

## TORRENS TITLES AND TITLE INSURANCE

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### I. HISTORICAL

Under the system of recording established in Pennsylvania since the days of William Penn, the title to real estate is subject to all defects in its entire recorded history. The object of the Torrens system of land registration is to procure the transfer of title to real estate with speed and safety at reduced costs. The question to be considered is whether this system, if adopted in Pennsylvania, would have such an effect, or whether it is not in the best interest of the public that the use of corporate title insurance, under reasonable regulations, be extended and the recording system retained.

Under the English Merchants' Shipping Law, a page in a registry was given to each ship registered. Here was listed the name and description of the ship, the name of the owner, and any liens or encumbrances. A certificate, being a duplicate of this page, was given to the owner. This certificate constituted his evidence of ownership. All liens or claims against the ship were required to be noted on the registry page so that the status of the title could be ascertained by an inspection thereof. To transfer such a title, the holder assigned his certificate, which certificate was taken to the registry office, where the old certificate was cancelled, the old registry page closed, and a new registry page opened. A copy of the new registry page, in the form of a duplicate certificate, was furnished to the new owner. This procedure made it unnecessary to examine prior cancelled certificates or to consider the legality of prior transactions in order to determine the sufficiency of the title.<sup>1</sup>

A commission in England appointed to consider the law of real property, suggested in 1830 that a registry of title to land be established on the same principles as a registry of stocks. This is the first reference to a plan for registering titles of which there is any record in England.<sup>2</sup>

While Commissioner of Customs in South Australia, Richard Torrens observed the comparative ease with which the transfer of ships was consummated. Subsequently, becoming a Register of Deeds, he endeavored to apply this plan to the registration of titles in place of the old system of registration of the deeds. In 1857, while a member of the Colonial Ministry of

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1. Patton, *The Torrens System of Land Title Registration* (1935) 19 MINN. L. REV. 519, 520.

2. NIBLACK, *AN ANALYSIS OF THE TORRENS SYSTEM OF CONVEYING LAND* (1912) 7.

the Province of South Australia, he introduced a bill for the registration of titles to real estate which became the law of South Australia in 1858.<sup>3</sup> There have been many amendments to and revisions of the original Torrens Law in Australia.<sup>4</sup>

The first state in the United States to seek to adopt the Torrens system of land registration was Illinois.<sup>5</sup> This act was declared unconstitutional on the ground, *inter alia*, that the provision authorizing the registrar to examine the facts in relation to the title and to issue a certificate of ownership was a prohibited delegation of judicial power. It was held that the registrar's certificate would be, in effect, an adjudication that the person named therein was the owner of the fee.<sup>6</sup>

A statute adopted by Ohio in 1896<sup>7</sup> did not require one known to claim the title in fee simple adversely to the applicant to be named in the application, nor to be notified of the proceedings. As to him, the only requirement was notice by publication. This act was likewise held unconstitutional.<sup>8</sup>

Illinois, in 1897, enacted the first statute establishing the Torrens system which has been held constitutional.<sup>9</sup> This act required ownership of the property to be determined by a decree entered in a court of competent jurisdiction and imposed upon the registrar the duty of issuing the certificate of registration upon the decree. The contention that this act permitted a ministerial officer to perform judicial functions was held untenable.<sup>10</sup> The mere fact that an act requires a registrar to inquire into the existence of certain facts and to apply the law to them for the purpose of determining what his official conduct shall be, or the fact that the action of the official may affect private rights, does not, strictly speaking, constitute an exercise of judicial power. The act of the examiner in passing upon title relieves the judges of onerous duties, and of course the court is presumed to review the opinion of its examiner and is not bound by his conclusions. Massachusetts in 1898 established a separate court known during its first years as "The

3. Australia Acts 1857-1858, no. 15, cited in NIBLACK, *op. cit. supra* note 2, at 8.

4. HOGG, AUSTRALIAN TORRENS SYSTEM (1905).

5. Ill. Laws 1895, p. 107. See 3 DEVLIN, THE LAW OF REAL PROPERTY AND DEEDS (3d ed. 1911) 2607.

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

7. Ohio Laws 1896, p. 220.

8. *State v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551 (1897). Thereafter, the Ohio Constitution was amended and a new statute adopted. See OHIO CONST. art. II, § 40; OHIO CODE ANN. (Throckmorton's Baldwin, 1934) § 8572-1 *et seq.*

9. Ill. Laws 1897, p. 141. See *People v. Simon*, 176 Ill. 165, 52 N. E. 910 (1898).

10. See *Constitutionality of Provisions of Torrens Law for Constructive Notice* (1921) 11 A. L. R. 772. The annotator concludes "The danger to vested rights involved in taking away a title without personal notice to the owner is not lessened by the judicial reassurance that the courts will protect the absent." *Id.* at 775. See also *City of New York v. Wright*, 243 N. Y. 80, 152 N. E. 472 (1926).

Court of Registration", now as "The Land Court".<sup>11</sup> However, as one authority has pointed out, these laws differ materially from those proposed by Sir Robert Torrens.<sup>12</sup>

Nineteen states, as well as Porto Rico, Hawaii and the Philippines, have enacted laws pertaining to the Torrens system of land registration.<sup>13</sup> However, with the exception of Cook County, Illinois, Los Angeles, California, and the states of Massachusetts and Minnesota, the law is not in use to any great extent.<sup>14</sup> Even in Chicago, Los Angeles and Massachusetts, the record titles greatly exceed the Torrens titles.

## II. STATUTORY PROVISIONS

The subject of title registration was considered by the Commissioners on Uniform State Laws from 1903 to 1916, and in 1916 the American Bar Association endorsed the Torrens system.<sup>15</sup> In describing the system, the plan as recommended by the Commissioners on Uniform State Laws<sup>16</sup> will

11. Mass. Acts 1898, c. 562. The constitutionality of this act was sustained in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N. E. 812 (1900). The present act will be found in note 13, *infra*.

12. "The act as drawn by him (the drafter of the Massachusetts act) is not a Torrens act. The very foundation of our land registration system is the one thing which it was the purpose of Sir Robert Richard Torrens to get rid of, namely, a judicial proceeding." Davis, Chief Judge of the Land Court of Massachusetts, quoted in TANNER, REGISTRATION OF TITLES TO REAL ESTATE IN MASSACHUSETTS, ILLINOIS AND CALIFORNIA, AND SUGGESTIONS APPLICABLE TO NEW YORK (1935) 6.

13. 3 CAL. GEN. LAWS (Deering, 1931) tit. 601, acts 8609, 8610, and see also *id.* at tit. 599, act 8589; 2 COLO. ANN. STAT. (Courtright's Mills, 1935) c. 40, art. 5; GA. CODE (1933) tit. 60; 27 ILL. STAT. ANN. (Callaghan, 1936) c. 132; 2 MASS. GEN. LAWS (1932) c. 185; 2 MINN. STAT. (Mason, 1927) c. 65; MISS. CODE ANN. (Hemingway, 1927) §§ 6124-8167 [repealed by MISS. CODE (1930) § 3]; NEB. COMP. STAT. (1929) c. 76, §§ 701-798; N. Y. CONS. LAWS (Cahill, 1930) c. 51, §§ 370-435; N. C. CODE (Michie, 1935) §§ 2377-2428; N. D. COMP. LAWS (Supp. 1925) §§ 5604a1-5604a82; OHIO CODE ANN. (Throckmorton's Baldwin, 1934) §§ 8572-1—8572-118; 3 ORE. CODE ANN. (1930) tit. 63, §§ 63-301—63-3108; S. C. Acts 1916, p. 942 [omitted from S. C. CODE (1932), and repealed under S. C. CONSR. art. 6, § 5]; I S. D. COMP. LAWS (1929) §§ 3060-3143; I TENN. CODE ANN. (Shannon, 1917) §§ S-3793—S-3796 [repealed by TENN. CODE (1932) § 2]; UTAH COMP. LAWS (1917) §§ 4820-5008 [repealed by UTAH REV. STAT. ANN. (1933) tit. 88, c. 1, § 2]; VA. CODE ANN. (1930) § 5225; II WASH. REV. STAT. (Remington, 1933) tit. 7, §§ 10622-10726.

On November 2, 1915, an amendment was adopted to the Constitution of Pennsylvania authorizing legislation providing for a system of registering and insuring land titles by the state or counties thereof. PA. CONST. (Purdon, 1930) 522. This amendment has not been assigned to any definite section of the constitution.

