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## THE CONCLUSIVENESS OF A TORRENS CERTIFICATE OF TITLE

BY LORING M. STAPLES\*

THE primary purpose of the so-called "Torrens System" of registering title to real estate has been defined to be the "creation of an indefeasible title in the registered owner, and the simplification of the transfer of land."<sup>1</sup> An indefeasible title, represented by a certificate conclusive of the owner's rights as against the world, and upon which purchasers could conclusively rely, would be an ideal well worthy of accomplishment, and examination of the various Torrens title acts in force in this country and the British colonies leaves no doubt but that the framers had such a purpose in mind.<sup>2</sup> The Minnesota act,<sup>3</sup> for

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<sup>1</sup>*Baart v. Martin*, (1906) 99 Minn. 204, 207, 108 N.W. 945, 116 A.S.R. 394. "The purpose of this statute is to create a judgment in rem perpetually conclusive. Other proceedings in rem may determine the status of a ship or other chattel that is transient; this legislation provides for a decree that shall conclude the title to an interest that is to be as lasting as the land itself." *Smith v. Martin*, (1910) 69 Misc. 108, 111, 124 N.Y.S. 1064. "Besides clearing and registering the title and facilitating its transfer, the Torrens Systems practically guarantees, in behalf of the state, that the holder of a registered certificate of title has an absolute and indefeasible interest which can never be questioned on any ground whatever." A. H. Robbins, *The Torrens System of Land Registration*, (1902) 54 Cent. L. Jour. 282, 290.

<sup>2</sup>Torrens acts are in force in the following states: California, Stats. 1897, p. 138, amended and redrafted, Stats. 1905, p. 1932, *Henning's Gen. Laws, Cal.*, (1920) Act 5194; Colorado, Laws, 1903, ch. 139, *Mills Ann. Stats.*, secs. 856-957; Georgia, Acts, 1917, p. 108, *Park's Ann. Code*, (1922 Suppl.) Title 2, ch. 8; Illinois Laws, 1897, p. 141, R.S. 1921, ch. 30; Massachusetts, Gen. Laws, 1921, ch. 185; Minnesota, Laws, 1905, ch. 305, G.S. 1913, secs. 6868-6950; Nebraska, Laws, 1915, ch. 225; New York, Laws, 1908, ch. 444, *Real Prop. Law*, 1909 art. 12; North Carolina, Laws, 1913, ch. 90, C.S. 1919, vol. I, ch. 47; North Dakota, Laws, 1917, ch. 235; Ohio, Gen. Code, 1921, secs. 8572-1, 8572-118; Oregon, Laws, 1901, p. 438, C.L. 1920, secs. 9940-10052; South Dakota, Laws, 1917, ch. 368, R.C. 1919, secs. 3060-3143; Tennessee, Acts, 1917, ch. 63, *Ann. Code*, 1917, secs. 3793a3-3793a96; Utah, Laws, 1917, p. 51, C.L. 1917, secs. 4920-5008; Virginia, Laws, 1916, ch. 62; Washington, Laws, 1907, p. 693, C.S. 1922, secs. 10622-10726. Some of these, however, only provide for the registration of land in certain designated counties. Practically all of the British colonies have Torrens Title acts. A modified type is in force in England itself. See J. E. Hogg, *Australian Torrens System*, (London, 1905); *Registration of Title to Land throughout the Empire*, (London, 1920).

<sup>3</sup>The original act is found in Minn., Laws, 1901, ch. 237; amended, Laws, 1903, ch. 234. The act was redrawn in 1905 (Laws, 1905, ch. 305) and has been retained in practically this form in Minn., G.S., 1913, secs. 6868-6950. Land in any county may now be registered: Laws, 1909, ch. 183, sec. 2.

example,<sup>4</sup> provides that after the expiration of a period of six months<sup>5</sup> from the date of granting a decree of registration, the decree:

"Shall bind the land described therein and shall forever quiet the title thereto, and shall be forever binding and conclusive upon all persons, whether mentioned by name in the summons, or included in the phrase, 'all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the application herein,' and such decree shall not be reopened, vacated or set aside, by reason of the absence, infancy, or other disability of any person affected thereby, nor by any proceeding at law or in equity for opening, vacating, setting aside or reversing judgments and decrees, except as herein especially provided."<sup>6</sup>

And the certificate of title, or the owner's duplicate thereof:

"Shall be received in evidence in all the courts of the state, and shall be conclusive evidence of all the matters and things contained therein."<sup>7</sup>

The original act<sup>8</sup> went no further. It provided no method of preserving the rights of those of whom no jurisdiction had been obtained, or of those deprived of their interests through fraud, Minnesota being almost alone among all the states and British and American colonies which have adopted the Torrens system in omitting all mention of fraud.<sup>9</sup> Apparently, then, the purpose of the Minnesota statute was to make the decree and certificate of registration absolutely indefeasible upon the expiration of a short statute of limitation, and to relegate the unjustly deprived to consolation from an "assurance fund."<sup>10</sup> This statute

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<sup>4</sup>For obvious reasons, the Minnesota Torrens act has been used as an example throughout this article. Unless otherwise stated, statutory references in subsequent notes are to the Minnesota statute.

<sup>5</sup>It was sixty days in the original statute. Minn., Laws, 1901, ch. 237, sec. 29.

<sup>6</sup>Minn., G.S., 1913, sec. 6889.

<sup>7</sup>Minn., G.S., 1913, sec. 6903.

<sup>8</sup>Minn., Laws, 1901, ch. 237.

<sup>9</sup>*Baart v. Martin*, (1906) 99 Minn. 204, 108 N.W. 945, 116 A.S.R. 394. "An examination of the Torrens laws of the different states and colonies discloses the fact that those of Minnesota and the Fiji Islands only contain no express exception in cases of fraud"—per Elliott, J., p. 207. But it appears that there are provisions even in the Fiji Islands for protecting the interests of the defrauded. See W. C. Niblack, *An Analysis of the Torrens System of Conveying Land*, (Chicago, 1912) p. 217, citing section 14 of the Fiji Act.

