Two Perspectives on the Real Estate Title System: A Proposal for a Title Registration System for Realty

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A PROPOSAL FOR A TITLE REGISTRATION SYSTEM FOR REALTY

Martin Lobel*

I. INTRODUCTION

As the ancient legal apparatus providing for the transfer of land creaks into the final quarter of the twentieth century, the need for a massive overhaul becomes increasingly clear. Designed and introduced at a time when it could work reasonably well, the land recordation system has now reached senility, its irrationality becoming more and more apparent with each passing year.

In our major metropolitan areas, property changes hands rapidly and each time a transfer occurs, a thorough, expensive and inefficient search of the "chain of title" must be made. Furthermore, because the public records are often poorly maintained it is virtually impossible in many cases to obtain a complete record of the state of the title. As a result, what was and should be a public function—providing reliable and easily accessible records for persons seeking to transfer land—increasingly has become an almost exclusively private one controlled by title insurance companies which maintain their own "title plants." For the individual contemplating the purchase of a house, the cost of the process of gaining title to the property has become a significant factor in the decision of whether or not to purchase it. The cost of the process also prevents many persons from purchasing the type of home they desire, or sadly, from purchasing a home at all.

One reason for condemning the recordation system to the legal executioner as it has evolved in Washington, D.C., and many other places is that it fails to provide the purchaser with needed legal advice in making what is potentially the largest purchase of his life. While lawyers scurry around in federal and state governmental agencies to protect consumers from the hazards of fraudulent adver-

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tising, unsafe products and a poisonous environment, the individual consumer does not receive meaningful representation as he negotiates his most important purchase and most immediate environment. Without legal representation, and in light of the system's inherent irrationality, the consumer is at the mercy of the "experts" whose very economic existence depends upon the inadequacies of the present system.

One asks why this outdated system remains; why, when things are going from bad to worse, no real replacement has been proposed and adopted. The answer is simple. There are simply too many powerful parties involved whose self-interest lies in seeing the patient remain on his death-bed rather than undergo an ignoble burial. By prescribing a pill here and applying a band-aid there, title insurance companies, title lawyers and others who profit from the systemic illness have fought and will continue to fight to preserve the recordation statutes. A cure would jeopardize their very existence.

A cure, however, exists; it is a title registration, or Torrens system. A Torrens system would completely replace the present irrational, costly and inefficient means of transferring property. Such a proposal will soon be presented to the District of Columbia City Council, which will then have the opportunity to bring about for the first time in the United States, a truly modern, well-tested method of land transfer. The purpose of this article is to describe that proposal and to explain how it will work. But first it is necessary to examine in more detail why a title registration system is needed.

II. THE PRESENT SYSTEM OF RECORDATION AND ITS PROBLEMS

It is beyond the scope of this article to review in detail the workings of the present system of recordation and the multitude of problems associated with it. Each state has its own statute and its own body of customs and traditions. However, in order to understand

1. See Appendix infra. For a discussion of the history of the Torrens system in Virginia, see Comment, Yes Virginia—There is a Torrens Act, 9 U. RICH. L. REV. 301 (1975). Virginia, like many other states, has adopted a statute which gives landowners the option of registering land under the Torrens system. VA. CODE ANN. § 55-112 (Repl. Vol. 1974). However, this section is seldom used. A similar situation prevails in most other jurisdictions which have a Torrens provision but do not require its use.


3. See generally U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT & VETERANS...
why the present system is so outmoded but why there is so much resistance to changing it, we first must see how it operates generally and what are its weaknesses.

A. Operation of the Present System

In a common transaction today, a prospective home purchaser locates a real estate broker who in turn shows that buyer a number of houses. When the buyer decides on a house, he meets with the seller and after any negotiations the parties execute a sales contract. Prior to the formal closing, a title search is made, financing is arranged, title insurance is drawn up, an inspection and survey are often conducted and the deed is prepared. Next, the actual closing takes place with the broker, the buyer and seller, an attorney of either or both, a representative of the lender and a representative of the title insurance company or an escrow agent all possibly present. Who is actually present depends upon the particular transaction and the custom of the locality. After the closing, the mortgagee usually makes sure that the deed is properly recorded.

"Recordation," the heart of this system, takes place when the deed is taken to the public recordation office and the recorder enters

4. There has been a great deal of criticism of the present recordation system. See, e.g., Leary & Blake, Twentieth Century Real Estate Business and Eighteenth Century Recording, 22 Am. U.L. Rev. 275 (1973) [hereinafter cited as Leary & Blake]; Cross, Weakness of the Present Recording System, 47 Iowa L. Rev. 245 (1962) [hereinafter cited as Cross]; Payne, The Crisis in Conveyancing, 19 Mo. L. Rev. 214 (1954) [hereinafter cited as Payne]; Hearings on S. 2775 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess. (1972) (legislation dealing with mortgage settlement costs) [hereinafter cited as Hearings on S. 2775].


6. Because of the dominance of title insurance companies in Washington, D.C., the process is slightly different since neither the seller nor buyer is generally represented by an attorney. See Burke, Conveyancing in the National Capital Region: Local Reform with National Implications, 22 Am. U.L. Rev. 527 (1973) [hereinafter cited as Burke]; HUD-VA Report, supra note 3, at 62.
into his books the fact that a transfer of a certain piece of property has occurred. The recording constitutes public notice to all those with present and future interests in the land.

B. Establishing Chain of Title

Prior to the closing, title must be established. There are three commonly used methods in the United States for doing this: (1) direct examination of the official land records by an attorney, who then certifies to the buyer (or lender) that the title is in a certain state; (2) examination by an attorney of a commercial abstract, prepared by an abstracting company; or (3) issuance of an insurance policy by a local title insurance company after it has searched the title. This third method has become dominant in many large metropolitan areas, including Washington, D.C. 8

The most basic legal problem with the present system is that even after one of these methods has been utilized, the purchaser has no assurance that the vendor "owns" the property to be transferred. The title may still be "defective." That is, at some point since the original grant from the sovereign, there may be a "gap" where: (1) a transfer took place but was unrecorded, or (2) an encumbrance of some type on the land was unrecorded and is still outstanding, or (3) a recorded interest was not discovered. Thus, another party may show up sooner or later to claim a superior right in the piece of property.

