writ dism'd); 29 Lange and Leopold, Texas Practice, Land Titles and Examination §732 (1992) (Supp. 2004).
[11] Tex. Prop. Code Ann., § 5.023 (Vernon 2000 & Supp. 2004).

effect of the doctrine of after acquired title is binding not only on the original grantor and its successors-in-interest, but that it is also binding on subsequent purchasers from the original grantor who acquired the interest with actual or constructive notice of the prior conveyance.[12] A subsequent purchaser under the original grantor, who may not have actual notice of what the grantor represented that he was conveying, is nevertheless placed on constructive notice by the recordation of the original conveyance instrument in the official public records of the county where the property is located.[13] In such an event, that purchaser cannot claim to be an innocent purchaser entitled to recover such additional interest.[14] Any practitioner that examines title can see the inherent dangers that this may cause.

II. NATURE OF THE DOCTRINE.

As discussed above, the doctrine of after acquired title is one that evolved through common law, where it was found to be a remedy that was equitable in nature and was based on the estoppel of the grantor to deny that which he has represented in his conveyance instrument.[15] The principle underlying the estoppel is that a person or entity which has contracted with another should not be permitted to later deny what it has asserted or implied to be true in his document(s).[16]

1. Bases used by courts in applying the doctrine.

More often than not, Texas courts have been less than clear on the rationale used for applying the doctrine of after acquired title. However, certain learned commentators have noted that the doctrine of after acquired title has been applied in numerous Texas cases under one of at least three major prongs.[17] The three general prongs where the courts have applied after acquired title doctrine are:

A. "Warranty Cases", being those particular cases where the court applied after acquired title on a covenant of warranty in a particular deed to prevent a "circuitry of action on the covenant";

B. "Estoppel Cases", being those particular cases where the court applied after acquired title on the basis of estopping a grantor from denying the title he purported to convey to the grantee; and,

C. "Estoppel/Warranty Cases", being those particular cases where the court applied after acquired title on the basis of estopping a grantor from denying the title he purported to convey to the grantee on the basis of a warranty contained in the conveyance.

As one can note above, certain courts

[12] Caswell, 36 S.W.2d at 211, citing Leonard v. Benford Lumber Co., 110 Tex. 83, 216 S.W. 382 (1919); Robinson v. Douthit, 64 Tex. 101 (1885); Davis v. Field, 222 S.W.2d 697, 699 (Tex.Civ.App. - Fort Worth, 1949 writ ref'd. n.r.e.).

[13] Jones v. P.A.W.N. Enterprises, 988 S.W.2d 812, 819 (Tex.App. – Amarillo 1999, pet. denied).

[14] Caswell, 36 S.W.2d at 211.

[15] Lindsay, 18 S.W. at 730. See also, Richard W. Hemingway, *After Acquired Title in Texas,* 20 S.W. L.J. (No. 1), 117 (1966).

[16] Lindsay, 18 S.W. at 730; Davis, 222 S.W.2d at 699-701.

[17] Hemingway, *supra* at 99-101.

have combined elements of warranty and estoppel as a basis for applying after acquired title. However, in quite a few other cases, the basis of the court's decision is simply not determinable.[18] Notwithstanding the lack of a determined rationale, one should note that Texas courts have consistently permitted the application of the after acquired title rule to pass title to real property by estoppel and that Texas courts have not limited damages to a breach of warranty action.[19]

Consequently, in Texas today, the application of the after acquired title doctrine does not depend solely on the breach of an obligation created by a title warranty. Rather, the presence of a warranty goes to the nature of the grantor's *manifested intent*, indicating whether or not he purported to convey the land described and describing the estate of land he actually intended to convey.[20] The courts look to the equitable principles of "good faith, right conscience, fair dealing and sound justice" in deciding to apply the after acquired title rule.[21]

