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Registered Lands Revisited

By James C. Maher

EVER SINCE the adoption of the original Registration of Land Titles Act by the legislature of Ohio in 1896, the merits of the so-called Torrens System of land registration have been the subject of controversy. Both the sponsors and the opponents of the system present persuasive arguments for their position. Unfortunately much of the dislike of the system is the result of unfamiliarity with it.

It is not the purpose of this article to engage in the controversy, but to familiarize the Bar with and refresh the recollection of the practicing attorney about the operation of the system. Whether one likes the system or not, it is here to stay, and the practicing attorney in the future is going to be called upon more and more to handle matters involving registered lands.

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The system is named after Sir Robert Torrens who, although he does not appear to have been the first to think of it, formulated a workable system and contributed to its adoption in a large part of the English speaking world. Torrens was familiar with the Australian practice regarding the transfer of ships which were called upon to visit various ports where they could be exposed to the assertion of liens. To make ships marketable, a system of certifying had evolved and had been very successful. He saw no reason why land, with its absence of mobility, should not be as readily marketable as ships, and he believed that the adoption of a practice comparable to that prevalent in the shipping industry would be of great benefit.

The proponents of the Torrens system claim that registration of lands is greatly to be desired.[1] They point out that it substitutes an official adjudication of title by a court in place of an unofficial examination, and that it provides for insurance against loss. It also avoids the necessity of repeated examinations of the same title, and obviates the necessity of going back to the original registration, since each certificate is conclusive. As the original Certificate of Title is always available at an office of a public official, the clarity of title can be more quickly determined. Finally,

[1] 8 THOMPSON, REAL PROPERTY § 4415 (2d ed. 1939).

the conveyance of registered lands is considerably less expensive to all parties to the transaction.

The first Torrens Act in Ohio was declared unconstitutional[2] for a number of reasons, but primarily because the county recorder was given judicial powers. The proponents continued to urge the adoption of a system of registration of land titles, however, and in 1912 the Ohio Constitution was amended to permit the passage of laws providing for such a system, specifically conferring judicial powers upon county recorders in matters arising under the operation of any such system.[3]

The Registration of Land Titles Act, which was formerly Ohio General Code section 8572-1 *et seq.*, and is now Chapters 5309 and 5310 of the Ohio Revised Code, was thereupon adopted by the legislature.

The advantages of registration were readily apparent to many land subdividers during the land boom of the 1920's, and substantial parcels of acreage were registered, then allotted and sold to individual investors. Registration made transfers more simple and less expensive, and the guaranty by the State Assurance Fund undoubtedly contributed to acceptance by the purchaser. Many of these allotments were in fast growing suburban communities and to encourage their development, improvements were installed and special assessments levied to recover the cost of the improvements. The depression years which followed caused many of the purchasers to default in the payment of their obligations and large delinquencies resulted, especially in those allotments created near the close of the land boom period.

In 1937 the Ohio Supreme Court decided the case of *Curry v. Lybarger*,[4] holding that special assessments arising out of the making of improvements were not collectible against registered lands if the notice required under the then existing General Code section 8572-56 had not been filed. For some reason the requirements of this section had been almost completely ignored, and a deluge of injunction cases then followed, in which the courts restrained the collection of special assessments and ordered their removal from the tax duplicate. Released from these heavy burdens, registered lands became widely used for residential construction, and although the doctrine of the *Curry* case was later limited,[5] their use

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[2] State *ex rel.* Monnett v. Guilbert, 56 Ohio St. 575, 47 N.E. 551 (1897).

[3] OHIO CONST. art. II, § 40.

[4] 133 Ohio St. 55, 11 N.E.2d 873 (1937).

[5] Gunderson v. South Euclid, 157 Ohio St. 437, 105 N.E.2d 863 (1952) (a purchaser at a tax sale knowing of the existence of the improvement is not estopped from contesting the validity of the assessment); Groene v. Boyle, 141 Ohio St. 553, 49 N.E.2d 564 (1943) (an owner who does not petition for the improvement but knows of its installation is not estopped); Shaker Corlett Land Co. v. Cleveland, 139 Ohio St. 536, 41 N.E.2d 243 (1942) (a grantee of one who signed a petition

to a large extent spearheaded the reviving building activity of the late 1930's and early 1940's.

