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THE TORRENS SYSTEM—AFTER THIRTY-FIVE YEARS

FREDERICK B. McCALL*

The Torrens system for the registration of land titles has existed in various forms in the United States for thirty-five years. The first attempt to introduce the system in this country was made by the legislature of Illinois in 1895.¹ This act was declared unconstitutional,² but in 1897 an amended law³ was passed which successfully withstood attack.⁴ Ohio passed an act in 1896,⁵ which was declared invalid⁶ and remained so until the system was expressly authorized by the Ohio Constitution of 1912.⁷ Pursuant to this authorization the present act has been operative since 1914.⁸ California, profiting by the mistakes of Illinois and Ohio, passed a valid act in 1897.⁹ The other states, which complete the total of nineteen having Torrens registration laws, passed their Acts in the following order: Massachusetts, 1898;¹⁰ Oregon, 1901;¹¹ Minnesota, 1901;¹² Colorado, 1903;¹³ Washington, 1907;¹⁴ New York, 1908;¹⁵ North Carolina, 1913;¹⁶ Mississippi, 1914;¹⁷ Nebraska, 1915;¹⁸ South Carolina,

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¹ Ill. Laws 1895, p. 107.

² *People v. Chase*, 165 Ill. 527, 46 N. E. 454 (1896).

³ Ill. Laws 1897, p. 141. For present Illinois statute see *ILL. STAT. ANN.* (Callaghan, 1924) vol. 2, c. 30, §§ 49-157.

⁴ *People v. Simon*, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175 (1898); *Tower v. Glos*, 256 Ill. 121, 99 N. E. 876 (1912).

⁵ 92 Ohio Laws 1896, p. 220.

⁶ *State v. Guilbert*, 56 Oh. St. 575, 47 N. E. 551 (1897).

⁷ Art. 2, §40.

⁸ 103 Ohio Laws 1913, p. 914; *OHIO CODE ANN.* (Throckmorton, 1929) §§8572-1, 8572-2 through 8572-118.

⁹ Cal. Stats. 1897, p. 138. Declared constitutional in *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129 (1907); amended and redrafted, Cal. Stats. 1905, p. 1932; *CAL. GEN. LAWS* (Deering, 1923) §8589.

¹⁰ Mass. Acts 1898, c. 562; *MASS. GEN. LAWS* (1921) c. 185.

¹¹ Oregon Acts 1901, p. 438; 3 *ORE. CODE ANN.* (1930) c. 3, §§63-301 through 63-3, 108.

¹² Minn. Laws 1901, c. 237; Minn. Laws 1905, c. 305; *MINN. STAT.* (Mason, 1927) §§8247-8329.

¹³ Colo. Laws 1903, c. 139; *COLO. ANN. STAT.* (Mills, 1930) §§856-957.

¹⁴ Wash. Laws 1907, p. 693; *WASH. COMP. STAT.* (Remington, 1922) §§10622-10726.

¹⁵ N. Y. Laws 1908, c. 444; *N. Y. CONS. LAWS* (Cahill, 1930) c. 51, §12.

¹⁶ N. C. Pub. Laws 1913, c. 90; *N. C. CODE ANN.* (Michie, 1931) c. 47, §§2377-2428(b).

¹⁷ Miss. Laws 1914, c. 131; *MISS. ANN. CODE* (Hemingway, 1927) §§6129-6167.

¹⁸ Neb. Laws 1915, c. 225, p. 494; *NEB. COMP. STAT.* (1929) §§76-701 through 76-7, 105.

1916;¹⁹ Virginia, 1916;²⁰ Georgia, 1917;²¹ North Dakota, 1917;²² South Dakota, 1917;²³ Tennessee, 1917;²⁴ Utah, 1917.²⁵

This system of registration has had a somewhat anaemic and precarious existence during the thirty-five years of its American life. It is our purpose in the present discussion to point out the extent of its use in the United States, the classes of landowners who have availed themselves of the law to register their titles, the kinds of land that have been registered, and the various factors that have militated against the widespread adoption and successful use of the system in the states which have given statutory sanction to its use.²⁶

The general purpose of the Torrens system is to secure by a decree of court, or other similar proceedings, a title impregnable against attack; to make a permanent and complete record of the exact status of the title with the certificate of registration showing at a glance all liens, encumbrances, and claims against the title; and to protect the registered owner against all claims or demands not noted on the book for the registration of titles.²⁷ The basic principle of this system is the registration of the official and conclusive evidence of the title of land, instead of registering, as the old system requires, the wholly private and inconclusive evidences of such title. In the one case only the ultimate fact or conclusion that a certain named party has title to a particular tract of land is registered, and a certificate thereof is delivered to him. In the other, the entire evidence, from which proposed purchasers must, at their peril, draw such conclusion, is registered.²⁸ Under this system title to land is not conveyed by deed, as such (as under the present system), but only by registration of the transfer.

¹⁹ S. C. Acts 1916, p. 942.

²⁰ Va. Acts 1916, c. 62; VA. CODE ANN. (Michie, 1930) §5225.

²¹ Ga. Acts 1917, p. 108; GA. CODE ANN. (Michie, 1926) §§4215(1)-4215 (118).

²² N. D. Laws 1917, c. 235; N. D. COMP. LAWS ANN. (Supp. 1926) §§5604 a 1-5604 a 82.

²³ S. D. Laws 1917, c. 368; S. D. COMP. LAWS (1929) §§3060-3143.

²⁴ Tenn. Acts 1917, c. 63; TENN. ANN. CODE (Shannon, 1917) §§3793 a 3-3793 a 96.

²⁵ Utah Laws 1917, p. 51; UTAH COMP. LAWS (1917), §§4920-5008.