14. In California, Colorado, and Illinois, the total registration is said to be approximately one per cent of aggregate transfers. But in Massachusetts approximately ten per cent of the titles are registered under the Land Court. TANNER, *op. cit. supra* note 12, at 19; McCall, *The Torrens System—After Thirty-five Years* (1932) 10 N. C. L. Rev. 329, 333. The Torrens law has been practically a dead letter in San Francisco, but in Los Angeles County out of approximately 1,200,000 parcels of land separately assessed for taxation, around 8,500 are registered under the Torrens plan. TANNER, *op. cit. supra* note 12, at 44-49. In Minneapolis, a substantial number of properties are registered thereunder. PATTON, MANUAL OF TORRENS PROCEDURE (1936) 27, 29. In North Carolina, large tracts of swamp land purchased by lumber companies have been registered under the Torrens system for the purpose of defining boundaries and attaining a legal defense to the claims of squatters. Land development companies throughout the United States have likewise registered title to unimproved tracts. McCall, *supra*, at 337, 339.

15. 41 REP. AM. BAR ASS'N (1916) 428.

16. Uniform Land Registration Act, 9 U. L. A. 217. See THOMPSON, ABSTRACTS AND TITLES (2d ed. 1930) §§ 796, 797, for miscellaneous provisions common to all statutes and provisions as to which statutes vary.

be considered and no attempt will be made to discuss in detail the differences in the existing legislation. The basic principle of this system is the registration of the title to land instead of, as the old system requires, the evidence 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 case, the evidence from which the prospective purchaser, or the company insuring his title, must at their peril draw such conclusion is registered.<sup>17</sup> The purpose of the Torrens law is to create a judgment in rem, perpetually conclusive.<sup>18</sup>

The Uniform Land Registration Act establishes a court of land registration for the purpose of settlement, registration, transfer and assurance of title.<sup>19</sup> The clerks of these courts are constituted registrars of title who are authorized, under the direction of the court, to issue process and enter the court's decree touching land in their respective communities, as well as to enter and issue certificates of title.<sup>20</sup> The courts are given power to appoint attorneys at law as examiners of title to search the records, investigate all facts stated in the petition or otherwise brought to their notice in any case, and to make a report to the court with a certificate of their examination of title and findings of fact.<sup>21</sup>

Suits for registration of title are begun by a petition to the court by a person or persons claiming an estate in fee simple to the land,<sup>22</sup> which petition is required to set forth, inter alia, the name and marital status of the petitioner, a description of the land and improvements thereon, and all known liens, interests and claims, adverse or otherwise, vested or contingent, as well as the full names and addresses, if known, of all parties who may claim an interest, including the adjoining owners.<sup>23</sup>

This petition is referred by the court to an examiner of title,<sup>24</sup> who, after notice by publication and summons, hears the parties, receives evidence,<sup>25</sup> and submits a report to the court. This report includes an abstract of title to the land, such extracts from the records as will enable the court to decide the question involved and the names and addresses, as far as has been ascertained, of all persons interested in the land as well as adjoining

17. *In re Bickel*, 301 Ill. 484, 134 N. E. 76 (1922); State *ex rel.* Wallace v. Westfall, 85 Minn. 437, 89 N. W. 175 (1902).

18. *Smith v. Marion*, 69 Misc. 108, 124 N. Y. Supp. 1064 (Sup. Ct. 1910).

19. Uniform Land Registration Act, § 4, 9 U. L. A. 224. In Illinois the statute contemplates setting up a separate unit within the recorder's office pertaining to the registration of titles, thus making the recorder of deeds the registrar of titles and combining in the same office the dual function of recording evidences of title and of registering Torrens titles. ILL. REV. STAT. (Cahill, 1933) c. 30, ¶ 49.

20. Uniform Land Registration Act, §§ 14, 15, 9 U. L. A. 226-227. The following footnotes all refer to the sections of said Uniform Land Registration Act therein specified.

21. § 16, 9 U. L. A. 227.

22. § 17, 9 *id.* 227.

23. § 21, 9 *id.* 228.

24. § 25, 9 *id.* 229.

25. § 16, 9 *id.* 227.

owners and occupants, showing their several interests and indicating upon whom and in what manner process should be served or notice given.<sup>26</sup>

Upon the filing of the report of the examiner of titles, the court requires notice thereof to be given to all persons shown therein to be entitled to it, in addition to notice by publication<sup>27</sup> and by posting.<sup>28</sup> A copy of the order of publication must be mailed by registered letter to every interested person named in the petition or in the report of the examiner of titles whose address is given or known.<sup>29</sup> Personal service of process is required upon residents of the state not under disability who are made known to the court before final decree and can be reached by its process, unless such service is waived.<sup>30</sup> Any person having any interest in or claim against the land, whether or not named in the petition and order of publication, may appear and file an answer.<sup>31</sup>

If the court after final hearing is of the opinion that the petitioner has title proper for registration, a decree of confirmation and registration is entered which binds the land, quiets the title, and is forever binding and conclusive upon all persons, resident or non-resident, including the state, whether mentioned by name in the order of publication or included in the general description "to all whom it may concern". This decree may not be attacked or opened or set aside by reason of the absence, infancy, or other disability of any person affected by it, nor by any proceedings at law or in equity for rehearing or reversing judgments or decrees, except as provided in the statute.<sup>32</sup>

Every decree of initial registration and subsequent memorial must be in prescribed form, showing the details with respect to ownership and disability of the parties. It must contain a description of the land, the estate of the owner, and the liens and encumbrances upon it, and must be prepared, recorded and indexed.<sup>33</sup> When this decree or memorial is registered, it

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26. § 26, 9 *id.* 229. The examiner usually requires a complete abstract showing the complete chain of title and such additional proof as is deemed pertinent. "In some states, the abstracters and title companies that first opposed the system on the supposition that it menaced the continuation of their business have found that any such result is remote and that abstract continuations required for initial registration proceedings more than offset their loss of business because of lack of need for abstracts in subsequent transactions." PATTON, *op. cit. supra* note 14, at 25.

27. § 27, 9 U. L. A. 230. In Minnesota, the statute divides the defendants, for the purpose of service, into five classes: residents of the state, non-residents of the state, the state, defendants of unknown address, and "all other persons or parties unknown claiming any . . . estate . . . in the real estate". The summons is required to be served as in a civil action upon all defendants who are residents of the state except those of unknown address. 2 MINN. STAT. (Mason, 1927) § 8262.

28. § 29, 9 U. L. A. 230.

29. § 28, *ibid.*

30. § 31, *ibid.*

31. § 36, 9 *id.* 231.

32. § 44, 9 *id.* 234. For discussion of the conclusiveness of a Torrens title, see *infra* part III.

33. §§ 45, 47, 9 *id.* 234, 235.

constitutes the original certificate of title<sup>34</sup> and, when entered by the registrar of titles in the appropriate title books, is conclusive evidence of all matters therein contained, except as otherwise provided in the act.<sup>35</sup> A duplicate copy of the certificate of title is delivered to the owner.<sup>36</sup>

The procedure pertaining to a voluntary transfer of registered title is simple and convenient, in contrast to the procedure for initial registration. When the owner of registered land agrees to dispose of his interest, he delivers a deed to the registrar and relinquishes his duplicate certificate for registration. A new certificate is issued to the purchaser.<sup>37</sup> The deed is duly filed by the recorder. Should the new owner demand a deed, the grantor is required to execute two deeds, one of which is stamped "duplicate" and is given to the new certificate holder. If only a portion of such estate is transferred, or in case of an encumbrance or lease for more than one year, the transaction is noted and registered, and new certificates are issued for the portions transferred and the portions not transferred.<sup>38</sup>

All mortgages, liens, long term leases, judgments, eminent domain proceedings, etc., to constitute valid notice and to affect the registered title are required to be filed with the registrar. The registrar notes them as memorials on the original certificate.<sup>39</sup> Consequently, after a title has been duly registered, there is no need to re-examine the chain of title upon a subsequent conveyance or encumbrance. However, if there are a substantial number of outstanding memorials, an experienced individual may be required to determine the precise status of the title.<sup>40</sup>

Lands or any estate or interest therein registered under the act, upon the death of the owner, testate or intestate, go to his personal representatives in the same manner as personal property, and are subject with certain qualifications to the same rules of administration as personalty.<sup>41</sup> However, the administrator is not entitled to a commission with respect to the real estate except in case of necessary sales in due course of administration.<sup>42</sup>

In the case of involuntary transfers, the procedure is no more expeditious than under the recording system. The registrar may not recognize such transfer unless accompanied by an order of court directing him to proceed with the registration. Such orders of court may be entered by a

34. § 48, 9 *id.* 235.

35. § 51, 9 *id.* 236.

36. § 52, *ibid.* Also see PATTON, *op. cit. supra* note 14, at 12.

