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YES VIRGINIA—THERE IS A TORRENS ACT

In contemplating our jurisprudence one is struck by the fact that while the law merchant has been developed to meet the expanding needs of commerce, and while other departments of municipal law have grown, or sprung into being, in answer to the demands of an increasingly complex civilization, there has been comparatively little change in the law of realty.¹

The Torrens law² is perhaps the most advantageous yet most infrequently used method of land conveyancing in the United States.³ This unique system of land registration is the present terminus in the long and ancient history of land conveyancing.⁴ In the earliest period of land transfers, the method of proving ownership was by actual occupancy.⁵ As society became more complex and the need for some formal ratification of ownership increased, the ceremony of livery of seisin became the prevalent

2. Because of their derivation from the Australian title registration act initiated by Robert Torrens, South Australia's first premier, title or uniform land registration acts are often referred to as "Torrens" acts. See 6 R. Powell, The Law of Real Property § 919 at 301-02 (1973) [hereinafter cited as Powell].
method of conveying title to land. Later, as the number of land transfers proliferated, a written instrument detailing the history of a particular parcel of land became the central document involved in the transfer of land ownership. Eventually, the delivery of the written deed of conveyance became the substitute for the ceremonial livery of seisin. Under the modern-day recording acts, all the instruments affecting land ownership are themselves transcribed into official records, thus registering the evidence of title to the land for conveyancing purposes. The Torrens law makes an innovative departure from previous conveyancing practices in that the title to the land itself is registered and not merely the physical evidence of such title (i.e. the deed) or other documents affecting the title.

THE TORRENS LAW: HISTORY AND THEORY

The Torrens system of title registration was first introduced in legislative form by Sir Robert Richard Torrens who at the time was serving as the first Premier of South Australia in the late 1850's. South Australia provided an ideal situation for the development of a new system of land registration. It “was being newly settled, and titles seldom had more than one or, at most, a very few links in the chain.” After extensive debate, the first Torrens Act was adopted in 1857. With certain modifications necessitated by due process considerations under the United States Constitution, the South Australian Act formed the nucleus of most of the American Torrens statutes, as well as the statutes enacted in England, Canada, New Zealand and several other nations.

6. See, e.g., C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 163-65 (1962); 1 Casner § 1.6, at 13; Bordwell, Registration of Title to Land, 12 IOWA L. REV. 114, 116-17 (1927); Massie, Commercial Land Titles, 3 VA. L. REV. 115, 137 (1916).

7. See 3 Casner § 12.2, at 210; Patton, supra note 5, at 225.

8. See Powell at 300: “American colonists devised a . . . mechanism under which instruments affecting land ownership found transcription into official records. Thus, ‘recordation’ became an important factor in conveyancing practices . . .”

9. See, e.g., In re Bickel, 301 Ill. 484, 134 N.E. 76, 80 (1922). See also 8A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 4354, at 82 (1963) [hereinafter cited as THOMPSON].

10. See Powell at 301-02. For a brief biography of Robert Richard Torrens see Massie, Commercial Land Titles, 3 VA. L. REV. 115, 116 (1916).


The principal theory underlying the Torrens system is "the registration of the title to the land, instead of registering, as under the old system, the evidence of such title." The typical American Torrens Act "rests upon two major premises: (a) that title to land should be absolute and indefeasible, and (b) the conveyance of land should be more simple, and less expensive, to the end that land may be more certainly marketable, more easily used as security, and, in general, made more 'negotiable'." In order to register a title under the Torrens Act, a judicial proceeding is held to determine the true holders of interest in the land, a proceeding very much in the nature of a suit to quiet title. Once this proceeding in rem is concluded, the Torrens law "clears [the] title and quiets it against all the world." An indefeasible and conclusive title is created in favor of the one initiating the suit if so determined by the court, and this newly created title is registered with the court. Once registered, a copy of the registration page is given to the owner. The official certificate and the duplicate "will always show the state of . . . title and the person in whom it is vested."

Further manipulation of the title, either to convey, transfer or encumber, proceeds in a manner strikingly similar to a stockholder dealing with his corporate stock certificate. For a stockholder to transfer his stock to another and have the transfer legally bind the corporation and its creditors, the stock certificate must be surrendered at the designated location where the corporation's stock register is kept. "On presentation of a stock certificate at the proper office, accompanied by a properly executed assignment . . . the [certificate] is cancelled and a new certificate is issued to the purchaser containing no data as to its former ownership." An identical process is followed in transferring or encumbering a registered title to land. The duplicate title retained by the owner is submitted to the registrar of titles. In the case of a transfer, the original certificate is cancelled as is the