This complicated and confusing process often necessitates utilization of a title insurance company, an attorney or an abstracting company. None of these parties has any self-interest in changing the basic framework of the recordation system, although some might be interested in reducing their workload or exposure through tinkering with the process. Of course, even if the purchaser were willing to risk buying property without a thorough title examination, his lender would require such a search since the particular parcel is the security on the loan.

Lenders also require "title insurance" because even if the lender were willing to rely on an attorney's certificate, the secondary mort-

8. HUD-VA REPORT, supra note 3, at 62.
gage market would not and an increasing number of lenders are selling or want the option to sell mortgages in this market. These institutional constraints force the purchaser to buy at least "lender's title insurance." Naturally enough, the private companies writing such title insurance are eager to maintain such a system.

1. The Complexity of the Search

Because the necessity for searching a title is something that the average consumer confronts rarely in his lifetime, little public attention has focused on the need to reform the system. One title insurance company lists seventy-six different sources of title information in fifteen different offices that theoretically are necessary to check in order to determine the state of the title. Furthermore, depending upon the state statutes involved, as many as forty-seven different liens or similar interests can attach to land and should be brought to the prospective purchaser's attention. There are also interests which may arise by operation of law such as prescriptive easements and fee ownership by adverse possession.

In the absence of marketable title acts or other curative statutes that cut off outstanding interests after a certain period of time, the title examiner must check for all possible interests back to the time of the sovereign. In practice, of course, few professional searchers go back further than sixty years and title companies only go back to the issuance of their last title insurance policy, relying on the accuracy of prior searches.

The difficulty of direct examination of title is greatly compounded in many states and localities by outmoded methods of


10. HUD-VA REPORT, supra note 3; See also Appendix A.

11. Leary & Blake, supra note 4, at 381. One such lien may attach for failure to pay dog license fees.

12. For a more detailed criticism of the substantive legal weaknesses of the recordation system see Cross, supra note 4.

13. Burke, supra note 6, at 548.
indexing for particular parcels. In most places the public index lists interests only by the name of grantor and grantee, although there are a few jurisdictions where tract indexes exist. Despite calls for reform of the indexing system stretching back more than twenty years, not a great deal of progress has been made.

Wide dispersal of records among numerous offices, the multitude of interests that can attach to land and poor indexing are all factors that contribute to the overall confusion of the present recordation system. They are also factors upon which expert searchers and title insurance companies feed. If something could be done to simplify the whole process so that very little time was necessary to determine the true state of the title, then there would be little need for the services offered by these private concerns.

In the major metropolitan areas the private concerns are particularly entrenched, precisely because it is there where the recordation system has proven to be the greatest failure. The volume of transfers which must be recorded is enormous, reaching several per minute of each working day in places. In some areas the turnover in home ownership is particularly rapid; in suburban Washington it has been estimated to be as great as 40 percent every three years. Furthermore, the need for access to public records is no longer confined to conveyancing. Taxing authorities, land planners, land use controllers and other governmental agencies also utilize the recordation system to one extent or another.

In the face of these strains on the public system, it is hardly surprising that private agencies (abstractors and title companies) have set up their own systems of duplicate records which are often more efficient than the public records. The duplication process has reached a high degree of efficiency. In Washington, D.C., the exist-

14. For a discussion concerning several problems of indexing see Cross, supra note 4, at 248-49.
15. See, e.g., Payne, supra note 4.
16. Some reforms of the indexing systems have been made through computerization. See, e.g., Maggs, Automation of the Land Title System, 22 Am. U.L. Rev. 369 (1973).
17. Bayse, A Uniform Land Parcel Identifier—Its Potential for All Our Land Records, 22 Am. U.L. Rev. 251 (1973) [hereinafter cited as Bayse]. In Washington, D.C., the rate is approximately 125 a day. Burke, supra note 6, at 535.
ing companies, despite serious antitrust questions, have developed a joint procedure to gather title information, whereby one is responsible for photocopied take-offs from the recorder’s office and another prepares a digest of courthouse records. Copies of these documents are sent to the other companies which share the expense. The failure of public agencies to provide easy, centralized access to information within the public domain has enabled private companies to flourish and to become an indispensable component of the present system.

2. The Role of Title Insurance Companies

The modern title insurance company is a perfect example of how an antiquated system spawns the growth of an unnecessary industry. Title insurance companies perform the service of searching the records and of insuring the homeowner and lender against the possible risk of loss. In essence, their business is to sell insurance to protect against the possibility a title was negligently searched. Such an absurd situation is compounded by the fact that the total losses paid as a percentage of premiums is only about 2.5 percent,\(^2\) and in some parts of the country, it is less than 2 percent.\(^2\)

The setting of rates is also irrational. For lenders, the policy is basically a declining term policy since as the mortgagor makes his payments, the mortgagee’s dollar-value risk decreases. Yet, the declining worth of the policy is not reflected in the charges to the homeowner. As for the homeowner’s own title insurance, the rates do not reflect any turnover in the property. Thus, if owner A buys a house one year and purchases title insurance and then sells the house the following year to owner B, both A and B normally pay the full amount of the insurance.

C. The High Cost of Buying and Selling

The present system of transferring property would be more tolerable if it were not so expensive. Six years ago, when the average price of a home was considerably less than it is today, one scholar stated that estimates of total costs excluding mortgage interest varied from

\(^{20}\) Burke, *supra* note 6, at 534-35.