²⁶ This article will be based largely upon data obtained from numerous letters received in 1931 from practicing attorneys, judges, law professors, and registration officials in the various states which have adopted the so-called Torrens System in some form. The writer wishes hereby to acknowledge his indebtedness to his correspondents for their coöperation and for the valuable information furnished.

²⁷ *Dillon v. Broeker*, 178 N. C. 65, 100 S. E. 191 (1919). See also Smith, *Torrens Registration of Real Estate Titles* (1902) 54 CENT. L. J. 285.

²⁸ *State v. Westfall*, 85 Minn. 437, 438, 89 N. W. 175 (1902).

Chief among the advantages claimed for the Torrens system of registration over the system now generally used throughout this country are the saving to the community of the cost of a new examination of the title in connection with each transfer or other transaction affecting the land, the removal of all uncertainties as to the title, and the greater speed with which transfers can be effected after title has once been judicially determined.²⁹

The procedure, prescribed by the various Torrens statutes for the registration of a title, runs about as follows: The person claiming a fee simple title in a tract of land files an application with the court having jurisdiction under the statute, describing the land, setting forth any estates, interests, or liens outstanding in other persons and known to the applicant, the name of the occupant, and the names of the owners of adjoining land. The court then refers the application to an official examiner of titles who investigates the status of the title and reports to the court. All persons who appear to have an interest in the land are made parties to the proceedings, and, under the statute, such persons must be adequately served with notice. Newspaper notice of the pending proceeding must be published for a prescribed period. After the lapse of a certain time if the examiner approves the title and no adverse claims are presented or if those presented do not appear meritorious, the court confirms the applicant's title, enters a decree for its registration and directs the registration official to issue a certificate of title to the applicant. The registrar then enters the certificate on the records which will show the exact title the applicant has, and there will be noted on the certificate any outstanding interests, trusts, or incumbrances recognized by the decree of court to exist in other persons. A duplicate of this certificate is then issued to the applicant. The statute declares that the title thus registered is absolutely conclusive on all persons—usually within a short period after the registration. However, to indemnify against losses those persons who might have an interest in the land and who inadvertently have not been made parties to the registration proceedings, the statute usually requires each applicant for registration to deposit with the court official a small percentage of the assessed valuation of the land. This sets up an assurance or indemnity fund out of which losses may be repaired.

Once the title to a tract of land has been registered all subsequent

²⁹ See TIFFANY, *REAL PROPERTY* (1912), §488; *The Empire Manufacturing Co. v. Spruill*, 169 N. C. 618, 620, 86 S. E. 522 (1915).

transactions affecting the title—to be valid—must be carried out according to statutory directions.³⁰ If the owner of registered land wishes to convey his interest therein he attaches a properly acknowledged but rather informal instrument of transfer to his certificate of title and delivers these papers to the grantee. The grantee presents these papers to the registration official who cancels the grantor's certificate, registers the title in the name of the grantee, and issues to the latter a duplicate certificate of his own title. The transfer of title is effective only from this registration.³¹

Extent of Use of Torrens System in the Various States.

Taking each state in the order, chronologically, in which a Torrens Act was passed for that state, we shall proceed to examine the extent to which this system of registration is being used in this country.³²

Illinois, 1897. The act has been adopted only by Cook County in which is located Chicago. About 20% or one-fifth of the area of all the land in Cook County is registered. The real value (as compared with the assessed value) of this land with improvements thereon aggregates at least a billion dollars. The Torrens office in Cook County is doing more business than any other office in the United States—transfers under the Torrens system aggregating annually about 15% of the entire number of transfers in that county. Statistics compiled by Mr. J. Scott Matthews, Chief Examiner of Titles for Cook County, show that up to August 31, 1927 there had been 18,774 original applications for registration of title filed, and 208,213 certificates of title issued; that the indemnity fund amounted to \$178,592.09, and that payments from this fund for losses claimed had amounted to only \$5,879.75 in over 28 years. He said that the value of property registered and the amount contained in each registration have been increasing each and every year.³³ A prominent attorney of Chicago said: "The Torrens Act is coming more and more into use."

³⁰ *Dillon v. Broeker*, 178 N. C. 65, 100 S. E. 191 (1919).

³¹ For a general discussion of the procedure to be followed in registering a title and transferring the same after registration, see TIFFANY, *op. cit. supra* note 29, at §§489, 490, 492 and 493; *State v. Westfall*, *supra* note 28.

³² The tabulation which follows, while not absolutely complete in statistical detail, is as accurate a compilation as could possibly be made. In addition to his own independent research, the writer has taken advantage of Professor Bordwell's previous investigation in the same field reported in his article: *Registration of Title to Land* (1927) 12 IA. LAW BULL. 114; also of the research conducted by the publication, LAWYER AND BANKER, reported in (1922) 16 LAWYER AND BANKER 37.

³³ MATTHEWS (1927) TORRENS AND REAL ESTATE DATA FOR COOK COUNTY, 12, 13, 14.

California, 1897. Of the eighteen counties in California in which the system is in use, the three or four southern counties seem to be most active in its adoption. An attorney writes: "It is only within the last ten years that any amount of land has been registered under the Act. In Los Angeles County about 2% of all land and about 7% of the occupied land has been registered under the act, and other parts of the state have a smaller percentage." Another attorney reports that little use of the system has been made in the northern portion of the state; that in Alameda County with a population of nearly half a million only 139 titles have been registered. He says: "In view of the number of years (35) that the law has been in force and of the fact that the county has been a growing and prosperous one, it is evident that the Torrens law has as yet proved of little use here."

