STATE OF CALIFORNIA

STATE LANDS COMMISSION

LAND TITLE LAW

OF

STATE OF CALIFORNIA

JANUARY, 1953

STATE OF CALIFORNIA
STATE LANDS COMMISSION

REPORT ON
LAND TITLE LAW
OF
STATE OF CALIFORNIA

Pursuant to the Budget Act of 1949
and
Section 6211 of the Public Resources Code

JAMES S. DEAN, *Chairman*
GOODWIN J. KNIGHT, *Member* ROBERT C. KIRKWOOD, *Member*
RUFUS W. PUTNAM, *Executive Officer*

JANUARY, 1953

TABLE OF CONTENTS

		Page No.
PART I - SUMMARY AND RECOMMENDATIONS		
Chapter 1:	Introductory	1
Chapter 2:	Conclusions	6
Chapter 3:	Recommendations	9
PART II - REGISTRATION IN CALIFORNIA		
Chapter 1:	Introductory Materials - Registration System	12
Chapter 2:	Procedure Involved in Initial Registration of Title	23
Chapter 3:	Procedure Involved in Subsequent Dealings with Registered Lands	51
Chapter 4:	Effect of Registration of Property under Torrens System	73
Chapter 5:	Operations	80
PART III - RECORDATION IN CALIFORNIA		
Chapter 1:	Introductory Material	85
Chapter 2:	Instruments which are Authorized to be Recorded	106
Chapter 3:	Time and Place of Recording	151
Chapter 4:	Manner of Recording	162
Chapter 5:	Prerequisites to Recording	173
Chapter 6:	Effect of Recording - In General	185
Chapter 7:	Effect of Recording Unauthorized, Void, or Defectively Acknowledged Instruments	192
Chapter 8:	Effect of Errors in the Instrument or Process	207
Chapter 9:	Effect of Recording Instruments Not in the Chain of Title	220

TABLE OF CONTENTS

		Page No.
Chapter 10:	Matters of Which Record Imparts Notice	234
Chapter 11:	Effect of Failure to Record	241
Chapter 12:	Title Insurance	256
Chapter 13:	Operations	279
PART IV - CONCLUSIONS		
Chapter 1:	Defects in the Torrens System in California	284
Chapter 2:	Defects in the California Recording System	288
Chapter 3:	Features of Good Land Title Systems	296
Chapter 4:	Methods for Improvement in California Systems	302

Chapter 1: INTRODUCTORY.

A. AUTHORITY.

For some years past the Assurance Fund established under the provisions of the previously enacted laws for the certification of land titles has been overdrawn as the result of a court decree. Applications for original certificates of title have ceased to be made, and the holders of a large number of certificates have found themselves with no financial protection as far as the registration system is concerned. Feeling that the circumstances warranted remedial action and that the participants in the State's land title registration system were possibly entitled to some form of relief, the State Legislature directed that the survey on which this report is based be made and provided funds for the purpose. This was accomplished by the following item contained in the Budget Act of 1949:

> "For comprehensive survey and report with recommendations to the Legislature on the land title law, commonly called the Torrens Title Law, Division of State Lands, Department of Finance, payable from the State Lands Act Fund ---------- 10,000"

Section 6211 of the Public Resources Code of the State of California reads as follows:

> "Land titles: Inspection and investigations: Reports and recommendations. The Commission may, not more often than once in two years, inspect and investigate conditions in the various counties in respect to land titles. It shall annually report thereon to the Governor and shall, prior to each regular session, report to the Legislature, making such recommendations as it deems proper and necessary. The commission may consult with and advise county registrars of land titles and make such suggestions and recommendations to them as it deems desirable."

Therefore, under the authority and by direction of the two foregoing legislative enactments, this report is submitted.

B. PROCEDURE IN REGISTRATION OF TITLE.

The procedure followed in registering real property in California and in obtaining a certificate of title therefor is similar to that used in an ordinary civil court action. It requires the filing of a petition, similar to a complaint, the giving of notice to interested persons by personal service or by publication, a court hearing similar to those in ordinary court actions, and a decree rendered by the court and entered in the same manner as a judgment. A decree results which purports to be a conclusive determination of all persons' interests in the property.

The decree orders the Registrar of Titles to issue a certificate of title which states who owns the property and what interests others have in it. It lists all proven liens, encumbrances and other charges against the land.

After property has once been brought under the provisions of the Land Title Law, subsequent transfers of that property are made by filing the deed with the Registrar, together with the duplicate of the certificate of title, and having a new certificate issued by the Registrar.

C. LEGISLATIVE HISTORY.

In 1893 the State Legislature provided for a Legislative Commission of five members, with instructions to examine and report on the Torrens land title act of Australia. As a result there was approved on March 17, 1897, an act "for the certification of land titles and the simplification of transfer of real estate." This law lay dormant for eleven years, the first certificate thereunder being issued in 1908.

The "McEnerny" or "Burnt Records" Act of 1906 accounts for some of the inertia that prevailed, as this law provided a means of establishing ownership of land by judicial procedure where the public records had been destroyed by the San Francisco fire.

The registration system did not really become active in California until a new Land Title Law became effective in 1915 as the result of an initiative measure enacted at the general election of November 3, 1914. While this act has been supplemented in certain minor respects, it has been amended only once. Chapter 293 of the Statutes of 1949, providing for the withdrawal of lands from the registration system, was approved at the general election of 1950. Since the basic law is the result of an initiative measure, amendments likewise require a vote of the people at a general election. The enactment of amendments is thus slow and cumbersome.

D. PRESENT STATUS OF LAND TITLE SYSTEM.

The constitutionality of California's original Land Title System was sustained in the courts in the case of Robinson vs. Kerrigan, 151 Cal. 40, 90 P. 129 (1907). Subsequent cases have appeared to assume the applicability of the decision in that case to the new statute of 1915. There have been a number of court decisions, however, which have tended to weaken the validity of a certificate of title. With reference to this situation, Professor Richard R. Powell, in his book entitled "Registration of the Title to Land in the State of New York", states that:

> "...reliance upon a certificate of title was unsafe if (a) some holder of a record interest at the time of registration had not been joined; or (b) the petition failed to reveal that the lands were tidelands so as to make the joinder of the state a necessary

act; or (c) an inspection of the premises would put one upon notice as to outstanding rights; or (d) if there were irregularities in the registration proceeding. ..."

The almost complete cessation of activity in the California Land Title System came as the result of the case entitled Gill vs. Frances Investment Company. A certificate of registration had been issued on certain property which had appeared to be unincumbered. A mortgage had existed, however, which was later enforced against a subsequent transferee who brought suit against the State Assurance Fund. A judgment was obtained against the fund in 1937 in the amount of $48,000, plus interest at 7%, which not only exhausted the fund but also left a deficit which, with accrued interest, amounted to $7,921.21 on June 30, 1952. Reports have indicated that between 1937 and 1949 only four original certificates of title had been issued in the entire state, the latest registration being in 1945.

On January 10, 1952, the Division of State Lands advised the Governor (pursuant to the provisions of Section 6211 of the Public Resources Code) that reports of activities from the twenty-one counties of the state in which the registration system was in effect showed total issuances of certificates of title as follows:

Alameda	213	San Bernardino	17,617
Fresno	131	San Diego	11,168
Humboldt	452	San Francisco	34
Imperial	80	San Luis Obispo	9
Inyo	5	Santa Barbara	1,629
Kern	227	Santa Cruz	693
Los Angeles	219,222	Sierra	8
Merced	1	Sonoma	1,307
Mono	5	Tulare	142
Orange	14,582	Ventura	7
Riverside	453		

Thirty-seven counties have reported as having had no transactions whatever under the Land Title Law.

E. CONDUCT OF SURVEY.

Item 26 of the minutes of the meeting of the State Lands Commission of December 21, 1949, reads in part as follows:

"The Commission was informed that in accordance with the authority granted the State Lands Commission by way of a special legislative appropriation for the purpose, the Executive Officer recommends that the Commission's mandate to make a 'comprehensive survey and report on the Torrens Title Act of California' to the Legislature, be carried out by means of written reports to the Commission by qualified experts in the field of land registration and recording systems.

"For this purpose it is proposed that the surveys be conducted and the reports be prepared as follows:

1. Field surveys and compilation of statistical and procedural data will be conducted:

   a. State of California, by Division Staff.
   b. Cook County, Illinois, by Illinois Attorney.
   c. State of Massachusetts, by Massachusetts Attorney.

2. Consultation and general supervision over field surveys and compilations, by Massachusetts Attorney.

3. Compilation of legislative history, and review and analysis of laws and court decisions:

   a. For California, by School of Law, University of Southern California.
   b. For Illinois and Massachusetts, by Massachusetts Attorney.

4. Conclusions:

   a. Main features of good forms of recordation and registration systems, by Massachusetts Attorney.
   b. Applicability to California, by School of Law, University of Southern California.

5. Recommendations: by State Lands Commission and Division Staff.

"To effectuate the foregoing program, it is proposed to contract for the services of Mr. James C. Short of Chicago, Illinois, an attorney of over 20 years' experience in Cook County where the Torrens system has been used extensively. To him will be assigned the field survey and compilations for that area.

"The field surveys and compilations for the State of Massachusetts and the operations called for in Items 2, 3b, and 4a above are proposed to be contracted for with Mr. Nathaniel C. Bidwell of Boston, Massachusetts. Mr. Bidwell is a former Assistant Attorney General of that State and has had a long experience in land title matters there. The State of Massachusetts is known to be outstanding in its land title laws and their administration.

"At the suggestion of the Commission at its meeting of November 21, 1949, conferences were had with the Dean of the School of Law, University of Southern California, with regard to what portions of the entire study it might undertake. As a result the assignments in Items 3a and 4b were tentatively agreed upon."

By resolution the State Lands Commission approved the program and authorized the negotiation and execution of the necessary contracts. The studies assigned were duly made, and reports rendered. The report of the University of Southern California, School of Law, was prepared by Miss Gertrude Greenard, Attorney at Law, and edited by Professor Moffatt Hancock; all of it is reproduced in this report. The other reports have been thoroughly reviewed and form the basis of some of the conclusions made.

Chapter 2: CONCLUSIONS.

A. RECORDING SYSTEM.

In the reports made by the School of Law, University of Southern California, and by Mr. Nathaniel C. Bidwell it has been emphasized that no registration system could operate successfully and efficiently in the absence of a good recording system. This is for the reason that the latter forms the basis for the title search and the preparation of an accurate abstract of title which is a most important prerequisite to the issuance of a certificate. The following conclusions may be drawn from the material in these two reports regarding the more important defects in the California system of recording:

1. Grantor-grantee index books in use by Recorders require exhaustive and cumbersome searches through a chain of transactions and former owners to determine with reasonable accuracy the history of title to a piece of property and encumbrances of record against it. The chances of errors and omissions are many.

2. No legal description is contained in the index, making it necessary for each document given by any one in the chain of title to be examined to determine its effect, if any, on the property in question.

