What You Didn't Know about Real Estate Recording Acts

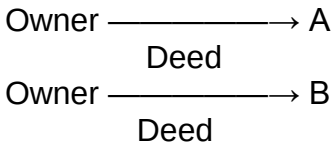
Dale A. Whitman[1]

Every real estate lawyer is generally familiar with the recording act of her or his state, but not many have a thorough understanding of how they work. Most would agree that "recording is a good idea" and that "failure to record will get your client in trouble." These statements are true, but for reasons that may not be apparent. This article is intended to peel back the layers and explain recording acts briefly in a clear, concise, and understandable way.

1. To what kinds of documents do the recording acts apply? Most recording act cases involve deeds or mortgages, but the acts are not so limited. They usually apply to any document creating or conveying an interest in land.[2] This means that leases,[3] grants of easements, declarations of restrictive covenants, mortgages and other liens are covered. So are contracts of sale of land, on the ground that they create an equitable title in the purchaser.[4] Options to buy land present an interesting problem, since in theory an option does not create an interest in land unless and until it is exercised, but most states include them in the coverage of the recording acts because it is so obviously practical and desirable to do so.[5]

2. Recording acts don't require recording, but they provide a strong incentive to do so. With very few exceptions, the recording acts don't mandate that written instruments conveying interests in land be recorded. [6] There's no liability for failure to record, and unrecorded conveyances are entirely valid as between their parties. Hence, a grantor can't "take back" a deed or claim that it is ineffective because the grantee failed to record it.

But against third parties who also have claims deriving from the same grantor, it may be a very different story. Suppose a grantor who holds title executes and delivers two conflicting deeds to the same land, the first to A and the second to B. The picture looks like this:



If there were no recording acts,[7] we would conclude without question that A now has title and B is out of luck, simply because A got title first and the grantor had nothing left to convey to B. This is the common law.

The extraordinary nature of the recording acts is that they can reverse this result, leaving A with nothing and B with title. For this to occur, the first thing that must happen is that A must fail to record. If A immediately records the first deed, A will always prevail against B and anyone else who claims under any subsequent conveyance from O or B. This is why it's fair to say that "recording is a good idea;" it provides the grantee protection against a crooked or careless grantor who makes subsequent conflicting conveyances of interests in the same land.[8]

However, if A fails to record, B doesn't prevail automatically. Instead, B has to qualify under the particular type of recording act that the relevant state has adopted. There are three types, and they vary with respect to what B must do to prevail over A[9] (assuming, of course, in all cases that A has failed to record). Here's how they work:

a. "Notice" statutes say that B must be a bona fide purchaser (a BFP). Being a BFP, in turn, implies two things: B must lack notice of A's previous conveyance, and B must pay value in return for B's own conveyance. About half the states

have this type of statute. Incidentally, observe that calling it a "notice" statute is not a very complete description, since it actually requires both (a) lack of notice and (b) payment of value. It would be more accurate to call it a "notice and value" statute, or something of the sort... but that isn't the customary terminology.

b. "Race" statutes say that B must record before A records. Only three states (Louisiana, North Carolina, and Delaware) have this type of statute.[10] In these states, it doesn't matter whether B is a BFP or not (although North Carolina makes a partial exception, requiring B to pay valuable consideration in order to get the protection of the statute).[11]

c. "Notice-race" (or if you prefer, "race-notice") statutes are simply a combination of the first two types. In order for B to prevail over A, B must *both* be a BFP and record first.[12] As you would guess, nearly half the states have statutes of this kind.

It isn't always easy to tell which type of statute a state has by reading it, since the statutes are often written in prolix and confusing language.[13] Here's a sample that is pretty clear:

> "A conveyance of land that is not recorded is void as against any subsequent purchaser or mortgagee without notice and for valuable consideration."

