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## The Applicability of the Torrens Act in California

THE arguments for and against the Torrens Act have usually been partisan, heated and overdrawn. It will be a long time before practical experience awards the decision and in the meantime the discussion must be to a considerable extent theoretical, even when confined as this article is to the desirability of the act under the conditions prevailing in the State of California. Any discussion at the present time must be based on what will probably happen, not on what has happened. Arguments confidently advanced fifteen years ago can be maintained no longer, and there is probably a consensus of agreement on the following points:

1. The Torrens Act is, in its broad general features, constitutional and a scientific method of solving the land transfer problem.<sup>1</sup>
2. The question of its enforcement in California is to be determined for the most part on practical grounds of economy and safety, not on legal considerations.
3. In foreign countries the history of their law, the present state of land titles, the social customs, the absence in general of constitutional limitations, the diversity in the laws—all make foreign experience of little value.
4. In the United States of America the act has not been in operation over enough land to enable anyone to see whether it would work as well as the older system if applied to all the land in the state, for it must be remembered that any system works fairly well if there are only a few transactions. It is their multiplicity which causes the trouble.

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<sup>1</sup> Robinson v. Kerrigan (1907), 151 Cal. 40, 90 Pac. 129. See American Land Co. v. Zeiss (1910), 219 U. S. 47, 55 L. Ed. 82, 31 Sup. Ct. Rep. 200; Devlin on Real Estate, Chapter XL; 1 American Bar Association Journal, p. 3, collecting authorities.

The comparison must therefore be made between the Torrens and other competing systems by assuming all the transactions to be taking place in turn under each system. Under the California Civil Code, which at the present time governs the vast majority of transactions in realty, every instrument in writing affecting real property may be recorded and with the exception of leases not exceeding one year, must be recorded to be constructive notice to those dealing with the property.<sup>2</sup> Recordation consists in copying the instrument verbatim into the appropriate book and indexing under the names of the parties. To get the history of a title from the Recorder's office one must therefore look through all the patents, grants, etc., until he finds the proper governmental source and then by means of the name indices run that title down. It is really more difficult than that, because under our law a person may grant land which he does not own and if he ever acquires it title immediately passes to his grantee. In other words, one must not only run down changes of title but must ascertain at his peril what each owner may have done with the land before he got it. This rule of the passing of title by estoppel is a mistake and should never have been enacted in the Code.<sup>3</sup> The title passing by estoppel should be merely between the parties, it should not be the legal title. Recordation should not constitute constructive notice thereof.<sup>4</sup>

The practical impossibility of running down titles led to the formation of abstract companies who gave an abstract of the title as it appeared in the above records. From this abstract an attorney could pass on the title as it appeared of record and this had to be done every time a conveyance or mortgage was made, each time going back to the beginning. A simple statute of repose limiting the time one may go back to thirty or forty years would relieve some of this difficulty. No one, however, defends the abstract method for city purposes, although it is still used in the more backward counties of the state. The sensible solution was found by companies which keep property indices. In connection with each subdivision of property every instrument affecting that piece is posted. When the title has once been run down on a particular subdivision it never has to be done again except for subsequent transactions. If blanket

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<sup>2</sup> Cal. Civ. Code, §§ 1213-1215.

<sup>3</sup> Cal. Civ. Code, § 1106.

<sup>4</sup> Rawle on Covenants for Title, Chapter XI.

conveyances, such as "All my property in the City and County of San Francisco", were refused recordation it would simplify somewhat the keeping of property indices.<sup>5</sup> The modern method based on the recording system is for the abstract companies to assume the title insurance business. With their abstract plant they can readily ascertain the state of the title and can issue a policy of insurance to anyone interested. What are the objections to this system?

(1) It necessitates copying in the record books lengthy instruments such as deeds and mortgages. A remedy for this to some extent is to use short forms. The Code provides a short form for deeds and a few real estate men use it. In England the clauses usually inserted in a mortgage are contained in a statute. They need not be and as a rule are not included in the instrument itself. Decrees and other instruments could be substantially shortened.

(2) The policy of title insurance, insuring as it does only the title as of record, does not, at any rate in San Francisco, cover adverse possession or other possessory interests, such as leases, nor does it include easements, overlaps, encroachments or any of those matters which may be ascertained by an examination of the premises.

