Topic 5: Deeds and Title Examination

I. Transfer of Title to Real Estate – may be either *involuntary* or *voluntary*

A. *Involuntary* – ownership transfers not by choice of the prior owner, but rather by action of law

1. *Condemnation* – through eminent domain power, a governmental unit at the local, state, or federal level may take private property for public benefit; just compensation must be paid (discussed in more detail in Topic 4).

2. *Adverse Possession* (discussed in more detail in Topic 4).

3. *Foreclosure* – party that holds a lien (claim to part of a property's value) can force sale of property if the money owed is not paid. Examples: mortgage lenders, providers of labor/materials ("mechanics"), taxing jurisdictions.

4. *Partition* – one or more cotenants (joint tenants or tenants in common) may wish to terminate the undivided ownership, and instead to partition the property into separate parcels (or sell the tract for cash). Any cotenant has the right to seek partition at any time, and to file a lawsuit for partition if the owner group can not reach a voluntary agreement. A court might try to find a way to break the land into equal pieces that the individual owners then could keep or sell, but if the property is of a type that could not easily be equally split (if there is a building on the land, for example) a forced sale would be necessary (discussed in more detail in Topic 3).

5. *Community property* – in the nine states that have this provision (Illinois is not one), a spouse who obtains property during the marriage, except by gift or will, must share ownership with the other.

6. *Escheat* – county where a parcel of land is located takes ownership from anyone who dies with no will and no heirs are found (a rare occurrence; serves as a way to make sure that some party has responsibility for real estate).

B. *Voluntary* – ownership transfers because the owner chooses to sell (or to give away, or leave in a will) his/her interest in real estate.

1. *Patent* – initial transfer of title from sovereign power (state or federal government) to private individual or entity.

2. *Sale* – by mutual consent of competent parties, through a valid contract.

3. *Will* – owner specifies, through a written document, who is to receive title to his/her property when he/she dies. Real estate passed along in a will is called a *devise*, personal property left in a will is a *legacy*. For a will to be valid, these conditions must be present:

a. Testator (person creating the will) has *testamentary capacity* – similar to contractual capacity in that there can be no fraud or duress, but not as restrictive as contractual capacity. To have testamentary capacity, someone need only:

- i) Know, in general terms, the nature and extent of property interests held
- ii) Know who "natural objects of his/her bounty" are (loved ones)
- iii) Understand how he/she wants property to be distributed

b. Will must *be in writing*; handwritten is acceptable if other requirements are met as well.

c. Will must *be signed* (on each page so replacement pages can not fraudulently be inserted).

d. Will must *be witnessed* by credible parties (they sign the document also). A person named to inherit property in a will is not a credible witness.

If one of these conditions is violated, or if some other occurrence invalidates the will (*e.g.*, divorce of *testator*), then property passes according to state laws of *intestate succession*.

4. *Intestate Succession* – Each state has laws that determine how property is to be disposed of if a deceased party did not have a valid will. Laws provide for a surviving spouse to get a share, and children to get a share (in Illinois it is a 50/50 split between the spouse, and the children as a group). If the deceased was preceded in death by a child, then that deceased child's share passes to his or her children on a *per stirpes* (meaning "by the root") basis.

First generation		A			
Second generation	B	C	D		
Third generation	E		F	G	

Example: A dies without a will and with no surviving spouse. A's children (B, C, and D) each should inherit ⅓ of A's estate. However, D is already dead, but D has surviving children F and G. F and G will share equally in D's ⅓, each inheriting ⅙ of A's estate. So B gets ⅓, C gets ⅓, F gets ⅙, G gets ⅙. This distribution shows the meaning of "per stirpes." E gets nothing for now, but we might assume that E eventually will inherit B's ⅓ when B dies.

The alternative to per stirpes is *per capita* ("by the head"). If distribution were per capita, B, C, F, and G each would get ¼ of the estate. Such a distribution could certainly be specified in a will. But generally we would not expect that breakdown to be a deceased person's preference, so state laws of intestate succession specify *per stirpes*.

5. *Gift* – property can be given away by its rightful owner. Points to note:

   a. A *promise* to give a gift generally is not legally binding (if no value/consideration is received)
   b. Once completed, though, a gift can not be revoked (the donor could ask for a completed gift to be returned, but the recipient would be under no obligation to give it back)
   c. You need not accept a gift (think of receiving, in a will, land with environmental contamination that must legally be cleaned up at a cost of $1,000,000 – but then will be worth only $80,000 afterwards)
   d. It is illegal to give property away to shield it from creditors

II. *Deeds* – a deed is a legal document (actually a special type of contract) that transfers rights in real estate from a *grantor* to a *grantee*. If the transfer is through a sale (rather than gift or will), the seller (grantor) and buyer (grantee) agree to terms in a sales contract. Then after financing approval, inspections, and other provisions specified in the contract have been fulfilled a *closing* is held at which the seller delivers a deed, more formally deed of conveyance, to the buyer. The deed *must be in writing* (in keeping with the *statute of frauds*) if it is to be enforceable in court, must adequately describe the parties and property involved, and also must: contain *words of conveyance* (stating that the grantor is conveying title and indicating what types of guarantees are given); have a *habendum* clause that indicates the strength of ownership rights the grantee is receiving; be signed by the grantor, whose signature is witnessed or *acknowledged* (as proven by the stamp from a notary public); be delivered to and accepted by the grantee (if the grantee's acceptance were not required someone could, for example, deed the environmentally contaminated land described above to some unknowing third party just to get rid of it); and contain a statement that the grantee paid consideration, though the dollar amount need not be told ("$1 and other good and valuable consideration" is often the wording used). Interestingly, a deed need not be dated to be valid (the date of recording, to be discussed below, matters, but not the date when the deed was executed).

