Making Land Liquid
On Time and Title Registration

This chapter critically analyses the effects which registration systems have on the temporality of land title. The chapter argues that whereas title deed systems were oriented toward the past, title registration systems are oriented toward the future. Whereas deed systems operate on the basis that the title to be transferred already exists, registration systems operate on the basis that title is produced anew upon every conveyance. Title registration systems facilitate the coordination of an increasingly complex and rapid trade in title which has minimal connection to the daily routines and interests of those who live and/or physically work on the land. Examining title registration systems in four different contexts, I argue that there is a disjuncture between the temporality of registered titles and the temporality of the land to which those titles pertain: registered title and land are out of sync.

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Around the world, title registration systems are being adopted by states as the most efficient means of facilitating a legal market in land (Raff 2003: 8). Title registration systems were designed with the explicit purpose of making land a more liquid asset - one that is easily tradable and convertible into cash. However, land is not liquid - it is mainly solid and immovable, and thus historically difficult to trade. The creation of a market in land has only been possible with the assistance of the legal architecture of property law. In the common law world, title - that is, the entitlement to exclusively possess land - is an essential part of that architecture. Prior to the development of registration systems, title to land was constituted through the ‘raw fact’ of physical possessions evidenced through local testimony and paper documents (Gray and Gray 2009: 180-182). Prior to registration systems, conveying land was a laborious and slow process requiring careful compilation of title deeds reflecting years of possession, along with physical inspections of the land and discussions with locals. In contrast, under registration systems, title is constituted through the singular act of registration and conveyances of land happen simply and swiftly through a central registry. Title registration systems make title an almost liquid asset, and create the illusion that land is also liquid.

The liquidity afforded to title through registration not only changes the administration of land ownership, but also its legal form. The estate or ‘slice of time’ in the land which was a feature of the ownership scheme under title deed systems no longer exists as an independent legal entity. This ‘slice of time’ or ‘fourth dimension’ of land is made redundant in the temporal order produced by title registration systems. Title registration systems regulate the temporality of title according to the registry’s ‘mirror’, ‘curtain’ and insurance principles. Operating together, these principles produce a centralised, authoritative temporality for land which is disconnected from the land’s local history and present physical use. Whereas deed systems operate on the basis that the title to be transferred already exists, being based upon a history of physical possession of the land, registration systems operate on the basis that title is produced anew upon every conveyance. Title registration systems empower the registry to create title in a process that some commentators have described as akin to magic: new, perfect title is conjured up each time land is transferred.
In this chapter, I discuss title registration systems in four different contexts: firstly the English and Welsh Land Registration Act 2002; secondly the Torrens title registration system in Australia; thirdly title registration systems introduced in the Global South at the behest of international financial and development institutions; and finally the Mortgage Electronic Registration Systems (‘MERS’) in the USA. While each context is historically and geographically distinct, the systems examined in each context share the ‘magical’ quality of creating new title rather than recording pre-existing title, thus imposing a distinct temporal order and producing a number of similar effects. Analysed together, these discussions show that there is a disjunction between the temporality of registered titles and the temporality of the land to which those titles pertain: registered title and land are out of sync. Titles take on a life and pace of their own through the registry, while unregistered and/or unregisterable connections to land that have been constituted through years of local use are wiped from legal memory. Registries produce a temporal order that facilitates the coordination of an increasingly complex and rapid trade in titles by parties who need not have anything but a purely financial connection to the land. For these parties, the local history of the land is not only irrelevant, but is preferably ignored lest a historical event threaten their investment in it.

**Title deeds: Keeping and transferring slices of time**

In the common law world, title to land has traditionally been based on physical possession proven through paper deeds. There was no centralised conveyancing system. Rather, conveyancing was done privately and law would intervene in ad hoc disputes only when parties approached the courts. True to its feudal origins, English land law does not have any overarching notion of individual ownership. Individual landholders do not directly own land, but instead own an ‘estate’ or ‘slice of time’ in land, which is ultimately owned by the Crown (Gray and Gray 2009: 58). An estate is a legal concept that combines land with time; estates are ‘the fourth dimension’ of land (Gray and Gray 2009: 56). Common law ‘title’ is the entitlement to assert rights over the estate; it is ultimately based on possession, and is relative rather than absolute. The relativity of title means that more than one person can hold title to the same estate, and that title might be lost if the estate owner fails to possess the land for an extended period of time (this period differs according to jurisdiction; it is currently 12 years in England and Wales).\(^1\) If during that period a squatter takes continuous possession of the land, the ‘paper owner’ will be prevented from bringing an action for possession, leaving the squatter with the better title to the estate. This loss of title by adverse possession occurs only rarely, but demonstrates the separability of title and estate in this system - the ‘slice of time’ in the land exists as a legal form independent of its owner. The estate, to draw on Mariana Valverde’s work, is an example of a legal conceptualisation of time ‘thickening’ and ‘taking on flesh’: it becomes spatialised in distinct ways, and responsive to events that occur upon the land’s other three dimensions (ie its width, length and depth) (Valverde 2015: 10). The estate is a temporal concept with legal flesh, its responsiveness to possession tying title to land (the two must not fall more than 12 years out of sync).