(3) The time required to get a policy of title insurance in San Francisco is usually from one to four days. Whether this can be improved under the Torrens system is much disputed.<sup>6</sup>

(4) Title insurance, like all other kinds, shows a gradual progression. In the beginning the effort seemed to be to avoid all work, to take no chances and to do as little as possible for the money. To a greater or less extent in different parts of the country this attitude has changed. The ideal service would be to take entire charge of the transaction for both parties, examine the records, examine the premises, make surveys if necessary, prepare the deed if desired, close the transaction, and issue a complete policy without exceptions other than actually existing defects; for after all, what the average buyer wants is the land itself and if

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<sup>5</sup> Transactions of the Commonwealth Club of California, Vol. VIII, No. 8, p. 450. In this number the applicability of the Torrens Act to California conditions is discussed.

<sup>6</sup> Batchellor, 9 Case and Comment, 725. "But the orderly administration of the system, even under the best circumstances, requires an interval of three or four days for the regular dispatch of the business. If there are any complications, more time is required." See also San Francisco Recorder, April 17, 1914.

by any chance he should not get it, complete indemnity. It should not be necessary to add to the expense of a cash sale or mortgage by calling in a lawyer.

(5) Cost.—If the cost is greater than the value of the service or the service is inadequate, or if the monopoly of title insurance companies brings monopoly evils there is a comparatively simple solution. Let the state take over the title insurance business and give better service at a cheaper rate if it can. Curiously enough, however, people hold up their hands in horror at the rank socialism involved in the state taking over the title insurance business, yet many of these same people have no objection whatever to state insurance when it is included in the Torrens Act.<sup>7</sup> They are perfectly willing to swallow the gnat of state title insurance when it is attached to the Torrens camel. Whether it is better to leave the business of title insurance in private hands is not the subject of present discussion. The writer holds no brief for the title insurance companies, is not interested financially or otherwise, directly or indirectly, in any title insurance company, and is perfectly neutral on the question of private versus state title insurance. The purpose of the discussion up to this point has been to point out that with a few simple legislative changes and shortening of legal forms and the extension of the title insurance service there would result the maximum efficiency in this method of land transfer which may be termed the title insurance method. Under it every instrument is copied into the proper official record book, the indexing is done by names; private companies keep property indices; the party interested is protected by title insurance. It now remains to compare this system with the Torrens.

At the outset it should be noted that many of the advantages claimed for the Torrens system do not apply to the conditions as they exist in San Francisco, Southern California, and many other portions of the state.

1. Few titles are seriously defective. There is therefore no need of a wholesale establishment of titles. When a title occasionally becomes incurable by ordinary means there are other satisfactory methods of making it good.<sup>8</sup>

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<sup>7</sup> The original Torrens Act in California, Statutes 1897, p. 138, contained no insurance provision. The initiative measure, Statutes 1915, p. 1932, known as the California Land Title Law, supplies this defect.

<sup>8</sup> Cal. Code Civ. Proc., § 749.

Report of New York State Bar Association, Volume 31, 1908, at

2. Under title insurance in California it is not necessary to search the title from the beginning more than once. In fact an examination of the arguments of the Torrens proponents will disclose that many of them do not apply to a state like California. The comparison is usually made between an ideal Torrens system, one that has not been tested as yet as a general system anywhere in the United States of America with an obsolete recording system with abstracts for each transaction, a system existing only in smaller counties where it is generally conceded that the Torrens system would be very expensive and where the abstract method is the cheapest. A perfectly fair comparison should therefore be made between the perfected title insurance system and the perfected Torrens system, for it should certainly be conceded that much more legislation will be necessary to bring the Torrens system to its maximum efficiency than to improve the title insurance system, which has had the advantage of practical operation for many years.

What then is the Torrens Act? "The object of the system is: first, to secure by a decree of court, or other similar proceeding, a title which shall be impregnable against any attack, and, when this title is once determined, to provide that all subsequent transfers, incumbrances, or proceedings affecting the title shall be placed on a page of the register and marked on the memorial of title."<sup>9</sup>

What are the objections to this system?

1. Initial cost.—It is assumed that if the Torrens Act is superior to the present system it should be generally adopted. To do this would require many years. The suggestion has been made that land be brought under the act at the death of each owner, so that in a generation or two most of the land in the state would be under the Torrens system. The records of San Francisco having been destroyed by the fire of 1906, the so-called McEnerney Act was passed to enable titles to be established of record. Over 36,000 actions have been brought for this purpose. At

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p. 412, has a statement from Judge Davis of the Massachusetts Land Court. "As to the great majority of the titles as now existing and dealt with in Massachusetts, I think that there is no particular reason at the present time for their registration. I do not believe in a compulsory act. I should be exceedingly sorry to see ours made compulsory in any respect." This volume, 31, of the New York State Bar Association for 1908, contains an elaborate report on the workings of the Torrens System in each country.