It's easy to see that this is a pure "notice" type statute; it says that if A fails to record, and if B (the subsequent purchaser) lacks notice of A's deed and pays value, B can treat A's deed as void as against B. If you wanted to change this statute to a "notice-race" type, you could do so merely by adding the words "who records first" at the end. If you wanted

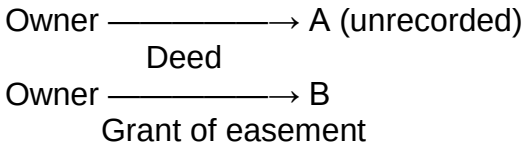
to change it to a pure “race” you could add the words “who records first” but delete the phrase “without notice and for valuable consideration.”

A few variations in the statutory language are worth noting. Sometimes the statutes use the phrase “in good faith” instead of “without notice.”[14] These are two ways of saying the same thing; anyone who buys property with notice that the grantor has already conveyed it to someone else is not buying in good faith.[15]

In another variation, a few “notice” or “notice-race” statutes state the requirement of “lack of notice” or “good faith,” but fail to say anything about paying value. Perhaps surprisingly, the courts usually read in the “value” requirement even if it’s not expressly mentioned.[16]

Finally, a few statutes use the phrase “actual notice” instead of “notice.” In these states, the question arises whether “constructive” or “inquiry” notice will also count, as it does in most jurisdictions. Answers vary; Massachusetts, for example, treats “actual notice” quite strictly,[17] while the Missouri courts have been somewhat grudgingly willing to accept constructive notice as well.[18]

3. The recording acts establish priorities. While the recording acts usually say that A’s unrecorded deed is “void” as against a subsequent purchaser who qualifies under the act, one should not take the word “void” at face value. If both A and B receive deeds purporting to grant fee simple title, then “void” is an accurate way to describe A’s unrecorded deed. But suppose the grantor gives a deed of fee title to A and later an easement over the same land to B.



If we assume B qualifies under the act (by paying value, lacking notice of A's claim, and/or recording first, depending on what the particular act requires), the result is not that A's deed is literally void, but rather that A's claim will lose priority to B's. A will hold title to the land, but it will be subject to B's easement. In other words, *A's deed is void only insofar as necessary to validate B's claim*.

Here's another example: the grantor gives a deed of the land to A, and then mortgages the same land to B:

Owner —Deed→ A (unrecorded)
Owner —Mortgage→ B

Once again, the result is that A will still have title, but it will be subject to the mortgage held by B. Yet one more example: the grantor gives mortgage to both A and B:

Owner —Mortgage→ A (unrecorded)
Owner —Mortgage→ B

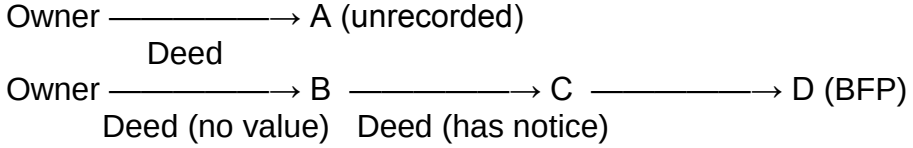
If A fails to record, and if B qualifies for the recording act's protection, B will have a first mortgage on the land and A will have a second mortgage. You can see the pattern, and it can be applied to any kind of written conveyances of any interests in land: if A fails to record and B qualifies for the act's protection, A will lose priority to B.

4. Strange but true. There are several features of the recording acts that are not always obvious. Here are a few of them. They are relevant in both pure "notice" and "notice-race" states (but not in pure "race" states).

a. Constructive notice. In our simple case involving deeds to both A and B, let's assume that A does immediately record. Why does A prevail against B? People (and courts[19]) sometimes say that it's because the recording of A's deed is constructive notice of it to B. That's true, but it's not the reason A wins. Rather, A prevails because the recording acts don't make recorded prior conveyances void; they only come into play if the prior deed is *unrecorded*. If the prior deed is immediately recorded, the common law "first in time" rule controls and the recording act is irrelevant. Constructive notice has nothing to do with it. A conveyance that is immediately recorded can never be divested by the act.

b. Is the first grantee a BFP? In the case in which A records and B , a court will sometimes go off on a tangent, talking about the fact that A should prevail because A is a BFP. But under the recording acts, A's BFP status is entirely irrelevant. For example, A may give the property away or get a million dollars for it; that doesn't matter. The acts simply don't care whether the first grantee is a BFP or not. It's only important (except in the pure "race" states) whether the *subsequent* grantee is a BFP. (Actually, it makes little sense to talk about A being a BFP anyway, since there is nothing for A to have notice of.)

