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PROPERTY—THE EFFECT OF THE *HERSH* DECISION ON THE TORRENS ACT: GETTING TO THE ROOT OF THE PROBLEM

Hersh Properties, LLC v. McDonald's Corp., 588 N.W.2d 728 (Minn. 1999)

Anh T. Le†

I. INTRODUCTION

In *Hersh Properties, LLC v. McDonald's Corp.*,[1] the Minnesota Supreme Court for the first time addressed the applicability of the Minnesota Marketable Title Act (MTA)[2] to land registered under Minnesota's Torrens statute.[3] The court held that the MTA applied to registered land and could extinguish interests recorded on a Torrens certificate of title in cer-

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1. 588 N.W.2d 728 (Minn. 1999), *rev'g* 573 N.W.2d 386 (Minn. Ct. App. 1998).

2. *See* MINN. STAT. § 541.023 (1998).

3. *See Hersh*, 588 N.W.2d at 732 (noting that the court had not previously determined whether the MTA could be used to remove an easement from Torrens land). Minnesota's Torrens Act appears in Chapters 508 and 508A of the Minnesota Statutes. *See* MINN. STAT. §§ 508.01-508.84, 508A.01-508A.85 (1998).

tain circumstances.[4] The court proceeded, however, to sharply restrict the circumstances under which a Torrens landowner could invoke the MTA for public policy reasons.[5]

This case note argues that the court's holding regarding the applicability of the MTA to Torrens land is unconvincing in light of the statutory language of the MTA. It also contends, however, that the court acted wisely in limiting the circumstances in which a Torrens owner could invoke the MTA. Despite wrongly applying the MTA to Torrens land, the court's ultimate resolution remains positive because most Torrens landowners can continue to rely on the conclusive nature of their certificates of title.

To comprehend the importance of the *Hersh* decision on the existing body of real estate law, one must first understand the purposes of the MTA and the Torrens Act. Part II of this case note addresses the basic principles of both the MTA and the Torrens Act in Minnesota.[6] Part III presents the facts, procedure, and reasoning of the *Hersh* case.[7] Parts IV and V analyze and critique the *Hersh* court's reasoning, and discuss the ramifications of the court's holding on the future application of the Torrens Act in Minnesota.[8]

II. BACKGROUND

Title[9] assurance is a crucial element of real property law because land

4. *See Hersh*, 588 N.W.2d at 735. "[T]he plain language of the MTA leads us to hold that the MTA applies to property registered pursuant to the Torrens Act." *Id.*

5. *See id.* at 735-37. The court held that a Torrens landowner may invoke the MTA only if he or she holds a certificate of title that is over 40 years old. *See id.* at 736. An individual could have easily satisfied that criteria years ago, when the United States was more of an agrarian society. *See generally* JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 345 (3rd ed. 1989) (noting that the change in land use patterns, that is, the frequent ownership transfers, is a result of increased urbanization). However, in today's era, land use has changed and ownership transfers occur more frequently for any given tract. *See id.*

6. *See infra* Part II A-B.

7. *See infra* Part III.

8. *See infra* Part IV-V.

9. As applied to real estate, the term "title" is used to designate "the means by which an owner of lands has the just possession of his [or her] property, the legal evidence of his [or her] ownership, or the means by which his [or her] right to the property has accrued." 1 RUFFORD G. PATTON & CARROLL G. PATTON, PATTON ON LAND TITLES 2 (2d ed. 1957). The term "title" also refers to the deed, which is the instrument used to effect the ultimate transfer of legal title. *See* ROGER CUNNINGHAM ET AL., THE LAW OF PROPERTY 759 (2d ed. 1993).

transactions hinge on a buyer's ability to acquire definite title to realty.[10] The *Hersh* decision involved two separate systems of title assurance, the MTA and the Torrens Act. An examination of these systems reveals that their approaches to ensuring certainty of title remain fundamentally different.

A. *The MTA*

The MTA operates within the recording system, the first land title system in the United States,[11] and to this day the most predominant.[12] The recording system was developed and organized by individual state governments to permit interested persons to discover who owned a parcel of land.[13] The recording system today operates much like a publicly maintained "library of title-related documents."[14] Instruments affecting title[15] are recorded in the county recorder's office.[16] The county recorder's office serves as a central location to store and safe-keep documents affecting land, but makes no averment as to the state of title of such land.[17] The

10. *See* PAUL E. BASYE, CLEARING LAND TITLES 18-19 (2d ed. 1970). A purchaser of realty is entitled to title that is reasonably secure against future attack and loss. *See id.* at 18. A reasonably secure title is also referred to as "merchantable or marketable title" and is one that a reasonably prudent person would be willing to accept at in an arms-length transaction. *See id.*

11. *See* John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 WM. MITCHELL L. REV. 61, 67 (1992) (stating that the first type of recording system was used in the Massachusetts Bay Colony in the 1600s).

12. *See* C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem*, 63 IND. L.J. 55, 67 (1988) (noting that the recording system is the heart of American title assurance).

13. *See* CUNNINGHAM ET. AL., *supra* note 9, at 823 (stating that each state is responsible for maintaining recorded instruments affecting title to land and mostly organizes such records on a county by county basis); *see also* 1 PATTON & PATTON, *supra* note 9, at 9-28 (describing the origin and use of the recording system within the United States). The recording system was developed in the colonial era. *See* 1 *id.* at 9-14. The early colonial statutes provided for a registry system patterned after Continental Europe. *See* 1 *id.* Over time, individual states adopted statutes that organized records of conveyances and encumbrances into a public record system. *See* 1 *id.* at 15-28.

14. *See* CUNNINGHAM ET. AL., *supra* note 9, at 824.

15. Any written instrument affecting title may be recorded except for wills, short leases, and powers of attorney. *See* MINN. STAT. § 507.01 (1998). "[E]very instrument in writing whereby any interest in real estate is created, aliened, mortgaged, or assigned or by which the title thereto may be affected in law or in equity, except wills, leases for a term not exceeding three years, and powers of attorney." *Id.*

16. *See* MINN. STAT. § 507.34 (1998). "Every conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated." *Id.*

17. *See* CUNNINGHAM ET. AL., *supra* note 9, at 824 (showing how the demand-

county recorder's only task is to receive, copy, index, and return the documents and maintain the collection.[18] Each time land is conveyed, a purchaser of land must complete a historical search and examination of the entire record.[19]

In the recording system, title to land is not a discrete document.[20] A landowner's deed to a parcel of land is simply evidence of the landowner's "claim of title."[21] A deed may "pass" title to the grantee, but does not itself constitute the title.[22] The extent of one's possessory rights to the land, also known as one's "state of title," is a conclusion drawn by comparing one's claim of title with the recorded evidence in the public repositories.[23]

A title examination requires a title searcher, usually a professional, to visit a county recorder's office, and identify and read all of the documents that relate to the land in question.[24] The professional then examines the documents and renders an opinion as to the state of title based on his or her knowledge of real estate law and practice.[25] The documents recorded in the county recorder's office are only evidences of title,[26] and the title searcher must manually search and examine each instrument using the appropriate index to ascertain the quality of title.[27] The professional

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ing work of evaluating title is left to private users).