<sup>9</sup> Devlin on Real Estate, § 1439.

least as many would be brought under the Torrens system, for while separate owners may unite in a single action it is not probable that many will, and the saving in the initial filing fee made thereby is soon overbalanced by the complexity. It is probable that the cost of the McEnerney Act exceeded fifty dollars on the average to the plaintiff in each action. The cost to the people of San Francisco has undoubtedly been in excess of two million dollars. It does not seem possible to put the Torrens Act into operation for anything like that sum. The McEnerney Act is a simple statute of eighteen sections, the Torrens a complicated one of one hundred and fifteen. A survey must be provided; this usually costs about twenty-five dollars. In many cases an abstract will be necessary and a report thereon. There will doubtless be contests and in some cases juries will be demanded. In many proceedings stale claims will be asserted that would otherwise never have been thought of. The service of the summons is difficult and expensive, as the adjoining owners must be personally served as well as all those who have or appear to have any interest. These adjoining owners and others who have an interest will find it necessary to take the matter up, employ counsel and have an appearance entered.<sup>10</sup> Owners of property, their neighbors and others having interests therein as mortgagees and lessees have done nothing wrong; their titles are good. Why should they all be compelled at their own expense to litigate their respective claims? Unless the advantages of the Torrens Act after the original registration are overwhelming this consideration of first cost alone is enough to condemn the system. The estimate of costs of four million dollars for a San Francisco and twenty million dollars for the entire state seems moderate.<sup>11</sup>

2. The attack on the Torrens system has usually been made upon legal grounds, pointing out various inconsistencies in the act and possibilities of injustice. Experience in other lines has shown that it is possible to conceive of a multitude of objections which in actual practice do not arise. There is, therefore, danger in accumulating theoretical legal difficulties. It is not the purpose of this article to go into the legal phases; this has been done exhaustively by others. A few of the objections may, however, be mentioned briefly:

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<sup>10</sup> Cal. Land Title Law, §§ 5-12.

<sup>11</sup> Transactions of the Commonwealth Club, Volume VIII, No. 8, p. 456.

(1) If A is the registered owner of land and a forged instrument is registered to C and a new certificate is issued to C, C gets no title under the Torrens system and apparently has no recourse against the insurance fund. It is C's misfortune that he has not dealt with the registered owner. If, however, C should then sell to D, D would prevail over A, according to the wording of the act.<sup>12</sup>

(2) On the foreclosure of a mortgage or other encumbrance, other persons having an interest in the property may be irrevocably cut off without service on them, if this can be done constitutionally. Is it constitutional to deprive a person of his property through no fault of his own? Has he had his day in Court? Is the Recorder a judicial officer for this purpose? As shown above the Torrens certificate is not conclusive. That it is not conclusive is also shown by the fact that most purchasers of Torrens certificates and most persons taking mortgages on Torrens land find it necessary to take out title insurance, a wise precaution for the above and for other considerations which will be taken up later.<sup>13</sup>

(3) If the initial proceeding is invalid can it be said that the land has been brought under the act? Is it not then necessary to examine the initial proceedings just as the McEnerney decrees are scrutinized by the searchers of title today? The many defects found in McEnerney proceedings show how often this will be the case with Torrens titles.<sup>14</sup>

(4) If the initial proceeding is taken without notice to one who is actually in possession will that person's title be taken from him?<sup>15</sup>

(5) In subsequent transfers which are made without judicial decree, can title be taken away by the act of the administrative officer like the recorder?<sup>16</sup>

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<sup>12</sup> Cal. Land Title Law, § 38. Apparently otherwise if the forger gets possession of the duplicate certificate, § 60.

<sup>13</sup> San Francisco Recorder, April 17, 1914; *In re Riley* (1913), 120 Minn. 210, 139 N. W. 361.

<sup>14</sup> *Henry v. White* (1913), 123 Minn. 182, 143 N. W. 324. "If the want of jurisdiction due to the failure to serve known claimants appears affirmatively from the judgment roll itself, the judgment is void as against such claimant and may be attacked collaterally."

<sup>15</sup> Niblack, § 215; *State v. Westfall* (1902), 85 Minn. 437, 89 N. W. 175.

<sup>16</sup> Niblack, p. 110. "In this connection it must be remembered that a certificate signed by an administrative officer is not necessarily in and of itself conclusive evidence of the matters of fact and of law set forth and declared therein, and a legislature in this country may not enact a law making evidence conclusive which is not necessarily so in and of itself."

