

THE CHANGING CONTOURS OF TORRENS LAW¹

The Torrens system of determining interests in real property is an alternative to abstract property ownership. “Under the abstract system, documents evidencing marketable title may be found in recorded documents or by material outside the recording system. . . . the prospective purchaser of real property looks at recorded documents to determine marketable title of record.” *Hersh Properties, LLC v. McDonald's Corp.*, 588 N.W.2d 728, 733-34 (Minn. 1999). In contrast, interests in Torrens property are determined – in fact, established – by a court. *Id.*

And, whether property is abstract or Torrens affects more than where documents are recorded, or who examines title. It also impacts on issues such as whether possession of the property will mature into ownership. Recent cases and a statutory change in Minnesota not only illustrate how complex these issues can be, but have impacted on how they will be resolved. This article briefly reviews the history of Torrens law, then discusses the status quo after cases including *In Re Collier* and *Hebert v. City of Fifty Lakes*, and a change to the language of the Torrens Act at Minn. Stat. § 508.02.

Invention of the Torrens System in Australia

The Torrens system was invented by Sir Robert Richard Torrens. He was born in Cork, Ireland, in 1814. Percival Serle, *Torrens, Robert*, Dictionary of Australian Biography, <http://gutenberg.net.au/dictbiog/0-dict-biogT-V.html#torrens1> (last visited September 30, 2011). He was the oldest son of a colonel who was both a distinguished economist and one of the founding fathers of South Australia. *Id.* Torrens was educated in Trinity College, Dublin, and went to South Australia in 1841 to become the collector of customs at Adelaide. *U.S. v. Ryan*, 124 F. Supp. 1, 4 (D. Minn. 1954). South Australians elected Torrens to their first parliament

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after becoming self-governing in 1856, largely on the strength of his platform of land law reform. Rosalind F. Croucher, *Inspired Law Reform of Quick Fix? Or, "Well, Mr. Torrens, What do You Reckon Now?" A Reflection on Voluntary Transactions and Forgeries in the Torrens System*, 30 *Adel. L. Rev.* 291, 304 (2009). He was knighted by Queen Victoria, and died near London at his home in 1884. THE TORRENS SYSTEM OF REGISTRATION AND TRANSFER OF THE TITLE TO REAL ESTATE. ITS PRINCIPLES EXPLAINED AND ITS METHODS SET FORTH, Chicago Real Estate Board 24 (M. M. Yeakle ed., 1894).

Torrens introduced his land registration system in South Australia's Parliament in 1858. *Id.* at 28. At the time, "land titles were in serious disarray" in South Australia. Croucher, *supra*, at 303. The population was growing quickly, and with it land titles; it was estimated that "the documents for three-quarters of the titles had been lost." *Id.* Torrens described the existing law of real property as "complex and cumbrous in its nature, ruinously expensive in its working, uncertain and perplexing in its issues, and specially unsuited to the requirements of this community." *Id.*, at 301.

This unfavorable opinion was both personally and philosophically motivated. *Id.* at 302. Personally, the plight of a good friend troubled Torrens: While serving as an officer in the Indian Army, the friend lost his land in South Australia as well as upwards of 20,000 pounds in improvements to that land, when a title defect was discovered. *Id.* at 304. Philosophically, Torrens, the economist's son, had a commitment to economic liberalism: He wanted to establish a free market in land and saw the lack of security of title as discouraging investment of capital in it. *Id.*, at 302.

Such considerations may have motivated him, but his reform was made feasible by his work as controller of customs (and hence experience with ship ownership), and as a registrar of deeds. *Id.*, at 304. Torrens sought to apply the principles of ship ownership registration (under

the English law known as the “Merchants Shipping Act”) to registration of title to land. THE TORRENS SYSTEM, *supra*, at 25. Torrens also learned of a German custom of registering land titles; from these sources, he formulated his system of land title transfer. *Id.*

The idea gained favor in Australia, resulting in the framing of what became known as the Torrens Act and the adoption of the system in practically all Australia not later than 1870. *Ryan*, 124 F. Supp. at 4. Its popularity spread, and the South Australian Act became the basis of most of the American Torrens statutes, as well as the statutes enacted in England, Canada, New Zealand and several other nations. Case Comment, *Yes Virginia – There is a Torrens Act*, U. Rich. L. Rev. 301, 302 (1974-1975). Towards the end of the last century, approximately 30 nations used a form of title registration. Note, *Possessory Title Registration: An Improvement of the Torrens System*, 11 Wm. Mitchell L. Rev. 825, 827 (1985).

