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THE TORRENS SYSTEM

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[Editor's Note: This treatise presents, separately, the two sides of the Torrens System. First, it presents the viewpoint of the Title Companies who announce the System as "an unnecessary innovation." In the second part of the article the arguments of the Torrens League are presented, wherein the Torrens System is called "a great constructive reform." Our next issue will contain an article entitled "The Torrens System—Conclusions of a Dispassionate and Unbiased Inquirer into the System." Released from *The Paper Book*.—G. J. B.]

I. AN UNNECESSARY INNOVATION

From a perusal of the material on the Torrens System in the average library one would conclude that the millenium was at hand and that all title difficulties were at an end. The utter absence of criticism and opposing literature would lead one to suppose that this system must represent the last word in perfection of title registration, but to one who disbelieves in unmitigated good and to whom panacea is anathema, it serves but as an impetus to his critical examination.

The first natural inquiry is what is wrong with our present system and why the need of change. Lawyers, conveyancers, and title men have built up in this country a system of land transfers and a recording machinery, under which litigation is relatively small, title certain and secure, mortgage investments solid, frauds and errors few and certain of discovery and easily corrected. This present system is American in spirit, growth, and development, and is a product of the ideals which formulated our constitution. It is the result of conservative thought and sound business judgment, covering a long period of time, adapted to our needs, and while not perfect, as no human agency is perfect, it has served us well. Why substitute for a growth of the soil a foreign system adapted to a form of government different from ours?

The theory of the Torrens System is, in effect, that when a title is registered, neither a purchaser nor a mortgagee needs to look any farther than the registrar's roll, and he can rely absolutely on a clear title shown there. But is this certificate final and conclusive, or is it any better than the decree of court

on which based? Mr. Charles E. Jones of the Department of Justice in Washington is quoted as saying, "There is no certainty of a Torrens certified being good; at best it is but *prima facie* evidence of title. It must be accompanied by an abstract of title and a certified copy of all court proceedings under which the certificate was issued." Necessarily, the Torrens System breeds litigation, since the initial registration involves litigation, and the subsequent interpretation of the certificate gives rise to further contention. In effect, the courts have said that a person taking a Torrens certificate does so at his peril, the same as one who bought worthless stock without proper inquiry.

The Torrens System is opposed to the spirit of our constitution, and the basic principles of our jurisprudence, and is in direct conflict with the XIVth amendment, which guarantees due process of law. The registrar must be given absolute and unlimited power in order to operate this system successfully. This power may be given in a country where no such guaranty exists, but not even the president himself can be given so arbitrary a power under our constitution. The Torrens System assumes to bind all parties whether made defendants or not, under the name of "All whom it may concern," but under our constitution no man may be deprived of his property without his day in court, and if a man is known and his name can be ascertained, he cannot be bound under the description of "All whom it may concern."

It is a compulsory dual system of registration because there must first be a complete abstract of title made and then an initial lawsuit. Further, there is compulsory contribution to an indemnity fund.

Since the abstract is necessary there is no saving in time or money, but on the other hand, the proceeding is very expensive; the court costs alone are estimated at about $94.00 in an initial suit, plus the cost of the abstract, ordinarily about $25.00. At least 90 days are ordinarily required for initial transfers and for subsequent transfers usually ten days are required—vastly more time than is required for a policy of title insurance.

Banks and other investors will not loan on Torrens certificates unless accompanied by abstracts and legal opinions.

The type of men selected for registrars and assistants has not been such as the advocates of the system would like to have us believe. Ordinarily they are politicians with no specialized train-

ing or real qualifications such as should fit them for the duties imposed on them by this utopian scheme.

If it is a proper governmental function to issue certificates of title superseding the policy of title insurance why is it not proper for the government to undertake fire and theft insurance? The recollection of the government management of railroads is too fresh in the minds of most of us at this time to think of increasing the functions of governmental activity.

The indemnity fund is wholly inadequate because a county or state has no right to enter into the business of guaranteeing or insuring titles, and a guaranty fund can only be built up by taxing one man to pay a possible defect in another's title. Before a defrauded property owner can maintain suit to recover from the fund he must first establish the fact that he has sued the party directly responsible and has been unable to recover. Further such suit must be brought within a limited time after the wrong was committed, and failure to learn of such wrong until after the time limit has expired would completely bar any recovery. Ordinarily the total amount in such an indemnity fund is insufficient to satisfy the loss in any single case.

No provision is made for owners less than in fee, and equitable interests not subject to registration are wholly unprotected. The right of adverse possession is wholly destroyed and all possessory interests are jeopardized. The certificate is of no more value where there are forged or invalid deeds than a mere quitclaim deed.

