CHAPTER 5

THE TORRENS SYSTEM

1 Introduction into Australia

1.1 Outside Great Britain the system of registering title, which we described in Chapter 2, is widely known as the 'Torrens system', for it was Sir Robert Torrens who in 1858 introduced registration of title into South Australia, the first jurisdiction (at least of jurisdictions using English land law)[1] to establish such a system. It spread throughout Australia and to many other parts of the world under his name, which was not only distinctive but was of a form convenient to use as an adjective, or even as a verb. Indeed 'torrens' has passed into the American version of the English language, and in States which have adopted registration of title "a registered title is commonly spoken of as a 'torrens title', and the process of original registration is frequently designated as 'torrensing the title".[2] Yet in London where there are 6,000 or more practising solicitors and many hundreds of barristers there would be difficulty "in hunting down more than a round dozen...who had ever heard of Sir Robert Torrens".[3] His story is worth telling in some detail because it should be an inspiration to any would-be reformer anywhere. Valuable lessons are to be learned from it.

1.2 Robert Richard Torrens was born at Cork in Ireland in 1814. He joined the civil service, and in 1840, after working for four years as a customs officer in London, he was appointed Collector of Customs in Adelaide in South Australia, his father being one of the Commissioners working out arrangements for colonization under the South Australia Act 1834.

1.3 In the preface to the famous treatise which he wrote in 1859, *The South Australian System of Conveyancing by Registration of Title*, Torrens related how he came to be interested in the subject of conveyancing and in land law generally. He explained how, twenty-two years previously (i.e. shortly before he left England), his attention had been "painfully drawn to the grievous injury and injustice inflicted under the English Law of Real Property by the misery and ruin which fell upon a relation and dear friend who was drawn into the maelstroom of

[1] In his Australian Torrens System (1905) Hogg gave pride of place to the crown colony of Labuan (an island off the north coast of Borneo, now part of Sabah), for he stated (at 17) that an ordinance was enacted there in 1849 making registration of transactions in land essential to their validity and that this appears to have been the earliest instance of any attempt by a British legislature at making registration of transactions in land essential to their validity even as between the parties; but in Registration of Title to Land throughout the Empire (1920) (at 4) he classed this system, along with those of South Africa and of Scotland, as registration of deeds.

[2] 29 *Minnesota Statutes Annotated* (St Paul Minn) 435

[3] Ruoff *Torrens System* 1

the Court of Chancery" and how he had "resolved some day to strike a blow at that iniquitous institution".[1]

1.4 Torrens told how he had become familiar with the Law of Shipping while serving in the Customs, and "having just as much acquaintance with the principles of our Constitution and Law as ordinarily forms part of the education of an English gentleman" (born at Cork and educated at Trinity College, Dublin) he had conceived the idea that his purpose might be achieved by applying to land the principles which regulate the transfer of shipping. Appointed Registrar-General of Deeds in 1853, he "gained some insight into the details of conveyancing". This strengthened his conviction but, though he had a seat in the Legislature by virtue of his office, his friends persuaded him that he would be "over-borne by the power and influence of the legal profession", and so he did not at that time pursue his idea.

1.5 In 1857, however, when representative government was first established in South Australia, Torrens was elected to the Colony Parliament as Member for Adelaide and became the first Premier. Having secured the support of "the leading journal of the colony...in a series of telling articles", he introduced a private bill which was carried by a majority of nineteen to seven "notwithstanding the opposition of the Government". He then abandoned his political career in South Australia,[2] so that, as Registrar-General, he could devote undivided attention to the practical details of his measure, which came into operation on 2 July 1858; and he proceeded to make it work despite every obstacle that the legal profession could put in his way.

1.6 This was an outstanding personal achievement. "That one man, and a layman at that, could achieve a radical and salutary reform of the most technical of all branches of the law against the vested interests of the most conservative of all professions was a remarkable feat."[3]

2 Opposition of legal profession

2.1 Torrens himself had no false modesty. He fully realized the magnitude of the task he had accomplished. In his treatise he explained why this sort of reform has usually been left in the hands of the legal profession. "It is not to be wondered at," he said, "that non-professional men, whilst with one consent acknowledging

[1] Torrens was not alone in his opinion, nor was it particularly intemperate. There was indeed a crying need for reform. Only a few years previously, Dickens describing a foggy November afternoon in the Court of Chancery had written: "This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire; which has its worn out lunatic in every madhouse, and its dead in every churchyard; which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to moneyed might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give - who does not often give - the warning, 'Suffer any wrong that can be done you, rather than come here!'" Bleak House (1852-53) Ch 1

[2] He resumed his political career when he returned to England, for he was Member of Parliament for Cambridge from 1868 to 1874. He died in 1884.

[3] Ruoff *Torrens System* 4

that the Law of Real Property 'imposes upon the community a grievous burden', have shrunk from undertaking the task of reform which would place them in immediate antagonism with the most powerful body in the kingdom, impose upon them an oppressive responsibility, involve them in an almost Herculean labour, and (not the least deterring consequence) interrupt cordial friendly intercourse with men highly esteemed, whose interests are incompatible with the success of that enterprise."[1] Then, under the significant subheading 'Professional bias incapacitates for the work of reform' he went on to suggest that "without adopting the ancient proverb 'Hawks dinna paik out hawks' een'"[2] there was a less sordid motive for the reluctance of lawyers to reform the land law and he quoted Lord Brougharn as saying: "They love and revere the mysteries which they have spent so much time in learning, and cannot bear the rude hand which would wipe away the cobwebs, in spinning which they have spent their zeal and their days for perhaps half a century."

2.2 Having successfully secured the enactment of his measure, Torrens was not disposed to brook the subsequent attempts of the legal profession to boycott[3] Torrens titles, or to charge enhanced fees for dealing with them. If the lawyers would not come into line, he would do without them. Conveyancing without professional assistance was perfectly feasible under the new system and he encouraged it with complete success. He wrote, with greater foresight than zoological accuracy: "Thus, as pigs, when they attempt swimming against stream, cut their own throats, the South Australian conveyancers, by struggling against the new system, have rendered its effect vastly more disastrous to themselves than it would have been had they complacently submitted to the inevitable necessities of progressive reform."[4] To this day conveyancing in South Australia is conducted by 'landbrokers' licensed under the Real Property Act and the legal profession has but a small share of this lucrative business.

2.3 The 1858 Act did not provide for landbrokers, but the provision for their appointment which was made in the Real Property Act of 1860 "was instrumental in ensuring that the administration of the Torrens system did not break down in its early stages and probably ensured its ultimate success there",[5] though the overall importance of the landbroker system is hard to assess because it was but one of several factors. A majority of the jurisdictions which followed Torrens successfully introduced registration of title without landbrokers, but in some places this was not until a threat had been made to introduce them should professional opposition continue, and so the landbroker system had a wider influence than is revealed by the legislation actually enacted.

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[1] Torrens *South Australian Registration of Title* 5

[2] "Hawks do not peck out hawks' eyes" (or as we might say 'dog doesn't eat dog'). Why the Irish-born Torrens should adopt a proverb expressed in broad Scots is a mystery which our research has failed to resolve.