History of Torrens in America

In America, Illinois was the first state to adopt a Torrens Title Act: The Chicago fire of 1871 destroyed Cook County real-estate records, and the County was growing quickly. John T. Durkin, *Torrens Title*, The Electronic Encyclopedia of Chicago, <http://encyclopedia.chicagohistory.org/pages/1262.html> (last visited September 30, 2011). There was a serious demand for secure and adequate verification of title. *Id.* The first act passed in 1895, but was declared unconstitutional by the Illinois Supreme Court. *The Torrens Law in Illinois*, N.Y. Times, Nov. 3, 1897. See, *People ex rel. Kern v. Chase*, 165 Ill. 527, 46 N.E. 454 (1896). In 1897, the Illinois legislature passed an amended version. *Id.* Virginia was the first state to provide in its constitution for the enactment of a Torrens Act; the Virginia Torrens Act was passed in 1916. Case Comment, *Yes Virginia – There is a Torrens Act*, *supra*, at 304. At the end of the 1800s, it was lamented that, regarding the Torrens system, “the favoring flood-tide, that will surely sweep over the country, has been kept back so long.” THE TORRENS SYSTEM, *supra*,

at 2.

However, that did not occur. Torrens-type registration statutes were enacted in twenty-two states. Note, *Possessory Title Registration*, *supra*, at 828. But, Torrens came into widespread use in only five: Hawaii, Illinois, Massachusetts, Ohio, and Minnesota. Anh T. Le, *Property—The Effect of the Hersh Decision on the Torrens Act: Getting to the Root of the Problem*, 26 Wm. Mitchell L. Rev. 601, 608 (2000). And Illinois repealed its Torrens Act in 1992. 765 Ill. Comp. Stat. Ann. 40/1 (West 2011).

What stemmed the Torrens tide? Critics point to the expense and time involved in the registration process. Case Comment, *Yes Virginia – There is a Torrens Act*, *supra*, at 318. In some states, Torrens was opposed by interest groups. The dormant Virginia Torrens Act found early opposition from various interest groups within the legal, real estate, and banking industries. *Id.* at 320. The antipathy may have been exacerbated by well publicized claims that Sir Robert Torrens, the man, had a distaste for lawyers; he saw them holding a vested interest in a broken system, and he claimed that “lawyers got ‘the oyster’ while litigants got ‘the shell.’” Croucher, *supra*, at 301-02. Old fashioned unfamiliarity with a new system and inertia may have played a role, as well. Case Comment, *Yes Virginia – There is a Torrens Act*, *supra*, at 320.

The Torrens system was adopted in Minnesota in 1901 as a reform measure. *Hersh Properties*, 588 N.W.2d at 733 (noting that “[i]n 1901, Minnesota adopted the Torrens system . . . the goal of the legislature was ‘to clear up and settle land titles.’”) (Citations omitted). Torrens thrives in Minnesota today. And “Hennepin County . . . is the largest county in the state in terms of population and has more Torrens property than any other county in the state.” *In re Collier*, *In re Collier*, 726 N.W.2d 799, 808 n.4 (Minn. 2007).

Distinctive Characteristics of Torrens Title.

Specifically, “[t]he purpose of the Torrens system [is] to create a title registration

procedure intended to simplify conveyancing by eliminating the need to examine extensive abstracts of title by issuance of a single certificate of title, free from ‘any and all rights or claims not registered with the registrar of titles.’” *Hersh Properties, LLC v. McDonald's Corp.*, 588 N.W.2d 728, 733 (Minn.1999). This adjudication relieves a purchaser of the need to conduct certain due diligence, such as investigating documents of record and inspecting the property itself: “Under the abstract system, documents evidencing marketable title may be found in recorded documents or by material outside the recording system . . . the prospective purchaser of real property looks at recorded documents to determine marketable title of record . . .” N.W.2d 728, at 734.

Property owners derive significant benefit from the Torrens system; the purchaser of Torrens property does not have to pay for an expensive abstract to ascertain the quality of title, but may simply consult the certificate of title:

Under the Torrens system, time-consuming and expensive title searches, which characterize the abstract system, are alleviated because the purchaser of Torrens property may, subject to limited exceptions, determine the status of title by inspecting the certificate of title.

In re Collier, 726 N.W.2d at 804. But, for such a system to work, property purchasers and owners must be able to rely on their certificates of title:

Registered land stands on a different footing than unregistered land: The purpose of the Torrens law is to establish an indefeasible title free from any and all rights or claims not registered with the register of titles, with certain unimportant exceptions, to the end that *anyone may deal with such property with the assurance that the only rights or claims of which he need take notice are those so registered.*

Mill City Heating and Air Conditioning Co. v. Nelson, 351 N.W.2d 362, 364 (Minn. 1984)

(emphasis added). When one purchases Torrens property, then, they take subject only to “the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar.” Minn. Stat. § 508.25. The Torrens statute provides that every person

“who receives a certificate of title in good faith and for a valuable consideration shall *hold it free from all encumbrances and adverse claims . . .*” *Id.* (emphasis added).

The most significant exceptions to this rule are “certain rights or encumbrances subsisting against,” or existing at the time of the issuance of, the certificate of title, which by law do not need to be listed at memorials on the certificate of title. *Id.* The Minnesota Court of Appeals has referred to them as “seven exceptions that encumber Torrens property in spite of their failure *to appear on the last certificate of title.*” *In re Collier*, 726 N.W.2d at 802 n. 1 (emphasis added).

