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The Demise of the Recording Act as a Rule of Property

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For as long as there have been human beings battles have been fought over ownership of real property. For as long as human beings have been forming civilized societies, rules have been adopted for the purpose of avoiding battles over ownership of real property.

The basic rules which were adopted in England hundreds of years ago to deal with this problem are essentially the same rules we are all familiar with today – if it concerns real property, it has to be in writing, it has to be signed and acknowledged, it has to be placed in the public record, and, most importantly of all, the public record is determinative of title.

The last mentioned item is critical to the goal of avoiding battles over ownership of real property. The reason the foregoing rules avoid such battles is precisely because everyone agrees that the owner reflected in the public record is the owner, and everyone agrees that everyone can rely on the public record to establish the identity of that owner.

Arkansas became a state on June 15, 1836. In the following years, Arkansas' legislators met and adopted statutes dealing with a variety of issues, to include real property. Included in those statutes was a piece of legislation commonly referred to as the recording act, now codified at A.C.A. §14-15-404. The recording act, on its face, says that a recorded instrument controls over an unrecorded instrument, absent "actual notice" of the unrecorded instrument.

Although the phrase "actual notice" would seem, at first glance, to be relatively simple to understand, interpret, and apply, the reality is quite the opposite. In the real world, the phrase that is actually applied is "inquiry notice," a phrase which has a vastly different meaning (or not – it all depends on what you think "actual notice" actually means).

This paper will attempt to provide an explanation of how we got from "actual notice" to "inquiry notice," will define and describe "inquiry notice" to the extent it is possible to do so, and will conclude by attempting to state the current rules of property in the State of Arkansas with respect to how one goes about determining who owns real property.

I. Why Have Rules of Property?

The Arkansas Supreme Court has answered this rhetorical question eloquently, on multiple occasions, beginning in 1840.

> "It is all important to the interest of society, that the rules of property should be definitely settled, and that they should possess uniformity and consistency. *Moody v. Walker*, 3 Ark. 147 (1840).
>
> "In our body of law there have grown up a number of rules and principles governing the law of real estate which have become known as "rules of property." While it may be argued that many of such rules are based upon technicalities, it is nevertheless true that these rules, and the technicalities

> upon which they are based, have come into existence and have been continued because of the ever present need for stability and predictability in this field of the law. Were this not the case then chaos soon would be the result and property values would diminish in direct relationship to the degree of instability existing in the law of this or any other state as it might be applied to real property. Consequently, economic and moral necessity have dictated the establishment of such rules and the technical basis of many of them. Thus it is that the maintaining of the integrity of such rules devolves upon this tribunal. General welfare requires a continuation of the observance of such rules and may in special cases, as in the case at bar, be found to require a decision in accordance with these principles even though the court may entertain great sympathy for individuals in a particular situation." *Kirkham v. Malone*, 232 Ark. 390, 336 S.W. 2d. 46 (1960).

There can be no doubt that the recording act, and the recording system in general, are rules of property. In *Peterson v. Simpson*, 286 Ark. 177, 690 S.W 2d. 720 (1985), the Arkansas Supreme Court adopted the Duhig rule as a rule of property in the State of Arkansas. In reaching its decision, the court had the following to say with respect to the recording system.

> "In the United States, the recording system is the only method we have for keeping track of the ownership of mineral rights. The recording system only makes available the evidence of title, evidence which is meaningless until interpreted by a title examiner. Rules like those that comprise the Duhig rule exist primarily to make it possible for title examiners to interpret the evidence they find in the recorder's office. Without such objective rules of construction, marketable title, and thus a market in mineral rights, would not be possible. The initial question faced by a court that is dealing with a Duhig problem is not whether to follow Duhig or some other rule of construction. The first question is whether to set aside all objective rules of construction and engage in a subjective inquiry into the meaning of the deed or [instead] to find the intent of the parties objectively according to accepted rules of construction.
>
> The general criteria for making this threshold decision are clear. The goal of interpretation is finding, if possible, the actual intent of the parties. Relevant facts, which are admitted by the parties or are proper matters for judicial notice, can be taken into account if doing so will not injure the rights of subsequent purchasers or undermine reliance on the recording system. When, however, fairness to individual parties and preservation of a viable recording system are in conflict, preservation of the recording system, being more important, must control."

Returning to the rhetorical question "why have rules of property?", the answer is that public policy requires it. It is in the best interest of a civilized society to have stability and predictability in this field of the law.