37. §§ 54, 57, 9 U. L. A. 236, 237. See also PATTON, *op. cit. supra* note 14, at 12.

38. § 54, 9 U. L. A. 236.

39. § 56, 9 *id.* 237. See also Patton, *supra* note 1, at 527.

40. The memorials in the decree and certificate are necessarily brief, being merely the recording references in Massachusetts. If the memorial shows the property is subject to a trust, party wall agreement, restrictive covenant, easement or any other encumbrance, it is advisable to examine the instrument cited in the memorial. TANNER, *op. cit. supra* note 12, at 23, 24.

41. Uniform Land Registration Act, § 61, 9 U. L. A. 238.

42. § 62, *ibid.*

probate court in the form of a final decree of distribution or may be made in another court as, for instance, a decree of partition. It may be merely an order of an appropriate court directing a conveyance. In all such cases, if the proceedings are jurisdictionally regular and the time for appeal has expired, the court's order to the registrar to make the transfer by cancellation of the outstanding certificate and the issuance of a new certificate is made without notice, all rights having been adjudicated in the legal proceedings.<sup>43</sup>

Any registered owner of an estate or interest in land or any person having any claim against registered land arising from any cause other than fraud or forgery may, within ninety days after the claim or cause of complaint, petition the court for relief.<sup>44</sup> Registration procured through fraud or forgery may be set aside by the court, but the rights and title of an intervening registered encumbrancer or bona fide purchaser for value are not affected thereby. The injured party may pursue all his legal and equitable remedies against the party or parties to the fraud or forgery.<sup>45</sup>

Every registered holder of an estate or interest in land under the act may hold it free from any and all adverse claims, rights or encumbrances not noted on the certificate of title, except for certain liens, claims or rights arising under the laws or Constitution of the United States, taxes and levies assessed but not delinquent, and any lease for a term not exceeding one year under which the land is actually occupied.<sup>46</sup> This provision does not apply to the benefit of a registered owner in case of fraud or forgery to which he is a party or in which he is privy without having paid valuable consideration in good faith.<sup>47</sup> No title to, nor right nor interest in, registered land in derogation of that of the registered owner may be acquired by prescription or adverse possession.<sup>48</sup>

Any person having no actual notice of a registration under the act by which he is deprived of an estate in land and who is without remedy under the act may bring an action for the payment of his damages out of an assurance fund created by fees paid at the time of registration.<sup>49</sup>

### III. CONCLUSIVENESS OF TITLE

Opponents of the Torrens system contend that it is not conclusive in a number of material particulars and that an independent search is essential to protect a grantee or mortgagee against claims of the United States, bank-

43. PATTON, *op. cit. supra* note 14, at 13.

44. § 68, 9 U. L. A. 240.

45. § 73, 9 *id.* at 241.

46. § 74, 9 *id.* at 242. The exceptions differ in the various states. The usual matters excepted are rights of appeal, short-term leases, rights on public highways, current taxes and certain liens or rights arising under the laws of the United States. See *infra* part III; PATTON, *op. cit. supra* note 14, at 14.

47. § 75, 9 U. L. A. 242.

48. § 77, *ibid.* See *infra* notes 70-73.

49. § 83, 9 *id.* at 244.

ruptcy of the parties, current taxes, short term leases, rights of appeal, mechanics' liens, and other possible adverse claims.<sup>50</sup>

The statement made by proponents of the Torrens system that a Torrens title in these particulars is as conclusive as a deed given under the recording system<sup>51</sup> is unquestionably true but is nevertheless incomplete so far as the question considered in this article is concerned. Where the conveyance under the recording system is accompanied by an adequate policy of title insurance, the owner or mortgagee is protected against such defects and the expense incident to defending a suit if his title is attacked. A Torrens title holder, even if he can bring his claim within the provisions of the assurance fund and that fund be adequate to defray his claim, has the burden and the expense incident to maintaining a suit against the fund.<sup>52</sup>

### Taxes

Prior to the Act of Congress of August 1, 1888,<sup>53</sup> in those states where a judgment on the execution of the state court created a lien only within the county in which the judgment was entered, a similar proceeding in the federal court created a lien to the extent of its jurisdiction.<sup>54</sup> This statute was the first formal act to regulate fully the liens of judgments and decrees of the federal courts. It provides that judgments and decrees entered in the federal court within any state shall be liens on property throughout the state, in the same manner and to the same extent as if they had been rendered by a court of general jurisdiction of the state. The clerks of the several courts are required to keep appropriate records. In the absence of a state law

50. For an extended discussion see Staples, *Conclusiveness of a Torrens Certificate of Title*, 8 MINN. L. R. 200 (1924). Under the system now in force, as well as in localities where the Torrens system is the law, it is still essential to make a separate search for liens in anticipation of or resulting from suits or mechanics' liens, county, state, city and other taxes, bankruptcies, and federal estate tax liens. A Torrens examiner, before passing anew a title which has been registered some years previous, brings its history to date by a comprehensive search for possible bankruptcy since 1898 and liens for federal estate taxes after the owner's death until 1916, as well as by the invariable examination for local taxes. MASSACHUSETTS CONVEYANCERS ASSOCIATION, *THE LAND COURT OF MASSACHUSETTS* (1936) 4.

The exceptions to which a Torrens title in Massachusetts is subject, in addition to those noted in the certificate, include items other than those mentioned in this article. 2 MASS. GEN. LAWS (1932) c. 185, § 46. See also *Hooper v. Haas*, 332 Ill. 561, 164 N. E. 23 (1928); *Hawes v. Clarke*, 159 App. Div. 65 (1913) 144 N. Y. Supp. 11 (1st Dep't, 1913); *Partenfelder v. People*, 211 N. Y. 355, 105 N. E. 675 (1914); *In re Harper*, 106 Misc. 514, 176 N. Y. Supp. 337 (Sup. Ct. 1919).

51. PATON, *op. cit. supra* note 14, at 14-23.

52. An extreme case is *Gill v. Johnson*, wherein a suit growing out of a fraudulent registration in 1917 is still pending in the courts of California on a judgment entered in favor of the plaintiff in the sum of \$48,000 after one suit in the federal courts and five appeals in the state courts. *Gill v. Frances Investment Co.*, 19 F. (2d) 880 (C. C. A. 9th, 1927); *Gill v. Johnson*, 103 Cal. App. 234, 284 Pac. 510 (1930), 110 Cal. App. 442, 294 Pac. 405 (1930), 125 Cal. App. 296, 13 P. (2d) 857 (1932), 125 Cal. App. 302, 14 P. (2d) 1017 (1932), 8 Cal. App. (2d) 369, 48 P. (2d) 139 (1935). A sixth appeal is now pending.

53. 25 STAT. 357, 28 U. S. C. A. § 812 (1928).

54. *Massingill v. Downs*, 48 U. S. 760 (1849); *Williams v. Benedict*, 49 U. S. 107 (1850); *Brown v. Pierce*, 74 U. S. 205 (1868).



providing conformity as to recording, etc., between liens and judgments of the federal courts and judgments of the state courts, a judgment in a federal district court is a lien on all lands of the judgment creditor within the court's territorial jurisdiction.<sup>55</sup>

In 1928 Congress provided<sup>56</sup> that a lien for taxes in favor of the United States shall not be valid as against any mortgagee, purchaser or judgment creditor until notice of it has been filed by the collector in accordance with the laws of the state in which the property subject to the lien is situated.

A search, whether the title be that of a Torrens certificate or pursuant to the recording system, is required not only for federal taxes but also for various taxes due to the state and its political sub-divisions.<sup>57</sup> While the loss records of many title insurance companies are inadequate and incomplete, it is certain that the losses due to non-payment of taxes constitute a substantial proportion of the losses, as do also those arising from judgment liens and forgeries.<sup>58</sup> The risk incident to bankruptcy of the title owner is one to which the holder of a Torrens title, as well as the holder of a title under a recording act, is subject and against which the holder of title insurance is protected.<sup>59</sup>

Many of the particulars wherein a Torrens certificate is inconclusive, such as the right of appeal from the decree of the court in reference to the original registration of the title and also in connection with the certificate issued following an involuntary transfer, constitute hazards which are less serious than would exist if the right of appeal were not reserved. It should be noted, however, that most decrees of court are entered by default on a record which would not afford any ground for reversal, and that the combined care bestowed upon such proceedings by the applicant's attorney, the examiner of title, and the court precludes the likelihood of judicial error.<sup>60</sup>

55. *Rhea v. Smith*, 274 U. S. 434 (1927); *United States v. Harpootlin*, 24 F. (2d) 646 (C. C. A. 2nd, 1928).