These are:

- (1) liens, claims, or rights arising or existing under the laws or the Constitution of the United States, which this state cannot require to appear of record;
- (2) the lien of any real property tax or special assessment;
- (3) any lease for a period not exceeding three years when there is actual occupation of the premises thereunder;
- (4) all rights in public highways upon the land;
- (5) the right of appeal, or right to appear and contest the application, as is allowed by this chapter;
- (6) the rights of any person in possession under deed or contract for deed from the owner of the certificate of title; and
- (7) any outstanding mechanics lien rights which may exist under sections 514.01 to 514.17.

Minn. Stat. § 508.25.

There are many implications of this policy. For example, to the extent that ownership can be established by possession, certificates of title are made more unreliable. Consistent with that, Minn. Stat. § 508.02 provides that “[n]o title to registered land in derogation of that of the registered owner shall be acquired *by prescription, or by adverse possession.*” Minn. Stat. § 508.02.

Further, since the certificate of title must authoritatively recite ownership, no interest is *established* against the property until it is registered. That is true of voluntary conveyances, such that delivery of a deed does not effect a transfer:

No voluntary instrument of conveyance purporting to convey or affect registered land, except a will, and a lease for a term not exceeding three years, shall take effect as a conveyance, or bind or affect the land, but shall operate only as a contract between the parties, and as authority to the registrar to make registration. *The act of registration shall be the operative act to convey or affect the land.*

Minn. Stat. § 508.47 (emphasis added). Liens, also, must be registered to be established as interests against the subject property.

Every conveyance, lien, attachment, order, decree, or judgment, or other instrument or proceeding, which would affect the title to unregistered land under existing laws, if recorded, or filed with the county recorder, shall, in like manner, *affect the title to registered land if filed and registered with the registrar in the county where the real estate is situated*, and shall be notice to all persons from the time of such registering or filing of the interests therein created.

Minn. Stat. § 508.48 (emphasis added). Those are fundamental principles, but it is problematic to oversimplify them.

In Re Collier: Good Faith and Equity are Vindicated.

In *In re Collier*, the petitioner was a purchaser of Torrens property, who was aware of a mortgage and sheriff's certificate that were not registered against the property.

Upon learning those documents had been mistakenly filed with the country recorder, the petitioner bought the property at a discounted price from the owner of record:

The Ramsey County Sheriff's office held a mortgage foreclosure sale . . . M & I filed a Sheriff's Certificate of Sale in the Ramsey County Recorder's office, but failed to file its purchase interest with the Registrar of Titles. . . Collier subsequently conducted a title search on the property, and thereby learned that M & I had not filed its mortgage or purchase interest with the Ramsey County Registrar of Titles. Knowing that the property was Torrens property, Collier concluded that M & I did not have a validly recorded interest in it. Collier then contacted Conley on his own behalf and offered to purchase any interest Conley may have had in the property. Conley . . . conveyed his interest to Collier by a warranty deed. On the same day he received the deed from Conley, Collier obtained a loan from Dennis Wager, repayment of which was secured by a mortgage on the property Collier had just purchased from Conley. Collier then filed the Conley warranty deed and the Wager mortgage with the Registrar of Titles.

726 N.W.2d at 801-02.

During litigation, the petitioner “correctly assert[ed] that Minnesota’s Torrens act places great emphasis on filing and registration.” 726 N.W.2d at 804. And, although Collier was aware of an unregistered claim against the property, Torrens law arguably provided that an unregistered interest is not actually an interest at all. Again, Minn. Stat. §§ 508.47 and 508.48 provide that it is the act of registration that effects conveyance of an interest, or establishment of a lien. And, *Moore v. Henriksen* provides that even possession by another does not put one on notice of an adverse claim against property. 165 N.W.2d at 218.

Yet, Minn. Stat. § 508.25 provides that only purchasers of Torrens property who receive “a certificate of title *in good faith* and for a valuable consideration shall hold it free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title.” (Emphasis added). And, as the *Collier* Court noted, the term “good faith” is in the statute, and therefore it must mean something: “Although the legislature never defined the meaning of good faith in that section, we conclude that good faith must mean something; if not, the language would be rendered a nullity.” 726 N.W.2d at 805. Also, the principles of equity still apply to registered property.

We also note that we have applied principles of equity when a result under the Torrens Act violates notions of justice and good faith. See Finnegan v. Gunn, 207 Minn. 480, 292 N.W. 22 (1940). In Finnegan, we concluded that “[n]othing in the Torrens system indicates that the ancient concepts of equity are not applicable” under certain circumstances. 207 Minn. at 482, 292 N.W. at 23. See also Mill City Heating & Air Conditioning Co. v. Nelson, 351 N.W.2d 362, 365 (Minn.1984)

726 N.W.2d at 808 (emphasis added).

Moreover, there was precedent for taking actual notice into consideration. In *In Re Juran*, decided over seventy five years earlier, the owner of multiple interests in a Torrens property claimed ownership of it. As the *Collier* Court noted, one interest was obtained before

notice was given that the property had been sold; other interests were obtained after said notice was given:

