

5-1-1955

## Rights Arising Under Federal Law Versus the Torrens System

Richard B. Johnson

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

---

### Recommended Citation

Richard B. Johnson, *Rights Arising Under Federal Law Versus the Torrens System*, 9 U. Miami L. Rev. 258 (1955)

Available at: <https://repository.law.miami.edu/umlr/vol9/iss3/3>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

## RIGHTS ARISING UNDER FEDERAL LAW VERSUS THE TORRENS SYSTEM

RICHARD B. JOHNSON\*

The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid unless in conflict with some special inhibitions of the Constitution, or against natural justice.<sup>1</sup>

The ideal decree in rem, either registering or quieting title to land, would be conclusive in all respects against all persons. Necessity and considerations of policy outranking security of titles impose certain exceptions, however, and conveyancers dealing with the land must be familiar with these exceptions so that they can make the necessary supplemental investigations or evaluate the risks involved in omitting them. This article deals with the limitations on the Torrens System occasioned by the fact that we live in a federal system.<sup>2</sup>

### THE PROBLEM

The existence of the problem is commonly recognized by express language in state Torrens Acts.<sup>3</sup> Beside the normal legislative desire to avoid unconstitutionality, the draftsman of a Torrens Act has an assurance fund which would be subject to claims if Torrens decrees were vulnerable on constitutional grounds. Georgia, for example, provides that registered titles are subject to "liens, claims or rights arising or existing under the laws or Constitution of the United States which the statutes of this State cannot require to appear of record under registry laws."<sup>4</sup> California, curiously, inserts a comma before the "which,"<sup>5</sup> and the Colorado statute reads, ". . . and which the statutes . . ."<sup>6</sup> Strictly speaking, these grammatical variations make substantial differences in the sense. The

---

\*Lecturer, Northeastern University, School of Law, Boston, Mass. A.B. Harvard, 1936; LL.B. Harvard, 1939; Member of the Massachusetts and Federal Bars.

1. *Arndt v. Griggs*, 134 U.S. 316, 321 (1890).

2. Much of what is said will apply to actions to quiet title, but the practice and procedure therein vary so from state to state as to be comparatively confusing. Torrens Systems are more convenient to study, because they are much more uniform in pattern.

3. GA. CODE, § 60-419 (1933); MASS. GEN. LAWS, c. 185, § 46 (1932); COLO. STAT. ANN., c. 40, § 201 (1935); DEERING'S GEN. LAWS ANN. Act 8589, § 34 (1950). But not in Illinois, which ignores the federal problem. ILL. REV. STAT., c. 30, § 70 (1951).

4. GA. CODE, § 60-419 (1933).

5. DEERING'S GEN. LAWS ANN., Act 8589, § 34 (1950).

6. COLO. STAT. ANN., c. 40, § 201 (1935).

absence of a comma means that the modifying clause is restrictive; the comma indicates that it is descriptive.<sup>7</sup> The Georgia language means that in the opinion of the legislature there are two kinds of liens, claims or rights arising under the laws or Constitution of the United States: those which Georgia can require to appear of record, and those which it cannot, and the exception is limited to the latter category. In Georgia, therefore, a Torrens decree purports to cut off some rights arising under federal law. In California, on the other hand, the legislature appears to be excluding all rights arising under the laws or Constitution of the United States, and adding a purely descriptive, not restrictive, clause containing an expression of opinion only. Such an expression would be appropriate in a preamble, but it is unusual in statutory draftsmanship to insert it in the body of the act. Furthermore, it is obviously incorrect, because Congress has expressly provided for recording some rights arising under federal law.

California also shows its independence by omitting "the Constitution."<sup>8</sup> This must have been on the theory that it went without saying, because the California legislature could hardly have intended to discriminate against the Constitution.

So much for the words of the statutes. Let us look now at the constitutional problems (a) for light on the statutory meaning, and (b) to see if there are any problems *not* met by the statutes.