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\(^1\) The length of time has varied according to what is set by the Statute of Limitations. Currently the period is 12 years for unregistered land in England and Wales (*Limitation Act 1980 s15*). For registered land the doctrine of adverse possession is now governed by the statutory scheme set out in the *Land Registration Act 2002*. 
Retaining common law title to land thus requires an ongoing performance of estate ownership: ownership of one’s slice of time must be performed through possession. Such ownership was difficult to securely convey. In medieval times, the transfer of land ownership involved the local community at large - public ceremonies around estate transfer were designed to embed the event in local memory (Pottage 1994: 361). These public ceremonies were eventually replaced with title deeds, which still require a level of ceremonial formality, but which prove in document form the title-holder’s right to possession based on the genealogy of the estate. The details of the estate recorded in the deeds are checked as against facts on the ground, meaning deeds are connected to and conditional on local memories of physical realities external and prior to the deeds themselves, memories carved out through years of local land use and custom. The temporality of land title under this system is thus produced by the local history and present of land use, via the legal concepts of estates and possession.

The conveyancing rule of *nemo dat quod non habet* (you cannot give what you do not have) further orients the title deeds system towards the past. The *nemo dat* rule means that all conveyed title is dependent on its predecessors: during a conveyance of land, the title-holder must be able to prove that the title has ‘a good root’ (Burns 2011: 791). As such, title deeds orient their users toward the local history of the land. Pottage writes that title documents ‘stored up the past and projected it into the future’ (1998: 135), with the purpose of keeping estates in the family for future generations. This system of conveying title is productive of a linear temporality: every title is dependent on its predecessors, and the slices of time are extended out as far into the future as was possible through documentary techniques. Linear time strongly links the past, present and future, and tends to naturalise events and structures by rendering them part of a seemingly irreversible, logical progression from past to present (see Greenhouse 1996). The linear time of the title deed system orients title-holders toward the history of the land, and helped keep an elite class of families closely aligned with English land over multiple centuries.

**English Title Registration**
Prior to land registration, conveying land in the heart of the common law world was slow. The English title deed system for conveying land required prospective buyers to satisfy themselves of the seller’s legitimate ownership of a slice of time in the land, which was a cumbersome and difficult process. The details contained in paper title deeds would need to be verified by locals, and solicitors would be hired to construct a chain of deeds that stretched as far back in time as possible. During the British industrial era, proving that title had ‘a good root’ came to be regarded as an inefficient and onerous task for purchasers, particularly by those from outside the elite class that had traditionally owned estates in land. Throughout most of the 1800s, English law required that ‘a good root’ of title be at least 60 years old (Pottage 1998: 139). This was reduced to 40 years in 1874, as title transactions became more frequent and the process of proving title genealogy became more of an impediment to commercial transactions (it is 15 years for unregistered land in England and Wales today).
Consistent with the push to make land more marketable, throughout the 1800s there were also several attempts in England to introduce a state-backed title registration system in order to make the process for conveying land faster and easier for the growing pool of people keen and financially able to purchase property in land (Anderson 1998: 116). Proposals were made for a title registry in which ‘the entries in the register must constitute the title, the entire and only title’ (Hogg 1830 in Simpson 1976: 40). Such a system would simplify and speed up conveyancing because law would no longer refer a prospective purchaser ‘to a tedious and uncertain list of by-gone transactions and events, in which he has no concern or interest, but to an authentic statement of a present fact, which alone he wishes to know, namely the fact that the person from whom he is buying is entitled to sell’ (Wilson 1850 in Simpson 1976: 41). That is, conveying title would no longer orient prospective estate owners toward the land’s local history, because title would no longer be dependent on its predecessors. The registry would provide conclusive information relevant to the immediate transaction. That conveniently centralised information is all that would matter for the title’s legal validity, with registered titles being indefeasible and guaranteed by the state. The rights and interests encompassed in each title would be frozen in time at the point of initial registration, after which any changes to the title could only be made via the registry. The singular act of registration - rather than years of physical possession of the land - would legally constitute title, making the proposed registry a title-making machine for the industrial age.