$1 billion to $3 billion a year.\textsuperscript{22} The HUD-VA study,\textsuperscript{23} the most extensive made to date on settlement costs (including closing costs), found that average settlement costs as a percentage of the sales price ranged from slightly more than 6 percent to more than 17 percent, depending upon the state.\textsuperscript{24} In individual cases, the settlement costs may exceed 20 percent.\textsuperscript{25}

The component parts of the total cost also vary greatly from state to state and locality to locality.\textsuperscript{26} The HUD-VA study categorizes 21 different types of charges and costs\textsuperscript{27} and additionally lumps together under "other closing costs" 14 additional fees.\textsuperscript{28} The additional fees proliferate in large metropolitan areas where an unnecessary specialization of function occurs most frequently.\textsuperscript{29} Increased costs also correlate with the dominance of title insurance as the primary method of establishing clear title.\textsuperscript{30}

The reasons why the various parties to a land transaction are able to charge for such a wide variety of services are not difficult to discern. Chief among them is that the system provides little price competition. Furthermore, the homeowner has little knowledge about the process and is understandably led to believe that since a transaction is so complicated, he must rely entirely on the services of these professionals. Thus, his lack of bargaining power and knowledge enable the title insurance companies, real estate brokers, attorneys and others to compete through a system of kickbacks, referral systems, interlocking directorates and other non-consumer oriented methods. This lack of price competition is amply demonstrated by the fact that settlement costs vary widely within the

\textsuperscript{22} Id.
\textsuperscript{23} HUD-VA REPORT, supra note 3.
\textsuperscript{24} The report defined "settlement costs" as "the sum of closing cost items, loan discount payments (mortgage points), prepaid items, and sales commissions;" it defined "closing costs" as "all charges paid at settlement for obtaining the mortgage loan and transferring real estate title." Id. at 13. These definitions are adopted for this article.
\textsuperscript{25} Id. at 76. In the District of Columbia, the average total settlement cost was 14.25 percent, a figure exceeded only by Delaware and Pennsylvania. Id. at Appendix E.
\textsuperscript{26} Id. at 76.
\textsuperscript{27} Id. at 99.
\textsuperscript{28} Id. at 73.
\textsuperscript{29} Id. at 66, 64.
\textsuperscript{30} Id. at 33. The largest cost components identified by the HUD-VA study were title examination and insurance, attorney's fees, origination fees, loan discount fees, prepaid items and sales commissions. Hearings on S. 2775, supra note 4, at 25.
same locality. In Washington, D.C., for example, closing costs differ as much as 100 percent for the same-priced house and real estate commissions may vary as much as 500 percent. The lack of price sensitivity is reflected by the fact that commercial abstracting, despite being relatively inexpensive, has been eclipsed by title insurance as the dominant form of title examination in many parts of the country.

There is no doubt that the present outmoded recordation system is responsible either directly or indirectly for a substantial portion of these costs. For example, the necessity for title insurance at all stems from the ever-present shadow of uncertainty that falls across most titles. As noted earlier, the cost of title insurance compared to actual dollar losses is disproportionately high. The reasons for this result include the cost of labor to search the records, the cost of establishing and maintaining a title plant, expenses associated with commissions paid for referrals, free services given land developers and ineffective or non-existent rate regulation.

In localities where attorneys play a significant role in title examination, their charges are also necessarily driven up by the archaic recordation system. Furthermore, many attorneys charge for their services a percentage of the value of the property rather than on the basis of actual work performed, a departure from traditional fee setting methods and one which may have antitrust implications.

It is often said that the lender's insistence on a high degree of title protection is responsible for much of the cost associated with title insurance. Naturally, the lender wants to make sure that its mort-

31. HUD-VA REPORT, supra note 3, at 73. Where attorney's fees are a common component, minimum fee schedules have served to prevent price competition. Hopefully, as a result of the Supreme Court's decision in Goldfarb v. Virginia State Bar, 421 U.S. 733 (1974), the cost of legal services will be reduced.
32. Title insurance companies, through agency arrangements and purchases, are gradually eliminating the competitive effect of abstracting companies. Payne, supra note 4, at 473-74.
33. Leary & Blake, supra note 4, at 292.
34. Id.
35. Id.
36. Hearings on S. 2775, supra note 4, at 131, 134 (statement of Barlow Burke, Professor of Law, American University). It should be pointed out, however, that the profits of title insurance companies may not be unreasonably above other industries. Leary & Blake, supra note 4, at 291 n.55.
37. Hearings on S. 2775, supra note 4, at 134.
38. See, e.g., Payne, supra note 4, at 462, 474.
gages are marketable in the secondary market. In fact, the lender-institutional mortgagee is often required by law to obtain either an attorney's certificate of title or a title insurance policy attesting to its first lien status. In any case, there would be no point in banks, savings and loans, and secondary mortgage market institutions requiring title insurance if there were some more efficient method to provide the needed financial protection.

Unnecessary costs in the settlement process should be eliminated. Although concrete data describing the effect of settlement costs on purchasing patterns is unavailable, there can be little argument that the present system keeps a substantial number of persons out of the housing market altogether and others out of the type of housing they could otherwise afford. In large metropolitan areas where settlement costs in terms of both direct and indirect expenses may reach several thousand dollars, the effect must be considerable. The role that home ownership plays in our social and economic systems adds an important incentive to eliminate economic waste in the transfer process.

III. Proposals for Reform

A. Band-Aids on the Spurting Artery—Marketable Title Acts, Computerization and Other Proposals

To say that our system of land transfers in the United States is basically irrational is not to say anything new. The land recordation statutes and the systems grown up around them have been under vigorous attack for at least twenty years. There have been almost as many proposals for reform as there have been law review articles

39. Id. at 481.
40. Hearings on S. 2775, supra note 4, at 133.
41. Professor Payne has pointed out that settlement costs, when added to the down payment, may be determinative in a decision whether to buy a house at a given time, since purchasers usually have only a limited amount of cash for initial investment. Payne, supra note 4, at 456. For a concurring view that high settlement costs discourage home purchases see statement by Gus Cramer, Executive Vice President of the Communications Workers of America, in Hearings on S. 2775, supra note 4, at 49-51.
42. Costs that the seller must bear will be reflected in the sales price of the house.
43. See HUD-VA REPORT, supra note 3, at Appendix E.
44. Id. at 32-33.
45. See, e.g., Payne, supra note 4.
critical of the system. Some of these reforms have been enacted into law. Whether they treat the underlying sickness or merely the symptoms of the dying patient is another question.

