

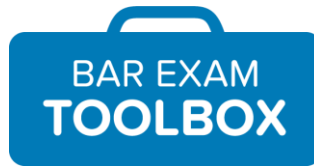


Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we have another in our “Listen and Learn” series – this one is on recording statutes. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on [BarExamToolbox.com](#), and we’d love to hear from you. And with that, let’s get started.

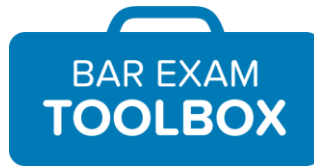
Lee Burgess: Hello, and welcome back to the “Listen and Learn” series! Today we are going to be talking about recording statutes, and the recording system more generally. Recording statutes exist to protect those who record their interests in land. Prior to the adoption of recording statutes, the common law used only a first-in-time rule. Under that rule, if real property was transferred multiple times by the same grantor, whoever rightfully received the property first had valid title against the other transfers. Today, every state has enacted a recording statute altering the common law rule.

Lee Burgess: We’re going to go through all of the different kinds of recording statutes in detail, but before we do, we need to define some terms that come up in the statutes, starting with “bona fide purchaser”. A bona fide purchaser (or BFP) is a person or entity who, (1) takes real property without notice of a prior conveyance; and (2) pays valuable consideration. A person who receives land by gift (a donee) or by bequest (an heir or devisee) is not a bona fide purchaser, because he did not pay valuable consideration for the property.

Lee Burgess: So, what does it mean to take property without notice? Well, there are three types of notice: actual, constructive, and inquiry. A person has actual notice of information directly received – for example, expressly told or language in the deed. A person is on constructive notice of any information that could have been obtained from an inspection of public land records – for example, search of a grantor-grantee index. A person is on inquiry notice of information that would be revealed upon a reasonable inspection of the land. In a minority of jurisdictions, a purchaser that takes by quitclaim deed is presumed to take with inquiry notice. This approach is based on the theory that title is inherently suspicious if the grantor refuses to give covenants of title.



- Lee Burgess: Okay, now that we have defined those terms, we can move on to the recording statutes themselves. There are three types of recording statutes: race, notice, and race-notice. Let's take each in turn.
- Lee Burgess: In a race statute jurisdiction, whoever records first prevails. Notice is irrelevant. To illustrate, let's assume O sells a piece of property to A on January 1st. A immediately tells B about their purchase, but does not record the deed. O then sells the same piece of property to B on February 1st, and B immediately records. B has the superior claim because they recorded first. It is not relevant that B had actual knowledge of A's interest in the property. Pure race statutes are the least common and the easiest to apply. As a result, they're also the least likely to be tested on an exam.
- Lee Burgess: Moving on, the next type of statute is a pure notice statute. In a notice statute jurisdiction, a subsequent bona fide purchaser will prevail over a prior grantee that failed to record. Notice statutes can be a little tricky and are more likely to be tested, so let's take a look at some typical language for this type of statute. On your exam, a notice statute might read something like this: "No conveyance is valid against a subsequent bona fide purchaser who has no notice of the original conveyance, unless the conveyance is first recorded."
- Lee Burgess: What makes this statute tricky is that most of the language is redundant. To see why, let's break the statute into three parts. The first part states that "No conveyance is valid against a subsequent bona fide purchaser." If the statute just stopped there, it would already be a notice statute. But it goes on to state: "who has no notice of the original conveyance." This part is entirely unnecessary because, as we know, the definition of bona fide purchaser already includes the requirement that the purchaser have no notice of the original conveyance. But wait, there's more! The last part of the statute goes on to state "unless the conveyance is first recorded." Again, this qualification is entirely unnecessary, because if the original conveyance was recorded, the subsequent purchaser would have constructive notice of the conveyance and would, therefore, not be a bona fide purchaser to begin with. To make matters worse, the words "unless the conveyance is first recorded" make it seem like this could be a race-notice statute. So make sure to read these statutes carefully and don't get tricked by superfluous language. Also, just a quick public service announcement: Don't be like the lawyers that write these statutes. On exams and in real practice, don't use 24 words when you could say the exact same thing in 10. It's annoying and just makes things more confusing than they need to be.
- Lee Burgess: Okay, with that bit of advice out of the way, let's get back to our statutes. Next up is race-notice. In a race-notice statute jurisdiction, a subsequent bona fide



purchaser is protected only if he records before the prior grantee. In other words, this statute combines the requirements of a race statute and a notice statute. On your exam, a race-notice statute might read: “No conveyance is valid against a subsequent bona fide purchaser who has no notice of the original conveyance and who has recorded the deed on his conveyance first.” If we break this statute up, we can see that the first and second parts are the same as the notice statute, and they operate the same way. The first part establishes the notice requirement and the second part is redundant. The difference here lies in the third part, which adds the requirement that the subsequent purchaser record first. A good trick for recognizing race-notice statutes is to look for the word “and” before the mention of the recording requirement. Because there are two separate requirements in a race-notice statute, they are often separated by an “and”.