II. The Recording Act

In the fall of 1836 the legislature of the State of Arkansas met for the first time and commissioned the preparation of a code of civil and criminal laws, to be considered for adoption by the general assembly at its next session, in these terms:

> "That the governor shall appoint, by and with the advice and consent of the senate, two competent persons to revise and arrange the statute laws of this state, and prepare such a code of civil and criminal laws, as, in their opinion, may be necessary for the government of this state, in accordance with the constitution; and the persons so appointed shall make their report at the next session of the general assembly, whether it be a regular or called session."

Sam C. Roane and William McK. Ball, Esquires, were duly appointed by the governor, commenced upon their mission, and presented the results of their work at the October session of the general assembly of the State of Arkansas in 1837. "The statutes so revised and presented, were referred to appropriate committees, reported to one or the other house, and passed separately, and with such amendments as seemed proper."

A gentleman named Albert Pike was assigned responsibility for preparing an index to the foregoing statutes. A preface to the statutes prepared by Mr. Pike provides interesting reading. One of the topics addressed by Mr. Pike in his preface was the reason why the preparation of a code of laws was necessary. (The Revised Statutes of the State of Arkansas).

> "[I]n no state was ever such a revision called for, more needful for the common weal. Taking the organic law as the basis of legislation, the legislative bodies of Missouri and Arkansas territories had erected, at different times, and under the direction of diverse architects, an unseemly and incongruous superstructure thereon; composed of statutes, enacted in part by the legislature of each territory, in part by the legislature of the Louisiana territory, and in part by the governor and judges of Arkansas territory. The whole edifice, erected in such manner, and under the auspices of legislation so conflicting and inartificial, resembled some of those old baronial castles, still extant in England, where the gothic mingles with the Corinthian, the Doric with the Chinese style of architecture, as different ages have added different portions to the heterogeneous structure."

The Revised Statutes of the State of Arkansas ran some 966 pages, and included chapters for counties, county lines, county seats, courts, judges, and clerks. The Revised Statutes also included chapters on conveyances of real estate, chapter 31, and recorders, chapter 124. With respect to the last two chapters, everything you would expect to see in a comprehensive recording system is reflected in the statutes (in fact, they are the same statutes we still use today), with one notable exception – what we now refer to as the recording act is nowhere to be seen.

Instead, the recording act was adopted in 1846, and became effective on December 21, 1846. The recording act remains unchanged to this day, and reads as follows:

> "(a) Every deed, bond, or instrument of writing affecting the title, in law or equity, to any real or personal property, within this state which is, or may be, required by law to be acknowledged or proved and recorded shall be constructive notice to all persons from the time the instrument is filed for record in the office of the recorder of the proper county.
>
> (b) No deed, bond, or instrument of writing for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, made or executed after December 21, 1846, shall be good or valid against a subsequent purchaser of the real estate for a valuable consideration without actual notice thereof or against any creditor of the person executing such an instrument obtaining a judgment or decree which by law may be a lien upon the real estate unless the deed, bond, or instrument, duly executed and acknowledged or proved as required by law, is filed for record in the office of the clerk and ex officio recorder of the county where the real estate is situated." A.C.A. §14-15-404.

I have been unable to discover an explanation for why the recording act was not included in the original Revised Statutes of the State of Arkansas adopted in 1837. Recording acts were well known at the time. Indeed, in a case decided in 1855, the Arkansas Supreme Court discussed the registry acts of England and other states at length, *Byers v. Engles*, 16 Ark. 543 (1855). Nevertheless, whatever the explanation may be, the reality is that although all of the other elements of a recording system were adopted as the law of the State of Arkansas contemporaneously with statehood, the recording act did not arrive until 10 years later.

For purposes of this paper, the recording act may be distilled down to the following:

> "Every...instrument...shall be constructive notice to all persons from the time the instrument is filed for record...."
>
> "No deed...shall be good or valid against a subsequent purchaser... without actual notice...unless the deed...is filed for record...."

III. "Actual Notice" and Statutory Interpretation

When I embarked upon this project I assumed that since the recording act is a statute, and since it is the constitutional responsibility of the courts to interpret and enforce statutes, and since the recording act was adopted in 1846 and has remained unchanged ever since, I would begin my research by finding the first case in which the courts interpreted the recording act, and specifically the first case in which Arkansas' courts interpreted the meaning of the phrase "actual notice." What I found surprised me – as far as I can tell, Arkansas' courts have never been asked to interpret, and have never attempted to interpret, the phrase "actual notice" as a matter of statutory interpretation.

I will discuss in the next section my conclusions concerning the question of where "inquiry notice" comes from, since it is not the end product of judicial interpretation of the statutory phrase "actual notice." In this section I will devote my attention to a hypothetical question – what would happen if the courts were ever asked to determine the meaning of the phrase "actual notice," as a matter of statutory interpretation?