The facts in *Juran* were as follows. Peterson owned Torrens property that was encumbered by a registered mortgage. . . . Peterson executed a contract for deed and a warranty deed on the property to separate parties, neither of which documents was filed and registered with the registrar of titles. The warranty deed grantee subsequently executed a warranty deed to Juran, subject to the contract for deed. Later, Kroening registered a writ of attachment against the property with the registrar of titles pursuant to a legal action he brought against Peterson. *Nearly two months later, Peterson told Kroening's attorney that he had sold the property.* A few months later, Kroening filed with the registrar of titles a certified copy of a judgment rendered in the action in which the attachment had been issued, as well as a certified copy of a judgment he had obtained in a second action against Peterson. . . . Kroening then bought the property at a sheriff's sale, prompting Juran and the contract for deed grantees to challenge Kroening's rights in the property. They argued that Kroening had constructive notice that Peterson no longer had a full interest in the property because others were living on it.

under [Torrens] law possession of registered land is not notice of any rights under an unregistered deed or contract for deed. [The Torrens] act abrogates the doctrine of constructive notice except as to matters noted on the certificate of title. *We think however that it does not do away with the effect of actual notice, although it undoubtedly imposes the burden of proving such notice upon the one asserting it.*

726 N.W.2d at 805-06 (emphasis added; citations omitted).

As the *Collier* Court observed, the *Juran* Court concluded that the interest held by the claimant before receiving notice of the sale would be superior to the unregistered interest, but the interest received afterward would not.

We concluded in *Juran* that there was no evidence in the record suggesting that Kroening had actual notice of the property's occupation before he registered the writ of attachment, and we *therefore held that Kroening's rights under the attachment, judgment, and execution sale were superior to Juran's and the contract for deed grantees' interests . . .* But we also concluded that Kroening's rights in the property under the judgment in the second action were inferior and subordinate to Juran's and the contract for deed grantees' rights *because Peterson told Kroening's attorney that he had sold the property before the judgment in the second action was filed and registered with the registrar of titles.*

726 N.W.2d at 806 (emphasis added; citations omitted).

The *Collier* Court went on to note that other Minnesota Court of Appeals decisions relied upon this “actual notice” rule:

[T]hree court of appeals cases have shown that court's acceptance and reliance on *Juran's* actual notice rule. While these cases do not constitute precedent for the purpose of our court's jurisprudence, their reasoning is relevant to the extent it informs us about the role of actual knowledge in the Torrens system as it is practiced in Minnesota.

726 N.W.2d at 807 (citation omitted). Materials submitted by Hennepin County Examiner of Titles Edward A. Bock, Jr. showed that the legal community had relied on this precedent, as well:

It also appears that real estate practitioners in Minnesota have come to support and rely on our precedent that actual notice of another's unregistered interest in Torrens property can negate the good faith requirement found in section 508.25. For example, in his amicus brief, Hennepin County Examiner of Titles Edward A. Bock, Jr., asserts that our precedent in *Juran* “has provided sound guidance for the operation of the Torrens system for over 75 years.”

726 N.W.2d at 807-08. Finally, the *Collier* Court took notice of Mr. Bock’s point that a pure-race approach to Torrens, rather than a race-notice approach, could provide for problematic incentives and lead to inequitable results:

Bock claims that some degree of flexibility makes the Torrens Act more useful and efficient. He asserts that if a prospective purchaser could purchase Torrens property and then file his purchase documents with the registrar of titles when he has actual notice of another's unregistered interest, it “would establish a pure ‘race’ situation providing no benefit to good faith purchasers.” Bock claims that such a system would “encourag[e] unscrupulous persons to seek opportunities to profit at the expense of others.” He also asserts that our failure to uphold our ruling in *Juran* would create business risks. He claims that in the ordinary course of business, it may be days between a real estate closing and filing of the documents with the registrar of titles. During this interval, one who knows of the closing could take advantage of the delay.

726 N.W.2d at 808.

Expansion on the Prohibition Against Adverse Possession: Hebert v. City of Fifty Lakes.

Minn. Stat. § 508.02 prohibits taking property by adverse possession or prescription: “No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession . . .” Minn. Stat. § 508.02. However, what about other doctrines in which ownership is established by possession? Are they also prohibited, despite not

being specifically proscribed by the statute? After all, Minn. Stat. § 580.02 also said that Torrens property is subject to the “same burdens and incidents which attach by law to unregistered land,” that the Torrens statute did “not operate to change or affect any other rights, burdens, liabilities, or obligations created by law and applicable to unregistered land *except as otherwise expressly provided*” in the Torrens Act. Minn. Stat. § 508.02 (emphasis added). Yet, making the Certificate of Title reliable strongly implies that possession should not translate into ownership. And, the Minnesota Supreme Court has held that “*mere possession* of Torrens property will *never ripen* into title against the owner.” *Moore v. Henriksen*, 165 N.W.2d 209, 218 (Minn. 1968) (emphasis added). It has also held that “[o]nce property is registered, no one acquires rights in registered land by going into possession.” *Abrahamson v. Sundman*, 218 N.W. 246, 247 (Minn. 1928).