[3] Another surname of convenient form that has become a verb and a noun

[4] *Ibid* 30

[5] Douglas Whalan 'Immediate Success of Registration of Title to Land in Australasia and Early Failures in England' 2 *New Zealand Universities Law Review* (1967) 419

3 Spread of the Torrens system in Australasia

3.1 It is convincing proof of the persuasive force of Torrens's advocacy and strong evidence of the intrinsic merits of registration of title that it spread with quite extraordinary speed throughout Australia. Its success there was in vivid contrast to the long-drawn-out story of failure in England with its constant succession of commissions, committees and reports. The Torrens system was adopted in Queensland in 1861, in Tasmania, Victoria and New South Wales in 1962, and in Western Australia in 1874. In 1870 New Zealand repealed the Land Registry Act passed in 1860, which was based on the Report of the English Royal Commission of 1857, and replaced it by the Land Transfer Act modelled on the Torrens system.

3.2 This is rather puzzling because Torrens himself had remarked that "the Law Reformer will detect in the measure of which I claim the authorship a similarity, amounting almost to identity, with that recommended in the report presented to the House of Commons by the Commissioners on Registration of Title on the 15th May, 1857" and complained that he had "already been accused of plagiarism on this score".[1] We might not, therefore, expect to find any major difference between the 1860 and 1870 New Zealand Acts.

3.3 There was, however, one fundamental distinction: compulsion did not become effective until 1870. Though the Land Registry Act 1860 combined with the Crown Grants Act 1862 had the effect of making the registration of Crown grants compulsory as in the original Torrens Act, various legal quibbles delayed the commencement of registration, except in a very small area in Auckland, and in any case compulsion disappeared when the relevant sections of the Crown Grants Act 1862 were repealed by the Crown Grants Act 1866.[2] The Land Transfer Act 1870, however, fixed the dates by which registration districts had to be constituted throughout New Zealand and so ended the procrastination which had occurred under the 1860 Act. In other words the compulsory provisions became effective, and effective compulsion is the key factor. Herein lies the explanation of the immediate success of the Torrens system and the failure of the 1862 and 1875 Acts of England.

4 Compulsion and initial registration

4.1 We have described how registration of title was unsuccessful in England until compulsion was introduced in 1897;[3] but in Australia there was built into the Torrens system from the outset an effective measure of compulsion which was not available in England. Basically the Torrens idea was that records of the sort normally kept by any competent land office in respect of Crown leaseholds should also be kept in respect of freehold grants. It was a very simple idea to comprehend; moreover it was essentially feasible. It presented no mechanical or

[1] Torrens *South Australian Registration of Title* Preface v
[2] Whalan 'Immediate Success of Registration of Title in Australasia' 424 and 431n16
[3] See 3.14.1

procedural difficulty. A title good at the time of grant could easily be kept good by efficient record backed by law.

4.2 Accordingly the South Australia Real Property Act 1858 provided that all land alienated from the Crown after 1 July 1858 should be subject to the Act.[1] This meant that in a colony where there was plenty of Crown land and development was proceeding apace, there was a constant flow of titles onto the register. A comparatively new colony like South Australia had an advantage over older colonies like New South Wales and Tasmania where much Crown land had already been granted and where the problem was how to bring in these existing titles. In South Australia the gap in time between first and present title was not so very wide and, in the majority of cases, investigation must have presented much less difficulty than it did in England where title could very seldom be traced back to a Crown grant.

4.3 Yet in bringing pre-existing titles onto the register voluntary application appears to have been no more successful than it was in England, and for much the same reason. If a purchaser had already paid a competent private practitioner to investigate title and effect a transfer, there was very little to induce him to pay for a registered title. If this title was good, he derived no immediate benefit from registering it but only the future advantage of reducing the cost of investigation should he come to deal with it again. If the title was bad or doubtful, then the last thing the proprietor wanted was to have that disagreeable fact officially disclosed. "If there is one thing more undesirable than another for many titles, it is that they should be brought into the light of publicity. Peacefully reposing in the strong-room of a solicitor's office their constitutions are strengthened and their blemishes concealed, if not cured."[2]

4.4 Anyway, whatever the reason, the advantages of the Torrens system did not suffice to bring in by voluntary methods the old titles which had been granted before the system was introduced. More than a century later the two systems still exist side by side in all the Australian States. What is called 'old system' or 'general law' conveyancing is regulated by Conveyancing Acts which are similar in content to the English prototype of 1881, and there is the same sort of duality as exists in England.[3]

4.5 New Zealand, however, has been successful in making the Torrens system universal. An attempt in 1892 to introduce compulsory registration on dealing (adopted in England in 1897) failed, but in 1924 the Land Transfer (Compulsory Registration of Titles) Act made provision for compulsory compilation and within twenty years all the outstanding titles had been brought onto the register by the process described in Chapter 8. Similar legislation was adopted in South Australia in 1945 and in Victoria in 1954, but registration has not yet been completed.

4.6 In 1955 the Property Law Revision Committee in New South Wales was invited to consider the introduction of compulsory registration, and in 1957 Baalman, a member of the Committee, in a long report analysed "the reasons for resistance to voluntary conversion". He sought to answer the broad question:

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[1] s14

[2] H M Humphry 'The Land Transfer Bill' 5 *Law Quarterly Review* (1889) 283

[3] See 3.16

"What is wrong with the Torrens System which makes it necessary to compel Old System owners to accept its benefits?" The old system, derived from the common law of England, applied to land alienated by the Crown prior to 1 January 1863 which had not been brought under the Torrens system introduced into New South Wales by the Real Property Act 1862. In fact in 1954 the number of newly created old system titles (arising by subdivision of old system holdings) was greater than the number of applicalions for conversion.[1] Nearly a hundred years of the Torrens system had by no means proved effective in completing the registration of outstanding titles by voluntary methods and in 1967 the Real Property (Conversion of Title) Amendment Act was passed to introduce compulsion.[2]

4.7 Compulsion has been held up in Tasmania because of disagreement with the legal profession and a third of the titles there are still not under the Torrens system. On a strictly voluntary basis it has largely failed in the United States and in the West Indies. There is really no doubt that without some form of compulsion the Torrens system is no more successful than was the English system before compulsion was introduced.

5 Public familiarity and support

5.1 It can be argued that registration of title was more acceptable in Australia than it was in England because in Australia a deeds system was already in existence, which not only familiarized the public with such a system but revealed unsatisfactory features in its working which registration of title promised to remedy. In the South Australian election of 1857 this reform was an important issue, and Torrens, as its sponsor, topped the poll. There was, in fact, keen public interest and when, almost immediately, the new system faced disaster because of court decisions which destroyed the effect of fundamental provisions, public outcry induced amendment of the law.[3]

5.2 Torrens, in his treatise, made the point that “In England the grievance affects a class; in Australia the people",[4] and Professor Whalan has elaborated this theme in a persuasive passage which should be quoted in full:

> "In England large landowners held most of the land and held it under reasonably safe titles; they did not intend to sell it except as a last resort, and indeed because of the prevalence of strict settlements could not sell it in any event in many cases. Their lands were sacrosanct and would be handed on to their heirs either cherished and improved or neglected and impoverished, depending on the nature of the incumbent. As was said so often in England, dealing in land was the luxury of the rich. Even as late as 1914 Brickdale, in urging the wider adoption of registration of title in England, was able to say that unless this was done 'the soil of our country...will remain forever what it

[1] *Interim Report by the Property Law Revision Committee on Titles to Crown Land Holdings* (1954)l
[2] See 19.2.13-21
[3] See Whalan 'lmmediate Success of Registration of Title in Ausualasia’ 418-22
[4] Torrens *South Australian Registration of Title* 6

is at present − chiefly an exclusive luxury of the very rich, and seldom, if ever, enjoyed by any beyond the limited circle of the comparatively well-to-do'.