The most successful of these modifications in terms of the number of jurisdictions in which it has been enacted is a "marketable title act," which has been enacted in one form or another in at least 15 states. These acts cut off interests prior to a certain year or prior to a given period of years, usually forty, provided those interests have not been kept alive by recordation of a preserving notice. Although the HUD-VA study found that settlement costs were lower in states with such acts, it could not conclude that the acts were the sole cause of the lower costs. Marketable title acts have also been subjected to withering criticism on the grounds of unfairness. The only significant difference the acts make is to relieve title examiners from having to search the records farther back than the statutorily-prescribed period. In metropolitan areas where land changes hands frequently and where a variety of types of claims arise, marketable title acts do little to improve the system while preserving its worst features. As a consequence, the acts are often supported by existing industry groups.

Another reform that has been widely proposed and adopted in a number of places involves the computerization of the title search procedure and information storage. Besides expressing the naive notion that technology and automation are the keys to the solution of societal problems, proponents of computerization tend to overlook the fact that the start-up and capital costs are often prohibitive. In addition, computer systems are not error-free because humans must feed proper and complete information into them. Further, computerizing title searches does nothing to resolve the underlying conceptual problems of the current system.

46. See Barnett, Marketable Title Acts—Panacea or Pandemonium?, 53 CORNELL L. REV. 45, 95 (1967).
47. HUD-VA REPORT, supra note 3, at 49. The states are Connecticut, Florida, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Utah and Wisconsin.
48. Id. at 113.
49. See Barnett, Marketable Title Acts—Panacea or Pandemonium?, supra note 46, at 53, where the author describes as one example the fact that the owner of a 99-year leasehold will have his interest cut off unless he gives notice at least once every 40 years.
Other so-called "reforms" do not deserve the name. One of these is bar-related title assurance, which is another name for a title insurance company owned by lawyers. Although lawyers argue that they can provide title insurance less expensively than can the private companies, there is no inherent reason why they should be able to and the real impetus for such a movement comes from the fact that the dominance of title insurance companies has driven lawyers out of a business traditionally regarded as their turf.

Other movements which have been promoted with varying degrees of vigor and success include improving the indexing systems, providing uniform identification for parcels, federal regulation of title insurance rates, a proposal to make lenders bear all closing costs, and a "Revised Model Title Insurance Code" proposed by the American Land Title Association (ALTA). Not surprisingly, the most striking feature of the ALTA "reform" bill is a section which in the guise of "disclosure" requires a homebuyer to either purchase a title insurance policy or waive his common law right to sue the title company for negligence.

As is readily apparent from the discussion of these various proposals for change, none address the basic flaws in the system. This is hardly surprising since most of the proposals have been supported at various times by the very parties whose economic livelihood is at stake.

51. One such group is the Lawyers Title Guaranty Fund of Florida.
52. For an article telling lawyers what they have to do to retain their land title practice see Payne, Price the Bar Must Pay to Retain Its Title Practice, 35 ALA. LAW. 277 (1974).
55. See Hearings on H.R. 9989, supra note 9 (discussion of H.R. 12066).
56. Id. at 569.
57. Id. at 452.
58. Id. § 160(b).
59. For a more detailed examination of how the Model Act not only fails to achieve reform but blatantly seeks to consolidate the position of title insurance companies see the letter written by the author to Mr. James Blakely of Consumers Union. Id. at 658.
60. One of the exceptions is H.R. 12066, whose provisions to set maximum rates for settlement costs drew no support from the affected industry groups. See Hearings on H.R. 9989, supra note 9.
B. Torrens: A Change in Diet Works Wonders

There is one "reform" that has almost never received support from title lawyers, title insurance companies or any other interest who profit from the recordation system—title registration. As long ago as the 1920's, title companies and attorneys were sharpening their swords over the Torrens system of title certification and successfully propagandizing against it. Things are no different today. The District of Columbia title insurance establishment is already campaigning against the Torrens proposal in that city.

1. History of Torrens

The Torrens systems of land registration is not exactly a reform since it is more than 100 years old and was first introduced in this country on a "freedom-of-choice" basis in the early part of this century.

The system is named after Sir Robert Torrens, who was chiefly responsible for its enactment into law in Australia in the late 1850's and early 1860's. Since then, title registration has achieved widespread adoption in the world. Approximately thirty countries, including Great Britain, Israel, the Philippines, Puerto Rico, and the western provinces of Canada currently use it. In fact, the American system of land recordation, although originally adopted by the colo-

61. The Chicago Real Estate Board supported the Torrens system in the 1930's, as did some attorneys in that city. R. Powell, Registration of the Title to Land in the State of New York 149 (1938).
63. One commentator wrote that "[c]ertainly the landowning public has been very much prejudiced against adopting the new system through derogatory propaganda as to its practicability and effectiveness instigated and broadcast by title lawyers, banks and mortgage companies, and by title insurance and abstract companies." McCall, The Torrens System—After Thirty-Five Years, 10 N.C.L. Rev. 329, 343 (1932). "Propaganda" is not an exaggeration; indeed, opponents of Torrens went so far as to criticize it as foreign intervention in American affairs and suggested that it had been adopted in Australia to control criminal elements. HUD-VA Report, supra note 3, at 48.
64. For a general background of how the law obtained its final shape see Comment, The Elements of a Torrens Title, 11 Alberta L. Rev. 392 (1973).
66. Id.; HUD-VA Report, supra note 3, Supplement IV (*Ed.: The supplement is found only in Hearings on H.R. 13337, supra note 3).
nies from the British, is uniquely American, since the British have abolished their original system in favor of the Torrens system. Title registration was enacted into law in twenty-two states in the early twentieth century, and it still remains available for use in eleven states. But in none of the states in which it was enacted was it made compulsory, a feature which distinguishes it from a "true" Torrens system.

This voluntary feature was probably the main reason why Torrens failed to make a significant impact in the United States. Since title registration had to be initiated by a landowner or purchaser, the general ignorance about the law made its success unlikely. Furthermore, lawyers and title companies naturally were not about to encourage its use. In fact, there was strong sentiment against Torrens, capped in 1938 by the publication of Richard Powell's book on title registration in New York. Since that time, no important effort to utilize Torrens has been made.

