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# Torrens and Recording: Land Title Assurance in the Computer Age

John L. McCormack

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## TORRENS AND RECORDING: LAND TITLE ASSURANCE IN THE COMPUTER AGE

JOHN L. McCORMACK†

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## I. INTRODUCTION

The weaknesses of the recording systems<sup>1</sup> used in the United States are well known. Over the years, commentators have proposed replacing recording systems with the Torrens system of land title registration. Some proponents of Torrens point to the apparent success of registration systems in foreign countries, particularly Canada and the United Kingdom, as

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1. The term "recording" will be used to refer to land title record systems where the government simply acts as a custodian of land title data. "Title registration" will refer to systems where the government evaluates data, usually as it comes in, and where the record maintained is intended to be a generally conclusive governmental statement concerning ownership and title. The term "Torrens" will refer specifically to the title registration system adopted in Australia in 1857 and systems found elsewhere in the world which are directly based on the Australian model.

Some commentators use "Torrens" to refer to systems, actual or proposed, which may include some aspects of the Australian model without intending to refer to such model in its entirety. Of course, classifications are rarely perfect and some systems do not neatly fit into either the "recording" or "registration" categories as defined above. Indeed, title registration systems usually store some data for notice purposes without affirming that the data represent valid interests, while some recording systems give affirmations that certain data stored in the database represent legally binding interests or events.

proof that title registration could work in the United States.<sup>2</sup> One commentator observed:

It is a baffling fact that the United States is rapidly becoming virtually the only country in the world whose land title system is not founded upon Torrens-type principles. The writer finds it incredible that a system which seems to work quite well almost everywhere else cannot be satisfactorily adapted to the United States.<sup>3</sup>

The published commentary on the Torrens system in the American legal journals is overwhelmingly favorable.<sup>4</sup> Despite this, attempts to implement the Torrens system in the United States have almost completely failed.<sup>5</sup> Torrens advocates attri-

2. See Ted J. Fiflis, *Security and Economy in Land Transactions: Some Suggestions from Scotland and England*, 20 HASTINGS L.J. 171, 177-200 (1968) [hereinafter Fiflis, *Security and Economy*].

3. Walter E. Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 93-94 (1967). The United States is hardly alone in using recording systems, and the movement toward registration is proceeding at a glacial pace. See Fiflis, *Security and Economy*, *supra* note 2, at 177-200.

4. See generally Barry Goldner, Comment, *The Torrens System of Title Registration: A New Proposal for Effective Implementation*, 29 UCLA L. REV. 661, 665-67 (1982) (containing an excellent bibliography current to 1982).

Much of the American commentary, both pro and con, on Torrens is flawed because it is advocacy, rather than balanced scholarship. It also frequently suffers because of the authors' unfamiliarity with the subject. Anyone seriously interested in Torrens should study the Australian and Canadian commentary.

5. One respected scholar stated that, with the exception of the United States, he "knows of no jurisdiction in which title registration can be said to have failed." 1 THOMAS W. MAPP, *TORRENS' ELUSIVE TITLE 3* (Alberta Law Review Book Series, 1978).

Although it is commonly believed that title registration has failed only in the United States, registration has actually failed in a number of places both in and outside of the United States. For example, Nova Scotia, Canada, abandoned the Torrens system which was established there around the turn of the century. R.C.B. Risk, *The Records of Title to Land: A Plea for Reform*, 21 U. TORONTO L.J. 465, 470 (1971). Recently, title registration has been revived in Nova Scotia. The maritime provinces (New Brunswick, Nova Scotia and Prince Edward Island) have been using recording systems for over 200 years. However, after much discussion and study, New Brunswick and Nova Scotia recently enacted title registration statutes. Donald M. Lamont, *Land Registration Systems*, in SURVEY LAW IN CANADA § 3.103, at 104 (1989). This legislation grew out of an ambitious program to improve and computerize public land records in the maritimes. See Cyril Carlin, *Computerization of Land Records in the Maritime Provinces of Canada*, 43 U. CIN. L. REV. 487 (1974). Torrens was adopted in Brazil in 1890 but is not used much there today. ALEJANDRO M. GARRO, *THE LOUISIANA PUBLIC RECORDS DOCTRINE AND THE CIVIL LAW TRADITION* § 36, at 81 n.18 (1989). Torrens also failed in Spain and other parts of Latin America. *Id.* § 36, at 81.

Most of the countries using Torrens today were British colonies when Torrens was adopted and had no established public land title record systems at that time. To date, no title registration system has successfully replaced an entrenched recording

bute this failure to the high cost of initial registration<sup>6</sup> and the opposition to the Torrens system from the title assurance industry.<sup>7</sup> While this explanation contains some truth, it is somewhat simplistic and certainly incomplete.

The most significant cause of the failure of Torrens in the United States was the inertia of entrenched recording systems. Major contributing causes included the high cost of initial registration and the cost and difficulty involved in the continuing administration of the Torrens system.<sup>8</sup> This latter cause of the failure of Torrens has been very little appreciated.<sup>9</sup> It is doubtful whether opposition from the title assurance industry played a significant role.

The goal of the Torrens system is to establish and maintain a governmental record which mirrors the precise, current state of title. This goal has two consequences. First, creating a "mirror" makes initial title registration expensive. Second, administering such a system is relatively expensive and burdensome for government.<sup>10</sup> Without adequate funding and competent people to accurately and promptly evaluate title

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system in any major independent jurisdiction in the world. *See id.* Currently, projects are underway to replace entrenched recording systems with registration in Scotland, Ireland (Northern and the Republic), Ontario and the maritime provinces of Canada.

6. Under almost all American Torrens acts, a judicial proceeding is required to initially register a title. Torrens advocates argue that the cost of initial registration could be reduced through initial administrative registration of possessory titles that would be inconclusive for a period of time. *See Goldner, supra* note 4, at 690.

7. *See* Ted J. Fiflis, *Land Transfer Improvement: The Basic Facts and Two Hypotheses for Reform*, 38 U. COLO. L. REV. 431, 444-50 (1966) [hereinafter Fiflis, *Land Transfer Improvement*].

8. Under Torrens, every instrument presented for registration must be evaluated prior to its registration. In contrast, evaluation of instruments under recording systems only occurs when the title is searched and examined. The latter method of evaluating instruments in groups is arguably more efficient than evaluating them individually. Evaluation of a subsequent transaction may make evaluation of prior ones unnecessary. In addition, the passage of time may make evaluation unnecessary. Commentators favoring Torrens often emphasize the wasteful repetition of data evaluation under recording but ignore the inefficiency in continuous data evaluation under Torrens.

9. *See infra* text accompanying notes 213-24.

10. Report of the Blue Ribbon Committee Prepared at the Request of Carol Moseley Braun, Cook County Recorder of Deeds/Registrar of Titles 51 (June 13, 1989) (unpublished report; on file with author) [hereinafter Cook County Blue Ribbon Report]. Registration systems usually require subsidies because the costs of operation generally exceed the income from fees and other sources. However, the Hennepin County, Minnesota, Torrens system is currently at least self-sufficient. Hennepin County has supported its operations through economies (such as avoiding unnecessary issuance of certificates, electing not to check documents for forgery) and

data, the registration office will be unable to adequately administer the system.<sup>11</sup>

The architects of the American Torrens acts apparently gave little thought to whether county governments would be equipped or inclined to finance and implement the system. Perhaps it was believed that the inherent superiority of Torrens would inexorably lead to its implementation. The architects may have believed that after state government authorized Torrens, demand from the public for replacement of the recording system would assure implementation. The authors of Torrens legislation failed to appreciate that demand from the public would not be forthcoming in sufficient strength because of ignorance and acceptance of the status quo. Because of the costs and difficulties involved in administration of Torrens, local government was not likely to be an impetus for its implementation. Ordering county governments to implement Torrens was not a realistic alternative absent fundamental changes in the pattern of state and local government. The elected county recorders were not directly responsible to anyone in a hierarchy above. County government legislators were directly accountable to practically no one but their constituents.

Most commentary on the comparative merits of title registration and recording systems focuses on whether registration should replace recording. It is generally believed, even by those who think registration is superior to recording, that title registration has no realistic possibility of being implemented

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through fees which produce adequate revenues. Edblom-Witkowski Interview, *infra* note 72.

11. The Torrens system in Cook County, Illinois, failed after 91 years precisely because the government failed to provide the resources necessary to make the system reasonably efficient. See FRED I. FEINSTEIN, *The Torrens System*, in 2 BASIC REAL ESTATE PRACTICE 1-7, 15-3 (Ill. Inst. for Continuing Legal Educ., 1988 & 1990 Supp.). Over the years, Illinois has developed the following improvements to its Torrens system: 1) creating tax lien files for federal and state tax liens and requiring the Registrar to search for and memorialize filed liens against a registered title whenever a memorial is entered on the original certificate for such title; 2) replacing lost certificates by affidavits without resort to subsequent proceedings; 3) using title indemnity bonds to induce the Registrar to remove memorials of encumbrances which are probably no longer valid without resort to subsequent proceedings; 4) administratively processing the devolution of decedents' interests; 5) requiring judgment lien creditors to memorialize their judgments on original title certificates; and 6) backing up the assurance fund with the assets and credit of the county. See ILL. ANN. STAT. ch. 30, §§ 84, 102, 109.1, 114-15, 122, & 139.1 (Smith-Hurd 1969 & Supp. 1991).

throughout the United States in the foreseeable future.<sup>12</sup> While implementing title registration nationwide may not be possible, experience with it may be used to improve recording systems.

Those seeking to improve land title assurance systems must also take into account developments in computer technology. Computerization can reduce the comparative attractiveness of Torrens over recording.<sup>13</sup> While title registration systems have their own weaknesses compared to recording, Torrens is clearly superior from the title examiner's perspective in its consolidation of most relevant information in a certificate or register. Consequently, the data management and retrieval characteristics of manual Torrens systems are clearly superior to those of manual recording systems.<sup>14</sup> Computerization of Torrens does relatively little to improve these already good data management and retrieval characteristics. In contrast, computerization of recording systems can do much to improve their data management and retrieval capability by replacing slow and cumbersome manual methods of assembling relevant title data with rapid electronic means.

It is quixotic to advocate the implementation of title registration throughout the United States. The present county-by-county system is too well-entrenched to be summarily replaced

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12. See JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 352 (3d ed. 1989).

13. *But see* Martin Lobel, *A Proposal for a Title Registration System for Realty*, 11 U. RICH. L. REV. 501, 511 (1977). Lobel criticizes computerization proposals as "expressing the naive notion that technology and automation are the keys to the solution of societal problems. . . ." *Id.* However, when a large part of the problem is data input, storage and retrieval, it is hardly naive to expect that computers may provide at least a partial solution. Lobel also states that "proponents of computerization tend to overlook the fact that the start-up and capital costs are often prohibitive." *Id.* Concern about start-up costs seems odd coming from an advocate of title registration. The cost of initially registering all titles in the District of Columbia, as proposed by Lobel, would have been very high.

When Lobel published his article in 1977, the microcomputer revolution was just getting underway. Powerful computer technology is now affordable. Start-up costs can be drastically lowered by making the computerized operations prospective only, as was done in some computerized public records and private title plants. Another alternative is to backload data entered since the property was last transferred or during some fixed period into the past, such as thirty or forty years. Backloading makes a computerized system more useful to title searchers in the early stages of operations.

14. Colin D. Hadfield, *Computerization of Land Title Records*, 43 U. CIN. L. REV. 513, 514 (1974).

by special land registration districts administered by qualified civil servants under direct state supervision. The replacement of private sector title assurance is unwarranted, absent a clear showing that doing so would result in a substantial savings to the public. A better aim now is to improve existing recording systems in order to promote economy, efficiency and security of title in real estate transactions by applying computer technology and experience with title registration in the United States and elsewhere.<sup>15</sup>

## II. TITLE ASSURANCE IN THE UNITED STATES

### A. *Development of Recording and Registration Systems in the United States*

#### 1. *The American Recording System*<sup>16</sup>

Assurance for most real estate titles in the United States is based on recording systems of the type first used in the Massachusetts Bay Colony in the 1600s.<sup>17</sup> Today, the American recording system usually operates under state law at the county level of government.<sup>18</sup> Under this system, documents which may affect title to real estate are presented to government offices for recordation. Recording perfects legal priority over possible conflicting interests, thereby protecting the holder of an instrument against the possible loss of ownership or priority. In the absence of such perfection, title may be lost to a subsequent transferee who qualifies for the protection of the recording system.<sup>19</sup>

Recording is typically not a prerequisite to legal validity. Executed deeds and other instruments may create interests in property even if they are not recorded. In addition, recording a void instrument does not normally make it effective, although

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15. See Dale A. Whitman, *Optimizing Land Title Assurance Systems*, 42 GEO. WASH. L. REV. 40, 65 (1973).

16. Many good sources have been published discussing the American recording system, its weaknesses, proposed improvements and improvements already implemented. See, e.g., CRIBBET & JOHNSON, *supra* note 10, at 346; John E. Cribbet, *Conveyancing Reform*, 35 N.Y.U. L. REV. 1291 (1960).

17. George L. Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U. L. REV. 281, 282 (1941).

18. In a few places, charter cities, towns or townships maintain and administer public land title records. U.S. DEP'T OF HUD, *LAND TITLE RECORDATION PRACTICES: A STATE-OF-THE-ART STUDY* 12 (1980) [hereinafter HUD, *STATE-OF-THE-ART STUDY*].

19. CRIBBET & JOHNSON, *supra* note 12, at 307.



recording may raise a presumption of validity.<sup>20</sup> Furthermore, the acceptance of an instrument for recordation does not usually reflect a governmental judgment that the instrument is legally effective. Instead, the government is merely a depository of copies of the instruments so that parties wishing to evaluate recorded documents may have access to them. In this respect, recording facilitates real estate transfers by giving prospective transferees information which is relevant to the determination of ownership.<sup>21</sup>

Generally, recording systems use either grantor-grantee or tract indexes to locate recorded documents. Locating all of the relevant recorded documents can be difficult or even impossible using the available indexes. The oldest and most common type of index to the copies of recorded instruments is the grantor-grantee type. In this type of index, instruments are indexed alphabetically according to the grantors' and grantees' surnames. The grantee index is used to reach back into time to establish the chain of owners. The grantor index is used to find adverse recorded conveyances made by or through each owner during the time that the owner was the apparent, actual or record owner of the interest being searched. The grantor-grantee type of index is relatively easy and inexpensive for government to administer, but it is normally difficult to use.<sup>22</sup>

The tract type of index is much easier to use but is more difficult and expensive for government to maintain.<sup>23</sup> In states without official tract indexes, government or private title com-

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20. 1 RUFFORD G. PATTON & CARROLL G. PATTON, PATTON ON LAND TITLES § 20 (2d ed. 1957). This presumption is usually rebuttable. *Id.*

21. MAPP, *supra* note 5, at 49.

22. Searching a title with a grantor-grantee index can be physically cumbersome and time-consuming because a great number of index books may have to be consulted and reconsulted. In addition, where a past transfer of title does not appear in the grantee index, the title searcher may have to guess how ownership may have passed to an owner in order to reach further back in time where additional transactions may be recorded. If a particular transaction does not appear in the grantee index, the searcher is limited to the process of trial and error and may or may not be able to discover how ownership passed to a particular owner.

23. Recording office employees must be able to identify the proper segment of the index in which to reference instruments, usually from the legal descriptions appearing on each instrument. This process is time-consuming, more costly, and requires a higher level of expertise than is the case with a grantor-grantee index. Consequently, official tract indexes are found in relatively few states. See ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY, § 11.11, at 797 (1984).

panies sometimes maintain unofficial tract indexes. Tract indexes organize instruments according to the property they affect. Instruments affecting each segment of land are indexed on a page or set of pages for that parcel. Once the proper portion of the index has been located, searching title is relatively simple.<sup>24</sup>

The recording system falls short of providing conclusive security of real estate ownership.<sup>25</sup> It does not ensure that the actual state of ownership and the record of ownership are the same or even similar. A recorded, apparently valid transaction may be void or defective. Unrecorded interests that are discoverable by physical inspections or inquiries may be valid under the doctrines of constructive notice from possession and inquiry notice. Furthermore, some unrecorded interests may be valid even if they are not discoverable by such inspections or inquiries.<sup>26</sup>

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24. Title can be searched using the same segment of the index until the point in the past where the index was reorganized. Where this occurs, there is usually a reference to the older portion of the index where instruments affecting the subject property were indexed prior to the reorganization. Where a past title transfer was not indexed, the searcher does not run into the dead end which may be encountered using the grantor-grantee index.

25. For another good discussion of the deficiencies in the recording system, see Harry M. Cross, *Weaknesses of the Present Recording System*, 47 IOWA L. REV. 245 (1962).

26. A recorded instrument may be valid on its face but still be void, voidable or defective. The recording system does not protect a transferee who fails to receive an interest because it is based on a previously recorded void or defective instrument or transaction.

In addition, certain interests or claims may be valid against a particular title even though nothing appears in the record concerning them. See DEP'T OF HUD, LAND TITLE RECORDATION SYSTEMS: LEGAL CONSTRAINTS AND REFORMS IV-1 (1979) [hereinafter HUD, LEGAL CONSTRAINTS AND REFORMS]. Short term leases are exempt from recordation. See 4 AMERICAN LAW OF PROPERTY § 17.8 n.10 (A. James Casner ed., 1952). Usually, possession by the lessee will give notice of the lease. Certain claims or interests are outside of the recording system because they are not created or transferred by written instruments: adverse possession and prescriptive easement claims, implied easements, marital or homestead rights and unfiled mechanics' liens. See generally CUNNINGHAM, *supra* note 23, at 780. Possession will usually give notice of an adverse possession or prescriptive easement claim. A purchaser is also deemed to have notice of facts which would have been uncovered through a physical inspection of the property. This gives rise to the doctrine of constructive notice based on possession. Under this doctrine, an unrecorded claim may have priority over a subsequent claim if a physical inspection of the real estate would give notice of it.

Under the Supremacy Clause of the U.S. Constitution, U.S. CONST. art. VI, cl. 2, claims, rights and other interests based on federal law are not subject to state recording laws unless the United States consents. The difficulty caused by these interests has been ameliorated because the United States generally requires its agencies to file or record (but not to register) federal real estate claims and has consented to their

## 2. *The Torrens System of Title Registration*

Commentators have exhaustively discussed the weaknesses of the American recording system as a source of land title assurance.<sup>27</sup> Many reforms of the system have been proposed and a few have even been implemented.<sup>28</sup> One of the most radical reform proposals is to replace the recording system with the Torrens system of title registration.<sup>29</sup> Unlike recording, title registration does not usually create or transfer a legal interest until government itself makes a conclusive assessment of the current state of the title.

While title registration has been used in continental Europe since the early Middle Ages,<sup>30</sup> modern European title registration systems were not established until the 1800s.<sup>31</sup> During

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subordination in the event of a failure to file or record. *See, e.g.*, The Federal Tax Lien Act, 26 U.S.C. § 6323 (1989); *Davis v. United States*, 705 F. Supp. 446, 453 (C.D. Ill. 1989).

In addition to matters which may be valid without any reference at all to them in public records, other possible liens, claims, encumbrances or other interests may be binding on subsequent purchasers even though it might be extremely difficult, if not practically impossible, to find information about them in public records. *See* HUD, LEGAL CONSTRAINTS AND REFORMS, *supra*, at III-39. These include bankruptcy transfers, exercise of rights of eminent domain, matters referred to in recorded instruments, interests recorded before or after the time the record shows their transferors to have ownership and judgment liens filed alphabetically by debtors' surnames, especially where the names are common. *See* 11 U.S.C. § 549(c) (1990). Under the doctrine of *idem sonans*, a party may be deemed to have notice of information indexed under incorrectly spelled names which sound similar to the owner's name. *See* HUD, LEGAL CONSTRAINTS AND REFORMS, *supra*, at 5, II-26.

27. Much of this commentary exaggerates the inefficiencies and weaknesses of the recording system. *See, e.g.*, Goldner, *supra* note 4, at 665-67. For a comprehensive and generally balanced discussion, see generally HUD, LEGAL CONSTRAINTS AND REFORMS, *supra* note 24.