Leaving the legal objections the argument of Torrens proponents is based on its simplicity and economy. Let us see how it will work out in practice.

Take a purchase of real estate. What must be done under each system? Under title insurance a deed is executed and copied into the record by the recorder; indexed under the names of the parties; the work is so simple that mistakes are not frequent, and it is not necessary for an attorney recording a deed to see that it is properly copied into the record. Under the Torrens system the deed must be executed. For a simple deed, without limitations, trusts, registrations, conveyances, etc., the short form on the duplicate certificate may be used, but as we have seen a short form of deed may be employed under the present system, so the saving here is slight. Under the Torrens system the deed is not copied into the record; but the essentials, names, description, etc., must be copied twice, once on the original certificate and once on the duplicate. Perhaps some saving might be effected by making the duplicate a carbon copy, but the form which the certificate takes gives little if any advantage to the typewriter over ordinary longhand. Immediately on the deed being filed an entry must be made on the old certificate; later on the new certificate must be prepared; proper reference made on the old certificate, name indices made and the property indices posted corresponding to the record kept by the title insurance company. The transferee, if a natural person, must also execute an affidavit showing whether he is married and if so the name of his spouse and whether the property is community property or not. The parties, and especially the purchaser, must either attend in person at the registrar's office to close the trans-

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In judicial investigations the law of the land requires an opportunity for a trial, and there can be no trial of rights in registered property if a registration certificate is conclusive evidence of ownership in all courts and in all places, and if only one party may produce his proofs. To preclude a party from going behind a certificate of title issued in this country, and from showing the truth concerning the condition of the title, it would seem to be nothing short of invasion of the judicial province, of confiscation of property and of destruction of vested rights, without due process of law. It has been repeatedly held that in this country it is not within the legislative power to declare what shall be conclusive evidence."

P. 263. "With regard to the nature of the functions of the registrar in this country, the situation seems to be that if they are judicial they may not be exercised under our constitution, and if they are ministerial and quasi judicial they never can be the foundation for a conclusive certificate. Since the scheme of operation absolutely requires incontestable certificates, it can not be worked under our system of jurisprudence."



action or the purchaser must acknowledge his name and address and leave it with the registrar.<sup>17</sup> Service at this address is sufficient in any future proceeding affecting the land. Thus every change of address must be acknowledged and recorded or risk incurred of an adverse judgment affecting the land taken without notice. Addresses are changed frequently in this state. Is it probable that the proper precautions will be taken? In the eight certificates in the book in San Francisco, the addresses are given as New York, San Francisco, etc. A notice to such an address would be rather unlikely to reach the person. The service of the title insurance companies as a clearing house, relieving the Recorder's office from the burdens involved in closing transactions, is thus lost under the Torrens system.

It would seem evident that the Torrens system involves more actual labor. But in addition to this suppose the deed contains conveyances, trusts, limitations, restrictions, mortgages, liens or encumbrances; a simple statement of that fact is all that is made on the certificate with a reference to the original document. There is thus a saving in copying under the Torrens system, but so long as the limitations, etc., continue to exist the reference must be copied into the new certificate every time the land or a part thereof is transferred. Think what this means in tracts containing building restrictions, for example, restrictions which may last many years or perpetually. There is the labor involved in repeated reference copying; the danger of mistakes; the necessity of everyone interested, lien-holder, mortgagee, etc., being constantly on the alert to see that his interest is properly carried forward on each transfer. No attorney for the purchaser or any one else interested in the property would feel safe or be considered to have done his duty unless he followed the transaction up and saw that the interest he represented was properly put on the proper certificate, for the certificate is the title under the Torrens system. As wealth increases the agreements affecting real property are apt to become more complicated. People tie up their property with intricate trusts, settlements, building restrictions, covenants running with the land, etc. These most important provisions will not be found on the certificate except by reference to the original documents, which are on file in the registrar's office. Filing the documents themselves is a loose scheme very difficult to keep in order; separate documents that

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<sup>17</sup> Cal. Land Title Law, §§ 48-54.