519, 519-20 (1935); Rood, Registration of Land Titles, 12 Mich. L. Rev. 379 (1914).
15. In re Bickel, 301 Ill. 484, 134 N.E. 76, 80 (1922). See also State ex rel Douglas v. Westfall, 85 Minn. 437, 89 N.W. 175 (1902); Thompson at 82; Heinrich at 320.
17. Thompson at 81. See also Maher, Registered Lands Revisited, 8 W. Res. L. Rev. 162, 165 (1957).
19. See, e.g., In re Juran, 178 Minn. 55, 226 N.W. 201 (1929); Thompson at 81-82; Beale, Registration of Title to Land, 6 Harv. L. Rev. 369, 374 (1893); Niblack, Pivotal Points in the Torrens System, 24 Yale L.J. 274, 275 (1915).
20. In re Bickel, 301 Ill. 484, 134 N.E. 76, 80 (1922).
21. See, e.g., 4 Casner § 17.41, at 643; Patton, supra note 14, at 520-21.
duplicate. A new certificate is issued showing complete ownership in the new owner. The new owner is then given a duplicate certificate evidencing the fact that his title is registered under the Torrens Act. This process is simple and the cost is minimal.²³

THE VIRGINIA TORRENS ACT

History

Virginia was the first state to provide in its constitution for the enactment of a Torrens Act when the General Assembly authorized the establishment of a court of land registration in 1902.²⁴ After much debate²⁵ and a rather lengthy course through the legislative process,²⁶ Virginia enacted its Torrens Act in 1916 under the title of the Uniform Land Registration Act.²⁷ The Act is currently in force.²⁸ Although the constitutionality of earlier Torrens statutes enacted by several other states has been litigated,²⁹ the Virginia Torrens Act has not been attacked in the courts,³⁰ and is presumed to be constitutional.³¹

²³. See notes 124-26 infra.
²⁵. For the reaction of Virginia legislators and attorneys to the first proposed Virginia Torrens Act see The Torrens System—An Open Symposium, 11 Va. L. Reg. 570 (1905).
³⁰. Only one reported case in Virginia mentions the Virginia Torrens Act, and then only in passing. See American Nat'l Bank v. Chapin, 130 Va. 1, 107 S.E. 636 (1921), where the Justices of the then Supreme Court of Appeals stated: "The principal question for decision, however, involves no peculiar phase or feature of the land registration act, and might have arisen in any other proceeding requiring an adjudication upon the title." Id. at 3, 107 S.E. at 637.
³¹. See generally Massie, Virginia and the Torrens System, 35 Am. L. Rev. 727, 736 (1901); Massie, Commercial Land Titles, 3 Va. L. Rev. 115, 121-36 (1915). Early argument was made that Virginia's Torrens Act was unconstitutional because the Act did not afford due process.
Courts of Land Registration

The Virginia Torrens Act provides that those courts which have jurisdiction of "the clerks' offices of which deeds are registered" shall be "designated courts of land registration, transfer and assurance of titles to lands within their respective jurisdictions." The courts of land registration, exercising the power of both a law and an equity court, have "exclusive, original and general jurisdiction" of all the petitions and proceedings required and established for the registration of titles as well as to transactions affecting titles already registered under the Act. The proceedings in the court, either to register a title or in transactions involving a registered title, are proceedings "in rem against the land." As a consequence, the decrees of the court operate directly on the land. "This differentiates it sharply from all other suits to quiet title in personam." This distinction is of paramount importance with respect to the scope of the court's decree and the necessity of personal service on the parties. Although the proceeding for registration is expected to be heard by the court without intervention of a jury, provision is made to allow for trial by jury on motion of one or more of the interested parties. An appeal procedure is also available if utilized within ninety days of the court's final decree.

Registrars and Examiners of Titles

The clerk of the court of land registration is also designated the registrar of titles. His official duties and responsibilities include the issuing of process and entering the decrees of the court; entering and issuing certificates of title; affixing the seal of the court to documents; keeping records of all acts of registration which are performed by him and also of documents submitted to him; and keeping a separate account of all monies received for fees charged under the Act.

See O'Flaherty, Due Process of Law and the Torrens System, 9 VA. L. REG. 85 (1904). However, due process considerations were evident in the legislation as finally enacted and hence this constitutional criticism became moot. See, e.g., Massie, supra note 26, at 371-72; Massie, Commercial Land Titles, 3 VA. L. REV. at 121-36; The Torrens System - An Open Symposium, 11 VA. L. REG. 570, 583 (1905) (letter of Mr. R.C. Minor).