2. Other Conveyance Instruments.

In addition to being applied in the general circumstances above, it is noted that after acquired doctrine is also applicable to instruments other than standard conveyance deeds. Texas courts have clarified that the after acquired title doctrine also applies to deeds of trust.[22] The rationale behind the courts' decisions is that that mortgages and deeds of trust generally contain covenants that warrant title to the encumbered property. The courts have found that the mortgagor, having made such covenants, will not be allowed to assert title to after acquired property that was the subject of his covenant.[23] When a deed of trust or mortgage encumbers a conveyed interest and the lien holder subsequently forecloses on his lien, the question arises as to whether the foreclosure affects the application of the after acquired title doctrine. Texas courts have held that the after acquired title doctrine still applies despite the foreclosure.[24] It is noted that Texas courts have applied after acquired title to lien issues regardless of whether the interest in question was a fee interest granted on a deed or was a fee simple determinable granted under an oil and gas lease.[25]

The doctrine has also been applied to other types of liens, such as a mechanic's and materialman's lien.[26] A Texas appellate court has found the holder of materialman's lien could foreclose on after acquired property because the owner recited in the lien document that he and his wife were the owners of the property on which the lien was granted.[27]

With respect to application of after acquired title to liens, the following examples are noted:

Example 1: The Burns Case.

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[18] See Hemingway, *supra* at 99-101 for an extensive recitation of Texas caselaw.
[19] Hemingway, *supra* at 117.
[20] Lindsay, 18 S.W. at 729-730; Blanton v. Bruce, 688 S.W.2d 908, 911 (Tex.Civ.App. - Eastland 1985, writ ref'd n.r.e.); Hemingway, *supra* at 118.
[21] Lindsey, 18 S.W. at 730.
[22] Shield v. Donald, 253 S.W.2d 710, 712 (Tex Civ.App. - Fort Worth 1952, writ ref'd. n.r.e.); Galloway v. Moeser, 82 S.W. 2d 1067, 1069 (Tex.Civ.App. - Eastland 1935, no writ); Logue v. Atkeson, 80 S.W. 137, 140 (Tex. Civ. App. 1904, writ denied).
[23] Shield, 253 S.W.2d at 712.
[24] Burns v. Goodrich, 392 S.W.2d 689, 693 (Tex. 1965); Cherry v. Farmers Royalty Holding Co., 138 Tex. 576, 160 S.W.2d 908, 911 (1942).
[25] Caswell, 36 S.W.2d at 211-212.
[26] Land Title Bank, 126 S.W.2d at 73.
[27] Id.

> A father conveyed property to his daughter in 1942 by general warranty deed. At the time that the father conveyed the property to his daughter there existed a judgment lien encumbering one-half of the property. The lien holder foreclosed the lien and a third party purchased the encumbered one-half interest at a foreclosure sale in May 1945. In August 1945, the father purchased the foreclosed property from the third party purchaser. The court held that neither the foreclosure nor the third party's subsequent purchase of the property at the foreclosure sale divested the daughter of her right to the after acquired property or prevented the application of the after acquired title rule. Title passed to the daughter the moment the father acquired the property from the third party.[28]

Example 2. The Caswell Case, and the oil and gas shell game.

> A landowner executed an oil and gas lease covering property that was subject to a deed of trust lien. The lien holder foreclosed the deed of trust lien and conveyed title to a third party, whereupon the lease was "cancelled and terminated." The third party conveyed the property to the original landowner who executed an oil and gas lease to the second lessee. In the suit between the two lessees, the court held that by virtue of the general warranty clause in the first lease, the after acquired title doctrine applied and, upon the original landowner's acquisition of the property, the first lessee acquired its leasehold interest and it was again valid.[29]

III. LIMITATIONS

The crucible of numerous court cases has also inserted certain limitations on the doctrine of after acquired title. Specifically, the practitioner should note that after acquired title: (a) is limited to the estate conveyed; (b) is limited in application to certain areas of oil and gas leases; (c) does not apply to public lands; (d) does not apply to property acquired in trust for another party; and (e) is limited in application for documents that may be considered "quitclaims".

1. Title Limited to Estate Conveyed.

While Texas courts have applied after acquired title to estop a grantor from claiming title to the estate he has purported or intended to convey by his grant, one should note that Texas cases have limited the application to the specific estate only.[30] Phrased another way, the courts will not apply the doctrine to a reserved estate, to an excepted interest, or to an interest not conveyed.[31] The rationale behind this limitation is that the grantee is entitled to receive the estate or interest intended to be conveyed, but he or she is not entitled to receive a greater estate than the deed or conveyance document would have conveyed had his grantor owned the estate described in the document.