28. The principal reforms adopted include Marketable Title acts and official tract (parcel) indexes.

29. *See* Martin Lobel, *A Proposal for a Title Registration System for Realty*, 11 U. RICH. L. REV. 501 (1977) (proposing the adoption of a Torrens system for the District of Columbia).

30. SIR ERNEST DOWSON & V.L.O. SHEPPARD, *LAND REGISTRATION, COLONIAL RESEARCH PUB. NO. 13*, 173 (2d ed. 1964); RUDOLF HUEBNER, *A HISTORY OF GERMANIC PRIVATE LAW 218-19* (Francis S. Philbrick trans., reprint 1968) (1918).

31. DOWSON & SHEPPARD, *supra* note 30, at 63, 180, 187; HUEBNER, *supra* note 30, at 252. Land title record systems similar in basic concept to the American recording system were adopted in Europe many years ago and are still used today. European countries using recording include Belgium, France, Greece, the Republic of Ireland, Northern Ireland, the Netherlands and Scotland. Ireland, Northern Ireland and Scotland currently are converting very slowly to the English form of title registration. Conveyancing in France really depends on notaries for title assurance. Notaries in France in some respects play a role in conveyancing similar to that of title insurance

the 1800s, England considered adopting a recording system but instead adopted a registration system in 1862.<sup>32</sup> To a limited extent, England used some antecedents of the American recording system, but a comprehensive land title records system did not exist in England until this century. After substantial modifications and a number of false starts,<sup>33</sup> registration was finally implemented throughout England and Wales after

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companies in the United States. European countries using title registration include the United Kingdom, the Republic of Ireland, Germany, Austria, Hungary, Poland, Czechoslovakia, Yugoslavia, Denmark, Norway, Sweden and Switzerland. JOHN H. CRABB, *THE CONSTITUTION OF BELGIUM AND THE BELGIAN CIVIL CODE* 347 (1982); DOWSON & SHEPPARD, *supra* note 28, at 98; F.H. LAWSON ET AL., *AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW* 107-08 (3d ed. 1967); RICHARD R. POWELL, *THE NEW YORK LAW SOCIETY, REGISTRATION OF THE TITLE TO LAND IN THE STATE OF NEW YORK* 287-93 (1938); DAVID M. WALKER, *THE SCOTTISH LEGAL SYSTEM* 119 (4th ed. 1976); Athanassios N. Yiannopoulos, *Property, in INTRODUCTION TO GREEK LAW* 110-11 (Konstantinos D. Kerameus & Phaedon J. Kozyris eds., 1988); HUD, *STATE-OF-THE-ART STUDY, supra* note 18, at 23-24; John E. Cribbet, *Some Reflections on the Law of Land—A View from Scandinavia*, 62 *Nw. U. L. Rev.* 277, 282-83 (1967); Fiflis, *Security and Economy, supra* note 2, at 177-20; FRED I. FEINSTEIN, *The Torrens System, in 2 BASIC REAL ESTATE PRACTICE* 1-7, 15-3 (Illinois Institute for Continuing Legal Education 1988 & Supp. 1990); W.M. Kleijn, *The Law of Property, in INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS* 86-87 (D.C. Fokkema et al., eds. 1978); M. Lewis & Martin H. Jones, *Scotland, in 3 DOING BUSINESS IN THE UNITED KINGDOM* § 53.05[1][g] (MB 1990); H. Wallace, *Northern Ireland, in 3 DOING BUSINESS IN THE UNITED KINGDOM, supra*, § 54.04[7]; Ussher, *Land and Environmental Laws, in DOING BUSINESS IN IRELAND* § 8.01[3] (MB 1990). Although compulsory registration was authorized in Northern Ireland in 1970, no compulsory registration area had been designated as of the late 1980s. In 1964, compulsory registration was authorized in the Republic of Ireland. In Meath, Carlow and Laois Counties, registration is compulsory upon transfer by sale or long term lease. Because of the condition of the records maintained under the Irish recording system, searching titles in it is difficult, inconclusive and expensive. Ussher, *supra*, § 8.01[3]. The only substantial survey of foreign land title record practices published in English since Dowson and Sheppard's study, *supra* note 28, was conducted by Alejandro Garro of Columbia University. GARRO, *supra* note 5. Garro's survey does not purport to be comprehensive. He discusses American and French recording, Torrens and German title registration and, to a limited extent, Latin American recording systems. Very little about Asian land title record practices has been published in English. See Thomas H. Clarke, *Mortgage and Title Assurance in Asia*, 11 *INT'L BUS. LAW.* 127 (1983). Torrens was established in Brazil in 1890 but did not take hold. It is not used much there today. It also failed in other parts of Latin America and Spain. GARRO, *supra* note 5, at 81 n.18; Francisco V. Igartua, *The Public Registry of Property in Mexico*, 11 *MIAMI L.Q.* 457 (1957). Puerto Rico uses notaries, registration and title insurance. U.S. DEP'T OF HUD AND VA, *REPORT ON MORTGAGE SETTLEMENT COSTS* 1213 (Supp. 1972) [hereinafter HUD/VA REPORT]. Land title assurance in Italy appears to be based on notaries. Paul B. Rava, *Italian Procedure in Real Estate Conveyancing*, 1964 A.B.A. PROCEEDINGS OF THE SECTION OF INTERNATIONAL AND COMPARATIVE LAW (1965).

32. DOWSON & SHEPPARD, *supra* note 30, at 39; C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem*, 63 *IND. L.J.* 55, 74-75 (1987).

33. Land Transfer Act, 1875, 38 & 39 Vict., ch. 87 (Eng.).

enactment of the Land Registration Act of 1925.<sup>34</sup> In the late 1850s, Sir Robert Richard Torrens invented and implemented the Torrens system of title registration in Australia.<sup>35</sup>

Sir Robert based his system on the English method of registering ships. Each ship was assigned a page in the registry where the name and description of the ship appeared, along with the name of the owner and a statement of the liens and encumbrances against it. The owner received a duplicate of the page as a certificate of title and proof of ownership. Upon sale of the ship, the instrument of transfer and the certificate were sent to the registry office and a new page was prepared to show the transfer of ownership.

Sir Robert reasoned that a similar system could be used to register ownership of real estate and drafted legislation to accomplish that result. He promised that the new system would have four "grand characteristics": certainty, economy, simplicity and facility.<sup>36</sup> In 1857, the legislation was enacted in South Australia. Enactment of similar legislation in other British territories soon followed.<sup>37</sup>

Torrens is one of five general types of title registration systems used in the world<sup>38</sup> and is the only type used in the United States. In 1895, Illinois became the first American state to enact Torrens legislation.<sup>39</sup> Within a few decades, Torrens

34. Land Registration Act, 1925, 15 & 16 Geo. 5, ch. 21 (Eng.). The English program of compulsory registration is approaching completion of the mammoth task of registering every parcel in England and Wales. Bostick, *supra* note 32, at 74-77; Fiflis, *Security and Economy*, *supra* note 2, at 201-06.

35. A.G. Lang, *Computerised Land Title and Land Information*, 10 MONASH U. L. REV. 196, 197 (1984).

36. *Id.*

37. British Honduras (Belize), 1859; Vancouver Island (British Columbia), 1860; Tasmania, 1862; New South Wales, 1862; Ireland, 1865; New Zealand, 1870; Wales, 1875; Jamaica, 1888; Nova Scotia, 1904; and Uganda, 1908. BLAIR C. SHICK & IRVING H. PLOTKIN, *TORRENS IN THE UNITED STATES* 17 (1978); HUD, *STATE-OF-THE-ART STUDY*, *supra* note 18, at 23.

38. DOWSON & SHEPPARD, *supra* note 30, at 98. The other four are English, German, Swiss and Ottoman. *Id.*

39. The system was approved by the voters in Cook County on November 5, 1895. The statute was held unconstitutional in the following year. *People ex rel. Kern v. Chase*, 46 N.E. 454 (Ill. 1896). A second act was adopted and approved by the voters in 1897. This statute was held constitutional. *People ex rel. Deneen v. Simon*, 52 N.E. 910 (Ill. 1898). The Torrens office in Cook County opened on March 1, 1899, and has been in continuous operation ever since. In January 1991, legislation was signed which abolished Torrens in Illinois, effective January 1, 1992. 1990 Ill. Legis. Serv. 2959 (West); see also David Heckelman, *Bill Abolishes Torrens Title Registration*, CHI. L. BULL., Jan. 15, 1991, at 1.

was adopted by nineteen other states.<sup>40</sup> Since then, the legislation has lapsed or has been repealed in nine of them.<sup>41</sup> The Torrens system is used to a substantial extent today in only five states: Hawaii, Illinois, Massachusetts, Minnesota and Ohio.<sup>42</sup>

In Hawaii and Massachusetts, Torrens is used statewide. In the other states, use is limited to a few localities: Illinois (Cook County only), Minnesota (Hennepin and Ramsey Counties with minimal registrations elsewhere) and Ohio (Hamilton County with minimal registrations elsewhere). In no state or locality are a majority of parcels registered under Torrens. The highest incidence of use is probably in Hawaii where nearly forty-five percent of all parcels are registered.<sup>43</sup>

### 3. Computerization of Title Records

The computerization of title records at title insurance companies commenced in earnest in the 1960s.<sup>44</sup> Today, title searches in private title plants and public records are often done on computer databases. These unofficial computer systems bear little resemblance to the manual recording system, with its cumbersome indexes, or to the Torrens system, with its archaic manual certificate registers.

In 1984, Ontario, Canada, became one of the first North American jurisdictions to authorize an official computerized system for both its recording and title registration systems.<sup>45</sup>

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40. U.S. DEP'T OF HUD, LAND TITLE REGISTRATION SYSTEMS, PROPOSALS FOR IMPROVEMENT, III-4 (1979) [hereinafter HUD, LAND TITLE REGISTRATION]; see also HUD/VA REPORT, *supra* note 31, at II-A-4.

41. HUD/VA REPORT, *supra* note 31, at II-A-4, II-A-9; HUD, LAND TITLE REGISTRATION, *supra* note 40, at III-4. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Land Registration Act in 1916. This act was withdrawn by the commissioners as obsolete in 1934. HUD, LAND TITLE REGISTRATION, *supra* note 40, at III-6.

42. See HUD, LAND TITLE REGISTRATION, *supra* note 38, at III-4, III-5.

43. *Id.* at III-10. In Hawaii, Torrens did not have to displace a well entrenched recording system.

44. Fiflis, *Security and Economy*, *supra* note 2, at 172-73.

45. In 1984, Ontario, which uses both recording and title registration, adopted an official computerized land title records system called "POLARIS" for both its recording and title registration systems. Land Registration Reform Act, R.S.O. ch. 32 (1984) (Can.). Ontario recently decided to convert all of the Province to the land titles (title registration) system as part of implementing POLARIS. In February 1991, the Provincial government announced the formation of a partnership called Tenant Land Information Services Inc. between the Province and a private sector organization, Real Data Ontario, which will implement POLARIS and play a large role in administering it in the future. Interview with John Dalgliesh, Senior Adviser,

The Ontario system is now operational and in the process of full implementation. Data storage and retrieval is completely electronic. The future will produce more of the same. Data retrieval through computers and land parcel identifiers will replace the current manual index methods of retrieving data, especially in populous urban jurisdictions.

*B. Title Assurance: Goals and Methods*

*1. Goals of Title Assurance: Economy, Efficiency and Security of Title*

A basic objective of a land title assurance system is to enable real estate interests to "move freely and easily in commerce."<sup>46</sup> Dean John Cribbet has identified three principles which should be observed to achieve this objective:

First, the system must give adequate *security* for land titles. Unless the purchaser or mortgagee can be assured that his investment is sound, the particular method fails, whatever other virtues it may possess. Second, it must provide *speed* in the determination of title status so that the transaction can be closed with a minimum amount of cliff-hanging. Third, the method must be relatively *inexpensive* so that a disproportionate amount of the purchaser's dollar is not channeled into title service.<sup>47</sup>

The first principle, security of titles, refers to fulfillment of expectations about ownership and use of real estate. A system of title assurance should generate reliable expectations in transferees and owners about the legal rights and liabilities associated with the ownership and use of real estate.<sup>48</sup> Transferees and owners should have assurance that (1) they will have the legal right to possess or use all of their interests in the subject real estate for their intended purposes, (2) there are no undisclosed financial liabilities attached to its ownership, (3)

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Operations, for the Strategic Alliance Liason, Ministry of Consumer and Commercial Relations, Province of Ontario, in Toronto, Can. (July 25, 1991) [hereinafter Dalglish Interview]. In the Ontario system, data will be retrievable using permanent parcel identifiers, persons' names, tax assessment numbers, street addresses or numbers assigned recorded or registered documents. John R. Dow, *Property and Real Estate Law*, in 2 DOING BUSINESS IN CANADA § 9.06[1][d] (MB 1990).

46. CRIBBET & JOHNSON, *supra* note 12, at 346; *see also* Cribbet, *supra* note 16, at 1291.

47. CRIBBET & JOHNSON, *supra* note 12, at 347-48 (emphasis in original).

48. Stephen Cretney, *English Conveyancing Practice*, in HUD/VA REPORT, *supra* note 31, at 1266 app.

the ownership of the interest will remain secure, and (4) the interest will be transferable to a purchaser.

The security of title depends largely on the completeness and reliability of title or ownership data and its evaluation. In an ideal system, land title records would contain all facts relevant to title, ownership and use.<sup>49</sup> In such a system, the database would be complete and accurate. Consequently, determinations about ownership based on the information in the database would be reliable, eliminating the need for outside research.

The attainment of the second principle, speed, depends on the rapidity and efficiency of data management and evaluation. For this second goal to be met, data management must include input, processing, storage and retrieval. Data input should be swift and administratively simple. Data relevant to a question of title, ownership or use should be quickly retrievable. Data evaluation should be as prompt and efficient as possible. Unnecessary or avoidable evaluations should not be made. Reconsideration of previous determinations should not be necessary except in rare circumstances. Irrelevant data would not be in the database and, therefore, would not be inefficiently appraised.

Realization of the third principle, economy, also depends in part on the efficiency of data management and evaluation. Economy results when user costs are reasonably related to the cost of maintaining and operating the system.<sup>50</sup> Where the government conducts the necessary work, an interest in economy suggests that users pay a fair share of the cost. However, the land title assurance system should not be a source of excess revenue for government.<sup>51</sup> The least costly personnel available who are capable of maintaining the quality of work needed should perform it.

Most systems have trade-offs. Measures promoting security of titles may impair economy or efficiency and vice versa. The object is to design a system that will achieve these three goals

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49. See Whitman, *supra* note 15, at 41-42.

50. Where part or all of the system is operated by private enterprise, this cost may include a reasonable return for investors.

51. On the other hand, governmental components of such a system should be self-sustaining without a subsidy.



as fully as possible with as little conflict between them as is feasible.

## 2. *Methods of Title Assurance*

The two most commonly used methods of land title assurance in the United States are attorney title opinions and title insurance. With the exception of the few places in the United States with Torrens registered titles, both methods are based on recording systems. An attorney title opinion may be based on a search of the records by the attorney, but opinions are more commonly based on abstracts of title.<sup>52</sup> The attorney's opinion may be expressed in a formal opinion letter.

As title assurance, the attorney title opinion is inadequate. The opinion is limited to the public record as summarized in the abstract. Title risks which do not necessarily appear on the public record, so-called "off-the-record" risks, are not taken into account,<sup>53</sup> nor is the examining attorney liable if the client subsequently suffers a loss because of such a risk.<sup>54</sup> If the client does suffer a loss due to an erroneous title opinion, the client must prove that the attorney or abstractor was negligent in order to recover damages.<sup>55</sup> Proving that an attorney was negligent in rendering a title opinion can be difficult.<sup>56</sup>

Inefficiency is another weakness of attorney title opinions. Attorney opinions often involve repeated evaluations of the same data each time the title is examined.<sup>57</sup> To a limited ex-

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52. Abstractors prepare summaries of the public real estate records pertaining to a particular parcel of real estate. These summaries, called abstracts of title, describe the recorded prior conveyances or other transactions concerning the subject properties. The abstract is then presented to an attorney for examination and opinion.

53. See *supra* note 26 and accompanying text.

54. Off-the-record risks include the very serious possibility of a total failure of title because the title is based on a void title transaction. See *supra* note 26 and accompanying text for a discussion of the off-the-record risks that may be encountered under the recording system.

55. HUD/VA REPORT. *supra* note 31, at III-C-35.

56. In the typical title opinion letter the attorney states whether the title is "marketable." Marketability is a vague standard and competent title examiners may differ about whether particular facts appearing in the record negatively affect marketability. HUD, LEGAL CONSTRAINTS AND REFORMS, *supra* note 26, at III-1. An attorney may opine that a title is marketable. The title may turn out to be unmarketable. If the attorney was not negligent in rendering the opinion, the attorney will not be liable.

57. This weakness is more pronounced in urban areas where real estate is transferred more frequently, resulting in longer abstracts summarizing many more transactions than in rural areas. Abstractors typically do not prepare a new abstract from scratch each time the title is searched and examined. The usual practice is to update

tent, this inefficiency is reduced in some localities by reliance on prior examinations made by other attorneys. Where this occurs, the examining attorney will generally limit the data evaluated to that which was added to the abstract after the date of the previous examination.

The Marketable Title Acts, enacted in eighteen states,<sup>58</sup> attempt to improve the attorney and abstract system by reducing the past transactions which must be examined to those recorded within a limited period of time, such as the immediately preceding thirty or forty years, plus an additional time back to the "root of title."<sup>59</sup> Claims not preserved by filing within the limited time period are extinguished by the Marketable Title Act. While these acts undoubtedly have a positive effect on

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an existing abstract. DEP'T OF HUD, LAND TITLE RECORDATION SYSTEMS: ELIMINATING REPETITIVE TITLE SEARCHES 5 (1979).

Another problem with the attorney opinion method, which is more serious in areas where real estate is frequently transferred, is that the probability of the title being found unmarketable or otherwise defective increases as the number of transactions summarized on the abstract grows. Each time real estate is transferred, defects may arise out of errors or deficiencies in the instrument of transfer, its execution or recordation. As the number of persons or other entities in the chain of ownership increases, the possibility increases that a claim, lien, encumbrance or other defect will attach through them. This problem is exacerbated because the identical data may be reevaluated each time the title is examined. Examining attorneys are aware that they do not work in isolation. While an examining attorney personally may believe that certain data do not amount to a title defect, the attorney may know that other attorneys of a more meticulous, conservative bent may conclude otherwise. The examining attorney does not want to certify title to be good or marketable notwithstanding certain facts when a future examiner may refuse to so certify because of precisely the same facts. "Thus the entire process tends to become dominated by overabundant caution and ultra-meticulous judgments." Paul E. Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 265 (1962). The problem of overly meticulous title examination caused by the title examiner's awareness that his or her work may be reviewed by a very conservative, overly meticulous future examiner has been addressed by the promulgation of title examination standards by bar associations and others. HUD, LEGAL CONSTRAINTS AND REFORMS, *supra* note 26, at 13, III-5; *see also* LEWIS M. SIMES & CLARENCE B. TAYLOR, MODEL TITLE STANDARDS (1960). The development of standards has helped alleviate the problem:

[I]t was felt that if certain standards could be laid down in advance, they could accomplish much to dispel fears that opinions of future examiners would be at variance with present appraisals. Knowledge as to how others will treat certain recurring problems will increase the confidence with which present opinions can be rendered. Thus far real estate title standards have been adopted in twenty-two states on a statewide basis and in several other communities on a county or city level. Lawyers in these states unhesitatingly attest their value.

Basye, *supra*, at 265.

