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ABA Real Property, Probate and Trust Law Section, Title Insurance and You; B. Schick & I. Plotkin, Torrens in the United States

Christine Godsil Cooper
Assist. Prof., Loyola University of Chicago

BOOK REVIEW

*Christine G. Cooper**

ABA REAL PROPERTY, PROBATE AND TRUST LAW SECTION, TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW! (1979).

B. SCHICK & I. PLOTKIN, TORRENS IN THE UNITED STATES: A LEGAL AND ECONOMIC HISTORY AND ANALYSIS OF AMERICAN LAND-REGISTRATION SYSTEMS (1978).

Three different methods of land title assurance are employed in the United States: title insurance, Torrens registration and the abstract system. Two of these methods, title insurance and Torrens, are examined in these recently published books. *Title Insurance and You*[1] is a compilation of lectures given at the 1979 fall program of the ABA on Title Insurance.[2] This collection of articles is supplemented by exhibits of relevant documents such as a title insurance commitment,[3] an ALTA Form B,[4] a Leasehold Insurance Form,[5] and a reinsurance agreement.[6] Michael Rooney's[7] introductory article, "A Primer for Attorneys,"[8] is simply excellent.[9] The article examines the common title coverage endorsements[10] and explains the niceties of negotiating coverage and rates. Although some endorsements are so common as to be free for the asking, the attorney must be made aware of their existence. This is a superb introduction to the uses of title insurance, the coverage of standard forms and the common exceptions to coverage. Rooney succinctly

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* Assistant Professor of Law, Loyola University of Chicago, School of Law.

1. ABA REAL PROPERTY, PROBATE AND TRUST LAW SECTION, TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW! (1979) [hereinafter cited as TITLE INSURANCE AND YOU].

2. TITLE INSURANCE AND YOU, *supra* note 1, at 1.

3. *Id.* at 119.

4. *Id.* at 139.

5. *Id.* at 158-193.

6. *Id.* at 220.

7. Mr. Rooney is associated with the Attorneys' Title Guaranty Fund. He has also written an excellent handbook for the Illinois Institute for Continuing Legal Education. ROONEY, ATTORNEY'S GUIDE TO TITLE INSURANCE (1980) [hereinafter cited as ROONEY, IICLE].

8. TITLE INSURANCE AND YOU, *supra* note 1, at 3.

9. This piece also is reprinted in 14 REAL PROPERTY, PROBATE AND TRUST J. 608 (1979).

10. TITLE INSURANCE AND YOU, *supra* note 1, at 13-15.

distinguishes between coverage provided by the owner's policy and that provided by the loan policy.[11] Rooney also explains, at least by implication, why an owner needs not only a separate title policy, but separate legal counsel as well to insure adequate title protection.

The different interests of lender and buyer are noted by James Pedowitz in his article on title objections.[12] Pedowitz includes a copy of the Model Home Buyer's Title Protection Notice Act,[13] which places an affirmative duty on providers of lender's title protection to disclose to the borrower that the lender's title policy offers the borrower no protection. The required notice further urges the borrower to seek the advice of counsel.[14]

The need for competent legal counsel is the focus of Anthony B. Kuklin's chapter entitled "Title Insurance Isn't Everything."[15] In this chapter, Kuklin stresses that negotiation and review of the title insurance policy is clearly a legal task. As such, an attorney should be retained as soon as it becomes apparent that title insurance will be obtained. Conversely, when problems arise that are covered by the title policy, an attorney can insure that all available relief will be sought. The scope of remedies under a title policy is examined in an article by Theodore Taub,[16] who also provides a bibliography of additional sources on this subject.[17]

John P. Trevaskis tries somewhat unsuccessfully to explain the use of the approved attorney system in his article on "Economic Considerations."[18] Under this system, a title insurance company contracts with an attorney, who provides the insurer with a search and title report. Trevaskis understates the superiority of title insurance over this traditional method of relying upon an attorney's opinion based on an abstract of title.[19] Title insurance offers

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11. TITLE INSURANCE AND YOU, *supra* note 1, at 12-13.
12. *Id.* at 57.
13. *Id.* at 63-68.
14. *Id.* at 66.
15. *Id.* at 49.
16. *Id.* at 69.
17. *Id.* at 78-79.
18. *Id.* at 35.
19. The abstract system is used in many rural parts of the United States, and even in urban centers in New England. *See generally*, A. AXELROD, C. BERGER & Q. JOHNSTONE, LAND TRANSFER AND FINANCE 666 (1978) [hereinafter cited as AXELROD, BURGER & JOHNSTON]. *See* L. SIMES & C. TAYLOR, MODEL TITLE STANDARDS 1-15 (1960), *quoted in* P. GOLDSTEIN, REAL ESTATE TRANSACTIONS 211 (1980).