[28] Burns, 392 S.W.2d at 693.

[29] Caswell, 36 S.W.2d at 211-212.

[30] Talley v. Howsley, 142 Tex. 81, 176 S.W.2d 158, 160 (1944); McKinnon v. Lane, 285 S.W.2d 269, 273-274 (Tex.Civ.App. - Fort Worth 1956, writ ref'd n.r.e.).

[31] McKinnon, 285 S.W.2d at 273-274.

By way of example, in the McKinnon v. Lane case, the court examined an issue where the U.S. Government sold to Loyce Lane and wife, Wilma G. Lane, all of the surface and one-quarter of the minerals underlying a certain tract of land, but reserved unto itself the remaining three-quarters of the minerals.[32] The U.S. Government subsequently executed a lease on the three-quarter mineral interest, and, thereafter, sold the remaining three-quarters of the minerals in that certain tract to the Lanes, but subject to the lease.[33] In determining whether after acquired title doctrine was applicable to the remainder interest, the court noted that "…title subsequently acquired inures to the purchaser upon the theory that the vendor is estopped to claim a title which he has assumed to convey…[b]ut such estoppel is restricted to the estate intended to be conveyed by the grant, and is not applied to a reserved or excepted estate [and] does not apply to any interest after acquired which was not purportedly granted."[34] Phrased another way, after acquired title doctrine "…cannot operate to vest in the grantee a greater estate than the deed itself would have conveyed."[35]

It is because of this concept that deeds of trust in Texas usually include an express after acquired property clause stating that the deed of trust lien attaches to all after acquired property of the grantor so long as the lien is still in effect. Without a provision expressly conveying any after acquired title to the mortgagee until the debt is paid off, the mortgagee's lien will attach only to the property specifically described in the deed of trust.

While very fact specific, another example may be seen in a recent decision in the Phillipello v. Taylor case.[36] In that case, the court held that a reservation in a certain deed was ineffective because the grantor's title shortage meant that the conveyance and the reservation could not both be given effect.[37] In performing its analysis and looking to Duhig, the court looked at the intent of the parties as shown by the several contracts and deeds involved in that case and found that Duhig did not apply.[38]

2. Limited Application to Oil and Gas Leases.

In contrast to foreclosure of a lessor's title discussed in the Caswell case in example 2, above, Texas courts have declined to apply the Duhig rule, which is based on the after acquired title doctrine, to oil, gas and mineral leases where the lessor acquired an additional interest after execution of the lease.[39] In the McMahon v. Christmann case, the court explained that in many instances an oil and gas lease purports to cover the entire mineral estate, even though the parties know that the lessor only owns an undivided interest in the land, in order to make certain that no fractional mineral interest is left outstanding in the lessor.[40] The court reasoned that if the lease contains the standard provisions, the lessee is protected against overpayment of royalties by the inclusion of a proportionate reduction clause in the lease, thus application

[32] McKinnon, 285 S.W.2d at 271.
[33] Id.
[34] McKinnon, 285 S.W.2d at 273, citing therein Clark v. Gauntt, 138 Tex. 558, 161 S.W.2d 270; Stoepler v. Silberberg, 220 Mo. 258, 119 S.W. 418.
[35] McKinnon, 285 S.W.2d at 273, citing therein Chace v. Gregg, 88 Tex. 552, 32 S.W. 520.
[36] Philipello v. Taylor, 2012 WL 1435171 (Tex.App. – Waco 2012, pet. denied).
[37] Id.
[38] Id.
[39] McMahon v. Christmann, 157 Tex. 403, 303 S.W.2d 341 (1957).
[40] McMahan, 303 S.W.2d at 346.

of the Duhig doctrine is unnecessary.[41] The clause does not, however, operate to reduce the estate that the lessor purports to convey, which application of the rule in Duhig could do.[42] The application of the Duhig doctrine could prevent the landowner from asserting his royalty, allow the lessee who drafted the lease to take the lessor's entire mineral estate without having to pay royalties to the lessor, and permit the lessee to recover damages from the lessor for breach of warranty.[43]

3. Does Not Apply to Conveyances of Public Lands.

With respect to public lands, Texas courts have declined to apply the after acquired title doctrine to attempted conveyances of public land by private individuals. The courts consider such conveyances to be in derogation of public rights and void as against public policy. As such, title to any after acquired interest in the land will be void.[44]

