

TITLE ISSUES

Torrens in Cook County 1897-1997, A Tearless Requiem

By **Guerino J. Turano**

On January 14, 1991, the very last day of his record 14-year reign as Governor of Illinois, Jim Thompson signed House Bill 3386 into Public Act 86-1481. By the first few of its 111 pages, this Act has finally, very effectively, and painlessly (albeit gradually) put to death the once venerable Torrens System of Land Registration that had served Cook County property owners since its second enactment in 1897.

Historical Background

The total destruction of the land records in the Office of the Cook County Recorder of Deeds by the catastrophic Chicago Fire of 1870 made some system of land registration very useful with respect to those properties wherein title could not be documented after the fire. The Legislature attempted to establish a Torrens System to fill the void in 1895, but that first attempt was held unconstitutional. The second attempt in 1897 survived a constitutional attack, and eventually about one-fifth of all the land in Cook County became registered in Torrens.

In its infancy, teen years and adulthood well into middle age, the Torrens System of Land Registration served Cook County property owners and the real estate bar quite well. Indeed, through the 1960's a Torrens Certificate was a respected and acceptable alternative to title insurance policy in Cook County.

Old age, however, makes all of us less flexible and less willing or able to adapt to the needs of an ever-changing environment. This fact of nature, much more so than any minor inefficiencies of operation or petty corruption of employees, has led to the ultimate demise of the System.

The Chicago Title and Trust Company began to computerize its Cook County records in the 1950's; the Torrens Office remained a manual system to the end. In the 1970's Cook County virtually led the nation in the number of rental residential properties converted to condominium. Each condominium development that included any land registered in Torrens necessarily meant a multiplying of Torrens Certificates: for each existing Torrens Certificate included in a condominium conversion there was needed a new one for each condominium unit in the development, sometimes hundreds and even thousands (witness the conversion of Sandburg Village in Chicago which involved approximately 2200 units and included a single Torrens parcel that became

part of the common elements of every unit). The Torrens Office fell hopelessly behind in generating new Torrens Certificates at that time and never recovered. In 1989, two years or more were needed by the Torrens Office to issue a purchaser of Torrens property his Torrens Certificate, even longer if the transfer was a condominium re-sale.

Another blow to the System was struck by the investors in the secondary mortgage market: the packaging of mortgage loans by financial institutions for sale to Fannie Mae, Freddie Mac, Ginnie Mae, and others meant that owners of Torrens property were required by their lenders to purchase mortgage title insurance because the secondary market found a Mortgagee's Duplicate Torrens Certificate to be inadequate protection to them. While an ALTA Loan Policy insured the lien of the mortgage, its enforceability and priority, and may afford such additional coverage as zoning compliance, compliance with building and other restrictions, and such other matters as mechanics' lien protection, a Mortgagee's Duplicate Torrens Certificate only assures the lender that his borrower is the owner and has the right to encumber the land.

In November 1988, Representative Carol Moseley Braun was elected Cook County Recorder of Deeds and, ex officio, Registrar of Titles. Early in 1989, she called together an ad hoc Blue Ribbon Commission of lawyers, lenders, realtors, title insurers, and other community improvements. Among the many recommendations made by the commission was the total abolition of the Torrens System of Land Registration.

After making studies relating to the inefficiency of the existing Torrens System, the cost of automating it to increase efficiency, the reluctance of the secondary mortgage market to accept Torrens Certificates, as well as other factors, the commission made the following findings:

"A cure for the administrative problems within the Torrens Office would require substantial investment by the Cook County Board at a time when many pressing matters of county business are demanding more funds. This cure of the problem within the Torrens Office, however, is only worthwhile if the problems imposed by the secondary market and other market factors can be dealt with. In addition, Torrens transfer fees would have to be raised in order to pay for the operational changes required to bring the Torrens Office into the 21st Century. If this is done, there will be an incentive for owners to deregister unless the secondary market can be convinced to accept the Torrens mortgagee's duplicate certificate of title in lieu of title insurance with its variety of coverage.

“We believe that the secondary mortgage market cannot be convinced to accept Cook County Torrens Certificates as satisfactory evidence of title. So long as the secondary mortgage market refuses to accept Torrens Certificates without title insurance and dictates the lending terms of most of the money being made available for mortgages in Cook County, the Torrens System in Cook County will provide only very limited benefits in a very limited number of cases to the owners of registered properties. At the same time, the Torrens System will cost all other owners of registered property duplicate fees, and duplicate effort in every transfer.”

To her credit, Recorder Braun implemented virtually all the improvements to her office recommended by the Commission. The abolition of the Torrens System was among the last recommendation to be implemented because it required enactment of legislation at the state level, and because it was further recommended by the Commission that abolition not be abrupt, but rather a gradual process to take place over a number of years.