18. *See id.*

19. *See id.* at 854 (concluding that this search is expensive and time-consuming).

20. *See id.* at 721 ("[T]itle in the recording system is not a piece of paper, rather, it is an abstract concept").

21. *See* MINN. STAT. § 508.67, subd. 1 (1998) (noting that a tax deed evidences a "claim of title"); *see also* Cartwright v. Hall, 88 Minn. 349, 350, 93 N.W. 117, 118 (1903) (rejecting claim to "establish title" to a parcel "by introducing in evidence a warranty deed").

22. *See, e.g.*, Merchants & Farmers State Bank of Grove City v. Olson, 189 Minn. 528, 532, 250 N.W. 366, 368 (1933) (holding that title to land does not "pass" when delivery of the deed violates an escrow agreement).

23. *See* CUNNINGHAM ET. AL., *supra* note 9, at 824.

24. *See id.*

25. *See* 1 PATTON & PATTON, *supra* note 9, at 155-156, 198-202. A careful examination of the record requires the professional to have knowledge, skill and experience in real estate law. *See* 1 *id.* at 198. The professional is not a guarantor of the titles he or she approves, and is only liable to the extent of negligence or misconduct that arises from the title examination. *See* 1 *id.* at 198-99. He or she is "cannot be held liable for damages resulting from an opinion rendered in good faith." 1 *Id.* at 199-200.

26. *See* 1 *id.* at 112-114. Validly recorded instruments are evidence of title. *See* 1 *id.* at 112. They "constitute evidence of execution and delivery of the instruments." 1 *Id.* at 114.

27. *See* McCormack, *supra* note 11, at 68. The oldest and most common type of index is the grantor-grantee index, in which copies of instruments affecting title are indexed alphabetically according to the grantors' and grantees' last names. *See* McCormack, *supra* note 11, at 68. Another type of index often used is a tract in-

searches and examines the documents to see if there is an outstanding claim that is superior to that of the current purchaser of land. For instance, the title searcher must ensure that the landowner's title is not encumbered by rights of entry or possibilities of reverter created by ancient conveyances in the chain of title.[28]

The process of title examination under the recording system is expensive and time-consuming.[29] Under the recording system, a full search of the records requires tracing the chain of title[30] back to the original patent grants from the U.S. government.[31] To make a comprehensive assessment of the state of title, a title searcher must locate *all* of the relevant recorded documents relating to a parcel of land.[32] Some of these documents remain scattered in different locales outside of the county recorder's office, including bankruptcy courts and probate courts as well as other state and local agencies.[33]

Today, most title searches are conducted with the use of abstracts, which were developed by private companies as a supplementary aid to title searchers.[34] An abstract is "a commercially prepared set of copies or summaries of all the documents in the public records affecting a particular parcel of land."[35] A title searcher can obtain an abstract and examine the

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dex. In tract indexes, instruments are organized according to the specific parcel of property they affect. *See* McCormack, *supra* note 11, at 69.

28. *See* Wichelman v. Messner, 250 Minn. 88, 100-01, 83 N.W.2d 800, 813 (1957) (noting the special problems resulting from contingent interests produced by the creation of a defeasible fee).

29. *See* CUNNINGHAM ET. AL., *supra* note 9, at 854.

30. The phrase "chain of title" is "a shorthand way of describing the collection of documents which one can find by the use of the ordinary techniques of title search." *Id.* at 847.

31. *See id.* at 854. "Under the conventional recording system, a purchaser of land must obtain an historical search of the records back to a conveyance from the sovereign . . . ." *Id.*

32. *See* 1 PATTON & PATTON, *supra* note 9, at 142. A title searcher must conduct a search that is "broad enough to cover all records which will affect the title up to the time it is conveyed to his client." 1 *Id.*

33. *See* BASYE, *supra* note 10, at 11 (stating that a title searcher needs to examine a number of records outside the office of the recorder such as "records of the probate court as to the devolution of land owned by decedents, records of other courts where title may have been involved in judicial proceedings, records of the tax assessor and collector, and certain records in State and Federal offices").

34. *See* CUNNINGHAM ET. AL., *supra* note 9, at 825.

35. *Id.*; *see also* 1 PATTON & PATTON, *supra* note 9, at 135. An abstract is a synopsis or summary of the essential parts of the records of all instruments upon which the title to a particular tract of land is based, and all of the restrictions it is subject to. *See* 1 *id.* Each abstract brings the history of the record up to the date of the delivery of the conveyance to the seller. *See* 1 *id.* at 141. The abstractor's duty is merely to compile a summary or list of the record, and it is the title examiner's

title without the need to re-examine each individual document in the county recorder's office.[36] Widespread reliance on abstracts has encouraged use of the term "abstract land" to refer to land held within the recording system.[37] Even abstracts, however, can grow into bulky documents containing numerous conveyances, each of which must be evaluated to determine the state of title.

To resolve these problems in the recording system, the Minnesota legislature in 1943 adopted the MTA.[38] The MTA simplifies the title examination process by limiting the period of the search to the last forty years.[39] Under the act, the holder of a non-possessory interest in land must file a notice[40] with the recorder's office within forty years of acquisition to preserve his or her interest.[41] An interest holder who fails to file

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(the professional's) task to formulate a legal opinion as to the state of title. *See id.* at 155.

36. *See* 1 PATTON & PATTON, *supra* note 9, at 155. An abstract company does not act as a guarantor of titles. *See* 1 *id.* at 150-53; *see also* Wacek v. Frink, 51 Minn. 282, 284, 53 N.W. 633, 634 (1892) (noting that a title searcher must accurately describe recorded instruments in an abstract, but does not thereby "become a guarantor of the title").

37. *See* Richard S. Little, *Abstract and Torrens: An Overview of Real Estate Records Systems in Hennepin County*, HENNEPIN LAW., Mar.-Apr. 1992, at 4 (stating that land not yet in the Torrens system is referred to as "abstract land").

38. Minnesota Marketable Title Act, 1943 Minn. Laws ch. 529 (codified as amended at MINN. STAT. § 541.023 (1998)). In 1947, the original Act underwent a major revision that established the basic structure and language of the current act. *See* 1947 Minn. Laws ch. 118; *see also* Note, *Limitations of Actions Affecting Titles to Real Estate*, 33 MINN. L. REV. 54, 57 (1948) (noting that the 1947 amendments constituted a "total and radical redrafting" of the original Act).

39. *See* MINN. STAT. § 541.023, subd. 7. *See generally* CUNNINGHAM ET. AL., *supra* note 9, at 856 (stating that these types of acts simplify the system by making void most types of claims if they fail to appear in the records for a given period of time).

