PIVOTAL POINTS IN THE TORRENS SYSTEM

In publications devoted to law or to real estate, we occasionally see articles on the Torrens System of conveying land. These articles consist largely of reviews of and comments on the cases decided by the supreme courts of several states, upholding the constitutionality of Torrens acts. These cases set forth the provisions of the acts concerning the suit to be brought to quiet and establish title to land for the purpose of registering it, and, except in two cases, they declare that these acts do not infringe upon any of our constitutional guaranties. They are valuable additions to the law concerning the quieting of titles to land. It would be well for all our states to recognize the development of the law, made by these cases, by passing general acts for the declaration and quieting of titles along the lines set forth in the most progressive Torrens acts and in the McEnerny Act of California. But provisions of statutes for quieting titles do not touch upon any principle of the Torrens system. They treat of matters arising under an act prior to the registration of the title, and the principles of the Torrens system operate only on titles which have been registered. The only cases in this country which treated of or discussed any fundamental principles of the Torrens system are *People v. Chase*[1] and *State v. Guilbert,*[2] and they touched on them in a meager way. They held that an original registration of a title could not be made by a registrar and without due process of law, and in all later cases, in passing on other Torrens acts, the courts contented themselves with holding merely that the acts provided for the first and original registration of a title in a proper judicial method.

But the Torrens system is not especially concerned about adversary proceedings in court. It is not a judicial system where every step in the title is adjudicated in court or where deeds are protocolised by decree of court on every transfer. It is not a judicial system, but an official system. The registrar and his register are the central figures about which the whole system turns, and every provision of a Torrens statute which does not relate to one or the other is merely incidental and ancillary to the working of the system around the pivotal and essential points, the registrar and his register. A treatise on any of the provisions

[1] 165 Ill. 527, 46 N. E. 454.
[2] 56 Oh. St. 575, 47 N. E. 551, 60 Am. St. Rep. 756, 38 L. R. A. 519.

of a Torrens act is a discussion of an incidental matter unless it pertains to the powers and duties of the registrar or to the effect of his register. Torrens acts the world over may differ as between themselves in all of their provisions, except that all must provide for a registrar who shall register titles as they are presented to him and all must declare that his register, his certificate of title, shall be conclusive evidence of the ownership of the registered estate in all courts and in all places. Since this declaration of the indefeasibility of a registered title is the pith of the whole system, it seems strange that it was not even touched upon in any of the decided cases sustaining the constitutionality of a Torrens act, and it also seems strange that it has not challenged some discussion in our legal periodicals. In view of the fact that every year or two some state passes a Torrens act, it would seem that the time is ripe for a thorough examination and study of the principles of the system by the members of the legal profession.

All Torrens acts provide in effect that an officer charged with the duty of making registrations shall consider any title to land submitted to him for the purpose of registration, and that he shall make a public record of the status and condition of the title according to his decision and judgment. These acts then declare that the register of the title as made by him shall be in all courts and in all places conclusive evidence of the title as registered. Several principles and propositions arise out of such statutory provisions.

(1) They create but one estate or interest in land and that is the registered estate, in lieu of legal and equitable estates. If the register, the certificate of title, is conclusive evidence of the ownership and condition of the estate in land as registered, no claim of interest not shown on the register has any possible validity. If it existed prior to the issue of the certificate it was cut off when the certificate was issued containing no notation of it. Whether the failure to make such notation arose from a mere omission, or from a mistake of law or fact, on the part of the registrar, is of no consequence; the law declares the estate as registered to be unimpeachable. No notice or knowledge on the part of a purchaser of registered land that there is an interest or equity not shown of record will invalidate his certificate when it is once issued to him, unless the transaction amounts to actual, not merely constructive, fraud. In the absence of actual fraud the registered estate is in the holder of the certificate. The statute does not differentiate between the first and subsequent certificates or between those who have had notice of equities off

the register and those who have purchased in good faith for value without notice. It simply declares that the registered estate shall be good everywhere and from any point of view. It is manifest that the registered interest is the only estate or interest in land. It is also evident that the system of registering titles is governed by strict statutory law, as against principles of equity. The original laws concerning recording instruments of title were intended to create a record which might be relied on to show all the evidences of titles to land, but, by the application of principles of equity and the doctrine of notice off the record, the recorded evidence of title is only one branch of it. The declaration of the indefeasibility of the title as registered, of the conclusiveness of a certificate of title, is absolutely essential to the working of the Torrens system.