absolute protection against insurer's error,[20] in contrast to the limited protection provided by attorney malpractice insurance which incorporates a negligence standard.[21] In addition, title insurance offers the benefits of corporate longevity,[22] underwriting experience,[23] and, most important, protection against non-record matters.[24]

One recurring theme of this book is that the lawyer performs a valuable role in real estate transactions, a role supplemented rather than eliminated by the prevalence of title insurance. This theme deserves all the emphasis it gets.[25] In fact, I would argue that the authors in *Title Insurance and You* do not encourage the involvement of attorneys early enough. Kuklin notes, for example, that the attorney must begin negotiating for coverage as soon as it becomes known that title insurance is involved in the transaction.[26] The buyer's attorney, however, must negotiate the scope of coverage into the contract of purchase itself. Unless the buyer has obligated the seller to provide a certain level and quality of title insurance, the buyer, even though prepared to purchase the additional protection, may be unable to obtain it and yet remain contractually bound to close the deal. The attorney must take an aggressive stance at the contract stage and, for example, attempt to obligate the seller to provide extended coverage over the general exceptions.[27]

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20. TITLE INSURANCE AND YOU, *supra* note 1, at 36.

21. *See* Watson v. Muirhead, 57 Pa. 161 (1868).

22. TITLE INSURANCE AND YOU, *supra* note 1, at 36.

23. *Id.*

24. *Id.* Included in this category are fraud, forgery, incapacity of grantor, and failure of spouse to join in conveyance. However, there are some very important non-record risks that title insurers commonly refuse to cover, *i.e.*, the general exceptions. *See* note 27 *infra*.

25. TITLE INSURANCE AND YOU, *supra* note 1, at 38.

26. *Id.* at 49.

27. The general exceptions, sometimes known as standard exceptions, vary from region to region. The general exceptions in ALTA Form B, used by the Chicago Title Insurance Company for the Chicago area, are as follows:

> General Exceptions:
>
> (1) Rights or claims of parties in possession not shown by the public records.
>
> (2) Encroachments, overlaps, boundary line disputes, and any matters which would be disclosed by an accurate survey and inspection of the premises.
>
> (3) Easements, or claims of easements, not shown by the public records.
>
> (4) Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.
>
> (5) Taxes or special assessments which are not shown as existing liens by the public records.

Reproduced in AXELROD, BURGER & JOHNSTONE, *supra* note 19, at 695. General exceptions in

One area which the book fails to cover at all is gap period protection. Title insurance is retrospective: it decribes past defects in title, but does not insure against future defects. The gap period between the title commitment and the issuance of the title policy after the new deed has been recorded can be fatal to the buyer's interests. Any defects in title arising after the date of commitment, but before the issuance of the new policy, are specifically excepted on the final policy.[28] The defects, which may constitute unpermitted title exceptions, would have been unknown to the buyer at the time of closing.

A buyer can be afforded some protection by a seller's affidavit of title,[29] and/or a warranty deed.[30] This protection is remedial, how-

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the western states include claims of water rights and mining rights. *See* TITLE INSURANCE AND YOU, *supra* note 1, at 143. Coverage over these general exceptions may be obtained by negotiation with the title company. However, the scope and availability of the protection varies by region. In the Chicago area, it is the industry practice to automatically provide extended coverage, at no extra charge, under the following terms and conditions:

> GENERAL EXCEPTIONS 1 THROUGH 5 WILL BE DELETED ON ALL OWNER'S POLICIES UP TO $100,000 COVERING A COMPLETED SINGLE-FAMILY DWELLING, INCLUDING A CONDOMINIUM UNIT, OR APARTMENT BUILDING CONTAINING NO MORE THAN FOUR UNITS PROVIDING THAT THE FOLLOWING DOCUMENTATION IS FURNISHED:
>
> (A) A SURVEY, IF AVAILABLE, SHOULD BE EXHIBITED FOR EXAMINATION AND A COPY LEFT FOR OUR FILES. IF A SURVEY IS NOT AVAILABLE, A STATEMENT BY THE PROPOSED INSURED TO THIS EFFECT SHOULD BE FURNISHED. NO SURVEY NEED BE FURNISHED IF THE LAND INSURED IS A CONDOMINIUM UNIT.
>
> (B) ALTA LOAN AND EXTENDED COVERAGE OWNER'S POLICY STATEMENT (FORM 3736) EXECUTED BY ALL PARTIES HOLDING TITLE TO THE LAND DURING THE SIX MONTHS PRECEDING THE DATE OF THE POLICY.
>
> (C) SATISFACTORY EVIDENCE OF THE PAYMENT IN FULL OF THE COST OF FURNISHING SERVICES, LABOR AND MATERIALS IN CONNECTION WITH ANY IMPROVEMENTS MADE ON THE LAND WITHIN SIX MONTHS OF THE DATE OF THE POLICY. THIS EVIDENCE SHOULD CONSIST OF SWORN CONTRACTORS' AND SUBCONTRACTORS' AFFIDAVITS TOGETHER WITH ALL NECESSARY WAIVERS OF LIEN.
>
> ADVERSE RIGHTS DISCLOSED BY THE ABOVE DOCUMENTATION WILL BE SHOWN SPECIFICALLY.