40. *See* MINN. STAT. § 541.023, subd. 1. The notice required by the MTA must be a sworn statement by the claimant or the claimant's agent or attorney, setting forth: (1) the name of the claimant, (2) a description of the affected parcel of land and the event or transaction upon which the claim is founded, and (3) stating whether the claim is mature or immature. *See id.*

41. *See id.* The MTA states that:

> As against a claim of title based upon a source of title, which source has then been of record at least 40 years, no action affecting the . . . title of any real estate shall be commenced by a person . . . to enforce any right, claim, interest, incumbrance or lien founded upon any instrument . . . unless within 40 years after such execution or occurrence there has been recorded in the office of the county recorder or filed in the office of the registrar of titles in the county in which the real estate affected is situated, a notice sworn to by the claimant . . . .

such a notice will be deemed to have abandoned his or her interest in the land.[42] The MTA provides a statutory exception for possessory interests, treating them as the equivalent of preserving notice of the claim.[43]

To invoke the MTA to extinguish an interest, a landowner must have a "claim of title based upon a source of title, which source has been of record at least 40 years."[44] A source of title is a recorded fee simple ownership.[45]

The MTA increases certainty of title in several ways. First, it limits the number of potential interests by operating as a statute of limitations.[46] The Act bars interests not properly preserved within forty years.[47] The MTA simplifies land title transactions by limiting the search period to the fairly recent past and eliminating the need to examine the record back into a distant time each time land is conveyed.[48] Not only does it narrow the period of the title search, it also reduces the quantity of instruments that must be examined to determine the state of title of realty.[49] Second, the MTA extinguishes stale (old and unasserted) claims that in the long run fetter the marketability of title.[50] Stale claims are not favored because they tend to become mere nuisances after a long period of time by outliving their original purpose and clouding marketable title.[51] Third, the MTA operates as a recording act that requires individuals to give notice to the public of encumbrances and restrictions on the land.[52] The requirement of recording interests gives notice to a purchaser relying upon the recent record.[53]

Id.

42. *See id.*

43. *See* MINN. STAT. § 541.023, subd. 6 (stating that the MTA "[s]hall not bar the rights of any person, partnership or corporation in possession of real estate"); *see also* Wichelman v. Messner, 250 Minn. 88, 102, 83 N.W.2d 800, 814 (1957) (explaining that "occupancy or use is itself notice of a claim or interest which has not been abandoned or become nominal"); *see also* CUNNINGHAM ET. AL., *supra* note 9, at 857-58.

44. MINN. STAT. § 541.023, subd. 1.

45. *See Wichelman*, 250 Minn. at 105, 83 N.W.2d at 816 (examining the legislative intent behind MINN. STAT. § 541.023); MINN. STAT. § 541.023, subd. 7.

46. *See Wichelman*, 250 Minn. at 105, 83 N.W.2d at 816.

47. *See id.*

48. *See* BASYE, *supra* note 10, at 368.

49. *See id.* at 370.

50. *See* CUNNINGHAM ET. AL., *supra* note 9, at 854.

51. *See Wichelman*, 250 Minn. at 106, 83 N.W.2d at 816-17.

52. *See id.* at 816.

53. *See* BASYE, *supra* note 10, at 368.

B. *The Torrens Act*

In 1901, the Minnesota legislature adopted the Torrens Act as an alternative method of title assurance.[54] The Torrens provisions appear in chapters 508 and 508A of the Minnesota Statutes,[55] which are separate and distinct from the chapter containing the provisions affecting recorded land, chapter 507.[56] Currently, Minnesota is one of only five states with a fully implemented and well-functioning land registration system.[57] The Torrens system is widely utilized in Hennepin and Ramsey county.[58]

The Torrens system is fundamentally different from the recording system.[59] The recording system "makes no averments to the public about the state of the title to any parcel of land," and requires title searchers to make their own assessments as to the state of title.[60] The Torrens system, on the other hand, conclusively declares the true state of title through the issuance of a certificate of title.[61]

An owner of registered land receives a certificate of title, a tangible piece of paper that is the "actual title" and not just a title examiner's opinion of the state of title.[62] A certificate of title lists all of the encumbrances

54. *See* Torrens Act, 1901 Minn. Laws 237, §§ 1-98 (codified as amended at MINN. STAT. §§ 508.01–508.84, 508A.01–508A.85 (1998)). In *State v. Westfall*, 85 Minn. 437, 447, 89 N.W. 175, 179 (1902), the Minnesota Supreme Court declared the Torrens Act to be constitutional.

55. *See* MINN. STAT. §§ 508.01-508.84, 508A.01-508A.85.

56. *See* MINN. STAT. §§ 507.01 – 507.45 (1998).

57. *See* McCormack *supra* note 11, at 73 (noting that Minnesota is one of five states that uses the Torrens system to a substantial extent); *see also* 11 THOMPSON ON REAL PROPERTY § 92.16(b), at 187 (David A. Thomas ed. 1994) [hereinafter THOMPSON] (listing Hawaii, Illinois, Massachusetts, and Ohio along with Minnesota as states that use the Torrens system). The Torrens system has a long established history outside the United States, in countries such as Australia, New Zealand, and parts of England. *See* 11 THOMPSON § 92.16(a), at 185-86; *see also* Little, *supra* note 37, at 4. The system was developed by Sir Robert Torrens in the mid-1800s and was promulgated from an English method of ship registration. *See* 11 THOMPSON § 92.16(a), at 186. Sir Robert envisioned a system of title registration with four main characteristics: "certainty, economy, simplicity and facility." 11 *Id.*

58. *See* McCormack, *supra* note 11, at 73 (stating that Torrens registration is most prevalent in Hennepin and Ramsey counties of Minnesota).

59. *See* Jurens v. Fitzgerald (*In re* Juran), 178 Minn. 55, 58, 226 N.W. 201, 202 (1929) (noting that the Torrens system "establishes rules in respect to registered land which differ widely from those which apply in the case of unregistered land").

60. *See* CUNNINGHAM ET. AL., *supra* note 9, at 880.

61. A certificate of title is a document evidencing ownership. *See* BLACK'S LAW DICTIONARY 220 (7th ed. 1999). A certificate of title contains the name and residence of the owner, a description of the land, the estate of the owner, and memorials of all encumbrances, liens, and interests in which the land is subject to. *See* MINN. STAT. § 508.35 (1998).

62. *See* Henry v. White, 123 Minn. 182, 184, 143 N.W. 324, 325 (1913) ("The

and restrictions affecting the land, and subsequent bona fide purchasers hold the land free from all encumbrances and claims not noted on the certificate.[63]

The Torrens title is an official document that results from a judicial decree.[64] To convert abstract land into registered land, a landowner has to undergo a judicial proceeding, much like a quiet title action.[65] All individuals with possible claims on the land are made parties to the proceedings.[66] Next, a decree is issued by the court giving the owner a certificate of title showing the extent of the owner's title on the registered property.[67] The court's decree is "more conclusive and better protected from attack or opening up than an ordinary judgment."[68] As one decision noted, the finality of the registration decree is "the fundamental basis as well as the capstone of the Torrens system of perfecting land titles . . . ."[69]

The Torrens certificate is always up-to-date and mirrors the current state of title.[70] Each time a parcel of land changes hand, the examiner of titles[71] re-assesses the state of title on the old certificate, and makes the ap-

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basic principle of the [Torrens] system is the registration of the title to land instead of registering only the evidence of such title. A title is created by decree and certificate of registration."); *see also* Little, *supra* note 37, at 5 ("It is important to remember that an abstract is only *evidence* of title. In contrast, in dealing with Torrens property, the certificate of title *is* the title.").

