REGISTRATION OF TITLE TO LAND

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Registration of title is something more than what is ordinarily meant by registration or recording—the entry in a public office. Both in the British Empire and in the United States of America registration of title is regarded as a system of conveyancing which is intended to supersede the ordinary method of conveyance by execution of a deed only. Herein registration of title differs from ordinary deed registration, for in the latter the mere act of recording the assurance does not pass the property but only makes the grantee more secure. It also differs from the registration of a mere judicial declaration of title, for the latter is only the record of the fact that the person affected has a good title to his land. In addition to being thus distinguished from deed registration and judicial declaration of title, an essential feature of registration of title as generally understood is that the complete property in the land should pass—and pass only—on registration being effected; this is usually referred to as state warranty of title. The typical form of registration of title is to be found in the Torrens system, though there are other systems that have grown up independently of this, and of the Torrens system itself there are many varieties, both in Australia—its original home—and in territories where it has served as a model for local systems.

How does registration of title stand as a system among other systems of conveyancing and registration?

What are the important points on which the various systems of registration of title differ among themselves?

What would be an ideal system, and what prospect is there of its realization?

It is proposed to give some answer to each of these questions.

COMPARISON WITH OTHER SYSTEMS OF CONVEYANCE AND REGISTRATION

There seems to be only one territory (using the word in a neutral and non-technical sense) in the whole of the Anglo-American world—the British Empire and the United States—where conveyancing is carried on without the adjunct of some kind of registration. That territory is England, where registration is only in use in certain areas and as regards certain classes of land. The experience of the rest of the Empire, of America, and indeed of the rest of the civilized world, is—judged by the prevailing practice—that any system of registration is better than none. It can hardly be contended that registration of title is inferior to a system of conveyance without registration.

The registration of a judicial declaration of title is not in any sense

a system of conveyance, and, being merely a part of what is done by registration of title, cannot possibly be compared favorably with the latter. Instances of this kind of registration are afforded by the Canadian province of New Brunswick[1] and the British Crown colony of the Falkland Islands.[2]

Systems of deed registration stand on a different footing, and the two principal methods of conveying land are, in the Anglo-American world, conveyance by deed supplemented by registration, and conveyance by registration of title. In the British Empire and in the United States, taken together and separately, the territories in which registration of deeds (as an adjunct to conveyance by deed) is the only system are far more numerous than those which have introduced a system of registration of title. Even in the latter a system of deed registration also prevails side by side with registration of title, except in the case of a small minority. It is believed that the exceptions—at all events in the British Empire—are seven only, and that only in Saskatchewan, Alberta, the Canadian Northwest Territories, the Australian Territory of Papua, and the protectorates of the Federated Malay States, Uganda and Sudan, is there registration of title without any separate system of deed registration. The British Empire consists of about eighty-five territorial units with distinct legislative or administrative functions, and only in thirty-one of these is there a system of registration of title. In the United States and dependencies—more than fifty territorial units—there appear to be only sixteen instances of registration of title having been adopted.[3]

Thus, roughly one-third of the Anglo-American world favors registration of title, and two-thirds favor conveyance by deed with deed registration. Registration of title is making its way, but not as rapidly as its supporters would wish. A comparison of the progress made in long-settled countries like England and the older colonies, and in new and more recently settled countries like Australia and Canada (in its western portions), seems to give a clue to the difficulty. Registration of title makes least progress and is least popular where land is for the most part in private ownership. It makes the best progress and is most popular where there are large areas of public land available for sale to private persons. Where the land is in private ownership the title of the owner must be investigated as a condition of the land being placed on the register at all, and this investigation necessarily involves expense and delay in varying degrees. Where the land is purchased from the State the Crown grant or patent at once confers a good title and no expense in investigating a chain

[1] Land Titles Act, 1914, 4 Geo. V. ch. 22.

[2] Titles to Land Ordinance, 1904 (No. 6).

[3] (1917) 17 JOUR. COMP. LEG. 281, reprinting note from (1917) 17 COLUMBIA L. REV. 354.

of title has to be incurred, and the land can be initially registered with nominal expense and delay. Moreover, in Australia, where registration of title has made great progress, land thus granted by the Crown is at once placed on the register—initial registration is compulsory. The same procedure obtains in most British territories, exceptions being England (where the registration statutes are silent on the subject), Ontario (where such registration is compulsory in certain districts only),[4] and Jamaica and Leeward Islands, where entry on the register of titles is optional and not compulsory, and every first grantee from the Crown may if he chooses hold his land under the ordinary system of conveyance and deed registration.[5] For the most part, where land has once passed into private ownership, initial registration is purely voluntary and has to be effected at the expense of the owner of the land; the principal exceptions are in England and Ireland, but in England compulsory first registration only applies in a limited area, and in Ireland only to certain classes of land,[6] and in England the expense is as great as on a voluntary application.