The courts have also applied this limitation to a sovereign in the circumstance where the sovereign conveyed to a private individual public land that later became the subject of a boundary dispute between sovereign states.[45] In the Jones v. P.A.W.N. Enterprises case, Oklahoma, under its authority and laws, patented certain lands to a private person, who conveyed one-half of the minerals to a predecessor in interest to P.A.W.N Enterprises.[46] A subsequent boundary dispute occurred between the States of Texas and Oklahoma, and in the settlement thereof, title to the land became vested in Texas.[47] Texas then patented the land, under its authority and laws, to the heirs of the original Oklahoma grantee, who conveyed the property to Jones.[48]

Thereafter, P.A.W.N. claimed the one-half mineral interest under the Oklahoma conveyance based on the after acquired title doctrine, stating that when the heirs of the original Oklahoma grantee acquired a patent from the State of Texas, title to the one-half mineral interest went immediately to P.A.W.N.[49] The court noted that in instances of boundary disputes, unlike instances of ceded or conquered territory, the sovereign originally creating title, i.e. the State of Oklahoma in this case, was not in rightful possession of the land.[50] Accordingly, the exercise by the State of Oklahoma of its governmental powers in patenting such public lands was done without vested authority.[51] Because the State of Oklahoma never had title to the land, its patenting of the land to the private persons and all subsequent conveyances of interests in the land, including the one-half mineral interest, were invalid and the doctrine of after acquired title was not applicable.[52]

4. Title Acquired in Trust.

Texas courts have declined altogether to apply the doctrine of after acquired title to estates acquired and held in trust for another party.[53] The rationale is that

[41] McMahan, 303 S.W.2d at 346.
[42] McMahan, 303 S.W.2d at 346-347.
[43] Id.
[44] Lamb v. James, 87 Tex. 485, 29 S.W. 647, 649 (1895).
[45] Jones v. P.A.W.N. Enterprises, 988 S.W.2d 812 (Tex.App. - Amarillo 1999, pet. denied).
[46] Jones, 988 S.W.2d at 815.
[47] Jones, 988 S.W.2d at 815-816.
[48] Jones, 988 S.W.2d at 816-817.
[49] Jones, 988 S.W.2d at 817.
[50] Id.
[51] Jones, 988 S.W.2d at 821.
[52] Jones, 988 S.W.2d at 821-823.
[53] MacDonald v. Sanders, 207 S.W.2d 155, 158 (Tex Civ.App. - Texarkana 1947, writ ref'd n.r.e.); Newton v. Easterwood, 154 S.W. 646, 650 (Tex.Civ.App. - Texarkana 1913, writ ref'd).

the doctrine of after acquired title cannot not be used to benefit a grantee whose grantor is holding the interest in trust for a third party, because the grantee is not entitled to claim greater rights than his grantor under such subsequent title.[54] While the grantor holding in trust may have legal title to the property, he has no beneficial rights in such land.[55] Consequently, he has nothing to convey to his grantee.[56]

The same is true where legal title is held by virtue of a fraud and a constructive trust is imposed in equity.[57] In the Newton v. Easterwood case, a sheriff's sale was the result of fraudulent litigation begun and prosecuted for the purpose of unjustly depriving an infant ward of the title to his land. The court found the purchasers at the foreclosure sale, who had been involved in the fraud, did not acquire legal or equitable title by their purchase at the sale, or, if they did acquire legal title, they held the title in trust only for the benefit of the victim of their fraud.[58] The court made no distinction between a trust held actively or constructively when it stated that estoppel will not operate to transfer title to a party who is holding property in his own name for the benefit of another.[59]

5. Quitclaims and Limitations.

Texas courts have also limited their application of the after acquired title rule to conveyance instruments that convey a specific interest in the land itself and not just the grantor's title to the land, whatever it may be at the time of the conveyance.[60] A quitclaim, by definition, is a deed of conveyance intending to pass any title, interest or claim of the grantor, but not professing that such title is valid.[61] As a result, the courts will not apply the doctrine where a quitclaim deed is involved.[62]