58. HUD, LEGAL CONSTRAINTS AND REFORMS, *supra* note 26, at 8, II-51, II-52A.

59. PAUL E. BASYE, CLEARING LAND TITLES § 172 (2d ed. 1970).

marketability by extinguishing certain old defects, their efficacy is limited by the exception of certain interests for political, policy and constitutional reasons.<sup>60</sup>

The American title insurance industry developed in response to the weaknesses in the assurance provided by the recording and attorney opinion systems. When insurance is requested, a title insurance company searches for and examines the available data pertaining to the title. Records are kept of previous searches and examinations, and if the company has previously insured the title, the company can simply update the previous search and examination. The data used are mainly derived from the company's records, a recording system or, in a few places, from a Torrens registration system.<sup>61</sup>

Once the search and examination is completed, the company issues a commitment to issue a final title insurance policy.<sup>62</sup> The commitment is used as proof of the state of the prospective transferor's title and contains a list of the possible title defects uncovered by the company's search and examination. By reporting these defects in the commitment or any policy issued thereafter, the company excepts them from the coverage of the policy. Unlike the attorney and abstractor, the title insurer is absolutely liable for its search and examination, subject to exceptions and limitations stated in the policy. The typical title

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60. Interests and claims of the United States are excepted because of the Supremacy Clause of the U.S. Constitution. U.S. CONST. art. VI, cl. 2. State governmental claims are also frequently excepted. Most of the Marketable Title Acts except railroad and public utility easements and easements apparent by user. Several except leases where the lessee is in possession. A few except possibilities of reverter, rights of entry, reversions and remainders. *BASVE*, *supra* note 59 at § 173. The Illinois Marketable Title Act was held to be inapplicable where there were two competing chains of title to the same real estate which were each over 40 years old. *Exchange Nat'l Bank v. Lawndale Nat'l Bank*, 243 N.E.2d 193, 195-96 (Ill. 1968).

61. The source of the data depends, in part, on the judgment of the company concerning the economics of data storage and retrieval. The company may rely on public records in whole or in part. In some urban areas, title companies have organized elaborate title plants which duplicate public records. HUD, STATE-OF-THE-ART STUDY, *supra* note 18, at 41-43. The title plant maintained by the Chicago Title Insurance Company for Cook County, Illinois, is probably unique in that it not only completely duplicates the public records, it contains more data than the public records. The predecessors of Chicago Title Insurance Company were maintaining a partial private title plant in 1871 which was saved from the Chicago fire which destroyed the County Recorder's records. *SHICK & PLOTKIN*, *supra* note 37, at 123-24.

62. In some parts of the United States, this commitment is referred to as a "preliminary title report" or a "binder." See Anthony B. Kuklin, *Title Insurance Isn't Everything*, in *TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW!* 49, 51 (1979).

insurance policy covers the insured even for losses caused by certain off-the-record risks<sup>63</sup> not covered by the attorney opinion system. The requirements of minimum capitalization and reinsurance of large risks required by state statutes or regulations assures the property owner that the company will have funds available to pay a claim.<sup>64</sup>

Title insurance is becoming the dominant means of land title assurance in the United States,<sup>65</sup> in part because it is perceived to be superior to the attorney opinion method. The growing dominance of title insurance is also due to economies of scale and promotional efforts of title insurance companies. Furthermore, many national lenders and investors in the secondary mortgage market insist on relatively standardized title insurance policy coverage<sup>66</sup> when they invest in or purchase mortgages.<sup>67</sup>

The actual difficulties caused by the weaknesses in the recording system as a source of title assurance should not be exaggerated. Losses caused by title defects are fairly infrequent.<sup>68</sup> While the recording system may achieve at least adequate security of title, critics claim that it is too costly and

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63. Where a title insurance policy insures the owner of a registered title or an interest therein, it will typically cover so-called "off-certificate" risks which may be encountered under Torrens.

64. See S. Gilmer Towell, *Insuring the Multi-Million Dollar Transaction—A Major Lender's Evaluation of a Title Insurer's Balance Sheet*, in TITLE INSURANCE AND YOU, *supra* note 62, at 245, 249-50; Louis D. Pierce, *Reinsurance vs. Coinsurance: What the Title Customer Should Know*, THE GUARANTOR, Sept.-Oct. 1990 (Law. Supp.).

65. See ALLEN AXELROD ET AL., LAND TRANSFER AND FINANCE: CASES AND MATERIALS 764-65 (3d ed. 1986); see also HUD, STATE-OF-THE-ART STUDY, *supra* note 18, at 38.

66. Frequently, title insurance companies issue policies on standard forms promulgated by the American Land Title Association (ALTA), a national private association of title companies and lawyers. Because of the influence of ALTA, substantial uniformity exists among title insurance policies issued by different title insurance companies.

67. See AXELROD, *supra* note 65, at 764-65; see also FEDERAL NAT'L MORTGAGE ASS'N, SELLING GUIDE, LENDING REQUIREMENTS, CONVENTIONAL FIRST MORTGAGES § 214.04 (Oct. 31, 1987) [hereinafter FannieMae] (explaining that the maximum single risk assumed by a title company in connection with any mortgage is 50% of the sum of the company's capital, surplus and reserves).

68. The claims experience of American title insurance companies provides support. The ratio of claims paid to premiums is very low. Title insurance companies strive to avoid risks by searching for and reporting defects. With some exceptions, risks not reported to the insured are covered by the usual title policy. If the recording system were as inadequate as some critics claim, title insurance companies would suffer far greater claim payments than they actually do.

inefficient. As a result, some critics have proposed replacement of the recording system with the Torrens system of land title registration. Yet, these critics have failed to adequately appreciate that Torrens does not provide a completely reliable mirror of the true state of title either and that it is more difficult and costly for government to administer.

### III. THE TORRENS TITLE REGISTRATION SYSTEM

#### A. *The Torrens System in Operation: Mirror, Curtain and Indemnity*

The Torrens system of title registration has three major components: 1) the register of titles, 2) the document vault, and 3) the assurance or indemnity fund. The basic goal is to make the governmentally maintained record a conclusive statement of ownership and the condition of title. This conclusive statement is intended to function as a "mirror" of the true state of the title and as a "curtain" between the present and the past which should make it unnecessary to conduct the kind of historical searches performed in recording systems.<sup>69</sup>

Under Torrens, original certificates of title are maintained by the administrator of the system, normally called the Registrar of Titles. The certificate names the owner, describes the property and the estate owned and contains a list of the liens or encumbrances on the property.<sup>70</sup> Where these liens or encumbrances are created by registered instruments, the original or a copy of the instrument can be retrieved from the document vault or other storage facility for examination.

Upon initial registration or a transfer of ownership, the transferee receives a duplicate certificate of title.<sup>71</sup> The owner's duplicate normally is not kept up-to-date as subsequent claims, liens or other encumbrances are registered on

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69. Historical searches are sometimes necessary in Torrens. See, e.g., Ivan L. Head, *Real Property—Torrens System of Land Registration in Saskatchewan—Exception to Indefeasibility—Error in Not Reserving Minerals to Crown Pursuant to Original Grant*, 34 CANADIAN B. REV. 736, 737-38 (1956). Likewise, historical searches are a necessary part of the Ontario title registration system. D.J. DONAHUE & P.D. QUINN, *REAL ESTATE PRACTICE IN ONTARIO* 20 (4th ed. 1990).

70. See 2 RUFFORD G. PATTON & CARROLL G. PATTON, *PATTON ON LAND TITLES* §§ 683, 684 (2d ed. 1957).

71. In Cook County, Illinois, the owner must give the Registrar a receipt (called a "signature card") for the duplicate bearing the owner's signature. ILL. ANN. STAT. ch. 30, ¶ 81 (Smith-Hurd Supp. 1991).

the original. The owner's duplicate, or an acceptable substitute, and the deed of conveyance must be presented to register a transfer of ownership. When an interest is transferred, the former certificate showing the transferor as owner is canceled, and a new certificate is issued showing the transferee as the new owner. Active liens or encumbrances on the old certificate are carried forward to the new one.

At the time an instrument is presented for registration, the Torrens office may compare the signature on the instrument with a specimen of the owner's signature on file.<sup>72</sup> When this procedure is followed, Torrens has a built-in protection against the registration of forged instruments. Recording systems have no comparable protection against recordation of forgeries.

The assurance or indemnity fund is the third important component of the system.<sup>73</sup> Upon initial registration or at some

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72. The Cook County Torrens office routinely checks signatures for forgeries; the Hennepin County, Minnesota, office does not check for forgeries. Interview with Richard W. Edblom, Examiner of Titles, and Jan Witkowski, Registered Property Analyst, Office of the Registrar of Titles, Minneapolis, Hennepin County, Minnesota (Nov. 26, 1990) [hereinafter Edblom-Witkowski Interview]. Arguably, checking signatures is unnecessary when the party initiating registration must present an owner's duplicate certificate.

73. The coverage afforded by the assurance fund is sometimes likened to title insurance. However, the two kinds of protection have important differences. First, title insurance may provide indemnification for insureds when the state of title turns out to be other than as insured. In contrast, the Torrens assurance fund may provide compensation for those who lose or fail to attain interests because of errors or misdeeds by the registrar or because they are barred by the Torrens act from recovering interests. See ILL. ANN. STAT. ch. 30, ¶¶ 136-139 (Smith-Hurd Supp. 1991); MASS. GEN. LAWS ANN. ch. 185, § 101 (West 1991). The typical title insurance policy will cover the insured against losses due to off-the-record risks under recording or off-certificate risks under Torrens. See Michael J. Rooney, *A Primer for Attorneys*, in TITLE INSURANCE AND YOU *supra* note 62, at 3, 4. The Torrens assurance fund will generally not provide indemnification for losses caused by off-certificate risks unless registrar misconduct is involved.

Second, the title insurance and Torrens assurance fund differ in the coverage of litigation expenses. The typical title insurance policy contains an agreement to defend the title as insured or to indemnify the insured for litigation expenses incurred because of covered title defects. See *id.* at 9. In contrast, the Torrens registered owner or claimant may have to bear alone the cost of title litigation. In Cook County, pursuant to established policy, the Registrar intervenes in litigation concerning Torrens titles. See, e.g., *Echols v. Olsen*, 347 N.E.2d 720 (Ill. 1976). This policy tends to supply the title defense coverage available from title insurance.

Third, a Torrens claimant may have to exhaust remedies against others who might be responsible for the loss before being entitled to claim from the fund. A lawsuit against the registrar may be required before a claim is paid under some Torrens acts. See, e.g., MASS. GEN. LAWS ANN. ch. 185, §§ 101 & 102 (West 1991), MINN.

time thereafter, the owner or other party may be required to make a contribution to this fund. The fund is available to compensate those who suffer losses because of errors of the Torrens office personnel and to pay those who wrongfully lose interests in real estate because of the operation of the system.<sup>74</sup>

Confidence in the Torrens system in California was shaken in 1937 when the entire state assurance fund was wiped out by

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STAT. § 508.76 (1990). In other Torrens systems, the registrar may pay claims without being sued. In Cook County, the Registrar may recommend to the county that a claim should be paid without a lawsuit being necessary. *See, e.g.*, ILL. ANN. STAT. ch. 30, ¶¶ 138-139.1 (Smith-Hurd Supp. 1991). In contrast, a title insurance company may pay claims without being sued. The insured does not have to exhaust remedies against others to recover. Where others may be responsible, the insured is simply obligated to assist the title insurance company in being subrogated to the rights of the insured against other responsible parties. Of course, title companies may unjustifiably refuse to pay claims.

Fourth, contributory negligence may bar recovery from a Torrens fund. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 185, § 101 (West 1991). In Illinois, contributory negligence does not bar recovery from the assurance fund where the Registrar commits gross errors contributing to the loss. *See, e.g.*, Hoffman v. Schroeder, 186 N.E.2d 381, 388 (Ill. App. Ct. 1962) (holding set forth in supplemental opinion). Such negligence does not bar recovery under the terms of the typical title insurance policy. However, failure to disclose known adverse material facts to the company at the time of the issuance of the policy may bar recovery.

Fifth, individual claims against a Torrens fund are not limited to a maximum money amount; title insurance claims are subject to a limit set at the date the policy is issued (which may be adjusted upward with inflation, in some instances, by optional inflation endorsements). *See* MICHAEL J. ROONEY, ATTORNEYS' GUIDE TO TITLE INSURANCE 14 (1984). In some jurisdictions, insureds under title policies may be able to recover in excess of policy limits where tortious conduct is proved. *See, e.g.*, Heyd v. Chicago Title Ins. Co., 354 N.W.2d 154 (Neb. 1984).

Finally, various coverages are available from title insurance companies which simply are not provided by the Torrens assurance fund. The typical title policy issued currently covers off-certificate risks, such as some statutory overriding interests, not covered by the Torrens assurance fund and off-the-record risks, such as a void link in the chain of title, not included in the protection given good faith purchasers under the recording system. This coverage may include certain tax liens in existence at the date of policy, right of access to the property, hidden mechanics liens, zoning classification or violations and encroachments.

In summary, the coverage provided by typical title insurance policies is more extensive than that available from existing Torrens assurance funds with the important exception of the policy limit on claims in title insurance policies. Of course, the title registration assurance fund component could be expanded to include the broader coverages found in title insurance policies if it is decided that such coverage should be furnished by government. *See generally* D. BARLOW BURKE, JR., LAW OF TITLE INSURANCE (1986 & Supp. 1991).

74. *See* MINN. STAT. § 508.76 (1990); ILL. ANN. STAT. ch. 30, ¶ 138 (Smith-Hurd Supp. 1991); MASS. GEN. LAWS ANN. ch. 185, ¶ 101 (West 1991).

a single claim.<sup>75</sup> Repeal of the California Torrens Act followed in 1955.<sup>76</sup> In Illinois and Massachusetts, local funds are backed up by the assets and credit of the state or local government.<sup>77</sup> In Hawaii and Minnesota, special state funds supply the back-up.<sup>78</sup>

### B. Initial Registration

Initial registration of title is not a simple matter. The procedure has often been compared to an action to quiet title.<sup>79</sup> Once an initial registration becomes final, it has about the same effect as a final judgment in a quiet title action. Aside from the important exceptions of off-certificate risks and overriding interests, the registration is binding against the whole world. Indeed, it is often said that the main difference between recording and Torrens is that in Torrens, the title itself is registered, while under recording, the evidences of title are recorded.<sup>80</sup>

Since initial registration usually involves a binding determination of the rights in the title being registered, possible claimants must be given due process under state and federal constitutions. Reasonable efforts must be made to identify and notify these claimants of the initial registration and they must be given sufficient opportunity to be heard on their claims. This process requires title searches and examinations and the possible expense of preparing and conducting hearings on claims. Until fairly recently, initial registration under American statutes was handled almost exclusively through judicial proceedings.<sup>81</sup>

Initial registration of a title can be expensive. In addition to

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75. See *Gill v. Johnson*, 69 P.2d 1016 (Cal. Dist. Ct. App. 1937).

76. Land Title Law, CAL. GOV'T CODE, foll. § 27297.5 (West 1988), repealed by 1955 CAL. STAT. ch. 332, § 1.

77. ILL. ANN. STAT. ch. 30, ¶ 139.1 (Smith-Hurd Supp. 1991); MASS. GEN. LAWS ANN. ch. 185, § 104 (West 1991).

78. See HAW. REV. STAT. § 501-214 (1988); MINN. STAT. § 508.75 (1990); see also Comment, *Possessory Title Registration: An Improvement of the Torrens System*, 11 WM. MITCHELL L. REV. 825, 839 (1985).

79. See, e.g., CRIBBET & JOHNSON, *supra* note 10, at 353.

80. See, e.g., *People v. Mortenson*, 88 N.E.2d 35, 38 (Ill. 1949).

81. The first American Torrens act, enacted in Illinois, was held unconstitutional because it provided for administrative initial registration. A second Illinois act was passed in 1897 providing for *in rem* judicial initial registration. See *People ex rel. Deneen v. Simon*, 52 N.E. 910, 911 (Ill. 1898).



the required contribution to the assurance fund, the title must be examined to identify possible encumbrances or claimants, the property may be surveyed, court documents must be filed, notices must be published, and hearings may be held. Attorneys and other experts may be required.

It is difficult to determine precisely the average cost of initial registration even in a particular location. Attorney fees can vary considerably. Depending on local practices and procedures, some of the costs may be absorbed by the public, but most are usually borne by the owner seeking registration. Where a registration is contested, which rarely occurs, costs will rapidly escalate. In 1985, Richard W. Edblom, the Examiner of Titles for Hennepin County, Minnesota, estimated the cost to the registrant of initial registration of a parcel in the Minneapolis-St. Paul area at between one and two thousand dollars.<sup>82</sup> This is roughly in line with published cost figures for other localities adjusted for inflation.<sup>83</sup>

Regardless of the precise costs of initial registration, the costs which must be borne by the registrant are likely to substantially exceed any subsequent savings in seller title transfer costs due to registration. Therefore, the cost of initial registration gives the property owner a disincentive to register. This disincentive is exacerbated where it is likely that title insurance will have to be purchased in a subsequent sale transaction.

Advocates of registration argue that the cost of initial registration is justified by the allegedly lower aggregate title and transfer costs incurred by transferees in subsequent transfers. While the claim that these aggregate future title costs will be lower is disputable, it is clear that most of any savings will accrue to subsequent owners and not to the present owner who must bear the costs of initial registration.

It is generally agreed that the high cost of initial registration was a primary cause of the failure of Torrens in the United States.<sup>84</sup> As a result, three remedies have been proposed: first, to make registration compulsory;<sup>85</sup> second, to completely or substantially subsidize the cost of initial registration; or third,

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82. Comment, *Possessory Title Registration*, *supra* note 78, at 838.

83. In the late 1970s, uncontested initial registrations in the United States cost about \$550 to \$750. HUD, LAND TITLE REGISTRATION, *supra* note 40, at III-14.

84. See Goldner, *supra* note 4, at 688.

85. See *id.* at 695-96 and authorities cited therein; HUD, LAND TITLE REGISTRATION, *supra* note 40, at V-1, V-8.

to reduce its cost by authorizing an administrative registration of possessory titles which would become absolute after the passage of a specific period of time.<sup>86</sup>

The compulsory approach, given enough time and resources, will lead to increasingly greater use of registration.<sup>87</sup> The important question is whether more widespread use of registration through compulsion will be justified by the benefits to society or individuals weighed against the costs to them. The question of whether compulsory registration is politically feasible remains unanswered.

Whether the subsidy approach alone will result in increased privately initiated registration is uncertain. Although initial registration was substantially subsidized in Cook County, Illinois, during the early years of its Torrens system, there were only a few hundred registrations per year. These few registrations resulted, at least in part, from the need to establish title when the Chicago fire of 1871 destroyed the official land title records. A Chicago ordinance which made registration mandatory for real estate when acquired by the city was another cause of some initial registrations.<sup>88</sup>

Even if initial registration is free to property owners, depending on the state of local administration, they may be disinclined to register if they believe that dealings in Torrens property are slower or more cumbersome than transactions in recorded property.<sup>89</sup> The existence and use of deregistration procedures in American Torrens acts indicate that some property owners have been willing to bear the cost of removing their titles from the allegedly superior registration system.<sup>90</sup>

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86. See HUD, LAND TITLE REGISTRATION, *supra* note 40, at V-19; Diana Sclar, *Minnesota Simplifies Land Registration*, 11 REAL EST. L.J. 258 (1983); Comment, *Possessory Title Registration*, *supra* note 78, at 840-52.

87. Registration was not successful in England and Wales until it was made compulsory. After over sixty years of effort, many titles in England and Wales are now registered. See Bostick, *supra* note 31, at 91 (estimating that over 80% of the land in England and Wales was registered by 1987).

88. See POWELL, *supra* note 31, at 131, 145 & 156-57.

89. In 1989, it took over two years before a new certificate was issued when property was transferred. See Cook County Blue Ribbon report, *supra* note 10, at 2.

90. In 1983, Illinois added a deregistration provision to its Torrens Act. 1983 Ill. Laws 391. From November 2, 1983, through August 6, 1987, the Registrar of Titles completed 133 applications for deregistration in spite of the fact that applicants bear most of the costs of deregistration. FEINSTEIN, *supra* note 29, at I-38. During this time, no petitions for initial registration were received. As of June 1989, there had been no initial registration since 1981. See Cook County Blue Ribbon Re-

Presumably, these property owners perceived some advantage of recording over Torrens.<sup>91</sup>

Finally, there is a policy question whether taxpayers in general should subsidize an activity which may benefit primarily only those who frequently deal in real estate.<sup>92</sup>

### C. Administrative Initial Registration of Possessory Titles

In 1982, Minnesota became the first American state to authorize administrative initial registration of possessory titles.<sup>93</sup> These titles become absolute after a certain period of time.<sup>94</sup> Apparently, administrative initial registration of possessory titles is valid under American due process clauses if adequate notice is given to possible claimants and if the period during which a possessory title registration could be challenged is sufficiently long.<sup>95</sup> The Minnesota authorizing legislation was heralded as having "the potential for removing the remaining

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port, *supra* note 10, at Appendix G. In 1987, Illinois made deregistration purely administrative rather than judicial. FEINSTEIN, *supra* note 31, at I-38 to I-39.