33. Id. at § 5.
34. Id. at § 9. See also note 15 supra.
35. Massie, supra note 24, at 759.
37. Id. at § 11.
38. Id. at § 14. See also Niblack, supra note 13, at 275.
39. Va. Torrens Act § 15. Early objection was made to the judicial functions performed by
The examiner of titles is an attorney at law, appointed by the court, and vested with the powers of a commissioner in chancery.\(^4\) His principal responsibility is to “search the records and investigate all facts stated in the petition” for registration or otherwise brought to his notice in any case which is referred to him.\(^4\) After hearing the parties involved and receiving any necessary evidence, the examiner is required to file a report with the court containing his certificate of title examination and findings of fact.\(^2\)

**Proceedings to Obtain Registration**

The suit for registration of a title begins with the voluntary submission of a petition to the court by a person who owns, or who has the power to appoint or dispose of a fee simple estate in any land.\(^4\) Once the petition is filed, the “general rules of pleading and practice in equitable actions” prevail.\(^4\)

The petition, signed and sworn to by each petitioner, is required to set forth (1) a full description of the land and its value as of its last tax assessment; (2) when, how and from whom the land was acquired; (3) whether or not the land is presently occupied; (4) an enumeration of all known liens, interests and claims against the land; and (5) the full name and address, if known, of anyone who may be interested in the land, in the registrar. See Niblack, *supra* note 13, at 276. But the Virginia Torrens Act, as do other Acts of those states enacting a Torrens law, clearly defines the registrar’s role as always being under the direction and supervision of the court of land registration. See THOMSON at 85; Massie, *supra* note 6, at 123-28; Myers, *American Torrens Land Title System*, 4 *IOWA L. BULL.* 266 (1918).

Proceedings to Obtain Registration

41. Id.
42. Id. The report of the examiner is required to contain “(1) An abstract of title to the land, made from the records and all other evidence that can be reasonably obtained by the examiner; (2) Full extracts from the records to enable the court to decide the questions involved; (3) The names and addresses so far as ascertained of all persons interested in the land, as well as occupants and adjoining owners, showing their several interests, and indicating upon whom and in what manner process should be served or notice given in accordance with the provisions of this act.” *Id.* at § 26.
43. Id. at § 17. Provision is also made for the initiation of a suit by an infant or other person under disability, as well as a non-resident petitioner. *Id.* at § 18(1) and (3). Registration under the Virginia Torrens Act is not compulsory. *Id.* § 89(a). Persuasive argument has been made for compulsory registration and at least one state partially so provides. See, e.g., *THOMPSON* at 84; Bordwell, *The Resurrection of Registration of Title*, 7 *U. CM. L. REV.* 470, 482 (1940); Fiflis, *supra* note 14, at 202; Massie, *supra* note 26, at 372; McCall, *The Torrens System - After Thirty-Five Years*, 10 *N.C.L. RSV.* 329, 341 (1932). One author suggests that registration be made mandatory at the death of the present unregistered owner. See Brewster, *supra* note 24 at 465.
concluding any occupants and adjoining owners. The petition, once filed with the registrar of titles, is docketed, numbered and indexed and a notice of *lis pendens* is recorded and indexed in the proper record book in the city or county where the land is located. The petition is then referred to an examiner of title, who is required to report to the court the results of his examination of title and findings of fact.

**Notice**

The Act's requirements for the giving of notice of the proceedings have been the lightning rod of constitutional objections. Lack of personal service, which can not be avoided in the case of unknown interested parties, is cited by most critics as rendering this proceeding violative of due process protection and hence unconstitutional. The Virginia Act specifically provides that the proceedings are in rem and hence "due process of law" calls for nothing more than order of publication or constructive service. However, the Act does make provision for personal service of notice in certain circumstances.

Under the Virginia Torrens Act, upon the filing of the report of the examiner of title, the court directs an order of publication to be posted in the city or county where the land is located, and also directs that notice be given to those specific persons enumerated in the examiner's report as having an interest in the land. Interested parties, designated either in the