It lowers land values because valid restrictions against objectionable occupants and offensive businesses are evaded without knowledge of the court or the property owners interested. The Torrens certificate shows free and clear of all encumbrances, conditions and restrictions, although under the recording system certain things have been expressly prohibited.

The system although in effect in nineteen states has not proved popular. While in 1918-1919 there were 1,476 court cases, 2,795 applicants, 9,651 parcels of property, under Torrens proceedings, in 1920-1921 there were 748 court cases, 1,846 applicants, 5,121 parcels of property, and in the six months from Jan. 1921 to July 1921 there were 335 court cases, 431 applicants, and 942 parcels.

Summarizing; the defects most patent seem to be, the certificate is not final nor conclusive, it compels a dual system of registration, it is in flagrant violation of the XIVth amendment, an abstract is necessary and there is no saving of time nor expense, there is no protection to grantees under forged or undelivered deeds, the indemnity fund is insufficient, banks will not loan on certificate, the system breeds litigation, it is not properly a governmental function, the men in charge are not fitted by experience or training, it depreciates property values, and lastly, and most important of all there is no demand for it as there is no necessity for it.

II. A GREAT CONSTRUCTIVE REFORM

It might be well, at this point, to give a brief explanation of just what the Torrens System is, and what it seeks to do. The Torrens System is a scheme of title registration devised by Sir Robert Torrens, for whom it is named, whereby a unit of property is first placed on the registry with reference to the land itself, and the title is registered and established as good by judicial proceedings. The entry of transactions on the register is essential to their validity, and the original registration and entry of subsequent transactions operates as a warranty of title in the registered owner and as a bar to adverse claims. An official examiner of the Court examines thoroughly the title, upon a written application filed by the owner, accompanied by such usual evidences of title as are required by the Torrens law, before any decree of registration is made. When satisfied that the title is good, the Court enters a decree of registration, and a certificate of ownership is issued by the County Recorder to the owner, in duplicate, the original appearing on one page of the Recorder's Register, on which are entered the incumbrances upon the property. The subsequent transfer of title is accomplished by deed or entry on the owner's duplicate certificate, accompanied by an entry of the fact in the Registrar's office. One page of the record in the Recorder's office discloses the owner and the incumbrances at a glance, and at any time.

In short, then, the Torrens System is a plan of conveyancing which substitutes certificates for abstracts, and registration for mere recording of deeds.

That there is need for the Torrens reform can be learned from a consideration of the defects of the present system.

In the first place the Recording System fails to protect purchasers in the case of undelivered deeds. infancy of grantor, and in cases where, although the grantor has been declared in the deed to be single, he was in fact married and had a husband or wife living entitled to curtesy or dower. Further, there is no protection for purchasers where the owner of land died intestate and proofs of heirship were made upon his death.

Secondly, and a more serious difficulty has been the ever-increasing cost of transfers. Foreclosures, partitions, quiet title proceedings, transfer by devise or intestacv make abstracts of title very expensive. Chains of title have grown long and involved and have entailed the necessity of examination by competent and skilled attorneys at increased expense. The Recording System causes an accumulation of an ever-increasing mass of public records of deeds and liens affecting land which tends to create delay and expense in the examination of titles.

The Recording System has necessarily given rise to the Abstract Company and the Title Guaranty Company, whose business has tended to become a monopoly occasioning in many cases excessive charges. In the event the Title Guaranty company makes a fatal mistake the owner's recovery is limited to the face value of his policy, usually much less than his actual loss. Ordinarily the amount of time required to close a real estate transfer through a title company is considerable. There is also, usually, a gap between the date of the company's opinion and the date of passing deeds and purchase money, because of which the seller either has to take the chance of subsequent conveyances or incumbrances or else stand the expense of an escrow charge. So long as the owner still has the right to file all sorts of papers, becoming involved in litigation, die intestate or leaving a complicated will, between the date of one title policy and another, the necessity of an expensive search may arise for a single transfer. Further, title may be found so defective that it would necessitate a quiet title action before the title company would insure the title. Titles may thus become a matter of the judgment or caprice of the title officer, and the mere indemnity against actual loss provided by a title insurance policy can never make a defective or doubtful title marketable.