<sup>10</sup>"Assurance Fund—Investment—All money received by the registrar under the provisions of the preceding section shall immediately be paid by him to the country treasurer as an assurance fund . . . ."

"Damages Through Erroneous Registration—Action—Any person who, without negligence on his part, sustains any loss or damage by reason of any omission, mistake or misfeasance of the registrar or his deputy,

was declared constitutional by the unanimous opinion of the supreme court of Minnesota within a year after its passage,<sup>11</sup> and, with one exception, a similar conclusion has been reached by the courts of other states where Torrens Acts have been enacted.<sup>12</sup> Yet it was pointed out by the Minnesota court in rendering its opinion at that time that the statute could not operate to divest the rights of claimants in possession not personally served with notice of the registration proceedings,<sup>13</sup> and a few years later the same court held that as long as the title remained registered in the name of one guilty of fraud in procuring registration his decree and certificate might be set aside in an action brought by the defrauded party, the latter being only required to act within a "reasonable time."<sup>14</sup> Subsequent to this decision, the Minnesota statute was amended to provide for the impeachment of titles fraudulently registered.<sup>15</sup>

Lack of jurisdiction and fraud, therefore, are two possible defects that may prevent a Torrens certificate from being con-

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or of any examiner, or of any clerk of court, or of his deputy, in the performance of their respective duties under this law, and any person, who, without negligence on his part, is wrongfully deprived of any land or of any interest therein by the registration thereof, or by reason of the registration of any other person, as the owner of such land, or by reason of any mistake, omission or misdescription in any certificate of title, or in any entry or memorial, or by any cancellation, in the register of titles, and who, by the provisions of this law, is precluded from bringing an action for the recovery of such land, or of any interest therein, or from enforcing any claim or lien upon the same, may institute an action in the district court to recover compensation out of the assurance fund for such loss or damage." Minn., G.S., 1913, secs. 6942, 6943.

<sup>11</sup>State ex rel. Douglas v. Westfall, (1902) 85 Minn. 437, 89 N.W. 175, 57 L.R.A. 297, 89 A.S.R. 57, 54 Cent. L. Jour. 290.

<sup>12</sup>Robinson v. Kerrigan, (1907) 151 Cal. 40, 90 Pac. 129, 121 A.S.R. 90, 12 Ann. Cas. 829; White v. Ainsworth, (1917) 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918E 179; People ex rel. Deneen v. Simon, (1898) 176 Ill. 165, 52 N.E. 910, 44 L.R.A. 801, 68 A.S.R. 175; Tyler v. Judges of Registration, (1900) 175 Mass. 71, 55 N.E. 812, 51 L.R.A. 433, writ of error dismissed on jurisdictional grounds only, (1900) 179 U.S. 405, 21 S.C.R. 206, 45 L.Ed. 252; Drake v. Frazer, (1920) 105 Nebr. 162, 179 N.W. 393, 11 A.L.R. 766; Ashton-Jenkins Co. v. Bramel, (1920) 56 Utah 587, 192 Pac. 375, 11 A.L.R. 752. Contra: People ex rel. Kern v. Chase, (1895) 165 Ill. 527, 46 N.E. 454, 36 L.R.A. 105 (old act); State ex rel. Monnett v. Guilbert, (1897) 56 Oh. St. 575, 47 N.E. 551, 38 L.R.A. 519, 60 A.S.R. 756 (old act).

<sup>13</sup>State ex rel. Douglas v. Westfall, (1902) 85 Minn. 437, 445, 89 N.W. 175, 57 L.R.A. 297, 89 A.S.R. 57, 54 Cent. L. Jour. 290.

<sup>14</sup>Baart v. Martin, (1906) 99 Minn. 204, 108 N.W. 945, 116 A.S.R. 394.

<sup>15</sup>The last line of sec. 49, Minn. Laws, 1905, (Minn., G.S., 1913, sec. 6918) provides: "In all cases of registration which are procured by fraud, the owner may pursue all his legal and equitable remedies against the parties to such fraud, without prejudice, however, to the rights of any innocent holder for value of a certificate of title." Although found in a section dealing with the transfer of registered land, this presumably also applies to initial registration.

clusive. It is obvious, also, that the aura of indefeasibility which surrounds a Torrens certificate will constantly tempt the unscrupulous to employ the system for turning bad titles into good ones, and the presence of an examiner of titles,<sup>16</sup> whose business it is to prevent such occurrences, has not, and probably will not, in the future, entirely eliminate such a practice.<sup>17</sup> Sooner or later, by some hook or crook, a bad title will be registered, and the decree of registration will, in turn, be attacked by the rightful owner of the land.

It is possible, although improbable, (as the Minnesota court has pointed out<sup>18</sup>), that want of jurisdiction may exist alone, without the presence of fraud. The Minnesota statute contains the following provisions relative to jurisdiction for registration proceedings:

"The summons . . . shall be served in the manner now provided by law for the service of a summons in civil actions in the district court, except as herein otherwise provided. . . . It shall be served upon all persons who are not residents of the state, and upon all other persons or parties unknown claiming any right, title, estate or interest in the real estate described in the application herein by publishing the same in a newspaper printed and published in the county wherein the application is filed, once each week for three consecutive weeks.

"The clerk shall also, within twenty (20) days after the first publication of the summons, send a copy thereof by mail to all defendants who are not residents of the state and whose place of address is known to applicant. . . . Other or further notice of application for registration may be given in such manner, and to such persons as the court or any jury thereof may direct."<sup>19</sup>

It is to be observed that only *known, resident* claimants need be personally served, and that it has been held perfectly constitutional to obtain jurisdiction of *unknown resident* and *known or unknown non-resident* claimants by publication.<sup>20</sup> Consequently,

<sup>16</sup>Minn., G.S., 1913, sec. 6879. His duties are set forth in the subsequent section.