Types of deeds include:
A. *General warranty deed* – the words of conveyance are *convey & warrant*. This type of deed contains five guarantees, or *warranties*, of assurance, called *covenants*, that assure the grantee is getting good, often characterized as "marketable," title. (Marketable title usually is interpreted as being free from problems or "encumbrances" that the grantee does not acknowledge or agree to, and that would make the land difficult to sell to a cautious buyer. If a grantee tried to rescind a purchase on grounds that the grantor did not deliver marketable title, because title evidence provided at the closing shows that a neighbor's garage encroaches on the land in question, a court would likely rule that the title was not marketable unless the grantee corrects the problem, but easements for utility companies to run lines over all nearby parcels generally are seen as "de minimis" encumbrances that do not impair marketable title. Violation of a zoning law generally makes a parcel's title unmarketable. Under today's standards marketability of the title may be less of concern than whether the grantor is able to buy *title insurance* ("insurable title") to protect the grantee against existing title problems. Also, today state laws sometimes recognize title as marketable even if there is a minor documentation error, such as a misspelled name in a prior deed, and Illinois allows for marketability to be established in many cases if nothing that could impair title has occurred for 40 years. The five covenants are:

1. Covenant of *seizin* – the grantor assures that she has good title and the right to convey it (some references show separate covenants of seisin and right to convey). From "livery of seizin," an English ceremony from early Middle Ages in which a grantor gave a handful of dirt to the grantee to symbolically declare the grantee as the new owner. Legend holds that, at this ceremony, the youngest boy in attendance was severely beaten so that he would always remember the event – if true, a very primitive and cruel form of keeping property records. Recall that an adverse possessor is a *deseizor*. Lawyers observe that real estate transactions involve a lot of symbolism, some relating back to the Middle Ages. In today's world, delivering a deed fills the function met long ago by the livery of seizin.

2. Covenant *against encumbrances* – the grantor assures that there are no *encumbrances* (limitations on the owner's rights, such as leases or easements) *other than those specified or disclosed in public records*. So these first two "present" covenants assure that neither the grantor nor earlier owners took any previous steps that would endanger the grantee's ownership claims.

A grantor sold land knowing it was going to be subject to special assessments for improvements, which the grantee had no way to know because there had not yet been a recording in public records. A court ruled that the grantor violated the covenant against encumbrances and thus owed the grantee damages.[1] But when a buyer sued a seller for covenant against encumbrances violations after learning a sewer line ran under the land, the court held that the sewer did not encumber the land, because the line was 150 feet below ground and the sewer authority had no right to access the line from the land surface.[2]

3. Covenant of *quiet enjoyment* – the grantor assures that the grantee's use and enjoyment of property will not be disturbed in the future by anyone claiming title from previous events, whether or not through grantor's ownership.

4. Covenant of further assurances – the grantor assures that she will take any further action necessary to protect the grantee's claim of title.

5. Covenant of *warranty forever* – the grantor assures she will forever guarantee that the title passed to the grantee is good. These final three "future" covenants become operative only if unanticipated actions of outside parties endanger the grantee's ownership claims – *i.e.*, the promises in the two present warranties turn out to be wrong.

If any of these covenants is violated, the grantee can sue the grantor for damages. (In modern transactions the grantor's ability to deliver on these promises/covenants is assured through the purchase of a title insurance policy, paid for by the grantor and with the grantee as beneficiary.) In a transaction, the buyer's preference typically is to receive a General Warranty Deed. Less desirable than the General Warranty Deed are the:

B. *Special warranty deed* – contains some, but not all, of the five covenants listed above. For example, the grantor might not promise to defend the grantee against third party claims (missing the covenant of quiet enjoyment).

C. *Grant deed*, or bargain and sale deed – this type is even less favorable for the grantee; the grantor warrants primarily that she owns the property in question, that she conveys her interest to the grantee, and that she has not encumbered the property except as specified (assures nothing about what previous owners might have done). The executor's deed and administrator's deed (used for transferring ownership from the estate of someone who died with or without a will, respectively) seem to fit in this category.

As discussed earlier, any of these types of deeds can be accompanied by one or more "covenants, conditions, or restrictions," or more informally "deed restrictions," that place limits on what future owners can do with the land. A restriction might apply to a single parcel or to, for example, all lots in a subdivision (applied to each initial deed when the developer broke a large parcel into smaller lots and sold them). Activities limited sometimes are similar to those we might see as conditions on a fee simple determinable (or on a condition subsequent) estate, *e.g.*, use as a farm or banning alcohol, except the remedy would be a court order for the offender to cease the activity (injunction) or pay money damages, rather than lost ownership. (Sometimes the restrictions involve smaller matters like paint colors allowed in a subdivision, or mortar that can be used on brick work, or not allowing trucks to be parked in driveways, at least not overnight.) A "covenant appurtenant" that restricts the land owner from building a structure that could block an adjacent parcel owner's view seems undistinguishable from a view easement.

