

**OF TITLES AND TESTAMENTS:  
REFLECTIONS OF AN AMERICAN READER  
OF THE *ADELAIDE LAW REVIEW***

I INTRODUCTION

From the point of view of an American lawyer, two Australian innovations in the law of property stand out: titles by registration and the dispensing power in the law of wills. Both originated in South Australia, and both are the subject of articles in the *Adelaide Law Review*. Both spread rapidly to other Australian states and throughout the Commonwealth. But in the United States, despite some early success, neither achieved widespread adoption. Readers of the *Adelaide Law Review*, who doubtless view titles by registration and the dispensing power as obvious improvements on earlier property law, may be surprised by American exceptionalism. But in both cases the new entrants encountered entrenched practices which, while seemingly less eligible, nonetheless successfully resisted displacement.

II TITLE BY REGISTRATION<sup>1</sup>

Title by registration originated in 1858 with the South Australian *Real Property Act*.<sup>2</sup> Forever associated with the name of Robert Torrens, who sponsored the Act in the Parliament of South Australia,<sup>3</sup> the system provides a rational and efficient

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<sup>1</sup> I have written previously about title by registration and inevitably repeat some of my prior accounts and observations. See John Orth and Paul Babie, ‘The Troubled Borderlands of Torrens Indefeasibility: Lessons from Australia and the United States’ (2017) 7(1) *Property Law Review* 33; John Orth, ‘Torrens Title in North Carolina — Maybe a Hundred Years is Long Enough’ (2017) 39(2) *Campbell Law Review* 271.

<sup>2</sup> *Real Property Act 1858* (SA). For a critical review of whether the Torrens system achieved its goals, see Robert Stein, ‘The “Principles, Aims and Hopes” of Title by Registration’ (1983) 9(2) *Adelaide Law Review* 267.

<sup>3</sup> I am obviously incompetent to judge the relative claims of Robert Torrens and Ulrich Hübbe to the parentage of ‘Torrens Titles’. See, eg, Antonio Esposito, ‘Ulrich Hübbe’s Role in the Creation of the ‘Torrens’ System of Land Registration in South Australia’ (2003) 24(2) *Adelaide Law Review* 263; Horst Lücke, ‘Ulrich Hübbe or Robert Torrens? The Germans in Early South Australia’ (2005) 26(2) *Adelaide Law Review* 211; Greg Taylor, ‘The Torrens System — Definitely Not German’ (2009) 30(2) *Adelaide Law Review* 195; Horst K Lücke, ‘Ulrich Hübbe and the Torrens

means of determining title, replacing the chaotic traditional practice of examining the muniments of title at every transfer. The Torrens system was quickly replicated throughout Australia and other British colonies, and today is ubiquitous in the common law world.<sup>4</sup>

Eventually, the Torrens system reached the United States. A darling of American law reformers in the late nineteenth and early twentieth centuries, Torrens titles were first authorised by legislation in Illinois in 1895.<sup>5</sup> Although the system originally encountered challenges based on the American constitutional commitment to separation of powers and due process,<sup>6</sup> these were successfully overcome by modifications to the Torrens legislation.<sup>7</sup> By 1917, titles by registration had been made available in 18 more states.<sup>8</sup> The attraction of Torrens titles was particularly strong in places where titles under the existing system of recording were hopelessly confused, as in Chicago, IL after the Great Fire of 1871. In addition, registration provided clarification of boundaries and protection from claims based upon adverse possession.<sup>9</sup> So familiar was the system to the general public that the progressive novelist Sinclair Lewis could casually refer to it in his 1922 bestseller *Babbitt* — George Babbitt, a Midwestern real estate agent, attending a state meeting of realtors, reported ‘with startled awe ... that he had been appointed a member of The Committee on Torrens

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System: Hübbe’s German Background, His Life in Australia and His Contribution to the Creation of the Torrens System’ (2009) 30(2) *Adelaide Law Review* 213; Murray Raff, ‘Torrens, Hübbe, Stewardship and the Globalisation of Property Law Systems’ (2009) 30(2) *Adelaide Law Review* 245.

<sup>4</sup> On Torrens’ export to Canada and for references to studies of its spread elsewhere: see Greg Taylor, *Law of the Land: The Advent of the Torrens System in Canada* (University of Toronto Press, 2<sup>nd</sup> ed, 2005).