Beginning in 2008, the Court of Appeals and the Minnesota Supreme Court have expanded the prohibition against adverse possession to specifically apply to other doctrines in which ownership is established by possession. The first of these was de facto takings, a doctrine which provides that where government takes possession of property and makes improvements to it, it cannot be divested of the property. As the Minnesota Supreme Court observed in *Brooks Investment Company v. City of Bloomington*:

It is well settled that a de facto taking creates in the condemnor a protectable legal interest in the property which is equivalent to title by condemnation; the condemnor can be forced to compensate to the original owner of the property, but the owner cannot eject the condemnor nor can he require discontinuance of the public use.”

232 N.W.2d 911, 920 (Minn. 1975). That would appear to leave a Torrens property owner with a claim for damages, but no claim for ejectment. However, the Minnesota Supreme Court held that governmental entities cannot establish a protectable interest in Torrens property through de facto takings. The basis for the ruling was that de facto takings functioned similarly to adverse

possession:

[A]llowing the City to acquire the land at issue here by de facto taking *would operate in the same way as if the City acquired the land by adverse possession in that in both situations*, a landowner is deprived of rights to land due to actions of another. . . .

Adverse possession, however, is an exception to the general proposition that Torrens property is subject to the same “burdens, liabilities, or obligations created by law” as unregistered property, because acquisition by adverse possession is specifically disallowed by the Torrens Act. Minn.Stat. § 508.02. We cannot ignore this legislative prohibition.

Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 231-32 (Minn. 2008). It is worth noting that the Minnesota Supreme Court limited its ruling concerning de facto takings to Torrens property.

Of course, this ruling had implications for other doctrines where ownership of Torrens property was established by possession. And, in a second appeal of the same case, the Minnesota Court of Appeals explicitly broadened the principle to apply to statutory dedication, and one type of common law dedication. By statutory dedication, a government can establish ownership of property by possessing and maintaining it for six years:

When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.

Minn. Stat. § 160.05. The Minnesota Supreme Court found that statutory dedication was sufficiently analogous to adverse possession that it, too, was prohibited:

In concluding that statutory dedication is not akin to adverse possession prohibited by the Torrens Act, the district court relied on the differences between the two doctrines, specifically the elements of each action. . . . On the first appeal of this case, the supreme court addressed whether a de facto taking is tantamount to adverse possession. *Hebert*, 744 N.W.2d at 231-32. The supreme court noted that the Torrens Act does not contain an explicit provision governing whether a de facto taking of a Torrens property is permissible, but the supreme court looked for guidance to the language of Minn.Stat. § 508.02 allowing eminent domain and disallowing adverse possession. . . . The supreme court acknowledged the different elements of each claim, yet still looked to the practical operation to assess whether the two actions are related. Thus, our analysis is similarly focused on the operation of statutory dedication compared to adverse possession. [R]ecently, the supreme court characterized the user statute as a “substitute” relief for an

adverse-possession claim. *Barfnecht v. Town Bd. of Hollywood Twp.*, 304 Minn. 505, 505, 232 N.W.2d 420, 422 (1975). . . . The supreme court held that “[a]s a substitute for common-law creation of highways by prescription or adverse use, the [user] statute provides [a] method for acquisition of highways by adverse public use.” *Id.* The city argues that these cases analogize statutory dedication to adverse possession only in dicta and cites instead to authority from other jurisdictions. *See, e.g., Carter v. Michel*, 403 Ill. 610, 87 N.E.2d 759, 764 (1949) (concluding that an easement was valid despite not appearing on the certificate of title); *Duddy v. Mankewich*, 75 Mass.App.Ct. 62, 912 N.E.2d 1, 5-6 (2009) (concluding that Torrens landowners intended to give an easement*855 in a subdivided lot for the benefits of the other subdivisions despite the easement not appearing on the certificate of title), *review denied* (Mass. Oct. 29, 2009). Because recent supreme court precedent *in this case* instructs us to look to the operation of an action when comparing it to adverse possession prohibited by the Torrens Act, and because statutory dedication operates fundamentally similar to adverse possession, we conclude that statutory dedication is prohibited by the Torrens Act.

Hebert v. City of Fifty Lakes, 784 N.W.2d 848, 853 -855 (Minn. Ct. App. 2010) (italics in original; underline added).

Common-law dedication provides for dedication of land to the public if two showings are made: The demonstration of “the landowner's intent, express or implied, to have his land appropriated and devoted to a public use,” and “acceptance of that use by the public.” *Id.*, *citing to Barth v. Stenwick*, 761 N.W.2d 502, 511 (Minn.App.2009). The *Hebert* Court ruled that if the owner’s intent is merely implied from the owner’s conduct– and not expressly stated – it is another example of establishing ownership through possession of Torrens property, and also sufficiently analogous to adverse possession that it is prohibited:

But if statutory dedication is tantamount to adverse possession, common-law dedication based on an implied intent to dedicate is prohibited under the Torrens Act as well. As the supreme court held in *Moore v. Henricksen*, “[s]ince, by [Minn.Stat. §] 508.02, possession may not ripen into title against the holder of a registration certificate, a purchaser has no reason to assume that possession is adverse to the registered title.” 282 Minn. 509, 520, 165 N.W.2d 209, 218 (1968). Thus, even if a landowner is aware of another's possession or use of his Torrens property-which is the nature of an implied intent to dedicate-this awareness does not diminish the owner's interest in the Torrens property. *See id.* (concluding that use of the property by another for 30 years did not diminish the owner's property interests). The city's assertion that common-law dedication occurred is unavailing, and the district court's grant of the city's summary-judgment motion was erroneous.