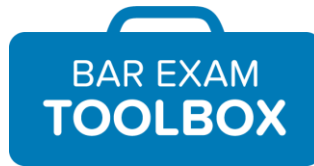
Lee Burgess: Alright, that covers the recording statutes. But before we move on to our hypos, we need to make sure we understand a few things about how these statutes apply. First, we need to understand how transfers of real property are recorded.

Lee Burgess: Transfers of real property are organized in public records under two indexes. One index is organized by the names of the grantors, and the other index is organized by the names of the grantees. The “chain of title” shows all transfers of title for a piece of real property. If a land transfer is not recorded properly, it is considered “wild”. A wild deed, mortgage, or easement is effective between the parties, but it will not put subsequent purchasers on constructive notice because it’s outside the chain of title. In other words, it is not discoverable in the land records.

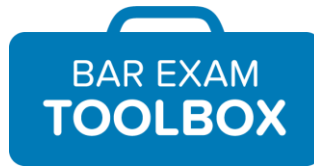
Lee Burgess: To illustrate, let’s assume that O sold a piece of property to A, who did not record the deed. A later sold the property to B, who immediately recorded the deed. Because A never recorded the transfer from O, A is not an owner of record. Therefore, when B recorded the transfer from A, the deed was not linked to the chain of title. To see why this is a problem, let’s take this example a step further. Let’s assume that after B recorded the deed, O sold the same property to C. If C searched the grantor-grantee index for O as the grantor, C would not discover the transfer from O to A because A never recorded the deed. As a result, C would not know that A was a grantee of the property and wouldn’t know to also search for A as a grantor. Therefore, C wouldn’t discover the transfer from A to B. So, when you’re dealing with an issue of constructive notice, make sure to consider whether the prior conveyance was properly recorded within the chain of title.



- Lee Burgess: The second thing we need to understand is the full scope of the protections afforded by the recording statutes. In addition to protecting the first party to comply with the requirements of the statute, the statutes also protect those that purchase the property from that party. This is called the “shelter rule”. Under the shelter rule, a person who purchases from a bona fide purchaser receives the same status and rights as the bona fide purchaser.
- Lee Burgess: Now, if you’ve really thought about how these statutes apply, you might be asking yourself what happens if none of the parties involved have complied with the requirements of the applicable recording statute. For example, what if we’re in a race jurisdiction and none of the parties claiming a superior interest in the property recorded their interest? That’s a great question. The answer is that we revert to the common law rule of first-in-time. In general, the best way to think about priority is that the first-in-time purchaser will always have the superior claim of title, unless the recording act applies to protect the subsequent purchaser.
- Lee Burgess: Okay, now that we’ve reviewed all of the relevant rules, we’re ready to tackle our first hypo. Let’s start out with a relatively straightforward fact pattern, just to get our feet wet:
- Lee Burgess: “Al owned a dairy farm. In 1990, Al sold the farm to his neighbor Ben for its fair market value. Ben immediately converted the farm to an apple orchard and planted thousands of apple trees, but he did not record the deed at that time.
- Lee Burgess: In 2009, Al deeded the farm to his daughter Carol and she recorded the deed. During an inspection of the farm, Carol had observed Ben picking apples in the orchard, but said nothing.
- Lee Burgess: In 2011, Ben recorded his deed. What are the rights, if any, of Ben and Carol to the farm?”
- Lee Burgess: Okay, the question here asks us to determine who has the superior claim to the farm – Ben or Carol. As a first step, we should determine who is the first-in-time purchaser because, as we know, the first-in-time purchaser will have the superior claim, unless the recording act applies to protect the subsequent purchaser. Here, we’re told that Al sold the property to Ben in 1990 and deeded the property to Carol in 2009. Thus, Ben has the superior claim under the first-in-time doctrine.



