

**Welcome to today's webinar!**

# **Search & Exam**

**John Rothermel**

**December 19, 2019**



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- Phones are muted for a clear recording.

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- Notate affiliation with Stewart Title
  - We welcome any other lawyers to listen, but cannot provide continuing education credit to you.



# Search & Exam Issues 2019

## John Rothermel

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## Why is this presentation important for escrow officers?

While closing deals and earning premium is crucial, a title company that fails to follow sound underwriting principles can:

- Eat up all of its premium dollars with claims
- Fail to follow TDI regulations
- Result in losses flowing to agent/office
- Have very unhappy customers
- End agency relationships



# Why is this presentation important for escrow officers?

Examiners and closers have two different outlooks on our business:

## Examiner—

- Title should be perfect
- Public record reflects such perfection

## Closer—

- Get the deal done
- Make my customers happy
- Collect premium

Understanding why the examiner makes certain requirements reduces the friction that can exist.

## Search p.2

In Texas, county records are set up by Grantor and Grantee.

How does the searcher look through all of those documents?

- Texas law requires that the title company own, lease or subscribe to an abstract plant.
  - An abstract is a geographically indexed set of the county records.
  - In other words, every tract of land has its documents permanently attached to it, rather than the names of the parties forming the basis of the search.





# What is the search process?

The abstractor must search the abstract plant for a period long enough to do two major things:

## Search for minerals and easements

- a) Search far enough back to the beginnings of mineral reservations in the county (somewhere between 1866 and the 1940s)
- b) Search far enough back to the beginnings of utility services in the county (for telephone lines, gas pipelines, and the like).

Both of these searches are county dependent.

## What is the minimum title plant start date?

As part of the 2009 solvency legislation, the title plant start date was changed from a rolling 25 years to January 1, 1980.

This change assures that title agents have a valuable asset in their plant and that agents have ever increasing computer access to records as time passes.

## What is the search process?

The second major thing relating to time frames is a search far enough back to be relatively certain that there is a defensible chain of title.

- Stewart's [Bulletin TX000065](#) places the majority of searches at the first deed covering the property that is more than 35 years old.
  - This search period will cover a majority of situations addressed by the 25 year statute of limitations.

# What is the search process?

## The Twenty-Five Year Statute (C.P.&R. Code, Sec. 16.028)

- The twenty-five year statute prohibits an action against a person having peaceable and adverse possession for twenty-five years in good faith under a deed or other instrument purporting to convey which has been recorded in the county deed records where any part of the property is located.
- This applies regardless of legal disability in the adverse claimant or any person under whom the adverse claimant claims.
- The adverse possession extends to the property described in the recorded deed or instrument even though the instrument is void on its face or in fact.
- A person holding property and claiming title under this statute has good and marketable title regardless of a disability arising at any time in the adverse claimant or a person claiming under the adverse claimant.
- See Section 1.28 of Virtual Underwriter for more details.
  - [Virtual Underwriter – Section 1.28 Adverse Possession](#)

# TIPS

If an abstractor is relying on Bulletin TX000065 and starting the title search at the 35<sup>th</sup> year, what issues would require a longer search?

- A reference to a deed of trust?
  - No, the vast majority of loans in the U.S. are for 30 years.
  - 35 years covers that time period plus the four years statute of limitations to enforce liens.
- A reference to a federal tax lien?
  - No. A federal tax lien is good for 10 years.

# TIPS

- If the first deed is a quit claim deed?
  - Yes. The company policy is that the deed must be a general warranty deed older than 35 years.
- The grantor in the deed is an executor?
  - No, the statute of limitations applies.
    - A minor may acquire title by adverse possession.
    - Limitation may run against devisees under a will, and against administrators or executors.
    - It may also run against creditors of the estate.
- What if title is in an entity?
  - A corporation may acquire title by limitation subject only to the questioning authority of the State of Texas.
  - An unincorporated association, the members of which take possession and claim adversely, may perfect a limitation title.

# Examination

- What is a title examination?
  - Examination is the review of the documents found in the search process to determine the effect of those documents on the land.
    - Ownership
    - Liens
    - Easements
    - Minerals and Severances
    - Access
    - Restrictions
    - Foreclosure
    - Name Searches
    - Curative Matters



# Examination

The examiner has many duties:

1. Determine if there is a proper and complete chain of title.
  - Did the proper parties sign every document and was the document properly acknowledged and recorded?
  - If someone's signature is missing, what happened to their interest/to them?