<sup>5</sup> *Land Transfer Act*, § 94, 1895 Ill Laws 107, 129.

<sup>6</sup> *People v Chase*, 46 NE 454 (Ill, 1896) (holding the statute an unconstitutional attempt to confer judicial power on the registrar of titles).

<sup>7</sup> *People v Simon*, 52 NE 910 (Ill, 1898) (upholding 1897 Ill Laws 141); *Eliason v Wilborn*, 281 US 457 (1930) (upholding 1897 Ill Laws 141). See also *Tyler v Judges of Court of Registration*, 55 NE 812 (Mass, 1900) (rejecting due process challenge to the *Massachusetts Torrens Act*).

<sup>8</sup> California (1897), Massachusetts (1898), Oregon (1901), Minnesota (1901), Colorado (1903), Washington (1907), New York (1908), North Carolina (1913), Ohio (1913), Mississippi (1914), Nebraska (1915), South Carolina (1916), Virginia (1916), Georgia (1917), North Dakota (1917), South Dakota (1917), Tennessee (1917), and Utah (1917). In 1903 the Territory of Hawaii adopted the Torrens system, which it retained after achievement of statehood in 1959. See, eg, Frederick C McCall, ‘The Torrens System — After Thirty-Five Years’ (1932) 10(4) *North Carolina Law Review* 329, 329–30.

<sup>9</sup> ‘No title to registered land, or easement or other right therein, in derogation of the registered owner, shall be acquired by prescription or adverse possession’: Mass Gen Laws ch 185 § 53 (1932). See Lynden Griggs, ‘Possessory Titles in a System of Title by Registration’ (1999) 21(2) *Adelaide Law Review* 157: arguing that titles based upon possession are inconsistent with a system of titles based on registration. But see Paul Babie, ‘The Crown and Possessory Title of Torrens Land in South Australia’ (2016) 6(1) *Property Law Review* 46.

Titles.<sup>10</sup> But by then, American enthusiasm for the system had already begun to fade. No more states added their names to the list of adopters.

In 1931 Professor Frederick C McCall surveyed the American experience of the Torrens system over its first 35 years.<sup>11</sup> Based upon information he ‘received in 1931 from practicing attorneys, judges, law professors, and registration officials in the various states’,<sup>12</sup> Professor McCall concluded that with few exceptions — notably Massachusetts and Minnesota — the system was not being widely used. In several jurisdictions, he said, ‘the law appears to have been still-born.’<sup>13</sup> Although the National Conference of Commissioners on Uniform State Laws — the ancestor of the modern Uniform Law Commission — had adopted a *Uniform Land Registration Act* in 1916,<sup>14</sup> it came too late and was withdrawn as ‘obsolete’ in 1934.<sup>15</sup> Not only did the surge of American adoptions cease, but over the decades since Professor McCall wrote his article, almost half of the original adopting states have abandoned the system.<sup>16</sup> By 1952 the multi-volume *American Law of Property* noted that ‘[t]he subject of registration of title is of too limited application to justify an extended review of the cases’.<sup>17</sup> Illinois, which had been the pioneer, prohibited new registrations as of 1 January 1992.<sup>18</sup> Even in the few states where it remains vital, the system

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<sup>10</sup> Sinclair Lewis, *Babbitt* (Floating Press, 1922) ch 13, 279. On Lewis’s political commitments, see Richard Lingeman, *Sinclair Lewis: Rebel from Main Street* (Random House, 1<sup>st</sup> ed, 2002) 41–4, 335–45.

<sup>11</sup> McCall (n 8) 329.

<sup>12</sup> *Ibid* 330 n 26.

<sup>13</sup> *Ibid* 343.

<sup>14</sup> *Uniform Land Registration Act* (National Conference of Commissioners 1916), 9 ULA 217.

<sup>15</sup> See National Conference of Commissioners on Uniform State Laws, *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the 44<sup>th</sup> Annual Conference* (1934) 253–4. The Committee found that the *Uniform Act* had been adopted by only three states: Virginia, Utah, and Georgia (with modifications), and that Utah, which had adopted the Act in 1917, repealed it in 1933.

