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On Recordation

Among the pillars of the land tenure system in this country, written conveyances, descriptions affording reasonable certainty, separation of interests, etc., is the practice of publicly recording evidence of title. (Some localities call the process of depositing deeds and other *muniments* of title in the courthouse “registration,” but for purposes of this essay I draw a distinction between the two terms.)

The Big Picture

Sustained commerce requires that purchasers receive what they buy. When potential buyers doubt the ultimate effect of the transaction (that is, doubt that they’ll get the goods), the transaction will not take place. If that happens on a large scale, whole economies halt. So society, to the extent it deems a healthy economy important, must insure that *bona fide* purchasers are not discouraged from *buying*. One way is to establish a means for purchasers to understand what they are buying; another is to provide for remedies in the event that the seller reneges. In fact, providing for the commercial viability of the market is the most important role that government plays in a free market economy.

Real property presents a number of unique wrinkles for a contemplated sale. For starters, it had no creation date. There was never a time prior to its existence. (Okay, okay, forget volcanic islands, accreted land, etc. Work with me here.) So there is always a potential for latent ownership that predates the current “owner’s” interest. Additionally, the concept of exclusive possession of land must be considered tenuous

when contrasted with the exclusive possession I have of the wallet in my pocket. Property may be property, but some forms are easier to possess. Other obstacles associated with real property further complicate buying it.

Therefore, prospective purchasers of land have a number of disincentives to their plunking money down. Will they receive what they intended to buy?

Land Records

Enter the recording system. Reduced to its essentials, a recording system is a mechanism to enroll and index land conveyance documents. Every state in the Union has enacted a recording statute. These laws incorporate the doctrine

jurisdictions “*bona fide* purchaser” is narrowed to exclude those grantees in receipt of quitclaim deeds. Other jurisdictions make no such distinction.

For surveyors, it is important to realize that recordation does not bestow *validity* on documents. It lends dignity of another sort, to be sure, but the documents themselves must withstand scrutiny in their own right. Arguing otherwise, of course, would fly in the face of any number of doctrines we surveyors hold dear, the most notable of which is the Order of Precedence for Conflicting Title Elements. Since that Rule only triggers in the event of a conflict, and since many of those conflicts would be discovered by comparing recorded documents, it

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of “constructive notice,” providing that all persons are deemed to have knowledge of the documents properly recorded (and, in some jurisdictions, properly indexed). Documents that have not been recorded are not binding on third parties.

The goal of a recording system is to give notice of existing interests to prospective purchasers of land. No more, no less. Upon that simple idea has grown an entire body of law, adding knobs and buttons onto the concept, as one would expect for a device so central to society’s property interests. For instance, in some

follows that the state of being recorded could not imply infallibility.

Placing the recording system in its proper context is easier, I think, by considering what it is not. It is not a guarantee of title; it is a means to an end, not the end itself. Guaranteed title is provided by private title insurers, who rely on the evidence contained in the land records should the title be disputed. It is their job to examine the whole of the record in light of applicable law and determine who

holds title. And they back their opinion with their pocketbook. Although there are clear deficiencies in this method, it functions, and millions of parcels are held thereby.

Conversely, the registration of title aims considerably higher in that the state acts as *guarantor* of ownership and encumbrances on that ownership. The state's role in land title registration is identical to its role in automobile titling: the certificate of title issued by the state is conclusive evidence of ownership. Obviously the state is not in a position to issue such a certificate without a clear understanding of the title (and survey) history. Consequently, the process whereby a property is enrolled in the land registry is costly and time consuming. However, once enrolled, transfers are a snap. But registration is a subject for another day.

Now What?

So how does recording affect our practice? Aside from the obvious benefit of making documents available to us that otherwise would be out of reach, recording plays a central role in the analysis of senior and junior rights.

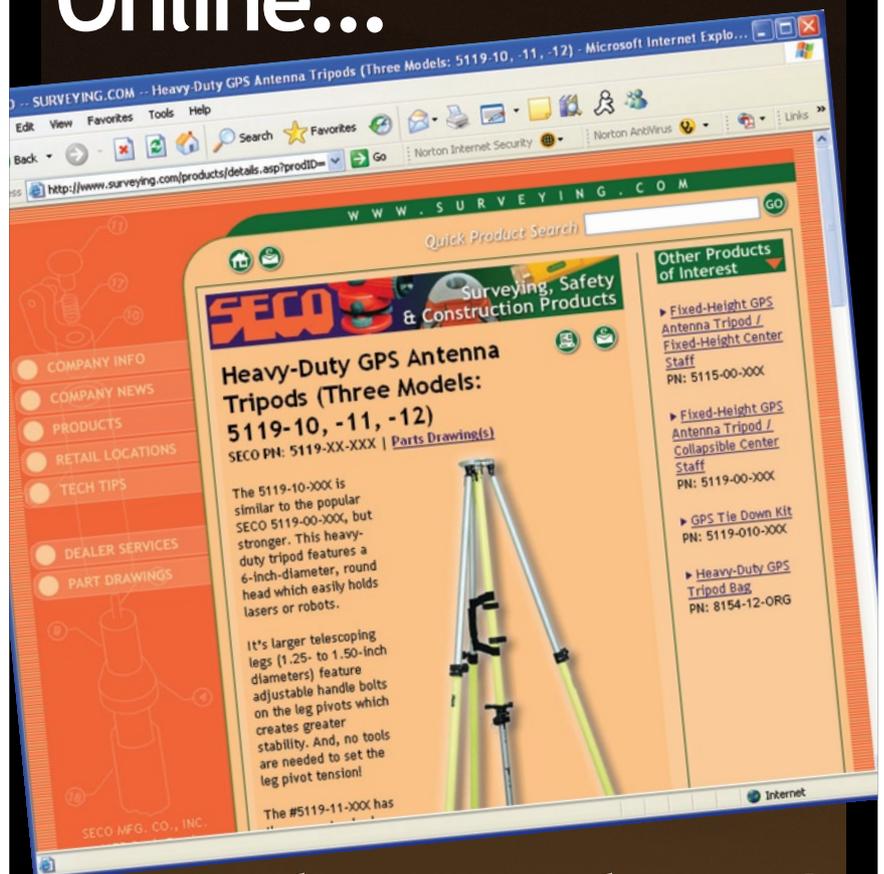
Some states give preference to deeds in the order they are received for record. Period. In other words, the first grantee to the recording desk with a valid deed from the grantor gets the effect of the deed. Other grantees with deeds from that same grantor who did not win that "race" to the courthouse get junior priority. The date on the deeds themselves does not matter. These are called "race" states. Other states add the requirement that the first grantee not have actual knowledge of any other deeds to the property from the grantor for the property. These are called "race-notice" states.

In practice, we surveyors are usually not privy to what actual knowledge grantees have (or had) unless there has been some record evidencing such knowledge. So for race-notice jurisdictions, except for the seldom-identified "notice" issues, we are left with the "race" component to use in our analysis.

In deciding senior and junior rights, then, the *recording date* determines the pecking order, not the date on the deed. The deed date is effective as between the parties, but the recording date is the key to priority between deeds.

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