# Examination

2. Did the people sign documents properly describing the land?
  - Are metes and bounds descriptions substantially the same?
  - Was an subdivision of the property properly done?
  - Was a proper condominium regime created?
  - Are carve outs properly described?

# Examination

## Releases of Liens

- Is the release signed by the owner of the indebtedness?
- Is the lien instrument properly referenced?
  - Right lender, right borrowers, right loan amount?
- Did the party signing the release have authority to do so?
  - Officer of a lender, properly appointed executor etc.
- Is the property full released (check the legal description)?

# PASSWORD BREAK

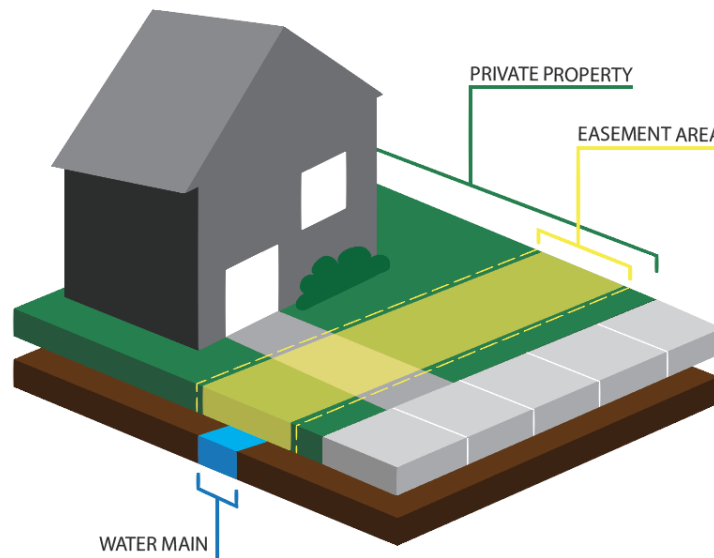
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## Easements

An easement is a right granted by the owner of property allowing someone else to use a portion of the property for a specific purpose.

Once created, the easement has an indefinite life and terminates usually only when it has ceased to be used for the stated purpose for a period exceeding the applicable statute of limitations.



# Easements

An easement can be a burden on the insured land or a benefit to the insured land.

The examination rules are different depending on which it is:

- If the easement is a **burden**, then its mere existence is sufficient to take an exception in the commitment and policy.
- If the easement is a **benefit** (an appurtenant easement like access) then we must examine the easement documents with the same care as the basic tract.

# Easements

A common question regarding easements is the failure to recognize boundaries.

- Does the easement holder use land outside of the easement?
  - The actual road surface is outside the ROW
- Does the land owner allow improvements to encroach into the easement?
  - House into the electric easement
  - Fence into the water easement
  - Pool into a drainage easement
- All require examination of a survey to give Area and Boundary coverage or T-19 or T-19.1 coverage.

# Survey Issues

Survey issues are closely related to easements since both involve recognition of boundaries.

## Encroachment

- Use of your land by another

## Protrusion

- Your use of another's land
- 
- Is the survey by a professional land surveyor?
  - Does it comply with minimum standards?
  - Does it show adjoinders?
  - Is it sealed?
  - Does it locate improvements, encroachments and protrusions?
  - If there are issues, how substantial are they?

## Survey Issues

Stewart's position on P-2 is that a survey of any age, that is otherwise acceptable can be used as long as it is "brought current" by a proper T-47 Affidavit.

Sometimes there will be changes that must be drawn in by the customers.

A good double-check is to go to Google Earth™ and view the property.



# Access

Access can be a major issue.

- Before 1991, access not insured.
- Since 1991, access is insured unless lack of access is an exception.
  - Legal right of access, not quality or condition.
    - Except if giving an access endorsement which might even require the title company to build a bridge!



# Access

## What does the survey show?

- Does the property touch a road that is owned by or dedicated to the public?
  - Plat
  - County road maps
  - Other maps
- Are there easements or reservations that separate the land from the road?
- Is there indication that there are physical issues like ditches, ravines or mountains that prevent access?
- Are there curb cuts?
- Is there an access restriction along interstate highways?
- Is there a crossing over railroad tracts?
  - License or easement?

# Restrictions

Restrictions or restrictive covenants create limitations on the use of land.