Massachusetts, 1898. Although not statewide in its use, the system has probably been used more in Massachusetts than in any other state. In the metropolitan district of Boston—as in Chicago, Los Angeles, and Minneapolis—the system has been to a certain degree a success. Otherwise it has not held its own with the old system of recordation despite the fact that Massachusetts has a highly efficient land court and other machinery for the administration of the system. Complete statistics are lacking, but according to Professor Bordwell "the business of registration of title has increased." He shows that at the end of the twenty-fourth year of the system's existence in Massachusetts there had been 9,177 petitions for registration filed as compared with the 4,712 petitions filed during the first fifteen years; that at the end of twenty-four years there had been issued by the four largest registries in the state 40,198 certificates of title and that 111,601 documents had been registered.³⁴ The Massachusetts Land Court statistics for the year 1929 show 660 registrations and 480 post registration cases, with the assessed valuation of registered land for that year standing at \$9,888,413.61.³⁵

Oregon, 1901. Chief Justice McBride of the Supreme Court of Oregon says: "It is seldom used in this state."³⁶

Minnesota, 1901. A letter from a prominent Minneapolis attorney sums up the situation as follows: "It is used very extensively in the three larger counties of Minnesota, that is, St. Louis, Ramsey and Hennepin counties. In the outlying counties—about one-half of

³⁴ Bordwell, *op. cit. supra* note 32.

³⁵ (1930) 16 MASS. L. Q. 61.

³⁶ Christenson v. Christenson, 109 Ore. 396, 219 Pac. 615 (1923).

them—it is being used fairly extensively, and in the other half they do not seem to be very familiar with it yet.” In the three counties, mentioned in the letter, are located the great urban centers—Minneapolis, St. Paul, and Duluth.

Another attorney states that “in the 25 years this law has been in operation, there have been about 3900 original registrations in Hennepin County.” It is in this county that the use of the Torrens system seems most concentrated. August W. Skog, Register of Deeds and ex-officio Registrar of Titles for Hennepin County, has prepared a booklet on the Torrens System in which he shows a steady growth in the use of the system. His figures show that up to January 1, 1927, 20,594 lots had been registered in that county, and that the assurance fund amounted to \$8,272.23.³⁷

Still another attorney estimates that even in Ramsey County—one of the counties where the system is most extensively used—only about one per cent of the land has been registered in twenty-eight years.

Colorado, 1903. The system seems to be used quite extensively in six counties in the northeastern part of the state. It is used to some extent in other parts, but, as an attorney wrote: “As yet it has not received the sanction of the bar of this state except in certain localities.” Another attorney estimated “that roughly 1000 tracts of land had been registered under the provisions of the Act” during the 27 years of the system’s existence. He also wrote: “It is, in my opinion, being used less and less in this state as the years go by.”

It is quite interesting to note that, according to the figures compiled by “Lawyer and Banker,” Colorado has the highest percentage of transfers by registration of any state, 3%.³⁸

Washington, 1907. Reports from the state indicate that the Torrens Act “has never met with much favor” and that it “has been used but very little.” Of recent years title insurance has become very popular and is used in approximately 90% of all transfers. A Seattle attorney wrote: “I doubt if the Torrens system will ever be any more popular than it is at this time.”

New York, 1908. According to a New York attorney and official examiner of titles under the Torrens Act, the original Torrens law drafted in 1908 was “impractical and unworkable” and practically no titles were registered under it; but since the act was amended in

³⁷ SKOG, TORRENS SYSTEM OF LAND TITLES (1927) 13.

³⁸ (1922) 16 LAWYER AND BANKER 37.

1918³⁹ through the efforts of advocates of the system, it has been used quite extensively in one county during the past three years. That is Suffolk County occupying probably two-thirds of the area of Long Island. Professor Bordwell's research indicates that from 1908 to 1927 only forty-one titles had been registered in New York State.⁴⁰

North Carolina, 1913. Letters of inquiry regarding the operation of the system were directed to attorneys and registration officials in each of the 100 counties of the state. Replies received indicated that the system has been used more or less in 32 counties. Of these 32 counties 13 have registered only one title since the act was passed; the others have registered from 2 to 300 titles—by far the majority registering the smaller number. A generous estimate would place the total number of tracts of land registered in North Carolina at 500.

The system has been used chiefly in the counties of eastern North Carolina—Beaufort, Hyde, Tyrrell, Dare, Gates, Pamlico, Carteret, and Washington. In Washington County about 300 titles were registered in nine books; in Beaufort County 83 titles in 3 books.

The investigation showed that most of the registrations were made in the early years after the system was adopted; it has hardly been used in the last ten years. In those counties where the system is used most, registrations are on the decrease rather than on the increase. The Torrens law is practically a dead letter so far as this state is concerned.

Ohio, 1913. A law professor reports that a comparatively small amount of property has been registered under the system in Ohio; that "the act does not cut a large figure in land titles in this state." Its use seems to have been confined chiefly to new real estate developments in the city of Cleveland.

Mississippi, 1914. Reports from Mississippi attorneys indicate that the system has been used very little, if at all, in that state.

Nebraska, 1915. Judge H. D. Landis of the Fifth Judicial District of Nebraska writes that under the law of that state it takes 10% of the freeholders of a county to force the county boards to install the system; that relatively few counties have put in the system; and that where installed it is very sparingly used. An attorney reports that only a few tracts of land have been registered in York and Seward counties and in practically all the other counties of the state no land has been registered.

³⁹ New York Laws 1918, c. 572.

⁴⁰ Bordwell, *op. cit. supra* note 32.

South Carolina, 1916. A prominent attorney of Columbia, S. C., wrote in a letter dated March 8, 1932: "The Torrens statute was passed in this state a good many years ago, but so far as I know the system has never been used at all in this state." The *Lawyer and Banker's* table shows that up to August 25, 1922, only 71 titles had been registered.⁴¹

Virginia, 1916. Our Virginia correspondence brought no results. Professor Bordwell's research shows that up to 1927 not more than five tracts of land had been registered, and that the act was regarded in Virginia as a dead letter.⁴²

Georgia, 1917. A Waycross, Georgia, attorney wrote: "The Act has operated finely in our section and its worth has grown during the years. At the present time there are a great many land registration proceedings pending in the courts, and it now follows as a matter of course that the act is a good one and will remain. We have registered thousands of acres of wild lands in Southeast Georgia. . . . It has been used successfully and satisfactorily in other sections." However, a law professor reports that in Bibb County, Georgia, where the population is 100,000, the Act has been used only 58 times and that there are now five pending cases.