Ohio General Code section 8572-56 was repealed in 1937, and special assessments are no longer required to be memorialized on certificates to be enforceable liens. For that reason the rule in the *Curry* case presently has only academic interest, and the practical value of the rule has diminished because many of the properties affected by the unenforceable liens are already improved, and because tax sales have extinguished other large delinquencies. The only area of possible litigation still remaining along the special assessment line would seem to revolve about the rule of *Taylor v. Monroe*,[6] holding that the amount of the invalid special assessments could not be retained by the county auditor out of his receipts at a tax sale, if an action to recover such amounts is brought within six years after the sale takes place.

The use of these dormant lots for construction purposes has brought some attorneys face to face, for the first time, with the requirements of the Torrens system, and it is likely that this exposure to the law relating to registered lands will increase with the passage of time, as many transactions affecting registered lands require special treatment. In addition, most of the improved land available for residential use has been exhausted, and building activities of the future will necessarily result in the development of acreage, either for use by a builder or for resale to the public at large. In this climate the value of the Torrens system is quite apparent.

SINE QUA NON

The entire structure of the Torrens System rests upon Revised Code section 5309.34, where it is provided that "except in cases of *fraud*" and except as otherwise provided, *"no person taking a transfer of registered land,"* or any charge upon or interest therein, "from the *registered owner,* need inquire into the *circumstances* under which, or the consideration for which, *such owner* or any previous registered owner, *was registered."* (Emphasis added). The transferee is not charged with notice, either actual or constructive, of any unregistered interest, and *even the knowledge that an unregistered interest is in existence shall not of itself be imputed to him as fraud,* or shall an unregistered interest prevail against his title if he takes in good faith.

Throughout the entire group of statutes relating to registered lands, there runs the requirement that a notation must be made upon the certifi-

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asking for an improvement is estopped); Amrich v. Boyle, 136 Ohio St. 325, 25 N.E.2d 850 (1940) (one who signed a petition seeking an improvement is estopped).

[6] 158 Ohio St. 266, 109 N.E.2d 271 (1952).

cate before anyone dealing with registered lands is affected. It is important to bear in mind in dealing with registered lands that the certificate completely reflects the condition of the title. In this respect the Torrens system is very similar to the requirements concerning automobile title registration. The primary difference between registered and unregistered lands lies in the fact that a record showing the status of the title is always readily available for examination in a public office, and with only minor exceptions, such examination will disclose the exact condition of the title.

ORIGINAL REGISTRATION AND CONVEYANCE

Original registration is a proceeding *in rem* somewhat in the nature of a suit to quiet title. The statutes confer jurisdiction on the probate court and the common pleas court of the county in which the property is situated in all matters relating to registered lands.[7] Anyone who has the power to convey real estate[8] may bring the original action, and while a fee simple interest only can be registered, for purposes of the act a perpetual leasehold is treated as a fee simple. The form of the application for original registration of title, and the procedure to be followed thereafter, is set forth in detail in Revised Code sections 5309.08 through 5309.24. Generally they require the filing of an application naming as defendants all persons having or claiming to have any interest in the land, together with the owners of abutting land, including governmental authorities having roadways. The application must be accompanied by plats of survey and an abstract of title for 75 years prior to filing. Notice may be given by registered mail to all of the defendants, but in addition, advertising in a newspaper of general circulation must be undertaken, and the sheriff is required to post a copy of the advertising on each parcel of land at least fourteen days before answer day.[9] Of course, any defendant may appear to protect his interest.