The judicial branch has been interpreting the laws enacted by the legislative branch from the time the constitution was adopted to the present. The rules of statutory interpretation adopted and applied by the judicial branch have been distilled over the years into relatively simple terminology, the basics of which are set forth below.

> "The first rule of statutory construction is to construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. We construe statutes so that, if possible, every word is given meaning and effect. If the language of a statute is clear and unambiguous and conveys a clear and definite meaning, it is unnecessary to resort to the rules of statutory interpretation. When a statute is clear, it is given its plain meaning, and this court will not search for legislative intent; rather, that intent must be gathered from the plain meaning of the language used." *Roberson v. Phillips County Election Commission*, 2014 Ark. 480, 449 S.W. 3d. 694 (2014).
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> "A statute is considered ambiguous if it is open to more than one construction. When a statute is ambiguous, this court must interpret it according to legislative intent and our review becomes an examination of the whole act. In reviewing the act in its entirety, this court will reconcile provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part. In addition, this court must look at the legislative history, the language, and the subject matter involved." *Simpson v. Cavalry SPV I, LLC*, 2014 Ark. 363, 440 S.W. 3d. 335 (2014).
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> "The basic rule of statutory construction to which all interpretive guides must yield is to give effect to the intent of the general assembly. When a statute is ambiguous,...we must interpret it according to the legislative intent, and its review becomes an examination of the whole act. Finally, a statute is ambiguous only where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning. In ascertaining legislative intent, we look to the statutory language, legislative history, and other appropriate matters." *Gafford v. Allstate Insurance Company*, 2015 Ark. 110, 459 S.W. 3d. 277 (2015).

Because this is a hypothetical discussion and it is difficult to predict how the Arkansas Supreme Court might apply the foregoing rules of statutory interpretation to the phrase "actual notice," I am going to cheat a little bit and only look at the question of statutory interpretation

from this perspective: is it possible to read the recording act in such a way that the phrase "actual notice" means "inquiry notice," as the latter phrase has been defined by the cases? The definition of inquiry notice, as established by the case law, is as follows:

> "A subsequent purchaser will be deemed to have actual notice of a prior interest in the property if he is aware of such facts and circumstances as would put a person of ordinary intelligence and prudence on such inquiry that, if diligently pursued, would lead to knowledge of these prior interests. This type of notice must be enough to excite attention or put a party on guard to call for an inquiry." (Emphasis supplied). *Killam v. Texas Oil & Gas Corp.*, 303 Ark. 547, 798 S.W. 2d. 419 (1990).

At this juncture I cannot help pointing out that if a person is "deemed" to have actual notice, then that person, by definition, does not actually have actual notice. The very definition of inquiry notice, as stated by the courts, therefore conclusively establishes that actual notice and inquiry notice are two different things. One would therefore think that if the courts were ever asked to address "actual notice" as a matter of statutory interpretation, the courts would conclude that actual notice, whatever else it might be, is not inquiry notice.

Continuing with my hypothetical question, if you place the recording act and the foregoing definition of "inquiry notice" side by side, and ask yourself if it is possible to read the phrase "actual notice" as "inquiry notice," the common sense conclusion is that it is absolutely impossible to interpret actual notice to mean inquiry notice. Applying the basic rules of statutory interpretation confirms the validity of this common sense reaction. The dictionary definitions of actual and notice are as follows:

> Actual: Existing in fact and not merely potentially. Existing in fact or reality. Not false or apparent.
>
> Notice: Warning or information of something

It would seem that there would be little difficulty in giving these words their plain meaning and interpreting the statute in accordance with the dictionary definitions. Certainly it would be difficult to describe these words as ambiguous.

Assuming arguendo it is possible to find ambiguity in the statute, the rules of statutory interpretation require that the statute be interpreted in accordance with legislative intent. The intent of the legislature in adopting the recording act is readily apparent. The purpose of the recording act is to provide certainty with respect to ownership of real property. It is a statement of public policy – in the words of the Arkansas Supreme Court: "It is all-important to the interest of society, that the rules of property should be definitely settled, and that they should possess uniformity and consistency." *Moody v. Walker*, 3 Ark. 147 (1840). Considering the statute in the context of legislative intent, the conclusion to be reached is, once again, that actual notice means actual notice, not what might be known or could be known or should be known.

The logical conclusion to be drawn from the foregoing discussion is that if the Arkansas Supreme Court were asked to interpret the recording act in a vacuum, ignoring all of the case law concerning inquiry notice, and looking only at the statute itself, the Arkansas Supreme Court would conclude that actual notice means actual notice – not what a person could know, might know, or should know, but what the person actually knows. Certainly, you would not expect the Arkansas Supreme Court to look at the four corners of the act and conclude that actual notice does not mean actual notice, it means inquiry notice.