D. *Quitclaim deed* – the words of conveyance are *convey and quitclaim*. The quitclaim deed specifies only that the grantee gets whatever interest the grantor has. The grantor may, in fact, possess no interest at all. This instrument often is used to clear questionable or "clouded" titles. After a survey of her Tiskilwa, IL lot Janssen learned that the legal description in the deed received years earlier did not include a strip of land she was supposed to have gotten, and long had used as a driveway to get to a public road. An expedient solution came through willingness of the surviving heirs of Janssen's grantor to give her quitclaim deeds for that strip – they could not have given warranty deeds without first proving they owned the excluded land, which they clearly thought their father had intended to sell. Janssen's solution could have been claiming ownership of the driveway strip through adverse possession, but doing that would have required a lawsuit, whereas the quitclaim deeds she received merely had to be recorded. That quitclaim deed situation actually was just a minor issue noted in a 1981 case, in which Janssen's neighbor Joiner successfully claimed adverse possession of an adjacent strip of land Janssen had owned on Joiner's side of the driveway, because Joiner had used it openly and without permission for far more than twenty years.[3]
Another instance when a quitclaim deed served to clear a clouded title: in 1947 a farm corporation sold a lot to a grantee, who did not record the warranty deed received and ultimately lost it. In 1963 the corporation's trustee gave

that grantee a quitclaim deed for the same lot, which she promptly recorded, and in so doing seems to have solved the title chain problem, especially since the quitclaim deed contained a specific statement that it replaced a lost warranty deed. It would have been fraudulent at that stage for the corporation to give the grantee another warranty deed, because the trustee had actual notice that title had been transferred to her long ago.[4] A quitclaim deed might also be used in a divorce, to convey the vacating spouse's interest to the spouse keeping jointly owned real estate.

(Under common law a grantor in a contract for the sale of real estate is expected to provide marketable title, but a quitclaim deed likely would not be used in a contract to buy or sell land – unless perhaps the transaction had to be completed quickly, with no time for a more careful process, as when a grantor was about to die.) A title search is a tracing through records of past transactions, history of property taxes paid, mortgages and other liens on the property, and perhaps other records like bankruptcies; a title examination is a review of what was found in those records, typically accompanied by the issuing of an attorney's opinion on whether any third parties have legitimate title claims. While title insurance (an insurance policy that reimburses a home owner's losses if a title problem later arises) has largely supplanted lawyers' opinions of title in today's transactions, attorneys' opinions still play a role in the market, one reason being that they tend to cost less. U.S. government home mortgage lending giants Fannie Mae and Freddie Mac (discussed in our Topic 11) will buy loans with attorney opinions rather than title insurance; one view is that the "deep pocket" insurance element in a title opinion comes through the lawyer's malpractice policy.[5]

Note: "title" to real estate is not something you can see. It is a quality like compassion or generosity: you might see evidence of it, but you can not see title itself. In fact, no governmental authority generally recognizes someone as being the owner of real estate. In a dispute over the identity of the true owner of part or all of the bundle of rights with respect to a parcel of land, the issue becomes who has the best evidence of title. If you have documents showing you made a purchase and received a general warranty deed, and a search of public records does not show that other unexpected claims have been recorded, and if you have occupied the property exclusively for perhaps twenty years and paid the property taxes every year, it is unlikely that anyone else could produce stronger evidence (or much evidence at all) for asserting ownership. But under our standard system no government agency issues a certificate of title naming someone as the owner. Once again, we see why a real estate purchase typically is accompanied by the purchase of title insurance (a policy paid for by the grantor to protect the grantee, and also one paid for by the grantee to protect the lender if the grantee uses borrowed money to buy the land) that provides compensation if someone does later come forward with evidence that could support a claim of rights in the property.

[Between the date when a sales contract is signed and the closing date the seller and buyer both have title, in some sense. The seller retains "legal" title, technically a personal property interest that the seller holds as a trustee for the buyer, with the legal title holder retaining possession unless another arrangement is made (such as the buyer leasing the property from the seller until the closing). The buyer has "equitable" title, a real property interest even though the right of possession typically is absent. Both the legal and equitable titles generally would be alienable, devisable, and descendible; and both title holders are deemed to have insurable interests in the subject real estate.]

Items covered by title insurance could include problems with title documents (like a misspelled or forged signature on a deed), recording issues (recording errors, unrecorded mechanic's liens or judgments against the property), forged deeds, and surveying errors. (A mere misspelled grantee's name might not cause a problem if a court could verify, under the *doctrine of misnomer*, who the grantee was supposed to be; or a grantee could execute and record a new deed *from* herself with the *wrong* spelling, *to* herself with the *correct* spelling, to clear up potential chain of title problems. But a more serious problem, such as an incorrect legal description, may require the grantor to deliver a *corrective deed*, which the grantee then records to supersede the original.)