63. *See* MINN. STAT. § 508.25 (1998) (noting seven exceptions to the general rule); *see also id.* § 508.22 (stating that "every . . . registration shall bind the land described in it, forever quiet the title to it, and be forever binding and conclusive upon all persons"); Rea v. Kelley, 183 Minn. 194, 200, 235 N.W. 910, 912 (1931) (stating that a certificate of title is "conclusive evidence of all matters and things contained therein"); Mill City Heating & Air Conditioning Co. v. Nelson, 351 N.W.2d 362, 365 (Minn. 1984) (noting that a certificate of title describes all ownership interests in the land).

64. *See* CRIBBETT & JOHNSON, *supra* note 5, at 330 (citing State v. Westfall, 85 Minn. 437, 438, 89 N.W. 175, 175 (1902)).

65. *See* CRIBBETT & JOHNSON, *supra* note 5, at 330.

66. *See* CRIBBETT & JOHNSON, *supra* note 5, at 330.

67. *See* CRIBBETT & JOHNSON, *supra* note 5, at 331.

68. Harrington v. Linkert, 203 Minn. 575, 577, 282 N.W. 461, 462 (1938) (rejecting collateral attack on Torrens certificate because of the strict limitations upon such challenges under the registration act).

69. Murphy v. Borgen, 148 Minn. 375, 182 N.W. 449 (1921) (holding that a defendant to a registration proceeding, who failed to appear because of excusable neglect, cannot set aside a decree of registration).

70. *See* CUNNINGHAM ET. AL., *supra* note 9, at 882.

71. The examiner of titles is a court appointed official who examines titles and serves as a legal adviser to the county registrar. *See* MINN. STAT. § 508.12 (1998). An examiner of titles is a subordinate officer of the court that carries out a judicial function. *See* State v. Westfall, 85 Minn. 437, 446, 89 N.W. 175, 178 (1902).

propriate changes to reflect the new status.[72] Under the Torrens system, an individual can inspect the state of title expeditiously and need only extend the inquiry to seven exceptions that remain valid even if not listed on the certificate of title.[73] These interests—which include such things as tax liens and assessments, short term leases, rights under a contract for deed—do not seriously impair the conclusive nature of a Torrens certificate of title.[74]

The Torrens system, in short, does not operate in terms of evidence or claims of title. Old conveyances are irrelevant in the Torrens system because a certificate of title remains "free from any and all rights or claims not registered with the registrar of titles, with certain unimportant exceptions . . . ."[75] In fact, a "voluntary instrument of conveyance purporting to convey or affect registered land" operates "only as a contract between the parties, and as authority to the registrar to make registration."[76] The Torrens Act provides that "[t]he *act of registration* shall be the operative act to convey or affect the land."[77]

As a result, a Torrens landowner does not need to "search" the conveyance record for evidence of title. The title investigator need only examine the certificate of title.[78] The Torrens system eliminates the need for a title searcher to draw legal conclusions from the conveyance record, and

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72. *See* CUNNINGHAM ET. AL., *supra* note 9, at 882.

73. There are seven exceptions noted in the Torrens Act, that is, these interests are still valid even if they are not memorialized on the certificate of title:

> (1) liens, claims, or rights arising or existing under the laws or the constitution of the United States, which this state cannot require to appear of record; (2) the lien of any real property tax or special assessment for which the land has not been sold at the date of the certificate of title; (3) any lease for a period not exceeding three years when there is actual occupation of the premises thereunder; (4) all rights in public highways upon the land; (5) the right of appeal, or right to appear and contest the application, as is allowed by this chapter; (6) the rights of any person in possession under deed or contract for deed from the owner of the certificate of title; and (7) any outstanding mechanics lien rights . . . .

MINN. STAT. § 508.25 (1998).

74. *See In re* Juran, 178 Minn.at 58, 226 N.W. at 202 (describing the interests excepted from the Torrens Act as "certain unimportant exceptions").

75. *See id.*; *see also* MINN. STAT. § 508.25 (providing that a registered landowner holds his or her land "free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar," with seven enumerated exceptions).

76. MINN. STAT. § 508.47, subd. 1 (1998).

77. *Id.* (emphasis added).

78. *See* MINN. STAT. § 508.25.

instead, leaves the task of title determination to the title examiner (a court-appointed official), and the registrar of titles.[79] The Torrens system is thus a judicially supervised operation that makes land more marketable by establishing an indefeasible, conclusive title.[80]

The effectiveness of Torrens legislation hinges on the certainty and reliability that is afforded to an owner of a valid certificate of title. A certificate of title is deemed to be conclusive as to all matters contained within it.[81] The courts have upheld the conclusiveness of a certificate of title since the enactment of the Torrens Act, in part because of the judicial origin of a certificate of title.[82] The purpose of the Torrens Act would not be served if purchasers, title examiners, and other interested parties could not rely on a certificate of title's conclusive nature.[83]

C. *Differences Between the MTA and the Torrens Act*

The MTA and the Torrens Act constitute two separate methods of title assurance within the framework of Minnesota real estate law. Though both statutes have a common goal—to further the efficiency and certainty of land title transfers—each operates in a fundamentally different way.[84] The MTA was designed to simplify the title-examination process within

79. *See* MINN. STAT. § 508.12, subd. 1 (1998) (stating that the examiner of title is appointed by the judges of the district court); *see also* MINN. STAT. § 508.13 (1998) (stating that "the examiner of titles . . . shall proceed to examine into the title of the land described in the application [for registration] . . . shall search all public records, and fully investigate all facts pertaining to the title . . . [the examiner shall render] an opinion upon the title"); MINN. STAT. § 508.52 (1998) (noting that the registrar of titles shall assess the state of title between conveyances and shall change the memorials on the certificate of title accordingly).

80. *See* United States v. Ryan, 124 F. Supp. 1, 4 (D. Minn. 1954) (giving a synopsis of the history of the Torrens system and the purpose for its adoption).

81. *See* MINN. STAT. § 508.36 (1998); *see also* Mill City Heating & Air Conditioning Co. v. Nelson, 351 N.W.2d 362, 364-65 (Minn. 1984) (stating that an individual needs to look no further than the certificate of title for any transactions that might affect the land).

82. *See In re* McGinnis, 536 N.W.2d 33, 35 (Minn. Ct. App. 1995) (stating that "every person receiving a certificate of title pursuant to a decree of registration and every subsequent purchaser of registered land who receives a certificate of title . . . shall hold it free from all encumbrances . . . excepting only . . . [those] noted in the last certificate of title . . . ."); *see also* MINN. STAT. § 508.25.

83. *See* Loring M. Staples, *The Conclusiveness of a Torrens Certificate of Title,* 8 MINN. L. REV. 200, 200 (1924) (noting that the framers of the Torrens title acts sought to create "[a]n indefeasible title, represented by a certificate conclusive of the owner's rights as against the world, and upon which purchasers could conclusively rely . . . .").