(2) Where the registrar's act in issuing a certificate is conclusive evidence of ownership of the estate as registered, it is evident that the act of registration is necessarily the operative act to convey and effect the title. All Torrens acts declare that it is the operative act. Undoubtedly it is competent for the legislature to declare that no title to registered land shall pass from a transferor to a transferee unless and until the transfer has been registered, just as it may declare that no title shall pass from a grantor to a grantee of unregistered land unless and until the deed is recorded in the recorder's office. But it depends on the meaning of the phrase, whether our legislatures may declare that the registrar's act in making the registration is the operative act to effect or convey the title. In foreign countries the act of registration actually conveys the title just as it is registered. On an application for registration under the statute, the act of registering the applicant as the owner *ex proprio vigore* divests any outstanding title or interest from any other person and vests it in the person registered, so that he at once becomes the owner whether or not he had any interest in the land before his registration and the issue of the certificate to him.[3] The mere erroneous first registration of a title in a person is not a ground which can be urged by the true owner for an impeachment of the certificate. The registrar has full power to act in the premises and his act is binding on all the world, whether it is right or wrong. If this were not the rule, the act of the registrar would not be the operative act to establish and effect the title, and the statutory

[3] *Anderson v. Davy,* 1 N. Z. S. C. 302; *Coleman v. Riria Puwhanga,* N. Z. L. R. 4 S. C. 230.

declaration would not mean what it says so plainly when it declares that every certificate shall be conclusive evidence of title in all places. After land is registered no person about to deal with the title need inquire back of the last certificate of registration, and he need not inquire whether the last registered owner procured his registration through an erroneous registration or as the result of a fraud or forgery, because the last certificate of ownership forms a new and perfect root of title which will sustain the purchaser's title when he is registered as owner by the act of the registrar. For centuries land was conveyed by the act of the owner, and the efficacy of a deed depended on the validity of the title of the grantor, or on his power to convey the land, but where the title is vested by statute through the act of the registrar, a transfer of registered land does not depend in the least on the validity of the title of the transferor, or on the validity of his instrument of transfer. Where the mere act of registration transfers and vests the title pursuant to the very terms of the certificate of ownership, a registration, erroneous as to matters of fact or law arising in the title or in the transfer of it, must necessarily divest the title or some part of it from the real owner, in order to vest it in and transfer it to the person registered as owner. If the act of registration vests or transfers an indefeasible title to the registered owner only when the applicant or the transferor has such a title, the act of registration is not the operative act, vesting or effecting *ex proprio vigore* the title. The register is a mere record of the supposed legal effect of the links in the chain of title, and examination of the whole title must be made in order to determine whether the certificate states the true ownership and condition of the title. If the statute does not mean what it says about the act of registration and about the incontestableness of a certificate of ownership of land, issued under it by the proper officer, it is a snare for the unwary and the confiding.