A Torrens decree is both retrospective and prospective. It operates on existing rights, either cutting them off or confirming them, and it carries forward, protecting the rights it has created against subordination to subsequent claims which would otherwise prevail. The exceptions to the effect of the decree are likewise retrospective and prospective. It would seem to be better drafting to have handled them separately, but they are lumped together. We will consider them separately, taking the retrospective exceptions first.

Rights arising under federal law and the Constitution include rights of private individuals and rights of the United States themselves. The statutes make no distinction, but the problems are quite different. It is submitted that both the Georgia and the California statutes go further than they need to with respect to existing private rights, and that they may not go far enough with respect to rights of the United States themselves.

#### I. RIGHTS OF INDIVIDUALS ARISING UNDER FEDERAL LAW PRIOR TO THE STATE COURT DECREE

These would include (a) rights created directly in the individual by substantive federal law, such as the Bankruptcy Act, and (b) such rights created by procedural federal law, *i.e.*, judgments and decrees of federal courts (applying either state or federal substantive law).

---

7. FOWLER, MODERN ENGLISH USAGE, p. 712 (1st ed. 1926).

8. See note 5 *supra*.

Rights of individuals would also include rights originally in the United States, transferred to individuals by land patent or by sale.<sup>9</sup>

Unless the United States has a continuing interest in such rights, it is hard to see what constitutional requirement is violated by subjecting them to the same treatment that other rights receive in state Torrens proceedings.<sup>10</sup> Land is not forever removed from the operation of state laws by having once been the subject of a federal court decree or the property of the United States.<sup>11</sup> It is no infringement of the powers of the federal courts to say that a purchaser at a bankruptcy sale, or from the War Assets Administrator, or the prevailing party in proceedings in federal court to quiet title must thereafter exercise the same diligence to protect his rights against disseisors and adverse claimants in state courts that is expected of others. He should be bound by a state court decree as much as others, and should have no greater rights against an assurance fund. *Pendente lite*, the problem is different. While a federal court is exercising jurisdiction in rem over the property, interference by a state court could be enjoined.<sup>12</sup> It seems proper, therefore, for a state legislature to direct its courts to refrain from interfering. Beyond that, exemption of existing private rights arising under federal law seems unnecessary, either to protect the statute or the assurance fund.

However, the states have more or less clearly limited the exemption to rights which the state cannot require to appear of record. With respect to rights accruing after the entry of the decree, the point of this limitation is fairly clear. With respect to existing rights, this distinction is not required by the Constitution, which nowhere refers to recording. If my argument is sound, the states had, over certain rights which had arisen under federal law, jurisdiction long before Congress saw fit to require recording as a condition precedent to some of them. The requirement of recording as to some surely did not have the effect of eliminating state jurisdiction in rem as to others.

It may be that policy requires the exemption of existing private rights which are not required to appear of record. Torrens proceedings are designed to secure title, but not at the price of rank injustice. Obviously the risk of injustice to one whose rights do not appear of record is greater than to those whose rights do so appear. The risk of unexpected claims against the assurance fund is also greater. However, there are rights arising under state law, not required to appear of record for normal validity, which are extinguished by registration. There is reason to suspect

---

9. Federal law governs the construction of contracts disposing of federal property. *S.R.A., Inc. v. Minnesota*, 327 U.S. 558 (1946).

10. Properly conducted proceedings in rem to establish titles have been held to be due process, *American Land Co. v. Zeiss*, 219 U.S. 47 (1911), and proper conduct is, of course, assumed.

11. *S.R.A., Inc. v. Minnesota*, 327 U.S. 558 (1946).

12. *Mandeville v. Canterbury*, 318 U.S. 47 (1943).

that abundant constitutional caution was a large factor in favoring federal rights not appearing of record.

## II. RIGHTS OF INDIVIDUALS ARISING UNDER FEDERAL LAW AFTER THE STATE COURT DECREE.

As suggested above, rights which state law cannot require to appear of record are necessarily excepted from the prospective effect of the decree. Wherever Congress has not provided for recording, as where the bankruptcy court sits in the county where the land lies, the federal matters must have the same effect with respect to registered land as they do with respect to unregistered land.