must often be consulted are peculiarly liable to loss. This, however, is not all. Of the twenty thousand conveyances, mortgages and deeds of trust every year in San Francisco many must have concerned community property. Every conveyance under the Torrens system must state whether the property is separate or community and give the name of the spouse. If community, both spouses must join in any subsequent conveyance or encumbrances.<sup>18</sup> If, however, one of the spouses has died, then a special court proceeding must be brought to establish that fact. This must also be done whenever a name is changed by court proceedings, divorce, marriage, adoption, etc.<sup>19</sup> The last legislature protected the community interests of the wife by requiring her signature to instruments affecting the land. A purchaser in good faith, however, from the husband is protected by a presumption which the next legislature will probably make conclusive.<sup>20</sup> There is no such presumption under the Torrens Act, however, and the number of conveyances that will be delayed until a special proceeding before the Superior Court has straightened the matter out will certainly be large. Our Superior Courts in San Francisco are in some departments months behind in their work. The clogging of court proceedings by the initial registrations under the Torrens Act and by the special proceedings subsequently necessary is not going to promote a speedy hearing of litigation, nor are the fees of the attorneys who must bring these special proceedings to be left out of consideration in computing the cost. Owners must keep at their peril the duplicate certificate issued, for if lost the owner can do nothing with his land until by a proceeding in the Superior Court the duplicate certificate has been restored.<sup>21</sup> Every lien claimant or encumbrancer of any kind must before filing his claim ascertain the land affected by examining the certificate in the registrar's office, identify his claim and then see that the claim is actually entered correctly on the proper certificate. It is thus apparent that not only the physical and mechanical operations, but the care and diligence of the parties or their attorneys and the skill required of the registrar are all much greater than under the recording system. It should be realized that a purchaser of a Torrens title must

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<sup>18</sup> Cal. Land Title Law, § 57.

<sup>19</sup> Cal. Land Title Law, § 28.

<sup>20</sup> Cal. Civ. Code §§ 164, 172.

<sup>21</sup> Cal. Land Title Law, § 27.

get the duplicate certificate of the vendor with the proper conveyance, ascertaining at his peril the identity of the vendor; examine the original certificate to see that no liens, etc., have been put on the land since the issuance of the certificate; wherever there are such liens, etc., examine the original documents, examine the blotter, for while the requirement is that each instrument be indexed immediately on the old certificate, this may not be always possible; must take his chance that the initial proceedings bringing the land under the Torrens system were valid and the subsequent transfers within the constitutional powers of the registrar, that the court proceedings on change of name, death of spouse, etc., have been properly taken that there is nothing affecting the land in respect to the matters excepted under section 34 of the Land Title Law. When one considers these things, is it any wonder that the purchasers of Torrens titles take out policies of insurance? Would any prudent man do otherwise? But if this risk or expense must be incurred with every transaction, what is the value of the Torrens Act? The mechanical operations are greater, the work of the attorneys more arduous and responsible, and the expense of title insurance is not eliminated unless the above risks are assumed; yet Torrens proponents claim that all the above work can be done in a few minutes. Such has not been the experience in Australia or Canada.<sup>22</sup> Is it probable that it can be done sooner in California if the system should come into general operation? About one hundred instruments a day affecting real property are recorded in San Francisco; many more would have to be recorded under the Torrens system. The certificate would have to be consulted in advance before any of these transactions take place. The use of the certificate books, the latest being in greatest demand, would be enormously increased over anything now in the Recorder's office. There are about one hundred and fifty-five thousand pieces of land separately assessed in the Assessor's office in San Francisco. Under the Torrens Act it would be necessary to have almost as many separate certificates, requiring many volumes, the number constantly increasing. No advantage could be taken of the title insurance companies' duplicates unless the parties employ the title insurance companies. That anything like the present expedition in transfer could be attained seems

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<sup>22</sup> *Supra*, n. 6.

highly improbable. The oft-repeated assertion that any purchaser of a Torrens title can go into the Recorder's office and satisfy himself in a few minutes as to the validity of the title is nothing short of reckless mendacity. Almost as bad is the statement quoted without disapproval by Cameron that land may be transferred on the faith of the duplicate certificate.<sup>23</sup> The function of the duplicate certificate issued to the land owner is to minimize the danger of forgery and impersonation in a subsequent transfer. The duplicate certificate is no evidence of the real state of the title any more than a policy of title insurance issued by a title insurance company. On a new transaction the title must be run down from the date of the certificate, just as the title insurance company must run the title down from the date of issuance of its last policy. The assertion that the registered owner under the Torrens Act carries the title with him is a patent absurdity.