<sup>16</sup> See John L McCormack, ‘Torrens and Recording: Land Title Assurance in the Computer Age’ (1992) 18(1) *William Mitchell Law Review* 61, 72–3 (‘[Torrens] legislation has lapsed or has been repealed in nine [states]’). Six states — California, Mississippi, Nebraska, South Carolina, Tennessee, Utah — were identified as having repealed their Torrens Acts prior to 1972: Senate Committee on Banking, Housing and Urban Affairs, United States Congress, *Mortgage Settlement Costs — Report of United States Department of Housing and Urban Development and Veteran’s Affairs* (Report, March 1972) 22 n 40. In addition, both North and South Dakota repealed their Acts in 1941: *Act of 7 March 1941*, c 250, 1941 ND Laws; SD Session Laws, c 217 (1941). In other states, such as North Carolina, the Torrens Act remains unrepealed but is little used. See John Orth, ‘Torrens Title in North Carolina’ (2017) 39(2) *Campbell Law Review* 271.

<sup>17</sup> Rufford G Patton, ‘Registration of Title’ in James Casner (ed) *American Law of Property* (Little, Brown and Company, 1952) § 17.37, 637 n \*.

<sup>18</sup> *Torrens Repeal Law* 765 Illinois Comp Stat ch 30 § 40 (1992).

is not universal and is used in only limited geographical areas.<sup>19</sup> Most American law schools do not teach it, and most American property lawyers know nothing about it.<sup>20</sup>

### III DISPENSING POWER<sup>21</sup>

In 1975 South Australia adopted the *Wills Act Amendment Act (No 2) 1975* (SA) ('*Wills Act*'), which instituted many innovations in traditional wills law. Among these innovations was the dispensing power authorising judges to ignore flaws in the execution of a will if the instrument was found to have been executed with testamentary intent.<sup>22</sup> The *Wills Act* inspired imitations in other Australian states and Canadian provinces.<sup>23</sup> In America, too, the innovation drew the attention of law reformers. In 1987, inspired by the South Australian example, Professor John . Langbein published an influential article in which he advocated ignoring minor errors in will execution.<sup>24</sup> In 1990 the Uniform Law Commission included the dispensing power — under the

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<sup>19</sup> In Massachusetts, Torrens is used in Boston and on Cape Cod; in Minnesota, in the Twin Cities of Minneapolis and St. Paul. In Hawaii, as registrations dwindled, the legislature commissioned a study in 1987 to determine whether there remained any reason 'for maintaining two separate systems for holding and recording land titles,' but in the end left the dual systems in place: see Jean Kadooka Mardfin, 'Two Land Recording Systems' (Report No 7, Hawaii Legislative Reference Bureau, December 1987).

<sup>20</sup> See eg, Adam Leitman Bailey, who co-authored a comprehensive review of adverse possession laws and cases in states East of the Mississippi River: Adam L Bailey and Matthew Eichel, 'Analyzing Adverse Possession Laws and Cases of the States East of the Mississippi River' (2016) 30(1) *Probate & Property* 7. Bailey later described the Torrens registration system as 'archaic': Adam L Bailey, Letter to Editor (May/June 2016) 30(3) *Probate & Property* 1, 3.

<sup>21</sup> As with titles by registration, I have also previously written on the dispensing power, and again I have to some extent repeated myself. See John Orth, 'Wills Act Formalities: How Much Compliance is Enough?' (2008) 43(1) *Real Property, Trust & Estate Law Journal* 73.

<sup>22</sup> See Simon N L Palk, 'Informal Wills: From Soldiers to Citizens' (1976) 5(4) *Adelaide Law Review* 382. For subsequent developments, see Richard Bullen, 'Changes to the Law in South Australia Relating to Will Making' (1994) 16(2) *Adelaide Law Review* 269. For an argument that the reform of succession law in South Australia left a troublesome detail of the old law unchanged, see Simon N L Palk, 'Hotchpot — or Hotchpotch' (1981) 7(4) *Adelaide Law Review* 506.

<sup>23</sup> See John H Langbein, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion' (2017) 38(1) *Adelaide Law Review* 1, nn 2–3 ('Absorbing South Australia's Wills Act').