The push for a title registration system was associated with wider land reform and political enfranchisement, and the landed elite was generally opposed to the introduction of title registration (Anderson 1998: 109). The singular machinery of the registry would replace the old system of relativity, possession and documentary genealogies, and would orient its users not toward the local past but to the present as it was captured in the registry. Conveyancing would involve the production of new titles via the registry, rather than the transfer of already existing title to an estate. By maintaining the title registry and acting as statutory insurer of registered titles, the proposed title registry would involve a significantly more active and interventionist role than the state had previously taken in regard to land title, just at the time when the state itself was undergoing democratising reforms. By doing away with title documents that projected the past into the future and instead giving a centralised registry the power to continually dictate the present, title registration threatened to disrupt the linear temporality of the class system.

Despite opposition from the landed class, voluntary title registration was introduced in England and Wales in 1862 (Simpson 1976: 43), and has been made steadily more

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3 In 1846 a select committee of the House of Lords reported that ‘the marketable value of real property is seriously diminished by the tedious and expensive process attending its transfer’, and proposals were made both for a register of title deeds (i.e. a register of copies of existing documents evidencing title), and a register of title (i.e. ‘a registry which should in itself be evidence, not of a deed, but of a title’: Fonnerneau 1830 in Simpson 1976: 40), in order to make land transfer faster and easier (Simpson 1976: 41-45).

4 The state would indemnify all registered title holders, undertaking to pay compensation if the operation of the register caused a loss: Simpson 1976: 175.

5 The Representation of the People Act 1832 was the first of multiple Acts extending the franchise to eventually make it independent of land ownership.
compulsory and widespread since then. A number of Acts were passed in 1925 with the purpose of making English and Welsh land, ‘as easily and securely transferable as possible, as readily exchangeable as any other asset, and to deny the idea that land had any special meaning’ (Cowan, Fox O’Mahoney and Cobb 2012: 49). The Law of Property Act 1925 made title easier to register, and the Land Registration Act 1925 for the first time allowed the central government to initiate compulsory registration of title (Simpson 1976: 46). Since 1990, all land in England and Wales must be registered when it is sold, and the Register is open to public inspection.\(^6\) The Land Registration Act 2002 took the final step of transforming the basis of entitlement to land in English law from possession to registration (Law Commission 1998: 24), and also laid the groundwork for electronic conveyancing. Unregistered land still exists in England and Wales, however Her Majesty’s Land Registry today maintains and guarantees over 24 million titles to a value of over £2.5 trillion.\(^7\) The practical goals of making conveyancing simpler and faster, and making estates in land available to purchasers from outside the established landed class, have been achieved. While the ideal of the good landowner and class alignments still persist,\(^8\) title to English and Welsh land today is an asset available for purchase by anyone who can pay the asking price.\(^9\)

Gray and Gray describe the initial registration of title for previously unregistered land as ‘the terminal event’ in the estate’s lifetime (2009: 195), as the temporal order of the Land Registry takes over. With physical possession no longer legally constitutive of title, the local and the past have lost much of their power to the Croydon-based, increasingly digital Land Registry, as have the principles of relativity, possession and the concept of estates. The titles produced by the registry cannot be conceptually separated from the land to which they relate.\(^10\) The 2002 Act introduces a scheme\(^11\) to replace the rules of adverse possession, which no longer make sense when the basis of title is registration rather than possession. This temporal order of the Land Registry is produced in part by ‘the mirror principle’ that the entry on the register reflects the full range of interests which affect the land at any moment in time (Gray and Gray 2009: 190). Like actual mirrors, mirror-principle registers represent the reality they reflect as a continually produced superficial ‘now’. Nothing that appears in the mirror leaves a trace upon it, and nothing behind the surface appears in the mirror at all. The temporality of registered title is thus very different from the linear temporality of the deeds system, which allows past title to define present and future title, and which is ultimately dependent on significant physical relationships with land. The 2002 Act preserves the legal validity of particular interests even though they are unregistered,