The necessity for a special application by the owner, and the expense of the initial registration, seem to be the chief causes that contribute to the somewhat slow growth of registration of title in spite of its many advantages. There are other minor causes. One of these is the provision in many systems by which the use of certain prescribed forms of documents is insisted on for carrying out transactions with the land when once it has been placed on the new register. But in Nova Scotia the use of the statutory forms of conveyance and mortgage is optional,[7] and no special forms are prescribed in any of the American systems,[8] nor in Ceylon, British Honduras, East Africa, or Sudan. Another minor cause is the perfection to which some deed registries have been brought, as in the case of Scotland, where the "search sheet" system has secured advantages approximating to registration of title. Both in Scotland and South Africa registration is essential to the passing of property in the land conveyed, though there is no state warranty of title.

POINTS ON WHICH SYSTEMS DIFFER AMONG THEMSELVES

There is one point of difference between the British systems generally and the American, which is due to differences of constitutional

[4] Land Titles Act, R. S. O. 1914, ch. 126, sec. 159.

[5] Jamaica: Registration of Titles Law, 1888; Further Amendment Law, 1889 (No. 20) sec. 33; Leeward Islands: Title by Registration Act, 1886 (No. 1, 1914 Rev.) sec. 7.

[6] England: Land Transfer Act, 1897, ch. 65, sec. 20; Ireland: Local Registration of Title (Ireland) Act, 1891, ch. 66, sec. 22.

[7] Land Titles Act, 1903-4, ch. 47, secs. 49, 52.

[8] Draft of Uniform Land Registration Act (1914) sec. 47; Niblack, *Analysis of Torrens System*, 338.

law.[9] It is unnecessary to dwell on this here. The points to be now noticed are common to the whole aggregate of Anglo-American systems.

Perhaps the most important point (as being one of far-reaching juridical principle) on which registration of title systems differ *inter se* is the question of the relation of registration and possession.[10] Some registration statutes are silent on this question altogether; judicial decision is in favor of the right to acquire title by possession subsequent to initial registration.[11] As to whether initial registration puts an end to all rights that may be acquired by virtue of antecedent possession, judicial opinion in America seems to be against this view,[12] though perhaps it would meet with more favor in British courts. In some systems the statutes expressly make the registered title good against all possession, and to this extreme type belong New South Wales, Ceylon,[13] many American States,[14] and (as to fully warranted title) Ontario and Nova Scotia.[15] To the other extreme belong Victoria, Western Australia, Fiji, Federated Malay States, Sudan, Leeward Islands, where all rights arising under possession may be enforced against the registered title.[16] England, Ireland, Jamaica, South Australia, Tasmania, New Zealand, Manitoba, British Columbia, Saskatchewan, occupy a middle position, and rights under possession can only be enforced in certain circumstances against the registered title.[17] In South Australia, New Zealand, Manitoba, British Columbia

[9] See Report on Torrens System to 24th Annual Conference on Uniform State Laws (1914).

[10] This is the subject of an article by the writer in (1914) 15 JOUR. COMP. LEG. 83, where twenty-seven systems are dealt with. The Saskatchewan statute has since been amended.

[11] *Belize Estate Co. v. Quilter* (P. C.) [1897] A. C. 367; *Harris v. Keith* (1911, Alberta) 16 West. L. Rep. 433.

[12] *State v. Westfall* (1902) 85 Minn. 437, 89 Am. St. Rep. 571, 89 N. W. 175; *People v. Simon* (1898) 176 Ill. 165, 68 Am. St. Rep. 175, 52 N. E. 910.

[13] New South Wales: Real Property Act, 1900 (No. 25) sec. 45; Ceylon: Land Registration Ordinance, 1907 (No. 3) sec. 59, as to which see (1914) 15 JOUR. COMP. LEG. 85.

[14] Draft of Uniform Land Registration Act (1914) sec. 46; Niblack, *op. cit.* 190.

[15] Ontario: Land Titles Act, R. S. O. 1914, ch. 126, sec. 29; Nova Scotia: Land Titles Act, 1903-4, ch. 47, sec. 42.

[16] Victoria: Transfer of Land Act, 1915 (No. 2740) secs. 72, 87; Western Australia: Transfer of Land Act, 1893 (No. 14) secs. 68, 222; Fiji: Real Property Ordinance 1876 (1906, No. 7) sec. 14; Federated Malay States: Registration of Titles Enactment, 1911 (No. 13) sec. 8; Sudan: Title of Lands Ordinance, 1899 (No. 2) sec. 14; Leeward Islands: Title by Registration Act, 1886 (No. 1, 1914 Rev.) sec. 34.