IV. If "Inquiry Notice" Is Not the Product of Judicial Interpretation of the Phrase "Actual Notice," Then What Is It?

The recording act says that once a document is recorded in the deed records, it is "constructive notice" to everyone from the time it is recorded. Makes sense – what is the point of a recording system, if you are not charging everyone with knowledge of everything that has been recorded?

The statute also says that a recorded instrument beats an unrecorded instrument absent "actual notice" of the unrecorded instrument. Again, makes sense – it just wouldn't be right for someone who knows the whole story to prevail over the party who was first in time.

What about "inquiry notice?" The statute does not say anything about "inquiry notice," yet the case law is replete with discussion and application of inquiry notice, to the point that the concept of actual notice which appears in the statute is, for all practical purposes, rendered meaningless. Where in the world does inquiry notice come from?

The answer is that inquiry notice has nothing to do with the recording act. Rather, it is purely judge made law (common law) which existed before the recording act was adopted, and which has continued to be applied to the present day, without regard to the recording act.

In 1841, five years before the recording act was adopted, the Arkansas Supreme Court decided the case of *Porter v. Clements*, 3 Ark. 364 (1841), a case involving a dispute over the ownership of slaves. Clements needed money and had four slaves that were worth about $1,500.00. Clements cut a deal with Phillips pursuant to which Phillips gave Clements $400.00 and Clements gave Phillips a bill of sale for the slaves. The bill of sale, on its face, purported to convey the slaves unconditionally. Phillips then assigned the bill of sale to Porter. Clements later asserted that he actually pawned the slaves to Phillips – stated differently, Clements took the position that the "deal" was that if Clements would give Phillips $500.00 within two and one-half years, he would get the slaves back, otherwise Phillips got to keep them. Before the two and one-half years passed, Clements tendered the $500.00 to Porter and asked for the return of the slaves. Porter took the position that the bill of sale was absolute on its face, that he did not have any actual notice of the "deal" asserted by Clements, that he was an innocent purchaser, and that he therefore owned the slaves.

Drawing an analogy to the topic presently under discussion, the bill of sale would be record title, and the "deal" would be the unrecorded instrument.

Porter lost the case, not because there was any proof that he had actual notice, but rather because the court found that Porter had knowledge of facts which put him on inquiry, and that if he had conducted a diligent inquiry, he would have learned about the "deal." In reaching its conclusion, the court discussed the distinction between inquiry notice and actual notice in these terms:

> "...and it is equally as difficult to define with precision the rules which regulate implied or constructive notice; for it depends upon all the varied circumstances of the case, and whether there has been an exercise of ordinary diligence and understand in making inquiries. Suspicion of notice is not sufficient; there must be clear and strong circumstances, in the absence of actual notice." (Emphasis supplied).

Before the recording act was adopted, the courts applied these same judicial concepts to transactions involving real property. In 1853, the Arkansas Supreme Court decided the case of *Ringgold v. Waggoner*, 14 Ark. 69 (1853), a case involving events that occurred in 1844, prior to the adoption of the recording act. In that case John Waggoner, who was then in financial straits and being vigorously pursued by creditors, conveyed a piece of land to a relative, Edmond P. Waggoner, who then sold the land for the full market value to Edwin T. Burr. The creditors of John Waggoner filed suit, asserting that the conveyance from John Waggoner to Edmond P. Waggoner was a fraudulent conveyance, and arguing that the subsequent conveyance from Edmond P. Waggoner to Edwin T. Burr should be set aside on the ground that Edwin T. Burr knew or should have known that the conveyance to Edmond P. Waggoner was a fraudulent conveyance. Burr defended on the ground that he was entitled to be protected as an innocent purchaser. The court held against Burr, finding that even if Burr did not have actual notice that the conveyance was fraudulent, he had inquiry notice that the conveyance was fraudulent.

> "...he had sufficient notice to have put him on enquiry as a man of ordinary prudence and experience in business transactions; and when the means of information are afforded to a party, he will not be allowed to protect himself by the want of notice, because he did not choose to be informed."

The recording act is not mentioned in the decision.

One year later the Arkansas Supreme Court decided the case of *Hardy v. Heard*, 15 Ark. 184. In that case Rogers, who then held title to the W/2 of the NE/4, entered into an agreement with Montgomery to sell one acre on a bond for title (what we would today call a contract of sale or a contract for deed). Nothing was recorded, but Montgomery went into possession.