<sup>17</sup>"Unfortunately, the act has been advertised, and is being advertised by some attorneys seeking employment, as a means of making bad titles good, all of which has reflected upon this system of registering titles." Petition of Sherman, (1919) 106 Misc. 244, 246, 175 N.Y.S. 627.

<sup>18</sup>State ex rel. Douglas v. Westfall, (1902) 85 Minn. 437, 89 N.W. 175, 57 L.R.A. 297, 89 A.S.R. 57, 54 Cent. L. Jour. 290.

<sup>19</sup>Minn., G.S., 1913, sec. 6883.

<sup>20</sup>American Land Co. v. Zeiss, (1911) 219 U.S. 47, 31 S.C.R. 200, 55 L.Ed. 82; Mills v. Denver & R. G. Ry. Co., (1912) 198 Fed. 137; State ex rel. Douglas v. Westfall, (1902) 85 Minn. 437, 89 N.W. 175, 57 L.R.A.

if we exclude fraud from our consideration, there are few possible border line situations where want of jurisdiction may operate by itself to invalidate a decree; as, for example, where an unknown claimant in possession of the land to be registered is not served personally with notice. In such a case, the possessor's rights are not conclusively terminated by the decree.<sup>21</sup> An equally rare case would be where the certificate, through error, described more land than was sought to be registered. Such a certificate could hardly be conclusive.<sup>22</sup>

Where an initial decree of registration is concerned, the questions of fraud and want of jurisdiction are usually present together. For example, A wishes to register his title to Blackacre. He fears that B, a resident claimant, may have a superior title, and consequently by fraudulent means prevents B from being a party to the proceedings and no personal service of notice of them is made upon him. A obtains a certificate of title. In such a situation the law is clear that B may attack A's title and have it vacated, if he acts within a reasonable time;<sup>23</sup> he may even attack it collaterally, if the want of jurisdiction appears affirmatively upon the face of the records in the office of the registrar of titles.<sup>24</sup> Inasmuch as want of jurisdiction is in itself a fatal defect to the validity of registration proceedings, it is unnecessary

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297, 89 A.S.R. 57, 54 Cent. L. Jour. 290; *Hunt v. Hay*, (1915) 214 N.Y. 578, 108 N.E. 851. See also cases cited in note 12, *supra*, all dealing with this question.

<sup>21</sup>*State ex rel. Douglas v. Westfall*, (1902) 85 Minn. 437, 89 N.W. 175, 57 L.R.A. 297, 89 A.S.R. 57, 54 Cent. L. Jour. 290 (semble). *Contra*: *Alba v. de la Cruz*, (1910) 17 Philippine 49.

<sup>22</sup>*Petition of Furness et al.*, (Cal. App. 1923) 218 Pac. 61; *Marsden v. McAlister*, (1887) 8 N.S.W.L. Rep. 300; *Hay v. Solling*, (1894) 16 N.S.W.L. Rep. 60; *Hogg, Australian Torrens System* 828.

<sup>23</sup>*Follette v. Pacific Light & Power Corp.*, (1922) 189 Cal. 193, 208 Pac. 295, 23 A.L.R. 965; *Rock Run Iron Co. v. Miller*, (Ga. 1923) 118 S.E. 670; *Dewey v. Kimball et al.*, (1903) 89 Minn. 454, 95 N.W. 317, 895, 96 N.W. 704; *Baart v. Martin*, (1906) 99 Minn. 204, 108 N.W. 945, 116 A.S.R. 394; *Riley v. Pearson*, (1913) 120 Minn. 210, 139 N.W. 361, L.R.A. 1916D 7; *Arnold v. Smith*, (1913) 121 Minn. 116, 140 N.W. 748; *Henry v. White*, (1913) 123 Minn. 182, 143 N.W. 324, L.R.A. 1916D 4 (semble); *Hawes v. Clark*, (1913) 159 App. Div. 65, 144 N.Y.S. 11; *Kirk v. Mullen*, (1921) 100 Ore. 563, 197 Pac. 300.

<sup>24</sup>*Petition of Furness et al.*, (Cal. App., 1923) 218 Pac. 61; *Riley v. Pearson*, (1913) 120 Minn. 210, 139 N.W. 361, L.R.A. 1916D 7; *Arnold v. Smith*, (1913) 121 Minn. 116, 140 N.W. 748 (semble); *Henry v. White*, (1913) 123 Minn. 182, 143 N.W. 324, L.R.A. 1916D 4 (semble).

Conversely, there can be no collateral attack unless the error or want of jurisdiction appears affirmatively on the face of the record. *State ex rel. Coburn v. Ries*, (1913) 123 Minn. 397, 143 N.W. 981, L.R.A. 1916D 1; *Jones v. Wellcome*, (1916) 141 Minn. 352, 170 N.W. 224. See also *Mooney v. Valentynovicz*, (1912) 255 Ill. 118, 99 N.E. 344.

at this time to entertain the question of what acts constitute fraud.

The third, and most involved situation is where no question of want of jurisdiction is involved, but fraud is present. For example, A wishes to register his title to Blackacre. B also has an interest in the premises, but A persuades him not to appear in the proceedings, although he has been served with notice of them, and promises to see to it that B's interest, let us say that of a partner, appears on the certificate of registration. A then obtains a decree and certificate naming him (A) as the owner in fee without mention of B. This is obvious fraud, and A cannot rely on his certificate of title as indefeasible as against B.<sup>25</sup> Registration is no defense, likewise, where land has been transferred in fraud of creditors.<sup>26</sup> But, on the other hand, if there is jurisdiction of B, and B loses his rights in the land because of mistake or negligence on his own part, and not because of any influence A has brought to bear, A's title is indefeasible.<sup>27</sup>

It is necessary at this point to define what is meant by the term "fraud." We have seen that jurisdiction for the purpose of registration proceedings can constitutionally be obtained as to unknown residents or known non-residents by publication. Suppose A, who wishes to register his title, has no actual notice of B, who is a resident and claims an interest in the land, but could have been aware of his existence by the exercise of reasonable diligence, or was with notice of facts that should have put him on inquiry that would have disclosed B's interest. Or assume a much commoner situation: that A is aware of B and his interest and is also aware that B is residing in another jurisdiction at an

<sup>25</sup>Hamel v. Feigh, (1919) 143 Minn. 115, 173 N.W. 570; Henry v. White, (1913) 123 Minn. 182, 143 N.W. 324, L.R.A. 1916D 4 (semble); Lake Yew v. Port Swettenham Rubber Co., (1913) A.C. 491, 82 L.J.P.C. 89. A purchaser for value, relying on the certificate, of course, gets a good title. See White v. Ainsworth, (1917) 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918E 179.