\(^6\) Land Registration Act 1986 s2(1); Land Registration Act 1988 s1.
\(^8\) The racialised, moralistic language of recent anti-squatter rhetoric echoes Kate Green’s argument in her 1998 article “Citizens and Squatters: Under the Surfaces of Land Law”: see Manjikian, Mary, Securitization of Property Squatting in Europe (Routledge, 2013) chapter 2.
\(^10\) Land Registration Act 2002 s132(1).
meaning that there are ‘cracks in the mirror’: relics from the unregistered past which
survive into the registered future.\textsuperscript{12} However these cracks are exceptions to the mirror rule:
unregistered, historical interests should not legally appear in real life if they do not appear
on the register. As Gray and Gray point out, title can no longer be detached from the estate
to which it relates: the 2002 Act speaks indiscriminately of registration of an ‘estate’, of
‘title’ to an ‘estate’, and of a person as ‘proprietor’ of an ‘estate’... ‘the overall effect is to
weld concepts of ‘title, ‘estate’ and ‘proprietor’ into a form of statutory ownership of land’
(2009: 183). The ‘estate’ as a legal form, is subsumed into the registered title and the
subject to whom that title is registered.

With the 2002 Act making the ‘estate’ a redundant concept, what happens to the slice of
time in the land it used to represent? Does registration reduce land to three dimensions?
The simple answer is no - registered land still has a temporal dimension, as the duration of
title is recorded in the registry along with the land’s spatial dimensions.\textsuperscript{13} The estate is a
legal concept which represents time in land for the purposes of private property; it is an
abstraction from, rather than a reflection of the temporality of the physical and living
matter which constitutes land. As discussed above, the methods used to convey estates -
\textit{nemo dat} and paper title deeds - produced a linear temporality which helped maintain the
English class system. The redundancy and practical disappearance of the estate upon
registration does not eliminate the temporal dimension of land, but changes the way it is
legally determined. Whereas the grounding of title in possession ensures that the legal
‘flesh’ taken on by estates is connected to the land's local history, with registration as the
basis of title, the register is the sole legal determinant of all four dimensions of land.
Whereas paper deeds prove the existence of \textit{already existing} title, registration brings title
into being: each registered title is new, manufactured and guaranteed by the registry. The
rules of adverse possession which keep title and land within 12 years of each other no
longer apply. No ongoing performance of possession is required to retain title, nor are paper
title deeds required to convey it. The temporal order of the registry replaces the ‘slices of
time’ strung together over generations to produce the linear temporality of unregistered
title. The new temporal order is a series of staccato-like slices of time in the land that are
detached from the past and from any unregistered present land use (Keenan 2016: 12).
Land becomes a more marketable asset as it is assumed to be the mirror of title, and title
can be bought and sold swiftly and easily through the registry. Registration facilitates
liquidity by producing new titles upon every conveyance and rendering irrelevant the
cumbersome realities of land use and local history.

\textbf{New World, New Title: The Torrens System}

While the the introduction of title registration is relatively new in England, it has a longer
history in British colonies. Land in British colonies was understood by colonisers as ‘new’,
and thus socially and politically different from English land (Rogers 2006: 127). English land
law was was modified in various ways to increase the alienability of land in settler colonies.
Most significantly, in 1858 the Torrens system of title registration was introduced in the
colony of South Australia (Simpson 1976: 69). While the introduction of title registration in
England was stalled by political opposition from the landed class and the practical barrier of

\textsuperscript{12} Schedules 1 and 3.

\textsuperscript{13} The benefits and burdens of the estate will be recorded in the registry and vested in the title-holder
upon first registration of the estate: LRA 2002, ss11-12.
land ladened with centuries of convoluted estates, in South Australia there were no such hurdles. Indeed with Australian land being treated as *terra nullius* (belonging to no one), it offered notionally blank slate land upon which a title registration system that manufactured new titles could operate.

Robert Torrens, the South Australian politician after whom the system is named, successfully argued for the system in part by pointing out that the costs of transacting South Australian land under the old conveyancing system were often greater than the cost of the land itself, and suggesting that land could more efficiently be traded by adopting a registration system akin to that already used for ships and shares (Raff 2003: 27-36; Mawani 2016). Designed to facilitate a new market in cheap and legally unencumbered land, the Torrens system is based on three key principles: ‘the mirror’ (mentioned above) - the register will accurately and completely reflect the interests which affect the land within its coverage; ‘the curtain’ - interests that are not on the register will not bind new title-holders, the register is the sole source of information for prospective purchasers to check; and ‘the insurance principle’ - the state guarantees the accuracy of the register and will compensate any registered title-holder who suffers a loss due to a defect in the register (Taylor 2008: 11-14). These principles operate together to produce new titles free of the encumbrances of local land use and custom. The Torrens system makes the sale and resale of land by investors on the other side of the world simpler, cheaper and faster because the register is the basis of title to land - rather than possession and a chain of title back to a ‘good root’. South Australia thus made in 1858 this crucial change to the basis of title which would not occur in England until 2002.