3. Important records are kept separately in various offices other than that of the Recorder. The County Clerk's office must be consulted, and the County Tax Collector's office; also the records of the Probate and Bankruptcy Courts, and the assessment offices. This situation leads to omissions and inaccuracies, and is cumbersome.

4. A grantee is required to search all deeds in the record executed by the grantor which convey neighboring lands to discover restrictions against the land the grantee acquires.

5. The records in the Recorder's offices in the larger counties are bulky and voluminous, making the title search process a cumbersome one.

6. Adverse possession, lack of capacity, and fraud are not a matter of record.

B. REGISTRATION SYSTEM.

As to the registration system, the reports of those employed to make the survey lead to the following conclusions as to its important defects:

1. The State Assurance Fund has been proven to be vulnerable and will continue to be so as long as it attempts to insure the original certificate of title as well as errors that occurred following

original registration, as long as it has to cope with increased valuation with no increase in contribution to the Fund, and as long as determination of the issuance of a certificate of title rests upon abstracts that are based upon a faulty recording system.

2. The Land Title Law provides for inadequate fees to support the system, thus contributing to the tendency to employ insufficient and unskilled personnel to operate it.

3. The statutory requirement of a contribution of one one-tenth of one per cent of the assessed valuation of the property at the time of its registration resulted in an assurance fund that was too small to carry the obligations that it was called upon to meet.

4. Sufficient doubt exists about the validity of a certificate of title to have resulted in examinations of title going back of the last certificate even though the Land Title Law is to the contrary.

5. The Land Title System entails the filing of more documents in a transaction than does the Recording System, and more elaborate records must be kept in the Registrar's office; consequently the probability of occurrence of errors is greater.

6. A certificate of title merely shows a summary of encumbrances; in many instances reference to the actual documents (on file with the Registrar) and their interpretation by an attorney is necessary.

7. Property may not be acquired by adverse possession under the registration system once it has been registered. The Massachusetts Land Title Law permits such form of acquisition.

8. Through fraud and defects in the original registration proceedings a purchaser of registered property may be subject to interests which do not appear on the certificate. He may also suffer loss through a forgery of his certificate of title.

9. A certificate of title issued subsequent to an initial certificate cannot have the legal status of the first one, which has the backing of a court decree, because it is based upon an interpretation by the Registrar of documents filed with him.

10. Costs to the owner of a parcel of land that is under the registration system, for services and protection equivalent to that afforded by the recordation and land title insurance system, are equal to and often greater than the costs of the latter; in addition there is a substantial subsidy of public funds.

Chapter 3: RECOMMENDATIONS.

It is apparent that in equity to the large number of holders of certificates of title issued under laws which created a faulty system, some action should be taken by way of a remedy. Only two alternatives appear to be practical: Either abolish the Land Title System entirely, by appropriate means; or provide for a new system, with the defects in the present one removed, to which certificate holders under the existing system could transfer. What are believed to be appropriate steps to accomplish either alternative are discussed in what follows:

A. ABOLISHMENT OF LAND TITLE SYSTEM.

The existing Land Title System has resulted in the issuance of over 270,000 certificates of title, both original and subsequent, with probably about 70,000 parcels of property involved. Voluntary withdrawal from this system has been provided for by Chapter 293, Statutes of 1949. By following the procedures set forth in that act, paying the Registrar a fee of $10 for services rendered by his office, plus the Recorder's fees for recording and indexing a certificate of discharge and the cancelled last certificate of title, an owner will have withdrawn his property from the Land Title System and the fact thereof will have been recorded. Whatever protection the Land Title System afforded parties of interest in the property up to the time of recording of the withdrawal is to remain unimpaired. Withdrawals are being made at the rate of approximately 2000 parcels per year currently.

This process may be considered to be the equivalent of a voluntary transfer to the Recording System. If nothing further is done by way of legislation and a referendum it may reasonably be expected that a complete transfer to the Recording System would result in perhaps fifteen to twenty years. This would be the simplest solution to the problem of abolishing the Land Title System, but it cannot be recommended because of the large loss in public funds resulting from continuing the present system over that length of time. Annual losses are currently well in excess of $100,000.

The mechanics of abolishment of the Land Title System might best be put into operation through passage of a bill by the State Legislature and its subsequent approval by the voters of the State at a general election. Such a bill should provide for the act to become effective at some date well into the future, perhaps five years after the date of the general election at which it is approved. This is for the purpose of providing ample notice to all parties at interest and to allow sufficient time for the processing of all withdrawals from the system.

Making such withdrawal or transfer mandatory might be claimed to have deprived holders of certificates of title of rights or privileges without just compensation. However, in view of the condition of the Assurance Fund and of the other defects previously noted in this report, it is difficult to see how any future transactions under the existing system can be proven to possess anything more of value than would be the case were that system abolished.

Actual termination of the system might be effected by a provision in the bill which would discontinue completely the issuance of certificates of title

of all kinds as of the selected effective date. Care should be taken not to impair or diminish rights of all parties of interest in the properties involved as such rights existed at the time of withdrawal.

B. TRANSFER TO REVISED LAND TITLE SYSTEM.

Consideration has been given to correcting the defects in the existing Land Title Law by amendment of that law itself. It might be possible to do this, but there appear to be too many practical difficulties. If, for instance, the law were to be amended so that the Assurance Fund would protect only against errors arising subsequent to the issuance of the original certificate of title, it might well be claimed that certain present holders of certificates had been deprived of protection against errors in the original certificate. A change in the schedule of fees or in the amount required to be paid into the Assurance Fund might be handled by amendment, but there would result the problem of what to do with present certificate holders.

These and other similar complications lead to the conclusion that it would be better to provide for termination of the present Land Title System in the manner suggested in "A" of this chapter, above, and for transfer to the Recordation System or to a new Land Title System at the option of the holders of existing certificates. All new registrations would come directly under the new system.

If this alternative is to become a reality, an entirely new land title law should be drafted. It could contain many of the provisions of the existing law, and should incorporate the following changes or additions:

1. The Assurance Fund should be applicable only for errors or omissions occurring after issuance of the original certificate of title.

2. There should be a limit as to the amount of liability in any one case, probably the assessed valuation of the interest or estate concerned at the time the loss occurred.

3. A charge should be made upon the issuance of each subsequent certificate of title for augmenting the Assurance Fund. This charge should be related to the assessed value of the property at the time of issuance of the subsequent certificate.

4. Fees for services performed by the Registrar's office should be more closely related to the costs of such services.

5. Examiners of title should be appointed by the Court, and should be paid out of funds accruing to the county out of fees for services rendered in the Registrar's office.

6. There should be a State Inspector of Land Title Registration in the Division of State Lands to carry out the specific duties assigned to the State Lands Commission in Section 6211 of the Public Resources Code and in particular to consult with county registrars of land titles and make such suggestions and recommendations to them as deemed desirable with a view to improving methods used and assigning adequate and competent personnel.

7. Provision should be made for referendum elections in each county so that the voters in each can decide for themselves which alternative should prevail within the county.

In the report of Mr. Nathaniel B. Bidwell it was recommended that consideration be given to the creation of one or more Land Courts in California similar to that which has been in existence for over fifty years in Massachusetts. The jurisdiction of such a court is confined solely to land titles, and the members of the court and its staff are skilled and experienced in land title matters. While the principal activity of such a court is with respect to procedures related to land title registrations, all types of judicial actions involving land titles are handled, such as quiet title actions, foreclosure and redemption proceedings relating to tax titles, etc.

The creation of one or more Land Courts in California would require a major reorganization of the judicial system of the State, and it is believed that the results that would be obtained would not justify such action. Accordingly their establishment is opposed.

C. CHANGES IN RECORDATION SYSTEM.

As stated previously, no land title system can operate satisfactorily without a good recording system. Therefore, whether either of the foregoing alternates is ultimately adopted, certain changes are indicated in the laws of California pertaining to the recording of deeds and other instruments relating to real property. These changes can be accomplished without recourse to a referendum, as the basic laws were legislative enactments only. The changes recommended are:

1. Grantor-grantee indexes should show a legal description of the property involved.

2. Tract indexes should be provided so that all transactions involving a specific parcel of property would be listed on a page containing a legal description of the property involved.

3. All records of transfers of or encumbrances on property should be recorded in the same office, i.e., the Recorder's.

D. IN CONCLUSION.

Even though a new land title system is adopted with the revisions suggested in Section B of Chapter 3, above, it is not believed that it can be made to operate as effectively and economically as can the recordation system. It would be unwise to attempt to remedy the present unsatisfactory conditions by appropriating State monies to restore the Assurance Fund; the vulnerability of the fund would still exist. It is therefore recommended that the Land Title System of California, as provided for by the iniative enactment of November 3, 1914, be abolished, and that the State Legislature recommend to the electorate the adoption of a measure that will accomplish this end.

It would appear that those who own property for which certificates of title have been issued are not fully aware of the defects in the Land Title System and of the fact that the costs of supporting this system are greatly in excess of any benefits received. It is accordingly recommended that the SUMMARY AND RECOMMENDATIONS of this report be given wide distribution.

STATE OF CALIFORNIA
STATE LANDS COMMISSION

James S. Dean, Chairman — January 16, 1953 (Date)

Goodwin J. Knight, Member — January 17, 1953 (Date)

Robert C. Kirkwood, Member — January 17, 1953 (Date)

PART II

REGISTRATION IN CALIFORNIA

Chapter 1: INTRODUCTORY MATERIALS - REGISTRATION SYSTEM
(By University of Southern California)

I. HISTORICAL BACKGROUND

Contrary to popular belief the system of Registration of Titles as opposed to Recording of documents dealing with titles is of early origin. It has been discovered that such a system was in use in Bohemia in the 13th century.(1) Its modern use in Europe dates from 1836 and has been used to some extent in Germany, Austria, Hungary, Switzerland, and France. England adopted a Title Registration System in 1862, but it has not been used there to any great extent. The country of Australia adopted a compulsory system of Registration in 1858, through the concerted efforts of Sir Robert Torrens. Due to his active participation in connection with the Registration System it has been called the "Torrens System." This leads the majority of people to feel that the Registration system began in Australia originally, but as shown above its beginnings can be traced back to early days on the continent. Several Canadian provinces followed Australia in adopting the so-called Torrens System and its operation has been quite successful both in Australia and the Canadian provinces.(2)

Just before the turn of the century, writers in the United States became very interested in the Registration System as a method of Land Reform. Illinois adopted the first statute creating the Torrens System in the United States in 1895. Ohio, Massachusetts, and California then adopted the system at approximately the same time. At the present time there are 19 states which have adopted the Torrens System.(3) The system has not been well received by the general public in the United States and in many instances has functioned very poorly. This has been caused by many factors, such as the additional work involved; the refusal of the people to use the system due to ignorance and inertia; constitutional problems which are not present in the European countries and English Dominions, and finally, court decisions which have sapped the system of its effectiveness in achieving a system in which a certificate of title is conclusive evidence of title and can be completely relied on by the purchaser. These problems as they affect the functioning of the system in California will be discussed at length in subsequent sections of this paper.