Take mortgages. Most of the considerations above mentioned as to deeds apply here to mortgages. In addition it should be mentioned that the owner of property subject to a mortgage can at any time bring proceedings under the Torrens Act, omit the mortgagee and obtain a certificate cutting him out. The mortgagee may have an action against the mortgagor, but the Torrens Act is designed to facilitate transfers; it is intended to furnish a ready market for a thief to dispose of his plunder. Let the mortgagor transfer the property after obtaining a decree without mentioning the mortgage and the mortgagee's interest in the land has gone forever unless he is protected in some way by the state or federal constitution. Apparently a purchaser who bought from the dishonest mortgagor with knowledge of the fraud perpetuated would not be affected thereby.<sup>24</sup> In other words in the State of California today every mortgagee to be safe has to keep a strict watch on his land lest it be registered under the Torrens Act without his knowledge. The act constitutes a menace to every savings bank and trust company. After land is registered the mortgagee is subject to the danger that in some future conveyance by the mortgagor his mortgage may not be carried forward to the new certificate. He is also subject to the operation of any laws the legislature may choose

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<sup>23</sup> Cameron, *The Torrens System*, p. 44; Report of New York State Bar Association 1908, Vol. 31, p. 410, Judge Davis says, "It is a popular fallacy that a layman can take a registered certificate of title and deal with it with perfect safety. He can not."

<sup>24</sup> Cal. Land Title Law, §§ 36, 34, 39. The sections are ambiguous.

to make limiting the rights under his mortgage.<sup>25</sup> It is true that for the above losses an indemnity fund is provided. But there can be no recovery against this fund until the plaintiff has first exhausted any rights of action he may have for the recovery of the land. When this has been done he may then bring an action against the state treasurer to recover out of the insurance fund, all of course at his own expense for attorney's fees, etc., without possibility of recompense therefor.<sup>26</sup> Do mortgagees consider this action the equivalent of the security in the land which they had before the passage of the Torrens Act? Is it surprising that mortgagees insert a provision in mortgages declaring the entire amount secured by the mortgage due at once if a proceeding is commenced to bring the land under the Torrens Act?<sup>27</sup> There is also a danger to the mortgagor; he is now safe if he pays the principal or interest to the holder of the mortgaged note, whether there is an assignment by the holder of the note or not.<sup>28</sup> Apparently under the Torrens Act mortgagors must ascertain from the record whether such assignment has been made before making any payment.

Trust deeds were specially provided for in the former Torrens Act in California, but not under the present. It would seem necessary to go to the Supreme Court to find out who is the owner or the encumbrancer under the present act.

Take mechanics' liens. The same excess of labor under the Torrens Act will be found as compared with the present system. Incidentally it may be remarked that the provision of the present mechanic's lien law that the lien when filed relates back to the commencement of work is repealed.<sup>29</sup> Whether or not this relation back is desirable is not a subject for present discussion.

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<sup>25</sup> Cal. Land Title Law, § 44.

<sup>26</sup> Cal. Land Title Law, § 105. Mistakes are made now by the registrars, even with the limited amount of business, *Shevlin-Mathieu Lumber Co. v. Fogarty* (1915), 130 Minn. 456, 153 N. W. 871; 29 *Harvard Law Review*, 772.

<sup>27</sup> *Wachs v. Broomell* (1916), 274 Ill. 45, 113 N. E. 35. "A mortgagee or a trustee in a trust deed is liable at any time to be called upon to protect his interest in the real estate encumbered. If the trust deed or the mortgage so provide, the debtor can be required to repay all necessary expenses incurred by the mortgagee or trustee in protecting the interest of the creditor. If the creditor has not taken the precaution to make such provision in the trust deed or the mortgage, then he must bear this expense himself."

<sup>28</sup> Cal. Civ. Code, § 2935.

<sup>29</sup> Cal. Land Title Law, § 93. *Mechanics' Liens* must be put on the certificate within the statutory time, *McMullen & Co. v. Croft* (May 12, 1917), 164 Pac. 930 (Wash.).

It is perfectly clear, however, that without the relation back provision the value of the lien is seriously impaired. Suppose a bill we introduced into the legislature to amend the mechanics' lien law by striking out the provision that the lien shall relate back to the commencement of the work. The lumber companies and other material men, building trades and other unions, would combine to bring such influence to bear that the bill would never get out of the committee. Nothing is more surprising than the acceptance of such radical changes by persons interested. It can only be explained by the general ignorance of and indifference to the Torrens Act. The passage of the act by initiative in 1915 is simply an example of the folly of direct legislation whereby the people voted on a measure over twenty pages long, which they did not read and which the great majority could not understand if they did read.

Take street assessments. Under the Torrens Act all the work under the present law remains the same. In addition the notice of intention must be put on each certificate of each piece of land affected.<sup>30</sup> When one remembers how often a notice of intention is given and the proceedings go no further, the amount of labor under the Torrens Act from this one item will certainly be enormous.