Title insurance does not assure that the policy holder has or will get a "good and marketable" title; rather it assures that if title problems arise the insurer will handle legal matters and reimburse the policy holder for any financial losses suffered as a result of not getting good title. The American Land Title Association is the professional association for the title insurance industry; it also helps to set standards that surveyors must follow in doing land surveys (along with the American Congress of Surveying and Mapping). Title insurance is discussed in more detail in our Topic 17 general coverage of insurance that relates to real estate.

Contrast the real estate title situation with title to an asset we typically think of as having a less complicated potential division of rights and shorter expected period for providing service: a car. The State of Illinois recognizes you as the owner of your car; the buyer of a new or used car gets a certificate of title (or "title") from the Secretary of State's office. If there is a dispute over the identity of the true owner of a motor vehicle, the answer typically is the party who has a valid title certificate from the state. Long ago an Australian official named Torrens devised a means of having government officially recognize a true land owner. The process involved complex steps including an open public hearing where anyone who wanted to assert a claim could show relevant evidence, but then once the hearing ended the government would issue a certificate of title, and then the paper work for subsequent ownership transfers was as simple as the paper work for selling a car. And after the government recognizes a specific owner, other parties can not gain ownership by adverse possession, or easements by prescription, even through open, hostile use for the otherwise applicable time period. The Torrens system actually was used in the U.S. to a limited extent, including in Chicago. But the city ended all Torrens activity in the early 1990s, on the grounds that having two sets of land records and procedures was too complicated. Some economists say Torrens would be much better than our predominant system, and feel that its use never gained a strong foothold because of opposition from powerful parties like lawyers and title insurance companies that benefit from the more convoluted system we have.

Title to real estate is a special problem in countries without well-developed legal systems. In countries like Peru and Malawi land ownership has been informal; people plant crops on small tracts that their parents farmed, but because they do not hold formal title they can not borrow money against the land's value to increase productivity, and a local tribal chief typically can redirect the informal ownership to a more favored party.[6] Peruvian economist Hernando de Soto has long argued that the lives of people in third world countries would improve if stronger legal systems would provide for stronger individual property rights that clearly define who owns what. Having secure legal title allows owners to use land they control as collateral in borrowing, and to earn money by renting it out. One estimate holds that 90% of Africa's rural land has no formal ownership records; this "customary" ownership disincentivizes making improvements to land, which leads to less tax revenue for governments and encourages environmental harm.[7] In India most civil court cases are disputes over land, taking an average of 20 years to settle. The good news is that many African and Asian countries have begun mapping land, aided by drone technology, to better convey legal title to ordinary citizens. Still, only 30% of the world's people today hold formal title to the land they live on.[8] Sadly, uncertain land titles can be costly even to U.S. citizens. A historic lack of trust in the legal system often led African American land owners to avoid making wills, instead leaving property to their heirs as tenants in common through intestate succession. As successive generations contained greater numbers of inheritors these "heirs' properties" became problematic for their owners, as it was increasingly unclear who had the rights to sell (or could force others to sell in partition sales) or the obligation to pay taxes, and the clouded titles complicated getting mortgage loans.[9]

III. Recording

A. Need for Recording

Recording a deed (or other document related to title in a real estate transaction, notably a mortgage) is essential in protecting against *claims of third parties*. Otherwise, a third party who buys the property you just paid for could possibly be viewed by the legal system as the legal owner; that happens if the third party is a *bona fide purchaser* acting *without notice* of your ownership interest. Having the grantee or grantee's representative (often the lender) present a deed for recording provides evidence that the deed was delivered to the grantee, and accepted. (One type of interest that always should be recorded is a notice of pendency or notice of *lis pendens*, to give constructive notice to potential third party buyers that there is a pending lawsuit in which the individual filing the suit claims to have an ownership or other claim on the property; potential buyers will not want to make offers until any such suits have been settled. The current owner can, in turn, file a "slander of title" suit for the damage suffered by having her title clouded, if the lawsuit is unwarranted.)

So if J sells to K, J has no basis to support a claim that J is still the owner – J is a party to the transaction, not a third party who might not know what has occurred. J obviously knows (thus he has notice) that J has sold to K and K is the new owner; the issue is whether unrelated third parties have *notice* of K's ownership claim.

B. Types of Notice: notice can be of either (or both) of two types.

1. A third party has *actual notice* if

a. He knew about someone's interest (*e.g.*, he observed the transaction, or a credible party told him that the property already had been sold), *or*

b. An inspection of the premises reveals a likelihood that someone has an interest; *e.g.*, obvious signs that a family may be living there. (In Illinois, and some other states as well, this situation is called *inquiry notice*; it sometimes is classified as a type of constructive, rather than actual, notice, because a third party who *should* have known there was an issue is deemed to have notice). [So always physically/visually inspect real estate before you buy, and make inquiries regarding anything you see, especially evidence that someone has possession, that could affect a buyer's ownership interest. Title insurance usually does not provide protection against title problems arising from rights gained through adverse possession or easement by prescription that were not established in court and recorded, because these interests can not be found in public records, but an inspection of the property might disclose them.]