45. Id. §§ 20 and 21.
46. Id. §§ 22 and 24. Pending the actual registration of the land by the court, the land may be dealt with "as if no such petition had been filed." Any person who acquires an interest in or claim against the land after the petition has been filed "shall at once appear as a petitioner, or answer as a party defendant, in the proceedings for registration, and such interest or claims shall be subject to the decree of the court." Id. at § 42.
47. See note 42 supra.
48. See note 29 supra. See also Hudak, *Registration-of-Land-Titles Act: The Ohio Torrens Law*, 20 CLEV. ST. L. REV. 617 (1971), where the author states that litigation in opposition to the Torrens Acts "has been advanced on the theory that the original proceeding is not in rem and that jurisdiction over unknown claimants is not obtained by publication of notice." Id. at 627. Virginia's statute clearly defines the registration proceeding as "proceedings in rem against the land." Va. Torrens Act § 9. "The distinctive feature of this and all other proceedings under the act is that they are in rem; and this must always be borne in mind." Massie, *supra* note 1, at 120.
49. See note 31 supra.
51. See note 55 infra.
petition for registration or in the examiner's report, receive a copy of the order of publication by registered mail, if their address is given or known. An attested copy of the order is posted on each parcel of land described in the petition. The sheriff, who is responsible for such posting, is under a duty to report to the court the name and address of any occupant he finds on the land. The court is empowered to give any further notice "in such manner and to such person as it may deem proper" but "such personal service of process as is required in equitable actions shall also be made upon residents of the State, not under disability, who are made known to the court before final decree and can be reached by its process, unless such service be waivered by appearance or otherwise." Except for this specific requirement of personal service, any other notice given under the provisions of the Act is in lieu of personal service and "shall be conclusive and binding on all the world."  

The Adjudication of Title

The Virginia Torrens Act provides that the cause for registration is mature for hearing after the expiration of at least fifteen days following the completion of the publication and the posting of the order of publication. Any person having a claim against or interest in the land which has been submitted to the court for registration, irrespective of whether that individual was named in the petition and order of publication as an interested party or not, may appear and file an answer to the petition at any time before the court enters a final decree. Once the petition and all answers

53. Id. at § 28.
54. Id. at § 29. "If the petition involves the determination of any public rights or interests, the court shall cause a copy of the order of publication to be delivered by the registrar to the proper attorney for the State, county or city." Id. at § 30.
55. Id. at § 31. See LILE'S, supra note 50, at § 53 for the requirements in equity for personal service.
56. Va. Torrens Act § 32. Provision is also made for a certificate to be made by the registrar and the sheriff, or his deputies, showing due execution of the order of publication and the proper mailing and posting of copies of the order as required under the Act. The certificates shall be "filed among the papers in the cause and be conclusive proof of such service." Id. at § 33.
57. Id. at § 34. The Act provides for the appointment of a "discreet and competent attorney at law of the county or city in which the land lies" to serve as a guardian ad litem for "all persons under disability, not in being, unascertained, unknown, or out of the State, who may have or appear to have an interest in or claim against the land." Id. at § 35.
58. See notes 45 and 52 supra.
59. Va. Torrens Act § 36. The answer must be personally signed and sworn to, and in the case of a corporation or an individual under disability, the answer must be signed and sworn to by the person authorized to file the answer. Id. at § 37. Provision is also made for amending petitions or other pleadings "upon terms that may be just and reasonable." Id. at § 41.
have been filed, "the court may proceed to take such action as may be proper, upon the report of the examiner of titles and all other evidence before it with reference to the rights of all persons appearing to have any interest in or claim against the land, and may refer the cause again or require further proof." 60

If the court determines that the petitioner has a title which is proper for registration, the decree of confirmation and registration is entered. 62 The decree is all encompassing and by provision of the Act:

1. Shall bind the land and quiet the title thereto . . . ;
2. Shall be forever binding and conclusive upon all persons, resident or non-resident, including the State, whether mentioned by name in the order of publication or included under the general description, "to all whom it may concern";
3. And shall not be attacked or opened 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 rehearing or reversing judgments or decrees, except as herein especially provided. 63

The decree of initial registration is required to specify (1) the name and residence of the registered owner, 64 whether married or unmarried, and if married the name of his or her spouse, and (2) a full description of the land as finally determined by the court, including the estate of the owner in the land, all the rights and easements appurtenant to the land, and all encumbrances to which the land is subject, showing their relative priorities. 65

The decree is legally binding on the title to the registered land at the

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60. Id. at § 38. The court of land registration is given a great degree of latitude in the procedures available to ascertain the necessary facts required for a proper adjudication of the petition. For example, the court may, at any time before entering the final decree, (1) order the land be surveyed; (2) order durable bounds be set and a plat filed among the papers of the suit; and (3) enter all necessary decrees for the establishment, declaration and protection of the right and title of all persons appearing to have any interest in or claim against the land. Id. at § 39. If in the opinion of the court the petitioner's title is not and cannot be made proper for registration, the petition may be dismissed without prejudice. Id. at § 40.

61. The primary determination as to whether the title is "proper" for registration is the absence of any defect in the chain of title or in its merchantability which would prohibit the court from vesting an absolute title in the petitioner. No final decree of registration can be made unless all due or delinquent taxes and levies have been paid in full. Id. at § 43.

62. Id. at § 44.

63. Id. See also Massie, supra note 3, at 756; Niblack, supra note 13, at 275.

64. Va. Torrens Act § 45(1). If the owner is under a disability, the nature of the disability must be specified, and if an infant, his age. If the registered owner is a corporation, the place of incorporation and the corporation's chief office is required. If the registered owner is a personal representative or trustee, the name of the decedent or beneficiary must be set out in the decree. Id.