(3) In foreign countries the act of registration is a solemn adjudication by the registrar on the rights of all persons in the land, whether these rights are in the registered estate or whether they relate to the validity or priority of liens on the estate. Having fixed a method of adjudication as to the ownership and condition of the title, binding on all the world, foreign statutes declare that this adjudication may never be put in question in any court or in any place. It is evident that the act of registration is not clerical or administrative, but is judicial. It certifies

to a legal conclusion, namely, that a certain person is the owner of a certain estate in land, subject to such burdens as are set forth in the register. The first act in Illinois concerning land titles (1895) provided that upon the filing with the registrar of an application for registration, he should cause examination to be made into the applicant's title to the land as shown by the abstract of title presented, and as to the truth of the matters set forth in his application, and if it should be made to appear to the registrar that the facts stated in the application were true and that the applicant was the owner of the land, he should issue a certificate of title unimpeachable after five years, and bring the land under the act; otherwise he should dismiss the application without prejudice. In considering these provisions of the act, the Supreme Court held in *People v. Chase*[4] that if an officer is clothed with power of adjudicating upon and protecting the rights or interests of persons, though not finally determining the rights, which are brought before him, he is concerned with a judicial proceeding and exercises judicial functions, and it was further held that the act was invalid as conferring judicial powers on an administrative officer. These sections of the Illinois act were almost identical with certain sections of the act of Victoria, 1890, and concerning the latter it was said, "The intention of the legislature was obviously to impose the duty upon the registrar to prevent instruments being registered which, in law as well as in fact, ought not to be registered in the first instance and to determine the validity of the instruments, as well as the priority of registration in point of time. He has therefore to discharge not merely ministerial but judicial duties."[5] The next Torrens act in Illinois provided for an adversary proceeding in a court of general jurisdiction to quiet and declare the title and provided that the registrar should register the title according to the terms of the decree in the case. This proceeding was held to form the basis for a valid registration in *People v. Simon*.[6] The latter act and all the Torrens acts which have been passed since in this country provide that on a transfer of the land from the original registered owner or from some subsequent registered owner, the registrar shall examine the instrument of transfer and if he is satisfied that the instrument is a proper one and that the transferee or devisee should be registered as owner, he shall issue a

[4] *Supra.*
[5] *In re, etc., ex parte Bond,* 6 V. L. R. (L) 458.
[6] 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801.

new certificate to him. There is a certain vagueness in most of the statutes as to what the registrar shall be satisfied about in passing on a transfer of registered land, as if the points of his satisfaction should not be made too definite, but this is certainly what all the provisions on that subject mean. These provisions as to subsequent registration might have been discussed and passed upon in each of the cases involving the constitutionality of a Torrens act, but, as has been said, the courts were content to pass only on the validity of the original registration under a decree in a contested suit, leaving subsequent transfers of the property by the sole act of the registrar entirely out of consideration. Under the Illinois act of 1895 the registrar was to examine or cause to be examined the abstract of title to the land in order to determine whether he would register the applicant as the first registered owner, and he was to examine the instrument of transfer on each registration subsequent to the first, in order to determine whether he should make a new registration to the new registered owner. His determination on the abstract as to the ownership of the title to the land was held to be a judicial act and yet his work and duty in passing on an abstract of title and on a single instrument of transfer differs only in amount and not in kind. If his act is judicial in one case it would seem to be so necessarily in the other. If his certificate of title is not conclusive evidence of ownership on original registration, it cannot be so on any subsequent one. Indeed, under all foreign Torrens acts, the power of the registrar is more unrestricted in making registrations on transfers of registered land than it is in bringing unregistered land under the act by first and original registration. The Australian acts are not exactly alike in the provisions regarding initial registration of titles, but they are very similar and may be stated in a general way. If it appears to the registrar from the report of the examiner that the title of the applicant is free from any lien or conflicting interest, he causes notice of the application to be advertised in a newspaper for a certain length of time, and in the notice appoints a time for hearing, not less than thirty days or more than one year from the time of the last advertisement. Unless in the interval he receives a caveat from some person who claims an interest in the land, forbidding him to do so, he proceeds to bring the land under the act by placing it on a public register, so that an indefeasible title to the estate is held by the registered owner of it and is transferable only by entry on the register. If it appears to the registrar from