Inquiry notice seems to be the legal system's way of telling us all to use common sense: if something seems amiss, then protect your interests by asking appropriate questions. In a case discussed in our Topic 4, a Delaware district judge said the longtime open encroachment of a neighbor's goat enclosures put an owner on inquiry notice of an issue with his land.[10] A couple who offered a mineral lease on land the husband's parents had given them was held to be under inquiry notice (had a "duty to investigate" and make an "inquiry with reasonable diligence") that the mineral rights were already under an as-yet unrecorded lease to another party, even though they did not know the details of the agreement.[11] Or consider Jones, with an "escrow" account through which he gave his mortgage lender money to pay the yearly property taxes on an Arkansas house he owned. After he had paid the loan off, and not being used to dealing with property tax, he neglected to pay the taxes for a few years. Because he did not live in the house following a divorce, delinquency notices sent to him there were returned as "unclaimed," and the county eventually seized and sold the house to cover the unpaid taxes. The U.S. Supreme Court ruled that county officials had denied due process rights by not taking enough extra steps to notify Jones when they knew their mail had not reached him. An argument the county made (and lower courts had accepted) was that it is common knowledge that property tax is due every year, so anyone who has not paid it is under inquiry notice that a tax problem exists.[12]

2. A third party that does not have *actual* notice nevertheless has *constructive notice* if a *search of documents properly recorded* at the local recorder of deeds or county clerk's office, in the county where the parcel is located, would have revealed someone's interest, such that the third party *could* have known about it by doing a careful search of the public records in the county where the land is located (or inspecting the property, as noted above).

Example 1: J sells to K, K does not record the deed or other transaction documents (presumably a mortgage if K borrowed some of the money to make the purchase – perhaps from lender other than a lending institution, which would make sure the documents were recorded). J knows that K has not recorded, and takes advantage of this mistake by trying to sell the property again, now to L. Here the question is whether L had notice of K's interest.

Possibility a: L knows (has actual notice) that J already sold the land to K; perhaps a business associate of J's mentioned the transaction to L. Then L (along with J) is attempting a fraudulent act, which would leave K as the rightful owner (unless L's actual notice was successfully concealed, in which case L might prevail).

Possibility b: L has no actual (or inquiry; K has had no chance to take possession yet) notice of the sale to K, and because K did not record the deed L does not have constructive notice – there would be no way for L to know of K's interest. If L purchases the land from J, the law likely would view L as the rightful owner. K, who did nothing dishonest but did not sensibly protect her interests by recording, would be able only to sue J for any money paid to J.

Example 2: J sells to K, and K immediately records the deed and other applicable transaction documents. J later attempts to sell the same land to L. Again, the analysis centers on whether L had notice of K's interest.

Possibility a: L has no actual knowledge of the previous sale to K, but L or a party representing L (an attorney or title insurance company) searches the public records and finds the recorded deed transferring ownership from J to K. L now knows that K already is the owner, and avoids the fraudulent transaction.

Possibility b: L has no actual knowledge of the previous sale to K, and L does not bother to search the public records to learn whether a previous deed has been recorded. L is deemed to have *constructive notice* of K's claim; L should have discovered K's interest and thus L, with constructive notice, will not be treated favorably as a party acting without notice. K will be viewed by the law as the rightful owner. L, who did nothing dishonest but did not sensibly protect his interests by searching the public records, would be able only to sue J for any money paid to J.

Recording provides constructive notice, to third parties, of real estate title issues. So if L does not take some minor steps (inspect the property, use the indexing system as described below to search the public records) to look for claims of parties other than the one who purports to have the right to sell it, then the law deems L to have "notice" in effect/*constructively* even if L does not really know. But if L has no actual or constructive notice of K's interest (K did not record the deed, and an inspection does not disclose anything about K's interest – maybe the property is undeveloped land), then under the law L is likely to be seen as the rightful owner (with K's only recourse to sue J). [The recording system exists to protect *bona fide purchasers*, not those who, *e.g.*, inherit land rather than pay for it.]

Caution: in the examples above we ignored the important issue of whether L records his interest. The identity of the true rightful owner can change depending on state law. In the small number of states with *race* recording statutes, if a dispute arises as to who the rightful owner is, the first party to have recorded is the legal owner (like winning a foot race). So if L buys without notice, *or perversely even with notice*, of K's interest and L immediately records, and K records a day later, L's claim wins over K's even though K's purchase predated L's (the winner need not be a *bona fide* purchaser!). In states with *notice* recording statutes, a *bona fide* purchaser acting without notice does not have to record her own interest to be declared the true owner – which seems unfair in that L's claim above could supersede K's even if L fails to record and thus is no more careful than K (and then L could lose rights to subsequent innocent buyer M). In states with *race-notice* statutes, to win an ownership dispute in this type of situation you must 1) be a *bona fide* buyer acting without notice of another party's interest and 2) record your own interest before others have recorded. Lawyers say the wording of the Illinois Conveyance Act makes our state a notice state, but courts consistently have interpreted the statute as being race-notice – which makes sense, in that courts tend to encourage responsible behavior and fair outcomes. Race-notice benefits the party that is both innocent and careful.