In its strict adherence to the mirror, curtain and insurance principles, the Torrens system produces titles that are indefeasible rather than relative.14 As famously described in *Breskvar v Wall*, Torrens is ‘not a system of registration of title but a system of title by registration’.15 That is, registration in the Torrens system is not merely the recording of pre-existing title, it is what creates title - perfect, new, indefeasible title. As I have argued elsewhere, by producing perfect titles, the Torrens register has been understood as having an almost magical quality, the moment of registration starting time anew for the registered land and thus freeing title from the land’s local history (Keenan 2016). Greg Taylor describes the Torrens system as ‘a hospital’ which ‘cures invalidities’ and makes people’s titles certain ‘by taking away the need to show [from the moment of registration] that the registered owner’s title originated in the seller’s right to sell the land. The Torrens system therefore means the end of the need to look backwards for possible flaws’(2008: 10).

In its production of new titles free of legal encumbrances, the Torrens system favours ‘dynamic’ over ‘static’ security - that is, security of title for new owners, at the expense of

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14 The Torrens principles do not sit easily with the principle of relativity of title. If the register is the guaranteed authority of all the interests in land, then registered title is indefeasible, and it does not make sense for title to be obtainable through adverse possession. Torrens jurisdictions have found different ways of modifying the common law principles of adverse possession to accommodate it within the system of title registration (for example O’Connor 2006), but it is clear that registered title is more absolute than relative (it is arguable that relativity of title still exists to some degree under the Torrens system because it allows for different kinds of title to exist in the one estate).

existing and previous owners (O’Connor 2005, 2009). As Hickey and Harding have argued, the choice between a system that favours dynamic security and one that favours static security is political, as it will ultimately favour particular human values over others (Hickey and Harding 2011). Legal commentators have described this choice as being between security of title on the one hand, and ease of title transfer on the other (Harris and Au 2014). Another way to understand the choice between static and dynamic security is as a choice between old and new relationships with land. The Torrens system favours new relationships with land; indeed, it operates on the basis that every title is new. Whereas the English title registration system retains some exceptions to the mirror and curtain principles by allowing particular old, unregistered relationships with land to survive into the registered present, the Torrens system’s strict operation of its three principles means that if a relationship with land is unregistered it cannot bind a new registered purchaser. The system makes land title a more liquid asset than it has ever been before, but it can only do so via the magical/hospital-like mechanisms of the mirror, the curtain and the insurance principle. These Torrens mechanisms produce the fictional starting point for each registered title - a starting point which is reinvented upon each conveyance, allowing land to be swiftly transferred.

The Torrens system thus has its own temporality separate from the land to which it relates. Unlike the title deeds system, its temporally ‘thick’ estates and its reliance on historical documents and local testimony, Torrens title registration is future-focussed. The temporality of registered land is determined by the registry, which assists buyers and sellers of land title to efficiently coordinate their trade. Though seemingly objective, the temporality of land produced by the Torrens register involves subjective decisions about which changes are worth noticing and which are to be ignored. As Michelle Bastian writes, ‘even the seemingly objective clock requires ongoing decisions about what is of significance to us, and consequently which elements of our world we want to keep to time with and which elements we can afford to drop from our sphere of direct concern’ (Bastian 2012). Torrens registration produces a temporal order that allows for the land’s local history to be dropped from the sphere of direct concern of title-holders, directing their attention only to future changes in the land that law will recognise as registrable. In settler colonial contexts such as Australia, this means that the temporality of registered title is noticeably out of sync with the land’s local indigenous history. Indeed, indigenous activists have long argued that the Torrens system was invented ‘in order to complete the dispossession of the Aboriginal people’ (Pearson in Ainger 1991: 18). While it is difficult to prove Torrens’ intentions in regard to colonial dispossession, it is beyond doubt that the dynamic security favoured by this registration system - its magical conjuring of new titles, curtain drawn across the pre-colonial past, and the fast-moving and internationally accessible market in land it facilitates - has been of great benefit to the settler colonial project of taking Aboriginal land.