the report of the examiner that the title is imperfect and defective, he may reject it or he may give notice of a time of hearing by publication and by personal notice to all interested persons where possible. He designates the persons to be notified and the kind of notice to be given, and he may require proof of service. The time set for the hearing must not be less than thirty days or more than one year from the time of the last publication. Unless a caveat is filed he may bring the land under the act at the hearing. He is clothed with the power to pass on all questions of law arising in a title submitted to him for registration and to hear evidence concerning facts affecting the title, but he is not a judge of a court having jurisdiction to pass on contested claims in an adversary proceeding. Of his own motion he may submit to the court any question of law which may arise in the title, but unless a caveat is filed and the application is contested, the court may not be called on to inquire into and determine questions of fact; and if a caveat is filed and a contest concerning the title is made, he has no power to consider the application, and it must be referred to the court to be tried as a litigated case.[7] But no Torrens act provides that any notice shall be given by publication or otherwise to persons who may be interested in the transfer of land from one registered owner to another. The statutes generally require that the instrument of transfer shall be presented to the registrar and that he shall register the new owner on being satisfied that the transferee is entitled to be registered. Most acts provide that any person feeling himself aggrieved by the action of the registrar in any matter involving his functions or duties may apply to court by petition, bill or complaint to require him to perform his duty properly; but, nevertheless, under most acts on a transfer of registered land, the registrar alone has power to make a new entry, no court has power to direct what registration he shall make, he is not required to give notice and opportunity for hearing to any person, and his certificate is conclusive evidence of ownership as against all the world. The purpose and simplicity of the system require that when land once has been registered, the registrar shall administer the act creating the system, and shall make all transfers of land according to his own judgment, without direc-

[7] Secs. 17-23, New South Wales act; Secs. 18-28, Queensland act; Secs. 20-30, New Zealand act; Secs. 31-40, South Australia act; Secs. 15-24, Tasmania act; Secs. 22-33, Victoria act; Secs. 21-33, Western Australia act; *In re Stanley*, 24 W. N. (N. S. W.) 74.

tion or supervision from courts and without notice to interested persons. In *People v. Chase* and *State v. Guilbert, supra,* it was held that an original certificate could be created only by a power judicial in its scope and nature, and by analogy one might think that such a power was necessary for the creation of conclusive certificates of title on subsequent registration. Nevertheless, since the decision in *People v. Simon, supra,* (1898) many states have passed Torrens acts containing provisions for the issue by the registrar of conclusive certificates on transfers of registered lands, and the courts in passing on the constitutionality of these acts have ignored the legal questions involved in them. No state which has passed a Torrens act has a constitutional provision permitting its legislature to make the registrar a judicial officer, and he must be held to exercise only administrative functions in making a certificate of ownership of the title. A certificate signed by an administrative officer is not necessarily in and of itself conclusive evidence of the matters of fact and of law set forth and declared therein, and a legislature in this country may not enact a law making evidence conclusive which is not necessarily so in and of itself. In a judicial investigation the law of the land requires an opportunity for trial of the rights of the parties, and there can be no trial of rights in registered land if the certificate of an executive officer is conclusive evidence of ownership in all courts and in all places, and if only one party may produce his proofs. To preclude a party from going behind such a certificate, and from showing the truth concerning his rights in the property is nothing short of invasion of the judicial province, confiscation of property and destruction of vested rights, without due process of law. It has been held repeatedly in this country that it is not within the legislative power to declare what shall be conclusive evidence.[8]

In a judicial trial on proper pleading it is always competent to show that there has been between the parties a former adjudication of the matters involved. In foreign jurisdictions an adjudi-