The *Lawyer and Banker's* table shows that seven-tenths of one per cent of the entire number of transfers in Georgia are made by registration under the Act. This is a relatively high percentage.⁴³

North Dakota, 1917. Letters from North Dakota attorneys indicate that the system has never been used in that state. One attorney said: "So far as our state is concerned it might as well not exist upon our statutory law."

South Dakota, 1917. A prominent attorney of Aberdeen, South Dakota, wrote: "It has been used practically not at all."

Tennessee, 1917. A leading legal firm of Memphis, Tennessee, wrote: "It is being used extremely little, if at all. Indeed, we do not know of a single instance in which it has been used, though there may be few."

Utah, 1917. Apparently only two parcels of land have been registered under the Act: one involving the real estate in a subdivision in the suburbs of Salt Lake City; the other a parcel of land in Salt Lake County. The attorney who caused the registration of these two

⁴¹ *Supra* note 38.

⁴² Bordwell, *op. cit.* *supra* note 32.

⁴³ *Supra* note 38.

tracts wrote: "As far as I know, no other land has ever been registered in this state."

The above tabulation shows pretty clearly that the system, throughout its thirty-five years of existence in this country, has at most been only sporadically successful; that even in those states where it has attained greatest success and can be said to be fairly permanently established—Massachusetts, Illinois, Minnesota, California, Colorado, and perhaps Georgia—its use has been confined to certain limited areas and has by no means been statewide in scope. With the possible exception of New York, North Carolina, and Ohio, the system—so far as any use of it at all is concerned—seems to have been almost a flat failure in the remaining thirteen states.⁴⁴

Classes of Owners Using System; Types of Property Torrenized.

Our investigation discloses the interesting fact that in localities where the Torrens system has been used, only limited classes of landowners have availed themselves of its advantageous provisions, and that only certain types of real property have been registered thereunder. The results indicate that the system has been utilized mainly where there have been clearly defined economic interests to be served.

In the eastern part of North Carolina where the system is most used, large tracts of forest-covered swamp lands have been bought up by large lumber corporations (mostly foreign) and the titles thereto registered for the purpose of establishing definitely the boundary lines, thereby obviating once and for all the possibility of boundary disputes and the acquisition of title to these lands by adverse possessors. When the timber has been removed, these lumber companies then have property which may be drained, cut up into farms and readily disposed of because the titles thereto have been made marketable through the registration proceedings. Before registration of the titles, the boundary lines of a number of these tracts of swamp lands were seriously in dispute due to the fact that the titles thereto grew out of grants made by the state. These grants either were not surveyed at all or were inaccurately marked off by surveyors because of the physical obstacles presented in traversing swamps. The writer was informed that in a number of instances these state grants, purportedly of separate tracts to different grantees,

⁴⁴ New York, North Carolina, Ohio, North Dakota, South Dakota, Tennessee, Utah, Virginia, South Carolina, Nebraska, Washington, Oregon, and Mississippi.

actually criss-crossed each other with reference to boundaries indicated in the grants.

Titles to the wild, mountainous tracts in the western part of North Carolina are in a similar state of confusion, but apparently no effort has been made by the owners to clear them up by registration.

The Torrens system has been used also by another particularized class of land-owners in North Carolina. Some years ago, the Swan Island Club, a Massachusetts corporation composed of wealthy Boston sportsmen, acquired as a hunting preserve nearly one thousand acres of small islands and marsh lands lying between Currituck Sound and the Atlantic Ocean. They had the title to this land registered under the Torrens law, but have had considerable difficulty in defining one of their boundaries which extends for two or three miles out into the open waters of the Sound.

The sparsely settled "Pine Belt" section of southeast Georgia has furnished an ideal situation for the operation of the act. Thousands of acres of these wild lands, owned in large tracts by few owners, have been Torrenized. Since actual possession of these lands by their owners is very impracticable, the registration law not only fixes the title and boundary lines of the property but also serves as a watch dog of the owners' interests against adverse possessors.

It is interesting to note that in the northern counties of Minnesota where there are valuable mineral deposits, the purchasers of mining property insist upon a registered title so as to settle definitely and conclusively in advance of any mining operations the status of the title.

In the eastern part of Colorado the Torrens law was utilized to clear up a rather bad title situation. It seems that this part of the state was settled under homestead, preëmption, and timber culture claims in the late eighties and early nineties. Nearly every man who acquired from the Government a quarter or half section of this land immediately placed a mortgage upon it running from \$250 to \$400 per quarter section. Inexperience in farming in a semi-arid region caused many of these settlers to fail in the business of making a living. Then to complete their ruin came the panic of 1893. It was a question of either starving or leaving their lands. They left in hordes. Tax liens added chaos to an already confused condition of the titles caused by the previous mortgage encumbrances. These mortgages had been "hocked" about in the eastern states, many had

been abandoned, the parties thereto had died and their heirs could not be found. When in 1900 a boom in these lands was again started by the development and promulgation of the Campbell system of farming semi-arid lands, the necessity for clearing up the titles became acute. The Torrens system was resorted to as the only adequate means of performing the task. The result was that in the eastern counties of Colorado, from about 1908 to 1918, probably a thousand quarters of land were registered under the system.