- Lee Burgess: Now, let's see if a recording statute applies to save Carol. The question here does not give us a recording statute, so we need to analyze the issue under each type of recording statute. Let's do that now, starting with a race statute.
- Lee Burgess: As we know from our rule, in a race statute jurisdiction, priority goes to the first to record. Here, Carol recorded her deed in 2009 and Ben did not record his deed until 2011. Therefore, in a race jurisdiction, Carol's claim would be superior to Ben's.
- Lee Burgess: What about in a pure notice jurisdiction? Well, we know that Carol needs to be a bona fide purchaser to have a superior claim in a notice jurisdiction, which means that she needs to be a purchaser for value without notice of Ben's claim. It looks like Carol doesn't satisfy either part of this rule. We're told that Al deeded the farm to Carol, his daughter, and there is no indication that she paid anything for the farm. Moreover, we're told that she observed that the farm had been converted to an orchard and that Ben was picking apples. That's likely to be enough to put Carol on inquiry notice of Ben's interest. Had Carol inquired about what she observed, she would have discovered that Al had sold Ben the farm in 1990. Therefore, in a pure notice jurisdiction, Ben's claim would be superior to Carol's.
- Lee Burgess: What about in a race-notice jurisdiction? We know that Carol wins in a pure race jurisdiction and loses in a pure notice jurisdiction. Because a race-notice jurisdiction is a combination of the two, Carol can't win. While Carol did record before Ben, she is not a bona fide purchaser, so she doesn't satisfy the notice part of a race-notice statute. Now, you might have noticed that Ben also wouldn't satisfy the statute because he recorded after Carol, thereby losing the race. That's true, but Ben doesn't need to satisfy the statute to defeat Carol's claim. Remember, as the first-in-time purchaser, Ben has the superior claim, unless the recording statute applies to save Carol. Because Carol wouldn't satisfy a race-notice statute, Ben's claim would remain superior in a jurisdiction that used such a statute.
- Lee Burgess: Okay, hopefully that hypo got you a little more comfortable with the basic application of the recording statutes. Let's do another one that deals with some more complicated issues:
- Lee Burgess: "In 2000, Olivia sold a parcel of land to Sally, but Sally failed to record the deed.
- Lee Burgess: In 2005, Sally granted Electric Company an easement to run power lines across a portion of the land. Electric Company immediately recorded this easement and ran the power lines. The lines are still in place and clearly visible.



Lee Burgess: In 2010, Sally conveyed the land to Nephew as a wedding gift. Nephew promptly recorded the deed. Except for the power lines, the land has remained undeveloped.

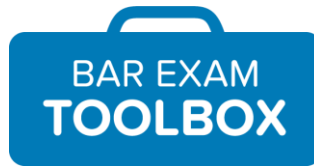
Lee Burgess: In 2015, Olivia died. Unaware of the prior transactions, the executor of Olivia's estate sold the land to Buyer by quitclaim deed for its fair market value. Buyer was also unaware of the prior transactions. Buyer immediately recorded this deed.

Lee Burgess: The state in which the land is located maintains its records under a grantor-grantee indexing system, and the state's recording act provides: 'No conveyance or mortgage of real property shall be good against subsequent purchasers for value and without notice, unless the same be recorded according to law.' What are the rights, if any, of Buyer, Nephew, and Electric Company in the land?"

Lee Burgess: Okay, as with our first hypo, we're being asked to determine who has the superior claim, but this time we have three parties – Buyer, Nephew, and Electric Company. So let's start by figuring out who has priority under the first-in-time doctrine as between these three parties. We're told that Electric Company was granted an easement in 2005, Nephew was gifted the property in 2010, and Buyer purchased the property in 2015. Therefore, as between these three parties, Electric Company has priority, and Nephew and/or Buyer can only prevail against Electric Company if the recording statute applies to protect them. Similarly, as between Nephew and Buyer, Nephew has priority, and Buyer can only prevail against Nephew if the recording statute applies to protect him.

Lee Burgess: Okay, the next step is figuring out the type of recording statute we're dealing with. Let's break the statute down. The first part of the statute states: "No conveyance or mortgage of real property shall be good against subsequent purchasers for value without notice." As we know, a "subsequent purchaser for value without notice" is the definition of a bona fide purchaser. So the first part of this statute establishes a pure notice requirement. The next part of the statute states: "unless the same be recorded according to law." As we saw earlier, this type of language changes nothing. The words "the same" simply refer to the original conveyance, so the statute just says that a conveyance is not valid against a bona fide purchaser, unless the original conveyance was recorded. As we know, that last part is redundant, so what we're left with is a pure notice statute.