[8] *State v. Beach,* 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179; *Wantlan v. White,* 19 Ind. 470; *State v. Buck,* 120 Mo. 479, 25 S. W. 573; *People v. Cannon,* 139 N. Y. 32, 34 N. E. 759; *Felix v. Wallace Co.,* 62 Kans. 832, 62 Pac. 667; *Chicago Ry. Co. v. Minnesota,* 134 U. S. 418, 33 L. Ed. 970; *U. S. v. Klein,* 13 Wall. 128, 20 L. Ed. 519; *People v. Rose,* 207 Ill. 352, 361, 69 N. E. 762; *Corbin v. Hill,* 21 Iowa 70; *Baart v. Martin,* 99 Minn. 204, 108 N. W. 915; *Farmers' Union v. Thresher,* 62 Cal. 407; Cooley Const. Lim. (5 Ed.) 453-5; 3 Cyc. of Ev., 292; 8 Cyc. of Law, 820.

cation takes place when the registrar performs the act of registration under the terms of the Torrens acts, and this adjudication is declared by statute to be binding against all the world in all courts and in all places within those jurisdictions. Some lawyers who are attracted by many qualities of the Torrens system have advocated the placing in the state constitutions of provisions enabling legislatures to confer judicial power on registrars. In the new constitution of Ohio, as in force and effect January 1, 1914,[9] it is provided: "Laws may be passed providing for a system of registering, transferring, insuring and guaranteeing land titles by the state or by the counties thereof, and for settling and determining adverse or other claims to and interests in lands, the titles to which are so registered, insured or guaranteed, and for the creation and collection of guaranty funds by fees to be assessed against lands, the titles to which are registered; and judicial powers with right of appeal may by law be conferred upon county recorders or other officers in matters arising under the operation of such system." A constitutional amendment now before the people of Pennsylvania is substantially like the provisions just quoted, and it provides also that new courts may be established for carrying the system into effect. By these provisions it is probably intended that the first and original registration shall be made by an adversary proceeding in court, according to the practice which has obtained in this country, and that judicial powers with right of appeal may be conferred by law on registrars of title for settling and determining adverse and other claims to and interests in the titles to lands which have been registered. In foreign countries legislatures may make the record of a judicial officer import verity and may make it an absolute adjudication of the rights in the land of all persons in the world, whether they were present at the adjudication or not, whether they had notice of the proceeding or not, and whether they had an opportunity to be heard or not. But in this country merely making the registrar a judicial officer does not go far enough to avoid the fifteenth amendment of the federal constitution, which provides that a state legislature may not deprive any person of property without due process of law. Among other things, due process of law requires judicial authority of competent jurisdiction and notice and opportunity to be heard. A judicial officer is not necessarily a court, with power to issue summons and hear

[9] Art. II, Sec. 40.

litigated cases, and he has not been made such by the foreign statutes, but if a Torrens act to be passed in Ohio shall provide for summons to all interested persons and for a judicial determination of all contested rights in land, when it is to be transferred from one registered owner to another, the proceeding will be an adjudication as to all parties personally or constructively served with process, but not necessarily as to all the world. The proceeding will have to be examined in order to determine that all interested persons are bound by the adjudication, and in any subsequent litigation over the title the record of the proceedings before the registrar will have to be introduced in evidence in order to lay a sufficient foundation for the introduction in evidence of the former adjudication, the certificate of title. In other words, the statute to be passed in Ohio, in order to be sufficient under the fifteenth amendment, must create a judicial system of conveying land which has been registered, and not the Torrens system which creates an indefeasible title in the registered holder by the very fact of the issue of a certificate to him by the registrar. On receipt of the last duplicate certificate of title and of an instrument of transfer, whether it be a will, proof of heirship and due administration in an intestate estate, or a deed, a foreign registrar, as a part of his official routine, without notice to anyone and without opportunity on the part of anyone to be heard, issues a new certificate according to his judgment on the law and the facts, and this new certificate vests the title as registered in the new certificate holder, whether his act is correct or erroneous. A Torrens certificate of title is a public register, established by a state, creating an indisputable title to the estate in land as adjudicated and entered by a judicial officer who binds the whole world by his act, and evidencing in and of itself such title in all places in the state. Two elements of this definition always must be lacking in any certificate of ownership of land issued in this country, whether it be issued by an administrative or a judicial officer, or even by a court of competent jurisdiction. Here a certificate cannot create an indisputable title to land, and though in fact in a given case it may certify the facts correctly, it is not in and of itself conclusive evidence of the facts set forth therein. An administrative certificate has been treated of. The binding and conclusive character of a judgment or certificate of a judicial officer, or of a court of competent jurisdiction, is dependent on its jurisdiction of the parties to be affected by it, and the record of the proceeding in which the judgment or cer-

