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The Land Tenure System of the United States

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Abstract

The purpose of this paper is to briefly describe the land conveyancing system used in the United States of America. In addition to its operational aspects, several shortcomings of the system are described. Although the U.S. conveyancing system at first observation appears to be far inferior to the land registration system used in the Federal Republic of Germany, the U.S. system supports certain policies which are considered important within the U.S. social framework. It is submitted that recent technological advances may be moving U.S. jurisdictions towards a conveyancing system which will have the same overall effect as a land registration system.

Introduction

The most common alternative land conveyancing system to that used in the United States is commonly referred to as "title registration". Under registration, the actual title to property is recorded in a public office. In the U.S., by contrast, only evidence of title is recorded in the public land records office. As a rule, land registration is far more reliable and less costly to users than recordation systems. However, jurisdictions in the U.S. are effectively precluded from implementing registration systems due to several idiosyncrasies of the U.S. legal system.

Strong biases toward the rights of individuals exist in the U.S. Just because a particular action or administrative framework would greatly benefit most citizens of the community doesn't necessarily mean the action may be carried out. The "due process" clause of the U.S. Constitution and other enumerated rights within the amendments to the constitution give individual citizens significant protection from intrusion by the government and have been cited as substantial constraints in converting to a land registration system. In addition, there is a peculiarly strong sanctity in the rights of individuals when land ownership legal issues are involved.

Land records offices in the U.S. are highly decentralized. They are typically maintained at the county or local level. As a result, numerous jurisdictions exist with a wide variety of record keeping systems. This large number and diversity of systems makes conversion to any other system, such as land registration, a difficult task. From a practical perspective, the conversion process would be different for each jurisdiction. To remove the land records office from the local community or county to a more centralized facility would result in a redistribution of governmental powers and would meet with great resistance.

Another reason cited to explain why the U.S. has never converted to a simpler conveyancing and title system is that vested interests have developed over time and constitute a considerable force in resisting change. Not the least of these vested interests is the private title insurance industry which owes much of its reason for existence to the inefficiencies and non-conclusiveness of the current public records systems.

For these and other reasons, a land registration system modeled after those seen in Europe would not be acceptable within the current U.S. social, legal, and institutional environment. The

induction of land registration into the U.S. framework, whenever tried in the past, has typically resulted in failure or a highly inefficient operational system. However, recent advances in technology may aid advocates for reform in skirting much of the resistance to change seen in the past.

Typical Title Search

Each time land changes ownership in the U.S. it is necessary to carry out a "title search." the purpose of a title search is to discover all those individuals and institutions that might have an interest in the land parcel.

The first step of a traditional title search is to construct the chain of all previous owners of the parcel. In most U.S. jurisdictions indexes to the land records are kept only by the names of the grantors and grantees of the property. By looking up the current owners name in the grantee index the name of the seller may be determined. This new name is used to trace the next previous owner and the process continues. The local custom of many lawyers in the past was to trace this lineage back at least 60 years. Surveyors may need to trace the line back much further to determine when a parcel was initially created.

The second step of the title search is to search each owner in the chain forward in time until the owner sold it to the next person in the chain. The purpose of this step is to make certain the previous owner didn't first sell the parcel to someone other than in your chain or didn't grant away some other right regarding the property.

After all the relevant documents have been uncovered, the next step is to thoroughly examine the text of all the documents. The lawyer checks to see that each document in the chain has been properly executed and that rights haven't been transferred or altered in the text of the instruments.

The final step is the lawyer's title opinion. After reading all the documents, the lawyer advises the purchaser of any potential problems with the ownership rights and aids the purchaser in clearing up these problems to make the title to the property more secure.

Shortcomings in the Title Search Process

There are numerous problems in using the above procedure in practice. For instance, even though an instrument may be found in the public records that instrument is not necessarily valid or accurate. Forged documents may be as easily recorded in the land records office as valid documents. In another instance, a previous owner might fraudulently sell the same property several times and all those documents will be readily admitted to the public record even though only one might be valid.

A reverse situation is also true. Some claims may be valid even though not recorded in the land records office. Thus, it's possible that other people may have valid rights in your property and yet a search of the public record will give no indication of those rights. Examples include titles obtained by adverse possession and prescription, lien claims, and the statutory rights of spouses.

In addition to the legal problems cited, there is a wide range of problems relating to the operational inefficiencies apparent in most local land offices. The documents which the lawyer needs to consult may be physically kept in several different locations. Deeds and mortgages are typically kept in the land recorder's office but other rights affecting the land may be present in the records of the clerk of courts, clerk of probate court, county clerk, county auditor, tax assessor, and treasurer. Being paper documents, they are inconvenient for retrieval and use.

Typically, there is also a general absence of comprehensive indexes. Each office within a jurisdiction may develop their own unique index system. Systems also differ from jurisdiction to jurisdiction. There is a lack of ability to access information by referring to the parcel since deed record indexes typically are accessed only by knowing the names of the parties to previous transactions.