Repeal Procedure

The Act abolishing the Torrens System became operative on January 1, 1992 (See Ill. Rev. Stat., ch. 30, par. 1201 et seq.) Complete abolition is to be accomplished by January 1, 1997, “or as soon thereafter as it can practicably be accomplished,” in the words of the statute. The Act newly defines several terms, among them, “adverse instrument” and “voluntary instrument.” An adverse instrument is defined as:

“any document, instrument or paper that adversely affects, but does not convey, the fee title to registered land, and the validity of which is not dependent upon consent by an owner of the registered land or some person claiming by, through or under that owner. Adverse instruments include, but are not limited to, mechanics' lien claims, memoranda of judgment, and lis pendens notices. Adverse instruments do not include sheriff's deeds, marshal's deeds, or tax deeds.”

A voluntary instrument is defined as:

“any document, instrument or paper that either conveys the fee title to registered land or affects title to the registered land and the validity of which is dependent upon consent by an owner of the registered land or some person claiming by, through or under that owner. Voluntary instruments include, but are not limited to, deeds, including tax deeds, sheriff's deeds and marshal's deeds, mortgages, assignments of mortgages, leases, and grants of easement or license.”

The Act prohibits the registration of any additional land in Torrens after January 1, 1992, its effective date. It also prohibits the Registrar from accepting for registration after that date any “voluntary instruments”; rather, it permits her thereafter, and prior to January 1, 1997, to accept for registration and memorialize only “adverse instruments” tendered to her for registration. When a voluntary instrument is tendered to her for registration after January 1, 1992, the statute directs the Registrar to refuse to accept the instrument,

but instead, “upon payment of the statutory recording fee, place of record with the recorder each current certificate of title or a registrar's certification of condition of title to all lands affected by that voluntary instrument. Before placing the certificate or certification of record, the registrar shall memorialize on the certificate or certification any instruments, documents, or papers that have been filed with the registrar and that have not yet been memorialized.”

When the Registrar records the updated the updated Torrens Certificate or Certification of Condition of Title, the property thereby is removed from the Torrens System and becomes subject to the public notice system maintained by the Recorder of Deeds. The Act provides that the recorded Torrens Certificate or Certification as updated becomes “a new chain of record title in the registered owner of any estate or interest as shown on the certificate or registrar's certification, subject only to estates, mortgages, liens, charges, and interests as may be noted on the certificate or registrar's certification and free from all others except the following:

“(1) Unpaid general taxes, special taxes, or special assessments and unredeemed tax sales and forfeitures for nonpayment,

“(2) Liens for federal income taxes payable to the United States, recorded in the office of the recorder before the recording of the certificate of title.

“(c) Liens for taxes payable to the Illinois Department of Revenue, recorded in the office of the recorder before the recording of the certificate of title.

“(d) Mechanics' liens that are recorded in accordance with the statutory authority creating such liens.”

The foregoing matters, (1), (2), (c), and (d) basically are the same matters to which the old Torrens Law made Torrens Certificates subject.

The Act goes on to provide that, after the Torrens Certificate is recorded, title to the property is to be conveyed or encumbered the same way title to unregistered lands are conveyed or encumbered, and that all “instruments shown as memorials on the certificates of title or registrar's certification of condition of title so recorded shall have the same force and effect as if they were filed with the recorder at the time they were filed or were otherwise memorialized on the certificates of title or registrar's certification of condition of title.”

Questions have been raised with respect to whether owners of registered property will be left without the protection afforded by the Torrens System of Land Registration after the property has been deregistered and returned to the system maintained by the Recorder. The Act makes clear that all the statutory protection afforded by the Torrens Law “have continuing force and effect with respect to the period of time that the title remained under the registry system. Those provisions giving rise to a right of action for damages against the county shall also continue in force and effect with respect to the period of time that title remained under the registry system.” To secure the continuing right of property owners and other interested parties to this protection, the Act requires that the Torrens indemnity fund maintained by the county pursuant to Sections 99 through 103 of the old Torrens Law be maintained until July 1, 2037. The 2037 date is 40 years

beyond which the last parcels of land should have been deregistered and returned to the recording system. The Limitations Article of the Code of Civil Procedure places a 40-year limitation on claims to real estate (see Ill. Rev. Stat., ch. 110, par. 13-118); hence, the indemnity fund would have little relevance or usefulness after that date.

Office Procedure

After January 1, 1992, the procedure in the Torrens office will remain the same for those attorneys seeking to make adverse filings: the instrument or document intended as an adverse memorial (such as a lis pendens notice, mechanic's lien, memorandum of judgment, etc.) will have to be presented to and examined by a Torrens Examiner for sufficiency before it is accepted for memorializing, the regular filing fee will be collected and the memorial will be entered on the existing Torrens Certificate.