65. Id. at § 45(2).
precise moment the decree is filed for registration in the proper registrar's office.\textsuperscript{66}

\textbf{Certificates of Title}

The registrar is required to maintain a register of titles. When a decree of initial registration is issued by the court of land registration and filed with the registrar, he is required to copy the decree onto a page of the register of titles. The page of the register on which the decree is copied is then numbered, signed and sealed with the seal of the court by the registrar. When so registered, the given page of the register setting out the initial decree of the court constitutes the original certificate of title.\textsuperscript{67} This certificate of title is "conclusive evidence of all matters contained therein."\textsuperscript{68} An exact copy of the certificate of title is made and delivered to the owner of the registered land, constituting the "owner's duplicate" certificate.\textsuperscript{69}

\textbf{Registration of Transfer and Other Transactions}

As the certificate of title and the owner's duplicate certificate are "conclusive evidence of all matters contained therein,"\textsuperscript{70} the Act makes imperative "the requirement that a notation must be made upon the certificate before anyone dealing with registered lands is affected."\textsuperscript{71} The entire Torrens system of registering titles rests on the degree of conclusiveness of the Torrens title certificate.\textsuperscript{72} The title certificate's conclusiveness is ensured

\textsuperscript{66} The Act states that the decree has legal efficacy "as of the day, hour and minute it is filed for registration in the office of the proper registrar." \textit{Id.} at § 46. The registrar of titles is required to record the decree in the appropriate book of the court, and to record and index the decree in the register of titles and also in the proper deed book of the county or city where the registered land is located. \textit{Id.} at § 47.

\textsuperscript{67} \textit{Id.} at § 48. The registrar is also required to maintain a separate book in which he is to enter "a memorandum of any writing, instrument, or record filed with him for registration. . . ." \textit{Id.} at § 49 (erroneously designated as § 59 in the Act, preceding § 50). The register of titles book is to include the consecutive numbering and indexing of the original and all subsequent certificates of title, and all transactions, voluntary or involuntary, authorized to be registered under the Act, as well as notation of the date, hour and minute of registration made upon any duplicate certificate issued or subsequently presented. \textit{Id.} §§ 50 and 53.

\textsuperscript{68} \textit{Id.} at § 51(2). It is also provided that "[n]o erasure, alteration, or amendment of said certificate, or of any memorial thereon, shall be made except by order of court." \textit{Id.} at § 51(3). \textit{See also} Maher, \textit{Registered Lands Revisted}, 8 W. Res. L. Rev. 162, 165 (1957); Patton, \textit{supra} note 4, at 526-27.

\textsuperscript{69} Va. Torrens Act § 52.

\textsuperscript{70} See note 68 \textit{supra}.

\textsuperscript{71} Maher, \textit{supra} note 17, at 164-65.

\textsuperscript{72} See note 68 \textit{supra}.
by the fact that an official manipulation of the certificate is required before any interest in the land is legally affected.

As previously noted, the procedure to effectuate a complete or partial transfer of registered land is very similar to the transfer of a share of corporate stock. The basic requirement for any transfer of registered land, complete or partial, voluntary or involuntary, is the submission of the owner's duplicate certificate to the registrar; the cancellation of both the original and duplicate certificates of title; and the issuance of a new original and duplicate certificate by the registrar, evidencing the name of the owner and the extent of his interest in the registered parcel of land. In addition, a registered encumbrance, right, or adverse claim affecting the estate must be noted upon every outstanding certificate of title and duplicate certificate until the interest has been released or discharged.

Under the Virginia Torrens Act, procedural differences distinguish the registration of a voluntary transaction as compared to an involuntary transaction. In a voluntary transaction, the duplicate certificate of title must be presented to the registrar; only then, under the direction of the court and upon presentation of proof of payment of all delinquent taxes and levies, is he authorized to register the transaction. In an involuntary transaction, most notably a transfer ordered under a bankruptcy proceeding, the registrar is authorized to register the transaction only upon receipt of appropriate evidence from the tribunal involved or from a "proper state, county, city, or court officer" that the involuntary transaction is in compliance with the statute under which the proceeding was brought.