**Catching Up by Selling Off? Title Registration in the Global South**

Title registration systems in which the act of registration is the basis of title, are now increasingly favoured around the world (Raff 2003: 8). The Torrens system has proved highly influential, and was used as a reference point in the design of England and Wales’ Land

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16 A similar argument has more recently been made in terms of title registration and creation of racial value in settler colonies: Bhandar, B ‘Title by registration: Instituting modern property law and creating racial value in the settler colony’ 2015 *Journal of Law and Society* 42(2): 253–282.
Registration Act 2002 (Law Commission 1998). The introduction of Torrens-like title registration systems has been supported, promoted and insisted upon by the UN, World Bank and IMF as a way for states of the Global South to ‘modernise’ their relationships with land, and bring them into sync with the Global North (Deininger 2003). A 1975 World Bank land reform report on Africa strongly suggested title registration be introduced to replace unregistered communal customary tenure, which it described as ‘static in its technology and relatively insular’ (Besteman 1994: 484-487). Development scholars argue that title registration systems ‘contribute toward solving production, credit, poverty, and employment’ (Hanstad 1997: 702) primarily because property owners with registered titles are more likely to invest and to be granted credit than those with informal property rights (World Bank Group 2014); but also because title registration can improve local governments’ ability to generate resources through taxation (Deininger and Feder 2009: 248). Title registration systems are thus framed by international financial institutions and some development scholars as offering states of the Global South ‘a new start’ and a brighter economic future.

The academic and institutional encouragement of title registration as development policy has been particularly strong since Hernando de Soto’s influential call for the formalisation of land title as the answer to poverty in the Global South (2000). De Soto’s focus was on formalisation rather than registration specifically, but his vision for secure, marketable and future-oriented land titles that could be easily bought, sold and secured against by anyone with the appropriate funds, is clearly consistent with the principles of title registration. The extent to which title registration has been adopted as part of broader land management policies in the Global South indicates that it has become a taken-for-granted element of many such policies (Raff 2003: 8-9; Deininger and Gershon 2009: 244). The World Bank Group’s ‘Doing Business’ project which ranks nations on the ease of doing business there includes ‘registering property’ as a key determinant. The ‘Our Land, Our Business’ campaign argues that the rankings help facilitate ‘land grabs’, swift and large-scale acquisition of land in the Global South by corporations of the Global North, resulting in the forced displacement of local farmers. Title registration is an important part of reorienting the land and economies of the Global South toward a future of global capitalism and the growing international market for land.

Like settler colonial contexts such as Australia, states of the Global South were invaded by European colonisers. However while in settler colonies land is and was treated as a blank slate upon which to build a ‘new world’, land in the Global South has been treated more as an extractive resource than a home for white people. The land now being subject to title registration in the Global South includes some of the most densely populated urban areas in the world (see Gupta 2010). As such, the introduction of title registration faces some of the same practical hurdles as the introduction of the system in England - in both England and the Global South, the land is understood by those implementing the system as ‘old’ rather

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18 While local reactions to land grabs are more complex than is often acknowledged (Hall et al 2015: 467-478), there has been a rapid increase in the volume and geographical spread of foreign acquisition of land in developing countries, particularly in Africa, since 2006 (Sassen 2014: 80).

than ‘new’, and encumbered by long histories of unregistered interests in land. However whereas in England title registration has been introduced slowly and carefully over the course of more than a century, with multiple acts of Parliament refining the mechanisms of title registration to best suit the English landscape, in the Global South title registration has been introduced quickly and often with little local support.

The implementation of title registration systems in the Global South has not had the poverty-curing effects its advocates had hoped for. As David Kennedy argues, title registration focuses attention on the current allocation of land rights, reducing attentiveness to past and future possible allocations, and oversimplifying the complex political questions involved in relationships with land (2011: 55). Case studies from different areas of the Global South show that local farmers and residents can be reluctant to register their title even when registration is compulsory, as they are wary of this foreign system of land regulation and its potential to deprive them of their land (e.g. Besteman on Somalia and Kenya 1994: 499; Musembi on sub-Saharan Africa especially Kenya 2007). Writing on the recent introduction of the Torrens system in India, Priya Gupta points out that many people in India live on land for which they cannot prove title (2010: 90), and that it is those living in slums and other poor areas who are asked to prove and formalise their rights to land, unlike those in nearby middle class neighbourhoods who are assumed to already have such rights (2014: 80). Analysing the effects of the recent introduction of the Torrens system in Samoa, Ruining Ye argues that the system not only puts customary land rights at risk, but may in some instances be unconstitutional (2009: 827). With regard to the institution of title registration systems in eastern and central African states, Patrick McAuslan has argued that such systems are mainly concerned with the registration of non-African owned land (2003: 73), thus potentially putting African property rights at risk of being superseded by registered foreign ownership. In each instance, those with relations to land that have been produced through years of local use and custom but that are now un-registerable - who are often very poor and already socially marginalised - become precariously unlawful in their residence, and vulnerable to dispossession in favour of newly registered title-holders (see Home and Lim 2004).