784 N.W.2d at 855.

The Minnesota Supreme Court's ruling in *Hebert* may apply to other doctrines where ownership is established by possession, as well. For example, it may apply to the doctrine of implied easements, which has not been explored in a published case. The Court of Appeals has issued an unpublished opinion dealing with the doctrine:

[W]e do reject appellants' argument that easements by implication were created. The district court was correct when it concluded that the Torrens Act generally bars easements by implication. Under the Torrens Act, “[n]o title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession.” Minn.Stat. § 508.02 (1996). In addition, Minn.Stat. § 508.25 (1996) provides that:

Every person receiving a certificate of title pursuant to a decree of registration and every subsequent purchaser of registered land * * * shall hold it free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title * * *.

Here, it is undisputed that each of the claimed easements lies, in whole or in part, across registered Torrens property. None of the easements were registered on the certificates of title. The purpose of the Torrens Act is to

“establish an indefeasible title free from any and all rights or claims not registered with the registrar of titles, with certain unimportant exceptions, to the end that anyone may deal with such property with the assurance that the only rights or claims of which he need take notice are those so registered.”

Mill City Heating & Air Conditioning Co. v. Nelson, 351 N.W.2d 362, 364 (Minn.1984) (quoting *In re Juran*, 178 Minn. 55, 58, 226 N.W. 201, 202 (1929)). The district court properly found that the Torrens Act precludes the creation of any easements by implication.

Crablex, Inc. v. Cedar Riverside Land Co., WL 729210, 4 -5 (Minn. Ct. App.,1997).

The Expansion of Boundary by Practical Location.

That being said, there is one doctrine where ownership of Torrens property can still be primarily established by possession: Boundary by practical location. In general, here are three means of claiming boundary by practical location – by acquiescence, agreement, and estoppel:

Ordinarily, in order to establish a practical location of a boundary line it must appear (1) the location relied on was acquiesced in for the full period of the statute of limitations; or (2) the line was expressly agreed upon by the parties and afterwards acquiesced in; or (3) the party barred acquiesced in the encroachment by the other, who subjected himself to expense which he would not have done if there had been a dispute as to the line.

Romanchuk v. Plotkin, 9 N.W.2d 421, 427 (Minn. 1943). Though all three means involve possession, the Minnesota Supreme has noted that boundary by practical location is “independent of adverse possession.” *Enquist v. Wirtjes*, 68 N.W.2d 412, 417 (Minn. 1955).

For Torrens property, the doctrine of boundary by practical location was historically applied only in limited instances. The Minnesota Court of Appeals once held it applied only where a boundary line dispute existed at the time the property was registered, or when there was an ambiguity with respect to the legal description of the boundary line:

[T]he doctrine of boundary by practical location has been applied in limited instances to determine boundaries to registered property. *See Minneapolis & St. Louis Ry. v. Ellsworth*, 237 Minn. 439, 444-45, 54 N.W.2d 800, 804 (1952) (doctrine applied where original registration proceeding did not determine boundary lines, basis for boundary dispute existed at time of registration, and dispute is not collateral attack on Torrens proceeding); *In re Zahradka*, 472 N.W.2d 153, 155-56 (Minn.App.1991) (doctrine applied to resolve conflict between two certificates of title with ambiguous property descriptions that could include same property), *pet. for rev. denied* (Minn. Aug. 29, 1991). *In a recent case, this court recognized that adverse claims have only affected registered property where there was an ambiguous description in the certificate of title or the dispute existed at the time the property was registered. In re Building D, Inc.*, 502 N.W.2d 406, 408 (Minn.App.1993), *pet. for rev. denied* (Minn. Aug. 24, 1993). Here, there is no ambiguity in Lot 66's certificate of title, nor was there a dispute over the location of boundaries when Lot 5 was registered in 1914. The boundaries of Lots 1 and 66 were delineated by the July 7, 1915 plat which was filed with the registrar of titles on January 15, 1917. Both Williams and McGinnis' predecessors in title signed the 1915 plat as owners of the platted property, affirming the location of the boundaries at that time. As there was no boundary disagreement at the time of the 1914 registration, Williams cannot now assert that the failure to establish boundaries during the registration proceeding provides a basis for an adverse claim. *Cf. Ellsworth*, 237 Minn. at 445, 54 N.W.2d at 804.

Petition of McGinnis, 536 N.W.2d 33, 36 (Minn. Ct. App. 1995). In 2008, however, the Minnesota legislature modified the wording of the Torrens Act by adding the following italicized

language:

No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, *but the common law doctrine of practical location of boundaries applies to registered land whenever registered. Section 508.671 shall apply in a proceedings subsequent to establish a boundary by practical location for registered land.*

Minn. Stat. § 508.02. The added language stated the “common law doctrine” of boundary by practical location applied to Torrens, but did not explicitly state its application was limited to situations where there the factors referenced in *McGinnis* were present, i.e., an ambiguity or pre-registration dispute.