56. 45 STAT. 875; 26 U. S. C. A. § 1562 (1935). The Pennsylvania supporting act is that of May 1, 1929, PA. STAT. ANN. (Purdon, 1930) tit. 74, §§ 141, 147.

57. E. g., taxes due by corporations, liquid fuel tax, income and inheritance taxes, gift taxes, city, borough, county, school, road and poor taxes, etc. An official search can be obtained with respect to taxes due the Commonwealth of Pennsylvania by corporations and, in some of the larger cities, for municipal taxes.

58. See 12 PROC. AM. TR. ASS'N (1932) 36, for a series of articles with respect to claims against title insurance companies.

59. *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734 (1931); *Stratton v. New*, 283 U. S. 318 (1931).

The Chief Examiner in Cook County, Illinois, contends that a search under the bankruptcy statute or for other federal liens is unnecessary, inasmuch as the state law regarding title to property located within the state should be supreme. *TANNER, op. cit. supra* note 12, at 39.

PATTON, *op. cit. supra* note 14, at 20-21, states that judgments in the federal courts are subject to the provisions of the Minnesota statute [MINN. STAT. (Mason, 1927) § 8309], which provides that a personal judgment against the owner in either the state or federal court is not a lien unless a certified copy of the judgment entry appears as a memorial in the certificate of title, as provided in 25 STAT. 357, 28 U. S. C. A. § 812 (1928). See *supra* note 54.

60. PATTON, *op. cit. supra* note 14, at 15.

There is no uniform provision in the Torrens system for the protection of an owner or one possessing an interest where the decree has been obtained by fraud.<sup>61</sup> However, where the statute is silent it must be presumed that the legislature understood and expected that the courts of equity would remain open to parties able to bring themselves within the rules which require the granting of equitable relief. The fact that a statute does not expressly provide that fraud shall invalidate acts authorized to be done under it should not deprive the courts of the general power to protect the rights of the parties. Equity will not allow a party to retain the benefit of a fraudulent transaction, although obtained under the forms of law.<sup>62</sup>

### *Service of Notice*

A more serious objection to the alleged conclusiveness of a Torrens title is the fact that notwithstanding the provision that notice by publication, posting and registered mail shall be conclusive and binding upon all the world,<sup>63</sup> by the great weight of authority, the owner of a vested interest in possession of the premises not served in a registration proceeding would not be deprived of his title if the applicant knew, or had reason to know, of the title or claim of the person not so served.<sup>64</sup> Only known resident claimants need be personally served. It has been held constitutional to obtain jurisdiction of unknown resident and known or unknown non-resident claimants by publication.<sup>65</sup> Even a known resident within the state may be served by registered mail. Such a service has been held not to be a denial of due process within the meaning of the Federal Constitution.<sup>66</sup> The holder of a Torrens title certificate pursuant to a decree of court may find that the appellate court will hold the decree either void on the ground of fraud or not binding on persons not properly served with notice of the proceeding.<sup>67</sup>

61. 3 DEVLIN, *op. cit. supra* note 5, at 2640, 2646.

62. Baart v. Martin, 99 Minn. 197, 108 N. W. 945 (1906). See Uniform Land Registration Act, § 75, 9 U. L. A. 242.

63. §§ 27, 28, 29, 31, 32, 9 *id.* at 230.

64. Gill v. Frances Investment Co., 19 F. (2d) 880, (C. C. A. 9th, 1927); Follette v. Pacific Light & Power Co., 189 Cal. 193, 208 Pac. 295 (1922); Moakley v. Los Angeles Pac. Ry., 99 Cal. App. 74, 277 Pac. 883 (1929); Sheaff v. Spindler, 339 Ill. 540, 171 N. E. 632 (1930); Riley v. Pearson, 120 Minn. 210, 139 N. W. 361 (1913); Meighan v. Rohe, 166 App. Div. 175, 151 N. Y. Supp. 785 (1st Dep't, 1914); Belmont Powell Holding Co. v. Serial Loan Ass'n, 167 App. Div. 124, 152 N. Y. Supp. 868 (2d Dep't, 1915). But see Sterling Nat'l Bank v. Fisher, 75 Colo. 371, 226 Pac. 146 (1924); Thompson, *Analysis of the Disadvantages of the Torrens System* (1918) 87 CENT. L. J. 260. See also Staples, *supra* note 50.

65. American Land Co. v. Zeiss, 219 U. S. 47 (1911); Mills v. Denver & R. G. Ry., 198 Fed. 137 (D. C. Colo. 1912); State *ex rel.* Douglas v. Westfall, 85 Minn. 437, 89 N. W. 175 (1902); Hunt v. Hay, 214 N. Y. 578, 108 N. E. 851 (1915).

66. City of New York v. Wright, 243 N. Y. 80, 152 N. E. 472 (1926). Such satisfaction of a constitutional requirement need not necessarily be equivalent to satisfaction of a prospective lender of a substantial sum of money upon a mortgage.

67. In Follette v. Pacific Light & Power Co., 189 Cal. 193, 208 Pac. 295 (1922), the court did not base its conclusions exclusively on the absence of good faith. No jurisdic-

The inconclusiveness of a Torrens title due to non-joinder of a person in possession arises only where no adequate investigation of occupancy has been made. In Minnesota, one of the duties of the examiner is to investigate and report as to whether or not the land is occupied.<sup>68</sup> Many examiners make a personal inspection. Others rely upon an affidavit of the applicant or his attorney, or upon an examination by the sheriff. In the report all occupants, and the parties who encroach upon the premises, such as owners of adjacent buildings the eaves of which project beyond the property line, telephone companies whose wires are overhead, etc., are recommended to be made parties defendant so that their rights may be determined from the evidence introduced at the hearing.<sup>69</sup>

### *Bona Fide Purchasers*

The Uniform Land Registration Act expressly eliminates the possibility of loss of ownership due to adverse possession.<sup>70</sup> In the absence of such a provision it has been held that title to land already registered may be acquired by adverse possession.<sup>71</sup> The Nebraska statute provides that ten years' adverse possession will deprive a registered owner of his title.<sup>72</sup> In Minnesota there is a further exception in favor of one in possession under an unregistered deed or contract for a deed.<sup>73</sup> A case usually cited by the protagonists of the Torrens System as showing the conclusiveness of a certificate in the hands of a bona fide owner, and which is cited by opponents of the law to illustrate the ease with which a person may be defrauded of his property, is *Elliason v. Wilborn*.<sup>74</sup> In this case equitable relief was denied the owner of the property who, by delivering his duplicate certificate to another, gave him the power to transfer title to a bona fide purchaser.

If the purchaser of a certificate of title has knowledge that the vendor has previously failed to give notice to an interested party, the purchaser's title is subject to the claims of that party.<sup>75</sup> In one case where the assignee of a mortgage procured a notation of the assignment upon the title registry but failed to notify the owner, and the owner in good faith paid the amount

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tion having been obtained in the registration proceedings on the person in possession of the premises, it was held that the provisions of the land title law, which purported to entitle the purchaser of the registered title to the premises to hold it as against the person in possession, were in violation of the due process clause.

68. MINN. STAT. (Mason, 1927) § 8259.

69. PATTON, *op. cit. supra* note 14, at 38.

70. Uniform Land Registration Act, § 77, 9 U. L. A. 242.

71. Belize Estate & Produce Co. v. Quilter, [1897] 22 A. C. 367; Harris v. Keith, 3 Alberta L. R. 222 (1911); Wallace v. Potter, 6 Alberta L. R. 83 (1913). See also HOGG, *op. cit. supra* note 4, at 85.

72. NEB. COMP. STAT. (1929) c. 76, § 741.

73. PATTON, *op. cit. supra* note 14, at 14.

74. 281 U. S. 457 (1930), *aff'd* 335 Ill. 352, 167 N. E. 101 (1929). The law in Australia is otherwise. See (1936) 9 AUST. L. J. 355.

75. Gill v. Frances Investment Co., 19 F. (2d) 880 (C. C. A. 9th, 1927), *supra* note 52.

of the mortgage to the original mortgagee, it was held that the mortgage was discharged, despite the provision in the statute that the registration of an instrument under the Torrens system should constitute notice to all persons.<sup>76</sup>

Advocates of the Torrens law point out that its passage eliminates dangers incident to the recording system, such as deeds executed pursuant to forgery or undelivered powers of attorney. Likewise it affords an owner a title unclouded by judgments entered against other persons of the same name. However, it must be remembered that these disadvantages under the recording system are not present if the grantor or the mortgagor is protected by title insurance.