Upon the conclusion of the registration proceedings the court orders the issuance of an original certificate of title by the county recorder.[10] At the same time, the applicant must deposit with the clerk of courts for transmittal to the State Assurance Fund, an amount equal to 1/10th of 1% of the tax valuation of the property involved. This fund is available for the payment of damages.[11] The original certificate of title, and all

[7] OHIO REV. CODE § 5309.02.
[8] OHIO REV. CODE § 5309.06.
[9] OHIO REV. CODE § 5309.16.
[10] OHIO REV. CODE § 5309.24.
[11] OHIO REV. CODE § 5310.09.

certificates thereafter issued pertaining to the registered land, set forth the name, marital status, and age and address of the owner, identifies the documents under which title was taken and the date of recording, describes the property, and contains a plat and a statement of all building restrictions applicable to the land. On the reverse side of the certificate are set forth all lesser estates in or encumbrances against the land. Any potential transferee therefore, by examining the certificate, has complete information regarding the state of title, except for federal court liens arising prior to 1933, taxes and assessments, and leases for less than three years under which there is actual possession.[12] This certificate of title stays in the possession of the county recorder, the owner receiving a duplicate thereof, which must be delivered to the recorder for cancellation upon the conveyance of title.[13]

The duplicate certificate also contains a blank form of deed which need not be used in conveying the land, and which may be used only if all of the land described in the certificate is being conveyed by the registered owners themselves.[14]

At the time title is received, the signature and address of the owner is taken and preserved.[15] While not conclusive, this is a precaution to prevent forgery. If the duplicate certificate is lost or destroyed, another can be obtained.[16]

Where an owner dies, either testate or intestate, no conveyance can effectively take place until proceedings provided for by the statutes are brought. Such proceedings involve a suit to determine heirs or devisees[17] unless the will gives the executor power to sell, encumber, or otherwise deal in the property, in which case the transferee may have his title registered by application to the court.[18]

Liens and Encumbrances

The courts have held that the Torrens system is not a mere modification of recording acts, and as a result, special attention must be given to registered lands in matters involving liens and encumbrances. This subject is treated in Revised Code section 5309.47, and the succeeding sections provide in detail the procedure to be followed in filing and obtaining notation of instruments affecting registered lands.

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[12] Ohio Rev. Code § 5309.28.
[13] Ohio Rev. Code § 5309.40.
[14] *Ibid.*
[15] Ohio Rev. Code § 5309.30.
[16] Ohio Rev. Code § 5309.31.
[17] Ohio Rev. Code § 5309.45.
[18] Ohio Rev. Code § 5309.46.

As the certificate always reflects the status of title, in certain circumstances prospective lienors must deal with registered lands in a different manner than with unregistered lands. A mechanic's lien, for example, takes effect against registered lands *only from the time the notation of the lien is entered by the recorder,*[19] and contrary to the rules applicable to unregistered lands, does not date back to the beginning of work.[20]

It is possible for a materialman to protect himself against the time interval by the filing of an adverse claim under Revised Code section 5309.72 before the materials are supplied, but it is doubted that this ability has any practical value, as it would only serve to indicate the suspicion with which a materialman may hold his customer.

Judgment liens are not a matter of record merely because of their existence on court or judgment lien dockets, and must be specially filed to affect registered lands.[21] Considerable dispute exists regarding the effect of federal court judgments rendered after October 3, 1933, but a discussion of this situation is properly a topic for an article of its own. It may be said that at least one federal court recognizes the obligation of a trustee in bankruptcy to become a registered owner before he can properly convey registered lands.[22] To avoid any doubt regarding the applicability of federal court judgments, it has become the practice to supplement the certificate issued by the recorder with a Federal Court and Tax Search Certificate.

The desire to prevent hidden equities even goes so far as to provide that title to registered lands cannot be acquired *either by prescription or adverse possession.*[23] As we have seen, a tenant occupying under a lease for less than three years may have an interest in registered lands which does not appear upon the certificate, because of its specific exclusion.[24] Such is not the case with a land contract holder in possession, who must file a certificate of adverse claim under Revised Code section 5309.72 in order to gain the same protection that he has in the case of unregistered lands.