And, in *Britney v. Swan Lake Cabin Corp.*, heard after the modification of Minn. Stat. § 508.02 took effect, the change to the language was very important: The *Britney* Court did not analyze the case to see whether “there was an ambiguous description in the certificate of title,” or a “dispute which existed at the time the property was registered.”

Instead, the *Britney* Court simply analyzed the doctrine in light of the use put to the property, and distinguished between practical location and adverse possession. The acquiescence theory of boundary by practical location reviewed by the *Britney* Court is a direct analogue of adverse possession, and the basis for it is Minn. Stat. § 541.02:

“To acquire land by practical location of boundaries by acquiescence, a person must show by evidence that is clear, positive, and unequivocal that the alleged property line was “acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations.” *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn.1977). The statute of limitations is 15 years. Minn.Stat. § 541.02 (2000); *see Allred v. Reed*, 362 N.W.2d 374, 376 (Minn.App.1985) (citing Minn.Stat. § 541.02 in practical-location case), *review denied* (Minn. Apr. 18, 1985).

Pratt Inv. Co. v. Kennedy, 636 N.W.2d 844, 850 (Minn. Ct. App. 2001). The Minnesota Supreme Court has called Minn. Stat. §541.02 “the adverse possession statute,” and has found that it cannot apply to Torrens property:

City asserts that the landowners' claim for ejectment is time-barred by the 15-year statute of limitations set forth in Minn.Stat. § 541.02(2006), which provides: “No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff * * * was seized or possessed of the premises in question within 15 years before the beginning of the action.” Section 541.02 is the adverse possession statute in Minnesota. . . As such, *it cannot operate against Torrens property.*

Hebert, 744 N.W.2d at 233 (emphasis added). Previously § 508.02 specifically *prohibited* adverse possession claims, and the *Hebert* Court held this proscription extended to analogues of adverse possession.

However, the *Britney* Court noted that the type of acquiescence required to establish boundary by practical location must be something beyond mere passive conduct on the part of the owner of the property being claimed. Some conduct evidencing assent was required:

In the present case, appellant argues only that it has established a boundary by practical location by way of acquiescence. The acquiescence required *is not merely passive consent but conduct from which assent may be reasonably inferred.* *Engquist v. Wirtjes*, 243 Minn. 502, 507–08, 68 N.W.2d 412, 417 (1955) (affirming no-practical-location finding absent evidence that disseized or predecessors recognized or treated a fence as a division line, or that disseizor or predecessors used the disputed land); *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn.App.1987) (no practical location by acquiescence when disseizor does not use disputed area for statutory period, even though disseized “tacitly consented” to boundary by failing to dispute a sightline).

795 N.W.2d at 872. This is different from adverse possession, of course; there, the requisite showing is different. “The claimant must show he had actual, exclusive, open, continuous and hostile possession of the real property in question for a period greater than 15 years. If he has, he has become the owner of the property involved and the court confirms that ownership.” *Ehle v. Prosser*, 197 N.W.2d 458, 462 (Minn. 1972). And, one need only show that the use was sufficiently “open” to give notice to a reasonable owner, not that the owner actually had notice or acquiesced:

The claim of right must be exercised with the knowledge of the owner of the servient estate, i. e., actual knowledge or *a user on the part of the claimant of such character that knowledge will be presumed.*

Naporra v. Weckwerth, 226 N.W. 569, 571 (Minn. 1929) (emphasis added)

The Hickersons argue that the improvements were not ‘open, notorious, and hostile’ because the improvements may not have been visible to their predecessors in title from adjoining Green Gables Road. *We construe ‘open,’ however, to mean visible from the surroundings, or visible to one seeking to exercise his rights.*

Hickerson v. Bender, 500 N.W.2d 169, 171 (Minn. Ct. App. 1993) (emphasis added).

The *Britney* court went on to note that conduct implying assent is typically shown through physically marking the boundary line, most often with a fence; something that did not occur in the *Britney* case:

Typically, practical location by acquiescence “occurs when neighbors attempt to establish a fence as close to the actual boundary as possible, or when the disseizor unilaterally marks the boundary, and the disseized neighbor thereafter recognizes that line as the actual boundary.” *Pratt*, 636 N.W.2d at 851; *see also Fishman v. Nielsen*, 237 Minn. 1, 5–6, 53 N.W.2d 553, 555–56 (1952) (finding practical location by acquiescence when parties and their predecessors in title built dividing fence as close as possible to actual boundary and remained satisfied with fence's location for statutory period); *Allred*, 362 N.W.2d at 376–77 (finding practical location by acquiescence when disseizor built fence with intent to be as close to boundary as possible and when disseized treated fence as boundary). Appellant, both before the district court and now on appeal, points to a number of actions that it and its predecessors in interest took in seeking to determine the location of the boundary between Lots Four and Five, most notably constructing a fence that ran in the approximate vicinity of the boundary line. But appellant points to no evidence of respondents or their predecessors in interest acquiescing to such actions constituting the boundary between Lots Four and Five other than its statement that respondents “never assert[ed] ownership to the questioned land.” Assent may not be reasonably inferred from this passive conduct. *See Engquist*, 243 Minn. at 507–08, 68 N.W.2d at 417 (requiring more than passive consent to establish a practical-location boundary by acquiescence).