Where Congress has provided for recording, as a condition precedent to full effectiveness of a right arising under federal law, two questions arise: First, are such rights "rights which the state can require to appear of record?" The words of the state statutes could be so construed. They could also mean "rights which the state can single-handed require to appear of record, without any help from Congress." This question could only be raised in proceedings against the assurance fund, and no such proceedings seem to have been reported.

The second question is: "Did Congress mean 'recorded' in every case, or 'recorded with respect to unregistered land and registered with respect to registered land?" This question would arise in proceedings to enforce recorded but unregistered federal rights against registered land, and again no such proceedings seem to have been reported.

The Bankruptcy Act<sup>13</sup> provides for recording "in the office where conveyances of real property are recorded." Note that it speaks of conveyances generally. Suppose that the bankrupt's real estate is registered land and that conveyances thereof would therefore be registered in a different office. The trustee, not knowing this, records a copy of the petition on the unregistered side. Until court or Congress makes it clear that the registered land is not affected, a purchaser thereof would be well advised to examine the indexes on the unregistered as well as the registered side, for possible bankruptcies.

In contrast to the Bankruptcy Act, the language of the Federal Judgment Lien Act<sup>14</sup> provides that federal judgments shall be liens "in the same manner, to the same extent and under the same conditions" as judgments of state courts of general jurisdiction, and that whenever state law requires state judgments to be "registered, recorded, docketed or indexed" such requirements shall apply only if state law authorizes the federal judgment to be "registered, recorded," etc. Clearly Congress knows how to say "registered." It is not hard to conceive of reasons of policy which distinguish the bankruptcy trustee's title from the judgment lienor's.

---

13. 66 STAT. 423, 11 U.S.C. § 44(g) (1952).

14. 28 U.S.C. § 1962 (1948).

Mr. Patton appears to believe that the Federal Judgment Lien Act applies to all federal judgments in all states.<sup>15</sup> From this he deduces that no federal judgment needs to be recorded in any state which has not clearly provided equal facilities for recording, and he enumerates Massachusetts, among others, as such a state.<sup>16</sup> It is respectfully submitted that Mr. Patton has overlooked an important distinction. In some states, to secure a judgment debt the judgment is made an automatic lien on all the debtor's property in the state, regardless of whether it may have been involved in any way in the litigation.<sup>17</sup> But this is not true of all states. In Massachusetts, for example, a judgment in a personal action is not secured, except insofar as the plaintiff takes steps, by attachment and execution, to make it so.<sup>18</sup> Since a state judgment is not an automatic lien, it follows that a federal judgment is not, in Massachusetts.

The Federal Judgment Lien Act clearly applies only to the lien created by judgments rendered in states where judgments are automatic liens.<sup>19</sup> It follows that in states where judgments are not automatic liens, the Federal Judgment Lien Act is inapplicable.

In all states, however, judgments, for the plaintiff *or for the defendant*, in certain types of proceedings such as writs of entry or bills for specific performance can have a drastic effect on the title to land. Clearly they are not "liens" on the land, and the Judgment Lien Act does not apply.<sup>20</sup>

Must such a judgment be recorded to charge a subsequent purchaser with notice? Curiously enough, there is very little case law on the subject, and the text-writers, with one exception,<sup>21</sup> confine their remarks to the lien field.

It could be argued that the federal court had finished its work when its judgment became final and established the rights of the parties; that thereafter it was up to the successful party to protect himself against bona fide purchasers by complying with state laws; that a requirement of recording is a rule of property and binding on the federal courts.<sup>22</sup> On the other hand, the effect of the federal judgment on the parties *and their privies* may remain forever a matter of federal law. From 1872 to the adoption of the Federal Rules of Civil Procedure in 1938, the Conformity Act<sup>23</sup> provided that "the practice, pleadings and forms and modes of pleading in civil causes, other than equity and admiralty causes, shall conform, as near as may be, to the practice, pleadings, and forms and

15. IV AMERICAN LAW OF PROPERTY, 807 (1952).

16. *Ibid.*, n. 13.