Chicago Title Insurance Company, Commitment for Title Insurance.

28. The effective date of the title commitment predates the effective date of the final policy of insurance. Thus, the title insurer has no obligation to insure a given quality of title after the effective date of the commitment. It is the practice of insurers, at least in the Chicago area, to specifically except any liens or encumbrances that arise in this gap period.

29. An affidavit of title includes an undertaking that the affiant, since the date of the title commitment, "has not done or suffered to be done anything that could in any way affect the title to premises. . . ." George E. Cole, Legal Forms, No. 1601, August, 1966.

30. A warranty deed warrants the quality of title stated therein.

ever, and not preventive. A pre-closing later-date search[31] also can be performed, and can shorten a gap period to as little as one day. The only absolute protection against a gap period is to close through a deed and money escrow,[32] where there is no effective conveyance and no payment to the seller until a title search covering the recording of seller's deed discloses no unpermitted title exceptions.

One other major shortcoming of the book is the paucity of references. The lack of documentation is understandable, however, because the law in this area is formed by private decision-making and private dispute resolution. Most title insurance claims are settled rather than litigated,[33] resulting in a dearth of reported case law. The primary data remains inaccessible in practitioners' files. Perhaps this accounts for the scarcity of published title insurance sources. In any case, with the notable exception of the bibliography provided by Theodore C. Taub,[34] an interested reader is given no further sources.

The Torrens system of land title registration is a form of land title assurance offered in a limited number of jurisdictions. In *Torrens in the United States*,[35] the authors examine the operation of Torrens in three areas where it is most strongly entrenched: Cook County, Illinois; Massachusetts; and Hennepin and Ramsey Counties (Twin Cities), Minnesota. The book is a purported cost-benefit analysis based on direct observation of these Torrens systems, personal interviews with administrators and users, financial data, and the available literature on the system.[36] No indication is given, however, of the precise methodology of the interviews: how many people were interviewed, their occupation or position, when the interviews took place, or the structure of the interviews. Nor is there adequate disclosure of the source of the financial data the authors

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31. Whether or not a title insurer will perform a preclosing later-date, which is a search of the public records subsequent to the effective date of the commitment, is a matter of local practice. At least one insurer in the Chicago area provides two free, pre-closing later-dates, but only upon request.

32. *See generally*, Mann, *Escrows—Their Use and Value*, 1949 U. ILL. L.F. 398 (1949), updated and revised, October 1, 1975, and reprinted in pamphlet form by Chicago Title and Trust Company.

33. TITLE INSURANCE AND YOU, *supra* note 1, at 73.

34. *Id.* at 78-79.

35. B. SCHICK & I. PLOTKIN, TORRENS IN THE UNITED STATES: A LEGAL AND ECONOMIC HISTORY AND ANALYSIS OF AMERICAN LAND-REGISTRATION SYSTEMS (1978) [hereinafter cited as TORRENS].

36. *Id.* at 2.

relied upon to arrive at their cost-benefit conclusions. Moreover, although much of the book relies on statutory and judicial sources, these sources are rarely cited. One must read bibliographic references in their entirety to determine if any source supports the assertions made by the authors. These reliability issues are particularly disturbing because both authors are surely acquainted with the need for accurate research techniques and useful citation.[37] Another credibility concern is raised by the financing of this research by the American Land Title Association,[38] an industry association of title insurers. The Association generally disapproves of Torrens insofar as it competes with title insurance, and this raises the question of whether the authors merely echo the title industry in their displeasure with Torrens.

Notwithstanding these very serious shortcomings, the book is fascinating. The reasons behind Torrens enactments in different parts of the country are traced. The destruction of land records in the great Chicago fire of 1871 led to the institution of Torrens as a method of establishing marketable titles in Cook County.[39] In Hawaii, native law concepts interferred with land concepts of the colonizers, and in Southern California, Spanish land grants caused similar problems. In both Hawaii and Southern California, Torrens seemed especially well suited for clearing land titles.[40]

These historical highlights prepare the reader for an examination of the day-to-day operation of the extant Torrens systems. The authors argue that the American experience with Torrens has been an abysmal failure: while Torrens originally was authorized in twenty-one states, today it remains in use in only five states.[41] In the other states, the enabling legislation has been repealed, landowners have withdrawn their property from Torrens, or the system simply became obsolete.[42] This failure in practice makes the theoretical benefits of Torrens highly suspect.