Most of the time, the restrictions run with the land and continue for many years.

- Size and cost of buildings
- Residential vs. Commercial
- Homeowner Associations and dues
- Changed uses (how can we tell from the record)
- 99 year restrictions

# Condominiums

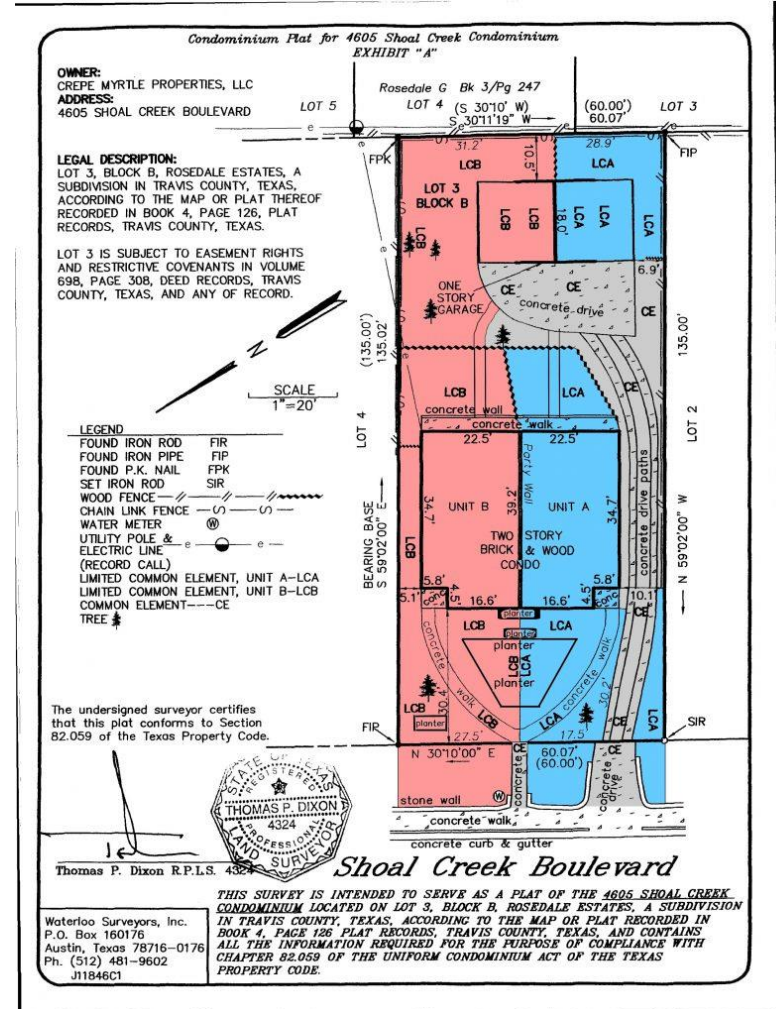
- Purely statutory creatures
- Declaration
  - Does it create, is it in phases, what are the restrictions, HOA and dues?
  - How is unit defined?
  - What are the general common elements?
  - What are the limited common elements?
  - Are parking spaces limited common elements?

# Condominiums

## Survey

There must be a plat attached to the Declaration

- All buildings must be located relative to each other and the boundaries of the project (for relocation purposes especially since improper placement can encroach into the general common elements).
  - This plat takes the place of individual surveys on units under P-2.



# Minerals and Severances

Texas allows severance (separate ownership) of the surface estate and the minerals (estate).

Not every state allows this.

It means that you can have totally separate chains of title for decades after the severance.