17. See *Rhea v. Smith*, 274 U.S. 434 (1927).

18. MASS. GEN. LAWS, c. 223, §§ 62-70 (attachments of real estate) and c. 236 (levy of execution on land) (1932).

19. Kooman; *Necessity for Searching Federal Court Records in Examining Florida Real Estate Titles*, 19 FLA. L. REV. 135 (1945).

20. Kooman, *op. cit. supra* note 19.

21. *Ibid.*

22. *Suydam v. Williamson*, 65 U.S. (24 How.) 427 (1861).

23. 17 STAT. 197 (1872), 28 U.S.C. § 724 (1926).

modes of proceeding existing at the time in like causes in the courts of record of the State . . . .” Whether this includes state requirements of recordings never seems to have been decided. The words “as near as may be” allow a large loophole for escaping from inconvenient state requirements.<sup>24</sup>

In 1938, the Supreme Court in *Erie Railroad Co. v. Tompkins*,<sup>25</sup> imposed a stricter degree of conformity to state substantive law. At the same time, by promulgating the Federal Rules of Civil Procedure, it substantially did away with conformity in procedure.<sup>26</sup> If the status of recording was unsettled before, the new Rules seem, if anything, to tip the scales away from any requirement that federal judgments be recorded, more than the *Erie* case tips the scales toward recording.

With respect to pending matters in the federal courts, there can be no argument that the court is not concerned with protecting the subject of the case from being carried away by a bona fide purchaser. It has been held, however, that local laws requiring the recording of a *lis pendens* notice are rules of property applying to federal proceedings.<sup>27</sup> This was certainly consistent with the spirit of the Conformity Act. Query, however, whether the Federal Rules may not have changed this, too.

### III. RIGHTS OF THE UNITED STATES EXISTING PRIOR TO THE DECREE

This is a different kettle of fish, indeed. Here, we encounter, in addition to questions of statutory construction, the doctrine of sovereign immunity.

First, the statutory construction: Do the states *purport* to bind the United States under statutes which exempt rights “which the laws of this state cannot require to appear of record?”

The United States can acquire property in two ways: by voluntary and by involuntary transfer. When it seizes property without regard to the wishes of the owner, as for taxes, or by eminent domain, no state can interpose conditions.<sup>28</sup> A different rule, however, seems to apply to voluntary transfers to the United States.<sup>29</sup> If a state requires a mortgage to be recorded to bind bona fide purchasers, a mortgage to the Federal Land Bank or the Home Owners’ Loan Corporation must be recorded too, and

---

24. *Mexican Central Ry. v. Pinkney*, 149 U.S. 194 (1893). See 6 HUGHES, FEDERAL PRACTICE, JURISDICTION AND PROCEDURE, 86 § 3564 (1931).

25. 304 U.S. 64 (1938).

26. For comment on some cross-currents thus created, see Note, 62 HARV. L. REV. 1030 (1949).

27. *U.S. v. Calcasieu Timber Co.*, 236 Fed. 196 (5th Cir. 1916); *Romeu v. Todd*, 206 U.S. 358 (1907); S.C. *sub nom* *Todd v. Romeu*, 217 U.S. 150 (1910).

28. *U.S. v. Snyder*, 149 U.S. 210 (1893) (taxes); *Kohl v. U.S.*, 91 U.S. 367 (1876) (eminent domain).

29. *U.S. v. Fox*, 94 U.S. 315 (1876); expressly reaffirmed in *U.S. v. Burnison*, 339 U.S. 87 (1950).

the recording is not just a matter of choice on the part of the United States.<sup>30</sup>

Although under no constitutional obligation to do so, Congress has seen the wisdom of conforming, and has provided for recording of federal tax liens<sup>31</sup> (except estate tax liens)<sup>32</sup> whenever state statutes require liens to be recorded. It has thus enabled states "to require recording of federal rights." As suggested above, it is doubtful that the State Torrens Acts contemplated such a broadening of jurisdiction by an assist from Congress. This is especially true since the assists came, for the most part, after the adoption of the state acts. It is also doubtful that Congress intended such a result.