Lee Burgess: Now that we know what type of recording statute we're dealing with, we need to determine whether the statute applies to protect Nephew and/or Buyer.

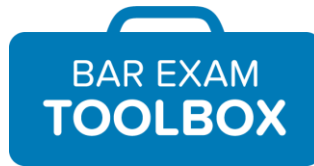


Let's start with Nephew. We're told that Sally conveyed the land to Nephew in 2010 as a wedding gift, which means that Nephew was not a purchaser for value. As we know, that alone means that Nephew is not a bona fide purchaser. But there are also a number of facts indicating that Nephew was on notice of the easement. First, we're told that Electric Company immediately recorded its easement in 2005, which means that Nephew was on constructive notice of its interest. Second, we're told that, pursuant to the easement, Electric Company ran power lines across the property that are still clearly visible. That means Nephew was on inquiry notice of the easement, because the lines would have been visible upon a reasonable inspection of the property. For any and all of these reasons, Nephew is not a bona fide purchaser, and therefore, Electric Company's easement is superior to Nephew's claim.

Lee Burgess: Now let's move on to Buyer. We're told that Olivia's executor sold the property to Buyer in 2015 by quitclaim deed for its full market value. We're also told that at the time of the conveyance, Buyer was unaware of the prior transactions. These facts clearly establish that Buyer purchased for value and that Buyer did not have actual notice of the prior conveyances. So the main issues here are going to be constructive and inquiry notice. Let's start with constructive notice.

Lee Burgess: We know that by the time of the conveyance to Buyer, both Electric Company and Nephew had already recorded their interests – Electric Company in 2005 and Nephew in 2010. Based on these facts, you might be quick to conclude that Buyer was on constructive notice of their interests. But before you jump to that conclusion, let's think through what would happen if Buyer went down to the county clerk's office to search the grantor-grantee index for any competing interests in the property. We know that Buyer bought the property from Olivia's estate, so Buyer would know to search for Olivia's name in the grantor index to see if she had conveyed the property to anyone else. Despite the two other interests in the property, the search would only turn up the conveyance to Buyer. That's because both Electric Company and Nephew received their interests from Sally, not Olivia. Sally did receive her interest from Olivia, but while both Electric Company and Nephew recorded their interests, Sally never did. As a result, there is no recorded chain directly linking Olivia to Electric Company and Nephew. In other words, the deeds recorded by Electric Company and Nephew are "wild deeds" that are not discoverable in the land records. As such, they do not put Buyer on constructive notice.

Lee Burgess: Okay, we're almost done; we just need to address inquiry notice. Both Electric Company and Nephew would argue that Buyer was put on inquiry notice of their interests, based solely on the fact that he received a quitclaim deed to the



property. While this argument might work in a minority of jurisdictions, it is not the best argument for either party.

Lee Burgess: The better argument is that the same facts that put Nephew on inquiry notice of Electric Company's easement – namely, the wires running across the property – would also put Buyer on inquiry notice. A simple visual inspection of the otherwise undeveloped property would have revealed the existence of the wires. Based on this inspection, Buyer should have engaged in further inquiry to determine the interest of the party that placed the wires.

Lee Burgess: Now, you might be asking yourself how that argument helps Nephew. After all, Nephew's interest has nothing to do with the electrical wires, so it's not immediately clear how those wires could put Buyer on notice of Nephew's interest. To see how this argument helps Nephew, we need to think through what Buyer's further inquiry would look like. Assuming that Buyer was able to determine that Electric Company owned the wires, Buyer would search for the Electric Company in the grantee index to see how it came to have an interest in the property. That would reveal the conveyance from Sally to Electric Company. Based on that discovery, a reasonable purchaser would probably inquire further into the nature of Sally's interest. A search of Sally's name in the grantor index would reveal the conveyance from Sally to Nephew. Therefore, it's likely that Buyer would be held to have inquiry notice of both Electric Company's easement and Nephew's ownership interest.

Lee Burgess: And with that, we're done for today! We hope you find these hypos to be helpful examples of how to work through issues involving recording statutes. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to Lee or Alison at [lee@barexamtoolbox.com](mailto:lee@barexamtoolbox.com) or [alison@barexamtoolbox.com](mailto:alison@barexamtoolbox.com). Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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