In past Texas court cases, this limitation would apply to a conveyance where a grantor conveyed all of its "right, title, and interest" in a described property because the courts viewed such language as constituting a mere quitclaim.[63] The courts also held that the purchaser of the grantor's "right, title, and claim" to land was not an "innocent purchaser."[64] Accordingly, unless the document or other evidence reflected an intent to convey the land itself, or contained recitals specifying a quantum of interest, the grantor only conveyed whatever interest he actually had at the time of the conveyance.[65] The result of these past cases was that any subsequently acquired interest did not contradict a quitclaim deed and the after acquired title doctrine would not apply.[66] This limitation controlled even if the deed contained a warranty because the rationale was that the warranty would not enlarge the intended grant.[67]

But what really defines a quitclaim?

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[54] MacDonald, 207 S.W.2d at 158.
[55] Id.
[56] Id.
[57] Newton, 154 S.W. at 650.
[58] Id.
[59] Id.
[60] Clark v. Gauntt, 138 Tex. 558, 161 S.W.2d 270, 273 (1942).
[61] Rogers v. Ricane Enterprises, Inc., 884 S.W.2d 763, 769 (Tex.1994).
[62] Halbert v. Green, 156 Tex. 223, 293 S.W.2d 848, 851 (1956).
[63] Daugherty v. Yates, 35 S. W. 937 (Tex.Civ.App. – 1896, no writ).
[64] Marshburn v. Stewart, 295 S. W. 679 (Tex.Civ.App. – Beaumont 1927, writ dism'd w.o.j.).
[65] Clark, 161 S.W.2d at 273.
[66] Id.
[67] Wilson v. Wilson, 118 S.W.2d 403, 405 (Tex.Civ.App. - Beaumont 1938, no writ).

Both past and recent cases indicate that what constitutes a quitclaim could be less straightforward than what a practitioner might initially suspect. A problem arises when the conveyance instrument contains a description of land and it is not clear if the language is merely describing the source of the title conveyed or if it is describing the actual interest being conveyed. This may happen when a draftsman attempts to clarify a property description by referencing a prior deed and the prior deed limits the interest conveyed. The question then becomes whether the reference to the prior deed is for the purpose of giving the source of title (i.e. description) or if it is for the purpose of limiting the interest conveyed (i.e., the grant). Some courts have interpreted such clauses as not restricting the granting clause and applying the after acquired title doctrine so that the deed estops the grantor from claiming after acquired title,[68] whereas other courts have interpreted such a clause to describe the interest being actually conveyed and therefore not applying after acquired title.[69]

In recent cases dealing with the determination of whether an instrument is a quitclaim or not, the courts have looked to the parties' intent as it appears from the language of said instrument.[70] What is important and controlling is not whether the grantor actually owned the title to the land conveyed, but whether the deed purported to convey the property.[71] A noteworthy case to look at is the Enerlex, Inc. v. Amerada Hess, Inc. case, in which the deed contained a general warranty, but was nevertheless determined to be a quitclaim. Specifically, in the deed in question, the grantor conveyed to Enerlex:

> [A]ll right, title and interest in and to all of the Oil, Gas, and any other classification of valuable substance, including any mineral leasehold and royalty interests, including any future or reversionary interest, in and under and that may be produced from the following described lands situated in Gaines County, State of Texas, to wit: WTTR Survey, Block G, Sections 160–230 inclusive.
>
> …It is the intent of Grantor to convey all interest in the said county whether or not the sections or surveys are specifically described herein…
>
> ….Grantor does hereby warrant said title to Grantee it's [sic] heirs, successors, personal representatives, administrators, executors, and assigns forever and does hereby agree to defend all and singular the said property unto the said Grantee herein it's [sic] heirs, successors, personal representatives, administrators, executors, and assigns against every person whomsoever claiming or to claim the same or any part thereof.[72]

The court held that the grantor did not warrant or represent that she actually owned any mineral interest. Even though the

[68] Duhig, 144 S.W. at 879-880; Rettig v. Houston West End Realty Co., 254 S.W. 765, 768 (1923).
[69] Wilson, 118 S.W.2d at 405. See Hemingway, *supra* 119-123 for a thorough discussion of drafting issues.
[70] Enerlex, Inc. v. Amerada Hess, Inc., 302 S. W. 3d 351 (Tex.App. – Eastland 2009, motion granted, rehearing overruled).
[71] Enerlex, 302 S.W.3d at 355 citing Am. Republics Corp. v. Houston Oil Co. of Texas, 173 F.2d 728, 734 (5th Cir.1949); Cook v. Smith, 174 S.W. 1094, 1096 (1915).
[72] Enerlex, 302 S.W.3d at 354.