"In Australasia there was a different spirit abroad. Land was a cornmercial commodity to be bought and sold without the sentimentality of hundreds of years of family holding. In Australasia land was not the luxury of the rich but every man either was, or hoped to be, a landholder; furthermore he had an excellent chance of realizing this hope. Land changed hands often. This was partly because land speculation was commonplace but perhaps, in smaller holdings at least, the more typical pattern as disclosed by titles searches was that a man bought a piece of land, improved it by putting into it his main asset, his own labour, and sold it to buy a larger piece to repeat the cycle.'

"A system under which a transfer might involve a delay of several years and cost a substantial percentage of the value of the fee simple, and under which there was a possibility that a title might be worthless, was quite unsuitable for such a community. Cheap and expeditious transfer and secure titles were of vital importance; Torrens and his supporters were able to convince the public that this was what the Torrens system offered. Having embraced the system and been shown that it could fulfil the promise of the reformers the public were determined that it was not to be undermined."[1]

5.3 This seems a convincing explanation of the massive public support for the Torrens system which secured its adoption in the first instance and later saved it when it seemed it might founder; yet in the United States, where in many parts conditions must have resembled the Australian conditions so graphically described above, popular support was unsuccessful in overcoming the forces set against the Torrens system and, as we shall presently see, it almost completely failed. Nor can the initial failure of registration of title in England really be attributed to lack of support from landowners. Curiously enough, the House of Lords, a majority of whose members owned large estates (but few of whom were lawyers), consistently supported compulsion, though the House of Commons (a large number of whose members were lawyers) opposed it for many years. Some eight bills passed the House of Lords but failed in the Commons before the compulsory provision became law in the Land Transfer Act 1897.[2]

6 Simplification of land law

6.1 The nature of the English task in compiling a register of title was wholly different from the Australian. In England there was no automatic feed-in to the register which Crown grants provided in Australia. Each title had to be expertly examined on its merits and, owing to the state of the law, this was no simple matter. Yet the Commissioners in 1857 recommended that the Act introducing registration of title should be confined merely to making changes in the machinery

[1] Whalan 'Immediate Success of Registration of Title in Australasia' 423
[2] See ibid 430n15

of conveyancing,[1] and accordingly the 1862 Act did not aim at altering the substantive land law. More than sixty years were to pass before the 1922-25 legislation swept away enough of the "rubbish" (as Underhill called it)[2] to enable registration of title really to go ahead.

6.2 Torrens, however, had no illusions about English land law, and it is in this regard that his approach differed so markedly from that adopted in England. His declared intention was to do away with the distinction between law and equity which he called "a monstrous feature in our system of jurisprudence, and one not recognisable in any part of the world except Great Britain and certain of her colonies, into which it has been introduced in ignorance, or through infatuated adhesion to ancient institutions".[3] He did not regard the problem as being merely one of procedure; he intended that his Act should be self-sufficient and, indeed, he concluded his treatise with the claim that "The South Australian Legislature has provided means of escape from the grievous yoke of the English Property Law".[4] His Act was, in fact, called the Real Property Act. Its preamble read, "Whereas the inhabitants of the Province of South Australia are subjected to losses, heavy costs, and much perplexity, by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous and unsuited to the requirements of the said inhabitants", and it began by repealing "all Laws, Statutes, Acts, Ordinances, rules, regulations and practices whatsoever, relating to freehold and other interests in land, so far as inconsistent with the provisions of this Act".

6.3 The following extract from Hogg's book on the Australian Torrens system (written in 1905) is particularly significant:

> "The introduction of the system into South Australia was strongly opposed by lawyers of every class, from solicitors to judges, and no harder things have been said of the Torrens system generally than have been said of the South Australian Statutes in South Australia. It will probably be conceded that the English Act of 1862 was better drafted and more scientifically modelled in accordance with English real property law. Nevertheless in New Zealand the Land Registry Act 1860, after a trial of ten years, and in Victoria and New South Wales Bills on the same lines, were all abandoned in favour of measures based on Sir Robert Torrens' Statute, and the Australian system has been as successful in obtaining the approval of the public as the English system has been unsuccessful. One explanation, or a partial explanation of this, seems to be that the English Acts have, by that very adherence to the forms and principles of English land law and conveyancing in which Sir Robert Torrens' Act was strikingly deficient, failed to remedy the evils incidental to the existence of the equitable estate. The South Australian Statutes grappled with these evils certainly rather from the point of view of a

[1] Stewart-Wallace said that the wisdom of this decision had never been challenged (Land Registration 33), but this seems questionable if only because registration of title in England made no progress until the law was changed.
[2] *Acquisition and Valuation of Land Committee - Fourth Report* (1919) Appendix 1 31
[3] Torrens *South Australian Registration of Title* 2
[4] Ibid 44

> layman than a lawyer - with great boldness, and at the cost of neglecting the feudal rules which underlie real property law; but the result has been the nearest approach yet made in form to allodial ownership under purely English law. Were feudal tenure technically, as it has been practically, replaced by allodial ownership, the Torrens system of conveyance by registration would require but little alteration to transform it into a consistent system logically resting on intelligible principles."[1]

6.4 Although it can no longer be said that the English system lacks public support, or indeed the approval of the great majority of the legal profession in England, this quotation from seventy years ago is specially worth repeating because in recent statutes like the Kenya Registered Land Act 1963 allodial tenure has replaced feudal tenure (or rather terminology and ideas which emanate from feudal tenure). Under such statutes land is owned absolutely and is not held in fee simple. In fact the South Australia Act of 1858 defined an ‘estate in fee simple' as meaning 'the absolute property in land', and though Hogg described this as "perhaps the most extreme instance of bad draftsmanship to be found in the Statute”[2] and this "solecism", as he primly called it, disappeared from subsequent versions, it signified the radical approach to English property law so pungently advocated by Torrens.

7 Torrens and English systems compared

7.1 Dowson and Sheppard expressed the hope that they might “dispel any lingering belief that Registration of Title to Land is an esoteric mystery, either legally or technically". They went on to say, “A misconception that we should correct at the outset is that there is, in any significant sense, a series of different systems of registration of title suited to differing conditions and standpoints. We think that the outstanding success of the first South Australian measure associated with the name of Sir Robert Torrens, in such contrast to the equally outstanding failure of the contemporary English Act, coupled with the growth of the term 'Torrens system', suggested a distinction in kind between the two and generated the conception of further alternative systems. Whereas, as we have repeatedly observed elsewhere, Torrens himself pointed out that there was 'a similarity amounting to identity' between the South Australian and the English measure, and that they followed principles whose practicability and advantage had been previously proved both on the Continent of Europe and in England itself."[3]

7.2 There is, indeed, little use in debating who first thought of the basic idea of registration of title that was so succinctly and lucidly expressed by Robert Wilson in the 1850 report which we have already quoted[4] and which presumably Torrens must have read. The idea that the register should show not merely that A had signed a deed purporting to transfer property to B, but the further fact that the property was thereby taken out of A and vested in B is so simple, and so obvious,

[1] Hogg *Australian Torrens System* 21-2
[2] Ibid 25
[3] D & S 73
[4] See 3.11.4-6

that it is astonishing that it was not adopted long before in those many jurisdictions where Government was granting land on unchallengeable titles, and so there was no problem of initial investigation. To remain good such titles only had to be maintained; a legally effective record of subsequent dealing was all that was needed.