91. In Cook County, developers may deregister when they plan a subdivision with many lots or a condominium with many units. They wish to avoid the expense and delay involved with closing many transactions through Torrens. Torrens transactions are closed in an office which has a limited physical capacity. The Torrens office cannot create many new certificates for new titles in a timely fashion. Developers also deregister to avoid the expense and delay involved in review of development documents by Torrens examiners. See FEINSTEIN, *supra* note 31, at I-39.

92. 1 AMERICAN LAND TITLE ASSOCIATION, THE TITLE INDUSTRY: WHITE PAPERS, ch. 5 (1976), reprinted in *The Torrens System* 56 TITLE NEWS 8 (1977).

93. Act of Mar. 10, 1982, ch. 396, 1982 Minn. Laws 192 (codified as amended at MINN. STAT. §§ 508A.01-85 (1990)). Administrative initial registration of possessory titles has been used for years in England and Australia. U.S. DEP'T OF HUD, IMPROVING LAND TITLE REGISTRATION SYSTEMS V-19 (1979).

94. This period is five years in Minnesota. MINN. STAT. § 508A.01, subd. 2 (1990). Hawaii authorizes registration of possessory titles, but such titles will not ripen into absolute ones after the passage of a certain period of time. HAW. REV. STAT. § 501-72 (1988). The Minnesota legislation was initially prepared by Mr. Edblom and his staff at the request of a HUD consultant. Edblom-Witkowski Interview, *supra* note 70. At the time, Torrens advocates were hopeful that administrative registration of possessory titles could lead to effective implementation of Torrens throughout the United States. The attractiveness of possessory title registration would be greater if titles could be administratively registered without the expense of searching for, identifying and notifying possible claimants. Such a "pure" form of possessory title registration probably would be unconstitutional under due process clauses unless the registration remained inconclusive for a long time such as 10 or 20 years. See *id.* It is possible that "pure" possessory registrations could be made immediately conclusive if provision is made to pay just compensation to those who lose interests. This would be a novel application of the power of eminent domain.

95. HUD, LAND TITLE REGISTRATION, *supra* note 40, at V-9 to V-12; Goldner, *supra* note 4, at 700-03.

disincentive for Torrens registration—the high cost of registering uncontested titles by judicial proceeding.”<sup>96</sup>

As is the case with judicial registration proceedings, the Minnesota possessory title registration statute requires the applicant to submit an abstract of title with the application for registration.<sup>97</sup> This is done so that record claimants can be identified and notified of the registration, thus satisfying due process requirements. The cost of preparing this abstract should be about the same as preparing one for a sale under the attorney opinion method of title assurance. This cost may be a financial disincentive for owners to register unless they feel reasonably sure that registration will make their title costs significantly lower upon a subsequent sale or loan transaction.<sup>98</sup>

Initially, Minnesota’s possessory title registration imposed at least as much cost on the registration office as did judicial registration. Under both procedures, an examiner of titles examined and reported on the application and abstract submitted by the person seeking initial registration.<sup>99</sup> Upon enactment of the Minnesota possessory title registration statute, Examiners of Titles feared that they would be overburdened by applications for initial registration.<sup>100</sup> Richard W. Edblom, Examiner of Titles for Hennepin County, wrote:

Although a court proceeding is not necessary to register title under the possessory title registration procedure, it is still necessary for an examiner to examine the abstract and write a report stating whether the applicant does have a good record title . . . . Consequently, this imposes a workload on the staff of our office not much different from a reg-

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96. Sclar, *supra* note 86, at 261.

97. MINN. STAT. § 508A.11 (1990). Among other things, the abstract identifies record interest holders or claimants who should be notified of the proceeding. Hennepin County requires the abstract to “be certified to all of the land to be registered, as of a recent date, and must include the deed or other instrument by which the applicant acquired title.” Richard W. Edblom, *Registration of Title Without a Court Proceeding 2* (1990) (unpublished report, on file with author).

98. While not as often as in Cook County, Illinois, title insurance is commonly used in Torrens transactions in Hennepin County, Minnesota. SHICK & PLOTKIN, *supra* note 37, at 98-99.

99. MINN. STAT. § 508A.13 (1990). Under a “pure” possessory title registration procedure, the examination and report would not be required. See discussion *supra* note 94.

100. Comment, *Possessory Title Registration*, *supra* note 78, at 848-49.

ular registration proceeding . . . .<sup>101</sup>

In response to these concerns, the Minnesota Legislature amended the possessory title registration procedure so that its use could be limited, upon recommendation of the county recorder and at the option of the county board, to cases where the applicant owned a tract of partially registered land.<sup>102</sup>

On August 1, 1990, approximately eight years after passage, Hennepin<sup>103</sup> became the first county to adopt the statute.<sup>104</sup> While Ramsey<sup>105</sup> and Anoka Counties have also expressed an interest in adopting possessory title initial registration, neither had done so as of November 1990.<sup>106</sup> Representatives of the Minnesota title insurance industry opposed the adoption of possessory title registration.<sup>107</sup> However, its failure to be adopted elsewhere in Minnesota may be due to a perception that it does not significantly reduce the disincentive to the property owner to register.

The main thrust of the Minnesota possessory title registration statute is to take initial registration out of the courts and into the administrative jurisdiction of the Examiner of Titles. Even if it is assumed that this alone will result in savings, the

101. *Id.* at 849 n.191. Since the publication of this statement, the possessory title registration statute was amended to provide for an examination fee to be paid by the applicant. MINN. STAT. § 508A.11, subd. 3 (1990). Hennepin County now contracts with a private law firm to do the title examination. Mr. Edblom wrote on November 26, 1991:

The "examination fee" not only covers the fee charged by the private law firm, but also covers the overhead of this office. With the examination being done by other attorneys, there is little work left to be done by our office. Therefore, the quoted statement greatly distorts the . . . procedure now in operation.

Letter from Richard W. Edblom, Examiner of Title, Hennepin County, to Kathleen Milner, Staff Member, *William Mitchell Law Review* 1 (Nov. 26, 1991) [hereinafter Edblom Letter] (on file with the *William Mitchell Law Review*). This amendment seems to be inconsistent with the central goal of the possessory title registration statute, which is to make initial registration more attractive by lowering the cost to the applicant.

102. 1983 Minn. Laws ch. 92, § 23 (codified at MINN. STAT. § 508A.01(1) (1990)).

103. Hennepin County includes the Minneapolis area.

104. Edblom, *supra* note 97, at 1. The Hennepin County Board did not choose to limit eligibility for possessory registration to cases where applicants owned tracts which were already partially registered. *Id.*

105. Ramsey County includes St. Paul and the surrounding area.

106. Comment, *Possessory Title Registration*, *supra* note 77, at 844 n.144; Edblom-Witkowski Interview, *supra* note 94. In addition to Hennepin, another county in northern Minnesota may have adopted the statute in 1991. Edblom Letter, *supra* note 101, at 1.

107. Comment, *Possessory Title Registration*, *supra* note 78, at 843; *contra* Goldner, *supra* note 4, at 692 n.152.

costs of identifying claimants to the title and giving them due process remain. These costs still have to be borne by property owners or government. The financial disincentive to register remains if the property owner is assigned a major portion of these costs. If government assumes such costs, the issue of whether society should subsidize initial registration is again material.

Now that one of the larger and better managed title registration offices in the United States has implemented possessory title initial registration, it will be interesting to see whether the frequency of initial registration will significantly increase in that jurisdiction. Preliminary evidence suggests that it will not.<sup>108</sup>

While American Torrens advocates recognize that the cost of initial registration is a serious barrier to implementation, most of them fail to appreciate that the quality and security of registered titles or interests are not as great as they may appear to be. Usually, a prospective transferee of a registered interest still needs professional title examination service. Furthermore, while the need for title insurance or its equivalent is not as great for registered titles as for recorded ones, registered titles usually involve title risks which may make such coverage appropriate, if not necessary. As a result, from a cost-benefit perspective, the incentives for an individual to register and for government to mandate registration and accept the burdens of administering registration are not as great as they may initially appear. While a registered title may appear more secure to a transferee than a recorded title, the question is whether this apparent greater security justifies the related costs and difficulties.

#### *D. Torrens in Operation: Security of Title*

Initially, Torrens appears to have an appealing simplicity compared to recording. Instead of having to search for and examine the entire recorded legal history of a parcel, it seems that the title examiner under Torrens simply has to examine the original certificate of title which "conclusively establishes

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108. As of November 26, 1991, 17 applications to register possessory titles in Hennepin County had been received. Edblom Letter, *supra* note 101, at 1. Hennepin County currently has approximately 170,000 unregistered parcels. HUD, STATE-OF-THE-ART STUDY, *supra* note 18, at appendix C-4.

the legal status of the parcel's title, subject to some limited exceptions."<sup>109</sup> These so-called "limited" exceptions are usually referred to as "off-certificate risks" or "overriding interests." They make the Torrens register substantially less conclusive than it is sometimes perceived to be.<sup>110</sup> Except where a party loses an interest in land to a good faith purchaser from a party to fraud, generally, those suffering losses from off-certificate risks are not entitled to indemnification from the assurance fund unless the registrar's actions constituted misconduct.<sup>111</sup>

In no title registration system is the register absolutely conclusive.<sup>112</sup> Exceptions to conclusiveness found in Torrens systems are both statutory and judge-made<sup>113</sup> and fall into eight categories:<sup>114</sup>

1. *Caveats*: notices on certificates of possible claims or interests which are not technically registered;<sup>115</sup>

2. *Governmental Interests*: a) rights under federal law in nations with federal systems of government, b) liens or equivalent interests which secure payment of taxes, c) governmental lands for uses such as streets and highways;

3. *Private special interest exceptions*: a) mechanics liens, b) judgment creditor or execution liens;

4. *Possessory interests*: a) short term leases usually where the lessee is in possession, b) easements by implication, c) other private easements, although these are rare;

5. *Equity*: equitable title, due process, and fairness claims

109. Goldner, *supra* note 4, at 678-79.

110. "[R]egistration is neither as conclusive nor indefeasible in fact as in theory." M. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* § 3.12, at 304 (4th ed. 1984).

111. See ILL. ANN. STAT. ch. 30, ¶ 138 (Smith-Hurd Supp. 1991); MASS. ANN. LAWS ch. 185, § 101 (Law. Co-op. 1990); MINN. STAT. § 508.76 (1990).

112. The English title registration statute permits a broad range of overriding interests: legal easements, rights relating to adverse possession and "rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed." Additionally, the administrator has authority to change the record by "rectifying" it. Land Registration Act, 15 & 16 Geo. 5, ch. 21, § 70 (1) (Eng.); Bostick, *supra* note 32, at 94.

113. The existence of some of these excepted claims or interests can, in some instances, be discovered through other records in the registration office (and elsewhere) and through physical inspection of the property.

114. At least some strong or pervasive influences or policies are involved because these exceptions are not peculiar to title registration. Some are found in recording systems and marketable title acts as well. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 589 n.70 (1988).

115. Illinois abolished caveating in 1979 because it was little used there. 1979 ILL. LAWS 415, § 1 (effective Jan. 1, 1980).

or interests: a) rights to appeal or contest initial registrations, b) exceptions in certain cases of fraud, c) exceptions to protect the relatively weak or disadvantaged such as contract vendees or the uninformed, d) equitable title interests;

6. *Error exceptions*: Exceptions due to errors in administration of the system;

7. *Encroachments*: a) encroachments by structures on the property onto adjacent property or over a building line, b) encroachments by structures on adjacent property onto the subject property or over building lines; and

8. *Non-title related restrictions on ownership or use*: a) planning laws, b) zoning ordinances or statutes, c) building or housing codes, d) environmental laws or regulation, e) lack of access to the property.

### 1. *Caveats*

Some Torrens acts provide for placement of caveats on original certificates. A caveat gives notice of a possible outstanding interest or claim. Caveats are aimed at situations where the validity of an interest is in litigation or otherwise undetermined.<sup>116</sup> A caveat preserves a claimant's rights against subsequent transferees while a court, a registrar or other forum determines the validity of that claim. The caveat is similar to the *lis pendens*. Caveating has been described as a recording system within Torrens, because the government makes no statement about the validity of the claim. A caveat merely preserves the claim against subsequent purchasers by giving them notice of it. Although caveats are represented to be inconclusive, they may have an adverse impact on marketability of title. Unlike recorded instruments, caveats may be removed from the record by cancellation.<sup>117</sup>

A caveat explicitly represents the status of the adverse claim as undetermined. There is another exception to conclusiveness which is not explicit. With the exception of overriding interests and other off-certificate risks, an interest which does not appear on the register will not be a valid legal interest.<sup>118</sup> Therefore, a claimant normally must register or memorialize a claim to make it legally valid, but doing so does not necessarily

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116. See MAPP, *supra* note 5, at 143-60.

117. *Id.* at 148.

118. There might be valid unregistered equitable interests under a court decision so providing. See Echols v. Olsen, 347 N.E.2d 720, 723 (Ill. 1976).



make it valid. Registered interests are subject to defeasibility because of overriding interests, exceptions for fraud, notice exceptions and other exceptions.<sup>119</sup> A Torrens act cannot realistically state without exception that all registered interests are legally valid.

## 2. Governmental Interests

### a. Federal Right Exceptions

Federal claims may take precedence over the register of titles.<sup>120</sup> The United States has consented to record (but not to register) its tax liens and certain other claims to real estate.<sup>121</sup> By statute, in Minnesota and Illinois, federal tax liens are filed in the recorder's office and not registered.<sup>122</sup> Tax liens are not a serious problem for title examiners in these jurisdictions. In Minnesota, title companies will prepare Registered Property Abstracts which include a list of outstanding federal tax liens.<sup>123</sup> The Cook County, Illinois, Torrens office will search for and report federal and state tax liens when the property is transferred or when a memorial is entered on the original cer-

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119. MAPP, *supra* note 5, at 99-141. See also Konantz, Koester, McCrossan, and Title to Torrens Property, 4 WM. MITCHELL L. REV. 59 (1978).

120. Nations having Torrens with federal systems of government include Australia, Canada and the United States. U.S. CONST. art. VI; MAPP, *supra* note 5, at 181-82; Lang, *supra* note 35, at 205.

121. I.R.C. § 6323 (West 1989). See GEORGE E. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES § 221A (2d ed. 1970). Ironically, the United States government, which was the source of renewed interest in Torrens in the 1970s, has also been a barrier to its implementation. The United States has steadfastly refused to register its claims to real estate held under Torrens acts. HUD, LAND TITLE REGISTRATION, *supra* note 40, at V-22. The history of land title record systems reveals a number of instances of government refusal to perform acts private parties must do to preserve real estate interests. The governmental refusal is often based on a desire to avoid the cost of performing these acts. A federally created and related agency, the Federal National Mortgage Association, is partially responsible for the necessity of title insuring many mortgages on U.S. land (registered and recorded) because of its usual insistence on title insurance on mortgage paper before it will purchase such paper in the secondary mortgage market. FannieMae, *supra* note 67, at 36.

122. ILL. ANN. STAT. ch. 30, ¶ 84(3) (Smith-Hurd Supp. 1991); MINN. STAT. § 508.25(1)-(2) (1990).

123. HUD, LAND TITLE REGISTRATION, *supra* note 40, at V-22. Apparently, tax liens and other statutory charges may have presented a greater problem in New South Wales, Australia and Alberta, Canada, where no provision was made for recording or registering them in the land records office. Lang, *supra* note 33, at 208. In New South Wales, a measure requiring statutory changes and other interests to be registered has proved ineffective. *Id.* In Alberta, overriding interests such as tax liens are not carried in registers. MAPP, *supra* note 5, at 184-85.

tificate.<sup>124</sup> Private rights arising under federal law, such as claims to real estate in bankruptcy proceedings, may also take precedence over the register even though they are not recorded or registered.

*b. State Governmental Interest Exceptions*

Interests in real estate held by the state may be exempt from registration. For example, liens securing real estate taxes, special assessments or other taxes may be valid although unregistered.<sup>125</sup> An exception is justified for real estate taxes that attach automatically at the beginning of regular periods. Requiring registration of these liens on a multitude of original certificates under a manual Torrens system would unnecessarily burden the government.<sup>126</sup> Once an owner defaults on the payment of these taxes, however, exemption from registration appears less justifiable because registration would not be as burdensome on government. Likewise, exemption of special assessments which do not attach on a periodic basis and which encumber only a limited number of parcels is difficult to justify.

*3. Private Special Interest Exceptions*

In some Torrens systems, orders of attachment, writs of execution and judgment liens are valid even if they are not registered or noted ("caveated") on the original certificates for the debtors' titles.<sup>127</sup> In the jurisdictions where notices of these claims are filed alphabetically or otherwise, their existence should be ascertainable without difficulty.<sup>128</sup>

In a few jurisdictions, the hidden mechanic's lien is a serious, statutory off-certificate risk.<sup>129</sup> A mechanic or person furnish-

124. ILL. ANN. STAT. ch. 30, ¶ 84 (Smith-Hurd Supp. 1991).

125. See NORBERT HORN ET AL., GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 181 (1982).

126. Professor Mapp states that the burden might not be great where the records are computerized. MAPP, *supra* note 5, at 184.

127. *Id.* at 192-93; Lamont, *supra* note 5, § 3.48, at 83. In Illinois, judgments do not become legal liens against real estate until they are memorialized on the original certificates in the register. ILL. ANN. STAT. ch. 30, ¶ 122 (Smith-Hurd Supp. 1991).

128. MAPP, *supra* note 5, at 193.

129. ILL. ANN. STAT. ch. 30, ¶ 84.1 (4) (Smith-Hurd Supp. 1991); MINN. STAT. § 508.25(7) (1990); see Fred I. Feinstein & Guerino J. Turano, *New Legislation Changes Torrens Act*, 68 ILL. B.J. 72, 73 (1979).

ing labor or material to premises has a fixed period of time<sup>130</sup> after the completion of the work to perfect a mechanic's lien and secure payment by filing in the recorder's or Torrens office. The priority of a lien that has been properly filed or registered will relate back to an earlier date.<sup>131</sup> As a result, a real estate purchaser in these jurisdictions, under either recording or Torrens systems, runs the risk that an outstanding unrecorded or unregistered mechanic's lien may exist which could be perfected by filing or registration within the prescribed period. Physical inspection of the property and affidavits from sellers, owners or other parties provides some protection against this risk, but the most effective protection has been title insurance.<sup>132</sup>

#### 4. Possessory Interest Exceptions

Short-term leases are frequently exempt from registration where the lessee is in possession or where there is actual occupation of the property for a period of time set by a state statute.<sup>133</sup> The justification for this exception is to relieve lessees

130. The period for filing is 120 days in Minnesota. MINN. STAT. § 514.08 (1990).

131. The priority will relate back to the date of the commencement of the work in Minnesota. MINN. STAT. § 514.05(1) (1990); *Armstrong v. Lally*, 209 Minn. 373, 376-77, 296 N.W. 405, 406 (1941).

132. HUD, LAND TITLE REGISTRATION, *supra* note 40, at V-25. This risk is serious. Title insurance companies' aggregate annual claim payments due to losses caused by mechanics' liens have ranged over a number of years from 8.7% to 22% of total annual claims paid. Jack Tickner, *Mechanics Liens*, TITLE NEWS, Jan. 1976, at 40. The amounts involved in a single claim may easily be many thousands of dollars. The Uniform Simplification of Land Transfers Act (hereinafter referred to as USOLTA) proposes elimination of hidden mechanics' liens. Under USOLTA, a mechanic's lien (called a "construction lien" in USOLTA) will not relate back if the property is "residential real estate." USOLTA §§ 5-105(b), 5-209; 14 U.L.A. 315, 338 (1990).