II. LEGISLATIVE HISTORY OF THE CALIFORNIA LAND TITLE LAW (THE TORRENS ACT)

In 1893 a Legislative Commission of five was appointed "for the purpose of examining and reporting to the Legislature on the Torrens land transfer act of Australia."(4)

In 1897 the first Torrens statute was adopted in California. It was entitled "An Act for the certification of land titles and the simplification of the transfer of real estate."(5) The statute consisted of 116 sections. Only one case was decided under this statute. This was the case of Robinson v Kerrigan,(6) which upheld the constitutionality of the 1897 statute.

The 1897 statute was replaced by an initiative measure enacted by the people of the State of California at the General Election held November 3, 1914. The new statute, entitled the "Land Title Law" became effective in 1915.(7)

The 1915 statute revised the wording of the sections of the old statute and expanded some of them. The 1915 statute consists of 115 sections.(8) It has not been considered necessary to indicate the exact changes in each section of the statute since the 1897 statute has been completely superseded by the 1915 statute and only one case was decided under the 1897 statute. The discussion of this paper will be confined to the problems raised by the 1915 statute, entitled the "Land Title Law," with the exception of the discussion of this one case.

The 1915 statute was supplemented in 1917 by an act which defined the duties of the Surveyor General in respect to title registration and preparation of forms.(9)

Two statutes have been passed which affect the Land Title Law, but which do not actually amend the statute. These are Section 542 of the Code of Civil Procedure, which provides for certain notations which must be made when an attachment is levied on registered property,(10) and Section 1223 of the Probate Code which requires a court order to sell registered property issued in connection with a Probate proceeding to direct the Registrar to issue a new certificate of title.(11)

There had been no actual amendment or change in the 1915 statute until November 1950. At that time an election was held in which a measure was adopted by the People of the State of California amending the 1915 statute to allow persons whose property was registered under the Torrens Act to withdraw their property and return it to the General Recording System.(12)

III. CONSTITUTIONALITY OF THE CALIFORNIA LAND TITLE LAW

The constitutionality of the 1897 statute was challenged in the case of Robinson v Kerrigan(13) and upheld by the Supreme Court of California. The constitutionality of the entire system has never again been challenged and it has been assumed in the case of Frances Investment Co. v Superior Court(14) that the holding in Robinson v Kerrigan is applicable to the 1915 statute.

The grounds for attack in Robinson v Kerrigan were as follows:

1. The Land Title Law provides that service by publication in a newspaper for four weeks is sufficient to give notice of the pendency of registration proceedings to those persons who are unknown to the party seeking registration of his property, but who nevertheless have an interest in the property which it is sought to have registered. This provision of the Land Title Law was attacked as a violation of the United States Constitution

since it deprived persons of their property without due process of law and deprived persons of the equal protection of the law. The court in Robinson v Kerrigan answered this contention in the following manner:

> "The state has full control over the subject of the mode of transferring and establishing titles to property within its limits. For these purposes the state has power to provide a special proceeding, in the nature of a proceeding in rem, to fix the status of the land and declare the nature of the titles and interests therein and the person or persons in whom such titles and interests are at the time vested. It may do this wherever it may be considered necessary or likely to promote the general welfare."

2. In addition, the court found there was no violation of the separation of powers between the judicial and administrative departments of the state government. The court in determining title in the initial registration proceedings and settling disputes exercises a judicial function. The Registrar in his duties in connection with the details of the transfer of title to registered property exercises administrative functions. At times he may make what is in effect a judicial determination in connection with these duties, but it is merely incidental to his general administrative duties and does not violate the rule of separation of powers between the judicial and executive departments of government.(15)

3. Other minor questions involving constitutionality were disposed of summarily by the court. They included the question of whether the act embraced more than one subject in violation of Article 4, Section 24 of the California constitution and the question of whether the act is special.

Special provisions of the Land Title Law have been subject to attack on the basis of unconstitutionality. For example, the provision regarding Mechanics' Liens. These matters are discussed in subsequent chapters of this paper.

IV. OPERATIVE EFFECT OF THE CALIFORNIA REGISTRATION STATUTE

When the Torrens System was inaugurated in many countries including the United States it was thought that such a system would solve the difficulties encountered in connection with the recording system. Torrens, who originated the system in Australia, stated its purpose was "...to simplify, quicken and cheapen the transfer of real estate and to render titles safe and indefeasible."(16) The way in which it was hoped to accomplish these purposes can be illustrated as follows by reference to the operation of the California Torrens System.

An owner of property desirous of bringing such property under the Torrens System must first bring an action in the nature of a quiet title action in the Superior Court. A court action is required to comply with the requirement of the United States Constitution that no person may be deprived of his property without due process of law. This requires that

the owner of property be given proper notice, a hearing, and an opportunity to be heard before any final determination of title to that property is made. (17) A court decree is rendered settling all questions of ownership of the particular piece of property which it is sought to have registered. A certificate of title is then issued by the Registrar in the name of the owner of the property as determined by the court decree and the interests of other persons in the property as established by the court decree are shown on the certificate. The purpose of the court action is to settle the state of the title conclusively and the certificate issued by the Registrar showing such title is intended to be conclusive evidence of the state of the title.(18)

Any subsequent transactions dealing with registered property are required to be shown on the certificate. If they are not registered and do not appear on the certificate (with certain exceptions discussed below), a purchaser of the property would not be subject to these interests.

Theoretically, subsequent purchasers may rely completely on the state of the title as indicated by the certificate in the Registrar's office. In actual practice this has not proved true. The reasons for this are given below.

To illustrate the operation of the Torrens System in California let us take the following example:

P is desirous of purchasing Blackacre owned by O and registered in O's name. P has the legal description of the property and can check the property index in the Registrar's office to find the certificate of title issued for this property. He could check the name index under O's name and obtain the same information since the Registrar's office maintains both property and name indexes. The prospective purchaser then looks at the certificate of title and finds O is the owner, subject to an easement in favor of X, a mortgage in favor of Y and certain property restrictions in favor of Z. According to the theory and purpose of the California Torrens Act, P would be subject to these interests only, with a few exceptions listed in the Torrens Statute such as certain interests of persons in possession although unregistered, federal liens, taxes and assessments.(19)

This illustration shows the simplicity of the method of search involved. Compare it with the lengthy, cumbersome, archaic method of search used when property is recorded under the General Recording System. Here under the Torrens Registration System all encumbrances can be determined by a glance at a sheet in the Register of Titles. However, this has been criticized since the purchaser searching for the state of the title sees only a summary of the outstanding encumbrances. He does not see a copy of the instruments creating such encumbrances. This may be insufficient to give the purchaser all the information he actually needs or is desirous of having to obtain a complete picture of the state of the title.(20) In addition, it is still necessary to secure the services of an attorney to

determine the exact nature and effect of the encumbrances listed on the Torrens Certificate of Title.(21)

However, in spite of this one criticism of the Torrens System it is indeed a simplification of the method of transfer of real property. In that respect one of the purposes of the System has been accomplished.

In actual practice the California system has failed to accomplish its main purpose of making titles to land absolutely certain and making the certificate conclusive evidence of title. This is partly the result of certain statutory provisions contained in the California statute and partly the result of judicial decisions of the California courts.

The provisions in the statute which prevent the title from being certain and the certificate conclusive evidence of title will be considered first.

Section 34 of the Land Title Law states:

"The registered owner of any estate or interest in land brought under this act shall, except in case of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject only to such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office and free from all others, except:

1. Any subsisting lease or agreement for a lease for a period not exceeding one year, where there is actual occupation of the land under lease. The term "lease" shall include a verbal letting.

2. All land embraced in the description contained in the certificate which has theretofore been legally dedicated as or declared by a competent court to be a public highway.

3. Any subsisting right of way or other easement, created within one year before issue of the certificate upon, over, or in respect of the land.

4. Any tax or special assessment for which a sale of the land has not been had at the date of the date of the certificate of title.

5. Such right of action or claim as is allowed by this act.

6. Liens, claims, or rights arising under the laws of the United States, which the statutes of California can not require to appear of record upon the register."

The practical effect of this section of the Land Title Law is that a purchaser of registered land may not rely solely on the status of the title as it appears on the register. He must check records of the Tax Collector's office, inspect the premises to determine whether someone is in possession under a short term lease, check the Federal records for outstanding liens against the property and check for any highways created on this property. If he fails to make these investigations he will still be held to take title to the property subject to these interests which do not appear on the certificate of title. Therefore, it can readily be seen that the certificate of title does not give a true picture of the state of the title. The purchaser is not safe in relying on it completely.

In addition, a one year period is allowed after the issuance of the first certificate of title for persons claiming adverse interests in the property to assert interests which they were unable to assert during the registration proceedings for various reasons.(22) This makes the title of the registered owner inconclusive for one year and prevents the certificate from being a complete indication of the state of the title. These claims could not, however, be asserted against a subsequent bona fide purchaser of the property generally.

Of course, the decree of registration is subject to the period allowed for appeal from an ordinary judgment.(23) It could also be set aside on the grounds of fraud or mistake within the statutory time limit, although a bona fide purchaser of the property would be protected in such a situation.(24)

The judicial decisions which have contributed to the inconclusiveness of the certificate of title have been mainly the result of defects in the original registration procedure. As shown above, there is a statutory one year period for persons who have not had an opportunity to assert their interests, to attack the decree of registration. The most common example of this occurs when a person who claims an interest in the property is "unknown" and therefore, receives notice of the registration proceedings only by publication in a newspaper. If he does not actually learn of the proceedings until after the decree he has only one year in which to assert his interest and it is cut off entirely if the property is transferred to a bona fide purchaser. He would, of course, have recourse against the Torrens Insurance Fund.

The California courts have not stopped with this limited protection. In a series of decisions in which persons with interests in the property that was being registered were not given the <u>proper type of service</u> (i.e. personal service if occupants or known to the party registering the land), the courts have permitted these parties to attack the decree and assert their interests <u>at any time</u>. The one year provision has been held to be no barrier in this instance. In addition, the fact that the property involved has been transferred to a bona fide purchaser has not affected the situation, either.(25) In such a case, the property may be taken away from a bona fide purchaser. His only recourse is against the Torrens Title

Assurance Fund provided by Section 105 of the Land Title Law. Since the celebrated decision of Gill v Johnson(26) this fund has been bankrupt, leaving the purchaser with no recourse other than his normal right of action against his vendor.

It is no wonder purchasers are dubious about acquiring a Torrens Title. This leads to a consideration of the defects in the Torrens System.

V. DEFECTS IN THE TORRENS SYSTEM

The defects can be divided into two categories: Internal and External.

A. INTERNAL DEFECTS:

The system of registering the title requires voluminous records. A page is required for each lot and a new certificate is issued for each transfer and the old one cancelled but retained. In addition, it requires a great degree of clerical work to prepare the certificates and record the interests on every certificate that is issued. This involves risk of error by omission of essential data when transferring memorials from one certificate to another.(27)

The system of showing merely a summary of the encumbrances on the certificate of title is poor since it does not give a prospective purchaser an opportunity to see the record of the instruments creating these encumbrances.(28)

B. EXTERNAL DEFECTS:

The most important defect is the fact that the certificate does not show all interests to which the title is subject. A bona fide purchaser may lose title to the property because of failure to notify a party in interest in the initial proceedings when he should have been notified.