#### IV. THE ASSURANCE FUND

Under the recording system, should a title prove defective, the grantee has, for what it may be worth, his remedy against the grantor under his warranty in the deed. A mortgagee, of course, has such rights as are available against the obligor on the bond, and both grantee and mortgagee retain, under the recording system and also under the Torrens system, their equitable remedies against the party or parties guilty of fraud or forgery.<sup>77</sup> Where the settlement is accompanied by a policy of title insurance, the grantee or the mortgagee has the additional security of the title policy.

The Torrens law provides for an assurance fund of one-tenth of one per cent of the assessed value of the land upon original registration.<sup>78</sup> Any person who has actual notice of any registration under the act by which he may be deprived of an estate or interest in land may, within two years after the time when his right of action first accrued, bring suit against the state treasury for recovery of damages out of the assurance fund.<sup>79</sup> The laws of many states confer such a right of action against the assurance fund only to persons who sustain loss without negligence on their part.<sup>80</sup>

76. *Rea v. Kelly*, 183 Minn. 194, 235 N. W. 910 (1931). A Minnesota statute provides that the record of an assignment of mortgage shall not, of itself, be notice of such assignment to the mortgagor so as to invalidate any payment made to the mortgagee. MINN. STAT. (Mason, 1927) § 8225.

77. Uniform Land Registration Act, § 73, 9 U. L. A. 241.

78. § 80, 9 *id.* at 243. In Minnesota, the fund is one-tenth of one per cent of the assessed value of the land, exclusive of improvements on all original registrations and on all transfers by descent or devise. 2 MINN. STAT. (Mason, 1927) § 8320. The fund is also increased by the accumulation of interest.

In Massachusetts, upon original registration and also upon the entry of a certificate upon the transfer of title by descent or devise, there is paid to the recorder one-tenth of one per cent of the assessed value of the land on the basis of the last assessment for municipal taxation, or, in case of the registration of an easement or right, one-tenth of one per cent of the value thereof as found by the court, as an assurance fund. 2 MASS. GEN. LAWS (1932) c. 185, § 99.

79. Uniform Land Registration Act, § 83, 9 U. L. A. 244.

80. 3 CAL. GEN. LAWS (Deering, 1931) Act 8589, § 105 (2); 2 MASS. GEN. LAWS (1932) c. 185, § 101; 2 MINN. STAT. (Mason, 1927) § 8322; N. C. CODE (1935) § 2423; N. D. COMP. LAWS (Supp. 1926) § 5604-a75; OHIO CODE ANN. (Throckmorton's Baldwin, 1934) § 8572-104; 1 S. D. COMP. LAWS (1929) § 3136.

In many states the assurance fund has been more than adequate to meet all claims thereunder. At the end of 1936 the assurance fund in Massachusetts was approximately \$250,000, while the damages paid out of it were only \$2,300.<sup>81</sup> In Cook County, Illinois, there was \$444,962.97 in the indemnity fund on March 1, 1937, and the losses which had thus far been paid amounted to \$17,196.25.<sup>82</sup> In the city of New York, the fund, including interest accrued until March 1, 1937, totalled \$1,604.96, against which no claims whatsoever have so far been presented.<sup>83</sup> On the other hand, in Nebraska a judgment was recovered in the sum of \$19,890.25 against a county assurance fund which then contained only \$182.17.<sup>84</sup>

Recovery in Massachusetts is not only limited to persons who sustain loss without negligence on their part, but is limited also to persons deprived of registered land by the subsequent registration of other persons as owners of the same land through fraud, or mistake. Furthermore, these persons are required to exhaust all other remedies before resorting to an action against the fund.<sup>85</sup> For errors committed in the original registration, the aggrieved party has no claim against the assurance fund.

Massachusetts and North Carolina likewise provide that, if the assurance fund at any time is not sufficient to meet the loss, the state treasurer shall make up the deficiency from any funds in the treasury not otherwise appropriated. If this is done any amounts later received by the state treasurer on account of the assurance fund must be used to make up the deficiency in the general fund.<sup>86</sup> The assurance fund provision in Illinois seems to imply that, if the fund were exhausted the credit of Cook County could be used to make up the difference.<sup>87</sup> The law of Nebraska is similar in this respect to that of Illinois. However, the Nebraska statute was held to limit recovery to moneys in the assurance fund, the court having concluded that under any other interpretation the statute would be in violation of the due process clause of the Fourteenth Amendment.<sup>88</sup> The constitutions of Cali-

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81. See also TANNER, *op. cit. supra* note 12, at 15; Sabel, *Suggestions for Amending the Torrens Act* (1935) 13 N. Y. U. L. Q. REV. 244, 250.

82. See also TANNER, *op. cit. supra* note 12, at 42; Laddey, *The Torrens System of Land Registration* (1931) 54 N. J. L. J. 42. In *Gill v. Johnson*, *supra* note 52, the California court entered judgment for the plaintiff in the sum of \$48,000. The assurance fund in the state was \$39,829.99 on December 31, 1936.

83. Letter from Chamberlain of the City of New York to the writer, dated March 2, 1937.

84. *Jones v. York County*, 47 F. (2d) 837 (C. C. A. 8th, 1931).

85. 2 MASS. GEN. LAWS (1932) c. 185, § 101.

86. 2 MASS. GEN. LAWS (1932) c. 185, § 104; N. C. CODE (1935) § 2425.

87. 27 ILL. STAT. ANN. (Callaghan, 1936) § 132.095.

88. *Jones v. York County*, 26 F. (2d) 623 (C. C. A. 8th, 1928). In holding the original Torrens law of Ohio unconstitutional, it was decided that the statute violated the constitutional provision prohibiting the taking of private property except for public use after due compensation to the owner. The court held that the owner of property not required for public use had the right to retain the same in specie; that, if an owner's property were

ifornia and New York specifically prohibit the giving or loaning of any public funds for private use.<sup>89</sup>

## V. COSTS

An express purpose of the Torrens law is to bring about the cheaper and more speedy settlement, registration and transfer of title.<sup>90</sup> It is claimed that the establishment of the system will decrease the expenses incident to transferring title.<sup>91</sup> This is generally true of a voluntary transfer of title after it has been registered under the act,<sup>92</sup> but the cost of initial registration exceeds the cost of title insurance.<sup>93</sup> Moreover the cost incident to the transfer of a registered title by descent or will or pursuant to an execution sale or under a testamentary power is substantial.<sup>94</sup>

These costs do not include the expense of incidental reports or special professional services which are sometimes required. Statistical data is not available to show the average total cost of purchasing a tract of land under the Torrens system and purchasing under the recording system with title insurance. Accurate statistics are difficult to obtain and are of little value for purposes of comparison because of the differences in labor and overhead costs in different localities. R. G. Patton, one of the fairest and ablest advocates of the Torrens system, concedes that it is probable that the expense to the public at large is about the same under either system.<sup>95</sup>

A primary reason for the failure of the Torrens system to obtain popularity in many states is the substantial expense incident to the original registration of title.<sup>96</sup> The fees received for the registration of a Torrens title do not actually cover the cost incident to its establishment.<sup>97</sup> Since the system is not on a self-sustaining basis, the public is in effect subsidizing the

taken away from him, the assurance fund might be insufficient to compensate him therefor and that, in any event, he was obligated to prosecute a suit against the fund in order to seek to recover the value of his property. See *State v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551 (1897). See also *DEVLIN, op. cit. supra* note 5, at 2617.

89. CAL. CONST. art. XII, § 13; N. Y. CONST. art. VII, § 1, art. VIII, §§ 9, 10. See opinion of Attorney General Lewis in *TANNER, op. cit. supra* note 12, at 76.

90. Uniform Land Registration Act, § 3, 9 U. L. A. 223.

91. 3 *TIFFANY, REAL PROPERTY* (1920) § 580; *McCall, supra* note 14, at 331.

92. For detailed statements as to the cost incident to voluntary transfer of title, see *HAAS, TORRENS AND REAL ESTATE DATA FOR COOK COUNTY* (1927); *TANNER, op. cit. supra* note 12, at 26.

93. *TANNER, op. cit. supra* note 12, at 17; *Patton, supra* note 1 at 531, 532; *Sabel, supra* note 81, at 249.

94. ". . . in the case of an involuntary transfer, descent or devise, foreclosure, execution sale, probate deed and the like, an order of court and often an adjudication of validity is required before the transfer can be made effective by issuance of a new certificate. The need for a lawyer's service in effecting such transfers would appear to leave the gross expense of all transfers about the same. There is, however, a greatly reduced cost to the public by a lessened expense in the keeping of title records." *Patton, supra* note 1, at 522, n. 4.

95. *Ibid.*

96. *McCall, supra* note 14, at 346.