'Residential real estate' means . . . real estate . . . containing not more than [3] acres, not more than 4 dwelling units. . . . A condominium unit that is otherwise 'residential real estate' remains so even though the common elements of the condominium . . . include more than [3] acres or the condominium . . . contains more than 4 dwelling units or units used for non-residential purposes.

14 U.L.A. 315. Purchasers of other kinds of real estate are presumed to be more sophisticated and, therefore, sufficiently protected by the USOLTA provision which requires mechanics to file a notice of commencement of work to obtain mechanics' (construction) liens.

133. The period in Illinois cannot exceed five years. ILL. ANN. STAT. ch. 30, ¶ 93 (Smith-Hurd Supp. 1991). In Massachusetts, exempt leases cannot exceed seven years. MASS. ANN. LAWS ch. 185, § 46 (Law. Co-op. 1991). In Minnesota and Alberta, leases cannot exceed three years to be exempt. MINN. STAT. § 508.25(3) (1991); MAPP, *supra* note 5, at 184-85 (citing § 64(1)(b) of the Alberta Act). The

and registrars from the administrative burdens involved with registering leasehold interests that are generally short-term and of little value. As a practical matter, possessory exceptions make imperative a physical inspection of property prior to purchase. Even a short-term lease can have a severe impact on a purchaser's plans for the future development, sale or use of property. In Illinois, a physical inspection is also required because the Illinois Supreme Court has held that an unregistered but active implied easement of right of way is valid against subsequent purchasers of registered land.<sup>134</sup>

### 5. *Due Process, Notice and Equitable Exceptions*

Persons who should have been joined as parties to a registration but were omitted may challenge the proceedings long after their completion.<sup>135</sup> Also, Torrens acts generally make the register inconclusive where a transferee is guilty of fraud or takes from a party to fraud without consideration paid in good faith.<sup>136</sup> Courts in some Torrens jurisdictions have introduced equitable concepts of notice into Sir Robert Torrens' scheme which he may not have intended. An Australian, G.J. Davies, analyzed issues of fraud and notice in property registration actions in western Canada and New Zealand.<sup>137</sup>

Davies concludes that Sir Robert intended to keep fraud and notice separate. Fraud or taking from a party to fraud without consideration paid in good faith was sufficient to void a registration in appropriate cases. However, Sir Robert did not intend notice of a prior unregistered interest alone to be sufficient.<sup>138</sup> Contrary to Sir Robert's intent, courts in New

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Australian statutes have excepted leases for periods not exceeding one year in South Australia and the Northern Territory, not exceeding five years in Western Australia, and in Victoria without any time limitation when the tenant is in possession. Lang, *supra* note 35, at 200.

134. Carter v. Michel, 87 N.E.2d 759, 764 (Ill. 1949).

135. See Sheaff v. Spindler, 171 N.E. 632 (Ill. 1930).

136. The case law is split on the effect of transfer by a void instrument or from an imposter rather than from the registered owner. See Hoffman v. Schroeder, 186 N.E.2d 381, 386-87 (Ill. App. Ct. 1962); Marcia Neave, *Indefeasibility of Title in the Canadian Context*, 26 U. TORONTO L.J. 173 (1976).

137. G.J. Davies, *Equity, Notice and Fraud in the Torrens System*, 10 ALBERTA L. REV. 106 (1971).

138. Sir Robert Torrens' views are reflected in the current Illinois statute. See ILL. ANN. STAT. ch. 30, § 86 (Smith-Hurd Supp. 1991). The statute provides that except in certain cases of fraud, the registered transferee does not have to inquire into the circumstances of prior transfers and states: "The knowledge that any unregistered

Zealand, British Columbia, Manitoba and Alberta have treated notice of prior interests, at least when coupled with an intent to defeat a prior unregistered interest, as sufficient to constitute fraud. The fraud disqualifies the subsequent transferee from prevailing over the prior interest. American court decisions have also imported notice concepts into Torrens.<sup>139</sup>

### 6. *Error Exceptions*

Administrative errors can create further exceptions to conclusiveness. For example, where a memorial erroneously describes the original document, the original document may control.<sup>140</sup> The transferee, therefore, takes the title as described in the original document.<sup>141</sup> Consequently, examination of the original documents or photographic copies, where authorized, is imperative. If the registrar erroneously issues more than one certificate for the same real estate interest, a situation may arise that is similar to the competing chains of title problem encountered under recording. In this situation, courts have held that the earliest certificate prevails.<sup>142</sup> Torrens assurance funds are generally available to compensate those suffering losses due to such errors.

### 7. *Encroachments*

Title defects due to encroachments are of two types: 1) a structure on the subject property encroaches on adjacent property or violates a building line on the subject property established by a restriction for the benefit of adjacent property; or 2) a structure on adjacent property encroaches on the subject property or violates a building line established for benefit

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trust, lien, claim, demand or interest is in existence shall not of itself be imputed to such transferee as fraud." *Id.*

139. See, e.g., 8930 South Harlem, Ltd. v. Moore, 396 N.E.2d 1, 4 (Ill. 1979) (holding that principle purpose of a registration system is to provide notice of defects or encumbrances); County Collector v. Olsen, 362 N.E.2d 1335, 1340 (Ill. App. Ct. 1977). Australian and Canadian writers rarely mention Torrens decisions by American courts. This lack of attention is well-deserved. Because few American judges and lawyers have a basic understanding of title registration, the opinions in the American Torrens cases tend to be poor.

140. See Horgan v. Sargent, 182 Minn. 100, 233 N.W. 866 (1930).

141. *Id.*

142. Lamont, *supra* note 5, § 3.45, at 82; see also Turta v. Canadian Pacific Ry. and Imperial Oil Ltd., 12 W.W.R. 97 (Can. Sup. Ct. 1954).

of the subject property.<sup>143</sup> If the encroachment is substantial, it creates an encumbrance which may render title unmarketable.<sup>144</sup>

Encroachments are off-the-record risks under recording systems and off-certificate risks under Torrens. They do not have to be recorded or registered to be valid defects. A recording or registration system cannot move structures or make them disappear. An examination of a current survey of the property can provide a real estate purchaser the best protection against encroachments. If the encroachment is against the subject property, the owner must demand its removal or accept its presence. The owner of the structure may have a right to maintain the encroachment under the doctrine of adverse possession. However, if the property encroached upon is in Torrens, adverse possession does not apply.<sup>145</sup>

#### 8. Traditionally Non-Title-Related Exceptions

Restrictions on ownership and use created by planning, zoning, building and environmental laws traditionally have not been considered title matters, although violations have sometimes been considered title defects.<sup>146</sup> Existing recording or title registration systems do not include data on land use legislation that restricts ownership even though such restrictions may have a dramatic impact on the value of real estate. By the 1960s, with powerful computer technology widely available, proposals surfaced to create computer data banks to store and retrieve data on real estate parcels.<sup>147</sup> Some of these proposals recommended the inclusion of data on applicable planning, zoning and similar laws not contained in existing recording or title registration systems.<sup>148</sup> It is questionable whether land title records should contain information about planning, zoning and similar laws. The experience of the title insurance industry is instructive.

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143. 2 PATTON & PATTON, *supra* note 20, at § 676.

144. *Id.*

145. See ILL. ANN. STAT. ch. 30, ¶ 85 (Smith-Hurd Supp. 1991). However, there might be a right to maintain it under an implied easement if such easements are exempt from registration.

146. See Richard H. Howlett, *Report of Title Insurance Standard Forms Committee*, TITLE NEWS, Jan. 1962, at 63, 65.

147. See Robert N. Cook, *Land Data Systems: The Next Steps*, 43 U. CIN. L. REV. 527, 527-38 (1974).

148. For a fairly recent proposal, see LANG, *supra* note 35, at 209-13.

Standard American Land Title Association policies exclude from coverage any losses caused by a "law, ordinance or governmental regulation (including, but not limited to, building and zoning ordinances. . .)." <sup>149</sup> Under pressure from lending interests, the title insurance industry agreed to offer limited zoning coverage by endorsement to policies. <sup>150</sup> The endorsement insures that the owner can use the property for a specific purpose and that improvements meet the requirements of the applicable zoning ordinance. <sup>151</sup> Title insurance companies were reluctant to provide zoning coverage because of difficulties in determining the zoning classification and the provisions applicable to specific properties. <sup>152</sup> If title insurance companies find that zoning coverage involves personnel and administrative problems, government should anticipate similar problems and accompanying costs if it stores zoning and other land use information for particular parcels. <sup>153</sup>

### 9. Conclusion: Security of Torrens Titles

Even with the exceptions discussed, the typical register is probably more reliable and, thus, promotes security of titles more than the record in the typical recording system. In other words, the Torrens system does provide a better mirror of the title than does the recording system. It also provides better, though no means perfect, protection against non-record interests. Nonetheless, the belief that registration systems may be capable of eliminating the roles of title insurance companies or attorneys in modern conveyancing is probably overly optimistic. The prudent purchaser of a registered interest will still need professional title services. The exceptions to the conclusiveness of the register may make title insurance advisable in

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149. Usually, this provision is found in part one of the "Exclusions From Coverage" in standard A.L.T.A. policies. D. BARLOW BURKE, JR., *LAW OF TITLE INSURANCE* § 3.2 (1986).

150. See AXELROD ET AL., *supra* note 65, at 798-99.

151. BURKE, *supra* note 149, at 418-19 & n.3 (referencing ALTA Endorsement Form 3.1).

152. See Charles C. Smith, *Title Insurance and Zoning Coverage*, THE GUARANTOR, Spring 1976, at 3. These difficulties included retaining persons competent to sort through complex zoning ordinances and the poor record-keeping of some municipalities. *Id.* Smith also suggests that providing zoning coverage might also constitute the unauthorized practice of law. *Id.*

153. *Id.*

many cases.<sup>154</sup>

### *E. User Difficulties with Torrens*

Initially, Torrens appears to be more user friendly than recording. It is obviously less burdensome for the user to examine the original certificate of title in the register than it is to wade through an often complicated recorded chain of title. While title examiners may find a registration system less painful and arduous, the parties initiating registration may have a quite different experience. The rigidity and inflexibility of a Torrens office can be frustrating and time-consuming.

Under recording, users ordinarily evaluate title data whenever they deem it necessary. These evaluations do not absolutely control whether data is added to the record. The recorder's acceptance of data for recording does not subject government to potential liability from an erroneous evaluation because the recorder usually makes no evaluations. In contrast, title registration operates as a piecemeal, continuing, quiet title action, albeit without all of the due process requirements applicable to initial registration.<sup>155</sup> Government makes the evaluations one at a time, and they usually are conclusive. The act of acceptance includes a governmental judgment that the instrument was effective to create, transfer, modify or cancel the interest referred to therein. Consequently, the government may be liable for erroneous or wrongful evaluations. Under these circumstances, it is not surprising that registrars are frequently quite careful about accepting instruments for registration.

An Australian lawyer's comment about registrar attitudes in his country, where initial registration is administrative rather

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154. The Torrens assurance fund usually does not provide compensation for losses caused by off-certificate risks. See, e.g., ILL. ANN. STAT. ch. 30, ¶ 138 (Smith-Hurd Supp. 1991); MINN. STAT. § 508.76 (1990). However, in *Shevlin-Mathieu Lumber Co. v. Fogarty*, 130 Minn. 456, 153 N.W. 871 (1915), the court held that the failure of the Registrar to report the existence of an overriding U.S. government interest was an "omission," within the meaning of the Minnesota statute, entitling the insured purchaser to recover from the assurance fund. *Id.* at 460, 153 N.W. at 873. Another serious risk is lack of access to the property, which can result in catastrophic loss and is usually covered by title insurance and not covered by the Torrens assurance fund. See, e.g., *L. Smirlock Realty Corp. v. Title Guarantee Co.*, 418 N.E.2d 650, 652 (N.Y. 1981) (rendering real estate worth over \$600,000 valueless from lack of access).

155. See, e.g., *Eliason v. Wilborn*, 281 U.S. 457 (1930).



than judicial, is pertinent here even though the lawyer was specifically referring to acceptance of applications for initial registration:

One of the principal criticisms of the administration of the Australian Torrens acts . . . has been that registrars have been far too finicky in scrutinizing applications for registration. . . .<sup>156</sup>

. . . .

. . . . These failures on the part of the administrators of the Torrens scheme do not reveal a fundamental inefficiency or incompetence on their part, but simply a lack of imagination in seeking the most effective means of implementing the goals of the scheme. They have not been able to appreciate that their duty does not lie in protecting the assurance fund at all costs, but also in broadening the reach of the scheme, and their real duty lies in achieving a sensible accommodation between these two aims.<sup>157</sup>

Critics of Torrens have referred to registrar inflexibility as a problem, usually without describing or even citing specific examples.<sup>158</sup>

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156. Ronald Sackville, *Some Aspects of the Torrens System in Victoria: A Comparison* 37 (1966) (unpublished manuscript on file with the Yale Law School Library collection), *quoted in* AXELROD ET AL., *supra* note 65, at 908-09.

157. *Id.* Registrar zeal in protecting the indemnity or assurance fund reached a zenith (or is it a nadir?) in *Hoffman v. Schroeder*, 186 N.E.2d 381 (Ill. Ct. App. 1962). In this case, the court held that a savings and loan which took a forged mortgage from an imposter did not acquire a lien against the property even though a memorial of the mortgage was registered. *Id.* at 388. The court said that the Illinois Torrens Act protects those who take from a party to fraud only where they take from a registered owner in good faith. *Id.* at 386. Since the savings and loan took from an imposter and since it lacked good faith because its officer improperly notarized the mortgage, no lien attached to the subject property. *Id.* However, the court held that the savings and loan was entitled to indemnification because of the Registrar's failure to discover the "palpable" forgeries on the mortgage documents. *Id.* at 388. In his petition for rehearing, the Registrar cited an 1889 New Zealand decision holding that contributory negligence may bar a party from recovering from the assurance fund. *Id.* at 388-89 (citing *Miller v. Davy*, 7 N.Z.L.R. 515 (P.C. 1889)). The Registrar argued that the improper notarization by the officer of the savings and loan was contributory negligence which barred recovery from the assurance fund. The court rejected this argument:

As we pointed out in our opinion, the indemnity fund is in the nature of insurance against mistakes of the registrar . . . . To import into this type of transaction the doctrine of contributory negligence, whereby gross errors of a registrar might be completely cancelled out by some slight mistake on the part of an insured, could discredit the whole system and destroy it as an effective means of assuring titles in this county.

*Id.* at 389.

158. *See Risk*, *supra* note 5, at 478.

Instruments are examined when they are presented for registration. If the examiner believes the instrument is irregular or defective in some respect, the examiner will refuse registration.<sup>159</sup> For example, at some offices, the examiner may refuse registration if the signature appears to be forged. Registration of a forged instrument may cause the true owner to lose title to the land.<sup>160</sup> To satisfy the registrar, a proceeding subsequent to registration may be necessary or, at a minimum, the transferring owner may have to appear in the Torrens office to acknowledge the authenticity of the signature and to prove identity.<sup>161</sup>

Examiners may also refuse to accept instruments which contain minor discrepancies in the description of the parties or the property. To satisfy the registrar, an owner may have to continue an error or resort to court or administrative proceedings

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159. This examination process, of course, has the advantage of detecting potential defects before they are entered into the record. A similar method of quality control exists in the Scottish recording system. There, the recorder (called the "Keeper of the Public Register") examines the instruments presented for recordation. See Fiflis, *Security and Economy*, *supra* note 2, at 189.

Under this process of examination, mistakes are caught, not buried, as is the case under the American recording system. This feature of the Torrens system may not be worth the cost to government and the cost and aggravation to the users of the system. Adjournment of real estate closings and repeated trips to the government office until the bureaucrats are satisfied are real costs, although difficult to measure. Few real defects are caught. The Registrar's objections often appear to be bureaucratic nitpicking.

Years ago, scandals occasionally arose in the Torrens office in Cook County, Illinois, involving the bribing of counterpersons. In some instances, it appears that illegal payments were used to inject flexibility into the system. See *United States v. Gannon*, 684 F.2d 433 (7th Cir.) (en banc) (affirming conviction of counterperson at Cook County Recorder of Deeds office for accepting payments in excess of what law required), *cert. denied*, 454 U.S. 940 (1981); William Juneau, *Boss Defends Bribed Aide as 'a Bit Guilty'*, CHI. TRIB., Sept. 25, 1980, at 1, 22 (quoting Cook County Recorder of Deeds). Presently, a cleaner regime prevails. Since 1977, the following notice has been displayed conspicuously at several places in the Torrens office: "ATTENTION—Office regulations prohibit members of the staff from accepting gratuities from any source in the conduct of office business." *Gannon*, 684 F.2d at 435; see also FEINSTEIN, *supra* note 31, at 1-43.

160. See *Eliason v. Wilborn*, 281 U.S. 457, 459 (1930).

161. The author once represented a person who owned a Torrens registered condominium unit. He wanted to convey the unit to his fiancée and himself in joint tenancy. The Cook County Registrar refused to accept the deed which was prepared to accomplish that result because the Torrens office workers suspected that the signature might have been forged. The client was accordingly required to appear in person with two pieces of identification to prove his identity and acknowledge the execution of the deed.

to correct it.<sup>162</sup> Such administrative inflexibility inconveniences the parties to a Torrens transaction<sup>163</sup> and creates additional user costs, such as time expenditures and added closing costs.

The inflexibility which may be encountered in Torrens systems causes other problems as well. For example, registrars may refuse to remove memorials of encumbrances which no longer exist, even those that cannot reasonably still exist.<sup>164</sup> Memorials may render the title unmarketable and may only be eliminated through a subsequent proceeding in court.<sup>165</sup> This process is costly and further undermines the owner's confidence in Torrens. At times, Torrens systems also require subsequent proceedings in court to establish title or the transfer of title. For example, upon the death of a registered owner, the Torrens office may require a subsequent proceeding separate from any probate proceedings in order to establish devolution of ownership.<sup>166</sup>

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162. See *Workshop on the Torrens System: A Panel Discussion*, TITLE NEWS, Jan. 1977, at 34. For example, where the name or marital status of an owner has changed since the previous registration, a proceeding subsequent to registration may be necessary to establish the owner's identity or claim to ownership. *Id.* By contrast, the Registrar in Cook County, Illinois, normally will accept affidavits to establish identities or claims to ownership after legal name changes or changes in marital status. As a result, subsequent court proceedings are usually unnecessary.

163. Torrens closings in Cook County must take place in the Torrens office because the paperwork has to be scrutinized by the employees or deputies of the Registrar. Members of the general public must reserve closing space at least a month in advance. See Cook County Blue Ribbon Report, *supra* note 10, at 44.

164. See *Workshop on the Torrens System: A Panel Discussion*, *supra* note 162, at 34.

165. In an attempt to cure this problem, a 1979 amendment to the Illinois Torrens Act authorized the Registrar to cancel memorials claimed no longer to be valid in return for a title indemnity agreement backed by a surety bond from a title insurance or bonding company or other security. If the Registrar later paid a claim from the assurance fund because the cancellation was wrongful, the Registrar would be entitled to indemnification under the title indemnity agreement. See ILL. ANN. STAT. ch. 30, ¶ 109.1 (Smith-Hurd Supp. 1991). Previously, the established title insurance practice had been to furnish a title insurance company with a title indemnity bond (frequently issued by itself or a related company) to induce the company to remove an exception to coverage based on a title defect of questionable validity.

166. See R.G. Patton, *Evolution of Legislation on Proof of Title to Land*, 30 WASH. L. REV. 224, 234 (1955). In Illinois, this kind of proceeding was called a "transmission proceeding." In the early 1970s, the Registrar in Cook County, without statutory authority, began transferring certificates without court orders from transmission proceedings. If the estate had been probated, the Registrar relied on the determinations made by the probate court. If no proceedings had been conducted in probate court, the Registrar administratively determined the devolution of the property and accordingly reregistered the property. This chagrined the judges who normally conducted transmission proceedings. In 1977, the Illinois Legislature amended sections 71 and

Title insurance companies and title examiners under the attorney opinion method of title assurance are often inflexible and overly conservative, but their pronouncements are not backed up by the state. In addition, title insurance companies will generally retract their objections after the owner furnishes statements, affidavits, title indemnity bonds or pays an additional premium. All of these items are usually less costly and more expeditious than getting court or administrative orders.<sup>167</sup> Finally, an unsatisfied owner usually has the option of using another company or examiner. An owner cannot choose another Torrens office.