In addition, the title of an owner of registered property may be lost if a thief steals the duplicate certificate, forges the owner's name and transfers the certificate to a bona fide purchaser. In such a case by express provision in the statute the subsequent purchaser is protected and the true owner loses his property.(29) Recourse against the Assurance Fund it has been seen is inadequate.

The purchaser's title is subject to certain latent factors such as possession by a lessee, taxes and assessments not showing on the certificate, et cetera.(30)

To what extent the title is subject to other defects such as non-delivery of a deed in the chain of title or lack of authority of an agent involved in one of the transfers in the chain of title has apparently not been judicially determined in California. According to the purpose and

intent of the Torrens Act the subsequent purchaser should be protected as he is in a case where he purchases from a thief who has forged the owner's name.(31) For example: O is the registered owner of Blackacre and has agreed to sell it to P-1. The deed is put in escrow, but delivered to P-1 in violation of the escrow instructions. Then if P-1 has acquired the duplicate certificate and has a new one issued in his name he may transfer the property to P-2. In such a situation P-2 should be protected against O's claim that the deed was wrongfully delivered out of escrow. He should be permitted to rely on the certificate which P-1 has acquired made out to himself. Any other conclusion would violate the purpose of the Torrens Act which is to make the certificate "conclusive". However, this results in O's loss of his property through no fault of his own as is the result in the case of forgery. To this extent the Torrens System is defective since it permits loss of property in such manner without provision for sufficient recovery against the Assurance Fund. The owner is left to what recourse he has at law against P-1 who received the deed out of escrow improperly or against the escrow for violating escrow instructions.

It can be seen from this summary of the defects in the registration system that it has not solved the problems presented by the recording system and has created some new problems of its own.

FOOTNOTES to CHAPTER 1: INTRODUCTORY MATERIALS - REGISTRATION SYSTEM

1. Gage, D. D., Land Title Assuring Agencies (1937), Ch. XVI.

2. Ibid. Reeves, Alfred G., Progress in Land Title Transfer, 8 Columbia Law Review, p. 438.

3. Bordwell, Percy, Resurrection of Registration of Titles, 7 University of Chicago Law Review, p. 470; Myers, O. P., American Torrens Land Title System, 4 Iowa Law Bulletin 266; Bordwell, Percy, Registration of Title to Land, 12 Iowa Law Review, p. 114; Powell, Richard R., Registration of the Title to Land in the State of New York (1938) p. 54.

4. Cal. Stat. 1893, p. 121.

5. Cal. Stat. 1897, p. 138. This statute was approved March 17, 1897. See Wild's Annotations of the Torrens Land Title Law of California (1915) p. 19; Landels, Edward D., A Brief Review of the Torrens Experiment in the United States (1938) p. 9; Powell, Richard R., Registration of the Title to Land in the State of New York, p. 90, cited supra, footnote #3.

6. 151 Cal 40.

7. Cal. Stats. 1915, p. 1932; Deering's General Laws 8589. Powell, Registration of the Title to Land in the State of New York; p. 90; Landels, A Brief Review of the Torrens Experiment in the United States, p. 9; Wild's Annotations, p. 19. All these works were cited supra, footnote #5.

8. Ibid, Powell, p. 90.

9. Cal. Stats. 1917, p. 1668.

10. Cal. Stats. 1927, p. 853, amended by Cal. Stats. 1931, p. 1726.

11. Cal. Stats. 1931, p. 668.

12. Proposition 11, General Election, Tues. Nov. 7, 1950. It should be noted that since the original 1915 statute was adopted by Initiative all amendments thereto must be voted on by the people. See Article IV, Section 1, California Constitution.

13. 151 Cal 40.

14. 189 Cal 107.

15. See Powell, Registration of the Title to Land in the State of New York, p. 91 and 92, cited supra, footnote #3.

16. Thompson, Real Property (Perm. Ed.) vol. 8, sec. 4415.
Landels, A Brief Review, p. 7, cited supra, footnote #5.

17. Ibid, Landels, p. 11 and 12. Robinson v Kerrigan, 151 Cal 40, cited supra, footnote #13.

18. Ibid, Robinson v Kerrigan. Ogden, Outline of Land Titles (1947) p. 610.

19. Land Title Law, sec. 34.

20. Crouch, Winston W., Analysis of Measures on the Ballot, Nov. 7, 1950, prepared under a grant from the Haynes Foundation.

21. Landels, A Brief Review, p. 16, cited supra, footnote #5.
In this article reference is made to Gage's book, cited supra, footnote #1, in which the same comment is made.

22. Land Title Law, sec. 45.

23. Ibid, sec. 15.

24. Section 473 of the Code of Civil Procedure limits time within which a decree can be set aside for mistake to six months from date decree entered. Apparently, under Section 45 of the Land Title Law, one year would be the time limit for setting aside a decree of initial registration based on mistake. When the basis is fraud apparently a longer time limit is given. Section 338 of the Code of Civil Procedure would apply in such a situation giving three years from discovery of the fraud within which to bring the action. The basis for this is that fraud is made an exception in Section 34 of the Land Title Law, whereas mistake is not. This provision states: "In case of fraud, any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act..."
See In re Sackett, 53 Cal App 592; Cooper v Buxton, 186 Cal 330.

25. Newcomb v City of Newport Beach, 7 Cal (2) 393; Moakley v L. A. Pacific Ry. Co., 99 Cal App 74; Swartzbaugh v Sargent, 30 Cal App (2) 457; Follette v Pacific Light & Power Corp., 189 Cal 193.

26. 21 Cal App (2) 649. See Ogden, Outline of Titles, p. 611, cited supra, footnote #18. Also, Wild's Annotations, p. 18, cited supra footnote #5.

27. 7 California Law Review, p. 75.

28. See supra, footnote #20.

29. Land Title Law, sections 38 and 60. If a forged deed is transferred by X to A without the duplicate certificate, A would not be protected.

If he, however, transferred the property to B, a bona fide purchaser, B would be protected, according to the wording of Section 38. If A receives the duplicate certificate, also forged, he will then be protected under Section 60 since he has the right to rely on such duplicate certificate. See 7 California Law Review, p. 81 for a discussion of such a situation.

30. Land Title Law, section 34.

31. See Beale, Joseph H., Registration of Title to Land, 6 Harvard Law Review, p. 369, in which it is shown how the Torrens System should deal with the off the record risks inherent in the Recording System. See also Patton, R. G., Torrens System of Land Title Registration, 19 Minnesota Law Review, p. 534. There seems to be no California authority on these questions and therefore, any conclusions must be conjecture.

Chapter 2: PROCEDURE INVOLVED IN INITIAL REGISTRATION OF TITLE
(By University of Southern California)

I. INTRODUCTION

The procedure followed in registering property under the Land Title Law is similar to that used in an ordinary civil action.(1) It requires the filing of a Petition, similar to a complaint, the giving of notice to interested persons by personal service or by publication service, a hearing similar to a hearing in an ordinary action, and a decree rendered by the court and entered in the same manner as a judgment. The proceeding is by nature similar to a quiet title action and results in an in rem decree which is said to be a conclusive determination of all persons' interests in that property. In spite of the fact that the Land Title Law declares that the decree is conclusive there have been various court decisions in which the decree has been set aside or held not to be binding on certain parties. This problem which is the major one in connection with the Torrens system is considered in detail in Chapter 4.

The decree which is granted orders the Registrar of Titles to issue a certificate of title which states who the owner of the property is and what interests other persons have in the property. It lists all liens, encumbrances, and charges against the land. This certificate is declared to be conclusive evidence of title. In actual practice, however, the certificate has not been treated as conclusive and the courts have permitted certain parties to assert interests in the property whose interests did not appear on the face of the certificate. To the extent that this has been permitted the Land Title Law has not been achieving its purpose of giving absolute certainty to the ownership of real property.

A judicial proceeding as outlined here is necessary to meet the constitutional requirement of due process as was discussed in Chapter 1.

After property has once been brought under the Torrens System the subsequent transfers of that property are made by filing the deed with the registrar, together with the duplicate certificate, and having a new certificate issued by the registrar. Chapter 3 discusses this in detail.

The various steps which must be followed in the initial registration of land and the various problems that arise in connection therewith will be discussed in detail below.

II. THE PETITION

The first step in obtaining registration is the filing of the Petition. This will be discussed under the following topics:

1. Form and Contents of the Petition
2. Additional Documents Filed with the Petition

3. What Persons May File Petition.
4. What Types of Interests in Land May be Registered.

A. FORM AND CONTENTS OF THE PETITION

The petition which is required to be verified is addressed to the Superior Court of the County within which the property is situated and is filed with the County Clerk. If the land constitutes a single parcel but lies partly in two or more counties one petition may be filed covering the entire parcel. This may be filed in either county in which the land lies, but the certificate which is subsequently issued covering the property must be filed with the Registrars of all counties within which the land is situated.(2)

The petition must contain the following information:(3)

1. Name, occupation, residence, post-office address of applicant.

2. If applicant represented because of any disability, name, occupation, residence, post-office address of person representing him and reason for representation.

3. If application is by corporation, its name, when and where incorporated, its principal place of business, names and addresses of president and secretary, and if none, of its executive officers.

4. Whether or not applicant is married. If married, name and address of husband or wife. If unmarried, how marriage relation terminated and if by annulment or divorce where and by what court.

5. That applicant is 21 and free from disability. If under disability, state age or other disability.

6. Description of the land.

7. Value at which land and permanent improvements assessed at last assessment for county tax.

8. If any petitioner claims title individually, separately from others, the particular land which he claims must be set forth separately.

9. Statement of the interest each petitioner has in the property, whether it is community property or subject to a homestead.

10. Statement of any easement, lien, or encumbrance against the property, nature and amount of lien, and book and page of record if recorded.

11. Statement of whether land occupied or not.

12. Persons who must be named in the petition are as follows:

a. Names and addresses of persons claiming easement, lien, or encumbrance.

b. Name and address of occupant of the property and statement of any interest he claims.

c. Name and address of owners of adjoining lands, so far as this can be ascertained by a diligent inquiry.

These will be the necessary parties defendant in the action which is begun by this petition.(4)

13. Section 6 of the Land Title Law requires the petition to show the character of possession if the petitioner claims title by adverse possession.

14. Section 6 of the Land Title Law requires a statement of what claims the petitioner has in a public or private way if the property he owns is bounded by such a way. Also, whether the petitioner desires to have the line of the way determined.

B. ADDITIONAL DOCUMENTS FILED WITH THE PETITION

When the petition is filed it is required to be accompanied by the following documents:(5)

1. Plat or plan of survey

2. Abstract of title

Where no map is on file with the county recorder, a plat or plan of survey of the land made by the county or licensed surveyor must accompany the petition. If a map is on file a reference to such map in the petition is sufficient.