Title registration systems have been implemented in states of the Global South with the assumption that what is recorded on the registry will mirror the interests that in fact exist, but the mirror’s superficial representation of land does not fit with the reality of relationships with land. The temporal assumption that the constantly produced superficial ‘now’ of the mirror accurately reflects the reality of interests in land at any moment is an essential part of title registration systems in any context, and it is also fictional in any context. In settler colonies the fiction of the mirror fits with the fiction of terra nullius; in England the fiction of the mirror fits with the speculative market in English land, but has been introduced slowly and with many provisos (‘cracks in the mirror’) for unregistered historical realities. In the Global South the fiction of the mirror fits with the growing speculative market in notionally ‘under-developed’ land, but pre-existing customary tenures - some of which have long histories and others which have come about as a response to colonial and post-colonial land distribution - continue on the land despite their absence on the registry, cracking the mirror and rendering unregistered residents vulnerable to forced removal. In each case, the future-oriented title registration systems facilitate an efficient market in land by producing new titles guaranteed by the state against the vestiges of
history; and in each case, the physical reality of re-existing relationships with land makes clear that the synchronicity promised by the mirror and the curtain is fictional.

The Mortgage Electronic Registration System: Title to Mortgaged Land in the USA

The final title registration system I will discuss in this chapter is slightly different from those discussed above: the Mortgage Electronic Registration Systems, Inc. (‘MERS’), an American company. MERS is different firstly in that it is a private rather than a state registry,\(^{20}\) and secondly in that it only registers mortgage titles, rather than freehold and leasehold titles. Indeed the United States federal government does not operate a system of land title registration. MERS is the one title registration system in the US that spans across state jurisdictions, and it is a private, national electronic register of mortgage titles. I conclude this chapter with a discussion of MERS because, like the title registration systems discussed above, MERS was designed to make land a liquid asset, and it operates by manufacturing new titles, albeit with a less clear legal status than Torrens-based systems. While MERS cannot be described as a title by registration system because formally it only records pre-existing title, in practice it effectively produces new titles and a temporal order appropriate for a land market of unprecedented (and ultimately unsustainable) liquidity. As electronic mortgage registration becomes an increasingly significant part of other title registration systems,\(^{21}\) the operation and effect of MERS is worth paying cautionary attention to.

As of 2013 MERS had more than 70 million mortgages - more than 60% of all residential mortgages in the country - registered on its database system (Card 2011: 1634). To understand how MERS operates, it is necessary to briefly set out the legal architecture of American mortgages. American mortgages are securities given over land in exchange for monetary loans. They are created by paper documents, and these documents must be produced as proof of the mortgage terms in the event that the borrower defaults on the loan and the lender seeks to take the securitised land through the foreclosure process. Once the mortgage is created, the mortgage documents are recorded at the county clerk office for a fee. Any subsequent assignment of the mortgage (that is, assignment of the security interest over the mortgaged land from the original lender to another investor) will also be recorded at the county clerk office for a fee.\(^{22}\) Mortgage assignments were traditionally fairly rare, but became significantly more frequent in the 1990s, with the onset of large-scale securitisation, a complex financial practice that involves multiple bulk assignments of mortgages.

MERS was created in 1995 - in the midst of the mortgage securitisation boom - in order to save banks and investors from having to pay the county fee or process the corresponding paperwork each time an assignment of mortgage occurs (Weber 2011: 102). When mortgages are registered with MERS, MERS is recorded as mortgagee at the county office,

\(^{20}\) It is worth noting that the British government has in 2016 proposed (for the second time since 2014) the introduction of a private Land Registry service delivery company.


\(^{22}\) Typically around $15-$30 for the first page and $2-$3 for each additional page: Phillips 2009: 263.
instead of the lender who actually owns the mortgage charge: MERS acts as the ‘nominee’ of the lender. Once MERS is recorded as owner, the actual owner of the mortgage charge can assign that charge multiple times without changing the county office record. When subsequent assignments take place, they are recorded in the MERS system, but not at the county office, where the original recording of MERS as owner remains unchanged (Steven 2012: 254-255). A mortgage registered with MERS can thus be sold and resold, assigned and reassigned ad infinitum without ever changing the county records or paying the fee. Christopher Peterson argues that MERS works by ‘pretend(ing) to own all the mortgages in the country’ (2011: 116). True to its trademarked slogan ‘process loans not paperwork’, MERS affords mortgage titles an unprecedented level of liquidity as they can be sold and resold more quickly than they could if the lenders assigning them filled out the paperwork that traditionally accompanied such assignments.