A somewhat similar situation, calling for the utilization of the Torrens law to clear up befogged titles, has arisen in New York state. In Suffolk County, covering probably two-thirds of the area of Long Island, there are vast tracts of land, vacant, wooded, or covered with brush, miles away from village centers and transit facilities. These tracts are in many cases abandoned by the original owners and are sold for unpaid taxes. The purchasers usually are development companies which subdivide these tracts into lots and sell the lots from maps which they file in the County Clerk's office. Since, however, the title insurance companies refuse to recognize the validity of these tax titles and decline to issue policies thereon, these development companies and other tax lot purchasers register their titles under the Torrens system to make them marketable.

We have ascertained that in Minnesota, also, persons buying land at tax sales assure themselves of valid titles by registration.

As has already been indicated, the Torrens system of registration has been used most extensively in the large urban centers of a few states—California, Illinois, Massachusetts, Ohio, and Minnesota. There is a definite economic reason for this. Real estate and development companies in Los Angeles, Chicago, Boston, Cleveland, St. Paul, Minneapolis, and Duluth have discovered that it is cheaper and safer to have registered under the Torrens law the titles to several tracts of land which they contemplate combining and platting into lots than purchasing the abstracts of each separate tract. When the development is registered and platted, the realtor then may offer to the purchaser of the individual lot not only a perfect, judicially-determined title thereto but may point out to him the saving effected by the latter not having to employ an attorney to examine the title to his lot. A new certificate of title for the lot is issued for the nominal sum of about \$2.50. Trading in realty is thus greatly facilitated and encouraged. And certainly the purchaser of valuable downtown real

estate with buildings located thereon, the title to which has been registered, has reduced his title risk to a minimum. In this connection it might be remarked that the city of Minneapolis now refuses to purchase real estate for its own use until the title has been registered under the Torrens law.

The only two tracts of land registered under the Utah Torrens Act, are, singularly enough, suburban developments in or near Salt Lake City.

Local conditions may incidentally facilitate the growth of the Torrens system in a given locality. For instance the success of the Torrens system in Chicago has been attributed in part to the fact that it helped untangle the confusion into which titles were thrown as a result of the destruction of title records by the great fire. In Minnesota the localization of the use of the system to the three large cities has been ascribed (and rightly so) to the fact that the first Minnesota statute⁴⁵ applied only to counties of over 75,000 population. Also, it seems that under the Minnesota law⁴⁶ the applicant for registration must pay the examiner's fees, ranging from \$20 to \$50 per registration, in all the counties outside of those in which St. Paul, Minneapolis, and Duluth are located; while in those three counties—Hennepin, St. Louis, and Ramsey—the examiner's fees are paid by the county. Professor Bordwell's research also indicates that many of the Minnesota abstracts are bad and do not accurately set forth the status of the titles;⁴⁷ hence the resort to the Torrens system.

Although included perhaps indirectly in the above categories, there is worthy of mention another group of landowners which has utilized to advantage the Torrens system. This group is composed largely of those individuals whose titles are technically defective as a matter of record and are therefore unmarketable. A particularly active real estate market may cause them to turn to registration under the Torrens law as an effective means of removing the clouds on their titles. This is especially true in those states like Minnesota, Illinois, and Massachusetts where not only attorneys but also clients are coming to appreciate and understand the advantages of a registered title. A prominent Duluth attorney writes: "Both attorney and client reason that it costs no more than some other form of proceeding and that the client gets something of value for his expenditure over and

⁴⁵ Minn. Laws 1901, c. 237, §1.

⁴⁶ MINN. GEN. STAT. (1923) §8258.

⁴⁷ Bordwell, *op. cit. supra* note 32.

above the mere curing of the defect, *i.e.*, a registered title in place of an unregistered one, the former being considered the more valuable."

A clerk of the Superior Court in one of the counties in eastern North Carolina called the writer's attention to the fact that in several instances the heirs of a deceased person had invoked the aid of the Torrens law to clear up defects in an otherwise hopelessly muddled record title. It is in this section of the state that the Torrens system is best known and understood.

From our researches, therefore, it is fairly evident that the Torrens system is being made to serve best those *present* landowners who will profit most by its use.

Some Reasons for Non-User of the System.

It is not at all surprising that the Torrens system throughout its life has had but sporadic success and has never attained any great degree of popularity. Many and varied are the forces and factors that have been and still are at work to prevent its widespread adoption by the landowning public. Many reasons have been assigned for the non-user of the system. Some of them are more illusory than real; most of them are very convincing and go to substantiate the proposition that *without popular support* a law cannot have an effective operation. Reports from the various states which have adopted Torrens' legislation have furnished us with interesting material for study, analysis and tabulation.

In the first place, it must be borne clearly in mind that in no state is the use of the Torrens system of registration compulsory. It is entirely optional with the landowner whether or not he will avail himself of the law to register his title; his exercise of the option is dependent upon and determined by many factors. In the second place, it must be remembered that the Torrens system is competing in each of the nineteen states with a well-established, well-known and fairly satisfactory recordation system; that upon a competitive basis the new registration system must win its way to popularity. It is the struggle of the new against the old, the unestablished against the established.

Now for the specific reasons assigned for the failure of the system to take root and grow. The general land-owning public—obviously the people most affected—is said to be ignorant of the law, its purposes and claimed advantages over the recordation system, and of the practical operation of the law with reference to the registration and transfer of titles under it. As a general proposition this is un-

doubtedly true. In the majority of the states where the law is in force the average citizen does not even know that statutory provision is made for another method of registering land titles than the one with which he is generally familiar.⁴⁸ A North Carolina lawyer wrote that during the twenty-six years of his practice only one client had made inquiry about the system. (The law has been in force in that state nearly twenty years.) This ignorance is readily understandable. The ordinary layman knows very little about the technical operation of laws, and he will not unnecessarily exert himself to discover and understand the operation of a new law governing land titles especially when the option of its use lies with him. Again, the layman can hardly be expected to appreciate and understand a new and technical procedural device for registering titles if the only professional group to which he can turn for advice and education has not intelligently informed itself as to the operation of the law. If the lawyer is ignorant the client will be ignorant. And for various reasons, some of which we shall point out later, the legal profession certainly has not adequately educated itself with reference to the Torrens law. One attorney who had been practicing law some fifteen years confessed that he had not even read the Act of his state.