An abstract of title must accompany the petition. The abstract need only go as far back as the date of a decree of a court determining the title to such property or to the date of issuance of a policy of title insurance.

The abstracts must be verified by the searcher making them.

When title is claimed by adverse possession an abstract need not be filed with the petition. The court may on the hearing require such abstract, however.

C. WHAT PERSONS MAY FILE PETITION

Section 5 of the Land Title Law provides that a petition may be filed by the owner or owners of any estate or interest in land whether legal or

equitable. An exception is made in the case of the owner of an undivided share or an easement.

In certain situations specific persons are designated to file the petition. These are as follows:(6)

1. If the application is made by husband and wife and the property is community property both husband and wife must join in the petition.

2. If the property is collectively owned by several persons, they all may join in the petition.

3. If the property is owned by a corporation, the petition may be filed by an agent of the corporation.

4. If the property is part of the estate of a deceased person, the petition may be filed by the administrator or executor of the estate.

5. When the property is owned by a minor or other persons under disability, the petition may be filed by the guardian, but in the name of the person who is the owner of the property.

The owner of several pieces of property which are contiguous may include them all in one petition.(7) It would seem that the same would be true of the owner of several pieces of property that are <u>not</u> contiguous.(8)

Several persons owning parcels of land individually may join in the petition for registration. For example, if A owns Lot #1 and B owns Lot #2 adjacent to Lot #1 and C owns Lot #3, adjacent to Lot #2, they may all join in a petition to have their property registered under the Torrens System.(9) It would seem that the land need not necessarily be contiguous.

A person who is out of possession may petition to have the title to the property registered. In the registration proceedings the court may determine the applicant's right to possession and may order that possession be delivered to the petitioner and may then order the property registered under the Land Title Law.(10)

Although Section 5 of the Land Title Law allows the owner of any estate or interest in land to register that interest, only the owner of a <u>fee</u> interest may obtain the <u>initial</u> registration. Section 7 states: "No mortgage, lien, charge, or lesser estate than a fee simple shall be registered unless the fee simple to the same land is first registered."

For example, O is the owner of Blackacre and has mortgaged it to M, the mortgagee. If O has not registered the property, M has no right to petition for registration. If O has registered his property, M will be given notice and his mortgage will be shown as a memorial on the certificate of title issued to O. If the property is registered and the mortgage is given later, the

mortgage will then be registered upon the filing of the mortgage and the production of the owner's duplicate certificate of title. The registration consists of the writing in of a memorial on the original certificate of title stating the existence of the mortgage. This is done by the registrar when the proper documents are presented to him. See Chapter 3 for a discussion of these transactions occurring after the initial registration of title.

D. WHAT TYPES OF INTERESTS IN LAND MAY BE REGISTERED

The Land Title Law permits the owner of any estate or interest in land to be brought under the Torrens System. An exception is made in the case of an owner of an undivided share or an easement. However, the statute refuses the registration of a mortgage, lien, charge, or lesser estate than a fee simple unless the fee simple to that land is first registered.

There have been several important decisions interpreting these code sections. They have considered the question of whether certain types of interests in land may be registered. These interests may consist of equitable rights to set aside documents, interests in land acquired by adverse possession, et cetera. These various decisions will be discussed below.

1. REGISTRATION OF FEE INTERESTS SUBJECT TO A LESSER ESTATE IN ANOTHER PERSON

It is elementary, of course, that the petitioner must show some title in himself, whether it is derived through a conveyance or acquired by adverse possession. If he fails to show such title, he has not brought himself within the provisions of the Torrens Act.(11)

More complex problems arise when an attempt is made to register land which is subject to rights in other parties. For example, O is the owner of Blackacre, but the property is subject to a lease in favor of L for five years, a mortgage in favor of M, and an easement for purposes of a road in favor of X. According to Section 7 of the Land Title Law, O may register his land even though it is subject to these various interests. Section 7 reads as follows: "...(a) It shall not be an objection to bringing land under this act, that the estate or interest of the applicant is subject to any outstanding lesser estate, mortgage, lien, or charge; but every such lesser estate, mortgage, lien, or charge shall be noted upon the certificate of title and the duplicate thereof, and the title or interest certified shall be subject only to such estates, mortgages, liens, and charges as are so noted, except as herein provided."

The case of In re Waltz(12) involved the following situation concerning this problem. O, owner of Blackacre, conveyed the property to P, who is petitioning to have the property registered under the Torrens Act. In the conveyance to P, however, O reserved the right to dig for oil and petroleum. It was held in this case that P was entitled to register his interest in the

property even though it was subject to a lesser estate in favor of O. This is in accord with Section 7 of the Torrens Act quoted above. Of course, the certificate issued must state the interest which O has reserved in this property.

It is interesting to note that the English Land Title Act(13) makes specific provision for the registration of the title to the surface land and registration of the title to the minerals separately. The California statute does not provide for such a situation, but by judicial decision in the case of In re Waltz it has been held that these interests may be registered separately. Therefore, the same result is achieved in California by court decision as is achieved in England by statutory provision.(14)

2. REGISTRATION OF PROPERTY ACQUIRED BY ADVERSE POSSESSION

The petitioner need not rely on a conveyance to prove his title, but may register a title derived through adverse possession.

The Land Title Law, Section 6, requires the petitioner in such a case to plead and prove the elements of adverse possession in order to show the court that he has met the requirements of the California codes for acquisition of title by adverse possession. If he is able to prove these elements he has a title which may be registered. It is, therefore, advisable to discuss at this point the method of acquiring title by adverse possession.

Title to property in California may be acquired by occupancy for the period prescribed as sufficient to bar any action for the recovery of the property.(15) This period of occupancy must be five years next preceding the action for recovery of the property or the action to register the property. Taxes must have been paid by the claimant or his predecessors during this time.(16)

The type of occupancy or possession which must be shown is very important:

a. If the occupant entered the premises under a claim of title founded on a written instrument (e.g. a deed or judgment of a competent court) he may show as a sufficient possession either of the following:

   1. Cultivation or improvement of the property.

   2. Fencing in the property.

   3. Use for pasturage and other ordinary use by the occupant.

   4. Where part of a known farm or single lot has been partly improved and the remainder of the lot left uncleared the occupant is treated as being in adverse possession of the entire farm or lot.(17)

b. When the occupant does not rely on a written instrument but has been

in possession claiming title for the requisite amount of time he may claim title to the part of the property he has been in actual possession of by cultivating, improving, or fencing in the property.

Possession in this case consists of cultivating, improving, or fencing in the property.(18)

In addition, the claimant must show he was in exclusive possession not sharing it with the true owner. The acts of occupancy must have been done openly, not in a clandestine manner. For example, one who entered another's property secretly under cover of darkness to pick crops or dig for minerals from time to time has been held not to have acquired title by adverse possession.(19) Of course, the possession must be adverse to the true owner. If it is consented to it cannot be made the basis of the acquisition of title. The possession must be continuous for the statutory period either by the claimant or his predecessors.

The final requirement is that the claimant or his predecessors paid the taxes assessed against this property for the five years during which the land was adversely occupied. If it is shown that taxes for one part of the area claimed have not been paid, although taxes assessed against the rest of the area have been paid the occupant may only claim title to the area for which the taxes have been paid.(20)

When the petitioner who is seeking to register his property has proved the type of possession required by statute and the payment of taxes he is then permitted to have his title registered in the same manner as a title acquired by a conveyance.

It should be noted at this point that no one may acquire title to property that has been registered under the Torrens System except by transfer of the certificate of title. This means that such property may not be acquired by adverse possession. The Land Title Act Section 35 provides for this as follows:

"After land has been registered, no title thereto adverse or in derogation of the title of the registered owner shall be acquired by any length of possession."

This provision has been subjected to criticism since it constitutes a radical change in the law of real property. It raises a question of public policy since it is undesirable to leave land unoccupied for any length of time without permitting someone to cultivate it and get some benefit out of the idle land.(21)

3. REGISTRATION OF PROPERTY ACQUIRED THROUGH SALE FOR TAXES

The Land Title Law permits a person who has derived title to his land through a tax sale to register this property. No change is made in the manner of acquiring such property. The procedure is as follows:

3

Since the year 1895 property on which taxes have become delinquent is sold to the State by operation of law after a specific time has elapsed and the proper notice given.(22)

The State is then required to hold the property for five years during which time the original owner may redeem. After that the property is sold at public auction to the highest bidder. The minimum bid must be the amount for which the property was sold to the State. The right of redemption which the original owner had is then terminated and the purchaser at the auction may pay his bid and redeem the property. At that time he will receive a deed to this property.(23) If the bidder does not pay or the property does not sell at the auction, the property is deeded to the state.(24)

The owner who has acquired his property through this procedure is entitled to have his property registered under the Land Title Law in the same manner as any other property.(25)

If the property was derived through a tax sale occurring before 1895 without the intervening sale to the State, the petitioner must prove that either he or his predecessors in title have been in adverse possession for at least five successive years prior to registration and have paid all taxes levied during that period.(26)

This requirement of proving adverse possession does not apply to property sold for taxes to the State after 1895 and then sold to a private individual after five years' holding by the State.(27)

4. REGISTRATION OF EQUITABLE INTERESTS IN LAND

The owner of an estate or interest whether legal or equitable may file a petition to register his interest. An equitable title may consist of the purchaser's interest under a contract to purchase real property, a beneficiary's interest under a trust, and other interests recognized by equity, but which do not consist of the legal title to the property in question. Of course, in many of these cases, the fee title would have to be registered first, before an equitable interest could be registered.

It has been held that the owner of property who has an equitable right to set aside a trust deed fraudulently acquired against this property may petition for registration. This case, Frances Investment Co. v Superior Court(28), decided that the court may determine the validity of the trust deed and set it aside if shown to be fraudulently acquired. The court may then certify title in the petitioner not subject to the trust deed. Therefore, when a person seeks registration of his property, he may have invalid instruments adjudicated in the registration proceeding and set aside before certification of title. The basis for such a decision is to avoid the necessity of two separate suits - one to determine validity of the trust deed and one to register the title.

It was argued in the Frances Investment Co. case that the petitioner could not bring such action since the fee title had never been registered and no lesser interest could be registered before that. The court held that it was sufficient if the abstract or petition showed facts sufficient to prove legal title in either the petitioner or the holder of the trust deed who claimed legal title. It is not necessary for the petitioner to have legal title at the time he files his petition if he is able to show that he has a right to legal title or that some other claimant in the registration proceedings has legal title.

5. REGISTRATION OF INTERESTS IN FIXTURES OR CROPS

The Land Title Law is limited in its operation to land titles and to transactions by way of mortgage, lease, contract to sell or other instrument intended to create such a lien, encumbrance, or charge upon land as shall affect the title thereto. If a mortgage involving registered land is not properly registered it may not be asserted against a bona fide purchaser of that real property. However, it has been held that failure to register a mortgage covering the crops on registered land will not affect its validity as to subsequent bona fide purchasers. This is because mortgages on fixtures and crops are not mortgages on real property within the meaning of the Land Title Law. Such instruments are not entitled to be registered and if they are registered none of the benefits of registration will apply. Likewise, the provisions of the Land Title Law cannot be invoked if such instruments are not registered.(29) The effect of recording such instruments is discussed in Chapter 2 of the paper on the Recording System in California.