<sup>24</sup> John H Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (1987) 87(1) *Columbia Law Review* 1. The author had earlier advocated a relaxed application of wills act formalities: John H Langbein, 'Substantial Compliance with the Wills Act' (1975) 88(3) *Harvard Law Review* 489.

name ‘harmless error’<sup>25</sup> — in the revised *Uniform Probate Code*,<sup>26</sup> but to date only six states have adopted it in full.<sup>27</sup> Characteristic of the fate of ‘uniform laws’ in America, several other states adopted it with non-uniform variations.<sup>28</sup>

In 1995 the American Law Institute added the harmless error rule to the *Restatement (Third) of Property*,<sup>29</sup> presenting the power to dispense with harmless errors in will execution as an intrinsic power of American courts. Casebooks widely adopted in law schools have prominently featured the harmless error rule,<sup>30</sup> so recent law graduates are well-informed about it, in contrast to Torrens title. But probate courts have been slow to exercise this power in the absence of legislative approval.<sup>31</sup> In its first 20 years in America, the harmless error rule has not had quite as many adoptions as had Torrens title in the same period. Although it may well advance further in coming years, at present even its most influential supporter admits that its spread has stalled.<sup>32</sup>

Ever since the law has allowed owners direct succession to property upon death, various formal requirements have been imposed. In ancient Rome, the Twelve Tables allowed patricians to dispose of their estates, but only by public declaration in the presence of the patrician assembly. Plebeians could use a form of sale in the presence

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<sup>25</sup> Harmless error, the doctrine that an unimportant mistake by a trial judge or a minor irregularity at trial will not result in a reversal on appeal, is familiar to American lawyers in the context of civil and criminal procedure.

<sup>26</sup> ‘Although a document or writing added upon a document was not executed in compliance with Section 2-502 [on formal requirements for will execution], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (1) the decedent’s will, (2) a partial or complete revocation of the will, (3) an addition to or alteration of the will, or (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.’: *Uniform Probate Code* § 2-503 (1998).

<sup>27</sup> Montana (1993); South Dakota (1995); Hawaii (1996); Michigan (1998); Utah (1998); New Jersey (2004). See Langbein, ‘Absorbing South Australia’s Wills Act’ (n 23) 6 n 30.

<sup>28</sup> Colorado (1994); Ohio (2006); Virginia (2007); California (2008); Oregon (2016). See Robert H Sitkoff and Jesse Dukeminier, *Wills, Trusts, and Estates* (Wolters Kluwer Law & Business, 10<sup>th</sup> ed, 2017) 176 n 56.

<sup>29</sup> American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (1999) § 3.3, 217.

<sup>30</sup> See, eg, Sitkoff and Dukeminier (n 28) 171–97.

<sup>31</sup> Ibid 171 (‘Most courts ... have continued to require strict compliance’ with the *Wills Act*). See also Anthony R LaRatta and Melissa B Osorio, ‘What’s in a Name?’ (2014) 28(3) *Probate & Property* 47. ‘The majority of states have rejected the UPC § 2-503 harmless error doctrine in favor of strict compliance.’: at 49.

<sup>32</sup> Langbein, ‘Absorbing South Australia’s Wills Act’ (n 23) 6. Langbein noted: ‘A quarter century after the Commission promulgated the measure, it has been adopted in only 11 of the 50 states’.

of witnesses, which eventually became revocable. In time, civil law came to require an instrument be signed and sealed by seven witnesses.<sup>33</sup> Some echo of the latter requirement may have reached even Hobbiton, if JRR Tolkien is to be believed. The will of Bilbo Baggins was reported to be ‘very clear and correct (according to the legal customs of hobbits, which demand among other things seven signatures of witnesses in red ink)’.<sup>34</sup>

In England, land was first made devisable by the *Statute of Wills 1540* which permitted a ‘last will and testament in writing,’<sup>35</sup> but required no signature or other formality. Over the next century, courts struggled to determine whether particular writings expressed a decedent’s testamentary intent. Oral evidence was heavily relied upon to establish the necessary facts. Judges upheld wills that were found to have been reduced to writing on the instruction of testators even if never read or signed by them, while rejecting others that commemorated oral statements of testators’ intention but were not written down by instruction (or subsequently adopted).<sup>36</sup> The distinction proved difficult to manage, and Sir William Blackstone probably spoke for many in the late 18th century when he observed:

Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the hand writing of another person were allowed to be good wills within the statute.<sup>37</sup>

In reaction, the *Statute of Frauds 1677* increased the necessary formalities by requiring that a will be signed by the testator or some other person in the testator’s presence, and that it be subscribed by ‘three or four credible witnesses’.<sup>38</sup> Even this proved unsatisfactory and the *Wills Act 1837* tightened the requirements.<sup>39</sup> Wills had to be in writing and subscribed, that is, signed ‘at the foot or end thereof,’ by the testator or by some other person ‘in his presence and by his direction’.<sup>40</sup> Furthermore, the testator’s signature had to be made or acknowledged in the presence of two or more witnesses ‘present at the same time,’ who attested and subscribed the

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<sup>33</sup> Thomas E Atkinson, *Handbook of the Law of Wills* (West Academic Publishing, 2<sup>nd</sup> ed, 1953) § 2, 9.