<sup>26</sup>Morris v. Small, (1908) 160 Fed. 142; Cunningham v. Bright, (1919) 228 Mass. 385, 117 N.E. 909. Contra: Pick & Co. v. Natalby, (1918) 211 Ill. App. 486.

<sup>27</sup>Cooper et al. v. Buxton, (1921) 186 Cal. 330, 199 Pac. 6; Mooney v. Valentynovicz, (1912) 255 Ill. 118, 99 N.E. 344; Mooney v. Valentynovicz, (1914) 262 Ill. 355, 104 N.E. 645; Rasch v. Rasch, (1917) 278 Ill. 261, 115 N.E. 871; Studley v. Kip et al., (Mass. 1923) 139 N.E. 485; Doyle v. Wagner, (1909) 108 Minn. 443, 122 N.W. 316; State ex rel. Coburn v. Ries, (1913) 123 Minn. 397, 143 N.W. 981, L.R.A. 1916D 1; Murphy v. Borgen, (1921) 148 Minn. 375, 182 N.W. 449.

Fraud of third persons in which the registered owner did not participate and of which he had no knowledge, is not sufficient to avoid a register. Coleman v. Riria Puwhanga, (1886) 4 N.Z.S.C. 230.

unknown address and who, it is safe to assume, will never read the notice published in some local newspaper of limited circulation that would inform him that the land is being registered. Is A tainted with fraud in case he registers the land to the exclusion of B under either of the above sets of circumstances? It is apparent that if a duty of diligent inquiry is to be imposed upon the applicant for registration, and if notice by itself, actual or constructive, of outstanding claims can taint him with fraud, decrees of registration will be subject to constant danger of attack and will be no more conclusive than judgments in actions to quiet title. Needless to say, such a result would clearly be at cross purposes with the obvious intent of the Torrens System to have the decree of registration as conclusive as possible, and this intent should have strong weight with the courts. The Privy Council has settled this question, as far as the British colonies are concerned, in what would appear to be a most logical way, holding that the fraud necessary to permit impeachment of a registered title must be actual fraud; that is, conduct amounting to actual dishonesty in obtaining registration; not what is called constructive or equitable fraud. It must be "brought home" to the party whose title it is sought to impeach.<sup>28</sup> An abstract definition of this sort has not as yet been given by any American court,<sup>29</sup> as lack of jurisdiction is generally coupled with fraud in American cases, and the decision turns upon this.

Questions of fraud arise most frequently in connection with land already registered. For example, A is the registered owner of land. He mortgaged it to B, but neglects to entrust B with his duplicate certificate of title and B is unable to obtain a memorial of the mortgage on A's certificate filed with the registrar of titles.<sup>30</sup> But until this memorial is entered, the mortgage

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<sup>28</sup>*Assets Co. v. Mere Roihi*, [1905] A.C. 176, 74 L.J.P.C. 49. "But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him"—per Lord Lindley, p. 210.

<sup>29</sup>In *Dewey v. Kimball et al.*, (1903) 89 Minn. 454, 95 N.W. 317, 895, 96 N.W. 704, the court implied, *obiter dicta*, that the applicant for registration is bound to follow upon notice sufficient to put on inquiry and investigation. The supreme court of California has implied to the contrary. See *Hoffman v. Superior Court, etc.*, (1907) 151 Cal. 386, 90 Pac. 939.

<sup>30</sup>"No new certificate of title shall be entered or issued, and no memorial shall be made upon any certificate of title in pursuance of any deed, or other voluntary instrument, unless the owner's duplicate is presented therewith, except in cases provided for in this law or upon the order of the court. . . ." Minn., G.S., 1913, sec. 6918.

operates only as a contract between the parties and does not in any way affect the land.<sup>31</sup> A now deeds the land to C, who pays full value for it, but knows of B's mortgage. C nevertheless obtains A's duplicate certificate of title and with the aid of it procures a new certificate in his own name as owner in fee. Under the old recording acts, of course, inasmuch as C is not a bona fide purchaser, he would hold the title subject to B's mortgage.<sup>32</sup> The Torrens acts, however, usually provide that unless a certificate is obtained by fraud, it is conclusive of the holder's rights, and it has been generally held that obtaining title with mere knowledge of the existence of an unregistered interest is not fraud, although conduct amounting to dishonesty in obtaining a deed and registering it for the express purpose of shutting out unregistered interest may be. This is the situation in several of the British colonies, where "fraud" is not defined in the statute itself.<sup>33</sup> Most of the Torrens acts, particularly in this country, expressly declare that actual or constructive notice of any unregistered interest shall not "of itself" be imputed as fraud,<sup>34</sup> and where such a statute is in force, a certificate of registration obtained with knowledge of interests not apparent on the face of the certificate of the vendor cannot be questioned on that score alone.<sup>35</sup> Of course, registering so as to exclude such in-

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<sup>31</sup> . . . No voluntary instrument of conveyance purporting to convey or affect registered land, except a will, and a lease for a term not exceeding three years, shall take effect as a conveyance, or bind or affect the land, but shall operate only as a contract between the parties, and as authority to the registrar to make registration. The act of registration shall be the operative act to convey or affect the land." Minn., G.S., 1913, sec. 6914.

<sup>32</sup> Every conveyance of real estate shall be recorded in the office of the register of deeds of the county where such real estate is situated; and every conveyance not so recorded shall be void, as against any subsequent purchaser *in good faith and for a valuable consideration* of the same real estate or any part thereof whose conveyance is first duly recorded. Minn., G.S., 1913, sec. 6844 (recording act).