III. REFERENCE TO EXAMINER OF TITLES

The next step in the registration procedure is the examination of the abstract of title when one has been filed with the petition. This may be done by the court or by an examiner appointed by the court. The examiner may be appointed when the petition is filed or at a later date. He is required to be "an attorney in good standing, skilled in the examination of titles and admitted to practice before the Supreme Court of the State for at least five years preceding his appointment." The compensation of the examiner is agreed on by the parties and the examiner or fixed by the court. The party in whose favor registration is granted must pay the compensation as part of his costs.(30) These examiners may be Deputy Registrars according to Section 108 of the Land Title Law.

The abstract of title is referred to this examiner who examines the title of the land described in the application and investigates all facts pertaining to the title which are brought to his attention. The examiner then files a written report with the court together with a certificate of his opinion on the title. The court may not enter a decree in a case where the matter has been referred to an examiner until this opinion is filed. The court is not bound by the report, however, and may require other or further proof.(1)

This Examiner of Titles may be appointed when an abstract of title has been filed. He apparently has the right to hear witnesses, receive evidence and rule on objections.

When no abstract is filed, a General Referee may be appointed under Sections 638 and 639 of the Code of Civil Procedure. This was decided in the case of In re Reed(2) since the registration proceeding is in the nature of a quiet title action in which it is proper to appoint a General Referee. Such referee may conduct a hearing, receive evidence, and render a decision based on the evidence. The referee then gives a report to the court on which the court may base its findings of fact and draw its conclusions of law therefrom. In re McNamee(3) reiterates the proposition that such referee may be appointed but requires the trial before the referee to be conducted in the same manner as if it were before a court. The findings of the referee must be based on evidence regularly admitted in the hearing before the referee. If this is not done the findings if relied on by the court may be set aside.

This General Referee does not have to meet the qualifications of an Examiner of Titles since he is not appointed under the Land Title Law. He must meet the ordinary requirements for a referee.(4) He may, of course, be a title examiner or deputy registrar as provided in Section 108 of the Land Title Law.

IV. RIGHT TO AMEND PETITION

The applicant is permitted by Section 9 of the Land Title Law to amend his petition. He must make a motion to this effect and if it is granted must file an amended petition verified in the same manner as the original. The amendment may, however, be ordered by the court on its own motion or upon the motion of any interested person.

The amendment may be made before or after notice has been served on the defendants. When the amendment is made before service of notice there is no problem of additional service. If the amendment is made after service of notice there is a question as to whether the notice need be republished or additional service given. California apparently has no authority on this point, but other states have refused to require additional service when all interested persons have been personally served or had entered their appearance.(5)

V. WITHDRAWAL OF PETITION FOR REGISTRATION

An applicant is permitted by Section 20 of the Land Title Law to withdraw his application at any time prior to the hearing of such application. The petitioner must pay all costs at the time of withdrawal and make a written request for withdrawal and return of his abstracts of title, deeds, and other instruments. If the withdrawal is granted, the court orders the clerk to return these documents except depositions and affidavits deposited to support the petitioner's application. In this

order the court states that the request for withdrawal is granted.(6)

No provision was made in the Land Title Law as originally adopted to allow owners of registered property to withdraw their property from the operation of the Torrens System. An initiative measure adopted by the voters in November, 1950 amended the Land Title Law in this respect providing for such withdrawal.(7) This permits owners of registered land to withdraw it from the operation of the Torrens System and deal with it under the Recording System as non-registered land is dealt with. The procedure involved in withdrawing property from the Torrens System is discussed in Chapter 3. The advisability of permitting withdrawal is discussed in Chapter 1, Part IV.

VI. METHODS OF GIVING NOTICE OF FILING OF THE PETITION TO REGISTER LAND

After the petition has been filed, amended if necessary, and all other proper steps taken, the order for service of notice of filing the petition is given by the court. The notice is given in the following manner to the various interested persons.

A. NOTICE TO SUBSEQUENT PURCHASERS

When the petition for registration has been filed with the proper person this constitutes notice to all subsequent purchasers or encumbrancers of the property that a registration proceeding is pending. It is not necessary to file a Lis Pendens with the County Recorder as is required for other actions affecting real property.(8)

B. NOTICE TO INTERESTED PARTIES

1. Form of Notice

After the court has ordered notice to be given, a notice must be issued under the seal of the court. This is similar to a summons in an ordinary civil action and contains the following information:

1. Name of court and county in which action is brought.
2. Names of applicants.
3. Description of the land involved in the proceeding.
4. A statement that the petition has been filed for the registration of title and which prays for a decree declaring the applicant to be the owner in fee of the land described in the petition.

The notice shall be directed to all parties who appear by the petition, or the petition and abstract, or by the report of the examiner of titles to have any interest in the land or any part thereof.

The notice shall order the persons whom it concerns to appear and answer the petition. The time limit for answering is 10 days after personal service if served within the county, or 30 days if served elsewhere.

The notice must state that if appearance is not made within the time allotted the court will grant the petition and direct registration of the title to the land. It must also state that any person so served who fails to appear will be forever barred from disputing such registration decree.(9)

2. Service of Notice

Service of the notice and petition in registration proceedings parallels service of a summons and complaint in an ordinary civil action.

The first step in serving the notice is to have the notice published in a newspaper of general circulation published in the county for four successive weeks. The newspaper should be designated by the court. If the notice is published in a daily paper it is sufficient to publish the notice once a week for four successive weeks. This shall operate as notice to unknown persons who may have an interest in the property.

(a) Personal Service:
Personal service must then be made on the following persons:

1. All parties who appear by the petition or petition and abstract or report of the examiner of titles to be interested in the fee.

2. All occupants named in the petition.

3. Husband and wife of the applicant if married.

These parties are served with a copy of the notice attached to a copy of the petition. Personal service is required if these parties listed above reside in the State and can, with reasonable diligence be found and served within the State.

4. Personal service of the notice must be made on the owners of adjoining lands provided they reside in the State and can, with reasonable diligence be found and served therein. It is not necessary to serve them with a copy of the petition.(10)

If any of these persons listed above have joined in the petition or have assented to the petition in writing, no such service is required.(11)

(b) Publication Service:

If any of the parties who have not joined in the petition or assented to the hearing in writing, do not reside within the State or cannot with reasonable diligence be found and served within the State, a copy of the notice shall be sent by mail to such party at his last known address, within 30 days after the first publication of the notice in the newspaper. If his last known address cannot be found with reasonable diligence the notice must be mailed to the party in care of the County Clerk of the County in which the land is situated.

If any of these parties appear by the petition, petition and abstract, or report of the examiner of titles to be interested in the fee a copy of the petition must be attached to the notice that is mailed to him.

In any case it is not necessary to serve a copy of the abstract, order or map with the notice.(12)

(c) Service on Special Parties:

(1) If the petition prays to have the line of any public way determined, notice must be given to the mayor or other presiding officer of any incorporated city or town in which such way is situated. If the way is situated outside of any incorporated city or town, notice must be given to the chairman or presiding officer of the board of supervisors of the county in which such way lies. Notice shall be given to these persons by delivering a copy of this notice personally.

(2) If the land borders on a navigable stream or an arm of the sea or if it appears from the application or proceedings that the State may have a claim adverse to that of the applicant, notice shall be given by personal service to the attorney general.(13)

(3) The court may in its discretion order further notice to be given of the application as it may deem necessary and proper in addition to the statutory provisions discussed above.(14)

The constitutionality of these various sections providing for service of notice is discussed in Chapter 1.

The questions which arise when service has not been proper are troublesome. In many cases it has been held that a decree may be attacked at a subsequent date for failure to give proper notice in the manner prescribed. This gives an element of inconclusiveness to the certificate of title since it can be attacked in such manner. These problems are thoroughly discussed in Chapter 4. The present chapter is mainly devoted to a discussion of the requirements for proper service. The effects of failure to give proper service are analyzed in Chapter 4.

VII. EFFECT OF ASSENT TO REGISTRATION

Any person who has or claims an interest in the land which is being registered may assent in writing to the registration. He will not be named as a defendant or if already named need not be served with notice of the proceedings.

The assent is to be executed and acknowledged in the manner required for the execution and acknowledgment of a deed. It should then be filed with the clerk of the court. The assents may be attached to the petition or filed separately.(15)

VIII. APPEARANCE

After the petition has been filed and proper notice given the persons who claim an interest in the property may appear and object to the granting of the application. An exception is made in the case of a party who has given his written consent to the registration of the property. If the objection is sustained the applicant must pay the costs of the appearance. If it is not sustained, the defendant so objecting must pay the costs.(16)

When a person has a right to appear but has not been named as a defendant he may appear, demand a copy of the petition, and answer it within the time allowed.(17)

The time for appearance is 10 days after personal service within the county; 30 days after personal service out of the county and in the state. When persons are permitted to be served by publication, they may make an appearance within 60 days after the first publication of the notice.(18)

IX. SUBSIDIARY MOTIONS AND PETITIONS IN CONNECTION WITH REGISTRATION PROCEEDINGS

A. APPOINTMENT OF GUARDIANS

Section 13 of the Torrens Statute provides for the protection of minors and other persons under disability. The applicant for registration or any other interested person may petition to have a guardian appointed for the purpose of suit for minors and other persons under disability, and for all persons not in being who may appear to have any interest in or lien upon the land. The court will then upon granting of the petition appoint such guardian.(19)

B. EFFECT OF DEATH OR DISABILITY OF APPLICANT FOR REGISTRATION

If the petitioner dies during the pendency of the registration proceedings or becomes subject to some disability the court, on motion, may allow the proceeding to be continued by, or against, his representative or successor in interest.(20)

C. EFFECT OF TRANSFER OF THE PROPERTY DURING PENDENCY OF REGISTRATION PROCEEDINGS

If the property or interest which is being sought to be registered is transferred during the pendency of the registration proceedings Section 21 of the Torrens Statute provides that the proceeding may be continued in the name of the original applicant. The court may if it prefers allow the person to whom the transfer is made to be substituted in the proceedings.

X. THE HEARING OF THE PETITION FOR REGISTRATION

After proper service has been given to all interested parties, and the time for appearance has expired, the court sets a date for the hearing.

Notice is given of the date to all parties who have appeared. This is done in the same manner as in an ordinary civil action. The court then hears evidence and determines the title to the land described in the petition.(21) The ordinary rules of evidence apply as in any civil action. The petitioner has the burden of proving he has a proper title for registration.(22) There are several items of interest connected with the hearing. These will be discussed below.

A. NATURE OF THE HEARING

There has been much discussion in the cases and texts on the question of the nature of the hearing and the power of the court to determine collateral issues of title incidental to the registration of title. Section 14 of the Land Title Law provides that "the court shall ... proceed to determine the title to all the land described in the petition and of all persons who may have any interest in any part thereof..."