The reason most frequently assigned for the failure of the lay public to utilize the Torrens system is *inertia*. As just pointed out, this may be due to ignorance, or it may be traced to more tangible sources. The failure of the system may be attributed in part to the hesitancy of land-owners to depart from the old and well-known system of recording and transferring titles—however unsatisfactory it might be—and to begin to use a radically different system with which they are altogether unfamiliar and of which they are naturally suspicious. The natural conservatism of the public to changes in the law stands out in bold relief particularly in the face of proposed alterations in the law affecting titles to real property. The landowner simply will not depart abruptly from the present system deep-rooted in history and tradition as the accepted way of handling titles. One North Carolina register of deeds wrote: "The present system is sufficient. To change it would be like changing the Constitution. The people are satisfied with the one hundred and fifty year old system." A lawyer from the same state wrote that people were suspicious of

⁴⁸ Letters received indicate that this situation obtains in Tennessee, Washington, Colorado, Nebraska, Georgia, Utah, Minnesota, Illinois, South Dakota, North Carolina, and South Carolina.

this new, "wild" scheme; that they suspected it of being a means whereby rich men could seize the lands of the poor and whereby lawyers could derive more fees. A California attorney points out "that the majority of purchasers of real property are conservative and this conservatism has contributed materially to the difficulty of a normal development of the system and has produced an apathy. . . . Also, in California a large percentage of prospective buyers are newcomers from the middle western states where the Torrens system is unknown, and in them, as in the majority of other persons, suspicion is aroused where the seller can only tender a certificate and cannot offer a deed."

Needless to say, the ultimate success of the system will depend to a great extent upon the overcoming of this opposition to innovation, especially in the law of real property.

This natural apathy to change may be heightened by the presence of very positive, practical considerations and influences. Certainly the landowning public has been very much prejudiced against adopting the new system through derogatory propaganda as to its practicability and effectiveness instigated and broadcast by title lawyers, banks and mortgage companies, and by title insurance and abstract companies.

The fact that the Torrens system has been used very little or not at all in a number of states where adopted indicates that there probably was never any timely demand for it. Without question the law appears to have been still-born in several jurisdictions. The purpose of a legislature in passing a particular statute is highly conjectural. In theory it is supposed to be in response to a social demand sanctioned by a majority of the people—a crystallization of popular consciousness as to a particular need. This was probably not the controlling factor in the passage of the Torrens law in the several states. Rather its enactment appears to have been mainly due to high-pressure salesmanship by the representatives of special interests or to the ill-timed advocacy of an idealistic minority who had faith in the new system and thought it would work.⁴⁹

⁴⁹ Only in North Carolina were we able to find any intimation as to why the Torrens Act was passed in a particular state. In *Cape Lookout Co. v. Gold*, 167 N. C. 63, 65, 83 S. E. 3 (1914), the Court said: "This Torrens System was adopted at the wish of the landowners of the state, as evidenced by the proceedings of the Farmer's Union, the Chambers of Commerce of many cities, and other organizations."

A lawyer from the eastern part of North Carolina informed us that the law was originally advocated by the farmers of the state. "It was thought by a

The law seems to have been passed in advance of any substantial or widespread popular demand for it in Utah, North Dakota, South Dakota,⁵⁰ Colorado, Nebraska and perhaps other states. Letters from attorneys in the states mentioned definitely ascribe the non-user of the Torrens system to the fact that since those states are comparatively young, the land titles generally are simple, short, and not complicated. Valid abstracts are easily and inexpensively procured and there is no need for a rather expensive judicial proceeding for the determination of the title. A law professor of the University of North Dakota writes that the records of titles in that state are so reasonably correct that there is no demand for the services of title insurance companies. A University of Utah law professor states: "We have an excellent recording system, much better than in most states. Title insurance companies cannot succeed as well here for that reason and no doubt it has also a bearing upon the use of the Torrens system."

There seems to be no great demand for the Torrens system in rural communities for the reason that rural tenures are long-termed, there are infrequent title transfers, and most titles, if perhaps originally defective, have been perfected by adverse possession. This may be one explanation as to why the active use of the system has been limited largely to the urban centers. A Minnesota attorney points out that "the urban interests wanted the Torrens system and the rural did not." One of our North Dakota correspondents writes: "This state being primarily an agricultural state, the number of transfers or land turnovers is limited. Many of the original homesteaders still retain the title to their homesteads. As to the other tracts the heirs or devisees of the original homesteader are in possession of the property." For reasons similar to those just mentioned it would seem that the unpopularity of the system could in part be accounted for in other primarily rural and agricultural states such as South Dakota, North and South Carolina, Virginia, Tennessee and Mississippi.

great many intelligent farmers that if their lands were registered under the Torrens System they could take the certificates of title and hypothecate them with the banks for loans just the same as they would certificates of stock in some corporation. Of course this could not be done."

⁵⁰ That this was the situation in South Dakota is pointed out by an attorney of that state who said: "There was a lack of demand on the part of the public for registered titles. The great mass of property owners here are unacquainted and unfamiliar with such a system, and the act in question was enacted before or in advance of any substantial demand therefor."