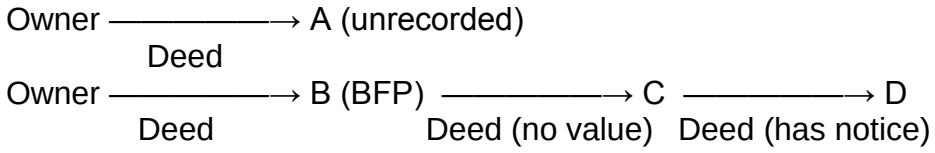
c. The winning BFP need not deal directly with the original grantor. Consider the case in which there is a whole chain of purchasers from B:



If B were a BFP and (in race-notice states) recorded first, B would obviously prevail over A. But suppose B receives the deed as a gift and pays no value; B won't qualify for the

protection of the recording act. Further, suppose C has notice of A's claim; C won't qualify either. Now, assume that D is a BFP and records first. D will prevail over A even though B and C didn't. So the prevailing subsequent grantee need not necessarily have dealt directly with the original grantor.

d. The shelter principle. This situation is the reverse of the one discussed above, but has the same general pattern.



Since B is a BFP and (in notice-race states, we'll assume, records first), B prevails over A. So B owns the land. Now, B conveys to C, who is not a BFP because C pays no value, and C conveys to D, who is not a BFP because D has notice of A's claim. Both C and D will get good title against A, despite their not being BFPs. Once the title has been run through one subsequent purchaser who is a BFP (and in notice-race states, records first), that purchaser can convey good title to anyone -- including people who pay no value, people who have notice,[20] and people who don't record first (or at all). You can think of B as the "BFP filter," sheltering the title for all who follow.[21] The only exception to this "shelter" principle is that an earlier purchaser who is not a BFP can't cleanse his or her own title by running it through a BFP who then conveys it back to him or her.[22]

5. What is notice? Since notice is important in nearly all states, we need to understand how one gains notice. There are only three ways:

- Actual knowledge (information that has come to one's attention)[23]
- Information that is found in recorded documents in the chain of title[24]

- Information that would be gained by viewing the land and inquiring of anyone (other than the purported owner) in possession[25]

This last point means that anyone buying real estate is strongly advised to look at it first, and if someone other than the purported owner is in possession, to ask them what their rights are. Any buyer who fails to do so is simply held to have had the notice that they would have gained if they had made the inquiry.[26] The courts have sometimes taken a very liberal view of what is means by possession (e.g., a farmer who is only on the land occasionally), so this can be a significant trap for subsequent purchasers.[27]

If a grantee obtains any information by any of these three means that suggests the existence of a prior adverse conveyance, the grantee is required to make a reasonable inquiry of the person who appears to hold the adverse interest. If no inquiry is made, the grantee is held to the notice that the inquiry would have revealed.[28]

6. What is value? To be regarded as paying value, a subsequent purchaser need not pay the full market value of the property,[29] but must pay something significant[30] -- more than nominal value, such as $1 or $10. Nominal payment may satisfy the contract concept of consideration, but it won't satisfy the recording acts.[31]

The value need not be an outright payment of a purchase price. It may be in the form of a contemporaneous loan; hence, if the owner borrows money from B and gives B a mortgage to secure repayment, value has been given. But a conveyance of a mortgage to B in order to secure payment of a preexisting debt won't count;[32] the value must be paid contemporaneously with the taking of the conveyance. The value need not be in cash;[33] it can be the relinquishment of a valuable legal right. Hence, if the owner has previously borrowed money from B, and now gives B a deed of the property in satisfaction

of the debt, value has been paid in the form of B's discharge and release of the indebtedness.[34] Finally, the liens obtained by judgment creditors are usually not protected by the recording acts from prior unrecorded conveyances by the judgment debtor, again on the ground that the creditor has paid no contemporaneous value for the lien.[35]

7. Interests outside the coverage of the recording acts. Not all claims to land need to be recorded in order to be safe against subsequent purchasers. One reason is that the recording acts apply only to written conveyances of interests in land -- conveyance such as deeds, leases, grants of mortgages and easements, and covenants affecting land use. They don't apply to changes of title or interest that do not arise from written conveyances. Here's an example. A moves onto an owner's land and adversely possesses it for the required time period. A now owns the land (even though there is, at this point, no document or court decree that says so).