This has been held to give the court authority to determine the validity of a trust deed obtained by fraud and to set aside such trust deed and decree that title to the property should be in the petitioner.(23) The court in Frances Investment Co. v Superior Court(24) which upheld a superior court's ruling to set aside a trust deed in a registration proceeding stated that the purpose of the act is to establish a merchantable title to the land in the true owner. It may be necessary to determine adverse claims and settle collateral issues preliminary to the establishing of title subject to registration. A registration proceeding is no different from an ordinary proceeding in equity even though the proceeding to register title is termed a special proceeding. Since the court is in substance a court of equity it may give complete relief and determine questions that are essential for a complete determination of the title to the land in question.

The case of In re Barlow(25) provides another illustration of the power of the court in a registration proceeding to decide collateral issues. Petitioner in this case sought registration of land to which he claimed title. Defendant claimed a right to part of this land as a result of a boundary settlement formerly made by the predecessors in interest of the petitioner and the defendant. The court in the registration proceedings settled the boundary dispute that had arisen between the parties and decreed that the parties were bound by the boundary agreement formerly made. This case shows the right of the court in registration proceedings to determine disputes as to ownership of the property sought to be registered and then to decree registration in accordance with the settlement of those disputes. The case of In re Scott(26) makes it clear that an action to register land is in the nature of a quiet title action in which all persons' rights in the particular piece of property are "conclusively" determined. In a later section it will be shown to what extent the decree represents a "conclusive" determination of rights.

The Scott case involved a petition for registration of land which was partially occupied by defendants under claim of title. The court determined

the issue of defendant's title to the land adversely to defendants, quieted plaintiff's title to the entire area and permitted registration of the land in petitioner's name. The court stated that although the purpose of the proceeding was to obtain conclusive evidence of title the action became a quiet title action in substance and effect when the defendant claimed title to part of the land. The court was, therefore, justified in determining the true owner of the property and permitting him to have possession of the property in addition to registration of his title.

The court has the power to decree title in any one of the parties who claims it. If the petitioner fails to show title in himself and the defendant successfully proves title, the court may quiet his title and register it in the defendant's name provided that is requested.(27)

Section 6 of the Torrens Act gives the court the right to determine the line of a private or public way in connection with a registration proceeding.

Section 14 of the Torrens Act requires the court to give a determination of title of all interested persons; a determination as to whether the land is the separate or community property of the party found to be the owner; and whether or not the title is held in any special capacity.

A decree is then rendered by the court to this effect.

B. RIGHT TO JURY TRIAL

A jury trial is provided for by section 14 of the Torrens Statute. This section states that any issue of fact raised by a verified pleading of a person claiming an interest in the land shall be submitted to a jury on demand of any party appearing in the action. It is then submitted to a jury in the same manner and to the same extent as it would be submitted in any ordinary action in accordance with general law and the constitution. The verdict of the jury will then have like effect as is provided by general law when issues in ordinary actions are submitted to a jury.

There are a few states which do not provide for a jury trial. These include Colorado, Illinois, Nebraska, Ohio, Oregon, Washington, Minnesota. In these states constitutional problems have been raised.(28) The California statute provides for a jury trial so no constitutional issues of that nature are involved.

C. ADVERSARY CHARACTER OF THE PROCEEDING

A proceeding to register title has been held to be adversary in character.(29) It is not a proceeding merely for the purpose of obtaining conclusive evidence of title, but is in effect an action in equity for the determination of title. The action to register property is considered adverse to the parties claiming title against the petitioner and it is also adverse to those who claim title through the petitioner.

For example, O the owner of Blackacre gives a deed of trust on the property to A. A is, therefore, claiming through O, the owner. X, who has been occupying the property claims title by adverse possession. A is, therefore, claiming title against O but not through him. If O then petitions to have his title certified and registered, A, the holder of the trust deed even though he claims through O would be a necessary party as well as X and would be accordingly served. He could not rely on O to protect his interests against X, the adverse possessor and should appear in the proceedings. The action would be adverse to A as well as to X. If A failed to appear after proper service on him, O might fail to mention the trust deed or by error it might not be shown in the decree and certificate subsequently issued by the registrar. A would have one year in which to attack the decree under Section 45 of the Torrens Act and have the interest he had appear on the certificate. If the property had been sold to a bona fide purchaser it would seem that A would not have this right to set the original decree aside. If A failed to come in within the prescribed time limit (leaving out the problem of an intervening bona fide purchaser) the decree would become final and A would lose his interest in the property. The court in the case of Title Guarantee and Trust Co. v Griset(30) states it is never safe for a necessary party to an adverse proceeding to fail to appear when summoned into court.

The result would be different if A had not received proper service. Chapter 4 discusses this problem.

D. REGISTRATION IN OTHER PROCEEDINGS

In an action to quiet title, establish title to, partition land, or to administer upon an estate of a deceased person involving land, and the court has or can acquire jurisdiction of the land in rem, the decree may order the land registered. This may be done if it is requested and proper notice is published and served on interested parties. The application must set forth the facts described in the first part of this chapter as essential to a petition for registration.(1)

In proceedings to probate an estate involving land, a decree determining title to the land may also order registration. As in the situations discussed above, a proper petition must be filed, notice published and served as in an ordinary action to register land.(2)

XI. THE DECREE OF REGISTRATION

After the hearing the court shall make, give, and enter a decree confirming the title of the person found to be the owner of the property involved in the action. This is provided by Section 14 of the Land Title Law. This section of the Survey will discuss the form and contents of the decree and the effect and conclusiveness of the decree. The methods of attacking such a decree will be discussed in a later chapter.

A. CONTENTS OF THE DECREE

Section 15 of the Land Title Law provides that the decree must state

the following matters:

1. Whether or not the owner is married or unmarried. If married, it must state the full name of the spouse.

2. If the owner is under a disability, it must state the nature of the disability; the person who is acting for him; the source of that person's authority.

3. If the owner is a minor, it must state his age and in whose custody his estate then is.

4. The decree must contain an accurate description of the property.

5. The decree must set forth the estate which the owner has.

6. It must set forth all estates, mortgages, easements, liens, attachments and other encumbrances to which the land is subject in relative priority. This includes the rights of husband and wife. Any recorded lien or charge must be referred to by book and page of the record.

7. Any other facts properly to be determined by the court.

The decree then states that the applicants are entitled to have the land registered and decrees that the land is registered. It then orders the registrar to issue a certificate of title to the owner when a certified copy of the decree is filed with him.(3)

The decree should also state that it is a final and conclusive determination of title to the land as against all persons, known and unknown except as the act provides.

B. FORM OF THE DECREE

Section 15 of the Torrens Act requires the decree to be stated in a form convenient for transcription upon the certificate of title. Sections 23 and 24 which describe the contents of the certificate do not make provision for the decree to be copied on the certificate. A reference to the decree on the certificate is, therefore, sufficient.(4)

In setting forth the various encumbrances to which the estate is subject it is permissible for the decree to refer to the book and page where such liens are recorded. For example, the decree may state the property is subject to exceptions and reservations contained in deed recorded in Book 2000, Page 501, of Deeds Book. It is not generally necessary to describe in detail the various covenants and conditions, et cetera, to which the title is subject. However, in a situation in which a reference will not be sufficient to make it clear what liens affect the property sought to be registered, it is preferable to describe the encumbrances in the decree.

This problem would be likely to arise when several lots are being registered in one proceeding and references to several recorded instruments would be necessary. These references might result in confusion to a person attempting to determine what encumbrances a particular piece of property is subject to. Under such circumstances it is advisable to describe the specific restrictions in detail. This problem was raised in the case of In re Bangle(5) and the court stated:

> "While under the act reference may be had to records of deeds, nevertheless, as to a title which, as here, under the deeds is limited and qualified by so many covenants contained therein, the purpose contemplated would be far better subserved if the decree in specific language set forth the conditions, restrictions, reservations, and liens to which the court found the title to be subject, rather than by reference."

The court in the Bangle case summarizes the situation very clearly by stating:

> "Since the purpose of the proceeding is, so far as possible, to simplify the title and eliminate questions that no longer affect it, the decree should in plain, explicit, and unmistakable terms set forth the conclusion of the court thereon."

C. EFFECT OF THE DECREE

The decree in the registration proceedings is declared by the Statute to be "in the nature of a decree in rem, shall forever quiet the title to the land therein ordered registered and shall be final and conclusive as against the rights of all persons, known and unknown, to assert any estate, interest, claim, lien or demand of any kind or nature whatsoever, against the land so ordered registered or any part thereof, except only as in this act provided."(6) The courts in a series of decisions have refused to hold that the decree is a conclusive adjudication of title in spite of this section of the Torrens Act. This has led to a general distrust of a Torrens title and a breakdown of the entire system. This problem will be discussed in Chapter 4 "Effect of Registration of Property Under Torrens System."

The decree granted in a Torrens proceeding does not change the interests in the property which existed before registration. It does not change a covenant in a deed which was not binding on a subsequent party into a covenant that would be binding on a subsequent party.(7) The interests remain the same as before registration. Title is merely certified in the owner, subject to certain specified interests.

In addition, a registration decree cannot change legal requirements for the transfer of property. For example, in the case of Fitzsimmons v Raiche(8) A executed a deed conveying property owned by him to his sister, S.

A filed the deed, obtained a decree of registration but the deed was never delivered to S. The mere act of registering the deed did not affect the status of A as owner. Title had never been transferred to S since the deed had never been delivered. This property was, therefore, included in A's estate at his death. Registration did not affect the title to this property.

D. ENTRY OF DECREE, FILING OF CERTIFIED COPY

After the decree ordering registration has been granted, it must be entered on the records of the court.(9) The decree is then filed with the clerk and a certified copy of the decree is filed with the registrar, who issues the certificate of title.(10) This certificate is discussed below in detail.

Failure to enter the decree relieves the registrar of the duty of accepting a certified copy of the decree and issuing the certificate of title.(11)

The methods of setting aside the decree of registration including the right of appeal from the judgment will be considered in a later chapter.

XII THE CERTIFICATE OF TITLE

After the decree of registration has been filed with the clerk, and a certified copy filed with the registrar a certificate is issued by the registrar to the person declared by the decree to be the owner of the property.(12) This section will deal with the issuance of the certificate, form and contents of the certificate, and the effect of such a certificate. The conclusiveness of the certificate will be discussed in a subsequent chapter.

A. FORM AND CONTENTS OF CERTIFICATE

Sections 15 and 22 of the Land Title Law provide for the issuance of the certificate of title by the registrar after the certified copy of the decree is filed with the registrar.

The certificate of title is required to be in duplicate. The original is retained by the registrar in a book entitled "Register of Titles." The duplicate is delivered to the owner or person acting for him. The certificates must be numbered consecutively and must have endorsed thereon the year, month, day, hour, and minute of the issuance of such certificate. It must be under the hand and official seal of the registrar.(13)

The certificate of title must contain the following information:

1. Description of the property registered.(14)

2. Character of the ownership. (e.g. Joint tenancy, tenancy in common, et cetera)

3. Whether land is separate or community property. If community property the names of husband and wife.

4. Nature, amount and order of the liens, encumbrances, et cetera, and other interests established by the decree.

5. Whether owner (unless corporation or trustee, et cetera) is married or not. If married, the certificate must state the name of the husband or wife.