84. *See In re* Juran, 178 Minn. at 58, 226 N.W. at 202 (stating that the Torrens Act "establishes rules in respect to registered land which differ widely from those which apply in the case of unregistered land").

the recording system without changing the system's essential framework.[85] The Torrens Act, in contrast, creates an entirely different means for determining title to land. Discarding the basic principles of the recording system, it substitutes a judicially administered system that establishes an "official" title to land.[86]

The application of the MTA to Torrens land would undermine the core principle of the Torrens system: the conclusiveness of a certificate of title. The *Hersh* court recognized the problem the MTA would pose if applied to registered land and acted to prevent its invocation except in rare circumstances.[87]

III. THE *HERSH* DECISION

A. *The Facts*

In 1944, Arthur and Doris Robinson registered two adjacent parcels of land under Minnesota's Torrens Act.[88] In 1950, the Robinsons conveyed what became the Hersh parcel by warranty deed to a corporation.[89] The 1950 grant included a fifteen-foot easement[90] for ingress and egress over the other plot (which later became McDonald's parcel), with the right to maintain a sign on the easement strip.[91] Since the creation of the easement, the certificate of title for each plot contained a recital of the easement.[92] When McDonald's acquired the burdened parcel in 1984, its title insurance policy excluded coverage for the easement.[93] None of the owners of the Hersh parcel had ever utilized the easement.[94] McDonald's currently is using the area encompassing the easement as a parking lot.[95]

85. *See* Walter E. Barnett, *Marketable Title Acts: Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 52 (1967-68) ("Marketable Title Acts are intended to operate in conjunction with, rather than as a substitute for, the recording acts.").

86. *See Mill City*, 351 N.W.2d at 364 (noting that "[r]egistered land stands on a different footing than unregistered land").

87. *See* Hersh Properties, LLC v. McDonald's Corp., 588 N.W.2d 728, 735 (Minn. 1999).

88. *See id.* at 730.

89. *See id.*

90. An easement is a non-possessory interest in the land of another. *See* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 1.01 (1988).

91. *See Hersh*, 588 N.W.2d at 730.

92. *See id.*

93. *See* Hersh Properties, LLC v. McDonald's Corp., 573 N.W.2d 386, 388 (Minn. Ct. App. 1998), *rev'd*, 588 N.W.2d 728 (Minn. 1999).

94. *See Hersh*, 588 N.W.2d at 731.

95. *See id.* at 730.

In 1995, Hersh acquired the parcel benefited by the easement.[96] Several months after its purchase, Hersh told McDonald's that it intended to use the easement to erect a sign for its liquor business.[97] McDonald's denied the validity of the easement and refused to permit its use by Hersh.[98]

B. Procedural Posture

Hersh brought a declaratory judgment action seeking a determination of the validity of its easement.[99] McDonald's asserted that the MTA barred Hersh's use of the easement because neither Hersh nor its predecessors in title filed a sworn notice with the registrar of titles within forty-years of the creation of the easement to preserve its interest the McDonald's parcel.[100] Because no notice was filed, McDonald's claimed that the MTA extinguished the easement.[101] The trial court granted summary judgment in favor of McDonald's on the premise that the MTA applied to Torrens property and extinguished Hersh's claim to such easement.[102] The Court of Appeals affirmed the lower court's finding, holding that the recital of the easement in Hersh's Certificate of Title did not satisfy the notice provisions of the MTA.[103]

On appeal, the Minnesota Supreme Court reversed in part and affirmed in part, holding that Hersh's claimed easement was not extinguished by the MTA.[104] The *Hersh* court affirmed the lower court's finding that the MTA applies to Torrens land.[105] The court held that the MTA applies to Torrens land because it expressly covers "any real estate," fails to exclude Torrens land and provides for filing notices with the "office of the registrar.[106]

However, the *Hersh* court strictly limited the circumstances under which a Torrens landowner could invoke the MTA.[107] Noting that a landowner could invoke the MTA only if he or she possessed a claim of title based upon a source of title of record for forty years, the court proceeded

96. *See id.*
97. *See id.*
98. *See id.*
99. *See id.* at 729.
100. *See id.*
101. *See id.* at 730.
102. *See id.* at 729-30.
103. *See id.* at 730.
104. *See id.* at 737.
105. *See id.* at 730.
106. *See id.* at 735.
107. *See id.* at 735-37.

to analyze the meaning of "source of title" as it applied to Torrens land.[108] Holding that the phrase was ambiguous, the court examined legislative purpose and public policy to define the term in a way that would best restrict the application of the MTA to Torrens land.[109] It held that "source of title" refers to the landowner's own certificate of title rather than any previous conveyance.[110] As a result, a Torrens landowner could invoke the MTA to extinguish an interest recorded on his or her certificate of title only if the landowner's certificate is over forty years old.[111] On these grounds, the court found that McDonald's lacked an adequate "source of title" to invoke the MTA.[112] The court found that a more liberal application of the MTA would destroy the binding and conclusive nature of the certificate of title under the Torrens Act.[113]

IV. ANALYSIS

A. *The MTA and Torrens Land*

The *Hersh* court held that the statutory language of the MTA "clearly and unambiguously" encompasses Torrens property.[114] The MTA, it stated, expressly covers "any real estate" and makes no attempt to exempt Torrens land, even though it excludes other types of real estate.[115] Moreover, the language of the act provides for recording of notice of interests not only at the county recorder's office, but also at the "office of the registrar," which deals exclusively with Torrens land.[116]

Though the court's reasoning appears superficially plausible, a close analysis of the statutory language casts considerable doubt on the validity of the court's decision. Despite the court's assertions, the MTA does not clearly encompass "any real estate." The *Hersh* court based its conclusion upon the first sentence of the MTA, which states that: "[a]s against a claim of title based upon a source of title, which source has then been of record at least 40 years, no action affecting the . . . title of *any real estate* shall be commenced" unless the recording provisions of the MTA have been followed.[117] This convoluted sentence prescribes who may invoke the MTA

108. *See id.* at 735-36.
109. *See id.* at 736.
110. *See id.* at 737.
111. *See id.*
112. *See id.*
113. *See id.* at 736.
114. *See id.* at 735.
115. *See id.*; *see also* MINN. STAT. § 541.023, subd. 1 (1998).
116. *See Hersh*, 588 N.W.2d at 735.
117. MINN. STAT. § 541.023, subd. 1 (emphasis added).

and thus the scope of the statute. In interpreting the sentence, however, one must interpret the phrase "any real estate" in light of the earlier clauses in the sentence.[118] The principle of *ejusdem generis* requires courts to construe "general words" in a statute (such as "real estate") as "restricted in their meaning by preceding particular words."[119] The rules of construction also require that a statute "be construed, if possible, to give effect to all its provisions,"[120] and that "no word, phrase, or sentence should be deemed superfluous, void, or insignificant."[121] Construed in light of these principles, the MTA's first sentence states that the act applies only to real estate that is held by a "claim of title" based upon a "source of title" recorded at least forty years.[122] Stated slightly differently, the MTA covers only *that real estate capable of being held by a claim of title based upon a recorded source of title.*[123]

This distinction holds great importance because Torrens land does not fall within the category of real estate capable of being held by a claim of title based upon a recorded source of title. Under the Torrens system, the landowner does not possess a claim of title. Rather, the landowner holds the actual and "official" title to the property in the form of a certificate of title.[124] The phrase "claim of title" only makes sense in the abstract system, where it refers to the written evidence of title recorded in the county recorder's office.