Owner ——————→ A (no document)
Adverse possession
Owner ——————→ B
Deed

Then A vacates the land and the original owner purports to sell it to B (who pays value, takes without notice of A's claim, and immediately records). Despite the fact that B has done everything necessary to qualify for the protection of the recording act in every state, A will still prevail against B. The reason is that A's acquisition of title was not by means of a written conveyance, and therefore not subject to being divested by the recording acts, which apply by their terms only to written conveyances.[36] This result seems terribly unfair to B, who did everything possible to ensure that she or he was getting

good title. In effect, it is a flaw in the system, and can be overcome only by B's purchasing title insurance.

The same principle applies to prescriptive easements,[37] and quite possibly to implied easements,[38] easements of necessity, dedication by public use, and boundary changes by acquiescence or oral agreement. Since these changes to title are not represented in any written document, it's arguable that they need not be recorded to be protected against subsequent purchasers.[39] In addition, specific recording acts sometimes exempt other transfers from the act's operation. A common example is a short-term lease (usually defined as less than one to three years).

Finally, note that documents that are available in other governmental offices are often treated as recorded even though they cannot be found in the recorder's office. Examples include court docket records (for such matters as judgment liens[40] and suits raising the doctrine of *lis pendens*), property tax records, and records of municipal land use decisions.[41] In some states other types of government liens, such as special improvement assessments[42] and liens for unpaid municipal utility bills[43] are treated as recorded even though they may be difficult or impossible to find in the recorder's office.

8. What's wrong with the system? While the recording system is highly useful, it also has many defects. It does not guarantee that anyone who does a careful and competent search will get good title. The recorder's office is like a library, and searchers are invited to look at the documents and decide for themselves the state of the title to a parcel of land. But many things can go wrong:

- The recorder's personnel may record a document correctly but delay indexing it or misindex it, so that as a practical matter it cannot be found by a searcher.[44]

● The indexing by the recorder may be technically correct but confusing or misleading. Is “X.Y.Z. Corp.” the same as “XYZ Corp?”[45]

● Interests in the land may exist outside the recording system, so that even a BFP who immediately records is not protected against them. These interests are essentially unfindable. We have already mentioned prior claims of adverse possession, prescriptive easements, and the like.[46] Another category raising the same issue is mechanics liens. In many states a notice of such a lien need not be recorded until several months after work on the property is completed, but when filed, the lien will “relate back” in terms of priority to the date work commenced. If a BFP purchases an interest in the property between these two dates, the lien may be binding against the interest the BFP acquires.[47]

● The documents found by a searcher may appear regular on their face but may in fact be defective under standard conveyancing law in undiscoverable ways, such as forgery, failure of delivery, and the like. Recording doesn’t cure any of these potential defects, and the recorder’s office has no responsibility to try to screen for them[48] or to give legal advice to those who are searching the records.[49]

● A document may be in the records, but technically not entitled to be recorded because of a missing or improper notarial acknowledgement,[50] lack of witnesses,[51] or other technical requirements of the recording system. Such documents are usually treated as if they were unrecorded, even if the defect cannot be discerned on the face of the instrument. Of course, if a title searcher actually sees such a document, the searcher will be held to have knowledge of it.[52]

● Finally, there is human error. Title searching is a tedious job, and even the most conscientious searchers can suffer a moment's inattention.

9. Conclusion. The recording system is archaic and fraught with the potential for yielding wrong conclusions. Conversion by many recording jurisdictions to computer-based electronic indexes has been helpful, but most of the legally problematic flaws continue to exist. Title insurance has been invaluable in making the weight of the recording system bearable, but it adds a further layer of complexity as buyers try to understand the limitations of their title policies. It seems unlikely that major changes will occur, so it is essential that real estate lawyers understand the peculiarities and limitations of our present system.