97. *ALLIN, MEMORANDUM UPON THE SYSTEM OF REGISTERING TITLES TO REAL PROPERTY, COMMONLY KNOWN AS THE "TORRENS SYSTEM", IN NEW YORK AND SOME OTHER STATES*; *TANNER, op. cit. supra* note 12, at 51.

registration offices and courts for the benefit of the relatively few persons who deal frequently with real estate. Obviously, if a sufficient volume of registration were secured this would not be true, but the relatively slight use which has been made of the law in those states which have it warrants the assumption that many years will elapse before a sustained public demand will arise for a change of system in Pennsylvania.

The Torrens system requires either (1) a separate court as in Massachusetts, where there are three judges trained in title work, a recorder, a chief examiner, an assistant clerk and others, including an engineering department;<sup>98</sup> or (2) the examination by judges of existing courts of the reports of the examiners of title, process servers, a comprehensive title plant, and a skilled personnel for examining, interpreting and filing the records. The rules of real property are complicated. The services of experts are required to interpret the facts revealed by prior documents and the current search. While the indices are available as public records, trained minds are needed to comprehend the records to which they open the doors. There is no place for political drones either in a title plant or in the Torrens system set up. Even for the transfer of a title already registered there must be a re-examination of title at least back to the date of the prior registration.<sup>99</sup> It is idle to contend that this technical work can be performed by public officials more efficiently or more cheaply than it is performed by private corporations which issue specific obligations of title insurance.<sup>100</sup>

## VI. SPEEDY TRANSFER

Not all Torrens titles can be with safety transferred as speedily as can title to automobiles under the Pennsylvania Motor Vehicle Act.<sup>101</sup> Whether or not such a desirable object is attainable in foreign countries, in the United States it is frustrated by the constitutional requirement of due process which makes court proceedings essential in connection with the initial transfer to the Torrens system and with the devolution of title by descent or devise, etc. Since lack of jurisdiction may impeach a Torrens title,<sup>102</sup> all parties in interest must be served with notice of the proceeding, either personally or by publication and posting. Whether the advertisement need appear but

98. See MASSACHUSETTS CONVEYANCERS ASSOCIATION, *op. cit. supra* note 50.

The Hon. Clarence C. Smith, Associate Judge of the Land Court of Massachusetts, in a letter to the author, expressed the opinion that it would be inadvisable for any state to attempt to institute and carry on a land registration act without a separate court to administer it, notwithstanding the fact that a considerable degree of success has been attained in Cook County, Illinois, in administering a land registration act through one of the prior existing courts.

99. TANNER, *op. cit. supra* note 12, at 26.

100. "The Torrens System, if adopted, must either sustain an enormous cost on the plant and court set-up or work on the search and abstract system, neither of which would benefit the property owner, either in cost, security or time." UMSTED, A BRIEF FOR TITLE INSURANCE (1936) 6.

101. PA. STAT. ANN. (Purdon, Supp. 1936) tit. 75, §§ 31-41.

102. Staples, *supra* note 50, at 202.

once, as in New York, or more often, the loss of time incident to the service of notice of the proceedings, the examination of the title, the inspection of the site, the preparation of the examiner's report, the service of notice thereof upon all parties in interest, as well as the time consumed in the consideration of the examiner's report by the court, makes inevitable the lapse of considerable time before the Torrens certificate may be issued. Thus the popular impression that a certificate of title can be obtained in all instances without delay is not a correct one.<sup>103</sup> Once a title is registered under the Torrens system, it may be transferred voluntarily with comparative safety and speed, but not until the purchaser has completed his search with reference to possible bankruptcy, federal and other tax liens, rights of tenants in possession and other objections which are excepted by a Torrens title but which are covered by title insurance.<sup>104</sup>

### VII. COMPULSORY LEGISLATION

Certain bills were introduced in New York State in 1936 to amend the relatively unused Torrens law of that state<sup>105</sup> by providing for compulsory registration in the five counties comprising the city of New York. The suggestion was also made that such registration should be compelled following all voluntary sales and mortgages.<sup>106</sup> The Torrens plan was made compulsory in Germany in 1899. It is compulsory upon corporations in Hawaii, but it is discretionary in the states and other territories of the United States.<sup>107</sup> The Land Registration Act of Massachusetts provides for four alternative systems, (1) confirmation of title with registration, (2) confirmation without registration followed by transfers under the recording system,<sup>108</sup> (3) transfer of title following examination by conveyancers or attorneys, and (4) transfer of title upon examination and insurance by title companies. Massachusetts has found no need for a compulsory system.<sup>109</sup>

Under the recording system in use in Pennsylvania, a prospective purchaser or a mortgagee can, as soon as he is satisfied with the state of the

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103. "It is a popular fallacy that a layman can take a registered certificate of title and deal with it with perfect safety. He can not." Davis, Chief Judge of the Land Court of Massachusetts, quoted in TANNER, *op. cit. supra* note 12, at 26.

104. See *supra* note 46.

105. Senate Bill Int. 735, Print 796; Assembly Bill Int. 991, Print 1035. The principal bills considered by the legislature at Albany in 1936 were combined as Nos. 1455, 1880 and 2748, Int. 1231. The bill died in committee.

106. Sabel, *supra* note 81, at 252.

107. Registration of solid blocks is in progress in London, under a compulsory registration system. PATTON, *op. cit. supra* note 14, at 18. See also PROBYN, SYSTEM OF LAND TENURE IN VARIOUS COUNTRIES (1881) 193. The statutes providing for optional initial registration in the United States are listed *supra* note 13.

108. 2 MASS. GEN. LAWS (1932) c. 185, § 56a.

109. The former senior judge of the Massachusetts Land Court has expressed strong disapproval of a compulsory act. See TANNER, *op. cit. supra* note 12, at 29.



title either by an abstract or by a policy of title insurance, record a deed or mortgage at a nominal expense. If a compulsory law were enacted, he would be compelled to engage in a court proceeding in order that his title be registered and to subject himself to the delay, expense and inconvenience discussed above. Such a law may well constitute a violation of the privileges and immunities clause of the Fourteenth Amendment.<sup>110</sup>

Another important consideration is that unless such a scheme contemplated the purchase by the state of the plants of private companies which represent an extremely large investment, the state would be required to compete with the efficient service rendered by these established institutions. To compete successfully, the state's charges obviously could not exceed those of the private companies. Consequently, it would be necessary for the public to subsidize the system, at least in its initial stages. A state registration system sustained by a subsidy might well be attacked on constitutional grounds.<sup>111</sup>

#### VIII. A COMPARISON WITH TITLE INSURANCE

In the metropolitan areas of Pennsylvania the title insurance policy has practically replaced the abstractor's search. Outside of the larger urban centers the abstractor and the conveyancer still prevail, except where large mortgages or substantial conveyances are under consideration and corporate title insurance is required. We have observed that a Torrens title will not reduce the expense to the public, and that, for an original registration or an involuntary transfer, there is no saving in time. It would therefore seem to follow that if the Torrens system were adopted in Pennsylvania it would be used as little as it has been used in other states.<sup>112</sup> There is no great demand for the Torrens system in rural communities, since rural tenures are long-term, the title changes are infrequent, and most titles, even though originally defective, have been perfected by adverse possession.<sup>113</sup> A factor of considerable concern to owners of ground in this state is that, while some mortgage loan companies and insurance companies do not object to the principle of the Torrens system of land registration,<sup>114</sup> other lending

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110. In *Anderson v. Shepard*, 285 Ill. 544, 121 N. E. 215 (1918), a statute which sought to compel administrators and executors to register title to real estate of their decedents was held unconstitutional, on the grounds that the administrator or executor had no interest in the real estate and that the act operated with inequality, in that it affected only one group of owners of real estate.

The Hon. Clarence C. Smith, Associate Judge of the Land Court of Massachusetts, states: "The practical objections to compulsory registration are so manifold that the academic question of constitutionality is not worth considering." Letter to the author, March 10, 1937.