In 1848, Rogers executed and recorded a deed conveying the W/2 NE/4 to Hardy, reserving "...all pieces and parcels of land granted, bargained, and sold to sundry persons...in one and two acre lots...." In 1849, a judgment was levied on Montgomery's interest in the one acre, and it was sold at an execution sale to Heard and Sloan. Heard and Sloan paid off the remaining balance due Rogers, and obtained a quitclaim deed for the one acre from Rogers. Heard and Sloan then sued Hardy, seeking to quiet title to the one acre.

The court concluded Hardy had inquiry notice of the executory bond for title, and therefore took subject to the bond for title.

> "...[Hardy] would have to be held chargeable with notice of the prior rights of Montgomery, on the principle, now universally admitted, that whatever is sufficient to put a purchaser on enquiry, in considered as conveying notice. [Citations omitted.] This is sometimes called constructive notice, or notice in law, and which is no more than evidence of notice, the presumption of which is so violent, that it cannot be suffered to be controverted. [Citations omitted.]

Once again, the recording act is not mentioned in the decision.

In 1855, the Arkansas Supreme Court decided the case of *Hamilton v. Fowlkes*, 16 Ark. 340 (1855). Although the case was decided after the enactment of the recording act, all of the relevant events occurred well before 1846. Although the case does not mention the recording act, it nevertheless applies the same substantive legal concepts as are embodied in the recording act:

> "Though the agreement was not upon the public records of the county where the land was situated, yet, if Fowlkes became the incumbrancer or purchaser thereof, with notice of the agreement, it is well settled that he is bound thereby. On the other hand, it is equally well settled, that if he was an innocent incumbrancer or purchaser, for a valuable consideration, in good faith, without notice of the agreement, he is in no way to be bound, nor is he to be prejudiced thereby. <u>These are familiar rules of law, requiring no reference to authority to sustain them.</u>" (Emphasis supplied).

The court discussed notice in the following terms:

> "Mr. Kent says: it is indeed difficult to define, with precision, the rules which regulate implied or constructive notice, for it depends upon the infinitely varied circumstances of each case. The general doctrine is that whatever puts a party upon inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding."

The court then went on to discuss the relationship between notice and actual possession:

> "...where a person is in open and actual possession of land, even though he claimed by an equitable title, that possession is sufficient to put a subsequent purchaser upon inquiry, as to the actual rights, and the nature of the claim of such occupant; and is constructive notice of the nature and extent of those rights."

Byers v. Engles, 16 Ark. 543 (1855) is the first reported decision I was able to find applying the recording act to events which occurred after 1846. In *Byers*, Harvey Engles held record title to a tract of land. A judgment was entered against Engles, and the property was sold at a sheriff's sale to Byers. John Engles then sued, presenting an unrecorded deed from Harvey Engles to John Engles, and asserted that the judgment sale was a nullity, as Harvey Engles had conveyed the land to John Engles before the judgment lien attached.

The case quotes the recording act verbatim, then goes into a lengthy discussion of the history of recording acts and the evils recording acts are intended to eliminate. The court then went on to find that John Engles was in actual possession of the land at all times relevant to the litigation, that actual possession is equivalent to "registry notice," and that Byers was therefore "deemed" to have knowledge of the unrecorded conveyance from Harvey Engles to John Engles.

The case does not discuss the definition of "actual notice" as that phrase is used in the recording act, and does not recognize that there is any possibility of a contradiction between the statutory phrase "actual notice" and the judicially created concept of "inquiry notice."

I have expended a good deal of energy reviewing recording act cases from the 1840's to the present. The cases routinely apply inquiry notice to recording act cases, repeatedly reciting words to the effect that a person is "charged with notice of" or is "deemed to have notice of" anything that might have been discovered upon inquiry (and expanding what, exactly, is sufficient to put a person "on enquiry"). I have not found a single case, however, which addresses the apparent conflict between the statutory phrase actual notice and the judicial phrase inquiry notice. Specifically, I have been unable to find a single case addressing this issue as a matter of statutory interpretation – what did the legislature intend when it adopted the recording act, and said a recorded instrument beats an unrecorded instrument, absent "actual notice"? What does the statutory phrase "actual notice" actually mean?

V. Black's Law Dictionary

If the foregoing discussion has not been sufficient to give you a headache, the lengthy definition of "notice" in Black's Law Dictionary is sure to give you one. The definition is too long to quote here, so a copy is attached as an exhibit to this paper. My only comment here is that the Black's Law Dictionary definition of "notice" is as schizophrenic as the foregoing discussion – as I read the definition, Black's Law Dictionary says that the phrase actual notice may mean either actual notice or inquiry notice or both.