From 1888 to 1951, Congress also provided that federal eminent domain proceedings should conform to state practice,<sup>33</sup> in language similar to the Conformity Act discussed above. Similarly, the question, whether this conformity included recording where required, does not seem to have been decided. In 1951, the proponents of uniformity prevailed; Section 71A was added to the Federal Rules, and conformity went out the window.<sup>34</sup>

It appears, on the whole, that the states, by undertaking to settle, by Torrens decree, rights which the state can require to appear of record, may be purporting to deal with a rather large and nebulous collection of rights of the United States.

This brings us to sovereign immunity.

Can a state court's *in rem* decree bind the United States? It would seem fairly clear that it cannot.<sup>35</sup> It is well established that the United States cannot be sued without its consent,<sup>36</sup> and a suit against property in which the United States has an interest is a suit against the United States.<sup>37</sup>

"A steady change of opinion has gradually undermined unquestioned acceptance of the sovereign's freedom from ordinary legal responsibility . . . . The subject, it has been recognized, is not free from casuistry because of the natural, even if unconscious, pressure to escape from the doctrine of

30. *Pittman v. HOLC*, 308 U.S. 21 (1939); *Federal Land Bank v. Crosland*, 261 U.S. 374 (1923).

31. INT. REV. CODE of 1954, § 6323.

32. *Detroit Bank v. U.S.*, 317 U.S. 329 (1943).

33. 36 STAT. 1167 (1911), § 258 of Title 40, U.S.C. (1952).

34. See Notes of Advisory Committee on Rules, in the 1953 Pocket Supplement to the West Publishing Company Annotations to the Federal Rules, p. 130.

35. *Van Keuren v. U.S.*, 138 N.J. Eq. 66, 46 A.2d 815 (1946); *Newcomb v. City of Newport Beach*, 7 Cal. 2d 393, 60 P.2d 825 (1936); *U.S. v. Candelaria*, 271 U.S. 432 (1926); *Sunderland v. U.S.*, 266 U.S. 226 (1924); *Privett v. U.S.*, 256 U.S. 201 (1921); *Bowling v. U.S.*, 233 U.S. 528 (1914); *Shevlin-Mathieu Lumber Co. v. Fogarty*, 130 Minn. 456, 444, 153 N.W. 871 (1915).

36. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949); *U.S. v. Lee*, 106 U.S. 196 (1882); *The Siren*, 7 Wall 152 (U.S. 1868); *U.S. v. Clarke*, 8 Pet. 436, 444 (U.S. 1834).

37. *The Siren*, 7 Wall 152 (U.S. 1868); *U.S. v. Alabama*, 313 U.S. 274 (1941).

sovereign immunity which . . . whatever its historic basis . . . is hardly a doctrine based upon moral considerations. The trend of deep sentiment, reflected by legislation and adjudication, has looked askance at the doctrine."<sup>38</sup> The judicial exceptions to the doctrine have been discussed at length by the Supreme Court,<sup>39</sup> but little satisfaction is to be gained from comparing Torrens proceedings with any of them.

The nearest thing we have to a legislative exception is § 2410 of Title 28 of the United States Code, which provides that "under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court . . . or in any state court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien."

This is a very limited consent to suit. First, it cannot apply to Torrens proceedings. The condition prescribed in section 1444 is that any action brought under section 2410 against the United States in a state court may be removed by the United States to the federal district court. If there is any form of proceeding in a state court which cannot be removed, a Torrens proceeding is it. The federal court lacks the state court's legal and engineering personnel to assist it in arriving at its decrees; it lacks the machinery for transcribing its decrees into certificates of title, indexing and recording them and dealing with subsequent transfers, and, most important of all, it wholly lacks the assurance fund for reimbursing innocent losers which is an essential element of the Torrens System.