7.3 Any country which, in the late nineteenth or early twentieth century contemplated the introduction of registration of title would naturally tend to look to Australia and New Zealand where the Torrens system had been so successful, rather than to England where the Act of 1862 had so conspicuously failed, and the Act of 1875, lacking compulsion, had made no progress. But, as Dowson and Sheppard pointed out, "no genuine classification of the variant statutes according to differences in system is possible". Nevertheless, they suggested that countries can be divided into groups which "indicate broadly the registration law upon which the various statutes have been founded or are most closely connected with", and for comparative purposes it is worth repeating their classification (with names of territories as given by them):

> *The English Group*: England, Ireland, Nova Scotia, Ontario, Nigeria, Tanganyika, Leeward Isles.
>
> *The Torrens Group*: South Australia, Victoria, New South Wales, The Federal Capital Territory, Queensland, Western Australia, Tasmania, New Zealand, Fiji, Sarawak, The Federation of Malaya, Brunei, Kenya, Uganda, Trinidad-Tobago, Jamaica, New Hebrides, British Honduras, Dominion of Canada, Alberta, British Columbia, Manitoba, Saskatchewan, California, Colorado, Georgia, Illinois, Massachusetts, Minnesota, Nebraska, New York, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Virginia, Washington, The Belgian Congo, The Ivory Coast, French Guinea, Senegal, French Sudan, Morocco, Tunis and Syria.
>
> *The German Group*: The German States, Austria, Hungary, AlsaceLorraine, Poland, Czechoslovakia and Yugoslavia.
>
> *The Swiss Group*: Switzerland, Egypt.
>
> *The Ottoman Group*: Cyprus, Iraq, Palestine, Syria, Transjordan.[1]

7.4 But even the distinction between Torrens and English origins becomes blurred as problems are re-examined and dealt with on their own in the light of modern developments, or new statutes replace old and draw their provisions from different sources. For example, would it now be true to say that the Registration of Title Act 1964 of the Irish Republic falls into the English group, merely because it retains some of the features of the Local Registration of Title (Ireland) Act 1891, which it replaced and which Dowson and Sheppard listed in the English group? Indeed, should Ireland have been placed in the English group when the first Irish Act - the Record of Title (Ireland) Act 1865 (which was just as much a failure as the English Act of 1862) - was actually drafted by Torrens[2] and, in any case, the

[1] D & S 98
[2] See *Lowry Cominatee Report* (1967) 7

Irish themselves do not recognize any English group but regard the English Acts of 1862, 1875 and 1897 merely as "modified versions of the Torrens system"?[1] It is significant that in 1905 Hogg wrote, "Adaptations and modifications of the Australian system are also known as 'Torrens' systems. Thus, there is now an English Torrens system, a Canadian Torren. system and an American Torrens System.'[2] Even Cheshire says that the registration of title that was introduced into England in 1862 "was based on the system which Sir Robert Torrens had invented in Australia".[3]

7.5 This indeed, though historically incorrect, indicates perhaps the most sensible way of approaching the matter. Like the Americans we should regard the name 'Torrens' merely as a suitable word to designate the system which has as its essential basic feature the fact that the register alone proves title; that is, the system that we call 'registration of title'. Nevertheless it is not infrequently asked what the difference is between the English and the Torrens systems, and it may be useful to identify some of the features in which the system operated by HM Land Registry in England is usually considered to differ from the 'Torrens system' as practised in Australia and New Zealand. Most of these features are examined in detail in other chapters, and here we need do little more than very briefly describe them and give the appropriate references. We do not, of course, pretend that the list is complete.

7.6 *Initial compilation of the register*. In Chapter 11 we describe how the Torrens register is made up of Crown grants or subdivisions of Crown grants. No process of investigation is needed in respect of the title of any land granted after the date the Act has come into effect but only in respect of what has been granted before that date. In England, however, there is no automatic first registration; every title must be investigated before it can be put on the register.

7.7 *Registration of Crown land*. In England, so far as registration is concerned, there is no difference between Crown land and privately owned land; the Queen ('the Queen's Most Excellent Majesty in the Right of her Crown') is registered as the proprietor of Crown land. Similarly government land is registered in the name of the Minister authorized to hold it under the provisions of statute. In Australia, however, since the register is composed of Crown grants, ungranted land obviously does not appear on it, and even granted land which is re-acquired by the Crown may be removed from the register. Thus so long as any land remains ungranted, a Torrens register can never become a complete register showing title to all land. Even Crown leasehold grants do not appear on the Torrens register, but are dealt with in records kept by the Department of Lands where the procedure on transfer is naturally much the same as it is in the Torrens registries. To the English visitor, accustomed to the leasehold title of the English register, this seems a curious anomaly, and the position is even more curious in New Zealand, where the basic principle is that, with certain exceptions, every lease or licence issued under the Land Act 1948 is to be registered under the Land Transfer Act 1952 (the New Zealand Torrens Act), but the exceptions are many,

[1] Ibid 5
[2] Hogg Australian Torrens System 1
[3] Cheshire 10th ed (1967) 839 (omitted from the llth ed 1972)

and these are kept in the Department of Lands. There is also an inbetween type of lease (covering a large part of New Zealand Crown leasehold) for which it is provided that, though it must be kept in the Land Registry in the same form as under the Land Transfer Act, it does not count as registration under that Act but is in reality a species of registration of deeds.

7.8 *Boundaries and maps*. It is their approach to boundaries and maps that is commonly regarded as the most outstanding difference between the two systems, with the 'general boundary' of the English system contrasted with the so called 'guaranteed boundary' of the Torrens system. Yet basically the distinction is between two methods of boundary demarcation rather than two systems of registration of title. In England boundaries are usually marked in length by physical features such as walls, fences or hedges, which have no official status, and the precise line of the boundary may not be known, still less recorded. In Australia, however, demarcation is by official mark emplaced and surveyed at the time of the grant from the Crown, or on subsequent subdivision. All land is marked in this way whether it is registered under the Torrens system or under the deeds system. Indeed this was a feature of the Crown grant long before the days of Torrens, just as it has been a feature of the State patent in the United States. In the Torrens system a plan showing the turning points thus marked on the boundary is actually drawn on the certificate of title, whereas the English register is illustrated by a separate topographical map. We discuss maps and boundaries at length in Chapter 8.

7.9 *Form of register*. The English register with its system of loose cards, any of which can, when necessary, be replaced by a new edition purged of dead matter, should be contrasted with the bound volumes which persist in some Torrens registries to the present time, preserving, in folios running from volume to volume, all entries from the time of first registration. The English system is concerned only with the current situation, in striking contrast to the Torrens system which carefully conserves the history of the parcel from its very beginning. It is the English form of register that we commend in Chapter 17.

7.10 *Public access to the register*. The registers of title at HM Land Registry can only be inspected by, or under the authority of, the registered proprietor or his solicitor; but the Torrens system has been public from its inception. It could scarcely have commended itself as a substitute for the existing deeds register if its effect had been to make secret what public policy had already required to be public (though this has been the effect of superseding the Middlesex and Yorkshire deeds registers by the English system of registration of title).