*F. Operation and Administration of Torrens: Economy and Efficiency?*

At their extreme, registration advocates paint the private title industry as populated by parasites feeding off the inefficiencies of the recording system.<sup>168</sup> The advocates claim that replacement of recording with Torrens registration will result in substantial savings to the public through the elimination or reduction of title examination or insurance costs. However, the comparative public and private costs of different land title assurance systems are difficult to assess. The available data are sporadic, incomplete and, in some instances, unreliable.

Even if reliable data were readily available, meaningful quantification of the relevant costs presents difficult analytical problems. Despite the well-financed and in-depth studies of recordation and title registration in the United States done in the 1970s by Arthur D. Little, Inc.,<sup>169</sup> and Booz, Allen & Hamilton, Inc.,<sup>170</sup> a statement published in 1966 by Professor Ted

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72 of the Illinois Torrens Act to authorize the Registrar's creative way of enabling owners to avoid transmission proceedings. See ILL. ANN. STAT. ch. 30, ¶ 115-16 (Smith-Hurd Supp. 1991).

167. In Cook County, the Registrar has developed a set of affidavits which may suffice to cure objections without going to court. Additionally, transferee title objections to Torrens titles can often be satisfied by title insurance coverage.

168. See, e.g., Myres S. McDougal & John W. Brabner-Smith, *Land Title Transfer: A Regression*, 48 YALE L.J. 1125, 1142 (1939).

169. The Arthur D. Little study was conducted mainly for the American Land Title Association. See SHICK & PLOTKIN, *supra* note 37.

170. The reports include the following: LAND TITLE SYSTEMS: LEGAL BIBLIOGRAPHY (1978), LAND TITLE RECORDATION SYSTEMS: LEGAL CONSTRAINTS AND REFORMS (1979), LAND TITLE RECORDATION SYSTEMS: ELIMINATING REPETITIVE TITLE SEARCHES (1979) and LAND TITLE REGISTRATION SYSTEMS: PROPOSALS FOR IMPROVEMENT (1979) (also published by the U.S. Department of Commerce National Technical Informa-

Fiflis remains true today: "There is no reliable, current analysis of the comparative out-of-pocket costs under the title registration, recording, and title insurance systems."<sup>171</sup> Thus, the economics of Torrens in relation to recordation are difficult to quantify and evaluate.

Several published cost comparisons fail to distinguish between two basically different cost problems. One problem has to do with the resources expended to operate the systems. Here the issue is one of comparative economic efficiency. The other problem is about the fairness of the charges borne by consumers. Here the focus should be on whether consumers are paying for unnecessary or avoidable services or whether they are paying too much for them. For example, legal fees for title examinations may not be indicative of actual resources expended in such examinations. If lawyers charge equivalent amounts for examining Torrens and recorded titles, that does not necessarily demonstrate that the efficiency and economic cost of examination is equivalent in these systems. It may simply mean that lawyers charge fees for examinations unrelated to the actual time and resources expended. If the premise is that fees should be related to the time and resources expended, it may be that some consumers are paying too much for title examination services.

Professor Risk suggests two relevant costs: costs to government and costs to users.<sup>172</sup> Costs to government are relatively easy to ascertain.<sup>173</sup> User costs present more difficulty since they include the costs of searching for, examining, and solving problems uncovered by searches and closing. These costs, according to Professor Risk, should not be measured by charges made by government or service providers to users and clients.<sup>174</sup> Risk appears to believe, as the author does, that these charges are not systemic but rather external and do not accurately reflect the actual resources expended.

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tion Service under the title IMPROVING LAND TITLE REGISTRATION SYSTEMS). Two additional reports include LAND TITLE RECORDATION PRACTICES: A STATE-OF-THE-ART STUDY (1980) and LAND TITLE MAPPING AND SURVEYING (1981).

171. Fiflis, *Land Transfer Improvement*, *supra* note 7, at 458.

172. Risk, *supra* note 5, at 477.

173. *Id.* Such costs include the costs of staff, space and equipment and can thus be determined by accounting records and investigation. *Id.*

174. *Id.* Risk criticizes studies by Professors Powell and Fiflis comparing costs based in part on charges made to users and clients. *Id.* at 477 n.54.

Professor Fiflis attempted to make a rough comparison of user costs under recording and Torrens systems by using attorney fee schedules, title insurance rates, recording and registration fees, and questionnaires sent to title insurance companies, abstractors and attorneys.<sup>175</sup> He concluded: "All in all, it seems that transfers of registered titles are likely to be much less costly than transfers of recorded titles, especially when the cost of title insurance is included."<sup>176</sup> Professor Fiflis' conclusion is flawed by the common erroneous assumption that title insurance costs are appropriately incurred only with recorded titles.<sup>177</sup> He fails to consider title insurance costs in Torrens transactions that are title insured. More importantly, Fiflis' data on comparative governmental costs in operating the systems is limited to the costs reflected by registration or recording fees.<sup>178</sup>

In the mid-1970s, Shick and Plotkin studied Torrens systems in Illinois, Massachusetts and Minnesota.<sup>179</sup> They attempted

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175. Fiflis, *Land Transfer Improvements*, *supra* note 7, at 458-68. Professor Powell also made cost comparisons in his study for the New York Law Society. Because his data are now so old and because of flaws in his research design, as pointed out by Professor McDougal and others, Powell's cost comparisons are not considered here. See POWELL, *supra* note 31; see generally McDougal & Brabner-Smith, *supra* note 168.

176. Fiflis, *Land Transfer Improvement*, *supra* note 7, at 468.

177. Professor Fiflis compared the following fees: attorney's, abstractor's and governmental recording and title registration. He also attempted to compare conveying costs in a number of special situations. Fiflis concluded that there was no difference in attorneys' fees in Minnesota and Illinois and that buyers' attorneys' fees were one-third to one-half for registered titles in Massachusetts. Surveyors' fees were the same. Registration fees were slightly higher than recording charges. Abstractors' fees were a significant cost under recording and not incurred under registration. Fiflis also treated title insurance costs as applicable solely to recording. See *id.* at 458-62.

It is possible that insuring Torrens titles was uncommon when Professor Fiflis collected his data, but that is not true today. While this is due at least in part to demands from investors in the secondary mortgage market, title insurance provides protection against potential losses due to overriding interests or off-certificate risks and other causes not covered by the usual Torrens assurance fund. Fiflis was aware of these risks or interests: "[M]ost of them can be determined conclusively by further action, such as examination of additional records, inspection of the premises, and inquiry of occupiers." *Id.* at 452. If this is true, Fiflis should have taken into account the costs of making these additional investigations in Torrens transactions to make a fairer and more accurate comparison.

178. Professor Risk criticizes Fiflis and Powell because "no distinction is made between the costs of operation and the costs of change, and because the costs are assumed to be the costs charged to the users and clients." Risk, *supra* note 5, at 477 n.54.

179. See SHICK & PLOTKIN, *supra* note 37, at 56.

to ascertain and compare closing costs under Torrens and recording in those jurisdictions.<sup>180</sup> In Cook County, Illinois, where title insurance is almost the sole form of land title assurance, Shick and Plotkin found that Torrens transfers cost less than recorded transfers if the property was more expensive housing.<sup>181</sup> However, for less expensive housing, uninsured Torrens transfers were more costly.<sup>182</sup> Where a Torrens transfer was title-insured, closing costs were substantially higher than those incurred in insured transfers under recording.<sup>183</sup>

Shick and Plotkin found different results in Massachusetts. There, a common form of land title assurance was the attorney opinion method based on attorney searches rather than abstracts.<sup>184</sup> The authors found little or no difference in closing costs between registered and unregistered parcels.<sup>185</sup> In Hennepin and Ramsey Counties in Minnesota, Shick and Plotkin reported that title owners frequently obtained title insurance for both registered and unregistered property.<sup>186</sup> They also found that registration is not perceived as having any significant effect on closing costs at the time of resale.<sup>187</sup>

Because Shick and Plotkin received support from the American Land Title Association, some critics have questioned their objectivity.<sup>188</sup> Moreover, their cost figures are based on fees

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180. *See id.* at 142-44.

181. *Id.* at 143.

182. *Id.*

183. *Id.*

184. *Id.* at 102.

185. *Id.* at 119.

186. *Id.* at 97.

187. *Id.* at 96. In contrast to the findings and conclusions of Shick and Plotkin, the report on improving land title registration systems prepared for HUD by Lane and Edson, a Washington, D.C., law firm, asserts "that the cost of a title search and examination can be substantially reduced, and the cost of title insurance eliminated, under a registration system." HUD, LAND TITLE REGISTRATION, *supra* note 40, at II-2. To support this assertion, Lane and Edson do not cite empirical evidence. Instead, they refer to the study by Janczyk, *see infra* note 190, and an article by Professor Whitman, *see supra* note 15. These authorities do not provide adequate support for the assertion. Contrary to Lane and Edson's assertion, off-certificate risks in existing Torrens systems are serious enough to make title insurance frequently advisable, if not necessary. The typical Torrens assurance fund presently is not a substitute for the coverage available under ALTA title insurance policies. However, registration systems could provide protection equivalent to that currently available from title insurance.

188. *See, e.g.*, CUNNINGHAM, *supra* note 23, § 11.15, at 828 n.5; JOHN E. CRIBBET ET AL., CASES AND MATERIALS ON PROPERTY 1366 (6th ed. 1990).

and charges which are not reliably indicative of actual comparative economic efficiency.

Two published studies attempt to compare the economic efficiency of title registration and recording in actual operation. One was conducted under the direction of the Ontario Law Reform Commission;<sup>189</sup> the other was by an economist, Professor Joseph T. Janczyk.<sup>190</sup> Janczyk attempted "to estimate the social opportunity costs directly from the expenditures of the institutions involved."<sup>191</sup> His study in Cook County, Illinois, compared the costs of operating the Torrens system with the costs of running the recording system. The costs of the recording system were derived from the expenditures of the Cook County Recorder's Office, Chicago Title and Trust Company, processors of title transfer documents and surveyors. The costs of the Torrens system were based on the expenditures of the Cook County Torrens Department and processors of title transfer documents.<sup>192</sup> His cost data were obtained from interviews, reports from the Cook County Recorder/Registrar of Titles, and from Chicago Title and Trust Company. Janczyk concluded that the title transfer costs in Torrens were approximately \$100 (in 1967 dollars) less than in recording.<sup>193</sup> He determined that significant cost savings would be achieved through a complete conversion of recorded parcels in Cook County to the Torrens system.<sup>194</sup> Janczyk recommended that "Cook County seriously consider enacting legislation requiring that property currently being transferred in the recording system be switched into the Torrens system."<sup>195</sup>

Janczyk's study is unpersuasive because of the apparent un-

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189. ONTARIO LAW REFORM COMMISSION, DEP'T OF JUSTICE, REPORT ON LAND REGISTRATION (1971) [hereinafter ONTARIO LAND REGISTRATION REPORT].

190. Joseph T. Janczyk, *An Economic Analysis of the Land Title Systems for Transferring Real Property*, 6 J. LEGAL STUD. 213 (1977). Janczyk's study is more readily available in the United States than the Commission's report. Accordingly, Janczyk's study has received more attention in this country.

191. *Id.* at 216.

192. *Id.* at 217.

193. *Id.* at 215.

194. *Id.* at 226.

195. *Id.* Contrary to Janczyk's suggestion, Recorder/Registrar Carol Moseley Braun recommended abolition of the Cook County Torrens system and lobbied the Illinois Legislature to pass the necessary legislation, which was enacted in January 1991. See Cook County Blue Ribbon Report, *supra* note 10; Recorder Urges End to Torrens System, CHI. TRIB., May 31, 1990, § 2, at 6; Mark Hornung, *Best-laid Plans Fall Far Short in Recorder's Office Revamp*, CRAIN'S CHI. BUS., Mar. 5, 1990, at 56.



reliability of some of the data he used as well as serious factual misconceptions about the operation of conveyancing and land title assurance systems in Cook County. One of the most serious errors he made was assigning the entire cost of Chicago Title Insurance Company Cook County title service operations to the recording system.<sup>196</sup> A common misconception is that registration makes title insurance unnecessary and that registered titles are rarely, if ever, insured.<sup>197</sup> Chicago Title Insurance Company, for example, has been insuring substantial numbers of Torrens transactions in Cook County since at least 1937.<sup>198</sup> An estimated ninety-five percent of Torrens transfers in Cook County currently involve title insurance.<sup>199</sup> Indeed, deputized employees on the payroll of Chicago Title Insurance Company work side by side in the Torrens office with Cook County employees.<sup>200</sup> Therefore, it was erroneous to attribute the entire cost of Chicago Title Insurance Company Cook County title service operations to its recording system, instead of assigning some portion of the costs to Torrens.

Janczyk's study also fails to adequately take into account important systemic user costs.<sup>201</sup> These include the costs of examining the register or title insurance reports, making and examining surveys, clearing title objections under both Torrens and recording, and closing transactions. While Janczyk does consider these costs, he treats them as identical in both

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196. Janczyk, *supra* note 190, at 227. Other errors include his statement that Chicago Title Insurance was the "only title insurance firm in Cook County." *Id.* As an apparent afterthought, he states that Pioneer Title Insurance was a "minor exception." *Id.* at 227 n.32. Because of Chicago Title's dominance, the U.S. Justice Department sued under the antitrust laws in the 1970s. See *Chicago Title and Trust Sued*, CHI. TRIB., Feb. 6, 1973, at 1. Chicago Title settled with the United States. Currently, approximately 70 title companies do business in Cook County with Chicago Title Insurance doing about 38% of the business. See *Who Cares About Title Insurance?*, CHI. TRIB., Apr. 30, 1989, § 16, at 1.

197. See, e.g., Janczyk, *supra* note 190, at 214.

198. See POWELL, *supra* note 31, at 143 n.90.

199. Cook County Blue Ribbon Report, *supra* note 10, at 52. Shick and Plotkin reported that Chicago Title Insurance Company (which at the time had 70 to 80% of the title insurance business in Cook County) insured a total of 1,833 of the 12,866 Torrens transfers in 1976 and 2,059 of 9,650 transfers in 1975. They concluded that this data meant that as much as 25% of Torrens closings included title insurance costs. SHICK & PLOTKIN, *supra* note 35, at 143. If these figures are accurate, the use of title insurance in Torrens transfers in Cook County has grown substantially in the last 15 years.

200. Cook County Blue Ribbon Report, *supra* note 10, at 50.

201. See, e.g., Risk, *supra* note 5, at 477.

systems, with the exception of surveys, which he assumes are required in recording and not in Torrens.<sup>202</sup> To assume that no need exists for surveys in Torrens is erroneous. Surveys are used for more than just determining the boundaries of property. Surveys may be advisable under both Torrens and recording because they provide the best way to discover encroachment defects<sup>203</sup> and they usually indicate whether there is sufficient access to the property. Finally, the most serious flaw in Janczyk's study is that much of the cost estimation is based on rough estimates by a few, albeit knowledgeable, individuals interviewed.<sup>204</sup>

A study conducted over twenty years ago under the direction of the Ontario Law Reform Commission is probably the best empirical cost comparison of title registration and recording currently available.<sup>205</sup> Ontario, Canada, is one of the few places in the world where title registration<sup>206</sup> and recording systems operate side by side in the same localities. At the time of the Commission study, approximately fifteen percent of Ontario titles were in the title registration system; the remainder were in deed registration (recording).<sup>207</sup> The Commission attempted to determine comparative user and governmental costs of the two systems where they were operating side by side. Instead of measuring user costs on the basis of fees or charges, the Commission used time expended in searching title.

The Commission concluded that user searching costs were higher under the registry system (recording) than the title registration system. Further, the searches in the recording system took longer. The amount of time needed for a search depended on the experience of the searcher; conveyancers and students required more time than lawyers. A conveyancer conducting a search in Toronto needed two and one-half hours more to search the registry system than the title registration

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202. Janczyk, *supra* note 190, at 231.

203. Encroachment defects are not covered by Torrens assurance funds.

204. Janczyk, *supra* note 190, at 230, 232-33.

205. ONTARIO LAND REGISTRATION REPORT, *supra* note 189.

206. The Ontario title registration system (called "Land Titles") is not a Torrens system and does not presently use title certificates. The Ontario Land Titles system is based on an early version of the English title registration system and not directly on the Australian Torrens model.

207. ONTARIO LAND REGISTRATION REPORT, *supra* note 189, at 16.

system. Lawyers who conducted searches in northern Ontario needed only a half hour more for a registry search. For Toronto and southern Ontario, the area in which most of the conveyancing is done, a registry search took on average about two hours longer.<sup>208</sup> However, the Ontario Commission also found that the closing costs were higher under title registration than for the registry system (recording). In addition, the government's cost to operate the title registration system was higher than the costs incurred with recording.

On the basis of the report of the Law Reform Commission and his own experience, Professor Risk concluded that the aggregate operational costs of recording systems are higher than in registration systems even though user closing costs and governmental costs are higher under registration systems.<sup>209</sup> He reached this conclusion because title searches and examination under the recording system are longer and more repetitive. To the extent that repetitive search and examination is not eliminated by reliance in some fashion on prior searches and examinations where the same title is being re-examined, Professor Risk is probably correct that these user costs are higher under recording. However, these costs may not be very significant because the additional time required to search and examine title in recording systems is generally not great.<sup>210</sup> Also, computerization can substantially reduce the time expended in searching under recording. In addition, the Ontario study did not consider the effect of title insurance on comparative costs because Ontario did not use title insurance at the time.<sup>211</sup>

While the comparative user costs of Torrens and recording have not been satisfactorily determined and measured, governmental costs of operation are another matter. In contrast to

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208. *Id.* at 22.

209. Risk, *supra* note 5, at 477-78.

210. ONTARIO LAND REGISTRATION REPORT, *supra* note 189, at 99-100. On the basis of available data, the Commission assumed that searches averaged 167 minutes in recording and 66 minutes in registration. The Commission assumed that the searching would (or could) be done by paralegals (conveyancers). The assumed average title examination time by lawyers was five minutes longer for recording than for registration. Risk estimated the additional time to be 5 to 10 minutes. *Id.* at 100. Some American recording offices probably are not as well organized or managed as the Ontario offices studied by the Commission and, consequently, searches in those American offices are probably more time consuming.

211. Stanton S. Roller, *Title Insurance—An International Perspective*, TITLE NEWS, Mar. 1983, at 7.

the paucity of reliable and meaningful comparative user cost data, published reliable data on comparative governmental costs are available. These data include information from the County of York, Ontario, and three American jurisdictions with Torrens and recording systems operating side by side: Illinois (Cook County), Minnesota (Hennepin County) and Ohio (Hamilton County).

Comparative governmental costs have frequently been overlooked in published commentary comparing Torrens and recording and are of vital significance in explaining the failure of Torrens to take hold in much of the United States. To work efficiently and satisfactorily, a title registration office must be staffed adequately with competent people who are capable of swiftly and accurately evaluating instruments presented for registration. These staffing requirements make it more costly to run a title registration office than a recorder's office.

In 1978, under contract from HUD, Booz, Allen and Hamilton, Inc., conducted extensive field research on actual land record-keeping activities at twenty sites in the United States.<sup>212</sup> The Booz, Allen report on this research contains comparative cost data on three locations with dual Torrens and recording systems: Cook County, Illinois; Hennepin County, Minnesota; and Hamilton County, Ohio.