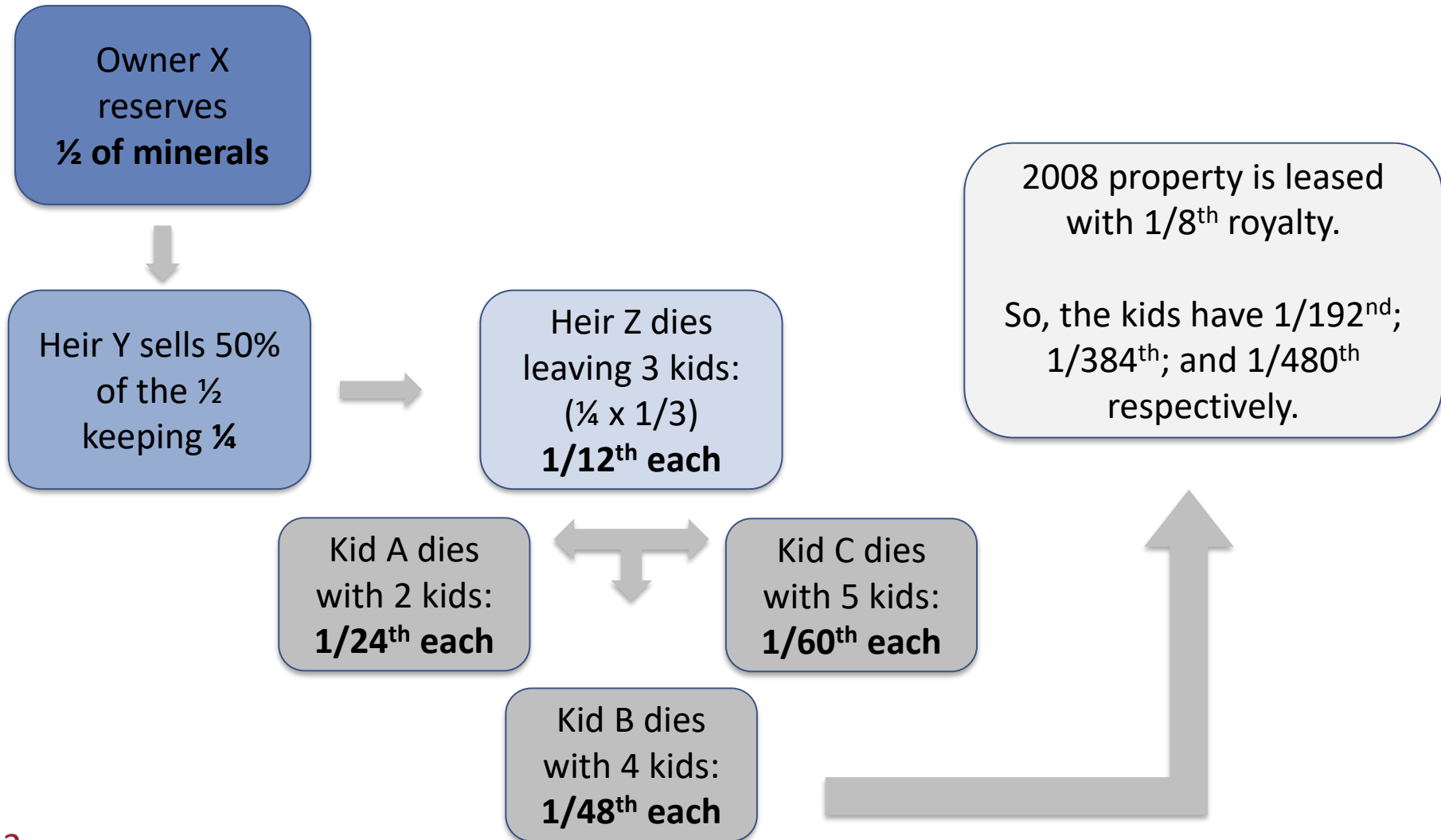
## Minerals and Severances

Once the minerals are severed, it is virtually impossible for the land owner to reunite them without purchasing them from every mineral owner.

Mineral owners buy, sell, and inherit the interests totally separate from the surface owners.

Interests are usually in fractions and can be amazingly small after just a few years/generations.

# Minerals and Severances – Fractional Example





# Minerals and Severances

## Surface vs Mineral

- Generally surface is stuff you can get within 200 ft of the surface
- Minerals is stuff you have to go down more than 200 ft to get to
  - Oil and gas is mineral
  - Gravel is surface
  - Coal can be either.

But not really our job to decipher. We just take exception to the document doing the severing.

# PASSWORD BREAK

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# Mineral Exceptions

This is a currently controversial area

- General exception to minerals must be used unless you are able to conduct a mineral search to the sovereignty of the soil for your county and then except to all mineral documents found. [Texas Bulletin TX2012006](#)
- Best practice is probably to show surface in Sch. A, take exception to mineral documents in Sch. B and on exhibits of the legal description
- T-19 coverage is general available on of less than 5 acres under RRC regulations. Please contact an underwriter for exceptions to this standard.

## Mineral Exceptions

T-19 coverage is generally available on of less than 5 acres under RRC regulations. Please contact an underwriter for exceptions to this standard.