795 N.W.2d at 872-73. The *Britney* Court went on to further distinguish the acquiescence theory from adverse possession by stating that case law from adverse possession cases would not apply, due to the prohibition of adverse possession of Torrens property:

Appellant's theory relies on outdated cases addressing the doctrine of adverse possession, which the legislature has explicitly precluded in the Torrens Act. See Minn.Stat. § 508.02 (providing that no title to registered land in derogation of that of the registered owner may be acquired by adverse possession). The district court therefore did not err by concluding that appellant had failed to establish the practical location of the boundary line between Lots Four and Five by acquiescence.

795 N.W.2d at 873 (emphasis added).

The distinction between acquiescence and merely allowing possession to continue to exist is subtle. Although the *Britney* court stated “[a]ssent may not be reasonably inferred from this passive conduct,” the Court of Appeals has noted, in a boundary by practical location case, that “[a]cquiescence entails affirmative *or tacit* consent to an action by the alleged disseizor, such as construction of a physical boundary or other use . . .” *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 849 (Minn. Ct. App. 2001); *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. Ct. App.1987). Actual knowledge may be a means of distinguishing between abiding a trespass and acquiescing to it.

The *Britney* Court also provided a practice pointer concerning the modified statute: One seeking to change the boundary line contained in a certificate of title must comply with the procedural requirements of Minn. Stat. § 508.671, even though one opposing the boundary by practical location claim, in bringing an ejectment action, does not:

Because the procedural requirements of Minn. Stat. § 508.671 were not followed, the district court properly dismissed appellant's counterclaim. . . The procedure for seeking a judicial determination of a boundary line of one or more Torrens properties is set forth in Minn. Stat. § 508.671: . . . A proceeding under section 508.671 must follow several steps, including filing a certified copy of the petition with the registrar of titles and providing notice to all interested parties. . . .Appellant also argues on appeal that the district court was without authority to consider respondents' claim, as respondents' action similarly did not follow the procedural requirements of Minn. Stat. § 508.671. We disagree. The statute governs the procedural steps that must be followed by a party seeking to have “all or some of the common boundary lines judicially determined.” Minn. Stat. § 508.671, sub. 1. Respondents' claim, however, was not one seeking a judicial determination of a boundary line. Instead, respondents' complaint sought a judgment that they were the “owner[s] in fee of the entirety of Lot Five (5), Block Two (2), Plat of Swan Lake” and were entitled to recovery of possession “of the whole thereof.” Because respondents' complaint sought a judicial determination of ownership—rather than a judicial determination of the boundary—and the Northern Lights survey accurately described the boundary as platted, the procedural requirements of Minn. Stat. § 508.671 do not apply to respondents' claim.

795 N.W.2d at 870-71.

In *Ruikkie v. Nall*, the Court of Appeals held that use of the doctrine to alter a legal description stated in a certificate of title was previously prohibited, but now allowed:

The Nalls argue that the district court properly denied the Ruikkies' petition because the district court's determination of boundaries would require an alteration in the legal descriptions of Gov't Lot 1 and Gov't Lot 6. They cite to this court's *Geis* decision for the proposition that “a court may not, in a proceeding subsequent to initial registration of land, determine boundary lines, if that determination alters the legal description of the land as stated in the certificate of title, and thereby attacks the Torrens certificate.” 576 N.W.2d at 750. This statement from *Geis* does not reflect the present state of the law. *Geis* was decided before *the amendment of Minn. Stat. § 508.02, which overrules Geis by expressly allowing judicial proceedings to establish boundaries by practical location*. Regardless, the majority in *Geis* recognized that the decision was based on “unique facts.” *Id.* at 751. Most importantly, the Ruikkies' petition does not seek to alter the legal description of the Nalls' or the Ruikkies' land; rather, it seeks merely to establish the correct location of the boundary between Gov't Lots 1 and 6. Acceptance of the Nalls' plat and issuance of certificates of title are not a shortcut or proper back-door strategy for avoiding a proceeding subsequent to determine boundaries pursuant to Minn. Stat § 508.671.

Ruikkie v. Nall, 798 N.W.2d 806, 821(Minn. Ct. App. 2011).

Conclusion

Over the past few years, the importance of good faith and equity in determining interests in Torrens property has been affirmed, and can provide grist for arguments to be made in future cases. The prohibition of adverse possession of Torrens land has been expanded to situations where ownership is established by means analogous to adverse possession. And boundary by practical location now appears to apply to Torrens property even if there is no ambiguity in the legal description, or dispute pre-existing registration. Although the Torrens system is the product of a hundred-year-old statute, the law of registered property is dynamic.