The following table is excerpted from a table in the Booz, Allen report:<sup>213</sup>

RECORDER'S COSTS:	COOK <sup>214</sup>	HENNEPIN	HAMILTON
Documents Processed	246,983	88,060	82,584
Transfers	81,112	26,683	27,230
Total Expenditure	\$1,556,628	\$536,964	\$425,902
Cost Per Document	\$6.30	\$6.10	\$5.16
Cost Per Transfer	\$19.19	\$20.12	\$15.64

212. HUD, STATE-OF-THE-ART STUDY, *supra* note 18, at 68.

213. *Id.* at 71. Anyone who evaluates these data should be aware that the three Torrens systems were hardly equivalent. For example, Cook County checked the signatures on documents presented for registration for forgeries; Hennepin County did not. Also, at the time, Cook County government was still saddled with the burdens of a now largely defunct political patronage system. When recording and Torrens costs are compared, it should be appreciated that the Registrar or Examiner of Titles performs quasi-judicial functions. The Registrar or Examiner determines title questions which otherwise might have to be handled by the general court system. Edblom Letter, *supra* note 101, at 2. There are no available data which could be used to assess the economic impact of these quasi-judicial functions.

214. Excludes costs incurred by Chicago Title Insurance Company.

TORRENS COSTS:	COOK <sup>215</sup>	HENNEPIN	HAMILTON
Documents Processed	35,825	50,310	15,403
Transfers	16,324	17,000	5,080
Total Expenditure	\$2,000,084	\$546,000	\$104,604
Cost Per Document	\$55.83	\$10.85	\$6.79
Cost Per Transfer	\$122.52	\$32.12	\$20.59

The Ontario Law Reform Commission data for the County of York also indicate that the cost to government of operating a title registration office is greater than the cost of running a recording office. The cost of staff for each recordation in the recording office was \$4.50, the cost of space was \$2.50 and the entire cost for one recordation was \$7.75. To register a title, the cost was higher. The cost of staff for a registration was \$6.50, the cost of space was \$2.25 and the entire cost for a registration was \$9.50.<sup>216</sup>

The Booz, Allen study also reveals that American recorders' offices are profit centers for counties.<sup>217</sup> In contrast, American Torrens offices usually require a subsidy because the income they receive falls short of operational costs.<sup>218</sup> The high cost of initial registration and the opposition from the title assurance industry may have contributed to the failure of Torrens in the United States. However, the high public cost and burden of continuing administration of Torrens has been the most significant contributing cause of its failure. For users, Torrens is actually or potentially a more efficient, less costly system of land title assurance and transfer than recording. Arguably, title risks are or can be made to be so much less under Torrens compared to recording that title insurance may be unneces-

215. Excludes costs incurred by Chicago Title Insurance Company.

216. ONTARIO LAND REGISTRATION REPORT, *supra* note 189, at 22.

217. In 1972, total operating expenses of U.S. recording offices were in excess of \$137 million; revenue received in the same year exceeded \$240 million. HUD, STATE-OF-THE-ART STUDY, *supra* note 18, at 13.

218. SHICK & PLOTKIN, *supra* note 37, at 58. "While there are considerable variances among the data-reporting formats used by the different systems examined, we estimate that the 1976 'subsidy' ranged from \$140,000 in Ramsey County to a high of \$625,000 for the statewide Massachusetts program." *Id.* Shick and Plotkin's cost conclusions are in accord with recent Cook County data. The Blue Ribbon Committee appointed by the Cook County Recorder/Registrar estimated 1989 Torrens office revenues of \$3,305,000 and expenditures of \$3,850,000. This deficit was expected even though fully one-half of Torrens transfers are handled by deputized title insurance company employees who are not on the County payroll. Cook County Blue Ribbon Report, *supra* note 10, at 44. The Hennepin County Torrens office currently requires no subsidy. Edblom Letter, *supra* note 101, at 2.

sary. But it is clear that Torrens or any other true registration system is more costly and difficult for government to administer than recording. This higher cost is inherent in title registration systems because much of the data consolidation, evaluation and management done by private parties under recording is done by government employees or their agents under registration.<sup>219</sup> This aspect of title registration cannot be reduced to insignificance by reforms or improvements of title registration procedures except by a radical and probably unacceptable simplification of a jurisdiction's real property law or a limitation of registrable interests to a very few types.

Since local governments had a first-hand appreciation of the administrative difficulties and costs involved with Torrens, it is not surprising that some of the most effective opposition to title registration came from local governments responsible for its implementation and not, contrary to conventional wisdom, from the title assurance industry.<sup>220</sup> The worst enemies of

219. Experience in Ontario indicates that computerization can reduce this burden on government.

220. The Cook County Recorder/Registrar led a successful effort to eliminate her Torrens system, the oldest and one of the largest in numbers of titles registered in the United States. No credible evidence exists that the title industry was behind this effort to abolish Torrens. The industry certainly had little or no financial interest in the outcome because it was insuring over 90% of Torrens transactions in Cook County at the time the effort to eliminate Torrens was initiated. Title insurance company officials did serve on the committee which recommended abolition of Torrens. Cook County Blue Ribbon Report, *supra* note 10, at 52.

The failure of Torrens in Cook County, after 90 years of implementation, was mainly caused by incompetent, unsatisfactory administration. See *supra* note 11. The demise of Torrens in southern California in 1955, after 40 years of implementation, appears to have been due to grossly incompetent management. SHICK & PLOTKIN, *supra* note 37, at 149. To attribute this incompetence to a title assurance industry conspiracy to strangle Torrens is absurd. The "reputation of American county government for being incompetent," referred to by Professor Johnstone, is well founded. Quintin Johnstone, *Systems of Land Title Protection in the United States and Possibilities for Their Improvement*, reprinted in JAMES L. WINOKUR, *AMERICAN PROPERTY LAW: CASES, HISTORY, POLICY AND PRACTICE* 1096 (1982). This incompetence is largely due to the fiscal or political constraints which bind many county governments and is really not the fault of the people who administer and work for these governments.

In some states, Torrens acts were repealed, not at the urging of the title industry, but at the request of local recorders who found the existence of little used registration statutes to be a nuisance. SHICK & PLOTKIN, *supra* note 37, at 18; Charles D. Knight, Comment, *A Fly-Specker's Manual for the Illinois Torrens Act*, 1978 U. ILL. L.F. 487, 488 n.13. In Minnesota, Torrens administrators successfully lobbied for amendments making possessory registration available at the option of each county only where a part of the applicant's tract was already registered. The administrators feared the costs and burdens that a relatively sudden and substantial increase in re-

Torrens included administrators charged with implementing it who were generally ill-equipped and disinclined to do so. Informed<sup>221</sup> government administrators are not likely to welcome with enthusiasm a system that is more difficult and costly for them to administer. Informed local legislators and administrators normally will not support replacing a system that generates profits with one that may require a subsidy. The high cost to local government for continued administration tends to make government unsupportive of registration, unless adequate resources are allocated to support the greater burden.<sup>222</sup> The failure to provide adequate resources has contributed to an inertia that caused little registration to occur after twenty

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registrations would place on county government. Comment, *Possessory Title Registration*, *supra* note 78, at 848-49.

The conventional wisdom that the title assurance industry was a major cause of the failure of Torrens in the United States is simplistic. As Professor Percy Bordwell pointed out in 1940, the conventional wisdom does not explain why Torrens was a relative success in the state legislatures (20 states or territories enacted Torrens acts between 1895 and 1917, when both state legislatures and the title assurance industry were dominated by lawyers) and an almost complete failure in implementation. If the title assurance industry was a major force in blocking Torrens, one wonders why the industry was relatively ineffectual at the state legislative level. See Percy Bordwell, *The Resurrection of Registration of Title*, 7 U. CHI. L. REV. 470 (1940). The title assurance industry may have contributed to the failure of Torrens by remedying problems caused by weaknesses in the recording system and thereby removing the need for its replacement.

The notion that the title assurance industry's lobbying against or disparagement of Torrens significantly caused its failure is not based on established fact. Today, correctly or not, title insurers generally believe that Torrens is cumbersome, archaic and no serious threat to their business. For example, William McAuliffe, the Senior Vice President of the American Land Title Association, stated that the Torrens system "has not proven itself" and is unlikely to "put the title companies out of business." Cheryl Frank, *Title Firms Dying?*, A.B.A. J., Nov. 1985, at 33. Furthermore, according to Leonard Donahoe, General Counsel for Chicago Title Insurance Company, even in an ideal system, "[t]here are still going to be elements of risk, exposure and potential loss." *Id.* Thus, property owners may still need title insurance.

221. A source of information about the costs and administrative difficulties involved with Torrens was almost certainly the title assurance industry.

222. However, consider a 1972 newsletter issued by the then Cook County Recorder/Registrar, the late Sidney Olsen, who touted the alleged superiority of registration and urged owners to register. See Sidney R. Olsen, *A Dozen Reasons Why You Should Register Your Property Under the Torrens System*, COOK CO. RECORDER, Sept. 1, 1972, at 9. Despite his urging, few Cook County real estate owners followed his advice. Between 1969 and 1981, only 120 initial registrations occurred. Cook County Blue Ribbon Report, *supra* note 10, at 40. No initial registrations have been made in Cook County since 1981. *Id.* The current Cook County Recorder/Registrar, Carol Moseley Braun, a lawyer and former state legislator, led the successful movement to abolish Torrens in Illinois. *Recorder Urges End to Torrens System*, *supra* note 195, at 61.

states passed enabling legislation, except in a few instances where special facts and circumstances overcame this inertia.<sup>223</sup>

#### IV. COMPUTERIZED RECORDING

##### A. *Registration and Recording: Land Title Assurance for the Computer Age*

A world-wide movement is advancing toward computerized land title record systems.<sup>224</sup> American title insurance companies have been developing computerized land title record systems since the 1960s.<sup>225</sup> American local governments have been implementing unofficial computerized land title record systems since the late 1970s. In Australia, computerization of a Torrens system began in 1969.<sup>226</sup> By 1982, computerization of the Austrian title registration system was well underway.<sup>227</sup> In 1984, Ontario, Canada, authorized an official computerized recording and title registration system.<sup>228</sup> This movement will accelerate as less expensive, more powerful and more user-friendly computer technology develops. Inevitably, computer systems will replace manual records, especially in populous jurisdictions with frequent land transfers and large amounts of data to manage.<sup>229</sup>

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223. In Cook County, these special facts included the need for reestablishing title where the 1871 Chicago fire destroyed the public land title records.

224. See Lang, *supra* note 35, at 213. Bumps in the road to computerization have been encountered. The effort to computerize the Hennepin County, Minnesota, Torrens office was a near disaster. The failure of the Hennepin County project was the result of the decision to use computers to produce paper certificates. Experience with computerization of title registration in Ontario shows that computers are more effectively used when paper records are completely replaced with electronic storage. The computer, of course, can print paper copies when needed. Edblom-Witkowski Interview, *supra* note 72; John Dalglish Interview, *supra* note 45. See also David L. Drury, *Computerization Increases Productivity*, TITLE NEWS, Sept.-Oct. 1986, at 13 (stating that real estate recovery and 100% increase in volume brought increasing pressure to computerize). Computerization proved to be no panacea for the Cook County Recorder/Registrar. Mark Hornung, *Best-laid Plans Fall Short in Recorder's Office Revamp*, CRAIN'S CHI. BUS., Mar. 5, 1990, at 56. The author cynically commented: "But only in Cook County government could computerization make matters worse." *Id.*

225. Fiflis, *Security and Economy*, *supra* note 2, at 173.

226. See Lang, *supra* note 33, at 213.

227. *Id.*

228. Land Registration Reform Act, R.S.O., ch. 32 (1984) (Can.).

229. Manual records may be more cost effective in smaller systems with less data to manage. Cf. Drury, *supra* note 225, at 13.



## B. Basic Components

A computerized land title assurance system, whether recording or registration, should have two basic components. First, it should contain a database with information on ownership and title, consisting primarily of the facts pertaining to past title transactions and past legal evaluations of these facts. Second, it should contain maps showing the units of ownership in the system with permanent identifying symbols assigned to each unit. The database should be organized into computer records for each ownership unit in the system shown on the map. This proposed system is essentially a computerized version of the Austrian, German and Swiss title registration systems.<sup>230</sup> The Chicago Title Insurance Company uses a similar plan for its computerized title plant in Cook County, Illinois.<sup>231</sup> It also is

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230. DOWSON & SHEPPARD, *supra* note 30, at 173-90.

231. In Cook County, both the Chicago Title Insurance Company and the County maintain computerized land title records. Access to data in both systems is through permanent identification numbers assigned to parcels. Interview with Sally Dolphin, Chicago Title Insurance Company, in Chicago, Illinois (April 1989) [hereinafter Dolphin Interview]. The Cook County system of permanent identifiers was developed by Mr. Joseph Sidwell who owned a mapping company in the 1940s. Interview with Robert Egan, Office of the Assessor, Cook County, in Chicago, Illinois (April 1989). Sidwell mapped the entire County into townships, sections, blocks and parcels. Each parcel was assigned a permanent identification number. Sidwell persuaded Cook County to use his system and maps to identify parcels for real property taxation purposes. The Illinois legislature authorized the use of Sidwell's system by Cook County in 1945. See ILL. ANN. STAT. ch. 120 ¶ 511 (Smith-Hurd 1969 & Supp. 1991) (current version of the authorizing legislation). The maps are updated as changes occur. These maps resemble the governmentally maintained cadastral surveys found in continental Europe and other parts of the world. See DOWSON & SHEPPARD, *supra* note 30, at 46-71. The POLARIS maps in Ontario are similar, but they are computer-based; hard copies are printed for the convenience of users. Dalglish Interview, *supra* note 45.

In Cook County, the County Clerk is responsible for assigning identifiers to specific parcels. The assigned number refers to a particular parcel in a particular location but does not determine precise boundaries. Precise legal descriptions can be obtained from Sidwell maps or other sources. Subdivisions and consolidations are handled administratively. When new numbers are issued, the former ones are permanently retired.

The Sidwell map system existed for decades before computerization of land title records began in Cook County. Because of the success of the Sidwell system over decades and its adaptability for computer data retrieval use, both Cook County and Chicago Title Insurance Company are presently using it to identify and retrieve data from their computer systems. Since 1986, the Cook County Recorder/Registrar has required instruments presented for recordation or registration under Torrens to bear the permanent identification numbers assigned to the parcels affected by such instruments.

Prior to computerization, the Chicago Title and Trust Company maintained five

the basic system currently being implemented in Ontario, Canada, for its title registration system.<sup>232</sup>

Data pertaining to each title would be stored in a computer record permanently identified by a number, called a land parcel identifier. Individuals who are parties to documents can be identified by name and birth date;<sup>233</sup> other entities can be identified by name and taxpayer identification numbers. Each file would contain a list of the documents entered. Photographic, electronically stored copies of title transaction documents would be retrievable upon command.<sup>234</sup> The party initiating registration or recording should be required to supply the land parcel identifiers. This requirement will make the indexing even less burdensome for government than administering a grantor-grantee index under a recording system. When a transfer of ownership is recorded or registered, the transfer would be added to a file which will be similar to a parcel-specific tract index. While the land parcel identifiers should be

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manual indexes to its elaborate Cook County title plant: tract, general tax, special assessment, judgment and miscellaneous (bankrupts', minors' and decedents' estates) indexes. Fiflis, *Security and Economy*, *supra* note 2, at 173. By 1965, all but the tract index had been computerized and put into at least partial operation. *Id.* Computerization of the tract index was completed in 1974. Dolphin Interview, *supra*.

For convenience, in the Chicago Title Insurance Company system, land title data in its title plant may be accessed through either permanent identification numbers or street addresses. If the permanent identification number is unknown, entry of the street address will retrieve the permanent identification number and other data pertinent to the parcel. When the company has previously searched or examined the title to a parcel, the results are entered in the database. When the title is searched again, these results will be retrieved. The company will normally only search back to the date of the prior examination. This procedure supplies the "curtain" feature found in title registration systems which is intended to eliminate the need for lengthy historical searches.

Legal description and permanent identification numbers are matched and checked using Sidwell maps. The Sidwell maps contain detailed legal descriptions with permanent index numbers assigned to all parcels shown on the maps. If the legal description of a parcel is known, the permanent identification number for it may be retrieved from the Sidwell maps and vice versa.

232. Dalglish Interview, *supra* note 45; Dow, *supra* note 45, § 9.06[1][d]; Lamont, *supra* note 5, at 102-03.

233. Federal privacy legislation may preclude use of social security numbers and, in any event, persons may refuse to disclose them. Birth dates, however, are matters of public record in the United States.

234. One of the very few weaknesses of the Ontario POLARIS system currently being implemented is that data from registered instruments is manually typed into the database. Human typists, unfortunately, make mistakes. However, so do electronic scanners. As computer technology advances, documents will be photographically stored and retrieved by letters, words or symbols contained in them.

the primary key to accessing file information, this information should also be retrievable by persons' names, street addresses, document numbers assigned to recorded documents and other useful means.

Identifying land titles and parcels by permanent land parcel identifiers is not as simple as identifying humans with permanent numbers such as social security numbers. Humans cannot be subdivided or consolidated. The development of a workable system of permanent land parcel identifiers is not a simple undertaking, as dimensions of parcels may change through subdivisions, consolidations, and other accretions and deletions.<sup>235</sup> A good system of permanent identification numbers also requires accurate and current maps showing the parcels identified.<sup>236</sup>

During the drafting of the Uniform Simplification of Land Transfers Act (USOLTA), the permanent identification number approach was rejected.<sup>237</sup> Instead, the drafters proposed a system where the recording jurisdiction would be divided into segments such as squares which would be assigned locator numbers. Instruments would be indexed according to the locator number assigned to the square or other segment in which the subject property was located. Under this proposal, the title searcher would sort out the data applicable to the title being examined from data pertaining to other properties in the same recording district with the same identifier. According to one of the drafters, Professor Dunham, their proposal of permanent identification numbers avoids the problems of consolidations, subdivisions and the need for accurate maps.<sup>238</sup>

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235. See Allison Dunham, *Land Parcel Identifiers and the Uniform Land Transactions Act*, 43 U. CIN. L. REV. 469, 475-86 (1974).

236. *Id.*

237. *Id.* at 480. The indexing section is in the Uniform Simplification of Land Transfers Act which was spun off the Uniform Land Transactions Act. See UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 6-207, 14 U.L.A. 368 (1990).

238. Professor Dunham also states that "assignment of a separate number, even if geo-coded to the center of the parcel, does not aid appreciably in performance of another role of the conveyancer—examining descriptions of neighboring parcels and the title history of these parcels to determine whether there are orts, gores, and overlaps and also rights in land of another." Dunham, *supra* note 236, at 481. Under a permanent number system, the title searcher can easily retrieve data about adjacent parcels through the permanent numbers assigned them as shown on the map. Under the drafters' system, only data for other parcels in the same square will be retrieved. If the subject property is on the edge of the square, information about adjacent property will not be seen unless data for the adjacent square is also retrieved. *Id.* at 482.

However, their proposed system would be more cumbersome to use, especially in densely developed areas with many titles in small areas.<sup>239</sup> Consolidations and subdivisions under permanent number systems can be handled administratively without great difficulty.<sup>240</sup> Consolidations involving entire parcels do not absolutely require the issuance of new permanent numbers; the numbers assigned the former separate parcels can be used to describe the consolidation. Subdivisions present more difficulty because they result in two or more separate parcels. In that case, a new identifier must be assigned to each parcel. However, this can be done by adding numbers for each new segment to the original identifier for the subdivided parcel.

The need for maps for permanent number systems is a more serious, though surmountable, obstacle. Even under the USOLTA drafters' proposal, a map would be needed to locate a specific property within the proper square or squares.<sup>241</sup> According to Dunham, the "searcher or the person initiating recording can enter the locator into as many locator squares as he thinks the parcel falls . . . ."<sup>242</sup> If the searcher and the person initiating recording "think" differently about which locator squares should properly be entered, a problem may arise.

Maps supporting permanent number systems do not have to be perfect. The depiction of the boundaries is sufficient if the map adequately identifies the various numbered parcels so that each can be distinguished from other parcels. Therefore, a

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239. Professor Dunham refers to a hypothetical square of land in the Hyde Park area of Chicago with "a portion of the University of Chicago and portions of 2 or 3 faculty houses" and states that this square "may have only 3 or 4 entries a year speedily retrievable" under the proposed system. *Id.* at 483. The author is familiar with other areas of Chicago where the proposed system would not work so well. In the lake shore area of Chicago, there are blocks containing many high rise condominiums containing hundreds of units and, therefore, separate titles for which there would be many more annual entries indexed for a recording district square of land the approximate size of Dunham's hypothetical square near the University in Hyde Park.