C. What happens if problems arise?

1. An error is made in the recording process. (Recording in Illinois traditionally was conducted in the office of the elected local county *recorder of deeds*. But as a cost-saving measure some Illinois counties have eliminated the recorder of deeds as a separate elective office, with recording functions now handled by the office of the elected *county clerk*, with that official perhaps holding the title of county clerk-and-recorder.) Not all documents are eligible to be recorded at the recording office. Among those eligible (all must be notarized) are deeds, mortgages and other liens (such as mechanic's liens), long-term leases, military discharges, wills, and powers of attorney.

Whether an incorrectly recorded deed or other document provides constructive notice can depend on state law, and on whether the error (like a slightly misspelled name) should have been caught in the search of the public records. Typically, county officials are covered by insurance ("bonded") that reimburses innocent parties for losses resulting from recorder errors. Title insurance also should cover a range of issues relating to questions of title.

2. A properly recorded and *indexed* deed can not be located through a proper search of the public records. When someone records a deed (or other document), the recorder's office personnel store a permanent copy of the document. The original system involved paper copies in large binders, then microfilm was used, and more recently on-line computerized files have been the storage medium. People searching the records can find a deed by looking at *grantor indexes* and *grantee indexes* of the records.

For example, if Michael Anderson is trying to sell you his house, you should search the public records. First, look in the grantee index alphabetically under A; you find a document number for a deed granting ownership to Michael Anderson from Michelle Bates. So you know Anderson was a grantee/bought the property. Then look under B in the grantee index and you learn that Bates got ownership from Collins, then look under C in the grantee index to find the deed in which Collins got ownership (from Dirks), and then look under D in the grantee index to find the deed by which Dirks got ownership – which was from the U.S. or a state government. (Perhaps Dirks got the land in the early 1800s as compensation for serving in the U.S. Army during the War of 1812.) Now you have verified that Anderson became the owner through a clean chain of title going back to the original owner under our legal system.

But does Anderson still own it? Look in the grantor index, alphabetically under D to find the deed through which Dirks as grantor sold to Collins, then alphabetically under C to find the deed with Collins granting to Bates, then see B in the grantor index to find the deed from when Bates sold to Anderson. Now the drum roll moment: look in the grantor index under A to see if there is a document number for a deed *from* Anderson to anyone. If Anderson is an honest seller, you will not find anything. If Anderson is a crook, you will find reference to a deed that he already granted to someone else, as long as the buyer recorded. (As suggested above you are unlikely to do this search yourself; an attorney would handle the task, or it would be done as part of the title insurance underwriting process.)

Problem: on rare occasions, a document that is properly recorded and indexed can not be found through a search of the records. There can be a *wild deed* situation, which might enter into the chain of title as follows:

> US Government gave a patent or grant to A long ago; A recorded
> A later gave a deed to B; B recorded
> B later gave a deed to C; C did not record
> C later gave a deed to D; D recorded
> B now gives a deed to E; E records

Does E have constructive notice of D's ownership? In some jurisdictions, the answer would be *no* – in doing a title search, E traces back through grantee indexes from B (who claims to be the owner, such that E is not aware of anyone else to check on) back through A to the government. Then working forward through grantor indexes, he finds that A granted to B, but can not find evidence that B granted to anyone, since C did not record. Under these circumstances, E would be viewed under the law as the legal owner, not D. (If records also were kept indexed based on the parcel itself, it would be evident that there had been transactions later than B's purchase. Title insurance companies often maintain their own records indexed by parcel, in addition to alphabetical indexing by the grantors' and grantees' last names; managing those extra records is a major component of title insurers' cost structure.)

Who was in error?

- C, by not recording
- D, by not adequately doing a title search tracing title back from C's purchase to the original grant

(Yes, B is a crook.) The moral of the story is:

- Record your interest
- Make sure that all prior owners recorded their interests

[This situation would be very unlikely to arise if lending institutions had been involved in C's and D's transactions. C's lender would have made sure that C's deed from B was recorded (or any problem would have been caught in a title search done in connection with the title insurance policies that the lender would have insisted on). Then even if C had not borrowed money and did not record, the lender when D purchased from C would not have made a loan secured by the property unless D bought title insurance to protect the lender's interest, and a title insurer would not have issued a policy unless its title search revealed a clean chain of title – and that search would have revealed the problem of D's seller C not having recorded when C purchased, so the title insurer would have made sure C's deed from B got recorded promptly. A search leading to a conclusion that the grantee is getting a "good and marketable" title would require not just a chain-of-title search through grantee and grantor indexes, but also verification that all past property taxes on the real estate have been paid, and perhaps an identification of who paid them.]

An unusual 2015 case touches on many issues relating to deeds and recording (along with adverse possession and property taxes). Schreppler wanted to get permission to hunt on fifteen acres of land near a Delaware parcel he owned, or perhaps even buy it. Public records showed "owner unknown" due to a poorly done survey, and poor metes and bounds legal descriptions in earlier deeds going back to 1844. Schreppler decided seek ownership through adverse possession. In 1988 he started camping there, and kept doing so regularly for many years thereafter. In 1990 he recorded a "straw" quitclaim deed (from his attorney's wife, who held no interest in the land, with a metes and bounds description based on adjoining boundaries), and paid property taxes back to 1977. He made improvements, kept paying yearly property taxes, and when nearby land was sold for development updated recorded plat maps actually showed Schreppler as owning the land in question. Locals also viewed him as the owner; he allowed others to use it but only with his explicit permission.