> "Actual notice has been defined as notice expressly and actually given, and brought home to the party directly. The term "actual notice," however, is generally given a wider meaning as embracing two classes, express and implied...."

I am not sure what to make of the Black's Law Dictionary definition. It can be read as either supporting the proposition that "actual notice" means actual knowledge, or it can be read as supporting the proposition that "actual notice" means inquiry notice.

VI. Public Policy vs. The Judicial Definition – Is It Time For A Legislative Solution?

The judicial definition is founded upon equitable considerations – the do-right rule. The judicial definition seeks to achieve the morally right result in every case. The de facto result, as a matter of public policy, is that the importance of rules of property, and specifically the recording act, is subordinated to the societal need to achieve the "right" result in every case. The public policy underlying rules of property is exactly the opposite – the societal need for stability in this area of the law outweighs the importance of achieving the "right" result in every single case.

As we sit here today, the public policy of the State of Arkansas is the judicially created one – the needs of the one outweigh the needs of the many. As Tom Daily once told me, the word "actual" in the recording act is as silent as the p in psoriasis. The question then becomes whether this should remain the public policy of the State of Arkansas, or if instead the legislature should alter this state of affairs by amending the recording act so that it accomplishes the public policy goals underlying rules of property – the societal needs of the many outweigh the needs of the few in this area of the law.

If you agree that a change is needed, the legislative solution would be a simple one – substitute "knowledge" for "notice":

> "No deed...shall be good or valid against a subsequent purchaser... without actual knowledge...unless the deed is filed for record...."

VII. So Where Does All of This Leave Us?

Although it would be wonderful for all of us to get in the magic way back machine and create a world in which actual notice means actual knowledge, it is not going to happen absent an amendment to the statute. The judicial concepts of inquiry notice have been repeated and enforced and extended to the point that they are now, in and of themselves, a rule of property. Stated differently, although never directly addressing the issue, as a practical matter the courts have defined "actual notice" to mean "inquiry notice." We are therefore left with the conclusion that the actual notice of the recording act is useless, and that the governing rule of property in the State of Arkansas is judge made law – inquiry notice.

What does inquiry notice mean? The definition has been stated and repeated in multiple decisions. A good example is the following statement from *Killam v. Texas Oil and Gas Corp., supra*:

> "A subsequent purchaser will be deemed to have actual notice of a prior interest in the property if he is aware of such facts and circumstances as would put a person of ordinary intelligence and prudence on such inquiry that, if diligently pursued, would lead to knowledge of these prior interests. This type of notice must be enough to excite attention or put a party on guard to call for inquiry."

Turning to the cases themselves, the following is an illustrative (but I am sure by no means exhaustive) summary of specific factual situations in which the courts have concluded the evidence was sufficient to place a prospective purchaser on inquiry notice.

Actual possession. Anyone buying a piece of real property is deemed to know who is in actual possession of the property. *Walls v. Humphries*, 2013 Ark. 286, 428 S.W. 3d. 517 (2013).

Taxes. A prospective purchaser is charged with knowledge of the identity of all parties who are assessing or paying taxes. *Killam v. Texas Oil & Gas Corporation, supra.*

Statements in recorded instruments in the chain of title. See, for example, *Hamilton v. Fowlkes, supra*, where the court held that a deed which conveyed the W/2 NE/4 reserving "...all pieces and parcels of land granted, bargained, and sold to sundry persons...in one and two acre lots...." was sufficient to create inquiry notice.

Reformation. A party who is considering purchasing a tract of real property must recognize that it is always possible someone will bring an action for reformation, and establish that a recorded instrument means something other than what it says (for example, a mineral reservation that does not appear on the face of the recorded deed). *Mauldin v. Snowden,* 2011 Ark. App. 630, 386 S.W. 3d. 560 (2011).

Imperfect title. "One who purchases from a grantor who does not have an apparently perfect record title is not a bona fide purchaser for value without notice." *Phelps v. Justiss Oil Company*, 291 Ark. 538, 726 S.W. 2d. 662 (1987). Seriously? I do not believe I have ever seen "an apparently perfect record title" in all of the years I have been reading title. If you take this language at face value, and consider it in the light of the reality that record title in the State of Arkansas is rarely perfect, this case says that there is no such thing as a recording act in the State of Arkansas.

Wild deeds. Wild deeds are inquiry notice. *Killam v. Texas Oil & Gas Corporation.* Think about that one for a minute. You are reading an abstract which actually has a perfect chain of title, unbroken from patent to the present day, no blemishes of any kind. You also have what appears to be a wild deed, in which the parties to the instrument do not appear anywhere in the perfect record title. Killam says that the wild deed is nevertheless inquiry notice of an unrecorded instrument. Certainly far afield from anything resembling "actual notice."