In the years following Powell's publication, legal scholars generally disregarded title registration, not because it was perceived unworkable or legally unsound, but because it was perceived as politically infeasible. Only in the last few years has the increas-

67. Instead of the landowner keeping all the evidence of his title in his possession as the
68. See Comment, Yes Virginia—There is a Torrens Act, 9 U. Rich. L. Rev. 301 (1975).
70. Even though it was voluntary, Torrens did manage to encompass a significant number
71. R. Powell, Registration of the Title to Land in the State of New York (1938).
ingly burdensome recordation system prompted renewed calls for a workable Torrens system.\textsuperscript{73}

2. Operation of the Title Registration System

One of the principal advantages of the title registration system, and thus one of its characteristics that inevitably rankles its opponents, is its simplicity. It somehow goes against the grain for modern man to accept a system which simplifies, even if it does make things work better.

In an oft-quoted opinion, the Minnesota Supreme Court described the difference between Torrens and recordation this way:

The basic principle of this system is the registration of the title of land, instead of registering, as the old system requires, the evidence of such title. In the one case only the ultimate fact or conclusion that a certain named party has title to a particular tract of land is registered, and certificate thereof delivered to him. In the other, the entire evidence, from which proposed purchasers must, at their peril, draw such conclusion, is registered.\textsuperscript{74}

The initial registration is accomplished by the filing of a petition with the court asking that the title to a particular piece of land be certified by the court. Persons with an interest in the land are normally notified and appear at an in rem proceeding to give evidence of their interest. The judge then determines the state of the title and a certificate is issued and a duplicate is issued to the court. The

\textsuperscript{3}, at 48, where it was noted that: "[M]ost practicing real estate attorneys and legal academicians believe that the utilization of the Torrens system is not likely to expand in this country and that Torrens is only of historical significance because established interests would resist the change necessitated by its use." \textit{See also} Barnett, \textit{ Marketable Title Acts—Panacea or Pandemonium?}, 53 \textit{Cornell L. Rev.} 45, 94, n.130 (1967) [hereinafter cited as Barnett], where the author observed that Professor Simes acknowledged in undertaking a research project sponsored by the ABA Section on Real Property, Probate and Trust Law that he "disregarded as useless any investigation" of Torrens. It seems irresponsible for lawyers to ignore Torrens on the basis of political impracticability and vested interest opposition.\textsuperscript{73} \textit{See}, e.g., Barnett, supra note 72; \textit{Whitman, Optimizing Land Title Assurance Systems}, 42 \textit{Gez. Wash. L. Rev.} 40 (1973); \textit{Hearings on S. 2775}, supra note 4, at 43 (statement by James E. Starrs, Professor of Law, George Washington University). Even Professor Powell now concedes that title registration may have some merit. \textit{6 R. Powell & P. Rohan, Powell on Real Property} 320.1-.2 (1975).

\textsuperscript{74} \textit{State ex rel. Douglas v. Westfall}, 85 Minn. 437, 89 N.W. 175 (1902).
original certificate is kept on file at the public registrar’s office. In order for these interests to be valid, they must be memorialized on the certificate, an essential part of the system. Once the initial certificate is entered, any party claiming an interest in the property such as a mortgage, judgment, attachment, lien or the like files an instrument with the registrar, who enters the claim on the face of the certificate of title.

Transfer of the property occurs by the buyer and seller presenting a deed of conveyance to the registrar who then issues a new certificate of ownership to the buyer and cancels the original and the seller’s duplicate. If the deed is for only part of the land, the registrar issues a new certificate and duplicate to the grantee for that part, and a certificate and duplicate of the residue to the grantor.

A Torrens statute is usually accompanied by a period of limitation after which a title cannot be challenged. Typically, an assurance fund is established to indemnify any person who suffers loss because of an undiscovered claim, a misdescription, omission or error on the certificate. The fund is supported by fees charged to the certificate holder—often a quarter of one percent of the amount of the sale. The registrar controls the fund, disbursing at the direction of the court.

3. Criticism of the Title Registration System

The major criticism of the Torrens system has been that the initial cost of registration is unreasonably high. In order for the system to work as it is supposed to, it is important that the certificate have a high degree of conclusiveness. If a certificate is not accepted by a lender or purchaser as sufficient evidence of title, then the costly and complicated process of search of the records will not be avoided, and no savings will be achieved. As a result, the initial registration proceeding must be as complete as possible, and thus the expense to the seller or purchaser in terms of attorney’s fees, court costs and legal fights over contested interests can be high.

76. It is important to note that no accurate cost data has been compiled since Powell’s book in 1938, which hardly makes a strong case that the cost of establishing a mandatory Torrens System is too high. R. Powell, REGISTRATION OF THE TITLE TO LAND IN THE STATE OF NEW YORK 40-53 (1938).
The major fault with the criticism that the initial cost of registration is too high is that such an argument deflects attention from the major advantage of the Torrens system, which is the inexpensiveness of subsequent transfers. When one considers that a given parcel of land may change hands several times in a single decade, it is incredible that the possibility of a one-time expense for registration can be used as an argument against a system that will save purchasers countless dollars in future transactions.

Another criticism of Torrens has been that the guaranty funds will be inadequate to cover all the potentially valid claims against it.\textsuperscript{77} The insufficiency of the fund in California in the 1930's is claimed to be one of the chief reasons for the demise of Torrens in that state.\textsuperscript{78} But in his 1938 study, Powell concluded that the problem of the fund's soundness was minimal in a state where competent public servants administered it.\textsuperscript{79} And, in any case, as we shall see, there are methods of assuring that the fund remains sound.

The Torrens statutes have been frequently challenged on constitutional grounds, but where the registration process has involved a judicial proceeding, constitutionality has been upheld.\textsuperscript{80} Supreme Court holdings on sufficiency of notice for due process purposes present no problem for a well-designed Torrens statute.\textsuperscript{81} For the most part, arguments made by Torrens opponents stand on shaky grounds. Even so, there is no reason why a statute cannot be drafted to meet those objections, whether imagined or real. The proposed District of Columbia statute, discussed in the next section, is a good example.