<sup>34</sup> JRR Tolkien, *The Fellowship of the Ring* (HarperCollins, 2nd ed, 2008) 51.

<sup>35</sup> *Statute of Wills 1540*, 32 Hen 8, c 1, s 2. The power to devise was limited to two-thirds of land held by knight-service but extended to all land held by socage tenure. When the *Statute of Tenures 1660*, 12 Car 2, c 14, s 4, converted tenure by knight-service into free and common socage, the power to devise land became general.

<sup>36</sup> See, eg, *Brown v Sackville* (1552) 1 Dyer 72; 73 ER 152; *Nash v Edmunds* (1587) Cro Eliz 100; 78 ER 358: Reporter’s notes provide information on several other cases.

<sup>37</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765–9, 1922 ed) vol 1, 376.

<sup>38</sup> *Statute of Frauds 1677*, 29 Car 2, c 3, s 5.

<sup>39</sup> *Wills Act 1837*, 7 Wm 4 & 1 Vict, c 26.

<sup>40</sup> *Ibid* s 9.

will ‘in the presence of the testator’.<sup>41</sup> The *Wills Act 1837* Act influenced most wills legislation in the United States.<sup>42</sup>

While the various wills acts brought useful clarity to testamentary formalities and reduced the likelihood of loose construction by the courts, they inevitably created new difficulties. Whenever formal requirements are imposed for the effectiveness of a legal act, problems arise when a person seeking to do what is allowed fails to satisfy those requirements, whether through ignorance or mischance. In such cases, a judge faces the unenviable choice of defeating the testator’s intention or introducing the confusion that the statute was intended to eliminate. In 1844, within seven years of the adoption of the *Wills Act 1837*, Dr Stephen Lushington was acutely aware of the dilemma when trying a wills case:

It may possibly be said, that the intentions of the Testator will be defeated by this decision; and if so, we may lament it: but we sit here, not to try what the Testator may have intended, but to ascertain, on legal principles, what testamentary instruments he has made; and we must not be induced by any considerations of intention or hardship, to relax the provisions of a Statute (perhaps the most important of modern times) for the disposition of property.<sup>43</sup>

This dilemma continued to trouble judges 100 years later. Disallowing a will in a notorious case of ‘switched wills’ — where each spouse mistakenly signed the will of the other — the Pennsylvania Supreme Court explained:

Once a court starts to ignore or alter or rewrite or make exceptions to clear, plain and unmistakable provisions of the Wills Act ... the Wills Act will become a meaningless, although well intentioned, scrap of paper ...<sup>44</sup>

(Could the author of this opinion have been thinking of the German Chancellor’s casual dismissal in August 1914 of the treaty that guaranteed Belgian neutrality as a mere ‘scrap of paper’?)

Even in states where the courts are authorised to use the dispensing power in appropriate cases, the judges may struggle with the same issue that confronted Dr Lushington almost two centuries ago. Confronting a case in which the testator

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<sup>41</sup> Ibid.

<sup>42</sup> See Atkinson (n 33) § 62, 292.

<sup>43</sup> *Croker v Marquess of Hertford* (1844) 4 Moo PC 339; 13 ER 334, 345. On the report of the Ecclesiastical Courts Commission, largely drafted by Lushington, that recommended adoption of the Wills Act (1837), see SM Waddams, *Law, Politics and the Church of England: The Career of Stephen Lushington, 1782–1873* (Cambridge University Press, 1992) 189, 189–92. The Commission expressly recognised that formal requirements would involve the loss of the ‘occasional benefits resulting from the latitude which the law at present allows’: at 189.