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[1] Dale Whitman is a Professor of Law Emeritus at the University of Missouri-Columbia. He can be reached at WhitmanD@missouri.edu

[2] Brown v. Johnson, 159 Cal. Rptr. 675, 678 (Cal. App. 1979) (self-serving statements or affidavits are not conveyances of interests in land and are not entitled to be recorded).

[3] Many of the acts exempt short term leases, commonly defined as 1 to 3 years or less.

[4] Chandler v. Cameron, 47 S.E.2d 528 (N.C. 1948) (recording act governs contracts to sell land, but not mere personal contracts).

[5] McCorkle v. Loumiss Timber Co., 760 So. 2d 845 (Miss. App. 2000); Carlson v. Taylor, 165 N.W.2d 178 (Wis. 1969); Petersen v. Olson, 112 N.W.2d 874 (Iowa 1962); Strong v. Clark, 352 P.2d 183 (Wash. 1960).

[6] This point has been made repeatedly by courts rejecting the arguments of recorders that MERS is somehow liable for the recording fees the recorders have lost as a result of nonrecordation of mortgage assignments. See, e.g., Montgomery Cty., Pa. v. MERSCORP Inc., 795 F.3d 372, 377 (3d Cir. 2015); State ex rel. U.S. Bank Nat. Ass'n v. McGraw, 769 S.E.2d 476, 482 (W.Va. 2015).

[7] Reeves v. Hayes, 95 Ind. 521, 525 (1884).

[8] The frustrated first grantee has an action against the grantor for damages, based on breach of the deed warranty of title (if any), tort (see Jones v. Garden Park Homes Corp., 393 S.W.2d 501 (Mo. 1965); Hilligas v. Kuns, 124 N.W. 925 (Neb. 1910)), fraud (Madden v. Caldwell Land Co., 100 P. 358 (Idaho 1909)), or unjust enrichment (Niles v. Groover, 3 S.E. 899 (Ga. 1887); Patterson v. Bryant, 26 N.C. 550, 5 S.E.2d 849 (1939); Bardwell v. White, 762 So.2d 778 (Miss.App. 2000)). But of course collection of a judgment may be problematic, and in any case doesn't give the first grantee the land itself.

[9] See Ray Sweat, Race, Race Notice and Notice Statutes: The American Recording System, Probate and Property, May/June 1989, at 27.

[10] A few additional states have special "race" statutes applying only to priority among competing mortgages; see, e.g., W.Va. Code Ann. §40-1-9; Fisher, The Scope of Title Examination in West Virginia: Can Reasonable Minds Differ?, 98 W. Va. L. Rev. 449, 470 (1996); Ohio Rev. Code Ann. § 5301.23.

[11] But even in North Carolina, notice to the subsequent purchaser is irrelevant; Runyon v. Paley, 416 S.E.2d 177 (N.C.1992).

[12] Hence, recording first won't help B if B has notice of A's claim; see Furnari v. Wells Fargo Bank N.A., 2006 WL 664843 (Mich. App. 2006); Spickler v. Ginn, 40 A.3d 999 (Me. 2012).

[13] See, e.g. State Street Bank v. Heck's, Inc., 963 S.W.2d 626 (Ky. 1998), where the court mistakenly characterized Kentucky's "notice" state as "race-notice." The Missouri statute is confusingly worded, but was correctly construed as pure "notice" in Henson v. Wagner, 642 S.W.2d 357 (Mo.App. 1982). The Colorado statute was problematic, but the legislature amended to expressly state, "This is a race-notice recording statute." Colo. Rev. Stat. Ann. § 38-35-109.

[14] See, e.g., Wash. Rev. Code §65.08.070. Nebraska uses both phrases together; Neb. Rev. Stat. § 76–238.

[15] See, e.g., Wachovia Bank, N.A. v. Swenton, 20 N.Y.S.3d 405 (N.Y. App. Div. 2015); Regan v. Jeff D., 339 P.3d 1162, 1167 (Idaho 2014); MidCountry Bank v. Krueger, 782 N.W.2d 238, 244 (Minn. 2010).