A very potent reason why the average landowner does not register his title is the fact that the registration proceedings savor strongly of a lawsuit. The status of his title must be determined in a judicial proceeding, and, by virtue of certain constitutional requirements regarding due process, notice of the suit must be given to all parties whose interests are likely to be affected by the decree of the court. The owner of property, the title to which is in a state of quiescence and is reasonably well-established according to the public records, hesitates to extend a call to the world at large and to his neighbors (the adjoining owners) in particular to come forward and present any objections they may have to his ownership of the land. Real lawsuits and bad feelings are likely to flow from the attempt under the registration proceeding to fix boundary lines *definitely*. This would be especially true in the older states like North Carolina where surveys in the rural districts have been made, and corners located, in a somewhat careless and inexact manner but where the owners have approximately established their lines by long-continued possession.⁵¹

“Let sleeping dogs lie” is an expression often used in this connection. The man is a fool, it is said, who voluntarily by means of a judicial proceeding will expose to the world the defects of his title which, if let alone, might be cured by the lapse of time. His adverse possession might ripen into undisturbable possession and therefore title. A title considered marketable might be revealed as unmarketable because of the existence of certain claims which if not publicized might be wiped off the slate by time.

Another reason why the average individual has shied away from the Torrens system is that the initial cost incurred in registering his title is too great.⁵² In Illinois the cost of initial registration of property valued at \$1000 or less (where the abstract thereof is down to date) is \$21.00. This includes the Circuit Court docket fee of \$5.00, examiner's fee of \$5.00, indemnity fund payment of \$1.00, publication costs (average) of \$7.00 and first certificate of title fee of \$3.00. If the property is valued at more than \$1,500 there must be added \$10.00 more to the examiner's fee, and for each additional \$1000 valuation of property registered \$1.00 must be added to the indemnity

⁵¹ Several North Carolina lawyers suggested that on this account the Torrens system might be more practical for those states where land is laid off in sections and quarter-sections according to accurate government surveys.

⁵² This is one of the main reasons given for the failure of the system to attain popularity in Minnesota, Ohio, Tennessee, Washington, California, Georgia, Mississippi, Illinois, North Carolina, and South Dakota.

fund payment. If the abstract of title is not down to date, the additional cost of making it complete must be reckoned with. In Minnesota the cost to an applicant for registering a title under the Torrens system, the assessed value of the land not exceeding \$1000, is approximately \$18.75. Greater valuations would increase this amount at the rate of one dollar for each additional one thousand dollar valuation, or major fraction thereof, plus one-tenth of one per cent of the assessed valuation exclusive of improvements. The costs in other states will run about the same as in the two states mentioned. These costs do not include attorney's fees which will average between \$50 and \$75 for each proceeding instituted. This seems to be a reasonable fee since the registration of a title involves a special court proceeding which requires time, technical skill, and accuracy.

It will be seen, therefore, that the total cost for the registration of a thousand dollar lot will amount to between \$70 and \$100. This first cost will fall entirely upon the present owner. Unless his title is defective and unmarketable or there is some other pressing economic need, he does not feel justified in incurring this expense for the benefit of those who may subsequently acquire the title.⁵³ This one factor has been a real deterrent to the widespread adoption of the system.

It has been said that the landowner has objected to the system because he has found it unwieldy, complicated, and cumbersome in operation. His lack of education as to its purpose and use may account largely for this attitude.

In some instances the layman has had some rather sad experiences in using the system. Our correspondence shows that this has been particularly true in California. A Los Angeles attorney writes us that on several occasions, after the landowner had registered his land and had considered his title conclusive and unimpeachable, the appellate courts had held the registration decree either void on its face or not binding on certain persons not properly served with notice of the proceeding.⁵⁴ A California law-school professor wrote that the Torrens act insurance fund in that state had been made bankrupt some time ago by a judgment against it for a large sum, "so that it is not at present giving the protection which it was intended should be

⁵³ A Denver, Colorado, attorney wrote: "I have never known an instance where a man registered a perfect title solely for the purpose of having it under the Torrens System. If a title is found to be good, it is let alone."

⁵⁴ *Petition of Furness*, 62 Cal. App. 753, 218 Pac. 61 (1923); *Follette v. Pacific Light and Power Corporation*, 189 Cal. 193, 208 Pac. 295 (1922).

rendered by it." These cases, it is pointed out, "have made it necessary that a title search by a title insurance company be had and have resulted in a real and justified impairment of the alienability of registered land."

The loss of a title certificate, entailing inconvenience and the cost of procuring a court order for the issuance of a new one, has put a bad taste in the mouth of the registered owner. Also several instances have been called to our attention where a registered landowner has confused his title by attempting to convey his property under the old recording system.

Another reason assigned for the lack of user of the Torrens system is that, even though a title be defective, the owner finds it preferable and less expensive to use the simple, efficient and better known suits to remove cloud on title. This was ascertained to be the situation in North Carolina, North Dakota, South Dakota, Ohio, Mississippi and Tennessee.

The failure of the Torrens system to function in the state of Washington is attributed to the fact that title insurance has become a very popular method of facilitating land transfers. Approximately ninety per cent of all transfers in the state are under title insurance which is less expensive than registration of the title. Abstracts are still used in large transactions.

Opposition of Legal Profession.

The legal profession may be held accountable, to no small extent, for the failure of the Torrens system.

Our survey shows that in a number of states⁶⁵ the legal profession as a whole knows little or nothing about the procedure of registering a title under the Torrens law. The ignorance and consequent inertia of the lawyer in this matter may be attributable to several causes. One of them certainly is his conservatism,—his fear of unbeaten paths, his imperviousness to innovation particularly in procedural matters. Satisfied with the present method of recording and transferring titles, he balks at the expenditure of time and energy requisite to a thorough knowledge of the new system. One can understand this disinclination on the part of those lawyers who have no practice in real estate law and would not be pecuniarily benefitted by a knowledge of the Torrens law. Other lawyers have felt that

⁶⁵ North Carolina, South Carolina, Mississippi, Utah, South Dakota, Tennessee, Georgia, Minnesota, and Colorado.

the fees to be gained in handling a registration proceeding were hardly adequate to compensate them for the time, trouble and risk involved. A Minnesota attorney said: "A Torrens case to an inexperienced lawyer is an almost total loss to him from a financial standpoint. If he blunders ahead without much study, he makes errors that may cost him many times his fee as well as costing him his client and a considerable part of his reputation."