Legal descriptions. In *Rice v. Welch Motor Company*, 95 Ark. App. 100, 234 S.W. 3d. 327 (2006), one of the calls in the recorded deed was "thence northerly along flood line of lake about 110 feet to center of the valley to the D.D. Glover lot corner." The court held that the foregoing was sufficient to constitute inquiry notice of a previously executed but subsequently recorded deed from the common grantor to D.D. Glover, which overlapped this deed by approximately 15 feet.

You have to assume anything the seller tells you is a lie. In *Woods v. Wright*, 254 Ark. 297, 493 S.W. 2d. 129 (1973), the seller had entered into an unrecorded contract of sale in 1966. In 1969 he sold the property to a third party. In connection with that transaction, he told the third

party about the unrecorded contract of sale, but represented to the third party that the purchaser had defaulted and that the contract was cancelled. It turned out this statement was false. The court concluded that the third party should have questioned the veracity of the seller's statement and inquired directly of the purchasers as to the status of the contract.

Common grantor. In *Brewer v. Fletcher*, 210 Ark. 110, 194 S.W. 2d. 668 (1946) the first, unrecorded instrument was a timber deed. The second, recorded conveyance was a certificate of purchase at a tax sale. The court there said that the unrecorded timber deed prevailed, on the ground that "The said statute refers to subsequent purchasers from the common grantor," and the parties did not acquire their interests from a common grantor. I cannot explain this one. It isn't really an inquiry notice case, but it does serve to illustrate the extent to which the courts have emasculated the recording act. The parties were clearly asserting claims through a common grantor, and in any event the statute says no such thing.

Adverse possession. Assume you do not have a perfect record title, but at the same time you have what appears to be perfect adverse possession title. The Arkansas Supreme Court says too bad, so sad – recording is irrelevant. In *Taylor v. Scott*, a mineral deed conveying an undivided one-half interest in minerals was executed in 1937 by the person who then held record title. In 1938, the person who was in actual possession executed a deed to a subsequent purchaser for value. The subsequent purchaser went into possession, assessed and paid taxes, and clearly established adverse possession title. The unrecorded mineral deed was finally recorded in 1956. The court said that the unrecorded mineral deed won, without even discussing inquiry notice, on the ground that the recording act does not apply to subsequent purchasers of adverse possession title rather than record title.

> "When a lawyer examines an abstract of title and finds that the apparent owner's title rests only on adverse possession, a rare situation, he is at once on notice that there may be flaws in the title...." *Taylor v. Scott*, 285 Ark. 102, 685 S.W. 2d. 160 (1985).

I also call your attention to the court's comment that title resting on adverse possession is "a rare situation". The author was evidently not familiar with Arkansas title.

Tax title. The Arkansas Supreme Court has also held that "The recording statute benefits a subsequent purchaser from the common grantor, not a purchaser at a tax sale." *Taylor v. Scott, supra*, citing as support for the statement *Brewer v. Fletcher, supra* (*Brewer v. Fletcher* says no such thing).

VIII. Conclusion

The title of this paper suggests that the recording act's usefulness as a rule of property in the State of Arkansas ended recently. The title is misleading. The truth of the matter is that the usefulness of Arkansas' recording act has always been illusory.

In the introduction to this paper I stated that I would conclude by attempting to state the current rules of property in the State of Arkansas with respect to how one goes about determining who owns real property. I suggest the following:

1. Examine record title. If there is anything in the record title which is inconsistent with a "perfect" record title, get to the bottom of it.

2. Compare the record of tax assessments and tax payments (both surface and mineral) with record title. If there are any inconsistencies or discrepancies, get to the bottom of it. Note – since there is always the possibility of an unrecorded mineral deed in which minerals were severed, and the Arkansas Supreme Court says that the severance was effective at the time the deed was executed and delivered (*Taylor v. Scott, supra*), your inquiry into taxes will need to extend from patent to the present day.

3. Actual possession. Verify the identity of everyone who has been in actual possession, from patent to the present day. Again, if there are any inconsistencies or discrepancies between actual possession and record title, get to the bottom of it.

4. Examine all wild deeds, track down the parties to all wild deeds, and verify what happened. Note that this is an interesting requirement, given the fact that Arkansas is a grantor-grantee index state, and finding all wild deeds requires that you search by legal description.