Torrens has been unsuccessful because it has not eliminated the need for title insurance. In every state in which Torrens is used, there are recognized exceptions to conclusiveness of title. The possibility of future judicial enlargement of these exceptions, moreover, makes Torrens title-holders additionally wary of relying on

37. Mr. Schick is a lawyer; Mr. Plotkin is an economist.
38. TORRENS, *supra* note 35, at xi.
39. *Id.* at 19, 53.
40. *Id.* at 19.
41. *Id.* at 18.
42. *Id.* at 18-20.

government certification of title.[43] The exceptions to the government's insurance coverage of Torrens titles are greater than the standard exceptions on a commercial title insurer's policy.[44] Furthermore, it is clear that a title insurer would assume litigation necessary to defend a title;[45] under Torrens, the government may not. In light of all these factors, it is not uncommon, therefore, for a buyer to obtain title insurance for property registered in Torrens.[46]

The other major flaw with the Torrens system noted by Schick and Plotkin is the inadequacy of insurance funds.[47] The government simply may be unable to pay legitimate claims if a claim exceeds the amount on hand. Thus, the quality of insurance in the Torrens system undercuts the viability of the system. History bears witness to the bankruptcy of several Torrens funds.[48]

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43. The Schick and Plotkin study was undertaken prior to substantial reforms made in the Cook County Torrens system. ILL. REV. STAT. ch. 30 §§ 47 *et seq.*, as amended by P.L. 81-415 (1979), eff. Jan. 1, 1980. Under these reforms, the exceptions to conclusiveness of title have been substantially reduced:

> Sec. 40a. The registered owner of any estate or interest in land bought under this Act shall, notwithstanding any rules of the common law to the contrary except in cases of fraud to which such owner is a party, or of the person through whom such owner claims without valuable consideration paid in good faith, hold the same subject to the charges herein set forth and also only to such estate, mortgages, liens, charges and interest as may be noted in the last certificate of title in the Registrar's Office and free from all others except:
>
> (1) General taxes for the calendar year in which the certificate of title is issued, and special taxes or assessments which have not been confirmed.
>
> (2) Such right of appeal, right to appear and contest the application, and action to make counter claims as is allowed by this Act.
>
> (3) Liens for internal revenue taxes, payable to United States of America, recorded in the office of the recorder of deeds subsequent to the date of the most recent search for liens for said taxes as herein provided.
>
> (4) Mechanic liens filed or to be filed in the Registrar's Office in accordance with statutory authority creating such liens.

ILL. REV. STAT. ch. 30 § 84.1. This section of the Torrens statute was an attempt to overrule Echols v. Olsen, 63 Ill. 2d 270, 347 N.E. 2d 720 (1976). Whether this attempt was successful can be determined only by judicial decision.

Another important reform makes explicit the fact that the resources of the indemnity fund are backed by the assets of the county. ILL. REV. STAT. ch. 30 § 139.1. *See generally*, Feinstein and Turano, *New Legislation Changes Torrens Act*, 68 ILL. BAR J. 72 (1979).

44. *See* note 27, *supra*. *See also* TORRENS, *supra* note 35, at 4.

45. TORRENS, *supra* note 35, at 73.

46. *Id.*

47. *Id.* at 63.

48. *Id.* One might argue that this flaw is external to the system: the purpose of Torrens is to provide a central registry of land titles backed by a government guarantee. The adequacy of the guarantee can be assured in the same manner the government assures its other financial obligations.

The cost-benefit conclusions of this study also are negative,[49] particularly for the residential homeowner. First, although it is slightly less expensive for Torrens property to be conveyed than for non-Torrens property, the authors conclude that this cost savings is offset by the public expense of supporting the Torrens system and its bureaucracy.[50] Since Torrens systems are not self-supporting, they are subsidized from public funds. Second, to the extent that a Torrens closing is less time-consuming for an attorney than a record closing, that time savings is not translated into lower fees.[51] Finally, the cost saving is completely eliminated by the added expense of title insurance, which must be obtained to provide for complete title protection.

The conclusions of Schick and Plotkin, even if somewhat questionable because of lack of source identification and methodology, still point to serious operational difficulties in the Torrens system, making it a weak alternative to title insurance. In conjunction with the ABA compilation, this study highlights the superiority of title insurance over the other means of title protection in the conveyance of real property.

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49. TORRENS, *supra* note 35, at 7.

50. *Id.* at 58, 64-68.

51. *Id.* From my personal experience, there is no time savings in Torrens closings; if anything, such closings take longer, requiring long waits in the Torrens Office.