A Torrens landowner also lacks a "source of title." The MTA defines "source of title" as a deed or other instrument that "transfers or confirms . . . a fee simple title to real estate."[125] Under the Torrens Act, a deed *cannot* "transfer" title to Torrens land[126] and thus cannot qualify as a

118. *See id.*

119. MINN. STAT. § 645.08(3) (1998).

120. MINN. STAT. § 645.16 (1998); *see also* MINN. STAT. § 645.17 (1998) (authorizing courts to presume that the legislature intended "the entire statute to be effective and certain").

121. Amaral v. St. Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999) (citing Owens v. Federated Mut. Implement & Hardware Ins., 328 N.W.2d 162, 164 (Minn. 1983)).

122. *See* MINN. STAT. § 541.023, subd. 1.

123. The rules of construction permit transposition of words to clarify the meaning of obscure or ambiguous statutory language. *See* Great Atl. & Pac. Tea Co. v. Ervin, 23 F. Supp. 70, 76 (D. Minn. 1938) (noting that "a court may properly disregard punctuation, or repunctuate, if that be necessary, in order to arrive at the natural meaning of the language used").

124. *See* Little, *supra* note 37, at 5 (noting that "the certificate of title *is* the title").

125. MINN. STAT. § 541.023, subd. 7 (1998).

126. *See* MINN. STAT. § 508.47, subd. 1 (1998) (stating that only the registrar's act of registration conveys an interest in land registered under the Torrens Act).

"source of title" under the MTA.[127] Old conveyances that would form a chain of title hold no legal importance under the Torrens system and are technically irrelevant to the landowner's title.[128] Moreover, an earlier certificate of title cannot constitute a source of title. Each time a parcel of Torrens property is conveyed, the examiner of titles makes a comprehensive assessment of title, cancels the old certificate and issues a new certificate of title.[129] The landowner's own certificate of title cannot constitute a *source* of title because it is the title itself.[130] Because Torrens land is not, strictly speaking, capable of being held by a claim of title based on a source of title, Torrens land does not fall within the provisions of the MTA.

In light of this analysis, the MTA's failure specifically to exempt Torrens land[131] holds little importance. The MTA did not exclude Torrens land because the act applies only to real estate that can be held by a claim of title based upon a source of title. Torrens land does not fall within this category.

The court's strongest argument for applying the MTA to Torrens land is the MTA's use of the term "office of the registrar."[132] The MTA states that a notice to preserve an interest must be filed with the recorder's office or the office of the registrar, which deals exclusively with Torrens property.[133] The *Hersh* court asserted that the presence of the words "registrar of titles" clearly indicates its application to registered property.[134]

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127. *See* MINN. STAT. § 541.023, subd. 7.

128. *See* United States v. Ryan, 124 F. Supp. 1, 10 (D. Minn. 1954) (emphasizing that "the only instruments which can possibly affect a registered title are those which are filed with the registrar of titles and noted as memorials on the certificate of title"); *see also* Henry v. White, 123 Minn. 182, 184, 143 N.W. 324, 325 (1913) (holding that the omission of a valid mortgage on a certificate of title does not affect a subsequent purchaser of registered land).

129. MINN. STAT. § 508.52 (1998) (setting forth the requisite steps for conveyance of registered land).

130. *See Henry*, 123 Minn. at 184, 143 N.W. at 325 ("The basic principle of the [Torrens] system is the registration of the title to land instead of registering only the evidence of such title"); *see also* Little, *supra* note 37, at 5 ("It is important to remember that an abstract is only *evidence* of title. In contrast, in dealing with Torrens property, the certificate of title *is* the title").

131. *See Hersh*, 588 N.W.2d at 735.

132. *See id.* at 735; MINN. STAT. § 541.023, subds. 2, 4 (1998). The references to the registrar's office were added to the MTA as part of the massive 1947 revision of the statute. *Compare* 1943 Minn. Laws ch. 529, *and* 1945 Minn. Laws ch. 124, *with* 1947 Minn. Laws ch. 118. *See also* Note, *supra* note 38, at 62 (mentioning the addition of the language regarding registered land and doubting where any "useful purpose is served by encumbering a title certificate with notices of claims").

133. MINN. STAT. § 541.023, subds. 2, 4.

134. *See Hersh*, 588 N.W.2d at 735.

Though troubling, the MTA's references to the registrar of titles do not show conclusively the legislature's intent to cover Torrens land.[135] The county recorder and the registrar of titles are the same person in the state of Minnesota.[136] Only a few Minnesota counties maintain separate offices for abstract and registered land, and most counties keep the two classes of records in a single office.[137] In providing for filing of MTA notices with "county recorders and registrars of titles,"[138] the legislature might have intended the phrase as a catchall term for the officer administrating the filing procedure. Even if the legislature actually intended for notices to be filed at the registrar's office, this intent would contradict its more fundamental intent to limit the scope of the MTA to land capable of being held by a claim of title based upon a recorded source of title, in other words, to non-Torrens land.[139] In either case, the court should disregard the MTA

135. The legislature probably did not possess an "intent" in regards to this issue. The Minnesota Bar Association drafted the 1947 revision of the MTA, which added the references to the registrar's office. *See* BENCH & B. OF MINN., Dec. 1946, at 7, 9 (stating that the MTA revision bill was one of three noncontroversial bills "drafted after long and intensive study . . . by a committee of the [Minnesota Bar] Association" for early presentation in the 1947 legislative session). Minnesota Bar representatives George Malony and Carroll Patton actively pushed the legislation through the legislature. *See* F. Gordon Wright, *Legislative Progress Slow But Steady*, BENCH & B. OF MINN., March 1947, at 13 (mentioning the efforts of Malony and Patton and stating that the bill "has received some amendments and is likely to be recommended for passage"); *see* also Note, *supra* note 38, at 57 (noting that the Minnesota State Bar Association actively sponsored the 1947 revision of the MTA). Though the legislature made several revisions in the Minnesota Bar's original draft, none of the changes concerned the language about the registrar's office. *See* JOURNAL OF THE HOUSE, 55th Legis. Sess. 212-13, 295-96, 926-27 (Minn. 1947); JOURNAL OF THE SENATE, 55th Legis. Sess. 214, 631 (Minn. 1947).

136. *See* MINN. STAT. § 508.30 (1998) ("[C]ounty recorders shall be the registrars of titles in their respective counties").

137. Telephone Interview with Richard S. Little, Deputy Examiner of Titles, Hennepin County (Jan. 28, 2000); *see also* United States v. Ryan, 124 F. Supp. 1, 7 (D. Minn. 1954) (noting that the Torrens Act did not create a "new or separate office . . . for the handling of instruments affecting registered property").