deed contained a general warranty and did not contain any "as is" or "without warranty" language, the deed when viewed in its entirety was determined to be a quitclaim deed rather than a warranty deed. As one noted commentator, Ernest E. Smith, opined:

> [t]hese provisions contain no representation that grantor owned any interest in the minerals and does not purport to convey any specified fractional interest in the minerals. A deed must be construed in its entirety, and the inclusion of a general warranty does not change the nature of the conveyance. As recipient of a quitclaim deed plaintiff cannot prevail under the bona fide purchaser doctrine because a quitclaim deed puts the grantee on notice of potential outstanding claims.[73]

Phrased another way, it did not purport to convey any specific title but broadly conveyed all of the grantor's interest. This should be of particular concern for a practitioner when he or she is drafting a deed. If a draftsman is trying to create a dragnet as to other interests but also wants to insure that it remains a warranty deed, he or she runs the risk of losing the advantages of after acquired title if it is not worded carefully. One commentator has noted that, in light of the Enerlex case, a better alternative may be to draft such a deed in a way that a two-part grant is included: one part which would grant a specified, represented interest and that is specifically tied to the warranty, and a second part which would convey any of the remaining, unspecified interest of the grantor.[74]

IV. EFFECTS ON NOTICE AND PURCHASERS.

As referenced above, it is important to note that after recording, the doctrine of after acquired title is also binding on subsequent purchasers from the original grantor who acquired the interest with actual or constructive notice of the prior conveyance.[75] A subsequent purchaser under the original grantor, who may not have actual notice of what the grantor represented that he was conveying, is nevertheless placed on constructive notice by the recordation of the original conveyance instrument in the official public records of the county where the property is located.[76] In such an event, that purchaser cannot claim to be an innocent purchaser entitled to recover such additional interest.[77]

Before discussing the effects of after acquired title doctrine upon subsequent purchasers and notice provisions, however, one must first understand who qualifies as a subsequent purchaser, what protections are afforded a subsequent purchaser, and what duty a party has to search the records.

1. Subsequent Purchaser.

A subsequent purchaser means a purchaser who is subsequent in the chain of

[73] Ernest E. Smith, *Current Judicial Developments in Oil and Gas Law*, 38th Annual Oil & Gas Mineral Law Institute, April 9, 2010, at 14.

[74] Michael J. Byrd, *Title Defect Issues in Purchase and Sale Agreements*, 37th Annual Ernest E. Smith Oil, Gas & Mineral Law Institute, April 8, 2011, at 14.

[75] Caswell, 36 S.W.2d at 211, citing Leonard v. Benford Lumber Co., 110 Tex. 83, 216 S.W. 382 (1919); Robinson v. Douthit, 64 Tex. 101 (1885); Davis v. Field, 222 S.W.2d 697, 699 (Tex.Civ.App. -- Fort Worth 1949, writ ref'd. n.r.e.)

[76] Jones, 988 S.W.2d at 812.

[77] Caswell, 36 S.W.2d at 211.

title of the grantee of the recorded deed, rather than one who is simply subsequent in time after the deed is recorded.[78] Texas courts have stated that the object of the recording statutes is to give notice to a grantee who would have reason to search for conveyances prior to his own, but not to give notice of conveyances out of his grantor after the grantee's purchase.[79] Such subsequent conveyances would be outside of the chain of title under which the first grantee purchased.[80] Everyone who derives title from the first grantee can insist on the same principles with respect to himself.[81] Phrased another way, a purchaser is charged with knowledge of the provisions and contents of recorded instruments as well as notice of the terms of deed which form an essential link in their chain of ownership.[82]