<sup>33</sup> *Assets Co. v. Mere Roihi*, [1905] A.C. 176, 74 L.J.P.C. 49; Hogg, *Registration of Title to Land throughout the Empire*, 120-124; Niblack, *An Analysis of the Torrens System of Conveying Land*, 226.

<sup>34</sup> For example, the Illinois statute provides (R.S. 1921, ch. 30, sec. 84): par. 42. "Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner shall be held to inquire into the circumstances under which or the consideration for which such owner or any previously registered owner was registered, or be affected with notice, actual or constructive of any unregistered trust, lien, claim, demand, or interest; and the knowledge that an unregistered trust, lien, claim, demand or interest is in existence shall not of itself be imputed as fraud."

<sup>35</sup> *Bjornberg v. Meyers et al.*, (1918) 212 Ill. App. 257. See also *Brace v. Superior Land Co. et al.*, (1911) 65 Wash. 681, 118 Pac. 910; *Gauder v. Dassenaike et al.*, [1897] A.C. 547, 66 L.J.P.C. 103, 77 L.T. 321.

terests may, under certain circumstances, amount to fraud, as where there is collusion with the vendor.<sup>36</sup> In other words, unregistered interests in registered land are void not only as against subsequent registering bona fide purchasers of the land, as is the case under the recording acts, but also as against subsequent registering purchasers not guilty of downright intentional dishonesty. This result, although it may seem harsh, is quite in accord with the Torrens idea: to have the certificate so conclusive of the title to land that purchasers need only scan its face to see what they are getting.

Some of the Torrens title acts, however, in providing for the transfer of registered land, make the title of the transferee, once registered, indefeasible only in case the transferee is a bona fide purchaser, and not if he is merely free from fraud. Strangely enough, the Minnesota act, which attempted to make the initial decree of registration so conclusive, is of this group.<sup>37</sup> Needless to say, this is hardly in accord with the Torrens idea of making the certificate conclusive as against the world, and, it is submitted, amounts to a reversion to the theory of the recording acts. It requires the would-be purchaser to look beyond the owner's certificate, which was the very thing the Torrens System was devised to make unnecessary. In Minnesota, it would seem, a purchaser from a registered owner would not be protected if he had notice, actual or constructive, at the time he made his purchase that an unregistered interest was outstanding. He is not permitted to shut his eyes and rely on the vendor's certificate alone. From analogy to decisions under the recording acts, it would seem to follow that notice of prior unregistered interests obtained after completion of the purchase, but before registering, would prevent the purchaser from being bona fide, since under the Torrens statute he does not obtain any title at all until he registers.<sup>38</sup>

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<sup>36</sup>Turner v. Clark, (1909) 2 Sask. L. R. 200.

<sup>37</sup>"Every person receiving a certificate of title pursuant to a decree of registration, and every subsequent purchaser of registered land who receives a certificate of title *in good faith and for a valuable consideration*, shall hold the same free from all incumbrances and adverse claims. . . ." Minn., G.S., 1913, sec. 6892.

" . . . Whenever any voluntary instrument is presented for registration, the production of the owner's duplicate certificate shall authorize the registrar to enter a new certificate, or to make a memorial of registration in accordance with such instrument, and the new certificate or memorial shall be binding upon the registered owner, and upon all persons claiming under him *in favor of every purchaser for value and in good faith*. . . ." Minn., G.S., 1913, sec. 6918.

But even in jurisdictions where the Minnesota statute is not followed the purchaser of registered land is not permitted to rely conclusively on the owner's certificate under all circumstances. Where this certificate has been procured by fraud, all of the Torrens acts apparently require the presence of a *bona fide purchaser* to remove the stigma. For example: A procures registration of Blackacre, defrauding B. A then deeds to C, who obtains a new certificate in his own name. In order that C's title be indefeasible, C must not merely be a purchaser free from fraud, but bona fide as well.<sup>39</sup> C must have no notice of B, actual or constructive; he cannot shut his eyes and rely on A's certificate. This is probably a bit out of line with the Torrens ideal, but likewise probably necessary. A recent California case, *Follette v. Pacific Light and Power Corporation*<sup>40</sup> presented the following situation: B purchased an easement over A's land and erected a power transmission line on it. A obtained registration of his land as owner in fee without mention of the easement, and fraudulently prevented notice of the registration proceedings from being served on B. A then sold the land to C, who had no notice of B, and relied on A's certificate. It was held that B's easement was still valid, even as against C. The California statute provided that:

"In case of fraud, any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act; provided, that nothing contained in this section shall affect the title of a registered owner *who has taken bona fide for a valuable consideration*, or of any person claiming through or under him . . .<sup>41</sup>

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<sup>39</sup>The rule in Minnesota under the recording act is that notice, obtained before the purchase is complete, prevents the purchaser from being bona fide. *Minor v. Willoughby et al.*, (1859) 3 Minn. 225, (154); *Marsh v. Armstrong*, (1873) 20 Minn. 81, (66). Inasmuch as recording the deed acts merely as notice to future purchasers, notice obtained between completion of the purchase and recording has no effect whatsoever. *Long v. Wright*, (1921) 70 Colo. 173, 197 Pac. 1916. But under the Torrens statute the purchase is not complete until the deed is registered, even though the money has all been paid and the deed taken. Minn., G.S., 1913, sec. 6914, note 31, supra. Accordingly, it would seem to follow that notice acquired prior to registering prevents the purchaser from being bona fide.

<sup>40</sup>The Illinois act provides as follows, (Ill., R.S. 1921, ch. 30, sec. 84), par. 40: "The registered owner of any estate or interest in land brought under this act shall, except in cases of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject to the charges hereinbefore set forth and also only to such estates, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office, and free of all others."

<sup>40</sup>(1922) 189 Cal. 193, 208 Pac. 295, 23 A.L.R. 965.