Rule 16 TAC 3.37 of the Texas Railroad Commission says that no oil, gas, or geothermal well can be drilled nearer than 1200 feet to any existing well or 467 feet to any property line (of the mineral estate).

# Foreclosures

Texas law provides for two types of foreclosures:

- **Judicial**
- **Non-judicial**

Since non-judicial foreclosures have no court presiding over them, trustees must scrupulously follow both the requirements of the statutes and the deed of trust being foreclosed.



# Foreclosures

A **hybrid foreclosure** is with Home Equity Loans.

- A judge must approve the non-judicial foreclosure.
- Then the trust conducts the foreclosure.

These are not judicial foreclosures.



# Foreclosures

## Elements to a foreclosure:

- Deed of trust secured indebtedness represented by a note.
- Note payments in default.
- Note accelerated.
- Notice of acceleration
- Trustee ordered to proceed to foreclose.
  - If trustee fails or refuses to close, a new trustee must be appointed.
  - Borrower notified of appointment.

# Foreclosures

## Elements continued

- Notice posted in 2 public places.
- At least 21 days prior to the first Tuesday of the month in which the foreclosure is scheduled.
- Must contain names of borrower and lender, legal description, date of the proposed foreclosure and the 4 hour time window that the foreclosure will take place on that date.



# Foreclosures

## Elements continued

- On day set out in the notice and no other day and during the times set out in the notice and no other times, the trustee will auction off the property
- High bidder for cash or to lender as credit on the debt (if bid is in excess of amount owed, borrower gets the cash difference)



# Foreclosures

## Elements continued

- Trustee's affidavit and deed prepared
- Affidavit sets out who did what in the way of notices
- Deed actually conveys the property

Since no court involvement, all of the elements must be done correctly to prevent allegations of invalidity due to procedure due process of law.

# Foreclosures

Examiner must review the papers and the affidavit to see that all of the steps were properly and timely done.

Remedy for missteps is re-foreclosure.

- Not allowed if the trustee missed a federal tax lien
  - Can't be re-foreclosed only to correct lack of notice and the IRS lien survives the foreclosure.

## Mechanic's Liens

A mechanic's lien contract is the proper medium to create an improvement lien against homestead property.

Must be signed by spouses and contractor before any work is done and must be recorded.

May or may not be assigned (in whole or in part) to the lender



# Equitable Subrogation

When there is a lien and a new party provides the money to pay off the loan, the new party steps into the lien position of the original lender.

- No assignment is required
- No transfer of lien is necessary
- A release by the 1<sup>st</sup> lender is actually ok



## Mechanic's Liens

A person who does work or provides materials for improvements to property is entitled to a lien to see that they gets paid.

- Lien is created by the earliest of the filing of a deed of trust or the first work or delivery of materials
- Goes to the issue of the priority of the lien
- Can prime a construction loan
  - Must pull off the job (7-30 days) and pay for the early work

# Mechanic's Liens

All workers and suppliers share in 1<sup>st</sup> lien

- None have priority over the others
- All share in 10% retainage for 30 days after end of construction
- Statutory commencement and completion affidavits help establish the time frames

# Mechanic's Liens

## Effect of foreclosure

- Construction lien cuts off all subordinate mechanic's liens
  - Except for removables
    - Things that can be removed without harm to the thing or the structure AT THE TIME OF REMOVAL
      - Carpet, appliances, HVAC, doors, windows, counters and tops, plumbing fixtures
      - Not paint, lumber, concrete, wall insulation, most wiring and pipes



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# Judgments

- Good for 10 years
  - Two extra years to reinstate but that doesn't change the 10 year SOL.
- Not Me affidavits
  - **Need last 3** Social Security number  
AND
  - **Last 3** Texas Driver License
    - Helps eliminate liars (one in a million chance)



# Judgments

## Homesteads

- AJ doesn't attach but homestead is a fact issue
- How do we know what the actual homestead status of the property is?
  - Inspection, utility bills, corroborating affidavits from neighbors
  - Tarrant Bank letters (833X666)
  - 30 day affidavits for AJs filed after 9-1-2007.
- Homestead affidavits

## Owerty Liens

Used in family situations where one person occupies homestead and wishes to use that interest as collateral to buy at cotenants.

In divorce case, crucial that the decree doesn't divest the spouse of ownership interest since no longer cotenants.