Take tax sales. Again we have the same work as under the present system and in addition certain sections provide for the filing of notice and other proceedings of vesting title.<sup>31</sup>

Take judgments. At present a judgment creditor docket his judgment in the Recorder's office. It at once becomes a lien on every piece of property in the county owned by the judgment debtor. This is perhaps to a certain extent inconvenient, as it has the effect of clouding the title to land owned by persons with the same name as the judgment debtor. In a short time, however, the judgment is satisfied, or the lien expires by the statute of limitations, so that comparatively few titles are injured and when the question does arise an affidavit of identity satisfies most title insurance companies. Under the Torrens Act each judgment creditor would have to have a search made of the records to find out the property of his judgment debtor. This in itself adds greatly to the work to be done. If in doubt as to whether the property belonged to the debtor the judgment

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<sup>30</sup> Cal. Land Title Law, § 94.

<sup>31</sup> Cal. Land Title Law, § 77, et seq.

would be put on the certificate anyway, as there is no penalty under the act for clouding a title in such a case. No certificate of identity would avail to remove this cloud; a court proceeding would be necessary to take it off the record.<sup>32</sup>

Take leases for more than one year. At present such leases are seldom recorded—about four hundred a year in the City and County of San Francisco. Neither party to the transaction desires as a rule that the rental and other terms of the lease should be matters of public record. The lessee is fully protected by his possession. All this the Torrens Act changes. Every lessee must record his lease and have an entry thereof on the certificate of title to the land. If this is not done it is perfectly easy to cut off the lessee's rights, no matter how long the term nor how valuable the improvements made by him, unless again the constitution of this state or the United States should intervene.

One could go through the entire list of instruments affecting real property filed in the Recorder's office from Acceptances to Wills. The comparison in each case will show little if any saving and a considerable increase in labor and expense under the Torrens system. In short, if any lawyer will read the Torrens Act carefully, then imagine it in complete operation, and then compare in detail the work that he himself, his clients and other parties affected would have to do in his daily practice under the Torrens System as compared with the present system, it is believed that the comparison will disclose conclusively the superior cheapness and efficiency of the present method. Too often the briefs for the Torrens System simply establish its general constitutionality and general practicability. They do not take up each operation involved in land transfers and analyze the actual work required under each system. Such an analysis, it is confidently believed, will demonstrate that under California conditions the title insurance method is the simplest yet devised, and with a few improvements the most satisfactory. The purchaser or mortgagee puts his instrument on record, and gets his policy of insurance. Many things may thereafter affect the land but they do not divest title except after legal notice. The statute of limitations soon does its work and without judicial proceedings automatically cancels many things affecting the title.

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<sup>32</sup> Cal. Land Title Law, § 98.

In other words it is simplicity itself to put an interest on record under the recording system; it is almost as simple to take it off. With a minimum of effort the title takes care of itself.<sup>33</sup> The Torrens System registering everything in advance on the certificate to the land, and requiring judicial proceedings for their removal, amendment, etc., does an enormous amount of work which never comes up under the recording system, e. g., mechanics' liens, judgments, etc., are now released or expire by limitations; the land has probably not been transferred in the meantime. The bulk of the work required under the Torrens System has been avoided. The question of cheapness is one on which it is hard to get accurate figures.<sup>34</sup> The statements in the books of proponents of the Torrens System are worthless as they simply give statutory fees, which of course tell nothing. The Torrens Act is a good example of a favorite trick in government accounting. The statutory fees are purposely made very low. Nothing is said as to the amount to be contributed by the tax payer for the highly expert services required of the registrar and his staff and nothing is said as to the work which must be done by the courts and by the attorneys, clients and others interested, all of which must of course be paid for. The only accurate way in which to figure the cost of the system is to determine the work that must be done. If the work is done it must be paid for by someone and no juggling of government accounting can make it otherwise.

From the perfervid arguments of Torrens supporters one would be led to believe that the Torrens solution is ethically and juristically superior to the present system of land transfers, but is this so?

1. Where is the saving in a system under which every mortgagee, encumbrancer, lien holder, runs the risk of his interest

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<sup>33</sup> Report of New York State Bar Association, Vol. 31, 1908, p. 394, Frank E. Hodgins, K. C.: "Whenever, in dealing with the actions of mankind, entire accuracy is demanded, difficulties arise from the careless way in which business is ordinarily done. The rules which endeavor to correct this are, in a busy age, likely to cause friction, trouble and delay. And as between a system which is simple in operation and leaves the title to take care of itself and one which aims at perfection of result, this element may become important enough to prevent the complete acceptance of the latter."