<sup>44</sup> *In re Pavlinko’s Estate*, 148 A 2d 528, 531 (Pa, 1959).

made her dispositive intentions clear but died before she could review and execute her will, the Appellate Division of the Superior Court of New Jersey rejected the document:

[W]e distinguish between evidence showing decedent's general disposition to alter her testamentary plans and evidence establishing, by clear and convincing evidence, that decedent intended the draft will prepared by [her attorney] to constitute her binding and final will.<sup>45</sup>

In the end, the problem is traceable to the ambiguity lurking in the word 'will'. Its primary meaning, even in a legal dictionary, is 'wish' or 'desire'. Only secondarily is it '[t]he legal expression of an individual's wishes about the disposition of his or her property after death'.<sup>46</sup> The *harmless error* rule (dispensing power) is an attempt to bring the two into better alignment by allowing intention to trump form in the execution of a will. But relaxation of the formal requirements for a testamentary document closes the gap between intention and form only on the assumption that the document expresses the testator's intent. As an official comment in the *Restatement (Third) of Property* makes clear:

The requirement of a writing is so fundamental to the purpose of the execution formalities that it cannot be excused as harmless under the [harmless error rule] of this Restatement. Only a harmless error in executing a *document* can be excused under this Restatement.<sup>47</sup>

In effect, the clock has been set back 500 years to the *Statute of Wills 1540*, which required a writing, but no signature or other formality. Despite clear and convincing evidence of a testator's intention (a will), unless there is a document executed, however informally, with testamentary intent (a will), a decedent made no legally effective disposition of property after death. An oral will remains invalid.

#### IV AMERICAN EXCEPTIONALISM

Accepting that titles by registration and the dispensing power are improvements on traditional methods of conveyancing by deed or will, one must inquire why they failed to displace existing American systems. Evolutionary theory prepares us to expect the 'survival of the fittest': in the struggle for existence a new entrant, better adapted to a particular environmental niche, will drive out all competitors. But Torrens titles, despite initial success, failed to maintain a significant presence, and the dispensing power, which may yet prevail, has so far had only limited success.

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<sup>45</sup> *In re Probate of Will and Codicil of Macool*, 3 A 3d 1258, 1264 (NJ App Div, 2010).

<sup>46</sup> See, eg, *Black's Law Dictionary* (10<sup>th</sup> ed, 2014) 'will'.

<sup>47</sup> American Law Institute (n 30) § 3.3 cmt (b) (emphasis added).



### A *Titles by Registration*

In America, titles by registration always existed in competition with traditional methods of assuring title by recorded deeds, usually bolstered by covenants of title and title insurance.<sup>48</sup> But Torrens prevailed only in the special conditions where the records were confused or nonexistent. Perhaps because the Torrens system appears so self-evidently superior, its supporters often attribute its relative failure in America to sinister forces: lawyers who derived a steady income from traditional conveying and the repeated title searches it required,<sup>49</sup> or the title insurance industry which profited from the uncertainties incident to the recording system.<sup>50</sup> The specific failure of Torrens in Illinois, the American bellwether, has been attributed to incompetent personnel in the Registry Office.<sup>51</sup> Recently, computerisation of land records, which has the promise to strengthen the Torrens system in Australia,<sup>52</sup> has also made searches of titles in traditional recording systems in America easier and more reliable.<sup>53</sup>

Torrens' failure need not necessarily be attributed to self-interested actors. Conveyancers might reasonably advise purchasers that traditional methods are less expensive and more expeditious. Professor McCall, who reported on the fate of Torrens in America after 35 years, suggested that its failure may have been due to the reasonable reluctance of landowners to register their titles and take the risk of exposing defects:

The owner of property, the title to which is in a state of quiescence and is reasonably well-established according to the public records, hesitates to extend a call to the world at large and to his neighbours (the adjoining owners) in particular to come forward and present any objections they may have to his ownership of the land.<sup>54</sup>

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<sup>48</sup> In addition, the operation of the doctrine of adverse possession provides the possibility of acquiring an original title, not one derived from prior grantors.

<sup>49</sup> See, eg, *Empire Mfg Co v Spruill*, 86 SE 522, 522–3 (NC, 1915). Clark CJ observed that Torrens Law 'has not been looked on with favor by some [lawyers] who believe that the act will deprive them of fees for the investigation and making of abstracts of titles'.