[16] Schwalm v. Deanhardt, 906 P.2d 167 (Kan. App. 1995); Mo. Rev. Stat. §442.400 as construed by State Bank of St. Louis v. Frame, 20 S.W. 620 (Mo. 1892).

[17] McCarthy v. Lane, 16 N.E.2d 683 (Mass. 1938); Allen v. Allen, 16 N.E.3d 1078 (Mass. App. 2014).

[18] Obernay v. Chamberlin, 506 S.W.2d 446 (Mo.banc 1974); Hayward v. Arnold, 779 S.W.2d 342 (Mo. App. 1989).

[19] There are many examples of this slightly muddled reasoning; see, e.g., MidCountry Bank v. Krueger, 782 N.W.2d 238, 251 (Minn. 2010).

[20] Guss v. Sydney Realty Corp., 129 S.E.2d 43, 49 (Va. 1963).

[21] The principle is nicely explained in Spickler v. Ginn, 40 A.3d 999 (Me. 2012).

[22] Sun Valley Land & Minerals, Inc. v. Burt, 853 P.2d 607, 613 (Idaho App. 1993).

[23] See Caruso v. Parkos, 637 N.W.2d 351 (Neb. 2002) (subsequent grantee received knowledge of prior deed through a discussion at a family meeting); First Alabama Bank of Huntsville v. Key, 394 So. 2d 67 (Ala. Civ. App. 1981) (subsequent mortgagee's attorney was told of prior deed).

[24] See, e.g., In re BowlNebraska, L.L.C., 447 B.R. 597 (B.A.P. 8th Cir. 2010) (recorded notice of default gave constructive notice of improperly recorded mortgage); In re El-Erian, 512 B.R. 391 (Bankr. D.D.C. 2014) (same); O'Connell v. JPMorgan Chase Bank, 2012 WL 6151972 (E.D.N.Y. 2012) (recorded second mortgage which referred to unrecorded first mortgage and recited its balance gave sufficient notice of first mortgage); Clancy v. Recker, 316 A.2d 898 (Pa. 1974) (reference in recorded deed to unrecorded restrictive plan of development gave notice of that plan). Contra, see Kalange v. Rencher, 30 P.3d 970 (Idaho 2001) (grantee of deed of trust was not held to notice of the contents

of separate note and loan agreement, despite fact that they were mentioned in deed of trust).

[25] Crown Coin Meter Co. v. Park P, LLC, 934 N.E.2d 142, 148 (Ind. App. 2010); Martinez v. Affordable Housing Network, Inc., 123 P.3d 1201 (Colo. 2005); Mazza v. Realty Quest Brokerage Corp., 712 N.Y.S.2d 288 (N.Y.City Civ.Ct. 2000); In re Crowder, 225 B.R. 794 (Bankr. D.N.M 1998). But see Madison v. Gordon, 39 S.W.3d 604 (Tex.2001) (possession by prior grantee of one unit in a fourplex was not sufficiently unequivocal and exclusive to give constructive notice).

[26] Vandelay Holdings, LLC v. Jackson, 2014 WL 10936746 (Pa. Super. Ct. 2014); Madison v. Gordon, 39 S.W.3d 604, 606 (Tex. 2001). In order to confer notice, the possession must be visible, open, and exclusive of the grantor's possession.

[27] Baldwin Cty. Fed. Sav. Bank v. Central Bank., 585 So. 2d 1279, 1282 (Ala. 1991) (occasional visits to the property and surveying it were sufficient to give inquiry notice).

[28] Smith v. FDIC, 61 F.3d 1552 (11th Cir. 1995); First Fidelity Thrift & Loan Ass'n v. Alliance Bank, 71 Cal.Rptr.2d 295 (Cal. Ct. App. 1998); Slachter v. Swanson, 826 So. 2d 1012 (Fla. App. 2001); Gerow v. Sinay, 905 N.Y.S.2d 827 (N.Y. Misc. 2010).

[29] Melendrez v. D & I Inv., Inc., 26 Cal. Rptr. 3d 413, 427 (2005).