## Name Searches

The examiner needs to be certain that the abstractor reviewed names of owners in the chain of title for sufficient lengths of time:

- Deeds – 35 years
- Deeds of Trust – 35 years
- AJs – 2 years
- MLAs – 2 years
- FTLs – 10 years
- USA and State of Texas AJs – 20 years
- UCCs – 5 years
- Tax sales – 3 years to cover limitations and due process/bills of review

## Curative Matters

For the most part, it isn't the examiner's job to actually decide the cure for problems but there are some "near" fixes we as the title industry can rely on.

If you have any question about these, check with your manager and Stewart legal staff as appropriate.

## Curative Matters

Since the title company didn't create the title defects that it discovers, the title company is not the party to cure them either.

The examiner's job is to craft requirements that will allow the title insurer to issue a policy with defects cured in a acceptable manner; not to do the curative work.

## Curative Matters

Probably to fastest cure is to apply to appropriate statute of limitation to cure defective acknowledgments

- Over a period of time, the SOL has be reduced from 10 years to 4 years to 2 years from the date of recording.
- Doesn't even matter if there is no acknowledgment.





# Curative Matters

## Strips and Gores Doctrine

- This doctrine states that when a conveyance misses a small, narrow otherwise useless strip of land, that land goes with the conveyance.
- Definitions of small, narrow and useless really depends on the type and location of the land.
  - Small is really small (like inches) in residential cases but can be a number of feet in rural or acreage tracts.
  - Useless means that is too small to be utilized independently by the prior owner.
- Mostly a defensive issue but can be used to insure

## After Acquired Title

This is the classic Brooklyn Bridge con game:

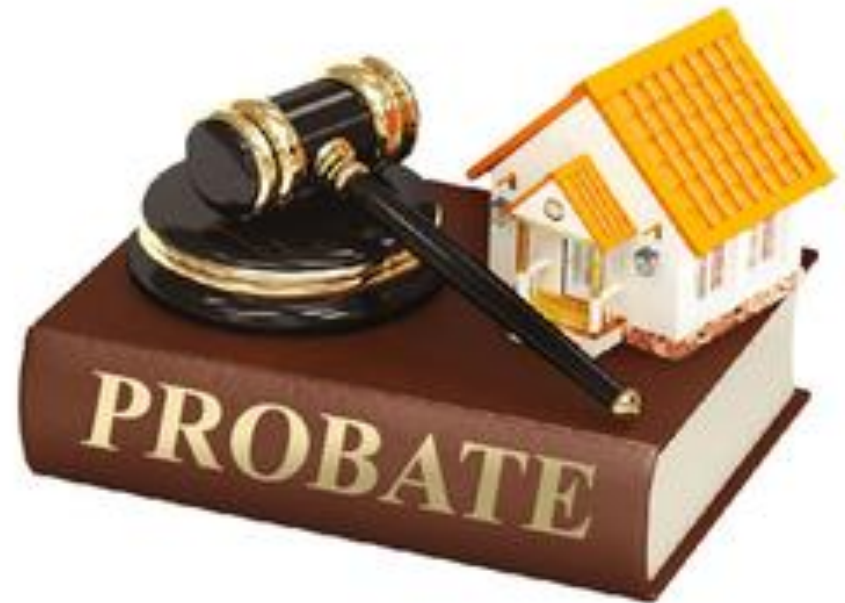
- I sell you the Bridge (but I don't own it).
- Later, I actually do get title to the Bridge.
- And guess what, you now own the Bridge not me.

Without this doctrine, there is no penalty for selling something you don't own and then actually buy it. With it, you don't get the ill-gained profits (you don't get to sell twice.).

# Other Issues

## Probates

- When to probate?
- What kind of proceeding?
- Affidavits of heirship
  - Corroborated by whom?
  - Who is disinterested?
- Missing heirs
  - When?
  - How many?



# Other Issues

## Surveys

- Reversed calls
  - Why?
- New or different calls
  - What kind of property?
  - Degrees, minutes or seconds?
  - Feet or inches?
- Points or monuments
- How old is one acceptable?
- Reusing one; copyrights?



## Other Issues

Setting out marital status?

- No

Using “exact fractions” for mineral estates or co-ownership interests?

- No use as stated in \_\_\_\_ document

Using 3’ encroachment of house into easement?

- Not without saying as shown of survey by etc.

## Contact Info

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# **Computing Rates Using New Rules**

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**For Questions/Comments Email**

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