138. *See* MINN. STAT. § 541.023, subd. 4 (directing county recorders and registrars "to accept for recording or filing notices conforming" with the provisions of section 541.023).

139. *See supra* notes 118-131 and accompanying text. In evaluating the legislature's purpose, one should remember that marketable title acts first grew popular during the 1940s and contemporaries lacked experience regarding the effects and ramifications of the statutes. *See* Ralph W. Aigler, *Clearance of Land Titles—A Statutory Step*, 44 MICH. L. REV. 45, 49 (1945) (discussing the then recent Michigan marketable title act and noting that similar legislation in other states was "comparatively recent"); Paul E. Basye, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 1097, 1110 (1949) (stating that statutes barring all ancient interests—marketable title acts—have been passed in "very recent years"); H. K. Brehmer, *Limitations of Actions Affecting Title to Real Estate*, 30 MINN. L. REV. 23, 29 (1945)

language regarding the registrar of titles.

B. Restrictions on the MTA's Application to Torrens Land

Though the *Hersh* court held that the MTA covered Torrens land, it sharply restricted the ability of Torrens landowners to invoke the act.[140] The court held that a Torrens landowner seeking to invoke the MTA must hold a certificate of title that is at least forty years old[141] – a rare circumstance these days.[142] The court reached this conclusion by concluding that the MTA phrase "source of title" was ambiguous and then determining its meaning in light of public policies underlying the MTA and the Torrens Act.[143] The court noted that the MTA exists to protect landowners from ancient interests that "fetter the marketability of real estate," while the Torrens Act exists to ensure certainty and security of title by means of a conclusive, indefeasible certificate of title.[144] In weighing these public policies, the court placed most emphasis on protecting the Torrens system.[145] The court reasoned that:

> It is difficult to see what purpose a certificate of title would serve if sellers, purchasers, mortgagors, title examiners, et al. could no longer rely on a certificate of title's conclusive nature. Indeed, such a holding would effectively ignore the purpose of registering title and remove the protection afforded by the Torrens Act.[146]

In short, the court sharply limited application of the MTA to Torrens land to protect public reliance on the conclusive nature of a Torrens certificate of title.

(stating that all marketable title acts "are of comparatively recent origin, and there are no decisions on any of them except that of Iowa"); Recent Statute, *Recording and Registry Laws*, 55 HARV. L. REV. 886, 886-88 (1942) (analyzing recent marketable title acts from Wisconsin, Illinois, Indiana and Iowa). The 1943 Minnesota Marketable Title Act, for instance, contained numerous unintended effects that required rectification in later legislative sessions. *See* George M. Maloney, *Comments on Minnesota Laws, 1943, Chapter 529, Relating to Limitations of Actions Affecting Title to Real Estate*, 30 MINN. L. REV. 32, 32-33 (1945) (describing numerous defects in Minnesota's original marketable title act); Note, *supra* note 38, at 57 (evaluating the numerous revisions to the original 1943 marketable title act wrought by the 1947 amendments).

140. *See Hersh*, 588 N.W.2d at 736.
141. *See id.* at 737.
142. *See* CRIBBET & JOHNSON, *supra* note 5, at 345.
143. *See Hersh*, 588 N.W.2d at 736.
144. *See id.*
145. *See id.*
146. *Id.*

The court's holding regarding the ambiguity of "source of title" remains somewhat unsatisfying. The MTA defines "source of title" in perfectly straightforward terms as a deed or legal instrument that transfers or confirms a fee simple title to real estate.[147] When applied to land within the recording system, the phrase offers few grounds for misunderstanding. In holding the term ambiguous, the court considered only the meaning of the phrase within the Torrens system,[148] where the term was never meant to apply. The court's difficulties in interpreting "source of title" result solely because of its holding that the MTA applies to Torrens land.

Nevertheless, the *Hersh* court's arguments for sharply restricting the use of the MTA within the Torrens system remain convincing. In limiting the MTA's application to Torrens land, the court emphasized the public's reliance upon the conclusive, indefeasible nature of Torrens certificates of title.[149] Torrens landowners assume that their certificates of title accurately describe the extent of their rights to their land. Those who convert abstract land to registered land spend a substantial amount of time and money to obtain the benefits of such certainty.[150] It would be inequitable to undermine the certainty of their titles. Hersh probably negotiated the purchase price of its land in reliance upon the easement, which it quickly attempted to exercise.[151]

Other public policies, overlooked by the *Hersh* court, bolster the court's restrictions upon the MTA's application to Torrens land. First, the holding avoids statutory redundancy.[152] The Torrens Act secures directly

147. *See* MINN. STAT. § 541.023, subd. 7 (1998) (stating that "source of title" means "any deed, judgment, decree, sheriff's certificate, or other instrument which transfers or confirms, or purports to transfer or confirm, a fee simple title to real estate . . .").

148. *See Hersh*, 588 N.W.2d at 735-36.

149. *See id.* at 736.

150. *See* Diana Sclar, *From the Legislatures: Minnesota Simplifies Land Registration*, 11 REAL EST. L.J. 258, 260 (1983) (noting that the cost of initial registration is high).

151. *See Hersh*, 588 N.W.2d at 730 (noting that Hersh acquired its parcel on June 27, 1999 and informed McDonald's a few months later that it intended to invoke the easement); *see also* Alvin v. Johnson, 241 Minn. 257, 261, 63 N.W.2d 22, 25 (Minn. 1954) (noting that an appurtenant easement increases the value of the benefited tenement and, for tax purposes, constitutes part of the purchase price of such tenement). Conversely, McDonald's probably paid less for the property because its certificate of title stated that its parcel was burdened by the easement. *See* Hersh Properties, LLC v. McDonald's Corp., 573 N.W.2d 386, 388 (Minn. Ct. App. 1998) (noting that McDonald's title insurance policy excluded the easement), *rev'd*, 588 N.W.2d 728 (Minn. 1999).

152. *See* Erickson v. Sunset Mem'l Park Ass'n, 259 Minn. 532, 543, 108 N.W.2d 434, 441 (1961) ("A statute is to be construed, where reasonably possible, so as to avoid irreconcilable difference and conflict with another statute. The general

two of the primary purposes of the MTA: extinction of stale claims and notice of interests in land.[153] The process of registering land under the Torrens system eliminates old, unasserted claims upon the parcel.[154] If parties summoned as defendants in a Torrens registration proceeding fail to assert their claims,[155] then upon motion of the applicant the claims are extinguished and the applicant's title is confirmed.[156] The Torrens certificate of title also provides sufficient notice to purchasers of all interests affecting a parcel of land.[157] The initial Torrens registration procedure provides notice to the public by publication and the trial itself.[158] Moreover, the certificate of title lists all interests that affect the land[159] and is updated each time the land changes hands.[160] In the *Hersh* case, McDonald's knew full well of Hersh's easement because the easement was listed expressly on its certificate of title.[161] No purpose would have been served by requiring an additional MTA notice of interests already listed on a Torrens certificate of title.