Like the Torrens system, MERS operates with a seemingly magical quality upon the titles in its system - each title (here the title to a mortgage charge) being given a new life upon each assignment, a financial life which is likely to be disconnected from the land to which the mortgage relates. Like Torrens and Torrens-inspired systems, MERS attempts to act as a hospital for titles, perfecting mortgage titles and curing them of their defects, even when the documents and processes legally required to transfer them have not been executed (Levitin 2013; White 2011). Unlike the Torrens system, MERS does not operate on the principles of the mirror, the curtain and insurance, though it is clear that it does operate a curtain-like principle by keeping borrowers’ interests off the register, and transfers off the county clerk records. MERS also operates something of a mirror principle, but its mirror is only held up by the lenders and investors, not by the borrowers/residents. As such the only interests it reflects are those of the lenders and investors - the mirror is angled away from those who physically live on the land. David Weber argues that the only way MERS can perform its dual claim to be both the mortgagee (as it is on county clerk records) and the nominee for the mortgagee (as it in fact operates) is through magic (2011: 107). The magic of MERS is its disappearance of the chain of title of mortgagees within its system, only to re-emerge unscathed at the moment a borrower defaults and foreclosure proceedings are instigated.

This kind of magic is needed for financial markets to operate, including the large financial market secured through mortgages on land. Annelise Riles refers to ‘the problem of the ‘meantime’ in financial markets - the gap in time between the pledging of security for a loan and the ending of the loan arrangement (either through repayment or default) in the context of derivatives markets (2011: 168-169). The solution to the problem of the meantime in Riles’ study is that the actors involved agree to act as if the holder of the security already has clear and complete rights to it (ibid: 169). Mortgage titles registered with MERS are also held for the meantime, and MERS members trade mortgage titles as if they had clear and complete rights to them even though legally they do not, because the paperwork does not legally support their entitlement to foreclose.  

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24 Specifically, the security instrument is separate from the note.
MERS produces a temporal order which facilitates the rapid trade in mortgage titles on international financial markets. As became evident during the foreclosure crisis which began in 2007, that temporal order is severely out of sync with both the land to which the mortgages are bound, and the order of legal events typically required of American mortgages. Lenders and investors are not co-ordinated with the land - its physicality, its residents or its local day-to-day life - because it is irrelevant to them. MERS enables lenders to coordinate solely with each other, and deal with mortgage title as an abstract financial object.

Upon the event of foreclosure, homeowners are informed that their time on the land is up. MERS distributes the proceeds of the subsequent sale to the lender which, according to its mirror principle, owns the mortgage at that point in time. Given notice to leave, the residents are rendered out of place in their homes, with some banks hiring contractors to preserve foreclosed homes in an empty state, thus turning the mainly Black and Hispanic residents into objects to be cleared from the property.\(^{25}\) The temporal order of MERS renders their relationship of permanence and belonging with their homes temporary, their futures erased. As Darden and Wyly write, ‘while quicksilver capital is back up to speed, time has slowed down in the families and neighborhoods devastated by a kind of violence’ (2010: 432). With title registration systems around the world becoming increasingly digitised, and mortgages continuing to be the only way many residents can afford to buy land, it is worth taking heed of just how out of sync MERS enabled mortgage title and residential land to become, and the consequences of that temporal discord.

Conclusion

‘[Y]ou cannot avoid the past’ (Patrick McAuslan 2003: 77).

This chapter has explored how title registration systems, in particular systems of title by registration, make land seem like a liquid asset by rendering title a three-dimensional object with a temporality wholly determined by the register. Title registration systems can be contrasted with title deed systems, pursuant to which title was dependent on local histories of possession as proved through documents and testimony. Title registration systems are future-oriented and free of the cumbersome estates which gave land its own temporal dimension, and kept land in sync with title through the need for estate owners to perform their rights of possession.

The discussion of various such systems in this chapter - in the contexts of England and Wales, Australia, the Global South and mortgaged land in the USA - suggests that title registries produce a temporal order that is out of sync with the multiple durations of time experienced by those actually living on the land. The fiction of the mirror is that what is on the register now accurately reflects who and what are on the land now. This fiction, which is given a totalling force in Torrens systems, renders historically derived but unregistered and/or unregisterable relationships with land out of place and precarious. While land registries erase all official traces of a time outside of its own overarching time, the living

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bodies of the dispossessed remain, disoriented and vulnerable, but haunting and unsettling these jurisdictions. The liquidity seemingly afforded to land by title registration cannot wash away the living reality of the land itself.

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