The land in question actually was part of a larger tract bought in 1971 by Tumulty, who in 1975 agreed to sell the whole tract to Lakewood (or was badgered by Lakewood into selling), but details still had not been finalized when Tumulty died in 1985. Tumulty's heirs completed the sale in 1992 and thought they had conveyed the land in question to Lakewood, while Lakewood thought that land was Schreppler's and developed only the part of the tract farther to the east. Then after Schreppler had occupied the land for all those years he had a dispute with a different neighboring owner that led to a 2008 survey, which clarified that the land in question had been part of Tumulty's purchase. The Tumulty heirs filed a trespass suit in 2010, two days short of Delaware's 20-year minimum after the 1990 quitclaim deed had been recorded – but the court held Schreppler had established possession by 1988. The heirs alleged that Schreppler had "slandered their title" and should have done more title investigation, but the judge said non-expert Schreppler would not likely have learned more than the public records showed. Those heirs also claimed that Schreppler's use was not "open," because they had not seen evidence of his presence on the land over the years – but it turned out that after their father's death they had never done much more than drive past. The judge said Schreppler had been "bold" in his actions, but also noted favorably his longtime payment of the property taxes, and ruled that he had met all requirements for getting ownership of the fifteen acres through adverse possession.[13]

Interesting aside: in 1841 Abraham Lincoln bought a forty-acre farm near Lerna in Coles County, Illinois for $200 from his father Thomas Lincoln (Thomas had fallen on hard times; Abe then owned the land but Thomas continued to farm it). In 1976 Ray Phipps, whose family had owned what came to be known as the "Abraham Forty" as part of their larger farm since after the Civil War, tried to raise money by selling extremely tiny parcels to the public (at a $5 per square inch advertised price), but fewer than 2,000 pieces were sold. One report said that buyers would get deeds that were essentially collectible souvenirs, possibly made of copper, [14] but another said that buyers were to receive recordable deeds – which would have had to include legal descriptions (government rectangular survey, combined with metes and bounds to identify the micro pieces?).[15] The Coles County Clerk's office, which handles recording, can not find a record of anyone's ever having recorded such a deed. (While it might seem that many people would enjoy owning a bit of history like a minuscule slice of a Lincoln farm, could a potential buyer with enough money to make the whimsical purchase of a tiny, unusable piece of famous property perhaps worry about liability issues in being even a very small partial owner of land on which personal injury or other problems with financial implications might arise?) But there is an "Abraham Lincoln Package" of records involving Lincoln-owned land in the county, including the deed by which Thomas conveyed the farm to Abe, that anyone can see by visiting the Clerk's office in Charleston.[16] In transactions to settle unpaid taxes the Best family bought thirty of the forty acres in 1989. Of the remaining ten acres, six constitute the Lincoln Log Cabin State Historic Site, and the other four were later purchased for $1.25 million in 2007 by Dan Arnold, owner of the Road Ranger truck stop chain, who planned to cell penny-sized parcels to raise funds for historical preservation, but Arnold died before the project was undertaken.[17] When the thirty-acre piece that was part of the Best holdings sold in 2019 the $10,000 per acre price was estimated by a central Illinois farm real estate appraisal firm to be a 43% premium over what the value otherwise would have been, all because of the emotional appeal of the direct connection to Lincoln.[18]

IV. Home Title Theft (or "Deed Theft" or "Home Title Fraud" or "House Stealing")
Could an identity thief create a fraudulent deed, forge your signature, and sell your house, or use the home's value to borrow money that you would have to repay? Vacant houses (including vacation properties) and vacant land are especially vulnerable, with fraudulent sellers offering below-market prices to achieve quick sales; also of concern are properties whose owners are deceased or live out of the area.[19] A 2021 business publication article asserted that the purported problem is far overstated in "title lock" service ads; it notes that the rightful owner does not ultimately bear financial costs from an illegal sale or loan. The requirement that signatures on deeds transferring title be notarized would, by itself, prevent this outcome in the vast majority of potential cases, but even if a notary were fooled (or dishonest, or notarization were faked), the true owner would prevail in court with an attorney's help. Costs from an unpaid loan obtained through fraudulent means would be the lender's to bear, not the victimized home owner's, though again there could be attorney fees for getting problems straightened out.[20] A 2022 real estate industry publication reported that real estate brokers, lenders, and title insurers increasingly are alert to the title theft issue and are taking steps to thwart fraudsters.[21] And the supposed "protection" the title lock ads tout does not cover the potentially substantial legal costs; it merely notifies the owner of changes in publicly recorded documents involving the property – which you should be able to check by yourself. (In some counties, including Cook and DuPage in Illinois, home owners can sign up to receive free alerts when transaction documents that include their names are recorded. After some high profile problems, in 2021 Broward County in south Florida started automatically notifying home owners when transfers of their properties are recorded.) A "Homeowners Policy of Title Insurance," with coverage more comprehensive than is provided under a standard "Owner's Policy," would cover these legal costs,[22] as might identity theft coverage in your home owner's insurance policy or separate identity theft protection.