<sup>41</sup>Henning's Cal. Gen. Laws, 1920, Act 5194, sec. 37.

" . . . No unregistered estate, interest, power, right, claim contract or trust shall prevail against the title of a registered owner *taking bona fide for a valuable consideration*, or of any person claiming through or under him."<sup>42</sup>

There was also the usual provision as to the conclusive nature of a certificate of title.<sup>43</sup> Inasmuch as B was in possession of the land at the time of A's sale to C, C was held not to be a bona fide purchaser; adverse possession being, of course, always constructive notice.<sup>44</sup>

Another type of constructive notice that might be invoked to upset the title of purchasers of registered land has been suggested in several Minnesota cases; that where an examination of the proceedings to register the land in question would disclose error or want of jurisdiction, the purchaser is not bona fide, at least where the error or want of jurisdiction appears affirmatively.<sup>45</sup>

Likewise, if by chance the memorial of an encumbrance on registered land is entered on the certificate of title on file with the Registrar of Titles, but not entered on the duplicate certificate of the owner thereof, a subsequent purchaser is charged with notice of this encumbrance, although he may have no actual notice of it.<sup>46</sup> It is worth noting here that conveyances of, and all instruments affecting the title to registered land that have been filed with the Registrar are indexed and retained by him.<sup>47</sup> Is the purchaser of registered land affected with constructive notice of the possible invalidity or legal effect of these instruments? Assume, for example, that A is the owner of registered land. A deed is drawn up in which B is named as grantee, but which is incorrectly acknowledged, or signed, or improperly witnessed. Nevertheless, on the strength of this instrument, a new certificate of title is issued in B's name. C now wishes to buy the land. Is C charged with constructive notice of the defect in the A to B deed on file with the registrar? The statute permits him to rely

<sup>42</sup>Henning's Cal. Gen. Laws, 1920, Act 5194, sec. 39.

<sup>43</sup>See Henning's Cal. Gen. Laws, 1920, Act 5194, secs. 16, 34.

<sup>44</sup>For a recent example of the limits to which this doctrine is sometimes carried, see the recent case of *Hauger v. J. P. Rodgers Land Co., et al.*, (Minn. 1923) 194 N.W. 95.

<sup>45</sup>Dicta to this effect are found in the following cases: *Riley v. Pearson*, (1913) 120 Minn. 210, 139 N.W. 361, L.R.A. 1916D 7; *Henry v. White*, (1913) 123 Minn. 182, 143 N.W. 324, L.R.A. 1916D 4; *Jones v. Wellcome*, (1919) 141 Minn. 352, 170 N.W. 224.

<sup>46</sup>*Christenson v. Christenson*, (Ore. 1923) 219 Pac. 615; *Niblack, Torrens System*, sec. 63. See also, Minn., G.S., 1913, sec. 6915.

<sup>47</sup>Minn., G.S., 1913, sec. 6905.

conclusively on the certificate only if he acts in good faith,<sup>48</sup> and the invalid deed is certainly open to his inspection.<sup>49</sup> So far, a question of this sort has never been raised in the courts. If it should be held that the purchaser is affected with notice of instruments on file with the registrar, a long step back to the old "chain of title" system will have been taken. Arguments to the contrary would be based on the conclusive effect given the issuance of a new certificate by the registrar. But the registrar is not a judicial officer, and it is hard to see how an act done in the course of his ministerial duties could validate an imperfect deed, or give a deed a legal effect which it did not actually have.<sup>50</sup>

The California court, in *Follette v. Pacific Light and Power Corporation*,<sup>51</sup> did not rest its conclusions solely on bona fides, however. No jurisdiction had been obtained of the party defrauded in the registration proceedings in that case, which raised the question of the protection given property interests by the "due process" clauses of federal and state constitutions. Can the Torrens system constitutionally sweep away a property interest without ever having obtained jurisdiction of the owner, even where it purports to vest the title in a purchaser for value without notice? The California court answered this as follows:

"The provisions of the land title law which purport to entitle the purchaser of a registered title to the premises in the actual possession and occupancy of another to hold the same superior to the prior rights and interests of such possessor, notwithstanding that such registered title is subject to the infirmities shown to exist in the instant case, are obnoxious to the provision of the federal constitution, which provides that persons shall not be deprived of their property without due process of law."<sup>52</sup>

The supreme court of Minnesota tends toward a similar conclusion:

"It may be correct, though we do not so decide, that a decree that is void and subject to collateral attack would not be invali-

<sup>48</sup>Minn., G.S., 1913, sec. 6892.

<sup>49</sup>See Minn., G.S., 1913, sec. 6905.

<sup>50</sup>The fact that the registrar of titles is given the incidental power to pass on the validity of instruments affecting registered land filed with him for registration has been generally held not to be such a delegation of the judicial power as to render Torrens statutes unconstitutional. *Robinson v. Kerrigan*, (1907) 151 Cal. 40, 90 Pac. 129, 121 A.S.R. 90, 12 Ann. Cas. 829; *People ex rel. Deneen v. Simon*, (1898) 176 Ill. 165, 52 N.E. 910, 44 L.R.A. 801, 68 A.S.R. 175; *Drake v. Frazer*, (1920) 105 Neb. 162, 179 N.W. 393, 11 A.L.R. 766; *Contra: State ex rel. Monnett v. Guilbert*, (1897) 56 Oh. St. 575, 47 N.E. 551, 38 L.R.A. 519, 60 A.S.R. 756.

<sup>51</sup>(1922) 189 Cal. 193, 208 Pac. 295, 23 A.L.R. 965.