<sup>34</sup> 19 Case and Comment, 742, average cost to establish title one per cent of value of property, minimum fee \$150 in New York; 71 Cent. L. J. 30, \$1100 for each title in Mass. The cost of the London office has been almost a scandal, Report of New York Bar Association, 1908, Vol. 31, p. 311.



being disregarded every time the owner sells the property; a system under which the owner himself may have his property taken away by forgeries, tax sales, etc., without his knowledge. An indefeasible title in the purchaser necessarily implies a defeasible title in every other interest.<sup>35</sup>

Sound policy should put the risk on the purchaser where it properly belongs. He can protect himself by insurance. The Torrens System unsettles the titles of the ninety-nine who hold their property for the sake of the one who makes a purchase. Even if it accomplished the security of the purchaser, which as we have seen it does not, the other effects would not be desirable.

2. The Torrens System is designed to eliminate the possibility of adverse possession. Is this just or desirable? It is unnecessary to refer to the fact that long continued possession and enjoyment as a source of title is recognized by almost every civilized nation. Is it not the commonest thing for parties to go into possession under an oral promise and make improvements? Equity recognizes this and enforces the contract specifically. The same is true of the so-called easement by estoppel, where improvements are made on the faith of an oral promise. Instances are by no means infrequent where an owner hands over possession to a relative or friend without any conveyance. In a few years the statute of limitations does its work and the title becomes unimpeachable. Under the Torrens Act the discovery of the duplicate certificate years after would afford the opportunity to destroy long continued possession taken in the best of faith. The tendency of modern jurisprudence is to get away from the rigid enforcement of a rule of law; to recognize that the particular circumstances of a particular case must be considered before the general rule can be applied. The ruthless universality of the Torrens Act gives little opportunity for special circumstances. It substitutes the abstract rule for the concrete case and in so doing conflicts with civilized jurisprudence.

It must also be remembered that the Torrens Act cannot be put into operation at once; it requires many years before it can embrace all the property in the state. In the meantime the people must be subjected to the dangers, expense and inconven-

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<sup>35</sup> 19 Case and Comment, 726. "As already indicated above, the subsequent transfer and certificate, even if valid and conclusive, is not safe. If it is made safe for the purchaser, it may be unsafe for the encumbrancer, and if made safe for all parties, the proceedings become so cumbersome as to be of no benefit at all."

ience of the dual system. This will become manifest as soon as the Torrens Act goes into any extended use. Deeds, mortgages, judgments, liens, street assessments, contracts, tax sales, all the operations affecting real property must halt until an examination of each piece of land affected has been made to determine whether the ordinary procedure, the Torrens procedure, or both should be adopted. No lawyer will be safe, for example, in merely docketing a judgment against a debtor, or taking out execution in the ordinary way. He must first ascertain whether the land involved or any part of it has been brought under the Torrens Act.

The Torrens Act is made for highly trained people, for lawyers who never make mistakes, clients who carry out transactions with formal accuracy, record their papers promptly, keep them safely, register their addresses on each change and decline to do anything such as taking a lease or possession under a contract without an entry on the record. Under the present system title, as has been said, is let alone, it takes care of itself. Simple recordation or possession protects the interests acquired and the widest scope is given by equity to protect purchasers in good faith. Under the Torrens Act there is a heavy initial expense, each transaction thereafter is more involved and complicated than under the present system, requiring more expert action by officials, the legal profession and the parties concerned. Innumerable questions, constitutional and otherwise, will be presented to the courts for solution<sup>36</sup> and expensive plants with highly trained officials must be provided for; at the same time risks are not eliminated and title insurance is still necessary. The justice of equity is throttled by rigid statute law; for generations the inconvenience of two systems must be endured. For the above considerations it is respectfully submitted that the solution in California is the repeal of the Torrens Law.<sup>37</sup>

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<sup>36</sup> Niblack, p. 328. An examination of the Australian and Canadian reports shows an increase in Torrens litigation.

<sup>37</sup> In 1916 a uniform Torrens Act was recommended by the American Bar Association. Report of American Bar Association 1916, Vol. 41, pp. 26, 478. The recommendation to that effect should detract from the high regard the profession has paid to the actions of that association. It was supposed to be a truism that uniformity in legislation is not a thing to be sought after under any and all circumstances. Rather in new matters diversity is considered advisable. Under competing systems experience is