7.11 *Postal business and personal search*. The English system encourages postal application and the use of the official search procedure, whereas Torrens registries are thronged with persons making their own searches and postal business is discouraged, where not actually forbidden.

7.12 *Caveats and cautions*. The Torrens caveat operates to stop a transaction until the caveat is removed, whereas the English caution merely entitles the cautioner to notice of a projected dealing.

7.13 *Possessory and qualified titles*. The English system allows possessory and qualified titles to be registered, whereas Torrens statutes as a rule make no

such provision, though the New Zealand 'limitation as to title' or 'limitation as to parcels' or 'as to both title and parcels', introduced in 1924, amounts to the same thing.[1]

7.14 *Sealing of deed of transfer*. In the English system the prescribed statutory instruments are required to be under seal; in most other jurisdictions this anachronism[2] has not been perpetuated and scaling is not required.

7.15 *Some general points*. We have culled the following general points of comparison from Curtis and Ruoff (repeated unchanged by Ruoff and Roper)[3] who say, “Each system has common aims but a comparison with the other reveals advantages and disadvantages inherent in each":

(1) "First, in those countries which have adopted the Torrens system it is operated unreservedly and wholeheartedly, not sporadically as in England, so that familiarity with its practice is general." (Indeed the Torrens title is sufficiently well known for it to be worth stating in an advertisement for the sale of land that a Torrens title is offered.)

(2) "Torrens titles are, almost without exception, infinitely simpler than English registered titles, but this characteristic is gained by depriving the landowner of many important dispositionary powers." (This is surprising, since Australasia has not had the benefit of the 1922-25 English legislation. Perhaps it might be suggested that the English landowner, thanks to the ingenuity of his legal advisers, has far too many dispositionary powers. Curtis and Ruoff themselves ask, "What English solicitor would not like to see the abolition, for example, of the futilities of modern restrictive covenants?")

(3) "English titles are freely rectifiable in cases of fraud, duress, adverse possession, illegality, mistake, and so forth, but Torrens titles are so sacrosanct that even the highest courts have little jurisdiction over them. And yet, strangely enough, the Torrens system produces far more litigation than the English system." (Perhaps the reason for this lies in the next general point, which is indeed a significant difference between the two systems.)

(4) "The English Chief Land Registrar possesses wide judicial powers of a kind and extent undreamed of elsewhere, which he is not slow to use." (It is not surprising therefore that fewer English cases come to the courts.)

(5) "In no country is the Torrens system worked as a system of insurance of title in the sense that it is in England." (This is particularly true on first registration.)[4]

(6) "Perhaps the principal difference...is that Torrens titles are often governed by a radically different code of substantive law from that relating to unregistered property, while in England the substantive law of real property is substantially similar in both registered and unregistered conveyancing". (We submit that a principal merit of registration of title is that it offers a golden opportunity for the clarification and simplification of land law, so far as the creation and disposition

[1] See 11.11.2-4
[2] See 4.5.2
[3] C & R 12; Ruoff and Roper 11
[4] See 11.7

of rights in land are concerned.[1] As we have already emphasized, this was one of Torrens's main objectives, though in fact it was not really achieved.)

8 Spread outside Australasia

8.1 Hogg in his classic work Registration of Title to Land throughout the Empire, published in 1920, did not, even at that time, attempt any grouping based on the origin of the governing statute. He listed twenty-eight separate systems covering thirty-one jurisdictions (since three systems were in force in more than one jurisdiction) and he divided them into five groups - "partly geographical and partly political" - as follows (with his numbering shown in brackets):[2]

> *United Kingdom Group*: (1) England and (2) Ireland.
>
> *Australasian Group*. The six States - (3) New South Wales, (4) Queensland, (5) South Australia, (6) Tasmania, (7) Victoria, (8) Western Australia - and three Territories - (9) Papua, (9a) Northern Territory, (9b) Territory for Seat of Government - of the Commonwealth of Australia, together with (10) the Dominion of New Zealand and (11) the Crown Colony of Fiji.

Hogg remarked that the systems of this group were the first to be known collectively as the Torrens system, since they were derived more or less directly from the South Australia Act of 1858, though the Fiji statute bore internal evidence of having been drafted with some regard to Scottish law. (It has now been replaced by legislation derived from New Zealand.)

> *Canadian Group*: Six Provinces and the Territories of the Dominitn of Canada, viz: (12) Ontario, (13) British Columbia, (14) Manitoba, (15) Saskatchewan, (16) Alberta, (17) North-West Territories, (17a) Yukon District, (18) Nova Scotia.

This group is of special importance and we devote the next section to it.

> *Crown Colonies Group (including one Protectorate)*: (19) British Honduras, (20) Trinidad-Tobago, (21) Jamaica, (22) Leeward Islands, (23) Federated Malay States, (24) Ceylon, and (25) The Gambia.

As Hogg pointed out, the systems in this group differ considerably from each other, and it is, indeed, a very heterogeneous collection. Moreover, out of it only the Federated Malay States can claim any real success; their system was the forerunner of the system now operated under the Malaysian National Land Code.[3] The Honduras Lands' Titles Act, 1858[4] was enacted on 18 May 1858 less than two months after the first Torrens Act became law in South Australia. The Honduras Act was framed entirely on its own lines but it provided for the registration of "absolute and indefeasible titles" and must be of great interest to any legal historian, though according to Hogg in 1920 the system in British Honduras "as compared with some is merely rudimentary". The 1858 Act was repealed and

[1] See 9.4
[2] Hogg *Empire* 5
[3] See 21.6
[4] This is how the short title was actually printed in sXXX of 21 Vic. c. 10 “enacted by Her Majesty's Superintendent, by and with the advice and consent of the Lcgislative Assembly”.

replaced by the Honduras Lands' Titles Act 1861. New legislation was enacted in 1954.

Protectorates Group: (26) East Africa, (27) Uganda, (28) Sudan.

Hogg remarked that each of these three systems "presents special peculiarities of purely local interest"[1] and he omitted them (together with Nova Scotia, Ceylon and the Gambia) from his analysis as not being of sufficient relative importance to justify detailed treatment. Registration of title was never established in Nova Scotia or Ceylon (now Sri Lanka), but, oddly enough, it is the development of registration of title in the Sudan, Uganda, Tanzania and in particular Kenya, (formerly the East Africa Protectorate) that, since 1919, has been specially instructive and is dealt with at some length in this book.

8.2 Hogg's grouping did not, of course, include territories outside what was then the British Empire, but Dowson and Sheppard included in the forty-six jurisdictions of their 'Torrens Group" a number of jurisdictions which are not in the British Commonwealth, and these require special mention. They can be divided into two classes, one comprising eight jurisdictions where the language of administration at that time was French, and the other consisting of States of the USA which had introduced the Torrens system, Each of these classes will be dealt with in a separate section after we have given some particulars of the Canadian Group, which deserves a section to itself.