5. Find and record all lost and unrecorded deeds. Again, good luck with this one.

If you are able to fulfill each of the following requirements, you will be as certain as you can possibly be that you have accurately identified the true owner. I will not, however, tell you that completing each of the foregoing chores will absolutely guarantee you an accurate result. In my opinion, the decisions of the Arkansas Supreme Court have created a situation where the public policy reasons underlying rules of property in general and the recording act specifically have been thrown under the bus, and replaced with a case-by-case analysis of the equities of each specific situation, resulting in a nightmare for parties who rely on mineral title and a cornucopia for lawyers who make their living resolving title disputes.

Notice. Information; the result of observation, whether by the senses or the mind; knowledge of the existence of a fact or state of affairs; the means of knowledge. Intelligence by whatever means communicated. Koehn v. Central Nat. Ins. Co. of Omaha, Neb., 187 Kan. 192, 354 P.2d 352, 358. Any fact which would put an ordinarily prudent person on inquiry. State ex rel. Gleason v. Rickhoff, Mo.App., 541 S.W.2d 47, 50. That which imparts information to one to be notified. Greene v. Ives, 25 Conn.Sup. 356, 204 A.2d 412, 415.

Notice in its legal sense is information concerning a fact, actually communicated to a person by an authorized person, or actually derived by him from a proper source, and is regarded in law as "actual" when the person sought to be affected by it knows thereby of the existence of the particular fact in question. United States v. Tuteur, C.A.Ill., 215 F.2d 415. It is knowledge of facts which would naturally lead an honest and prudent person to make inquiry, and does not necessarily mean knowledge of all the facts. Wayne Bldg. & Loan Co. of Wooster v. Yarborough, 11 Ohio St.2d 195, 228 N.E.2d 841, 847, 40 O.O.2d 182. In another sense, "notice" means information, an advice, or written warning, in more or less formal shape, intended to apprise a person of some proceeding in which his interests are involved, or informing him of some fact which it is his right to know and the duty of the notifying party to communicate.

Fed.R. Civil P. 5(a) requires that every written notice be served upon each of the parties.

A person has notice of a fact if he knows the fact, has reason to know it, should know it, or has been given notification of it. Restatement, Second, Agency § 9.

Notice may be either (1) statutory, *i.e.*, made so by legislative enactment; (2) actual, which brings the knowledge of a fact directly home to the party; or (3) constructive. Constructive notice may be subdivided into: *(a)* Where there exists actual notice of matter, to which equity has added constructive notice of facts, which an inquiry after such matter would have elicited; and *(b)* where there has been a designed abstinence from inquiry for the very purpose of escaping notice.

See also Adequate notice; Charged; Due notice; Immediate notice; Imputed notice; Judicial notice; Knowledge; Legal notice; Publication; Reasonable notice.

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

Averment of notice. The statement in a pleading that notice has been given.

Commercial law. A person has "notice" of a fact when: (a) he has actual knowledge of it; or (b) he has received a notice or notification of it; or (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists. A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by the U.C.C. U.C.C. § 1–201(25).

A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when: (a) it comes to his attention; or (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications. U.C.C. § 1–201(26).

Under the Uniform Commercial Code, the law on "notice," actual or inferable, is precisely the same whether the instrument is issued to a holder or negotiated to a holder. Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 296 Minn. 130, 207 N.W.2d 282, 287.

Constructive notice. Constructive notice is information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.

Constructive "notice" includes implied actual notice and inquiry notice. F. P. Baugh, Inc. v. Little Lake Lumber Co., C.A.Cal., 297 F.2d 692, 696.

Express notice. Express notice embraces not only knowledge, but also that which is communicated by direct information, either written or oral, from those who are cognizant of the fact communicated. *See also Actual notice, above.*

Implied notice. Implied notice is one of the varieties of actual notice (not constructive) and is distinguished from "express" actual notice. It is notice inferred or imputed to a party by reason of his knowledge of facts or circumstances collateral to the main fact, of such a character as to put him upon inquiry, and which, if the inquiry were followed up with due diligence, would lead him definitely to the knowledge of the main fact. "Implied notice" is a presumption of fact, relating to what one can learn by reasonable inquiry, and arises from actual notice of circumstances, and not from constructive notice. Or as otherwise defined, implied notice may be said to exist where the fact in question lies open to the knowledge of the party, so that the exercise of reasonable observation and watchfulness would not fall to apprise him of it, although no one has told him of it in so many words.

Personal notice. Communication of notice orally or in writing (according to the circumstances) directly to the person affected or to be charged, as distinguished from constructive or implied notice, and also from notice imputed to him because given to his agent or representative. *See Actual notice; Express notice, above.*

Public notice. Notice given to the public generally, or to the entire community, or to all whom it may concern. Such must commonly be published in a newspaper of general circulation. *See also* Publication.

Reasonable notice. Such notice or information of a fact as may fairly and properly be expected or required in the particular circumstances.