240. In Cook County, subdivisions and consolidations are handled administratively. A petition for Divisions or Consolidations is filed with the Division Department of the County Assessor's Office. These petitions currently take about two years to process because of the number of petitions received. The process could be accelerated considerably with better management and not a great deal more resources. The Ontario POLARIS system uses a similar procedure when new numbers are needed. Dalglish Interview, *supra* note 45.

241. See UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 6-206, 14 U.L.A. 368 (1990).

242. Dunham, *supra* note 236, at 482.

costly, comprehensive survey is not necessary. Adequate maps for zoning ordinances are assembled without costly comprehensive surveying. The maps can be assembled from existing tax assessment maps or subdivision and condominium plats.<sup>243</sup> Maps in many rural areas could be derived largely from the U.S. Government Rectangular Survey System and aerial mapping where necessary. Digitizing<sup>244</sup> the boundaries of individual parcels on computers is a cost-effective way of assembling computer-based maps.<sup>245</sup>

All in all, the permanent identification number approach would appear to better promote economy, efficiency and security of title.<sup>246</sup> The USOLTA drafters' proposal appears too cumbersome to use with few compensating advantages to counterbalance its faults.

The final Official Draft of USOLTA requires "recording of officers" to maintain geographic indexes and "maps that indicate location in a manner enabling public users to find the proper location or locations in the geographic index for every land parcel."<sup>247</sup> The definition of "geographic index" is broad enough to include a permanent identification number system, the system described by Professor Dunham, or almost any conceivable tract index, whether it is manual or computer-based.<sup>248</sup>

All system users should pay fees to access the data absent a showing of financial hardship. Current land title records sys-

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243. Such maps are the initial source material for the computer-based maps being developed for the Ontario POLARIS system. Information from survey plans and registered title documents are used to build an accurate mapping database. Government does not affirm the boundaries shown by the POLARIS computer-based maps. Dalglish Interview, *supra* note 45.

244. Digitizing is the computerized process of recording of numerical representations of geographical points on a map. Lang, *supra* note 35, at 214. "Graphic recording, or digitizing, involves the recording of individual land parcels, by manually pointing a device (like an electronic pen) at the lot corners already drawn on the standard maps. The computer then automatically calculates the lot's position on the earth's surface." *Id.*

245. See Lang, *supra* note 35, at 214.

246. Ontario, Canada, adopted the permanent identification number method when it decided to computerize its recording and title registration systems. See REGISTRATION DIVISION, MINISTRY OF CONSUMER & COMMERCIAL RELATIONS, ONTARIO DOCUMENT USER GUIDE, LAND REGISTRATION REFORM ACT, 1984 ¶ 33.405 (1986 ed.).

247. UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT §§ 6-206 to 6-207, 14 U.L.A. 367-68 (1990).

248. *Id.* at § 6-102.

tems are financed by fees from those who record or register or are paid out of other government revenues.

### C. *Registration or Recording?*

Computerization has fundamentally changed the debate between the Torrens and recording systems. Computerization of recording can eliminate redundancies and eliminate many other deficiencies of the recording system by providing rapid access to relevant data and eliminating redundancies. Further, remote terminal access to computerized public records will remove most of the incentive for title companies and examiners to maintain private records.<sup>249</sup> By contrast, Torrens already has good data management and retrieval characteristics, even without computerization.

The most difficult and important policy question faced by architects of computerized land title assurance systems is whether they should be purely recording systems or at least partially title registration systems. Persons considering this question should keep in mind that the vital distinction between the two systems lies in "the affirmations made by the state about the ownership of interests and the effect of documents."<sup>250</sup> Fully computerized recording and title registration systems should be very similar both in physical characteristics and in the manner by which data are stored, managed and retrieved. The basic issue is the extent to which the government will affirm the legal effect of information retrieved from the systems.

The best system would provide great security of title with low governmental and user costs. For most of the United States, the appropriate choice would be a computerized recording system, with privately or publicly supplied title insurance, which effectively incorporates the mirror, curtain and indemnity principles of title registration.<sup>251</sup> Experience with title registration in the United States and elsewhere in com-

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249. Title service providers sometimes use their private title plants to maintain a competitive advantage over others who are forced to use poor public records. Good public records will remove this advantage. Ontario is considering remote access to POLARIS from terminals in solicitors' offices. Dalglish Interview, *supra* note 45.

250. Risk, *supra* note 5, at 471.

251. Of course, title registration may be appropriate in those few American jurisdictions where Torrens has worked well, such as in Hennepin County, Minnesota. Title registration can succeed in jurisdictions which have skilled and dedicated peo-

mon law countries indicates that conclusiveness of the register is an elusive, often unattainable goal.<sup>252</sup> Nonetheless, existing title registration systems are less costly for title searchers and examiners to use and probably provide greater security of title compared to existing recording systems. However, the price for these user benefits is greater governmental cost and administrative difficulty as well as costs and difficulties encountered by system users. A properly structured computerized recording system which effectively incorporates the title registration principles of mirror, curtain and indemnity may provide equal or greater economy, efficiency and security of title.<sup>253</sup>

For countries such as the United States, which have entrenched recording systems and little experience with title registration, recording has many attractive features unrelated to its inherent merit. A reformed, computerized recording system would be far easier to implement than a computerized registration system. For example, no costly judicial or administrative initial registration proceedings would be needed with official computerized recording. Implementation of a computerized title registration system would face the same barriers of high start-up costs due to initial registration, and resistance due to administrative difficulties and costs which caused most manual Torrens systems to fail in the United States. Computerization will do nothing to remove these barriers. In addition, relatively few American lawyers and judges understand title registration. Since recording is much better understood, educating lawyers and judges about a reformed,

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ple available to operate the systems well, and a public and governmental commitment to raise and expend the funds needed for efficient operation.

252. *MAPP*, *supra* note 5, at 181; *Rose*, *supra* note 114, at 588-90.

253. A Canadian study committee also proposed a merger of recording and title registration concepts. After recognizing that it is not possible for any title registration system to guarantee ownership of all interests in land and that recording is more efficient and user friendly at the stage of data input than is title registration, the committee proposed a system where only the most common and best understood interests would be registered (fees simple absolute, life estates, leaseholds, security interests, easements, utility interests and restrictive covenants); all others would be recorded. JOINT LAND TITLES COMMITTEE, *RENOVATING THE FOUNDATION: PROPOSALS FOR A MODEL LAND RECORDING AND REGISTRATION ACT FOR THE PROVINCES AND TERRITORIES OF CANADA* 14, 21 (1990). This proposal merits serious consideration. However, it may be more appropriate for Canada than the United States because Canada has had much more experience with title registration and does not have the legal, political and practical barriers to its implementation to the extent found in the United States.

official computerized recording system would be less formidable.

The most obvious inherent advantage of recording is that it is less costly and less difficult for government to administer. Staffing a recorder's office is relatively easy because little expertise in real estate law is required. In contrast, at least some employees in a title registration office must have substantial expertise. Furthermore, because recording places relatively few demands on government resources, it is more responsive to sudden increases in the volume of data input than is title registration. Also, few resources are actually expended to close transactions in recording because government does not substantively review documents before recording.<sup>254</sup> Moreover, no time is wasted because of adjourned closings due to governmental objections.

The advantages, however, bring on their own disadvantages. Lack of examination means that the recording system provides no formal control on the quality of data input. Title insurance companies, lenders, escrow agents or lawyers representing parties may indirectly contribute such control. Also, a non-binding quality check for errors at the point of data input, which is similar to procedures used in registration offices, might be a cost-effective way of promoting security of titles and efficiency. This quality check would avoid creating the inflexibility caused by a binding, conclusive approval procedure.<sup>255</sup> Conveyancing on state-prescribed forms whenever possible would elevate the quality of data input and promote economy and efficiency.

#### *D. Mirror, Curtain and Indemnity in Computerized Recording Systems*

Architects of computer-based recording systems should draw on decades of experience with title registration systems in the United States and elsewhere. The title registration principles of mirror, curtain and indemnity should be applied,

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254. However, the actual closing costs may be high if fees and charges are excessive.

255. A non-binding review should be less prone to the overly meticulous examination encountered in binding reviews in some title registration offices. In contrast to American practice, some European recording systems are quite restrictive about accepting instruments presented for recordation. See GARRO, *supra* note 5, at 111-14.



whenever possible, consistent with the goals of economy, efficiency and security of titles.

### 1. *Mirror*

The mirror principle of title registration should be a paramount policy. Generally, all liens, encumbrances and other interests must be recorded in the computer file to give record notice to subsequent purchasers.

The real estate tax lien or its equivalent is the only practically universal overriding interest in title registration systems. A requirement to file these liens periodically would be too great a burden on government, especially since general knowledge of the liens minimizes their impact on the conclusiveness of the register. While no great harm would result in exempting these liens from recordation in the computer files, computerization would make their recordation a simple process. Computers can be programmed to make automatic entries showing the attachment of annual real estate tax liens against non-exempt property. Special assessments do not attach at regular intervals against titles generally, so they should not be exempt from recordation in the computer files. Rather, special assessments should not attach to titles until entered in the parcel files for the properties affected. Entries showing payment or release of both general real estate tax liens and special assessments could be made through a direct connection to the office which receives payments.

As required by some Torrens acts, judgment liens should be recorded against individual parcels. Recording and indexing such liens in a general judgment lien index should not suffice. During the drafting of the USOLTA, the drafters were persuaded by representatives of creditors' interests who suggested that it would be politically impossible to eliminate general lien indexes.<sup>256</sup> Notwithstanding this alleged "political impossibility," in both Minnesota and Illinois, state statutes require that judgment liens against Torrens titles be filed against individual Torrens certificates in order to be perfected.<sup>257</sup>

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256. Peter B. Maggs, *Land Records of the Uniform Simplification of Land Transfers Act*, 1981 S. ILL. U. L.J. 491, 502.

257. ILL. ANN. STAT. ch. 30, ¶ 122 (Smith-Hurd 1960 & Supp. 1991); MINN. STAT. § 508.63 (1990); *United States v. Ryan*, 124 F. Supp. 1, 6 (D. Minn. 1954). In Connecticut, judgment liens must be filed against specific parcels described by the lien claimants. CONN. GEN. STAT. ANN. § 52-380(a) (West 1991). The drafters of

Transfers by will or inheritance should be recorded in the appropriate computer file. Adverse possession should be prohibited, as is the case under Torrens acts. At the very least, those claiming title by adverse possession should be required to file notice of their claims in the appropriate parcel file to perfect their priority.<sup>258</sup>

The hidden mechanic's lien should be abolished. The USOLTA proposals for construction liens provide an excellent guide for reform. Notice of such liens should be filed by parcel before work commences and their general priority should relate to the time of filing.

As is the case with some existing Torrens systems, there should be no inquiry notice or constructive notice from possession.<sup>259</sup> Interests not entered in the computer files for the subject titles should be deemed unrecorded. However, leases should be exempt from recordation if they are short-term (three years or less) and the lessees are in possession of the property.

## 2. *Curtain*

Incorporating the curtain feature of title registration into a computerized recording system is a difficult problem. The curtain of existing title registration systems is based on an attempt to make the register a generally conclusive governmental statement of the condition of title, the very aspect of Torrens which caused it to fail in most of the United States. This characteristic is responsible for the high cost of initial registration and continuing administration, the cumbersome features and inflexibilities of Torrens, and the inefficiency of continuous data evaluation as instruments are presented for registration. Furthermore, conclusiveness of the register may be unattainable.<sup>260</sup> As is the case under existing recording systems, the record under computerized recording systems can be made

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USOLTA should have left it to state legislators to determine whether elimination of general lien indexes would be "politically impossible."

258. See Whitman, *supra* note 15, at 57.

259. See PATTON & PATTON, *supra* note 20, at § 682; Taylor Mattis, *Recording Acts: Anachronistic Reliance*, 25 REAL PROP. PROB. & TR. J. 17, 100 (1990); see also Rosewood Corp. v. Illinois Bell Telephone Co., 230 N.E.2d 172, 173 (Ill. 1967).

260. MAPP, *supra* note 5; Rose, *supra* note 114, at 588-90.

presumptively valid<sup>261</sup> without all of the costs, delays, inflexibilities and other difficulties caused by the attempt to make the register conclusive.<sup>262</sup>

Without some kind of curtain, user data evaluation costs under recording are unnecessarily high because identical data often have to be reevaluated from time to time. Existing methods of avoiding reevaluation include marketable title acts, title examination standards and reliance by title examiners on prior examinations. Reliance on prior examinations would be more effective to promote economy and efficiency if the process were formalized and better coordinated. Informal curtains may come from routinely entering title insurance company title reports or lawyer title opinions for individual titles in the computer files for the titles examined. The recording office could make the title insurer's or other examiner's direct access to the database through remote terminals conditional on their entering title reports or opinions in the database.<sup>263</sup> Alternatively, recording title opinions or reports could be required to qualify transfer documents for recording.<sup>264</sup> Subsequent title examiners could then choose to rely on prior reports or opinions in determining the extent of their searches. At present, title examiners rely on past examinations in a sporadic, disorganized fashion. Implementation of this proposal would organize and routinize this practice. Where a title insurer relies on the curtain of a prior title insurance company report, security of title could be enhanced by making prior owners' title insurance policies assignable to present owners with expiration to occur after some period of time, such as thirty or forty years after

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261. This is done through a presumption that recorded transactions were legally effective.

262. See *supra* notes 252-56 and accompanying text.

263. Computer records organized by parcel will eventually eliminate the use of abstracts of title. The title examiner will not have to rely on abstractors' summaries because electronically stored copies of original documents will be almost instantly retrievable from remote terminals.

264. Recording title opinions is not a new idea. See, e.g., Fairfax Leary, Jr. & David G. Blake, *Twentieth Century Real Estate Business and Eighteenth Century Recording*, 22 AM. U. L. REV. 275 (1972). The authors propose making title opinions conclusive after they had been on file for a set period of time, such as six years. *Id.* at 318. This process would create a private sector title registration procedure. Conclusiveness is probably not necessary to provide the needed curtain; one wonders how quickly courts and legislatures would heap "mud" on this crystalline proposal. See Rose, *supra* note 114, at 588-90.

issuance.<sup>265</sup>

Governmental curtains cutting off the relevance of past transactions may be provided by an administrative certification of title procedure similar to that provided by the Ontario Certification of Titles Act.<sup>266</sup> This Act provides for a type of administrative quiet title procedure which can be used to establish conclusively the state of a recorded title as of a particular time.

### 3. *Indemnity*

The indemnity feature of title registration also should be adopted. At the very least, indemnification should be available to compensate those who suffer losses because of mistakes, errors or omissions in administration. The current procedure of suing the recorder on his or her bond is woefully inadequate. A claimant should not have to bring a lawsuit to establish a claim. Experience with the administration of Torrens assurance funds indicates that claim payment policies should be fairly liberal in order to promote confidence in the funds. Claimants should not be disqualified because they may be entitled to sue others for their losses. In such cases, government

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265. See Whitman, *supra* note 15, at 57. Loan policies insuring mortgagees are currently assignable and have been for many years. Loan policies have built-in lifetimes because they expire when the mortgages are discharged. Title insurance companies might very well object to being required to issue policies which could potentially insure a perpetual chain of owners even though the liability of the company under any assigned policy would be limited to covered losses in existence at the date of the policy.

266. R.S.O. ch. 59 (1970); Richard E. Priddle, *New Requirements and Procedures in Land Titles and Registry Offices*, in SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA 1970, RECENT DEVELOPMENTS IN REAL ESTATE LAW 353, 356-57 (1970). This Act engrafts onto the recording system the generally conclusive governmental statement of ownership and title feature of title registration. Under this Act, which has limited geographical application, the administrator of the land title registration system has the authority, upon application, to have a certificate of title issued which establishes ownership and title as of the time of issuance. Essentially, the certificate has the effect of a final judgment of quiet title although it may be issued administratively. After issuance of the certificate, the property remains in the recording system. The advantage is that the legal effect of prior transactions is, in general, permanently determined. According to one commentator, the Ontario Certification of Title Act is infrequently used. Dow, *supra* note 43, at § 9.06[1][b]. "Such legislation is not resorted to often in Ontario, since . . . [land under recording] may voluntarily be brought within the land titles [registration] system and all, rather than only some, of the benefits of such system thereby obtained." *Id.* Another commentator indicates that the Certification of Titles Act is more frequently used. See Lamont, *supra* note 5, at 102.

should indemnify claimants in appropriate cases and be subrogated to their rights against others. Ordinary contributory negligence should not bar claimants from recovery. If the indemnification component uses an assurance fund, the resources of the fund should be backed up by government, as is the case with some existing American Torrens systems. The coverages currently available from title insurance companies should be available from private companies or government.<sup>267</sup>

## V. CONCLUSION

Previous proposals to reform land title assurance provide little basis for an expectation that the reform proposals made in this article will be promptly adopted and implemented. The land law reformer should be sensitive to political realities. Dreaming has merit, but progress ultimately depends on what can be, not what should be. Nonetheless, meritorious ideas for reform should not be held back because of expected political opposition. If a sustained, serious effort is made to implement a needed reform, special interest opponents will have difficulty blocking it, so long as it appears sound and is understood by legislators, other policy makers and the public.

An adversarial approach toward the title assurance industry tends to ensure that potential allies will become enemies. It is unwise to charge that people in the title industry are engaged in an expendable, unnecessary activity to the detriment of the public interest—especially because the charge is untrue. People in the industry have a formidable, detailed knowledge of the workings of title assurance systems, including its public and private components.<sup>268</sup> If approached as allies, people in

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267. The Iowa Finance Authority has been authorized to issue what appears to be a form of governmental title insurance coverage. See IOWA CODE ANN. §§ 220.2, 220.91 (West 1985 & Supp. 1991). Iowa previously had been the only state which prohibited title insurers from issuing policies within the state.

268. For example, one of the best general works on title insurance currently available was written by a title insurance company officer. See generally ROONEY, *supra* note 73. Rooney was the President of the Attorneys' Title Guaranty Fund, Inc., the bar-related title insurance company in Illinois. The late Professor Robert Kratovil of John Marshall Law School in Chicago was for many years a Vice President of Chicago Title Insurance Company. Kratovil published extensively both before and after he retired from Chicago Title and became a law teacher. He was a consultant to the committee which developed the Uniform Land Transactions Act. See Michael T. Rooney, *In Memoriam: Robert Kratovil*, 4 CONCEPTS AND VIEWPOINTS 22 (1989).

the title assurance industry can be valuable sources of information and creative ideas.

The governmental administrators who will implement reforms are usually very concerned about whether they will have access to the money and other resources necessary to perform the tasks assigned to them. A proposed system can only succeed if sufficient resources are provided to those who will have to implement it. Fairly charging all system users, including those who now have free access, would provide the needed revenues.

Successful reform requires organization, leadership, time and effort. Conscientious legislators will not adopt proposals which may have substantial impact just because experts or authority figures tell them they should. Legislators must be convinced that the necessary effort and costs will be justified by satisfactory results with no serious political costs. Because the area of land title assurance is specialized and not easily understood, the process of persuading and educating legislators will require time, patience and a sustained effort.

A principal reason why the Uniform Commercial Code was "the most spectacular success story in the history of American law"<sup>269</sup> is that its initiators and creators, under the leadership of Professor Karl N. Llewellyn and Mr. William A. Schnader, had the patience and the persistence to carry forward an effort over fifteen years to persuade state legislators to adopt the Code while continually making it more legally and politically acceptable.<sup>270</sup>

The history of the Code's success provides valuable lessons for anyone promoting legislative property law reforms in the United States. While the Code's triumph is not a perfect model for real estate law reform, it does teach us that property law reform will succeed when the proposed legislation is well drafted and considered, both legally and politically, and when legislators are convinced that change is necessary.

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269. JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 5 (3d ed. 1988).

270. *Id.* at 4. In the beginning, their progress was glacial, but after over ten years of sustained effort, the floodgates broke in the early 1960s when the Code became the most successful piece of model or uniform legislation ever created in the United States. *Id.* at 5.