9 The Canadian Group

9.1 It is extremely difficult to compress to a length appropriate for this book a meaningful account of the Canadian Group, since Canada offers examples not only of systems of registration of title derived quite distinctly from both English and Torrens sources (together with one in British Columbia which might claim to be 'homegrown') but also of a variety of deeds systems with, in the Maritime Provinces (Prince Edward Island, Nova Scotia, and New Brunswick), a most instructive exercise in conversion to registration of title combined with computerization. All this is against a background of English common law; but in the large French-speaking province of Quebec, where the law is based on the Napoleonic Code, is to be found an example of cadastral survey in conjunction with deeds registration which appears to be a model of its kind and which could well be the subject of detailed individual study, not least with regard to the feasibility - and desirability - of its conversion to registration of title. DiCastri's edition (1962) of Thorn's Canadian Torrens System (1912) alone runs to over 1,200 pages, and that deals with only five of the eleven jurisdictions.

9.2 DiCastri tells us how in Canada the advantages of registration of title were receiving consideration during the time the Torrens system was being adopted in Australia, and how "a system peculiar to itself but incorporating in part the indefeasibility principle" was introduced into Vancouver Island with the enactment of the Land Registry Act 1860. The Colonial Office had provided the draftsman of this statute with a copy of the draft bill of Torren's Real Property

[1] Hogg *Empire* 17n41

Act, but he omitted many of the details of the South Australian Act as being "too complicated, cumbersome, and expensive for the young Colony of Vancouver Istand".

9.3 In 1869 Vancouver Island was united with British Columbia, and in 1870 an ordinance was enacted which was based on the English Report of the Real Property Commissioners in 1857, "whence sprang the main, indeed all, the then useful principles of the Torrens system of land registry, and especially the principle of indefeasibility".[1] This ordinance, called the Land Registry Ordinance, provided for the issue of an 'absolute certificate' when the Registrar was satisfied that a *prima facie* title had been established. Despite its name, this was really of the order of a provisional certificate, and it was not until an owner had been registered for seven years that he could obtain a 'certificate of indefeasible title', which was conclusive evidence of ownership. An assurance fund for indefeasible titles only was set up in 1898. Today the bulk of issued certificates of title are indefeasible and any outstanding absolute certificate may be converted forthwith to an indefeasible certificate or automatically becomes one on registration of a transfer.[2]

9.4 Thom, however, did not include British Columbia as 'Canadian Torrens' in his original work, but only Manitoba, Saskatchewan, Alberta, and the Northwest Territories. Even in 1912, he could say, "Generally speaking, while from time to time there are occasions to find fault, often reasonably, with particular examples of maladministration, it may safely be said that it would be hard, if not impossible, to find anyone who would revert to the old system of registration of deeds".[3] In fact it is only in Manitoba that the 'old system' of registration of deeds under the Registry Act still exists alongside the 'new system' of registration of title under the Real Property Act. In the other jurisdictions the only system is registration of title under the respective Land Titles Acts. In 1885 (when legislation for registration of title was first enacted for Manitoba and for the Territories, which then included the districts that in 1906 became the Provinces of Alberta and Saskatchewan) there was still much Crown land available for disposition, and so the circumstances were much more like those in Australia than those in England. It is not surprising, therefore, that the Australian model was closely followed, and Hogg remarked that the term 'Torrerns' was "applied as commonly to the statutes of these four jurisdictions as to the Australasian statutes". Hogg also made the interesting observation that, as in Australasia, the case law under these four statutes "has been considerable. The number of reported cases on the British Columbia statutes is much smaller, and the number in Ontario still smaller again."[4]

9.5 The Ontario Land Titles Act 1885 was derived from the English Land Transfer Act 1875.[5] Strictly speaking, therefore, the Ontario system is outside the

[1] In re Shotbolt (1888) 1 *British Columbia Reports* 11337 at 346
[2] See DiCastri *Thorn's Canadian Torrens System* 22
[3] Thorn The Canadian Torrens System 30
[4] Hogg *Empire* 14
[5] The Nova Scotia Land Titles Act 1906 was adapted from the Ontario Land Titles Act 1885 but requires no further mention since it was a complete failure.

ambit or a chapter on the Torrens system unless the expression 'Torrens system' is taken to be a generic term denoting any system of registration of title as distinct from registration of deeds, as it usually is in the United States, This is obviously how Hogg regarded it in 1905 when he wrote, "The Torrens system in Ontario - the most important of the English provinces of Canada is principally based on the English Land Transfer Act 1875."[1]

9.6 The situation in Ontario is indeed of special interest. A system of registration of deeds was established in 1795. The deeds register was only indexed alphabetically by names of proprietors until 1865 when a geographical index was introduced, which is generally known as the 'abstract index' and is very similar to the Scottish search sheets described in the next chapter.[2] Then twenty years later, the Land Titles Act 1885 brought in registration of title. This Act, as we have just observed, was based on the English Land Transfer Act 1875, but it has applied to all land granted in the north of Ontario since 1887, thus providing the sort of compulsory feed-in to the register that we associate more with the Torrens than the English system. The deeds system, however, has continued to flourish in southern Ontario and in those parts of the north where land was granted before the Land Titles Act made registration of title compulsory for new grants. In 1969 it was estimated that, out of about 2,200,000 parcels in the Province 85 per cent were still governed by the deeds system (in 66 local offices) and only 15 per cent by the titles system (in 30 offices - shared with the deeds registry except in Toronto). Here then is an outstanding example of a titles register operating alongside a very effective deeds register, thus presenting a golden opportunity for comparative study.

9.7 The Ontario Law Reform Commission completed such a study in 1971 and issued a report in which they reached the unequivocal conclusion that "a land titles system [i.e. registration of title] is superior to a registry system [i.e. registration of deeds] in almost every material respect in which comparison can be made at present. A land titles system is also the system that can best be adapted to fit the needs of the future, particularly when seen as a major component of an integrated land information system, or when considered on the basis of potential compatibility with electronic data storage and retrieval technology."[3] The Commission recommended that a land titles system, substantially improved by the specific recommendations made in the report, should be the sole system for land registration in Ontario, and that all the parcels in specified areas should be converted at the same time.[4] It was also recommended that a computer system should be used, and the report contains a comparative cost analysis prepared by a firm of specialists. The whole report is most impressive and deserves the closest study, as will, of course, the action which is taken on the strength of it.

10 Former French and Belgian dependencies

[1] Hogg *Australian Torrens System* 12
[2] See 6.5.4(3)
[3] *Ontario Land Registration Report* (1971) 23
[4] See ibid 75 Recommendation 2; this recommendation for 'systematic adjudication' is especially significant (see 11.8)

10.1 Dowson and Sheppard devoted the last chapter of their book to 'Some French Colonies and the Belgian Congo'. They began that chapter by saying, "It is an established principle that the economic development of land depends, primarily, on the security of tenure conferred...thus the law governing the tenure and transfer of land is of paramount importance, and this more especially in a 'new' country. This has long since been realized by the French and Belgian colonial administrators, registration of title having been established in Tunis in 1885; in the Belgian Congo in 1886; in Senegal, French Guinea, the French Sudan and the Ivory Coast in 1906; in Morocco in 1912; and in Syria in 192l."[1] These are in fact the eight French-speaking territories which Dowson and Sheppard named at the end of their Torrens Group, and they gave short accounts of the system in Tunis, Morocco, French West Africa and the Belgian Congo, which, in each case, they specifically stated was based on the Torrens system.

10.2 We do not propose to repeat these accounts. All we need say is that the Torrens system, or at least registration of title, appears to be fully vindicated in French-speaking Africa, though, as would be expected, some difficulty, delay and expense have been found in the process of initial registration; nor have all the registers been kept up to date.