[17] England: Land Transfer Act, 1897, ch. 65, sec. 12; Ireland: Local Registration of Title (Ireland) Act, 1891, ch. 66, sec. 52; Jamaica: Registration of Titles Law 1888 (No. 21) sec. 55; South Australia: Real Property Act, 1886 (No. 386) secs. 69 (6), 251; Tasmania: Real Property Act, 1862 (No. 16) sec.

(as to fully warranted title), and Saskatchewan, the registered title is (as in New South Wales, etc.) good against all possession, but with an express exception in favor of rights of persons in possession at the time of initial registration.

Another important difference is the effect and operation of registration, both initial and of subsequent transactions. In the majority of the systems initial registration confers a complete title good against the world, subject to certain exceptions. But in a few of the British systems—England, Ontario, British Columbia, Nova Scotia, Leeward Islands—provision is made for registration of a title that is not fully warranted.[18] It seems to be owing to this statutory permission to register with merely *prima facie* title that a further difference exists between the system in England and all other systems. It has been laid down in England (though not yet by the final decision of the House of Lords) that, notwithstanding the existence of the new registered estate in fee simple, the old "legal estate" in fee simple remains in existence.[19] Whether this view will be taken in Ontario (where the registration statute is modelled on the English statutes) remains to be seen. But in New South Wales—and other statutes would seem to bear a similar interpretation—it has been expressly decided that no interest carrying the incidents of the legal estate passes without registration.[20] Most statutes indeed enact generally that no interest in the land passes until registration, whilst some expressly provide that unregistered instruments operate as contracts only.[21] In America it has been laid down that "the act of registration is the operative act to convey title,"[22] and this is assumed by the framers of the Draft Uniform Act to be the sense in many American state statutes, for one clause provides that "registration shall be the only operative act to transfer or affect the title to registered land."[23]

135; New Zealand: Land Transfer Act, 1915 (No. 35) secs. 60, 72; Manitoba: Real Property Act, R. S. M. 1913, ch. 171, secs. 82, 83; British Columbia: Land Registry Act, R. S. B. C. 1911, ch. 127, sec. 22; Saskatchewan: Land Titles Act, 1917 (Sess. 2, ch. 18) sec. 61.

[18] England: Land Transfer Act, 1875, ch. 87, secs. 5, 8; Ontario: Land Titles Act, R. S. O. 1914, ch. 126, secs. 6, 12; British Columbia: Land Registry Act, R. S. B. C. 1911, ch. 127, secs. 14, 23; Nova Scotia: Land Titles Act, 1903-4, ch. 47, secs. 8, 38; Leeward Islands: Title by Registration Act, 1886 (No. 1, 1914 Rev.) sec. 126.

[19] *Capital and Counties Bank v. Rhodes* (C. A.) [1903] 1 Ch. 631.

[20] *Macindoe v. Wehrle* (1913, N. S. W.) 13 S. R. 500; *Davis v. McConochie* (1915, N. S. W.) 15 S. R. 510.

[21] Nova Scotia: Land Titles Act, sec. 44; Leeward Islands: Title by Registration Act, 1886, sec. 6.

[22] *Tyler v. Judges of Court of Registration* (1900) 175 Mass. 71, 80; 55 N. E. 812.

[23] Draft Uniform Act, sec. 47.

The British systems for the most part require transactions subsequent to initial registration to be carried out by means of prescribed statutory forms of instruments. There are exceptions (as already pointed out) in the cases of Nova Scotia, Ceylon, British Honduras, East Africa, and Sudan. A further exception is British Columbia, where the only form prescribed is a form of transfer whose use appears to be optional.[24] But on this point there is a striking difference between the British systems as a whole and the American systems. In the latter the policy is deliberately adopted of allowing all transactions to be carried out by means of ordinary instruments.[25] This difference is more important than it may appear to be on the surface, and whilst it may be regarded as a concession to the opponents of registration of title that ordinary instruments of conveyance and mortgage are permitted to be used, their use rather than the use of specially prescribed forms seems likely to retard the development of the new system of conveyancing. In particular, the use of ordinary instruments gives colour to the contention that registration is not the sole "operative act" of conveyance.

One point on which a minority of the systems differ may be noticed with respect to the provision for indemnity against loss through the operation of the state warranty of title. Such loss is usually guarded against by the establishment of an insurance fund. In three cases—Fiji, British Honduras, Federated Malay States—no provision at all is made for an insurance fund. In Ontario,[26] and in many American states[27] the insurance fund only can be resorted to, and no provision is made for state liability in case of the fund's deficiency. In the majority of systems the state's liability is in effect made unlimited, so that the temporary deficiency of the insurance fund becomes unimportant. This seems the better plan on every ground.