tificate arose must be presented always in order to lay a proper foundation for the introduction of the judgment or certificate, and in order to show that by due process of law the opposing claimant had an opportunity to be heard in determining what judgment or what certificate should be entered in the action. Whether a court or a judicial registrar had power to register a title against all the world depends on the facts in each case under consideration, and these facts must be shown before the register may be produced as a bar in any place.[10]

The judicial proceeding in original registration, according to the Torrens acts in this country, is the establishment and declaration of the title to the land, and the certificate issued by the registrar pursuant to the terms of the decree is merely a clerical addition to it, signifying nothing to those who understand it, and setting forth conclusions of law as to the title and ownership of the property which may or may not be true, according to the opinion of most lawyers.. It is a base imitation of a real Torrens certificate, and any person who deals with the land and pays out his money on the strength of the certificate does so at his peril.

It is sometimes said that the Torrens system is a method of state insurance or guaranty of title. It is just the opposite of this. A contract of insurance or guaranty of title is one of indemnity in case the title shall fail, but under the Torrens system the state through its declaration of the indefeasibility of a registered title establishes it so that it cannot fail. The insurance or indemnity fund under the system is not for the holder of the certificate of title, but for persons who may be deprived of rights or interests in land by this declaration of indefeasibility. When the state puts a person on the list of registered owners of land within its borders it does not insure his title, but vests it in him. A person divested of some right in the land by the registration of another as owner goes to the indemnity fund for compensation, because by the registration he is barred from recovery of his right in the land. The purpose of registering titles, instead of the evidences of title, is two-fold, to give certainty of title to the person who is put on the list of owners of registered estates, and to facilitate transfers of registered estates by doing away with the necessity for any examination of the title back of the last certificate. Can this system with its many admirable qualities and great achievements be worked in this country? Is the

[10] *Partenfelder v. The People,* 211 N. Y. 355. (1914.)

necessity of the system for an official certificate of ownership in and of itself incontestable repugnant to our constitutional necessity for due process of law in depriving a person of property rights? Can a registrar, even though clothed with judicial power, make an examination of an instrument on a transfer of registered land once and for all persons, and by his judgment and act of registration bind all the world so that no one can question it? In Australasia, where the colony and the states have power to declare a certificate of title indisputable, and where the system has been developed for more than sixty years, a purchaser in good faith and for value may deal with the last registered owner, get a new certificate, and know beyond peradventure that no prior mistakes of law or fact and no prior fraud or forgery may prevail against it. On this point the language of our statutes and of the Australasian statutes is the same. Do the statutes produce the same results here? A system by which persons by an inspection of the register may ascertain absolutely who holds title to a particular piece of land, and what burdens, if any, are on it, though more complicated than a mere statement of its elementary principles might indicate, is worthy of adoption if it can be created under our laws.

It has been said cynically that nothing so befogs a subject as a general discussion of it, but if this be so it is only because the subject is not understood clearly by those who discuss it. In our books we have many interpretations of the meaning of due process of law, but a full understanding of the Torrens system may be had only by study of the reported cases which have arisen in the six states of the Commonwealth of Australia and in the self-governing colony of New Zealand. Great help may be obtained from Hogg's valuable treatise on the Australian Torrens System. The so-called Torrens cases which have arisen in this country do not touch the pivotal points of the system, and a discussion of the Torrens system in the light of these cases leads nowhere, except to confusion.

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