It is frequently charged that the Torrens System is un-American and diametrically opposed to the fundamental law of the land. In *American Land Co. vs. Zeiss,* 219 U. S. 47, the late Chief Justice White said,

"To argue that the provisions of the statute are repugnant to the due-process clause, because a case may be conceived where rights in and to property would be adversely affected without notice, being actually conveyed by the proceedings, is in effect to deny the power of the state to deal with the subject. The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals. . . . On the contrary, the provisions of the due-process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful State power, since they are so unreasonable and unjust as to impair or destroy fundamental rights."

Justice McKenna in *Ballard vs. Hunter,* 204 U. S. 241, said,

"It should be kept in mind that the laws of a State come under the prohibition of the fourteenth amendment only when they infringe fundamental rights. . . . A precise definition of "due process of law" has never been attempted. It does not always mean proceedings in court. Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceeding may be adapted to the nature of the case."

The question of the validity of service by publication upon unknown persons, resident or non-resident, minors and those under disability has been decided in *Twining vs. New Jersey,* 211 U. S. 78, *Orndt vs. Briggs,* 134 U. S. 316, and in 219 U. S. 47, supra.

The Torrens System settles definitely and finally the validity of title. James Edward Hogg of London, in his book entitled, *Registration of Title to Land Throughout the Empire,* says,

"The register, however, operates not merely by declaring good a title found to be so, but confers the title stated, notwithstanding that, but for the registration, the registered owner would have no title at all. This operation of the register in actually conferring title resembles that of limitation statutes. But there is much more than a bar of legal remedies, for the title (if any) of the hostile claimant is completely abrogated and in effect

transferred to the registered owner, conferring on the latter a title good against the world."

Alfred G. Reeves, an acknowledged authority upon realty law says,

"One of the splendid features of the Torrens system—a feature which realty interests should emphasize—is in its supplying a method whereby the owner of property may have his title tested and adjudged, even though no attack is being made thereon. Without this law a landowner whose title is questioned, however improperly or unsubstantially must often wait for a direct attack upon it, or a rejection of it, when it has been contracted to be sold, before he can get into court to settle the questions involved. But a registration action entitles him to proceed affirmatively and compel all who might gainsay his ownership, to come in and successfully assert their claims or have them forever barred and extinguished."

By means of the Torrens System protection is afforded to all interested parties. The danger of a bad title being registered under the Torrens Act is, undoubtedly considerably less than under a decree in a quiet title proceeding as greater degree of care is exercised in the examination of titles under this system than under ordinary court proceedings.

The state of title is always a matter of record under the Torrens System. Since it can only be changed by act of the registrar, the exact status of title is known at all times. Misdescriptions are practically impossible under this system.

Under the Torrens System the rapid transfer of titles is greatly facilitated, and in fact, transfers subsequent to the initial registration can be made in twenty-four hours.

The cost of transfers is greatly reduced where this system prevails. In Chicago, the average cost of the initial registration is about thirty-five dollars. Each new certificate costs three dollars, no matter how difficult or involved. William C. Niblack of the Chicago Title and Trust Company, one of the ablest and best informed opponents of the Torrens System, says on this score,

"It is undoubtedly true that the Torrens System is cheaper in the long run than the system of procuring an abstract of title to land and having it examined by a lawyer on each dealing with the land. . . . In large communities the latter system

has become expensive and unscientific enough to attract attention. . . . The progress of the Torrens System in this country is not to be impeded by mere adverse opinion as to its adaptability to our laws. A large part of the people in the several states desire to have it tried and the trial is now on. . . . This trial is to be a fair one, to be conducted patiently and slowly, and it will not be concluded until the success or failure of the system is demonstrated."

Summarizing: the advantages of the Torrens System which make it a great constructive reform and a consummation devoutly to be wished are—

1. Title is warranted, whereas under the recording system the record is no bar to adverse claims, and carries no warranty prior to the record.

2. Registration shows at a glance, all former dealings affecting a particular parcel of land.

3. An ample assurance fund is provided as indemnity to cover any loss or damage.

4. Registration protects against fraudulent signatures since the owner's signature is always on file. Protection is afforded against clouding title by judgments against persons of the same or similar names.

5. Adverse possession does not run against Torrens titles.

6. The physical boundaries of land are determined and kept fixed by registration.

7. Defective titles are cured by registration whereby defects are wiped out even though no attack is made thereon.

8. Ordinary transfers of registered property can be made in twenty-four hours.

9. The Torrens System substitutes at every step official acts for private acts.

10. The Torrens certificate abolishes secret liens and hidden equities.

11. By means of the Torrens System endless expense of abstracts and extensions thereon is eliminated.

12. Torrens registration stops the accumulation of public records of deeds and liens affecting land and eliminates the consequent delay and expense of title examination.