10.3 Thus in Tunisia, where registration of title on a voluntary basis was introduced in 1885, out of seven million hectares estimated in 1962 as being capable of registration only just over three million (approximately 43 per cent) had been registered by 1970, though this represented the major part of the country's real property wealth (both urban and rural) and nearly all the real property on the market had been registered. Nevertheless, not yet registered are almost all the small agricultural holdings, and the vast uncultivated lands of the centre and south, which certainly have potential value, but have not been developed for demographic, sociological, or climatic reasons."[2] To help landowners who had been unable to take advantage of registration and so were hampered in dealing with their land and in raising loans, it was decreed in 1964 that land registration should be compulsory and that a systematic and general cadastral survey should be made of the whole country free of charge to the landowners. But the operation of the registry itself has not been without its difficulties. The Government of Tunisia reported in 1970 that, out of some 167,000 registered titles about 18,000 were 'frozen' (i.e. out of circulation) because they were not up to date. Although provision to deal with this situation was included in the 1964 legislation, very little progress had been made.

10.4 In Morocco, where registration of title was introduced in 1913, a government report in 1970 said "the land title is one of the essential instruments in the development and progress of Moroccan agriculture...a very substantial part of Moroccan territory is registered...This considerable achievement would have been impossible if the registration system had not won the support of both rural and urban owners, who have discovered that the land title guarantees their lands

[1] D & S 199

[2] See Government of Tunisia *'Registration of Titles to Land and the Cadastre in Tunisia*' ECA Seminar on Cadastre E/CNA4/CART/271 (Addis Ababa Nov 1970) 3

against any usurpation and contestation and helps them in the constitution of charges on land - factors contributing to economic and social progress."[1]

10.5 Informative papers on registration of title and cadastral survey in these and other French-speaking countries in Africa (including a long and detailed paper by the Government of the Democratic Republic of the Congo) are to be found in the proceedings of a seminar on cadastre held by the Economic Commission for Africa in December 1970. No doubt these countries are a rich field for exploration, in a civil law context, but we must content ourselves with the simple assertion that French and Belgian colonial experience amply demonstrated the virtues of registration of title though it also illustrated a number of procedural difficulties in the compilation and maintenance of the register. The independent governments which have now taken over are fully aware of the importance of title registration for economic and social reasons, and are striving to make it truly effective.

11 The Torrens system and title insurance in the United States

11.1 We now turn from the 'success stories' of western Canada and French-speaking Africa to what really might be the subject of a separate chapter entitled 'The rise and fall of the Torrens system in the United States'. The United States is of particular interest and importance because land there as in most federations, is a matter for State, not Federal, legislation and there are fifty-one separate jurisdictions (fifty States and the District of Columbia) which, with the single exception of Louisiana, use versions of English land law, with its concept of the estate and all the complexities resulting therefrom, varying from State to State but largely unchanged by any rationalization of the kind effected in England by the 1922-25 legislation.

11.2 As regards conveyancing, however, there is one feature of the American system which has specially differentiated it from English practice. In England the provision of the Statute of Enrolments of 1535 that instruments of transfer must be recorded in a public register was, as explained in Chapter 3,[2] wholly evaded by the cunning of the conveyancers who thereby firmly established secrecy in conveyancing. But in America the public interest was not thus defeated. Laws requiring conveyances to be recorded were not only enacted in Plymouth Colony in 1636, in Connecticut in 1639, and in Massachusetts in 1641, but were put into effect. The system of 'recordation', as it is called in the United States, spread throughout the country, and we shall say more about it in the next chapter when we consider registration of deeds. For the moment we need only say that it suffers from the basic defect we mentioned in Chapter 2.[3]

11.3 Title, to be proved, has to be traced back to the original State grant or 'patent', and when lawyers had worked for many years in the same locality, they naturally became familiar with local titles and came to know the evidence needed

[1] Boubkcr Fassi-Fchri *'Note on the System of Land Registration in Morocco*' ECA Seminar on Cadastre EICK 14/CART/254 (Addis Ababa Nov 1970) 9
[2] See 3.9.5
[3] Sce 2.3.2

to remedy any deficiencies. The chain of title for No.15 Main Street would be the same as for No.17 as soon as it was traced back to the subdivision that had created them as separate plots. Thus a local firm could build up a valuable stock-in-trade of investigated titles, and in many cities there grew up 'abstract companies' which specialized in the searching of the records.

11.4 Abstract companies then proceeded to go a step further and insure title, thus starting the title insurance business which is such a feature of American conveyancing. There are approximately 160 title insurance corporations in the United States, the first having been established in 1870. Of these about 125 are 'local companies' in the sense that they confine their title insurance to one State, and most of them maintain what they call 'title plants', which are simply registers of title operated by private enterprise. The remaining companies, which engage in multistate business, do not invest in title plants except in the locality of their home office, but issue policies upon the basis of the opinions of approved attorneys.[1] The title plants are compiled and kept up to date by expert staff whom the companies employ to abstract each day the necessary details from the official records, thus enabling the company to insure a title if their register indicates that it is sound. In effect the title plant duplicates the public record (or what the public record could be, if it were organized as efficiently as the title plant), and yet a further copy of the records may be made when another company sets up in competition in the same area. Somebody must pay not merely for the official record (which alone makes private title plants possible), but also for each additional set of records, though one set, properly organized, would be adequate. The somebody who pays is the prospective landowner.

11.5 Obviously the idea of State registration of title was very unwelcome to the title insurance companies which, indeed, could marshal against it all the not inconsiderable arguments that private enterprise can advance against nationalization, and though registration of title had proved itself very successful in Australia and New Zealand and had been adopted in Canada in 1885 both in its English and in its Torrens form, it was not introduced into the United States until 1895, when Illinois enacted a title registration statute. This was based on Torrens legislation and followed the Australian (and English) practice in providing that if the registrar was satisfied with an application for registration he could forthwith issue a certificate of title. This provision was at once challenged, and the Supreme Court of Illinois held that the Act was unconstitutional on the ground that it conferred judicial power on an administrative officer, contrary to the doctrine of the separation of judicial and executive power on which the United States Constitution is based.

11.6 A new Act in 1897 provided for the judicial determination of title before registration, and the constitutionality of this new Act was upheld in spite of the determined efforts to upset it made by the powerful vested interests it threatened. Judicial determination, however, greatly increased the time and cost of first registration and in effect this requirement dealt the Torrens system the mortal blow from which it has never been able to recover in the United States. In any

[1] Sec C F Grimes *'The Lawyer, His Client and Title Insurance*' The Student Lawyer (April 1958)

case, its opponents in Illinois had managed to ensure that the system should not spread, for they succeeded in getting written into the Act a provision that title registration should not be adopted in any county unless supported by one-half of the legal voters, though in Cook County, where the system was first applied, a petition by 2,500 persons had been accepted as enough. It had been easy enough to obtain 2,500 signatories in Cook County, but it has naturally proved difficult to secure the signatures of one-half of the legal voters in any other county. In 1903 and 1910 attempts were made to make registration of title compulsory in respect of the land of a deceased landowner, but although overwhelming support was given in referenda, the attempts failed on constitutional grounds, and the system, confined to Cook County, has remained purely voluntary, though "some method of reasonably rapid compulsory registration seems essential to the overall success of title registration", a conclusion reached after "a comprehensive analysis and comparison of the various statutory features of Title Registration in England, Massachusetts and Illinois".[1] "Both reason and history demonstrate beyond doubt that a scheme for conversion that depends upon private initiative will not work."[2]