<sup>52</sup>*Follette v. Pacific Light and Power Corp.*, (1922) 189 Cal. 193, 208 Pac. 295, 23 A.L.R. 965.

dated by a transfer of title to a purchaser, though he paid a valuable consideration and had no actual knowledge of the facts which made the decree void."<sup>53</sup>

If this proposition is sound, as it appears to be, then the rights of those of whom no jurisdiction has been obtained are not terminated no matter who it is that holds the certificate of title to the land in question, or how much of a "bona fide purchaser" he may have been. Likewise, if the original certificate described, through error, not only the land sought to be registered but also land belonging to one over whom no jurisdiction had been obtained, it is probable that a future purchaser for value without notice relying on it would not be entitled to keep all that he thought he was getting. In the absence of constitutional protection, the opposite result seems to have been reached in the British colonies.<sup>54</sup>

Although at common law a forged deed was an absolute nullity, and the transferee had no power to convey a good title to a bona fide purchaser,<sup>55</sup> under the Torrens system the forged deed, if registered, may become the root of a good title in the bona fide

<sup>53</sup>Henry v. White, (1913) 123 Minn. 182, 185, 143 N.W. 324, L.R.A. 1916D 4. Although the meaning of this statement is obvious, it is submitted that the language used is a bit confusing. One cannot be a bona fide purchaser if he has notice of defects in the title, yet decrees are only subject to collateral attack if the want of jurisdiction appears affirmatively on the face of the registration proceedings.

The courts of Illinois and New York have made similar implications: "Objection is also made that by section 26 any person who has any interest in the land, whether personally served, notified by publication, or not served at all, must, within two years after the entry of the decree, appear and file an answer, and that after the expiration of that term of two years the decree shall (with certain exceptions) be 'forever binding and conclusive upon all persons.' This provision seems to attempt to make a decree binding upon persons not parties to the suit, and if given effect literally, would deprive persons of vested rights without due process of law. A limitation may be placed upon the time within which a person who has a mere right of action shall bring it, but limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims. (Cooley, Const. Lims., p. 366). To the extent that the act attempts to transfer property without due process of law, it cannot be upheld."—People ex rel. Deneen v. Simon, (1898) 176 Ill. 165, 177-178, 52 N.E. 910, 44 L.R.A. 801, 68 A.S.R. 175.

"A judgment of a court having jurisdiction of the subject matter is of course binding and conclusive upon all persons of whom the court obtains jurisdiction. It is not binding and controlling upon others. . . ." Partenfelder et al. v. People of the State of New York, et al., (1914) 211 N.Y. 355, 357-358, 105 N.E. 675.

See also, American Land Co. v. Zeiss, (1911) 219 U.S. 47, 31 S.C.R. 200, 55 L.Ed. 82. White v. Ainsworth, (1917) 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918E 179 seems to take the opposite view, however.

<sup>54</sup>Hay v. Solling, (1894) 16 N.S.W. L.Rep. 60, (semble); Hogg, Australian Torrens System 828.

<sup>55</sup>Cole v. Long, (1872) 44 Ga. 579; Sapp v. Cline, (1908) 131 Ga. 433, 62 S.E. 529; D'Wolf v. Haydn, (1860) 24 Ill. 525; Andre v. Hoffman, (1918) 81 W.Va. 620, 95 S.E. 84.

purchaser.<sup>56</sup> B entrusts A with his duplicate certificate; A forges a deed to himself, has himself registered as the owner and mortgages or sells to C, a purchaser for value, who registers his interest in good faith. C's rights are superior to B's.<sup>57</sup> If, on the other hand, the forged deed runs to a fictitious person, in whom title is registered, and C relies on such a certificate, the wrongdoer representing himself as the agent of the fictitious party, C is not protected.<sup>58</sup> The opposite result might well be reached in this country, in view of the provisions in most of the Torrens acts making the owner's duplicate certificate conclusive evidence of title.<sup>59</sup> A would have to procure this to enable C to register, and if it once got into his hands C would probably be protected, at least if B was negligent in letting it slip out of his own possession.

One more situation—where land is registered and it is later discovered that an earlier certificate of registration is in existence. Incredible as it may appear, this situation has nevertheless arisen several times in various British colonies. The courts

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<sup>56</sup>"A forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title." *Gibbs v. Messer*, [1891] A.C. 248, 257, 60 L.J.P.C. 20, 64 L.T. 237. It was through fear of this that the landlords of England refused to register their lands under the original English Torrens Act. Even Sir Robert Richard Torrens, who devised the system bearing his name, is said to have been of this class. The English Act was later amended to provide that a forged deed could not be the basis of a good title even though registered. See Niblack, *The Torrens System, its Cost and Complexity*, 16, 19. The danger is, of course, much diminished under a constitutional form of government where property rights are jealously protected. However, at least one of the states where Torrens statutes have been enacted contains a provision that a forged deed can never become the basis of a good title through registration. See *Virginia, Laws, 1916*, ch. 62, sec. 74.

<sup>57</sup>*Gibbs v. Messer*, [1891] A.C. 248, 60 L.J.P.C. 20, 64 L.T. 237, (semble); *M'Vity v. Tranouth*, [1908] A.C. 60, 77 L.J.P.C. 37, 97 L.T. 853, 24 T.L.R. 165; *Brown v. Broughton*, (1915) 25 Man. Rep. 489. The dictum to the contrary in *Baart v. Martin*, (1906) 99 Minn. 204, 206, 108 N. W. 945, 116 A.S.R. 394, is obviously based upon a misreading of *Gibbs v. Messer*, supra. The rightful owner has even been denied reimbursement from the "assurance fund." *Fawkes v. Attorney General*, (1903) 6 Ont. L. R. 490.

The purchaser, however, must be bona fide; he cannot rely conclusively on the wrongdoer's certificate. *Robinson v. Ford*, (1914) 7 Sask. L. Rep. 443, 31 West. Rep. 13.

<sup>58</sup>*Gibbs v. Messer*, [1891] A.C. 248, 60 L.J.P.C. 20, 64 L.T. 237. The reason for this distinction is explained by the court in *Assets Co. v. Mere Roihi*, [1905] A.C. 176, 204 74 L.J.P.C. 49 to rest on the fact that where the forged deed runs to a fictitious person, there has been no transfer away from the original owner and no transfer upon which the subsequent registration could operate.