But the problem is real, if rare, and the movement toward on-line closings, and having more real estate sale and loan documentation on the internet, may have aided the scams. Documents recorded in connection with a transaction can tell a scamster everything from the price paid for real estate and the amount of mortgage financing obtained to the Social Security numbers and birth dates of the transacting parties; in pre-Internet days people who wanted to see these documents at least had to make personal visits to public records offices. Houses owned by older individuals who are less tech-savvy and thus more susceptible to various forms of identity theft and, as noted above, houses that are unoccupied (at least for long periods, like vacation homes) and vacant land, can be more attractive targets, while having repaid your loan means there is not a lender looking out for its interests on title matters – and in turn protecting yours as the borrower. In 2021 an elderly Miami resident learned, when she tried to pay the property tax, that a vacant lot her family had owned for 120 years had been sold with a fraudulent deed carrying forged signatures for a purported seller and a notary. But she as the rightful owner did not lose title; title insurance reimbursed the innocent buyer (a New York development company), and a group of three crooked sellers were jailed on felony theft charges.[23] (If it had been an occupied home rather than unimproved land the buyer would have been on inquiry notice that someone had an interest in the property.)

In another case, also in Florida, fraudsters targeted high-end homes that were owned by foreign nationals who left the properties unoccupied for long periods. Members of the group illegally borrowed millions of dollars against the values of expensive properties by impersonating the owners (Venezuelan citizens who were under U.S. government sanctions and unable to enter the country) or members of their families; all did prison time.[24] And famous properties can even be targeted; in May 2024 a party claimed to have gained title to *Graceland* when Elvis Presley's deceased daughter Lisa Marie failed to repay a $3.8 million loan secured by the Memphis estate. A Tennessee judge stopped the foreclosure sale when evidence showed that the loan documentation and notary signatures were fraudulent, and that the address provided by purported lending firm Naussany Investments was that of a UPS store in Florida.[25] •

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[1] *Brewer v. Peatross* (Utah trial court, 1979).
[2] *Boehlinger v. Montalto* (New York trial court, 1931).
[3] *Joiner v. Janssen* (Illinois supreme court, 1981).
[4] *Miami Holding Corporation v. Matthews* (Florida appellate court, 1975).
[5] Ackerman, Andrew. "Plan Aims to Cut Home-Buying Costs." *The Wall Street Journal*, January 17, 2024, A2.
[6] "No Title." *The Economist*, March 31, 2001.
[7] "Parcels, Plots, and Power." *The Economist*, September 12, 2020.
[8] "Whose Land?" *The Economist*, September 12, 2020.
[9] Carpenter, Ann; Jones, Shana; and Pippin, J. Scott. "Understanding Heirs' Properties in the Southeast." *Federal Reserve Bank of Atlanta Partners Update*, March/April 2016.
[10] *Banks v. Schrock* (Delaware trial court, 2023).
[11] *Northern Oil & Gas, Inc. v. EOG Resources, Inc.* (North Dakota supreme court, 2023).
[12] *Jones v. Flowers* (U.S. Supreme Court, 2006).
[13] *Tumulty v. Schreppler* (Delaware trial court, 2015).
[14] McRoberts, Flynn. "Foes Struggling Over Lincoln's Forgotten Farm." *Chicago Tribune*, December 6, 1999.
[15] "For Sale: Lincoln's Farm, for $5 Per Square Inch." *The New York Times*, August 24, 1976, 22.
[16] As reported to your ancient instructor in an early 2022 phone conversation with Coles County Clerk Julie Coe.
[17] Anderson, John. "Original Abraham Lincoln Farm Property Sold at Auction." *Second Shelters*, February 13, 2019. See also "Road Ranger Founder and Philanthropist Dan Arnold Passes Away. *Convenience Store News*, November 18, 2015.
[18] Field Level Agriculture, Inc. "The Farm That Abe Lincoln Owned." February 14, 2019. https://fieldlevelag.com/news/2019/2/14/the-farm-that-abe-lincoln-owned.

[19] Friedman, Robyn A. "Keep Your House Safe from Scams." *The Wall Street Journal*, June 7, 2024, M5. See also Kusisto, Laura. "Latest Cyberthreat: Stealing Your House." *The Wall Street Journal*, December 8, 2015.
[20] Light, Larry. "The Home Title Theft Baloney." *Forbes*, September 11, 2021.
[21] Fierstos, Anneliese. "Is Home Title Theft a Real Threat to Homeowners?" *Illinois Realtor® Magazine*, August 2022 digital issue.
[22] Friedman, Robyn A. "Keep Your House Safe from Scams." *The Wall Street Journal*, June 7, 2024, M5.
[23] Ansberry, Clare. "Elder Abuse Spreads, Stoked by the Pandemic." *The Wall Street Journal*, December 28, 2021.
[24] Putzier, Konrad and Will Parker. "Florida Couple Turned the Empty Miami Mansions of Venezuela's Elite Into Personal Piggy Banks." *The Wall Street Journal*, October 12, 2022.
[25] DeAvila, Joseph. "Elvis's Granddaughter Fights Graceland Sale." *The Wall Street Journal*, May 22, 2024, B1, B6.