Second, even for suits to quiet title, this section is of very limited value. One of the purposes of quieting title is to give examiners a clean slate to start from. Note, however, that the United States must be named a party. That detracts from one purpose of quieting title: to bind all the world, including unknown parties. It has further been held that this section applies only to property on which the United States has or claims a mortgage or other lien, and not to property to which the United States claims absolute title.<sup>40</sup> The section goes on to require that the complaint shall set forth with particularity the nature of the interest or lien of the United States. To pass on the efficacy of the state court decree would therefore require not only a careful study of the complaint but also a substantial knowledge of the previous history of the title.

---

38. Frankfurter, J., dissenting in *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 708 (1949); and in *Snyder v. Buck*, 340 U.S. 15, 29 (1950).

39. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949).

40. *Brown v. Devlin*, 116 F. Supp. 45 (D. Mont. 1953); *Wells v. Long*, 68 F. Supp. 671 (S.D. Idaho, 1946).

## IV. RIGHTS OF THE UNITED STATES ARISING AFTER THE DECREE.

As suggested above, when the United States acquires property by voluntary transfer, the state can require recording.<sup>41</sup> If the state can require recording, it could presumably also require registration where registered land is involved. If the United States acquires land by seizure, however, no recording is necessary, except insofar as Congress may or may not have required it.<sup>42</sup> In some situations, the language used by Congress seems to indicate an intent to require registration where registered land is involved; in other situations, it may be that Congress intended simple recording to suffice to bind registered as well as unregistered land. There may be good reason for this: policy may require federal action not to be defeated by ignorance on the part of the federal officials as to whether land is registered or unregistered. The result, however, of giving recorded but unregistered instruments effect on registered land is to require conveyancers dealing with registered land to examine the indices for unregistered land, too.

Congress has provided<sup>43</sup> that federal tax liens shall not be valid as against purchasers, etc., until notice has been filed in *the* office designated by state law. States with Torrens Systems have, of course, two offices to designate. It seems fair to construe "*the* office" as "the appropriate office," but the suspicion that Congress had overlooked the point altogether is hard to avoid. The Supreme Court has further complicated the problem by holding that filed tax liens apply to after-acquired property, even as against bona fide purchasers.<sup>44</sup>

## V. PRACTICAL ASPECTS.

All of the foregoing would perhaps have sounded like an empty academic exercise to the able lawyers who drafted Torrens Acts half a century ago. In the thirteen original states, for example, the United States was not a source of title; its interests in land would have to be acquired. In former territories the United States was a source of title, but "patents from the United States are so generally in proper form that examiners are more or less liberal in checking them, provided only that they are of record locally."<sup>45</sup> In territories acquired by conquest or treaty, Congress had often provided by statute for the establishment of private titles against the United States before courts or boards of commissioners.<sup>46</sup>

---

41. See note 29 *supra*.

42. See note 28 *supra*.

43. 26 U.S.C. § 6323 (the 1954 Internal Revenue Code). For the former law see § 3672 of the 1939 Code.

44. *Glass City Bank v. U.S.*, 326 U.S. 265 (1945).

45. IV PATTON, *AMERICAN LAW OF PROPERTY*, p. 690 (1st ed. 1952).

46. See *Botiller v. Dominguez*, 130 U.S. 238 (1889); *More v. Steinbach*, 127 U.S. 70 (1888); *Barker v. Harvey*, 181 U.S. 481 (1901), for detailed accounts of the statutory procedures provided for California; and *Florida v. Furman*, 180 U.S. 402 (1901), for an account of the procedures provided for Florida.

When the Torrens Acts were adopted, no one worried about defects in original deeds or patents from the United States as a source of title. The United States had, of course, the power to acquire land by purchase or by eminent domain, but this power was only sparingly exercised, for an occasional fort or postoffice. It had a lien for taxes, but the comparison between federal taxes then and now is both odious and hackneyed.

Individuals, then as now, could acquire rights in land as a result of federal judgments, but the Federal Rules had not yet been thought of, and the Conformity Act doubtless afforded some measure of comfort.