Second, the *Hersh* holding protects the conclusive nature of a legiti-

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terms of a statute are subject to implied exceptions founded on rules of public policy and the maxims of natural justice so as to avoid absurd and unjust consequences.").

153. *See* Wichelman v. Messner, 250 Minn. 88, 105-06, 83 N.W.2d 800, 816 (1957). The court stated that the MTA operates as a curative act, correcting defective instruments; a recording act, giving notice of claims on real estate; and a statute of limitations, eliminating stale, unasserted claims of an interest in real estate). *See id.*

154. *See* MINN. STAT. § 508.19 (1998).

155. *See* MINN. STAT. § 508.15 (1998). Those listed in the application or discovered by the examiner to have a stake in the application is joined as parties to the proceeding. *See id.*

156. *See* MINN. STAT. § 508.19.

157. *See* MINN. STAT. § 508.25 (1998) (noting that a registered landowner holds his or her land "free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar," aside from seven enumerated exceptions); *see also* Mill City Heating & Air Conditioning Co. v. Nelson, 351 N.W.2d 362, 365 (Minn. 1984) (noting that a certificate of title describes all ownership interests in the land, with seven exceptions).

158. *See* MINN. STAT. § 508.16, subd. 1 (1998). The Torrens Act requires publication of the summons to be published in the newspaper of the county where the registration application is filed. *See id.*

159. *See* MINN. STAT. § 508.25.

160. *See* CUNNINGHAM ET. AL., *supra* note 9, at 882.

161. *See Hersh*, 588 N.W.2d at 730 (Minn. 1999) (stating that McDonald's certificate of title contained a recital of the easement). McDonald's had the option of not purchasing the land, or having the easement removed by other means. An owner of registered land may petition the court to remove an interest memorialized on a certificate of title upon the ground that it has terminated or ceased. *See* MINN. STAT. § 508.71, subd. 2 (1998).

mate judicial proceeding. Torrens registration is a judicially supervised operation.[162] The initial registration process involves a trial, where all interests in the land are adjudicated.[163] The court then issues a decree of registration that is "binding and conclusive upon all persons."[164] To apply the MTA to Torrens land would undermine the certainty of such a court proceeding. An owner of registered property would still need to file a notice with the office of the registrar even though that person would have had any interest adjudicated by the trial proceeding. Such a requirement is redundant at best because it attempts to accomplish a task that is already satisfied by the registration system.

The third and final public policy consideration underlying the *Hersh* decision is the extensive investment that Minnesota has put into the Torrens system. Minnesota is considered one of the leading states using the Torrens system.[165] Courts in this state have rigorously upheld the conclusiveness of a certificate of title,[166] and in turn purchasers of registered land have relied on the certificates as reflecting the true state of title.[167] In Hennepin County, approximately forty percent of the land is governed by the Torrens Act.[168] Landowners' confidence in registered title has led to the extensive use of the Torrens system Minneapolis and St. Paul.[169]

Minnesota's interest in the Torrens system is also evidenced by its willingness to expand the registration process through Certificate of Possessory Title (CPT) legislation.[170] Under this system, an owner of abstract

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162. *See* MINN. STAT. § 508.20 (1998) ("[T]he case shall be tried by the court in like manner as an ordinary civil action").

163. *See id.*

164. MINN. STAT. § 508.22 (1998).

165. *See* CRIBBET & JOHNSON *supra* note 5, at 331 (noting that Minnesota is one of the strong Torrens states).

166. *See* United States v. Ryan, 124 F. Supp. 1, 9 (D. Minn. 1954) (noting that the Minnesota Supreme Court "has taken a very definite stand in upholding the validity of titles registered under the Torrens System"); *see also Mill City Heating & Air Conditioning Co.*, 351 N.W.2d at 365 (finding that an unregistered instrument does not bind Torrens land because to do so would weaken the conclusive nature of the Torrens system); *In re* Juran, 178 Minn. at 58, 226 N.W.2d at 202 (holding that "the purpose of the Torrens Law is to establish an indefeasible title"); State v. Westfall, 85 Minn. 437, 444, 89 N.W. 175, 178 (1902) (declaring the Torrens Act as a constitutional means to adjudicate the state of title of real estate).

167. *See* MINN. STAT. § 508.22.

168. *See* Sclar, *supra* note 151, at 261 (stating that the office of the Hennepin County Title Examiner estimates that over 40% of all titles in this area are under the Torrens system).

169. *See* Sclar, *supra* note 151, at 261.

170. *See* MINN. STAT. §§ 508A.01-.85 (1998) (codifying registration procedures); *see also* 11 THOMPSON, *supra* note 58, § 92.16(d), at 190 ("In 1982, Minnesota became the first American state to authorize administrative initial registration

land can register title using an administrative registration procedure at a significantly lower cost[171] and in a simplified manner.[172] This administrative registration procedure can be used only for titles that are uncontested. Thus, if an individual has good title, the Registrar of Titles issues a Certificate of Possessory Title (CPT) to the landowner and in approximately five years the CPT is converted to a regular certificate of title.[173] The CPT legislation has made Minnesota more "Torrens friendly," because it reduces the time and expense involved in land registration. Applying the MTA to Torrens land would undermine Minnesota's investment in Torrens registration.

V. CONCLUSION

The *Hersh* decision represents the Minnesota Supreme Court's attempt to uphold the conclusiveness and certainty of Torrens registration amidst the ambiguous language of the MTA. The court noted that, "[t]here is nothing in the MTA to indicate that the legislature intended to abrogate the purpose of the Torrens Act through [the] enactment of the MTA, and we cannot presume the legislature intended such an absurd result."[174] The court thus crafted its holding to leave room for the legislature to intervene and rectify Minnesota's title assurance laws.

In 1954, the court in *United States v. Ryan*[175] concluded its analysis of the application of the Torrens system in Minnesota with the following:

> For more than fifty years the people of the State of Minnesota have been buying and selling properties registered under the Torrens system with full and complete reliance upon the certificate of title and in the firm belief that the certificate of title disclosed the true nature of the status of the title, and that they were amply and fully protected under the laws of the State of Minnesota.[176]

Forty five years later, this statement should continue to hold true for

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of possessory titles.").

171. The current cost of a typical CPT registration is approximately $275.00, excluding attorney's fees. *See* HENNEPIN COUNTY EXAMINER OF TITLES, REGISTRATION OF TITLE WITHOUT A COURT PROCEEDING IN HENNEPIN COUNTY 2 (1994).

172. *See* Sclar, *supra* note 151, at 258.

173. *See* MINN. STAT. § 508A.01-.85.

174. *Hersh*, 588 N.W.2d at 736.

175. 124 F. Supp. 1 (D. Minn. 1954).

176. *Id.* at 12.

Minnesotans who have invested in Torrens registration. The Torrens system is a unique framework, separate and distinct from the recording system that provides Minnesota landowners with an alternative and very successful method of title assurance. As the *Hersh* court recognized, its value and purpose cannot be fully realized if registered landowners cannot rely confidently on the conclusiveness of their certificates of title.