The difference with respect to compulsory initial registration has already been noticed. The absence in the American systems of such compulsion is one of the chief differences between the American and the British systems. In America all initial registration appears to be purely voluntary. In the British systems there are two places of compulsion—one on first grant of land by the Crown, the other on sale of land in private ownership. The latter has been adopted only in England and Ireland, and only there to a limited extent.

There are a number of other differences of more or less importance, such as the nature and protection of equitable interests, the effect of the registration of forged instruments, etc. The limits of an article will not permit of more than the mere mention of these.

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[24] Land Registry Act, sec. 106.
[25] Draft of Uniform Act, sec. 47; Niblack, *op. cit.* 238.
[26] Land Titles Act, sec. 124 (3).
[27] Draft of Uniform Act, sec. 56.

THE IDEAL SYSTEM AND ITS POSSIBLE REALIZATION

The object of registration of title being to enable transactions with land to be carried out easily and cheaply, the ideal system will be that by which these objects are best attained, at the same time retaining all advantages belonging to other systems of conveyancing and conforming to the general policy of jurisprudence as regards ownership of land. There are two things to be considered: how to bring land on to the register, and what rights to confer on owners of interests in it when it is once on the register. The first of these questions is much the more difficult of the two.

It is clear that the disadvantage of the initial application as now conducted will for a long time operate against land being registered voluntarily. If any approach to the universal adoption of registration of title is to be made, some means must be found to induce owners of land already in private ownership to place their land on the register. In other words, some form of compulsion must be used which will not be burdensome to the individual owner. It is suggested that a practicable scheme could be worked out by adopting the principle now adopted in the case of land compulsorily purchased or "resumed" for public purposes or such undertakings as railways. On a contract for sale being entered into, the purchaser would pay into the land registry or other public office his purchase money and an assessed sum for costs, and would then be let into possession and registered as owner. The vendor would be required to have his title investigated by the land registry or other public authority and would receive the purchase money on showing a good title. Stripped of details the essence of the scheme would be that the purchaser would receive the property at once on payment of the price, and the vendor's interest would become a claim for compensation, to be liquidated immediately the claim—*i. e.*, the right to the purchase money—was proved. By this means the purchaser would be subjected to no more expense or delay than if he were buying land already registered, and could at once have all the advantages of a registered owner. The vendor, on the other hand, would be in precisely the same position as at present, *i. e.*, he would have to show title in the usual way. The land would not be subjected to the double ownership of vendor and purchaser for a protracted period as is often the case at present. Voluntary application without sale could be encouraged by a scheme under which, upon a substantial sum being deposited by the owner, he could at once be placed on the register in the same manner as a purchaser, the deposit being returned when the title had been investigated and found in order.

Under the scheme suggested every title would be registered as fully warranted. It should also be carefully provided that the registered estate took the place for all purposes of the old technical legal

estate; if necessary any outstanding legal estate should be destroyed or vested in some public official, appropriate statutory provision being made for this.

The less difficult question has reference to rights of owners when once the land is registered. This involves no new scheme, but merely the selection of the best among alternative provisions. The subject of possession and registration and their interrelation is typical. The most reasonable plan would seem to be that initial registration should wipe out all rights of every kind, complete and inchoate, but that rights under limitation or prescription statutes should be acquirable by length of possession subsequently to initial registration, as in the case of unregistered land. The use of statutory forms of conveyance, etc., appears to have great advantages, and this has already been referred to. The form to be taken by the provisions for state indemnity has also been referred to and also the operation of registration. On the question of forgery, there seems no reason to treat forgery (considered as an invalidity of title) on any special ground; to make a registration invalid because effected on the faith of a forged instrument is really to lay more stress on the execution of the instrument than is warranted by the principles that underlie the theory of registration of title.

The possibility of the scheme above suggested being carried out, particularly as regards initial registration, depends largely on the manner in which the details are worked out. It also depends on the provisions, when embodied in a statute, being sufficiently adaptable to find favor in territories differing widely in local conditions. A well considered scheme which worked successfully when put to the test would probably be adopted in other territories. Uniformity in legislation within the British Empire is as desirable as it is in the United States.

Reform in the matter of transactions with land is of much more than merely juridical interest. The present system of conveyance by deed, involving repeated investigation of the back title, is economically wasteful. After all, the amount of time, money, and intelligence in the world is a fixed quantity, and the more there is consumed in unnecessary work the less there is available for necessary work. Efforts to simplify and cheapen land transactions in the British Empire and the United States of America are not mere Diogenean tub-rolling, but should, if well directed, be a real help to the Anglo-American Justinian of the future—when he arrives.

[The attention of the learned reader is also called to an article by Niblack, *Pivotal Points in the Torrens System* (1915) 24 YALE LAW JOURNAL, 274.—ED.]