IV. THE DISTRICT OF COLUMBIA PROPOSAL

A. Introduction

The District of Columbia is a jurisdiction where the need for drastic reform is particularly acute. As a large metropolitan area

\textsuperscript{77} See 6 R. Powell & P. Rohan, Powell on Real Property 308-09 (1975).
\textsuperscript{78} R. Powell, Registration of the Title to Land in the State of New York 72 (1938).
\textsuperscript{79} 6 R. Powell & P. Rohan, Powell on Real Property 316 (1975).
\textsuperscript{81} See notes 104-05 infra and accompanying text.
and the seat of our nation's government, it is subject to a high number of land transfers which have placed an intolerable burden on the present recordation system. Furthermore, the process of title examination is dominated almost completely by the title insurance companies, who, according to the HUD-VA study, conduct the title search in virtually all the transactions taking place in Washington. Private attorneys are infrequently involved in the process so that the home purchaser has no one to represent his personal interests.

The worst part of the system for the purchaser, however, is the cost. The average cost for title examination and title insurance in the District was far higher than in any of the 11 other metropolitan areas on which the HUD-VA study focused. The search fee that is charged is especially high, and it is not based on the difficulty of the search but on the sales price. In terms of title-related costs as a percent of the sales price, Washington ranked 49th out of 51, and in terms of actual dollar costs it ranked 50th. Finally, the structure of the Washington system has spawned the proliferation of specialized costs. Besides the major fees normally associated with a transfer, fourteen additional fees averaging a total of $101 were charged with varying frequency.

A title registration statute in the District of Columbia would have a significant impact on these high costs and would at the same time bring considerable reason and efficiency to an extremely irrational and inefficient system. The need for title insurance and tedious and expensive search of the records would be eliminated. Additional ancillary and perhaps unnecessary costs would likely be minimized. Furthermore, the attorney would once more play the role of

82. HUD-VA Report, supra note 3, at 99.
83. Id. at 63.
84. Id.
85. The HUD-VA Report defines "title-related costs" as "charges for title examination, title insurance, preparation of documents, closing fee, escrow fees, attorney fees and miscellaneous unclassified costs." Id. at 76. The term does not include transfer taxes.
86. Id. at 76.
87. Id. at 77. The average District of Columbia cost, $423, is more than seven times as great as the cost in the lowest-ranking state, North Dakota.
88. See note 85 supra.
89. Id. at 64. The fees listed include those for notary, lender's inspection, tax certificate, release, trustee, disclosure statement, amortization schedule, financing statement, lender's appraisal, and documents noting conveyance, compliance inspection, service charge and miscellaneous charges.
representing the purchaser in negotiating and drafting the deed of sale, if indeed the homeowner desired such representation at all. In addition, the attorney would not be involved in the time-consuming search of records or in referring clients to certain title insurance companies. However, this also means the attorney would not be able to justify charging for his work as a percentage of the sales price; instead, he could only charge for the actual amount of work done.

As a final introductory matter, it is important to point out that the proposed legislation will have no disruptive effect on the secondary mortgage market. In fact, since the legislation is careful to ensure that the title certificate will be conclusive as to the state of the title, there is every reason to believe that the marketability of first mortgages will be increased.

B. Description and Rationale of Proposed Legislation

Like most Torrens statutes, the title registration bill proposed for the District of Columbia provides for the initiation of a proceeding leading to the issuance of a certificate, notification of persons with an interest in the land, a requirement for the listing of interests in the land on the face of the certificate with a corresponding section allowing for certain exceptions, and a publicly controlled assurance fund. But the significance of the proposal lies in its unique features, which were designed to make title registration a feasible and attractive solution to the present mess.

1. Provision for Compulsory Registration

Chief among the unique characteristics of the D.C. proposal is Section 104(1), which requires, in essence, that before a landowner can transfer property he must first acquire a title certificate. There have been no Torrens statutes adopted in the United States that have had such a compulsory feature. It is this feature, of course,
that is the most controversial because it will eventually eliminate the need for title insurance and the present system of recordation. Without this compulsory feature, however, it would be foolhardy to propose a Torrens statute since the history of Torrens statutes in the United States has shown that the economic interests which profit from the present system can effectively prevent widespread adoption of Torrens on a voluntary basis.\footnote{The most effective way to prevent voluntary usage is simply to keep people ignorant of the existence of such a system. The extremely low percentage of use of the Torrens system in many states is indicative of public ignorance about the availability of title registration.}

The statute provides for a six-month delay\footnote{See Appendix § 104.} after enactment before the compulsory feature takes effect. This period will help to eliminate any confusion or hardship on owners who are in the process of selling their house, and certainly will provide adequate time to acquire a certificate for a homeowner who must sell his house shortly after the six-month period expires.

For the homeowner who does not sell his house, there is no requirement for registration. Thus, the complete transformation of the recordation system to title registration will take place over a number of years, reducing the immediate impact on the recorders' offices, the courts and owners of property.


To meet the objections of some critics that the initial cost of registration is so high that Torrens is impractical, the statute contains two major provisions. First, it provides for a streamlined judicial proceeding at which the state of the title is initially determined. Section 103(1) allows a person to obtain a certificate by "filing a petition . . . with the Superior Court and presenting evidence of his estate to an officer\footnote{An "officer" is defined as "an employee of the Superior Court designated by the Chief Judge to hold hearings and make recommendations of fact and law to the Court regarding title to land for which a title certificate is sought."Appendix § 102(1).} of the Superior Court who shall make findings of fact and law and recommend to a Judge of the Superior Court whether a title certificate shall issue."\footnote{Appendix § 103(1).} In cases where questions of fact or law are disputed, a party claiming an interest may press his
claim with the Judge, who may hold a de novo hearing.\textsuperscript{101} In practice, there will be relatively few instances in which a party will wish to go beyond the initial state. Thus, a full judicial proceeding with its attendant costs will be required only rarely.