Special provisions are made under the Act for the registration of a trust, condition, limitation or other equitable interest or estate, the registration

73. See text accompanying notes 20-22 supra.
74. Va. Torrens Act § 57. When the submission of the duplicate is required but not produced, "production may be required by suitable process of the court, if necessary." Id. at § 59.
75. Id. at § 54.
76. Where only a portion of a registered estate is transferred or in the case of an encumbrance or lease of a duration of more than one year, the original and duplicate certificates are cancelled and a new original certificate is entered into the register of titles. A new owner's duplicate certificate is issued for the portion transferred and the portion retained, each to its respective owner. Id. at § 55.
77. Id. at § 56.
78. Id. at § 57.
79. Id. at § 58. The Act also has made special provision for the sale of registered land where the registered owner has pledged his certificate for a loan or as security. Id. at § 89-b.
80. Id. at § 80. The special interest is indicated by the registrar entering a memorial on the certificate with a brief notation "in trust," "upon condition," etc.
of delinquent taxes and levies,\textsuperscript{81} sales for delinquent taxes or levies,\textsuperscript{82} registration of a redemption,\textsuperscript{83} and the registration of a final sale for delinquent taxes or levies if no redemption is made.\textsuperscript{84} Of particular interest is the provision for the registration of the estate of a decedent.\textsuperscript{85} Upon the death of a registered owner, whether testate or intestate, the registered land and any estate or interest therein which is registered under the Act passes "to his personal representative in like manner as personal estate, and [is] subject to the same rules of administration as personalty," with minor deviations provided for in the Act.\textsuperscript{86} However, the provisions of the Act do not "alter or affect (a) the course of ultimate descent under the statute of descents and distributions and the rights of dower and curtesy, when duly registered; (b) nor the order in which real and personal assets respectively are now applicable in and towards the payment of funeral and testamentary expenses, debts or legacies; (c) nor the liability of real estate to be charged with the payment of debts and legacies."\textsuperscript{87} The personal representative holds the registered realty as trustee for the persons who by law are beneficially entitled thereto.\textsuperscript{88} He is not entitled to any commission otherwise than is provided for by law or when it becomes necessary to make a sale in the due course of administration;\textsuperscript{89} and is subject to the right of the heirs at law or beneficiaries to require the transfer of the estate as if it were a personal estate.\textsuperscript{90}

\textit{Sundry Proceeding After Registration}

The Virginia Torrens Act provides that a registered owner of any estate or interest in the registered land, or any individual who has a claim against the registered land arising from any other cause than fraud or forgery since the land was registered, may, within ninety days after the claim or cause of complaint arose, petition the court for relief in any matter within its jurisdiction.\textsuperscript{91} Similarly, any person who is aggrieved by any act or refusal

\textsuperscript{81}\textsuperscript{82}\textsuperscript{83}\textsuperscript{84}\textsuperscript{85}\textsuperscript{86}\textsuperscript{87}\textsuperscript{88}\textsuperscript{89}\textsuperscript{90}\textsuperscript{91}
to act on the part of the registrar, or whenever a registrar indicates a reservation as to whether a proper registration should be made, may also petition the court for redress. After notice is given to all interested parties, the cause is heard by the court, which is empowered to "enter such decree as justice and equity may require, which shall be registered, and take effect in like manner as the original decree for registration." When the owner's duplicate certificate is lost or destroyed, the owner may petition the court for the issuance of a new duplicate. After the notice of the petition is published for four successive weeks, the court, upon satisfactory proof that the duplicate was lost or destroyed, may direct the issuance of a new duplicate certificate.

**The Legal Effects of Registration of Title**

Certain legal consequences emanate from the court's decree of initial registration. For example, once the decree is duly registered in the office of the proper registrar, it serves as notice to all persons that the land is registered under the Act. Furthermore, once the land is registered, the owner of the estate or interest in the land holds the land "free from any and all adverse claims, rights, or encumbrances not noted on the certificate of title," with three notable exceptions: (1) an adverse claim arising under federal law which the state can not require to be recorded; (2) taxes assessed but not delinquent; and (3) a lease of less than one year's duration.

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**Notes**

- [92](#) Va. Torrens Act § 68(2).
- [93](#) Id. at § 70: "Notice in lieu of process . . . may be served upon any person by registered mail . . . but the court may in any case order different or further service by publication . . . ."
- [94](#) Id. at § 69.
- [95](#) Id. at § 71(1).
- [96](#) Id. at §§ 71(2), (3).
- [97](#) Id. at § 72.
- [98](#) Id. at § 73.
- [99](#) Section 73 of the Act provides for three exceptions to the conclusiveness of the certificate of title:

  - First. Liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statutes of this State cannot require to appear of record under registry laws.
  - Second. Taxes and levies assessed thereon but not delinquent.
  - Third. Any lease for a term not exceeding one year under which the land is actually occupied.