2. Protections.

The recording statutes, which are located in the Texas Property Code, §§ 12 and 13, et seq., protect a subsequent purchaser who acquires property for valuable consideration and without notice of a prior document or circumstance affecting his title. Specifically, Section 13.001(a) of the Texas Property Code, known as the Texas recording statute, is often referred to as a notice statute. To get protection under the recording statute, a purchaser must "acquire the property in good faith, for value and without notice of any third-party claim or interest".[83] An unrecorded conveyance of an interest in real property is void as to a subsequent purchaser who buys the property for valuable consideration and without notice; thereby making the converse true - the unrecorded instrument will be binding on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.[84] It is a conclusive presumption of law that the proper and legal recording of a deed in the county where the land lies is constructive notice of the recorded deed's existence.[85]

For purposes of this paper, the authors have assumed that the subsequent purchaser has paid valuable consideration and will deal only with the notice portion of the statute as it relates to after acquired title. The relevant portion of the current statutes is Section 13.001, which provides that a conveyance of real property "is void as 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." Thus, a prior purchaser can protect himself from a subsequent purchaser who is without notice of the prior purchaser's rights only by recording his prior conveyance before the subsequent purchaser purchases the property. A recording of the prior deed after the subsequent purchaser has completed his purchase will not affect the subsequent purchaser's protection under the recording statutes, even if the recording of the prior deed is prior to the recording of the subsequent purchaser's deed. The subsequent purchaser's protection exists even if he never

[78] White v. McGregor, 92 Tex. 556, 50 S.W. 564, 565-566 (1899); Houston Oil Co. v. Kimball, 103 Tex. 94, 122 S.W. 533, 540 (1909).
[79] Houston Oil, 122 S.W. at 540.
[80] Id.
[81] White, 50 S.W. at 566.
[82] City of Edinburg v. A.P.I. Pipe and Supply, LLC, 328 S. W. 3d 82 (Tex.App. – Corpus Christi 2010, pet. granted).
[83] Hue Nguyen v. Chapa, 305 S. W. 3d 316, 323 (Tex.App. – Houston [14th Dist.] 2009, pet. denied).
[84] Id.
[85] Jones v. Clem, 2012 WL 1069168 (Tex.App. – Eastland 2012, no pet.) (mem. op.) citing White v. McGregor, 50 S. W. 564 (1899).

records his own deed.[86]

3. Duty to Search.

To get protection under Section 13.001(a) of the Texas Property Code, a purchaser must "acquire the property in good faith, for value and without notice of any third-party claim or interest".[87] The notice of third party claim or interest may be actual notice or may be constructive notice. So while it is a general rule that an unrecorded interest in real property is binding on those who have actual knowledge of the interest,[88] constructive notice is also sufficient. The presence of properly recorded documents in the record provides constructive notice to a subsequent purchaser of all documents in his chain of title that have been "acknowledged, sworn to, or proved and filed for record as required by law."[89] Further, a person may be charged with constructive notice for purposes of bona fide purchaser status for a deed outside his chain of title if the facts within the chain of title would place a reasonably prudent person on notice.[90] When a purchaser does not examine the deed records or make inquiries, he will be charged with notice of what would have been reasonably discovered.[91]

A. Early Texas Cases.

The question arises regarding the duty a subsequent purchaser has to search the records and the time period within which he or she is required to search. Early Texas courts established that to qualify as a subsequent purchaser, the purchaser had a duty to search the records and the period of the required search was from the date of the conveyance instrument into a grantor rather than from the date of the recording of the conveyance.[92] As a result, the duty of a subsequent purchaser originally was to look back to the date of each conveyance in his chain of title and run the name of each grantor backward and forward. This duty required an exhaustive search because each name had to be run back to the Patent and forward to the present. The recordation date of the conveyance instrument did not matter for purposes of running the title into a purchaser's grantor, so long as the recordation date was prior to the date of a grantor's conveyance to his grantee.[93]

These early cases also established the subsequent purchaser in situations where both senior and junior chains of title for a property existed. This junior/senior chain situation occurs when a common grantor creates two chains of title. The second or junior chain holder is, by necessity, the subsequent purchaser, because the senior chain holder, based on the date of his conveyance document is the first in the title chain.[94] As the subsequent purchaser, the junior chain holder will be the party protected by the recording statutes, but he will also have constructive notice of all recorded documents in his chain of title, which, as the junior chain, includes documents in the senior chain. The same is