Many attorneys have condemned the Torrens system as being "complicated, cumbersome, and impractical" and therefore have not studied it or recommended its use to their clients. This attitude seems somewhat expressive of a defense mechanism—a justification for not travelling new procedural highways.

As we have pointed out before, if the lawyer has not familiarized himself with the Torrens system as a working tool and has marked it off of his list of procedures to be recommended to clients, the land-owning public can hardly be expected to understand and avail itself of the new system.

The legal profession—and especially those members of it engaged in title searching and abstract work—has vigorously opposed the system on the ground that its general use will deprive them of much revenue derivable from practice under the present system. This fear of economic deprivation (whether groundless or not) gave birth to a prejudice against the system from the beginning, which prejudice has greatly impeded its widespread adoption. Perhaps this fear is more illusory than real. Since the registration of title is a judicial proceeding requiring the services of a lawyer and since transactions subsequent to the registration call for legal advice and assistance, it does not seem that the revenues of the legal profession would be seriously impaired by the general adoption of the Torrens system.

From a North Dakota attorney came a rather interesting explanation of the hostility of the legal profession to the Torrens law. He wrote: "In our opinion a great deal of the hostility to the act arises from the fact that North Dakota adjoins some of the Canadian provinces which have adopted the act. There is considerable contact with these Canadian provinces on the part of residents of North Dakota. Those of us who have had to deal with Canadian titles certainly have not found our experience with the Torrens Act a very satisfactory one."

Some opposition to the system on the part of administrative officials has been found. Recorders and registers of deeds, not conver-

sant with the law, have denounced the system as complicated. They, through ignorance, have made mistakes in registering titles and transfers and have prejudiced users of the system against it on that account. This has happened in Minnesota, in California, and in North Carolina. In Minnesota, registers of deeds are also abstractors of titles and these officials fearing loss of revenue have reacted unfavorably to the system.

Opposition of Mortgage Loan, Title Insurance and Abstract Companies.

Without question the most active and bitter enemies of the Torrens system are the title insurance and abstract companies, mortgage loan companies, banks lending money on real estate, and attorneys allied with these interests. From thirteen states⁵⁶ comes the report that the unpopularity of the Torrens system is due largely to the constant warfare waged against it by these units. They have felt that the success of the Torrens system would ultimately destroy their business, which of course has been developed on the basis of the present recordation system. Their income is derived chiefly from the examination of titles, the preparation of abstracts, and the issuance of title insurance. To the purchaser of land under existing conditions reasonable certainty of title depends upon one or all of these items. The adoption of the Torrens method of registration would to a great extent obviate their necessity.

With definite economic interests imperilled, the title insurance and abstract companies and other allied concerns have utilized every available method to throttle the menace. They have fought the passage of Torrens laws by the legislatures; and, while in some instances they have been unsuccessful in preventing the enactment of the laws, they have succeeded in their lobbying activities to the extent that the acts as finally passed were destined to failure in operation because too technical, too cumbersome, and too expensive.⁵⁷ A New York lawyer informs us that the first Torrens law passed in that state was drawn up by a law professor in the employment of the title companies association at a salary of \$10,000 a year. "When the legislature con-

⁵⁶ North Carolina, North Dakota, Ohio, Massachusetts, Tennessee, Washington, Oregon, California, Colorado, Minnesota (A prominent Minnesota attorney attributes 85% of the opposition to the system to the above named interests), New York, Nebraska, and Utah.

⁵⁷ "In the state of Washington, when it became apparent that the Torrens Act would pass, the abstract companies had it amended in such fashion that the original expense of Torrens registration was made excessive in that it required a complete abstract of title to be furnished the Registrar." So wrote a Washington attorney.

vened, the title companies' bill was passed and made into law. It was, of course, impracticable and unworkable, as the sponsors of the bill intended it should be."

These concerns, with selfish interests to serve, have by their propaganda created not only an apathetic but even a consciously hostile attitude on the part of the public toward the system. In their conventions,⁵⁸ through their publications, and by private contacts these business units have created hostility to the system by pointing out and emphasizing its alleged unfairness, its complexity and cumbersomeness, its expense, and the non-conclusiveness of titles registered under it. A Minnesota attorney has vigorously summarized the situation in these words: "They keep up a continuous campaign against it both by blatant propaganda, by a whispering campaign, and by vicious and malicious misrepresentation of the effects of the system, and by distortion of the effects of legal decisions."

In addition to their purely propagandic activities, the loan companies and the abstract and title insurance companies in several states have placed concrete stumbling blocks in the paths of those who might be interested in using the Torrens system. In California the forms of mortgages and trust deeds have provisions inserted therein forbidding the registration under the Torrens Act of the property secured and declaring that a recordation under the act will constitute a default under the mortgage or trust deed. The forms that are commonly used are printed and furnished by the title companies and local banks, and the interests of the two are so closely intertwined one rarely finds a form of mortgage or trust deed that does not contain such an inhibition. In Nebraska loaning companies will not take a Torrens certificate alone but insist upon the entire chain of title and a record of all proceedings. In Cook County, Illinois, one abstract company issuing guarantee policies had such a monopolistic control of that business it tended greatly to curb registration activities. In the greater city of New York the title companies control about ninety per cent of the mortgage business, and they have made it very clear to the public that they will not recognize Torrens titles. In North Carolina the writer was informed by a registration official of Beaufort County that the Federal Land Banks in making loans would not accept Torrens certificates unaccompanied by complete abstracts of title.

⁵⁸ A Colorado attorney wrote: "I have never known a title insurance company or convention of these men that did not spend at least a fair portion of the time condemning the Torrens System of land registration."