Upon close examination it will be noted that the three exceptions provided for in the Act are extremely restrictive. Provision for exceptions of this nature is not unique to the Virginia statute. See generally 4 Casner § 17.44, at 645; POWELL at 314-15.
No title, right or interest in registered land can be acquired by adverse possession or prescription. The obtaining of and registering the decree of registration is "construed as an agreement running with the land, and the same shall forever remain registered land." The Act also provides that registered land and ownership is subject to the same rights, burdens, and incidents as unregistered land, and may be dealt with by the owner as if it had not been registered.

The effect of a registration procured through fraud or forgery presents rather unique problems to the Torrens system of title registration. The difficulty arises from two competing concerns: a strictly statutory system which has as its focal point the declaration of an absolute title binding upon all the world and the possible existence of individual equities which, if given consideration and effect, could circumvent the intended purpose of the Act. The Virginia Torrens Act strikes a compromising balance between the "absoluteness" of its proceedings and the equitable considerations which must of necessity be made where fraud or forgery is involved in a registration. This is of special concern where there is an innocent intervening registered owner involved.

The Act provides that a registered owner is not entitled to enjoy the legal rights resulting from the registration of his title in two instances. First, in all cases of forgery, regardless of whether the owner is a party or privy to the forgery, the legal effects of registration are not given efficacy. Second, when the owner is a party or privy to a fraud and has not paid valuable consideration in good faith for the land, the registration has no legal effect. The court of land registration may set aside any registration that is procured through fraud or forgery "but the rights and title of an innocent intervening registered encumbrancer or purchaser for value and without..."
The innocent intervening registered party is still subject to the same restrictions above mentioned which are applicable to a registered owner.\textsuperscript{106} Regardless of whether fraud or forgery was involved in the registration, the injured party is not precluded from pursuing all other available legal and equitable remedies against the perpetrator of the fraud or forgery.\textsuperscript{107}

**Assurance Fund**

One of the more remarkable features of the Torrens Act is the provision for an assurance fund.\textsuperscript{108} The fund is generated by a fee required to be paid to the registrar for the original registration. The required fee is one-tenth of one per centum of the assessed value of the land.\textsuperscript{109} The assurance fund is available to satisfy the adjudicated claims of any person who (1) had no actual notice of the registration, (2) was deprived of an estate or interest in the land, (3) is without remedy and (4) brings the action within two years after the cause of action accrued.\textsuperscript{110} The measure of damages recoverable is specifically limited to the value of the land at the time the right to bring the action first accrued.\textsuperscript{111} The State is solely liable in damages only

\textsuperscript{105} Id. at § 75.

\textsuperscript{106} Id. at §§ 74 and 75. In effect, the Torrens Act protects the registered owner and any intervening registered party in cases of fraud where he is not a party or privy to the fraud. The registered owner and intervening party are vulnerable in cases of forgery, but the statutory provisions for the examination and registration of a title minimizes the possibility of forgery.

\textsuperscript{107} Id. at § 75. See also R. Powell, Registration of the Title to Land in the State of New York 72 (1938); Niblack, supra note 13, at 275-76; Patton, supra note 4, at 526; Comment, The Torrens System in Illinois, 45 Ill. L. Rev. 500, 503 (1950).

\textsuperscript{108} Va. Torrens Act §§ 80-87. See also Cushman, supra note 50, at 600-01; Heinrich, supra note 4, at 327-28; McDougal & Brabner-Smith, Land Title Transfer: A Regression, 48 Yale L.J. 1125, 1133 (1939).

\textsuperscript{109} Va. Torrens Act § 80. Provision is made for the fees collected by the registrar to be paid to the state treasury and maintained in a special trust. The State Treasurer is authorized to invest these proceeds in certain state bonds. Id. at §§ 81 and 82. Other fees are required in the registration proceeding: (1) two dollars to the registrar "[f]or docketing, indexing, and filing any original petition and exhibits therewith and publishing and mailing the notices thereof;" (2) two dollars to the registrar for the entry of the original certificate of title and issuing one duplicate certificate and recording and indexing memoranda; (3) to the registrar, one dollar for the registration of any other instrument, and fifty cents for each additional duplicate certificate requested. Twenty-five cents is the fee required for the docketing, indexing and filing of any additional papers; (4) to the examiners of title, for examining title and making report to the court, one-tenth of one per centum of the value of the land, and postage, and ten dollars; and (5) one dollar to the sheriff for reporting to the court the name and address of any occupant on the land. Id. at § 88.

\textsuperscript{110} Id. at § 83(1). See also Powell at 314.