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[19] OHIO REV. CODE § 5309.57.

[20] Gough Lumber Co. v. Crawford, 124 Ohio St. 46, 176 N.E. 677 (1931). The court held that even though work was commenced before the recording of a second mortgage, a mechanic's lien filed after the recording of the second mortgage was inferior to it. See also, Crawford v. Liston, 38 Ohio App. 294, 176 N.E. 598 (1930), where it was held that mechanic's lien claimants on the same job who perfect their liens on registered lands do not have priority as among themselves.

[21] OHIO REV. CODE §§ 5309.53 and 5309.54.

[22] *In re Kabbage,* 93 F. Supp. 515 (N.D. Ohio 1950). See also United States v. Ryan, 124 F. Supp. 1 (D. Minn. 1954).

[23] OHIO REV. CODE § 5309.89.

[24] OHIO REV. CODE § 5309.28.

Where the certificate indicates the owner as being unmarried, a transferee may deal with him free of dower rights, even though he knows of the existence of a spouse, as it is provided that a claim of dower must be memorialized before an unmentioned spouse acquires an interest in registered lands.[25] However, where a transferee knows of the existence of an unnamed spouse, the execution of the conveyance by the unnamed spouse should be obtained in order to assure against possible title complications if the property is later withdrawn from registry.

A trust may be declared upon registered lands or any interest therein in the same manner and for the same purposes as upon unregistered lands,[26] but the trust must be disclosed and where the trustee wishes to deal with such registered lands, the proposed transaction must be referred to the court for construction and authority.[27]

Although sections 5309.29 and 5309.90 both provide that once registered, lands shall forever remain registered, these provisions are in direct conflict with section 5309.68 which permits withdrawal. The continued presence of the former two sections apparently is an oversight by the legislature, to whose attention the matter is expected to be brought.

CONCLUSION

The Ohio statutes are precise and clear and thus most questions relating to the original registration, the conveyance, and the imposition of liens and encumbrances upon registered lands can readily be answered by them. Whether the claims of the proponents regarding the merits of the system are justified is a matter of opinion. Certainly the unconventional treatment of registered lands encourages opposition because of the natural resistance to change. It may be said for the system that it is advantageous in that it makes the examination of the status of the title quick, easy and certain. The expense of conveyance is normally less than in the case of unregistered lands. Further, those financial institutions which are called upon to advance funds during the course of construction can do so confident that any unpaid materialmen's or mechanic's liens will not be superior to the priority of their mortgage, and to this extent the need for bonds or other security is avoided.

The guaranty of the State Assurance Fund may be an inducement to some prospective transferees, but the balance in the fund ($78,340.32)[28] may be questioned as inadequate in certain instances.

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[25] OHIO REV. CODE § 5309.70.

[26] OHIO REV. CODE § 5309.35.

[27] OHIO REV. CODE § 5309.69.

[28] ANNUAL REPORT OF TREASURER OF STATE OF OHIO FOR YEAR ENDED JUNE 30, 1956.

Financial institutions have encountered some difficulty in dealing with registered lands where a prospective borrower requires a so-called "blanket" type mortgage and one of the properties happens to be registered. In such instances a blanket mortgage cannot be imposed, as no document affecting registered lands will be accepted by the recorder unless it relates exclusively to registered lands. Under these circumstances the financing institution is required to split its security, to its disadvantage.

A further objection to registered lands in recent years has involved the question of mortagages insured by a government agency. These mortgages are generally traded on a national scale, and as the systems of registered lands in various states are not uniform, a registered title is not generally accepted on the national market. Under these circumstances the certificate is usually supplemented with an American Title Association policy, which is uniform in all states, and the expense involved in registered lands therefore becomes the same as in the case of unregistered lands.

The registration of land in Ohio has largely been confined to the communities surrounding the larger cities, although a large minority of the counties have some registered titles. Whether additional land will be registered in the future is a matter of speculation, but it is not speculation that a practicing attorney must have a speaking acquaintance with the registered lands statutes, if he has much practice in real estate.