111. See *supra* note 89.

112. See *supra* note 14.

113. McCall, *supra* note 14, at 344.

114. Patton, *supra* note 1, at 531. Inquiries sent by the writer to the larger life insurance companies disclose the lack of a uniform policy. Certain of these companies will loan money secured by a mortgage or deed of trust on real estate where a Torrens certificate is

institutions are unwilling to make a mortgage loan of \$10,000 or more unless the Torrens certificate is accompanied by a satisfactory abstract or a policy of title insurance.<sup>115</sup>

Suggested reasons for the failure of the Torrens system to meet with widespread popular approval are that the average land-owner does not desire to invite a lawsuit by seeking to register a title which he considers good, and that substantial lawsuits may arise from the attempt under a Torrens proceeding to fix definite boundary lines. A title considered marketable might be found to be unmarketable if disturbed, whereas if permitted to remain dormant, the defect might be cured through lapse of time.<sup>116</sup> Furthermore, the proceeding under the Torrens act merely registers good titles and does not cure defective ones.<sup>117</sup> The Torrens system will not meet the problem of marketability of title as effectively as does title insurance under well organized companies.<sup>118</sup>

Should the cloud on the title be relatively minor, the title company can and frequently does issue its policy to the grantee or mortgagee, taking a bond from the grantor or mortgagor to protect it in the remote possibility of loss. Without the assurance of such a policy, the advantage of the sale or the mortgage would be lost to the owner. Should the holder of a policy of title insurance sustain a loss, he has a claim against a corporation whose reserves should, at all times, be adequate to meet the loss, and, as a general rule, he is able to procure the payment of a just claim without the necessity of instituting suit. Where the holder of a Torrens certificate seeks to assert a claim against the assurance fund, he must not only prosecute that claim by a legal proceeding, the costs of which are not compensable under the assurance fund, but he must first exhaust his remedies against defendants other than the custodian of the fund.<sup>119</sup> Although from the foregoing discussion it seems apparent that title insurance in Pennsylvania serves the public interest better than would the Torrens system of land registration, and that the use of corporate title insurance should be extended, it does not follow that

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submitted as evidence of title, without requiring any other evidence of title and without any restriction as to the amount of the loan. Other companies will accept the Torrens title certificate in Massachusetts, Minnesota and Chicago. One substantial company has set a limitation of \$25,000 on such loans and, in the case of larger ones, requires title insurance in Illinois, and in Minnesota and Massachusetts requires an abstract of the early title plus a detailed investigation of the registration proceedings. Other companies require abstracts of title or title insurance in all cases.

115. TANNER, *op. cit. supra* note 12, at 36. Mr. Tanner states that, of all the loans made by the Pacific Mutual Life Insurance Company of California, only four are on Torrens properties and these loans are likewise protected by title insurance; that, of the 1,800 loans made by the United Bank & Trust Company of Los Angeles, less than one per cent are on Torrens titles, and these are also protected by title insurance. *Id.* at 49.

116. McCall, *supra* note 14, at 345.

117. Partenfelder v. People, 211 N. Y. 355, 105 N. E. 675 (1914); *In re Sherman*, 106 Misc. 244, 175 N. Y. Supp. 627 (Sup. Ct. 1919).

118. See McClenachan v. Maris, 310 Pa. 99, 164 Atl. 780 (1933).

119. The arguments against the Torrens system are collected in 5 THOMPSON, REAL PROPERTY (1924) c. LV.

title insurance companies should be immune from reasonable regulation and examination by the State.<sup>120</sup>

### IX. REGULATION OF TITLE INSURANCE

The act which first authorized and as amended still authorizes a corporation to engage in the business of insuring titles<sup>121</sup> is the Pennsylvania Corporation Act of 1874.<sup>122</sup> In 1876 a group of conveyancers combined their resources to establish The Real Estate Title and Insurance Company of Philadelphia, the first corporation ever to issue a policy of title insurance. In 1889 a minimum paid in capitalization of \$125,000. was prescribed for all such companies.<sup>123</sup> In 1929 they were by statute<sup>124</sup> required to establish and maintain a reserve equal to ten per cent of the premium paid on each policy of insurance thereafter issued until the total amount set aside equaled \$250,000. This reserve fund must be retained by the company separate and apart from its other assets, and must be invested in such securities as are legal investments for trust funds. When the State Secretary of Banking closes such a company, he is authorized to use the reserve fund to purchase reinsurance to cover liabilities represented by policies outstanding against the fund. He may accordingly purchase a blanket policy from a qualified Pennsylvania title insurance company. Each policy holder of the company which originally issued the insurance then has a direct right of action against the title company issuing the reinsurance.<sup>125</sup>

The Act of May 17, 1933,<sup>126</sup> confers upon the Insurance Department of the Commonwealth of Pennsylvania the power and duty to supervise, examine and regulate title insurance companies. It authorizes the appointment of the Insurance Commission as liquidator of the title insurance business of any company which also has the power to transact any business under the supervision of the Department of Banking.

The public is entitled to consideration both with respect to the standardization of the form of policies and to the amount of protection given

120. A similar conclusion was reached by the Superintendent of Insurance of New York State. SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, 78TH ANNUAL REPORT TO THE LEGISLATURE (1937) 79, 80.

121. The formation of such a corporation was first suggested in 1853. *Report of Special Committee of the Hennepin County Bar Ass'n* (1935) 19 MINN. L. REV. 354, 357.

122. PA. STAT. ANN. (Purdon, 1930) tit. 15, § 2481. This statute, insofar as the same applies to title insurance companies, was not repealed by the Business Corporation Law of May 5, 1933, PA. STAT. ANN. (Purdon, Supp. 1936) tit. 15, § 2852 *et seq.*

123. PA. STAT. ANN. (Purdon, 1930) tit. 15, § 2495, *Cameron v. Christy*, 286 Pa. 405, 133 Atl. 551 (1926); *Corporations for Title Insurance*, 12 Pa. D. & C. 719 (1929).

124. PA. STAT. ANN. (Purdon, 1930) tit. 40, § 157.

125. PA. STAT. ANN. (Purdon, Supp. 1936) tit. 40, §§ 160-161. The fund carried on the ledger of the trust company as a title insurance reserve account must be set aside for the benefit of policy holders upon the insolvency of the company, even though it was actually mingled with the assets of the institution. *In re Counties Title and Trust Co.*, 21 Pa. D. & C. 55 (1934).

126. PA. STAT. ANN. (Purdon, Supp. 1936) tit. 40, § 58. See also *id.* § 202, amending the Insurance Code by the provision dealing with the liquidation of title insurance companies.

to the policyholders. Generally speaking there are two types of policies issued, one for the protection of mortgagees or lenders of money on real estate, the other to indemnify purchasers of property. The forms used by most Pennsylvania title companies for insuring mortgagees are substantially similar to the L. I. C.<sup>127</sup> and the A. T. A.<sup>128</sup> forms. In no particular is a policy issued by them to a mortgagee less advantageous than the L. I. C. form. In some respects their policies are superior to it. For example, the L. I. C. form insures the mortgagee against loss or damage not exceeding a specified sum which is suffered "by reason of the failure or unmarketability of, defects in, . . . the title of the mortgagor." The forms used by most Pennsylvania companies expressly insure the mortgagee that his title to the mortgage "is good and marketable and clear of all liens and encumbrances."

Where there is a conveyance subject to a mortgage, most Pennsylvania companies use a form of policy which insures the grantee and all persons claiming the real estate insured in the policy under the grantee by descent, will or under the intestate laws, as well as all other persons to whom the policy may be transferred with the assent of the title company endorsed on the policy, that the title to the real estate is good and marketable and clear of all liens and encumbrances as of the date of the policy, except those set forth in a schedule annexed to the policy or specified by its general conditions. Liability is limited to a specific sum.

At other times the owner, although paying the full premium for the insurance of his equity, receives merely an owner's certificate. Such a certificate, which recites that the owner has paid the premium for the policy and provides that when the mortgage is paid off and the mortgagee policy is cancelled another policy will be issued to the owner, has been held inadequate.<sup>129</sup> A form of owner's certificate now in use corrects this defect somewhat by a provision that until the policy issued to the mortgagee is surrendered for cancellation and a new policy is issued in lieu thereof, the policy held by the mortgagee and the owner's certificate shall be construed to be a contract of indemnity for the protection jointly of the mortgagee and the

127. Following the War the life insurance companies became interested in title insurance to protect their investments in real estate securities. They were confronted by many types of policies and instituted a movement towards uniformity. Their representatives drafted a form of mortgagee policy known as the "L. I. C." (Life Insurance Company) Standard Loan Policy of Title Insurance.

128. Following conferences between representatives of the life insurance companies and representatives of the American Title Association, there was drafted in 1929 the "A. T. A." form. See Special Committee of the Hennepin County Bar Association, *supra* note 121, at 354, 366.

129. *Cherry v. People's Trust Co.*, 282 Pa. 52, 127 Atl. 320 (1925). Even if all that happens between the owner, the mortgagee and the title company is considered as one transaction, the owner has not, by the very terms of such certificate, any enforceable rights under it until the fulfillment of the express conditions stipulated. So long as the title policy to the mortgagee is still outstanding, the owner may not maintain an action on such a certificate.

owner so long as the owner continues to hold title to the premises. While this proviso cures to a great extent the effect of the above decision, nevertheless the title companies should not only issue a policy to the mortgagee for the amount of the mortgage, but in place of the owner's certificate there should be issued a separate policy insuring the owner's equity which provides that if and when the mortgage is paid off and the mortgagee's policy is cancelled, the insurance to the owner will be increased by the amount of the insurance theretofore outstanding in favor of the mortgagee.