[30] See First Am. Title Ins. Co. v. Action Acquisitions, LLC, 187 P.3d 1107, 1112 (Ariz. 2008) ($3,500 for house worth $300,000 to $400,000 was payment of value); Cheatham v. Gregory, 313 S.E.2d 368 (Va. 1984) ($400 for 2.5 acres of farm land was payment of value). Cf. Neeley v. Intercity Mgmt. Corp., 623 S.W.2d 942, 953 (Tex. App. 1981) (no value found, where the amount paid is grossly and unconscionably insufficient in relation to the property's market value).

[31] Morris v. Wicks, 106 P. 1048 (Kan. 1910); Anderson v. Anderson, 435 N.W.2d 687, 690 (N.D. 1989). Contra, see Damian v. Damian, 2015 Guam 12, 2015 WL 1742944 (Guam 2015).

[32] Appeal of Dovey, 97 Pa. 153, 162 (1881); Wood v. Robinson, 22 N.Y. 564, 567 (1860). However the value requirement may be satisfied if B gives a time extension to pay or some other contemporaneous concession in return for the mortgage; see Gabel v. Drewrys Ltd., U.S.A., Inc., 68 So. 2d 372 (Fla. 1953). Contra, see Busey v. Reese, 38 Md. 264, 270 (Md. 1873).

[33] The giving of a negotiable note in payment is considered value only if the note is in fact negotiated to a third party; see Rush v. Mitchell, 32 N.W. 367 (Iowa 1887).

[34] Wight v. Chandler, 264 F.2d 249, 250 (10th Cir. 1959).

[35] ABN AMRO Mortg. Group, Inc. v. American Residential Serv., LLC, 845 N.E.2d 209 (Ind. App. 2006); In re Brosnahan, 312 B.R. 220 (Bankr.W.D.N.Y. 2004); Texas American Bank/Levelland v. Resendez, 706 S.W.2d 343 (Tex. App. 1986).

[36] See Muggas v. Smith, 206 P.2d 332 (Wash. 1949).

[37] In re Boston Reg'l Med. Ctr., Inc., 240 B.R. 813 (Bankr. D. Mass. 1999); Crescent Harbor Water Co. v. Lyseng, 753 P.2d 555 (Wash. App. 1988); McKeon v. Brammer, 29 N.W.2d 518 (Iowa 1947); O'Connor v. Brodie, 454 P.2d 920 (Mont. 1969); Oppold v. Erickson, 267 N.W.2d 570 (S.D. 1978). A few cases are contrary; see City of Corpus Christi v. Krause, 584 S.W.2d 325 (Tex. Civ. App. 1979); Kiler v. Beam, 539 A.2d 1138 (Md.Ct.Spec.App.1988). Restatement of (Third) of Property (Servitudes) §7.14, takes an intermediate position on the issue.

[38] See McKeon v. Brammer, 29 N.W.2d 518 (Iowa 1947). Most cases, however, hold that a subsequent BFP takes free of unrecorded implied easements and easements of necessity; see Russakoff v. Scruggs, 400 S.E.2d 529 (Va. 1991); Bush v. Duff, 754 P.2d 159 (Wyo.1988); Renner v. Johnson, 207 N.E.2d 751 (Ohio 1965).

[39] In many cases, of course, a prescriptive or implied easement will be apparent upon inspection of the servient property, thus giving the subsequent purchaser notice of its existence; see Jones v. Harmon, 1 Cal. Rptr. 192 (Cal. Ct. App. 1959).

[40] Les Realty Corp. v. Hogan, 714 A.2d 366 (N.Y. Super. Ct. 1998). In some states no judgment lien arises until the judgment is recorded in the real estate records; see, e.g. Noble Mortg. & Investments, LLC v. D & M Vision Investments, LLC, 340 S.W.3d 65 (Tex. App. 2011).