On the other hand, the attorney handling a Torrens closing, attempting to register a sheriff's deed, or seeking to file an instrument to remove a memorial (such as release of a mortgage, satisfaction of a judgment, or redemption from a tax sale) will be faced with deregistration before he can complete his transaction. It would be wise to notify the Torrens Office as far in advance as possible before presenting any voluntary instrument for registration. The following information will be requested by the registrar upon notification:

- (a) Permanent Real Estate Index Number;
- (b) Torrens Certificate Number;
- (c) Name of the Grantor;
- (d) Date of the last Torrens filing (if known); and
- (e) Intended date of filing.

The Torrens Office requests 30 days prior notice in writing or by phone of the intended date of filing. Within that time the Torrens Office should have prepared the Original Torrens Certificate or the Certification of Condition of Title (called the "Yellow Sheet") for recording. When the attorney appears at the Torrens Office on the appointed date with the voluntary instrument, he will be asked to pay the fee for recording the Original Torrens Certificate or Yellow Sheet as well as the instrument he is leaving with the Registrar for recording, both of which will be recorded in tandem by the Torrens staff person. It should be noted that no examination is made by the Torrens Examiner or other staff person of the deed or other voluntary instrument for legal sufficiency or other effect. Once the Certificate or Yellow Sheet is recorded, the property has been removed from the Torrens System and the subsequently recorded voluntary instrument carries no guarantee or other assurances under the newly recorded Torrens Certificate; therefore, title insurance may, and probably should be purchased to cover the subsequent transaction.

Special Problems

Deregistration procedure during the first five-year period is straightforward and fairly simple; in most cases it should be painless and smooth. There will be special problems,

however, in some cases. These include those in which Torrens Certificates are hopelessly defective (often referred to as "cripples"): those in which title problems in the past had never been tended to, and which may require court proceedings to untangle. It is anticipated that in some few cases, proceeding under Section 94 of the old Torrens Law (Ill. Rev. Stat., ch. 30, par. 131) may become necessary to establish clear title before deregistration takes place. In such cases, no Owner's Duplicate Certificate will have been issued, so the owner, his attorney or both should know in advance that deregistration may become more time-consuming and costly.

Condominiums are a special case: if an adverse instrument is submitted for registration against condominium units, it should be accepted and noted as a memorial only as against the unit or units affected; if a deed or other voluntary instrument is submitted that affects fewer than all the units, the unit or units so affected will be the only ones deregistered, regardless of the fact that each unit carries with it a percentage interest in the common elements of the entire condominium development. Conversely, if an amendment to the condominium declaration, or some other voluntary instrument that affects all the units is being submitted, the Registrar will be required to deregister the entire development, with a recording charge being made for each unit being deregistered.

In the overwhelming majority of cases in which a voluntary instrument is being submitted that will trigger deregistration, the owner or owners or their representatives should be aware that their property is being deregistered. There are other special cases, however, in which the owner may not become aware of the deregistration. This often occurs in those cases in which an institutional lender packages groups of mortgages in its portfolio and sells them on the secondary mortgage market. Although the assignment of each of those mortgages has the mortgagor's advance consent in the mortgage document itself, the owner may not have actual notice when the mortgage is sold and assigned, especially in those cases in which the original mortgagee continues to service the loan on behalf of the new assignee; either the assignor or the assignee will pay for recording the Torrens Certificate or Yellow Sheet along with the mortgage being assigned, so the mortgagor need not be notified of the assignment.

In cases such as those described above and in those cases in which a mortgage release is tendered by a lender or a title insurance company a considerable period of time after a transaction has been closed and title has been transferred to a new purchaser, the Registrar will insist that the party tendering the mortgage assignment or mortgage release notify the current title holders that their property is about to be removed from the Torrens System. In order to be certain that such notice has been given before the assignment or release is accepted, the Registrar will require the party submitting the release or assignment to execute an affidavit in which it is represented that such notice has in fact, been given.

Other special problems will arise from time to time during the five-year deregistration process that have not been anticipated, either here or by the Registrar. The attorney confronted with some such special problem should seek the assistance of the Registrar or her Chief Examiner of Torrens Titles, both of whom are, not only willing, but eager to help.

Conclusion

And so we witness the passing of the Cook County System of Land Registration — the Torrens Title. It was well conceived and created to fill a very real need caused by the Chicago Fire. It served that need quite well for the better part of the century of its existence; but as it aged, the System failed to keep pace with a more demanding marketplace, or to adjust to the world of automation. The pressing need it had served in times past faded, mainly because of Limitations statutes. It became more

and more of a burden on the citizens it had been created to serve, so it is now being permitted to fade away gradually.

Those of us who have enjoyed its benefits and suffered its burdens in the past will witness its passing without tears or regrets; yet not with jubilation, but with the quiet respect and high regard with which we would witness the passing of a once-great man who became senile in his old age.

We are soliciting ideas for possible subjects for future *TITLE ISSUES*. If you are interested in submitting ideas for subjects, complete the form below and submit to:

Chicago Title Insurance Company

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