Except with respect to the owner's certificate there would seem to be no criticism as to the form of policies in use in Pennsylvania and no need in this state for a statute such as exists in Texas, which treats title insurance as in the nature of a public utility and provides for state control over rates and the types of policies issued.<sup>130</sup>

The principal question to be considered in Pennsylvania in view of the existing legislation is whether the required reserves are adequate. By the Act of 1929, the reserve fund must be kept at one-quarter of a million dollars notwithstanding current losses.<sup>131</sup> Under the act it is a fund to be maintained for the protection of all policy holders, to be used in the event of liquidation either for the payment of outstanding claims under policies or for the purchase of reinsurance to indemnify outstanding policy holders. Since this fund must be kept intact, it is essential that a separate reserve be established out of current earnings to meet current losses.

In most forms of insurance the risk is of loss due to an event subsequent to the date of the policy, and therefore substantial reserves are essential. In the case of title insurance the loss is not with respect to a risk arising subsequent to the effective date of the policy, but is only in the event that a risk of the type insured against exists on the effective date of the policy.<sup>132</sup>

Title insurance companies should be required to charge as a liability, in addition to their capital stock, outstanding indebtedness of the company and the reserves required by the Act of 1929, additional reserves in an amount adequate to meet current losses. A reserve for current losses could be established by requiring a definite percentage of all gross premiums collected from and after a certain day to be set aside to meet current losses until the reserve totals \$100,000.

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130. TEX. STAT. (Vernon, Supp. 1931), art. 1302a. And see *Daniel v. Tyrell & Garth Inv. Co.*, 93 S. W. (2d) 372 (Tex. 1936).

131. PA. STAT. ANN. (Purdon, 1930) tit. 40, § 152.

132. Where, at the time the policy is delivered to an insured mortgagee, the title insured is defective by reason of a lien insured against, the title company is immediately liable to the insured even though the loss is not presently liquidated. In such a case, the measure of damages is the difference between the market value of the mortgage which is in fact subject to the prior lien and what the market value of the mortgage would have been had it not been subject to such prior lien. *Fifth Mutual Bld'g Soc. of Manayunk's Appeal*, 317 Pa. 161, 176 Atl. 494 (1935). See also *Foehrenbach v. German-Am. Title & Trust Co.*, 217 Pa. 331, 66 Atl. 561 (1907); *Schwab v. Cornell*, 306 Pa. 536, 160 Atl. 449 (1932); *Narberth B. & L. Ass'n v. Bryn Mawr Trust Co.*, Pa. Super. Ct., Feb. 26, 1937.

In addition thereto, when unpaid claims of which the title company has notice aggregate ten per cent of its reserves for current losses, the company should be required to set aside a special reserve equal to the aggregate estimated amount due or to become due on account of such unpaid claims upon title insurance policies from and after the time of notice until the final determination thereof. Reserves for current losses should be held for the purpose of satisfying claims under policies without distinction as to when the contract of title insurance or other transaction was entered into or where the property was located. All income arising from the securities or other assets in the fund and all profits resulting from their sale, after the deduction of all taxes payable with respect to them, should be added to the fund.

Title companies must recognize the fact that adequate reserves must be segregated and kept as trust funds for the payment of current losses. Otherwise they may be required to deposit with the Insurance Commissioner, or some other public officer, securities in direct proportion to the contingent liability upon outstanding title policies.

Title companies should be prohibited from issuing policies which do not bear a reasonable relationship to their capital and surplus. However, existing legislation in other states with respect to such a limitation<sup>133</sup> fails to recognize the obvious fact that title policies do not insure against future hazards as do surety bonds in connection with building contracts. A limitation prohibiting a single risk in excess of a definite number of times the existing capital and surplus of a corporation might well be enacted in Pennsylvania. It is the practice of some small companies to reinsure with other underwriters of title insurance wherever the policy is large in proportion to the capital and surplus of the originating company.<sup>134</sup> Metropolitan companies should be able to assume ordinary risks without the necessity of such reinsurance.

Directors should be bona fide stockholders owning a substantial number of shares in the company. A substantial fraction of the capital and paid-in surplus of a title company should consist of assets other than mortgages and the accompanying bonds. A title insurance company should not engage in the business of guaranteeing the payment of mortgages or in selling certificates or participations in bonds, notes or other evidences of indebtedness secured by mortgages or deeds of trust.<sup>135</sup>

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133. Texas limits a single risk to fifty per cent of the capital and surplus. See TEX. STAT. (Vernon, Supp. 1931) art. 1302a, § 11. In 28 STAT. 279, amended by 36 STAT. 241, 6 U. S. C. A. § 9 (1927), Congress has made elaborate provision for the safe use of surety companies as security upon bonds.

134. 9 PROC. AM. TIT. ASS'N (1929) 68.

135. McCall, *supra* note 14, at 337; Sabel, *supra* note 81, at 249; see *In re Commercial Trust Co.*, No. 1, 19 Pa. D. & C. 109 (1933).

Legislation should specifically provide that if the proper state official finds from the report of any examiner or otherwise, after reasonable notice and hearing, that the value of the assets in any of the several reserve funds is less than the amount prescribed by law, he may, unless such deficiency is made good within a reasonable time, order such title company to cease doing further title business; and it should be a misdemeanor for any officer of the company, after such an order is received, to transact or participate in the transaction of any new business of the kind prohibited until the title company has remedied the situation.<sup>136</sup>

The premiums paid for title insurance in the United States are necessarily divergent. The risk assumed differs in the different localities. The type of service likewise differs. Because of the varying state of the public records the cost of examining the risk varies with communities. In one community it is necessary to search through fourteen different offices to obtain tax information. And in Pennsylvania the manner of keeping public records should be improved. Rates are based on two fundamental costs, the cost of examining title, and the cost of insuring title. Items of cost incident to examining title are those pertaining to preparing the abstract of title, examining, maintaining and interpreting the assembled data. The precise cost of insuring the title is difficult to determine despite the fact that some companies have more than fifty years of loss experience. Losses arise at irregular intervals and it is difficult to reduce the risks to a mathematical calculation. The rates usually include a reasonable share of the insurer's overhead and should include a fair return on the capital invested. The rates charged are in effect a fee for a highly specialized technical service supplemented by an obligation insuring the accuracy of that service.

Whether the full title charges should be required where a second policy is issued within a reasonably short time after a deed or mortgage has been insured is a question which depends for its answer, *inter alia*, on whether or not bankruptcy, death, or some other factor has intervened subsequently to the date of the prior policy, which necessitates services by the title company other than a mere continuation of the abstract and a tax and judgment search. If bankruptcy, death, or some such similar factor intervenes, the company must make an extensive search for which the applicant should be required to pay. On request Philadelphia companies will keep a title open for a reasonable time in order to enable a mortgage to be created or a subsequent deed to be made and insured.

Title companies should refrain from misleading advertisements such as those suggesting that title insurance removes all risk. They should refrain from issuing opinions on titles, preparing deeds, mortgages, contracts,

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136. See, in this connection, PA. STAT. ANN. (Purdon, 1930) tit. 40, § 151 *et seq.*

or doing any acts which constitute the practice of the law.<sup>137</sup> Policies should set forth clearly and specifically those matters not covered by the insurance and the conditions precedent to the enforcement of liability under the policy. This should appear in type of a size which is easily legible and should be expressed in such a way as to enable the layman to comprehend just what is not covered by the insurance. Whenever reasonably possible a loss should be paid without a claimant's being subjected to the necessity of suit. As is the custom in Philadelphia, title policies should insure marketability of title except as to specified items which cannot be reasonably so covered. Policies to mortgagees should be assignable by delivery without the necessity for a specific approval by the company.

Philadelphia is the home of title insurance. Much of the criticism directed against title companies in other states of the union has no application to the companies now functioning in Pennsylvania. Nevertheless, it behooves the title companies to put their own houses in order in the particulars suggested in this article. Only by improving in every possible way the service rendered to the public, by reducing to the greatest possible extent the cost of their services, and by refraining religiously from engaging in the practice of law can title companies escape from onerous regulations by the state and from the necessity of meeting again and again the recurrent claims of proponents of a state title insurance system.

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<sup>137</sup> Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934); *In re Umble's Est.*, 117 Pa. Super. 15, 177 Atl. 340 (1935). See also Atlanta Title & Trust Co., 172 Ga. 437, 157 S. E. 455 (1931).