[86] White, 50 S.W. at 565-566; Houston Oil, 122 S.W. at 540.
[87] Hue Nguyen, 305 S. W. 3d at 316.
[88] Tex. Prop.Code Ann. § 13.001(b) (Vernon 2004).
[89] Id.
[90] Aston Meadows, Ltd. v. Devon Energy Production Co., LP, 359 S. W. 3d 856 (Tex.App. – Fort Worth 2012, pet. denied).
[91] Hamrick v. Ward, 359 S. W. 3d 770 (Tex.App. – Houston [14th Dist.] 2011, pet. filed), Fletcher v. Minton, 217 S. W. 3d 755 (Tex.App. – Dallas 2007, no pet.).
[92] White, 50 S.W. at 565-566; Houston Oil, 122 S.W. at 540.
[93] White, 50 S.W. at 565-566.
[94] White, 50 S.W. at 565-566; Houston Oil, 122 S.W. at 540.

not true of the senior chain holder. The early cases established that the senior claim holder is not required to take constructive notice of the recorded documents in the junior chain. Consequently, anyone claiming under the senior chain holder will have the same position as the senior chain holder, will be considered prior to anyone in the junior chain, and, in relation to the junior chain holder, cannot be the subsequent purchaser. Because the senior chain holder and those claiming under him are not subsequent purchasers, the recording statutes will not protect them. The rationale for the junior/senior chain relationship and who is the subsequent purchaser is that after the second deed from the common grantor is recorded, the second deed does not give notice to the first purchaser because he already owns the land. The courts do not require the first purchaser to continuously search the records to see if his grantor created a second chain of title or something has happened that affects his interests. Neither do the courts require those who hold under the first purchaser to look for subsequent deeds for the reason that such deeds are out of the chain of title under which they purchased.[95] For our purposes of analyzing after acquired title, we will use this limited explanation. However, for complete analysis and reference to supporting citations we would refer you to Lange and Leopold*, supra* at §884.

B. Later Texas Cases.

In Breen v. Morehead, the court created an exception or limitation to the subsequent purchaser and constructive notice rules by instead limiting the period of time required to be searched by a subsequent purchaser to the period coming forward from the date title vests in each grantor in his chain of title to the present.[96] As a result, the subsequent purchaser no longer had to look for conveyances out of his grantor that were made before the date of the deed that vested in the grantor title to the interest being conveyed to the grantee. Once the subsequent purchaser locates his grantor's vesting deed, he does not need to inquire further back.[97] Further, a purchaser of property is not charged with notice of deeds on the same property which are recorded outside of his chain of title.[98]

The extent to which the documents that are referenced in recorded conveyances puts a subsequent purchaser on notice has also been well defined in the Westland Oil Development Corp. v. Gulf Oil Corp case.[99] In Westland, the court stated that a subsequent purchaser is bound by recitals referenced in any instrument in the chain of title under which he claims. The court held that a 1968 conveyance, which referred to a 1966 letter agreement that provided for Westland to receive an overriding royalty and a working interest, was binding on the grantee in the conveyance.

V. CONCLUSION.

This paper was intended to provide a

[95] White, 50 S.W. at 565-566; Houston Oil, 122 S.W. at 540.

[96] Breen v. Morehead, 104 Tex. 254, 136 S.W. 1047, 1048-1049 (1911); Williams v. Cook, 282 S.W. 574, 575 (1926); Hemingway, *supra* at 131-133.

[97] Breen, 136 S.W. at 1048.

[98] Hahn v. Love, 2012 WL 2153675 (Tex.App. – Houston [1st Dist.] 2012, no pet. h.). For a more detailed example following the application of Breen and subsequent purchasers, please see the predecessor to this article in the Rocky Mountain Mineral Law Foundation Journal. Donald G. Sinex and Susan A. Stanton, *After Acquired Title Revisited*, Rocky Mountain Mineral Law Foundation Journal, Mar/Apr 2005, at 429-442.

[99] Westland Oil Development Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 908 (Tex. 1982).

brief analysis of current issues involving after acquired title, including the ways that courts have applied the doctrine, its historical background, and the limitations and effects that the evolution of the doctrine has created.

In sum, today's practitioner should understand the history and current holdings of the doctrine, and proactively draft around the limitations of the doctrine as noted herein.