The second and most important provision is one whereby a person seeking a title certificate shall be deemed to have the title shown on a title insurance policy issued to him or to the holder of a deed of trust in the land by a title insurance company licensed to do business in the District of Columbia at the time the policy was issued, if he submits a copy of the title insurance policy, a survey of the land done by a licensed surveyor, an affidavit that he had not done anything to change the title or boundaries shown in the title insurance policy and land survey and if none of the owners of adjoining property or other parties receiving notice claim an easement or other interest in the land within 45 days of being notified of the filing of the petition for a title certificate.\textsuperscript{102}

The effect of this provision is to avoid the high cost of search involved in trying to discover in the conventional manner all persons with a recorded or unrecorded interest in the land. By using the title insurance policy as prima facie evidence of title ownership, the proposal obviates the need for duplicating search of the records already conducted by a title insurance company. Since there has always been economic incentive for title insurance companies to thoroughly search the records before issuance of a policy, the companies themselves cannot honestly suggest that their policies are insufficient evidence of ownership. In fact, it is perfectly reasonable that the statutory standard of search be the one that the title insurance companies and lenders themselves have utilized to date. If the title insurance companies maintain that their policies are not sufficient evidence, then surely they do not suggest that homeowners should continue to be subjected to such an unreliable system.

While the provisions to reduce initial registration costs compared to other Torrens systems are an important aspect of the bill, the reader should not lose sight of the fact that one of the major advan-

\textsuperscript{101} Id.
\textsuperscript{102} Appendix § 103(2).
tages of the title certification system is the reduction in costs in subsequent transfers. Once registration is accomplished, the cost to the seller or purchaser for the next transfer will be minimal. Neither title search nor title insurance will be required. A lawyer need only examine one document to determine the state of the seller’s title.

The argument has been advanced that title registration is an unfair burden to present homeowners since they allegedly will have to pay again for services they already paid for when they purchased the house. But this argument is of no consequence since the cost of the initial registration will be negotiable between buyer and purchaser, and to the extent that the purchaser does not pay the cost, the expense will be reflected in the sale price of the property.

Another cost argument put forward is that lenders will continue to insist on title insurance even with a title registration system. However, it is not likely such a situation can develop when (1) the initial registration is based on a title insurance policy having been previously issued and (2) where any persons with valid claims to the land must seek relief from the title insurance fund administered by the recorder of deeds, not from the land itself. If lenders continue to insist on title insurance despite these provisions, serious antitrust questions may be raised.

Despite the bill’s provisions ensuring lower initial costs and the overall merits of the Torrens system for reducing the cost of subsequent transfers, opponents of the system will continue to argue that there is no savings in the proposed legislation. When one realizes that the enactment of the legislation effectively eliminates the need for title insurance companies or for searches by attorneys, it would be surprising if such short-sighted arguments were not developed and pressed. In fact, although the proposal has yet to be presented to the City Council, parties with financial interests at stake are already actively campaigning against it.

3. Constitutional Considerations

Although Torrens statutes have been challenged on constitutional grounds numerous times, they have generally withstood the as-

103. Appendix § 105.
saults. One of the crucial considerations is that due process standards of notice be met so as to not unfairly cut off a person's property interest. The proposed statute meets this test by requiring (1) notice to adjoining property owners, (2) notice to all others with interests in the land whose names and addresses are known and (3) notice by publication to unknown claimants. Since a title registration proceeding is in rem, these notice provisions should be more than adequate. Title insurance companies list on the policy all those with interests in the land, and since all those claiming interests which arose after the issuance of the policy will be known to the owner, it will be a simple matter for these persons to receive notification. The names and addresses of adjoining property owners are also easily discoverable.

4. Provisions Conducive to Conclusiveness

In any Torrens system it is critical that the title certificate reflect as conclusively as possible the existence of valid interests in the land. To the extent that it does this, Torrens is a successful replacement for the recordation system. To the extent that the certificate is questioned by a purchaser or not accepted by a lender, title registration loses its advantages and becomes indistinguishable from recordation because a purchaser or lender may still be required to search the records for outstanding interests. A statute will result in a conclusive system only if it minimizes the likelihood of judicially created exceptions.

The proposed District of Columbia statute does precisely that. The statute requires that no claim for an interest in land

may be brought in any Court except for (a) tax liens of the United States or of the District of Columbia, (b) public easements recorded on official plats maintained by the Recorder of Deeds, or (c) claims

106. The inconclusiveness of the title certificate in California was one of the reasons for Torrens' desuetude there. R. POWELL, REGISTRATION OF THE TITLE TO LAND IN THE STATE OF NEW YORK 96 (1938).
filed with the Recorder of Deeds and shown on the face of the title certificate.\textsuperscript{107}

This provision acts as a powerful motivation for any party who has an outstanding interest to file a claim for that interest with the recorder. The statute also makes clear that, other than the exceptions for tax liens and public easements, the registration statute applies to all interests in land. Therefore, courts cannot except certain types of interests on an \textit{ad hoc} basis; all interests or claims to interests must be shown on the face of the title certificate. If they are not filed and shown on the face, the court is forbidden from entertaining a suit seeking transfer of an interest.\textsuperscript{108}

In addition to providing for transfer of an interest voluntarily or by judicial order, the proposal allows for a transfer by operation of law. Thus, when one of the partners in a tenancy by the entirety dies, the surviving spouse can transfer the interest by filing a death certificate with the recorder of deeds.