<sup>59</sup>See *Minn., G.S., 1913*, sec. 6903.

have held that the earlier certificate took precedence over the later.<sup>60</sup>

Discussion of the conclusiveness of a Torrens certificate would be incomplete without mention of certain interests in the land which may not appear upon the face of the certificate, in addition to the possibilities of fraud or want of jurisdiction considered above. Most of these are mentioned in the statute itself.<sup>61</sup>

*Mechanic's Liens.* The Minnesota statute provides that all liens, trusts, mortgages, and the like shall be filed with the Registrar of Titles to be binding upon registered land.<sup>62</sup> But inasmuch as mechanic's liens may be filed within ninety days after the completion of work or the furnishing of the last item of the account,<sup>63</sup> it is quite possible for such a lien to be outstanding and not shown upon the certificate of title. A purchaser during this time could not rely conclusively upon the face of the certificate and would probably take subject to the lien.<sup>64</sup> But recording the lien with the register of deeds is not notice to him.<sup>65</sup>

*Taxes and Assessments.* Needless to say, unpaid taxes and assessments do not appear on the face of the certificate. Moreover, they survive registration. The state is not bound by a decree which omits to mention them.<sup>66</sup>

*Rights in Public Highways.* These also survive registration.<sup>67</sup>

<sup>60</sup>Oelkers v. Merry, (1872) 2 Q.S.C.R. 193; Miller v. Davy, (1889) 7 N.Z.L.R. 515. The earlier prevails as far as it goes, even if it only partly comprises the land comprised in the later certificates. Stevens v. Williams, (1886) 12 Vict. L. R. 152. For a discussion of the subject, see Hogg, Australian Torrens System 823; Niblack, An Analysis of the Torrens System of Conveying Land, sec. 153, p. 237.

<sup>61</sup>See Minn., G.S., 1913, sec. 6892.

<sup>62</sup>Minn., G.S., 1913, sec. 6914.

<sup>63</sup>Minn., G.S., 1913, sec. 7026.

<sup>64</sup>Hacken v. Isenberg, (1918) 210 Ill. App. 120 (semble).

<sup>65</sup>Application of Bickel, (1922) 301 Ill. 484, 134 N.E. 76; Hacken v. Isenberg, (1918) 210 Ill. App. 120; McMullen & Co. v. Croft, (1917) 96 Wash. 275, 164 Pac. 930. But compare, Chicago and Riverdale Lumber Co. v. Vellanga, (1922) 305 Ill. 415, 137 N.E. 212, (where registration of owner's deed not made at time lien filed).

<sup>66</sup>Minn., G.S., 1913, sec. 6892 (2); National Bond & Security Co. v. Daskam, (1903) 91 Minn. 81, 97 N.W. 458. See also, Canada Permanent Mortgage Corp. v. Martin, et al., (1909) 2 Sask.L.R. 472; Sutherland v. Spruce Grove, (1918) 14 Alta.L.R. 284, 1 W.W.R. 274. The state cannot be made a party to Torrens proceedings without its consent. National Bond & Security Co. v. Daskam, (1903) 91 Minn. 81, 97 N.W. 458. The Registrar cannot voluntarily enter memorials of taxes and assessments due on the certificate, and memorials so entered may be expurged. Curtis v. Haas, (1921) 298 Ill. 485, 131 N.E. 701.

<sup>67</sup>Minn., G.S., 1913, sec. 6892 (4).

*Leases.* Leases of three years duration or less, where there is actual occupancy, need not be registered, and consequently survive registration.<sup>68</sup>

*Rights of the United States.* A decree of registration does not bind the United States.<sup>69</sup> Its rights survive and inure to its vendees.<sup>70</sup>

*Right of Appeal.* A decree of registration cannot be conclusive, of course, pending appeal or as long as the right to appeal from it is still open.<sup>71</sup>

*Adverse Possession.* The Minnesota statute provides:

"No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession."<sup>72</sup>

In the absence of such a provision, there is a split of authority as to whether title to land already registered can be acquired by adverse possession.<sup>73</sup> The Nebraska act now expressly provides that ten years adverse possession will deprive a registered owner of his title.<sup>74</sup>

In conclusion, it is apparent that a Torrens certificate is not as conclusive as an examination of the statute under which it is created would lead one to believe. It is regrettable, perhaps, but probably unavoidable under a constitutional form of government where property rights are carefully guarded. To sum up: There are certain interests which the Torrens statutes themselves provide shall survive registration, such as rights of the United States. Where there has been fraud or forgery, the registration is not conclusive until the title gets into the hands of a bona fide purchaser for value. Where there has been lack of jurisdiction of necessary parties in the proceedings incident to a decree of registration, it is an open question whether the rights of such parties do not survive even as against a bona fide purchaser; they

<sup>68</sup>Minn., G.S., 1913, sec. 6892 (3).

<sup>69</sup>Minn., G.S., 1913, sec. 6892 (1).

<sup>70</sup>Shevlin-Mathieu Lumber Co. v. Fogarty, (1915) 130 Minn. 456, 153 N.W. 871.

<sup>71</sup>Minn., G.S., 1913, sec. 6892 (5); Dewey v. Kimball et al., (1903) 89 Minn. 454, 95 N.W. 317, 895, 96 N.W. 704.

<sup>72</sup>Minn., G.S., 1913, sec. 6869.

<sup>73</sup>Title to registered land can be acquired by adverse possession, Belize Estate and Produce Co. v. Quilter, [1897] A.C. 367, 66 L.J.P.C. 53, 76 L.T.R. 361; Harris v. Keith, (1911) 3 Alta. L. R. 222; Wallace v. Potter, (1913) 6 Alta. L. R. 83, 10 D.L.R. 544. See also, Hogg, Registration of Title to Land throughout the Empire 84-90.

<sup>74</sup>Nebr., C.S. 1922, sec. 5735.

certainly do as against anyone else. Lastly, where land has been validly registered, a purchaser of it takes free and clear, in the absence of actual fraud, of all unregistered interests, except probably in Minnesota and a few other jurisdictions, where he must be a purchaser free from notice and not merely free from actual dishonesty.