11.7 Nineteen States in all enacted Torrens statutes between 1897 and 1917, and five have since repealed them.[3] Only in three States has there been any measure of success, and that only on a limited scale. In Cook County in Illinois there was a gradual increase in parcels initially registered until 1925, but there has been a constant decline since then. The Minnesota statute, enacted in 1901, has had some success in the Counties of Hennepin, Ramsey and St Louis where the cities of Minneapolis, St Paul and Duluth are situated; but no use of it has been made elsewhere. Most success has been achieved in Massachusetts where a special Land Court was established in 1898, but "the costs of registration were too high to permit indulging in that luxury except for the curing of an unmarketable title or for the registration of a sizable area of unimproved land as a preliminary to its development as a subdivision".[4]

11.8 The following analogy is illuminating and amusing: "The Torrens system may be likened to a new race course built alongside an old race course (the title company system). The managers of the old course (the title companies), unable to prevent the building of the new course, yet contrive to gain a foothold of control of the new course, and cause it to fail by placing obstacles in the path of the runners. To be doubly sure they cause a tremendously high entrance fee to be charged to those who would enter. Friends of the new course succeed in clearing away some of the obstacles placed on the track, but the new course is not patronized because the entrance fee is prohibitive. This pictures the present

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[1] John J Quinn *'Registration of Title: A Statutory Comparison*' 4 Saint Louis University La w Jout not (1957) 258

[2] *Ontario Land Registration Report* (1971) 66

[3] Illinois, 1895 and 1897; Ohio, 1896 and 1913; Massachusetts, 1898; California, 1897 and 1914 (repealed 1959); Oregon, 1901; Minnesota, 1901; Colorado, 1903; Washington, 1907; New York, 1908; North Cuolina, 1913; Mississippi, 1914 (repealed 1930); Nebraska, 1915; South Carolina, 19 16 (repealed 193 2); Virginia, 191(5; Georgia, 1917; North Dakota, 1917; South Dakota, 1917; Tennessee, 1917 (repealed 1932); Utah, 1917 (repealed 1935).

[4] Powell *Registration in New York* 196

situation as to the Torrens law. The enormous cost (largely unnecessary) of the initial registration prevents owners from entering the system."[1]

11.9 In 1938 an exhaustive review of the whole system was published as a result of the study of title registration in New York State made by Professor R.R. Powel under a grant from the Carnegie Corporation. He began his investigation "with a strong predisposition favorable to title registration",[2] but by the time he had completed it he had reached the conclusion that there was no reasonable probability that title registration would operate better than title recordation. "In fact the collected evidence indicates that title registration involves difficulties, expenses and personnel problems more troublesome and more irremediable than those encountered in recordation."[3] His survey, though directed expressly to New York, included detailed particulars of sixteen other States, together with a supplement on systems in the British Empire and in Germany, Austria, and Hungary.

11.10 Powell naturally was careful to point out that the English system failed until compulsion was introduced, and he also "completely eliminates" the English experience since 1925, because there is no prospect in the United States of any legislation comparable with the English Law of Property Act 1925, and it was only the changes made by that Act which have enabled the English system to work. He laid himself open to resentful criticism in America when he said that there was "an appreciable difference between the career man of high grade who heads such an office [i.e. a registry] in British possessions or in Europe, and the successful politician who heads such an office in the United States", apart from the "substantial difference in both skill and efficiency between a staff of career governmental servants and the personnel encountered in the typical office of a county clerk or register of deeds in the United States".[4] Furthermore, Australians and New Zealanders, not to mention Canadians, will be somewhat astonished to hear that their experience has no relevance to the American problem because of "the wide gulf between the governing body and the governed. When such a gulf exists, the governing body can be dictatorial, and can effectively tell the subjects what is good for them and can see that they accept it."[5] This is rather odd because, as we have just mentioned in section 5, it was the coming of representative government to South Australia that enabled Torrens, the founder of the system, to get it accepted, and it was popular support which kept it going when it seemed that it might fail. Also it is not without significance that, on attaining its independence, the Government of Kenya embarked on a massive programme of systematic registration of title for which there was tremendous popular support.

11.11 Nevertheless, however much it may be possible to discredit Powell and find flaws in his presentation, or in his arguments, or even in his facts,[6] it cannot

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[1] Hopper *Torrens System* 59, cited by Powell 21
[2] Powell *Registration in New York* Foreword vii
[3] Ibid 74
[4] Ibid 58
[5] Ibid 56
[6] See for example McDougal and Brabner-Smith *'Land Title Transfer: A Regression*' 48 *The Yale Law Journal* (1939) 125

be gainsaid that there is really no possibility of the Totters system making any further progress in the United States. "Registration affords greater title security and ease of transfer than any method dependent on recordation, but it does so at a cost generally deemed prohibitive in this country...While the cost of registration might possibly be reduced, a halfcentury's experience shows that Torrens is not the solution to the land-transfer problem. Despite its success in other countries, Torrens has never been popular in the United States, and hopes for its ultimate acceptance have practically disappeared. Resistance is partially attributable to an irrational, but nonetheless powerful aversion to a 'foreign' system. More intense is the opposition of vested interest groups - notably title insurance companies, professional abstractors and some attorneys - who thrive on and would perpetuate the confusion which current recording systems create...Practical considerations therefore dictate its rejection as a potential solution to present problems - notwithstanding the fact that it would eliminate most of the risks which attend conveyancing under the recording acts."[1]

11.12 And, lest any should feel disposed to flirt with title insurance, the following quotation (from the same page) is apposite: "It is a terrible indictment of our boasted jurisprudence if it is incapable of inventing or enduring any improvement on the system which has enabled title guaranty companies and abstract companies all over our land, and often several in the same city, to put by millions in surplus, after paying immense dividends, salaries and clerical expenses, all extorted as a tax on land titles and transfers, for what has been somewhat sarcastically put as insuring against everything but loss."

11.13 The Torrens system, however, is still not without its dedicated enthusiasts in the United States. One of the most notable of them, Professor Barnett, at the end of a very critical analysis of the marketable title acts which have been adopted by thirteen States in one form or another, observes: "While keeping titles far more reliable, a Torrens system can eliminate the tremendous waste and inefficiency of the recording acts. It is a baffling fact that the United States is rapidly becoming virtually the only country in the world whose land title system is not founded upon Torrens-type principles. The writer finds it incredible that a system which seems to work quite well almost everywhere else cannot be satisfactorily adapted to the United States. If all the brainpower expended by law professors and by the property-law sections of local, state, and national bar associations on marketable title acts were expended instead on devising a model Torrens act, surely a satisfactory adaptation could be found."[2] We humbly offer a model act in Book 2.

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[1] 'Enhancing the Marketability of Land: The Suit to Quiet Title' 68 *The Yale Law Journal* (1959) 1253-5. In this passage, it should be noted, the word 'Torrens' is used as a noun synonymous with 'registration of title' - with the possessive pronoun 'its' instead of 'his'.

[2] Walter E Barnett 'Marketable Titles Acts - Panacea or Pandemonium?' 53 *Cornell Law Review* (1967) 93