Other provisions militate in favor of conclusiveness for the title certificate. The original petitioner must swear in an affidavit that he has done nothing to change the title and boundaries shown on the title insurance policy and land survey.\textsuperscript{109} Therefore, he must disclose any outstanding interests or claims that have arisen since the issuance of the title insurance policy or else face the risk of facing criminal penalties. He may also be held personally liable for those interests he knew of or should have known of and failed to disclose.\textsuperscript{110} A subsequent purchaser of registered land who seeks to sell his land must likewise swear that the certificate represents the true state of the title.\textsuperscript{111}

Finally, the statute provides a five-year grace period during which persons claiming to have had a valid interest cut off by the initial registration or by mistake, omission, error or fraud may file a claim in superior court against the recorder of deeds.\textsuperscript{112} If the court finds

\begin{footnotes}
\item[107] Appendix § 104.
\item[108] Appendix § 104(2).
\item[109] Appendix § 103(2).
\item[110] Appendix § 105(2).
\item[111] Appendix § 104(1)(a).
\item[112] Appendix § 105(2).
\end{footnotes}
that a valid interest was cut off, it ascertains the fair market value of the land at the time of registration, or the time the interest was cut off, and the recorder of deeds pays that amount from the title insurance fund and then can sue the seller to recover the loss.\textsuperscript{113} In order to ensure that the fund controlled by the recorder remains actuarially sound, the recorder is permitted to adjust the fee that is charged at the time the certificate is issued. Initially the fee is $\frac{1}{4}$ of 1% of the assessed value of the property.\textsuperscript{114}

**Conclusion**

While the Torrens system is not a novel idea in the United States, it has never been fully utilized in any state. Obviously many lawyers, title insurance companies and other interested parties would be adversely affected if such a system were instituted. On the other hand, the transfer of land would be greatly simplified, thereby benefiting the public. Furthermore, if properly designed, the Torrens system would offer even greater security to the prospective buyer. Legislators seem to be wary of making the necessary transition, but when viewed in detail there can be no question that the title registration system is the most advantageous to the general public.

\textsuperscript{113} Id.
\textsuperscript{114} Appendix § 105(1).
APPENDIX

A Bill

To require that all land in the District of Columbia be registered with the Recorder of Deeds

Be it enacted by the Council of the District of Columbia, that this Act may be cited as the “DISTRICT OF COLUMBIA TITLE REGISTRATION ACT OF 1977.”

Sec. 101. Findings and Declaration of Purposes

The Council of the District of Columbia finds that the unnecessarily high cost of title examination and insurance has prevented many lower income persons from purchasing housing. The Council believes that by modernizing the land recordation system and eliminating the need for expensive and time consuming title examination the public will save money and more people will be able to purchase homes.

Sec. 102. Definitions and Rules of Construction

For the purposes of this Act—

(1) “officer” means an employee of the Superior Court designated by the Chief Judge to hold hearings and make recommendations of fact and law to the Court regarding title to land for which a title certificate is sought.

(2) “person” means a natural person or his or her legal representative, firm, corporation, partnership, cooperative, association or any other organization, legal entity, or group of individuals, however organized.

(3) “title certificate” means a certificate issued by the Court or the Recorder of Deeds showing ownership of land. It shall contain the precise time and date of registration, the estate of the certificate holder, a description of the land and any encumbrances to which the land or the certificate holder’s estate is subject. The form shall be as specified by the Recorder of Deeds and shall be signed by him.

(4) this Act shall take effect 180 days after its enactment.
Sec. 103. *Petition for and Issuance of title certificate*

(1) Any person may obtain a title certificate showing his interest in land by filing a petition for a title certificate with the Superior Court and presenting evidence of his estate to an officer of the Superior Court who shall make findings of fact and law and recommend to a Judge of the Superior Court whether a title certificate shall issue. If there are disputed questions of fact or law, the Judge may hold a *de novo* hearing before issuing or denying a title certificate.

(2) A person seeking a title certificate for land from the Superior Court shall be deemed to have the title shown on a title insurance policy issued to him or to the holder of a deed of trust in the land by a title insurance company licensed to do business in the District of Columbia at the time the policy was issued, if he submits a copy of the title insurance policy, a survey of the land done by a licensed surveyor, an affidavit that he has not done anything to change the title or boundaries shown in the title insurance policy and land survey and if none of the owners of adjoining property or other parties receiving notice claim an easement or other interest in the land within 45 days of being notified of the filing of the petition for a title certificate.

(3) A person seeking a title certificate shall notify (a) adjoining property owners, (b) all others claiming interests in the land whose names and addresses are known to the person seeking title and (c) unknown claimants by publication within seven days of filing his petition and seven days thereafter.

Sec. 104. *Transfer of Ownership*

(1) Effective 180 days after enactment of this Act, interest in land may be transferred only (a) by signing the title certificate over to the new owner under oath, (b) by judicial order, or (c) by operation of law; provided, however, that releases of deeds of trust may be recorded without a title certificate. Such transfer shall not be effective until the signed sworn title certificate, the judicial order, or evidence satisfactory to the Recorder of Deeds that an event automatically transferring title to land has occurred, is filed with the Recorder of Deeds. The Recorder of Deeds shall then issue a new title certificate to the new owners.
(2) No claims to an interest in land for which a title certificate has been issued may be brought in any Court except for (a) tax liens of the United States or of the District of Columbia, (b) public easements recorded on official plats maintained by the Recorder of Deeds, or (c) claims filed with the Recorder of Deeds and shown on the face of the title certificate.

(3) The Recorder of Deeds shall maintain a list of all title certificates by grantor/grantee index, by plat and by serial number.

Sec. 105. Title Insurance Fund

(1) At the time a title certificate is issued a fee of 1/4 of 1% of the assessed value of the land and buildings appurtenant thereto shall be paid to the Recorder of Deeds who shall hold such money in trust to pay holders of claims against land whose claims were cut off by the registration of the land. The fee may be adjusted by the Recorder of Deeds to maintain an actuarially sound fund.

(2) Persons who claim their interest in land was cut off by registration or by mistake, omission, error or fraud must file their claim against the Recorder of Deeds in the Superior Court within five years of registration. If the Superior Court finds that the claimant had a valid interest in land which was cut off, it shall ascertain the fair market value of the interest at the time of registration or time the interest was cut off and the Recorder of Deeds shall pay such amount from the fund. The Recorder of Deeds may implead the person whose registration cut off the affected interest or may sue such person in a separate proceeding to recover the amount of payments plus costs if the person knew or should have known of the claim at the time the person applied for the title certificate and did not reveal it to the Court.