[41] Talbot v. Wake, 141 Cal. Rptr. 463, 467 (Cal. App. 1977) (record of special assessment found only in the county surveyor's office gave constructive notice); Metropolitan Dade County v. Fountainbleau Gas & Wash, Inc., 570 So. 2d 1006 (Fla. App. 2001) (covenants appearing in rezoning resolution available in planning office gave constructive notice). However, documents filed with land use agencies are usually treated as unrecorded; see, e.g., First Am. Title Ins. Co. v. J.B. Ranch, Inc., 966 P.2d 834 (Utah 1998) (road maps on file with the county clerk's office are not regarded as recorded); Story Bed & Breakfast v. Brown County Area, 794 N.E.2d 519 (Ind. App. 2003) (records in planning commission's office gave no constructive notice of PUD covenants); Ioannou v. Southold Town Planning Bd.; 758 N.Y.S. 2d. 358 (N.Y. App.Div. 2003) (covenants found only in records of town planning board gave no constructive notice).

[42] Golden Delta Enterprises v. City of Arnold, 151 S.W.3d 119, 123 (Mo. App. 2004) (sewer improvement lien was not subject to recording act); 612 S. LLC v. Laconic Ltd. P'ship, 109 Cal. Rptr. 3d 780, 787 (Cal. App. 2010) (special assessment lien was binding on subsequent purchaser, even though it was indexed in recorder's office only under the parcel number and not the name of the owner).

[43] N.J. Stat. Ann. § 40:14B-42 (unpaid utility bills are a lien on the property, binding on subsequent bona fide purchasers if filed in the office of the collector). Cf. Title Guarantee & Trust Co. v. Allen, 256 N.Y.S. 400 (N.Y. Mun. Ct. 1932) (lien for water rents was binding on a subsequent purchaser of property only if properly recorded).

[44] The cases are divided as to the effect of misindexing. Compare First Citizens Nat'l Bank v. Sherwood, 817 A.2d501 (Pa. Super. Ct. 2003) (incorrectly indexed mortgage imparted constructive notice) and Miller v. Simonson, 92 P3d 537 (Idaho 2004) (same) with Coco v. Ranalletta, 733 N.Y.S.2d 849 (N.Y. Sup. Ct. 2001) (improperly indexed mortgage gave no constructive notice); Dyer v Martinez, 54 Cal.Rptr. 3d 907 (Cal. Ct. App. 2007) (same); Waicker v. Banegura, 745 A.2d 419 (2000) (same).

[45] Compare Bilden Properties, LLC v. Birin, 75 A.3d 1143 (N.H. 2013) (document indexed under corporation's "a.k.a" name was considered recorded) and In re Thibault, 518 B.R. 635 (Bankr. D. Mass. 2014) (document indexed under the name "Thibeault," when owners held title in the name "Thibault," was considered properly recorded) with In re Corbett, 284 B.R. 779, 781 (Bankr. W.D. Pa. 2002) (document indexed under owner's married name, when she had received title in her maiden name, was not considered recorded).

[46] See text at note 18 supra.

[47] See Nelson, Whitman, Burkhardt & Freyermuth, Real Estate Finance Law §12.4 (6th ed. 2015).

[48] For example, in 2015 a mentally ill man recorded a deed purporting to transfer Petco Park, the home of the San Diego Padres, causing much consternation. County officials said they had no choice but to accept the deed for recordation. See Bogus Title Transfer Clouds Petco Ownership, San Diego Union Tribune, Oct. 25, 2016. However, recently several states have adopted statutes prohibiting the recordation of bogus liens and authorizing the recorder to reject them; see, e.g., Minn. Stat. Ann. §514.99; S.C.Code § 30-9-30.

[49] S & H Petroleum Corp. v. Register of Deeds, 707 N.E.2d 843 (Mass. App. 1999).

[50] The courts usually treat recorded but improperly acknowledged documents as if they were unrecorded; see, e.g., Nowak v. Chase Home Finance, LLC, 414 B.R. 269 (Bankr. S.D. Ohio 2009); In re Shannon, 343 B.R. 585 (Bankr. E.D.Ky. 2006); In re Crim, 81 S.W.3d 764 (Tenn. 2002).

[51] Mulligan v. Snavely, 223 N.W. 8 (Neb. 1929). Most states do not require witnesses, but a few do.

[52] Mulligan v. Snavely, id. (document was not properly witnessed and therefore not entitled to be recorded, but was actually seen by subsequent purchaser's attorney).