Consider now, however, the tremendous increase in federal activity in real estate since the days when Torrens Acts were being drafted. In the same year (1898) that Massachusetts adopted its Torrens Act,<sup>47</sup> the Federal Bankruptcy Act<sup>48</sup> was enacted and for forty years all the world was charged with notice of bankruptcy proceedings. Since 1938, a trustee in bankruptcy has been required to record a notice of the proceedings, *except* when the land lies in the county where the court sits.<sup>49</sup> The increase in federal taxation, with its attendant liens, needs only to be mentioned. The federal government, through financing agencies such as the Federal Land Bank, the Home Owners' Loan Corporation and the Reconstruction Finance Corporation, has directly acquired vast security interests in real estate, and still more indirectly through the FHA and VA insurance programs.<sup>50</sup> During World Wars I and II it acquired a great deal of property, in fee or for a term of years, for war plants and installations, or for training areas. Many of the war plants were disposed of, but with a string attached: they may be subject to a "dormant estate" in the United States, as part of the "National Industrial Reserve."<sup>51</sup> It has been estimated that the federal government owns twenty-five per cent of the 1,900,000,000 acres in the Continental United States.<sup>52</sup> Much of this, of course, is worthless land that could not be given away. Most of it is also in national forests and parks.

It is not suggested here that anyone is in serious danger of innocently purchasing a postoffice, a piece of a national park, or an airbase, *a la* Brooklyn Bridge. The existence of such institutions is commonly well known, and their boundaries determinable without too much difficulty. A Torrens Court is not likely to overlook them.

The existence of other kinds of federal interests, such as liens and mortgages, is something else again. What is the practical problem they

---

47. Mass. Acts of 1898, Chapter 562.

48. Act of July 1, 1898, now Title 11 U.S.C.

49. 52 STAT. 852, 11 U.S.C. § 44(g) (1938).

50. At the end of May, 1954, FHA insurance outstanding amounted to \$17,868,670,000 and VA insurance, as of the end of March, to \$16,400,000,000. Housing & Home Finance Agency, Housing Statistics, June, 1954, pp. 21, 22.

51. 62 STAT. 604, 50 U.S.C. § 451-462 (1948); C.F.R. c. 1. sub. c. A.

52. N.Y. Times, Sept. 26, 1954, p. 20, col. 2.

create? In Massachusetts, registration proceedings include an examination of the records in the registry of deeds by an experienced attorney appointed by the court. He would find and report all the mortgages held by the Federal Land Bank or the HOLC, or insured by the FHA or the VA, or federal tax liens outstanding or otherwise, that appear of record within the limits of his search in the chain of title covering the parcel being registered, and appropriate reference to them can be incorporated in the decree if they still appear to be outstanding. Since the decree commonly deals with them only by reference, without attempting to redefine them, it is of no great importance whether the United States is, or can be, made a party on this account. But the encumbrance may appear to be discharged or released, and the discharge or release might be subject to a defect not appearing on its face. If the court's examiner, and so the court, should overlook a mortgage or lien held by the United States, or if the court should rely on a defective discharge, the United States could disregard a decree which purported to extinguish its rights. Query: would it have an election to seek reimbursement from the assurance fund?

Although registration fixes conclusively the boundaries of the registered land, the court does not attempt to examine the titles to all the abutting parcels. The cost of registration would be prohibitive. Instead, the names of the abutters are obtained from the local assessors, and notice of the proceedings is given to them, on the theory that they will, as a practical matter, look out for their interests and adequately represent their mortgagees.<sup>53</sup> If they did not, an ordinary mortgagee would be bound by the court's determination of the boundary line. But suppose the mortgage is insured by the VA? It is "required to be recorded" and probably is recorded, so that the decree purports to be conclusive, but is it?