<sup>50</sup> See Barry Goldner, 'The Torrens System of Title Registration: A New Proposal for Effective Implementation' (1982) 29(3) *UCLA Law Review* 661. Goldner states that title insurers engaged in 'systematic sabotage of the American Torrens System': at 670.

<sup>51</sup> McCormack (n 16) 72 n 39.

<sup>52</sup> See Griggs (n 9) 173–4.

<sup>53</sup> See McCormack (n 16) 115–28. 'A paradigm shift in title examination has taken place and continues to evolve and improve because of the advent of user-friendly computer web pages and easily searchable data bases': Patrick K Hetrick and James B McLaughlin, *Webster's Real Estate Law in North Carolina* (Michie, 6<sup>th</sup> ed, 2016) § 21.01, 21–3.

<sup>54</sup> McCall (n 8) 345.

In addition, as Professor McCall discovered, some Americans suspected that Torrens was just a scheme ‘whereby rich men could seize the lands of the poor’<sup>55</sup> — a perception that has not yet disappeared.<sup>56</sup>

### B *Dispensing Power*

The slow acceptance of the dispensing power (*harmless error*) in America has also been attributed to lawyers’ lack of support. As explained by Professor Langbein,

[t]he professionals, who know what the relevant Wills Act requires and who know how to ensure compliance for their clients, do not have any incentive to encourage the legislature to enact a measure such as the dispensing power ...<sup>57</sup>

In addition, concern has been expressed that providing a means to probate formally defective testamentary documents will lead to increased litigation, although this is disputed.<sup>58</sup> Perhaps the greatest obstacle to acceptance of the *harmless error* rule in America has been widespread distrust of the competence of the American probate bench, a distrust incongruously shared by the rule’s foremost supporter.<sup>59</sup> Furthermore, Americans in general are suspicious of the discretion that permits ‘judicial activism’.

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<sup>55</sup> Ibid 342–3. See also Bruce Kersher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995) describing the Torrens System as ‘Australia’s legal gift to bourgeois land holding’: at 130.

<sup>56</sup> See, eg, *Adams Creek Assocs v Davis*, 652 SE 2d 677 (NC Ct App, 2007); *Adams Creek Assocs v Davis*, 662 SE 2d 901, 901–2 (NC, 2008): an appeal was dismissed and a discretionary review was denied; *Adams Creek Assocs v Davis*, 746 SE 2d 1 (NC Ct App, 2008); *Adams Creek Assocs v Davis*, 748 SE 2d 322, 322–3 (NC, 2013): a discretionary review was denied; *Adams Creek Assocs v Davis*, 810 SE 2d 100 (NC App, 2018): the decision of the Court of Appeals was vacated, and case was remanded to the Court of Appeals. According to news accounts, the family who lost title to land due to a Torrens registration are reported to believe that their land was stolen from them ‘via a murky conspiracy — among developers, local lawyers and judges’: see Jay Price, ‘For Two Carteret County Men, Waterfront Land is Worth Nearly Three Years in Jail’ (14 December 2013) *News and Observer*. For other reports of dishonest practices in title registration, see Phillip Bantz, ‘The Redheaded Stepchild of Land Registration’ (17 February 2012) *North Carolina Lawyers Weekly*.

<sup>57</sup> Langbein, ‘Absorbing South Australia’s Wills Act’ (n 23) 7.

<sup>58</sup> Ibid 7–8; Sitkoff and Dukeminier (n 28) 178 (discussing litigation incentives).

<sup>59</sup> See Langbein, ‘Absorbing South Australia’s Wills Act’ (n 23) 7. Professor Langbein describes the poor quality of American probate judges. See also John H Langbein, ‘Will Contests’ (1994) 103(7) *Yale Law Journal* 2039. Professor Langbein wrote ‘Americans can only look with envy to the esteemed and meritocratic chancery bench that conducts probate adjudication in English and Commonwealth jurisdictions’: at 2044.

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## V CONCLUSION

The fate of titles by registration and the dispensing power in America demonstrates that the success of a legal innovation is not dependent solely upon its excellence in the abstract but also upon its suitability in context. Torrens titles and the dispensing power were matched against familiar and well-established practices for conveyancing by deed or will. In addition to the ordinary human resistance to change, they encountered a characteristic American distrust of government. Successful resistance by the prior occupants of this particular legal niche reminds us that in the struggle for existence, the only test of fitness is survival.