It is appropriate to conclude that there is no such thing as a perfect title right in the U.S. After all the research is complete and correction instruments are filed, the lawyer provides the potential purchaser with only an evaluation of the risks in buying the property. Sometimes the risks may be slight and at other times the risks may be great.

Mechanisms Developed to Respond to the Shortcomings

The process so far described is for a traditional title search in the U.S. In modern practice, public jurisdictions and the private sector have addressed the shortcomings of the land tenure system in a wide variety of ways. I will mention only a couple examples.

Marketable title acts have been passed by the legislatures of most states. The length of the search of the public records is typically shortened in these acts. Thus, for most matters, if an individual has not reasserted their claim on the public records in the past say twenty years, their claim will no longer be considered by the courts. Marketable title acts also typically provide a definition for "reasonably secure title". Because title to real estate in the U.S. is never perfect, it is always possible to point to some small defect as an excuse to break a contract for the purchase of property. Marketable title acts have largely solved this problem by defining the extent of defects which make the risks of purchase unreasonable.

The tedious and labor-intensive search of the public records has been considered by many lawyers to be a waste of their skills and talents. Abstractors are individuals who carry out this work for lawyers and others. Because they specialize in record searches, abstractors are generally more efficient at completing the task than is the typical real estate lawyer. Abstractors deliver to the lawyer or other client short summaries of the most critical items in each of the relevant title documents.

To handle the risks involved in the purchase of real estate, a private title insurance industry has arisen in the U.S. After clearing up any defects exposed through the search of the public record, the title insurance company protects the purchaser from damage from any other defects which may arise which weren't exposed during the records search. A one time fee is paid to the insurance company to cover this risk for the entire time the purchaser owns the property. The title insurance industry has been criticized for the numerous exceptions written into most policies. For instance, any title defects which might be exposed by a competent land survey of the property are not covered by the typical policy. Some claim there are so many exceptions to the typical policy that the policy provides little protection to the purchaser. Others claim that the rates charged are far in excess of the services or coverage provided. Regardless, title insurance is the most widely accepted method of addressing property purchase risks in the U.S. In some jurisdictions, title insurance companies have taken over the conventional roles of abstractors and lawyers in clearing title to the property. Figure 1 illustrates the dominant parties in clearing title to real estate for each state in the nation.

The land conveyancing system in the U.S. has resulted in high costs to the public. There is a high cost involved in maintaining our land records in numerous local-level public offices. Long and tedious search times result in high transaction costs for each real property purchaser. In addition, the risks of oversight and errors significantly add to the costs of individual transactions.

Benefits of the Typical U.S. Real Property Records System

Regardless of its perceived or real shortcomings, the conveyancing system of the U.S. works. The U.S. legal system allows enough leeway to enable the system to adapt to new economic and social conditions over time. Although individual transaction costs may be high, the costs of transactions are placed primarily on the users of the system. The general public isn't being taxed to support an expensive cadastral system which, in the view of many, would primarily benefit only land owners.

Another argument used to support the current land conveyancing system is that the current system leaves the control and operation of the conveyancing system at the local or county government level. There is a general distrust of centralized government in the U.S. If governmental tasks can be accomplished at the local level it is best to keep state government out. If the tasks can be done without involving a state or federal bureaucracy, it is best to do so. If certain land records tasks are being accomplished adequately by the private sector, government should stay away. Current personnel may be doing the job inefficiently but local government would rather do it inefficiently than pay the price of letting others tell them how real property rights should be administered in their jurisdiction. There is a sense that land rights are too important to put in the hands of other than those who are most affected, i.e. local people and local government.

The Future

The current land tenure system in the U.S. is spurring technological innovation. The problem for researchers in the U.S. is to develop highly reliable cadastral systems which can be operated and maintained by relatively unsophisticated people at the local governmental level.

Technological advancement is not the solution for many of our social problems in the U.S. However, in this instance, technology may very well allow us to get around many of the legal and institutional impediments to reform in the U.S. At some point in time, as land records are automated, the computerized system will be found to be so reliable that it will be depended upon rather than searches by individuals. If everyone starts depending on the single system (i.e. the computerized system) we will in effect have converted to something similar to a registration system.

Because the U.S. has far more to gain by developing highly reliable computerized systems which are useable at the local level, researchers are putting a substantial amount of thought and effort into the problem. Significant advances have already been made. Because of this technological innovation, it's conceivable that the U.S. may eventually jump ahead of other countries in the cadastral mapping area within a relatively short time frame.

Summary

"It is surely one of the curiosities of the late twentieth century that broad segments of English (real property) law, developed from the middle ages to the nineteenth century, survive in the United States more or less intact while the nation in which this law principally evolved long since has abandoned its most archaic and non-functional features." (C. Dent Bostick *Indiana Law Journal*, Vol. 63:55 1987) Although curious, the lack of significant change within the U.S. conveyancing environment is perhaps explainable. In this author's opinion, it is likely that computerization, automation, and expert systems will have a significant impact on land records keeping and the administration of real property rights in the U.S. in the next few decades to come.