In Massachusetts we are not much concerned over the risk that the United States will appear suddenly and assert claims to our real estate on behalf of Indians. I gather, however, from cases already cited<sup>54</sup> that it happens disconcertingly often in the western states. Defects in the source of a Massachusetts title would probably enure to the benefit of the Commonwealth, if anyone, but in Hawaii they enure to the benefit of the United States as successor in title to the source.<sup>55</sup>

If the decree is subject to rights of Indians, federal judgments, *lis pendens*, eminent domain, estate taxes and bankruptcies, is it a very satisfactory decree? If the decree purports to do more than it can, it exposes the assurance fund to risk. That is bad for the community which backs it. It is not particularly satisfactory for the petitioner who presumably chose registration rather than title insurance (which is generally cheaper)

---

53. MASS. GEN. LAWS, c. 185, § 39 (1900).

54. See note 35 *supra*.

55. U.S. v. Fullard-Leo, 331 U.S. 256 (1947).

because he wanted to be sure of having the land, not a claim against a fund. If the assurance fund is safe because the petitioner is warned of the limitations of the decree, he is still not getting what he ought to be able to get out of title registration. If it is uncertain whether he takes subject to any or all of such matters, it is unsatisfactory. He ought to *know* whether he needs to run hither and yon, making supplemental investigations of federal court dockets and inquiries of the Director of Internal Revenue. Unnecessary inquiries are a waste of the inquirer's time and of the Director's.

#### VI. SUGGESTED IMPROVEMENTS

No one should complain of a condition without offering proposals for correction. The complete solution cannot be found in one place. There is room for constructive action by the state legislatures, by Congress, and by the Supreme Court.

The state legislatures could revise the expression "rights which the statutes of this State cannot require to appear of record." From a selfish point of view, they should separate individual rights from rights of the United States itself to avoid risk to the assurance fund. To improve the operation of the Torrens System and produce more nearly the result it was intended to produce, the states could deal more boldly with rights of individuals acquired prior to the decree.

Congress could make it clearer whether, when it provides for recording of notices of bankruptcy and of federal tax liens, it means recording in the appropriate office or recording in any office. Considerations of policy arise in this connection. If Congress specifies recording in the appropriate office, the trustee in bankruptcy or the tax collector may, by recording on the wrong side, fail to catch some land. On the other hand, the great majority of land transactions have nothing to do with bankruptcy or tax delinquency and should not be burdened with unnecessary investigations of such matters.

Congress might also consider extending the scope of its consent to suit against the United States. However, it must be admitted that serious difficulties present themselves. All suits heretofore authorized have been either in the federal courts in the first instance or expressly subject to removal thereto. Ordinary suits to quiet title could be removed, but not, for reasons already stated, proceedings to register title. Moreover, Congress has specified, insofar as it has consented at all to bills against the United States to quiet title, that the United States must be made a party and served with notice in a prescribed way. It is unlikely that Congress would ever consent to let the United States be bound, like other parties, without being named, and being served only by publication. Finally, Congress cannot dispense with the requirement that the nature of the interest of the United States be described with particularity, because if it did, everyone seeking to quiet title would make a practice of naming and serving the

United States whether it had an interest or not, and the United States Attorney would be overwhelmed with such matters, with no way to ascertain what, if anything, he must protect.

Congress might, however, consider consenting to suits *in rem* against property in which instrumentalities of the United States have a security interest only. Where the interest is indirect, as in the case of mortgages insured by the FHA or VA, the bank which made the loan and holds the mortgage could reasonably be expected or, if necessary, required to take steps to protect the security in such proceedings. If that is not sufficient, or if, as in the case of mortgages held directly by a federal instrumentality, there is no bank involved, there is still the protection of the assurance fund.

The Supreme Court could play its part by amending the Federal Rules expressly to require notices of *lis pendens* and of judgments in federal courts to be recorded in order to affect bona fide purchasers. It is submitted that this would detract very little from uniformity and would assist conveyancers immeasurably, and not with respect to registered land alone. It would significantly improve all land titles.

If all these suggestions were adopted *in toto* by Congress, the Court and the states, security of titles would be much increased. They do not need to be adopted *in toto* and all at once, however, in order to achieve some measure of improvement. Each change as made would be, *pro tanto*, a step forward.