6. If the owner is a minor, the certificate shall state his age.

7. If the owner is under any other disability, the certificate must state the nature of the disability.

8. If the certificate is issued to an executor or administrator the certificate shall show the name of the deceased testator or intestate.

9. If the certificate is issued to an assignee in insolvency or trustee in bankruptcy the certificate must show the name of the insolvent or bankrupt.

10. The registrar must note at the end of the certificate the particulars of all estates, mortgages, liens, encumbrances, and charges to which the owner's title is subject.(15)

11. If the property is held by the owner "in trust", "upon limitation or condition" this fact must be shown in the certificate of title, but the particulars of the trust, condition, or limitation need not be set forth.(16) If a trustee has "power of sale" this must be noted on the certificate.(17)

12. Section 34 of the Land Title Law contains a list of the interests to which a registered title is subjected. This provision should be printed on the certificate as a memorandum to the holder. See Chapter 4 for a list of these various items.

13. It has been suggested that the following be printed on the certificate:

> "Right of appeal exists for six months after entry of decree, by Sec. 939, Code of Civil Procedure."(18)

This serves to inform purchasers what right of appeal exists.

Section 24 of the Land Title Law provides a sample form which is suggested but not made compulsory. This reads as follows:

"State of California,) ss
County of .....)

A.B. (state occupation and residence, giving street and number), State of California (if an administrator, give the name of the deceased; if a minor, give his age; if under other disability, state its nature), married to (name of husband or wife, or if not married so state), is the owner of an estate in fee simple, (or as the case may be) in the following land (insert description contained in the decree). Subject, however, to the estates, easements, liens, encumbrances, and charges hereunder noted. (In case of trust, condition or limitation, say "in trust," or "upon condition," or "with limitation," as the case may be.)

1. Mortgage to ... for the sum of $..., dated ..., payable ..... after date, with interest at ... per cent per ..., interest payable ...

2. Mechanic's lien in favor of X. Y. for $...., filed ....

3. Assessment for improvement of ... street. Amount $..., due ....

(Any other encumbrances or charges.)

In Witness whereof, I have hereunto set my hand and caused my official seal to be affixed, this ... date of ...

.....
Registrar of Titles in and for the
(Seal) County of ..., State of California"

B. DUTY OF THE REGISTRAR IN CONNECTION WITH THE ISSUANCE OF CERTIFICATES

As stated above, the Registrar must issue a certificate of title in duplicate when the certified copy of the decree of registration has been filed with him.

He is required to keep the original certificates in a book known as the "Register of Titles." In this book the certificates are entered in the order of their numbers, with blanks for the entry of memorials at a later date. Each certificate is a page in this book and the duplicate is numbered in the same fashion as the original.

In another book a record is kept of the name of the person to whom a certificate was issued, the number of such cerificate, the day, hour and minute of its issuance. This book also contains an entry of the name of the person to whom the duplicate was delivered and the book and page where

the original is entered or recorded. In this book there is a place for the signature of the person to whom a certificate has been delivered, constituting a receipt for the certificate. (19) Section 30 of the Land Title Law provides that a receipt must be given before a certificate shall be delivered and must be signed by the owner. This receipt may be printed in the book as described above or pasted in the book. The signature of the owner must be witnessed by the registrar or deputy or acknowledged by any officer authorized to take acknowledgments of deeds. If it is acknowledged outside of the presence of the registrar or deputy registrar the receipt must be pasted in the book. The receipt will then be prima facie evidence of the genuiness of the owner's signature.(20)

Sections 25 and 26 of the Land Title Law permit tenants in common of registered land to have a single certificate issued for the entire area. They may, however, demand that the registrar issue a separate certificate for an undivided share. These various certificates may later be exchanged for a single certificate covering the entire area.

The Registrar must then keep indices in the following manner. He must keep one index in which the names of the owners of registered lands and other persons with interests in registered land are alphabetized. He must also keep a property index in which the property registered is indexed according to its legal description. This permits a person who is interested in finding out whether certain property is registered to discover this by means of the names of the owners or by the legal description of the property.

C. EFFECT OF THE CERTIFICATE

When the certificate is issued and properly numbered the property is considered Registered. It then becomes subject to provisions of the Land Title Law as of the date of the filing of the petition.(21)

The certificate of title is declared to be conclusive evidence that the registered owner has a good and valid title to the land.(22) According to Section 30 of the Land Title Law a person purchasing registered land is subject only to the interests mentioned on the certificate. Exception is made in the case of fraud and forgery and in the case of certain interests enumerated in Section 34. In a series of decisions the California courts have refused to recognize the certificate as conclusive evidence of title and have held that the title of subsequent purchasers of the registered property is subject to interests not listed in Section 34. The result has been that a certificate of title is not conclusive evidence of title and subsequent purchasers are not safe in relying on such certificate for the true state of the title to land they are purchasing.

This problem is discussed in detail in Chapter 4 "Effect of Registration of Property under Torrens System."

4

FOOTNOTES to CHAPTER 2: PROCEDURE INVOLVED IN INITIAL REGISTRATION OF TITLE

1. Title Guarantee & Trust Co. v Griset, 189 Cal 332.

2. Land Title Law, Section 5.

3. Ibid, Section 5.

4. See Title Guarantee & Trust Co. v Griset, 189 Cal 332, cited supra, footnote #1, for a discussion of necessary parties in registration proceeding.

5. Land Title Law, Section 6.

6. Ibid, Section 5.

7. In re Sackett, 53 Cal App 592, involving registration of two adjoining lots in one action.

8. See Wild's Annotations of the Torrens Land Title Law of California, 1915, p. 20, footnote #16, for an argument in favor of this proposition.

9. In re Bangle, 54 Cal App 415 is an example of joinder of several lot owners in a single petition for registration.

10. In re Scott, 182 Cal 83.

11. In re Finley, 103 Cal App 694.

12. 197 Cal 263.

13. 38 and 39 Vict. c. 87.

14. 14 California Law Review 143.

15. Civil Code Section 1007.

16. Code of Civil Procedure Section 325.

17. It should be noted that this form of constructive possession is only permitted when the claimant relies on a written instrument. See Code of Civil Procedure Section 323 for what constitutes adverse possession under a written instrument.

18. Code of Civil Procedure Sections 324 and 325.

19. In re Wasson, 54 Cal App 269.

20. Ibid.

21. Thompson, Real Property (Perm. Ed.), vol. 8, sec. 4438. See criticism of this provision in 14 California Law Review 287. See Chapter 1 for further discussion of criticism. (Part IV)

22. The 1895 Statute was Political Code Section 3767. The present provision is found in Revenue and Taxation Code Section 3436.

23. Revenue and Taxation Code Sections 3476, 3477, 3478, 3479.

24. Revenue and Taxation Code Sections 3511-3516.

25. Land Title Law, Section 8.

26. Ibid. See Chapter 3 for the procedure involved when land that has been registered is sold for delinquent taxes.

27. In re Cox, 63 Cal App 175; In re Rogers, 91 Cal App 726.

28. 189 Cal 107. See also Title Guarantee & Trust Co. v Griset, 189 Cal 382, cited supra, footnote #1.

29. Congdon v Wagner, 207 Cal 373. See also Galusha v Meserve, 58 Cal App 174.

30. Land Title Law, Sections 11 and 18.

1. Ibid. Section 19.

2. 204 Cal 119.

3. 131 Cal App 30.

4. Wild's Annotations, cited supra, footnote #8, p. 57.

5. Tower v Glos, 256 Ill 121. See Wild's Annotations, cited supra, footnote #8, p. 42 note.

6. See Hindle v Warden, 50 Cal App 356, for a case illustrating withdrawal of petition for registration.

7. Proposition 11, General Election, Nov. 7, 1950, amended Land Title Law by adding sections 48.1 to 48.9 permitting Withdrawal.

8. Land Title Law, Section 10.

9. Ibid, Section 12.

10. Ibid, Section 12; See also Toler v Smith, 133 Cal App 199.

11. Ibid, Section 12.

12. Ibid, Section 12.

13. Ibid, Section 13. See Newcomb v City of Newport Beach, 7 Cal (2) 393 for effect of failure to serve the attorney general in such a situation. This case is discussed in Ch. 4.

14. Land Title Law, Section 13.

15. Ibid, Section 12. Wild's Annotations, cited supra, footnote #8, p. 17 discusses assents and advises petitioner to get as many as possible since it saves time and expense. P. 44, footnote 54 of the same book states that a person who has assented need not be given an opportunity to be heard and he will not be permitted to appeal from the decree of registration or assign error upon it.

16. Land Title Law, Section 12.

17. Wild's Annotations, cited supra, footnote #8, p. 43, note 53.

18. Land Title Law, Section 12.

19. Ibid, Section 13.

20. Ibid, Section 21.

21. Ibid, Section 14.

22. Thompson, Real Property (Perm. Ed.) cited supra, footnote #21, vol. 8, sec. 4430.

23. Frances Inv. Co. v Superior Court, 189 Cal 107; Title Guarantee & Trust Co. v Griset, 189 Cal 382, cited supra, footnote #1.

24. 189 Cal 107.

25. 89 Cal App 787.

26. 182 Cal 83.

27. Land Title Law, Section 14. See In re Barlow, 89 Cal App 787, in which the court quieted defendant's title to part of the area claimed by petitioner. Apparently defendant did not seek to have his property registered in this action but merely to prevent petitioner from having it registered in his name.

28. Peters v Duluth, 119 Minn 96.

29. Title Guarantee & Trust Co. v Griset, 189 Cal 382, cited supra, footnote #1.

30. 189 Cal 382.

1. Land Title Law, Section 7.

2. Ibid, Section 46.

3. See Wild's Annotations, cited supra, footnote #8, p. 50 for a sample decree.

4. Ibid, p. 50, footnote 63.

5. 54 Cal App 415, cited supra, footnote #9.

6. Land Title Law, Section 16.

7. Maple v Canady, 189 Cal 373.

8. 63 Cal App (2) 398.

9. Stewart v Logan, 185 Cal 435.

10. Land Title Law, Section 15.

11. Stewart v Logan, 185 Cal 435, cited supra, footnote #9.

12. Land Title Law, Section 15.

13. Ibid, Sections 22 and 23.

14. See Petition of Furness, 62 Cal App 753 for the effect of an improper description in the decree. Also, In re Sackett, 53 Cal App 592.

15. Land Title Law, Sections 15 and 23.

16. Ibid, Section 67.

17. Ibid, Sections 68 and 75.

18. Wild's Annotations, cited supra, footnote #8, p. 65.

19. Land Title Law, Section 22.

20. Ibid, Section 22.

21. Ibid, Sections 15 and 31.

22. Ibid, Sections 40 and 41.