\textsuperscript{111} Va. Torrens Act § 83(3). Provision is also made for the determination of the party
in those cases where an action is instituted to recover for loss or damage arising through the legal operation of the act.\textsuperscript{112} In all other cases, the State, and hence the assurance fund, is secondarily liable and must satisfy the judgment only if the execution against the other party defendant is returned unsatisfied.\textsuperscript{113}

**ADVANTAGES AND DISADVANTAGES OF THE TORRENS ACT**

The primary advantage of the Torrens Act is that it eliminates most, if not all, of the disadvantages of the present recording act. The primary disadvantage of the recording act is that it "creates a lengthening chain of title, never any stronger than its weakest link, and piles up unending bits of evidence which must first be found and fitted together before any figure can be made out."\textsuperscript{114}

The very nature of the record system requires the accumulation, recording and preservation of all the relevant data necessary for a complete history of the title of any given tract of land.\textsuperscript{115} Yet for the most part, the record system "permits title to depend upon records and proceedings outside of the registry of deeds."\textsuperscript{116} The passage of title to land by adverse possession, marriage, devise or descent is not reflected on the record books\textsuperscript{117} and many an examined title has been later found to be defective because the examiner failed to ascertain these "unrecorded" occurrences which affect the status of land titles. Under the Torrens Act, the certificate of title reflects the entire legal status of the title of the registered land.\textsuperscript{118}
In addition, no title to or interest in registered land can be acquired by adverse possession or prescription.\textsuperscript{119}

There are numerous other shortcomings of the record system. For instance, the record system provides no means of verifying the genuineness of signatures, either of the grantor or witnesses.\textsuperscript{120} In addition, the mere fact that a deed appears of record raises only a presumption that the deed was in fact delivered.\textsuperscript{121} Questions of incapacity to contract are not determined by the recordation of a deed.\textsuperscript{122} Again, these difficulties are eliminated under the provisions of the Torrens Act. Title to land is submitted to a court of land registration which adjudicates and determines by a decree “forever binding, and conclusive upon all persons” the rightful owner of the land.\textsuperscript{123}

One of the outstanding advantages of the Torrens Act is that once a parcel of land is registered, further transfers of the land require a minimum of time, effort and expense.\textsuperscript{124} Because the title is registered and the conclusiveness of the certificate of title has been declared indefeasible by the court of land registration there is no need to examine the title any further than the certificate of the present grantor-registered owner.\textsuperscript{125} The time-consuming “search” of a title now conducted under the record system would be eliminated,\textsuperscript{126} and the probability of errors being committed dur-

\textsuperscript{119} See note 100 supra.

\textsuperscript{120} See Chaplin, supra note 117, at 303; Heinrich, at 322; Massie, supra note 26, at 364-65.

\textsuperscript{121} See, e.g., Hutchison v. Rust, 43 Va. (2 Gratt.) 395 (1846); Spenser v. Ford, 40 Va. (1 Rob.) 468 (1843); Skipwith’s Ex’r v. Cunningham, 35 Va. (8 Leigh) 271 (1837); 2 R. MINO, INSTITUTES OF COMMON AND STATUTE LAW 733 (4th ed. 1892).

\textsuperscript{122} See note 120 supra.

\textsuperscript{123} Va. Torrens Act § 44(2).

\textsuperscript{124} A recent transfer of a previously registered parcel of land in the City of Richmond indicated that the total cost of a transfer compares quite favorably with the cost to be expected if the same land was handled under the recording act. See also Crowley, The Torrens System, 6 MARQ. L. REV. 114, 120 (1922); Comment, The Torrens System in Illinois, 45 ILL. L. REV. 500, 507 (1950).

\textsuperscript{125} “The cost of registration will be only once incurred, and will avoid the endless examination of title now in vogue. After registration titles can be passed quickly, cheaply and with certainty.” Massie, supra note 26, at 372. See also Niblack, supra note 13, at 284.

\textsuperscript{126} See Bordwell, Registration of Title to Land, 12 IOWA L. REV. 114, 117 (1927).
ing the title examination is reduced to zero. The Torrens system is also more favorable in that the assurance fund is available to compensate those who have been deprived of an interest in the registered property due to the operation of the Act. 127 "Under the recording system, should a title prove defective, the grantee has, for what it may be worth, his remedy against the grantor under his warranty in the deed." 128

The primary disadvantage of the Torrens Act as cited by its critics is the supposed enormous cost involved in the initial registration. 129 Yet "[t]he cost of the initial registration will usually be slightly more than the cost of an ordinary conveyance of land under the existing systems, although it often compares very favorably." 130 When the cost is compared to the ad-

127. See text accompanying notes 108-13 supra.
128. Cushman, supra note 50, at 600.
129. See Balch, Land Transfer - A Different Point of View, 6 HARV. L. REV. 410, 414 (1893); Thompson, Analysis of the Disadvantages of the Torrens System, 87 CENT. L.J. 260 (1918).
130. Heinrich at 332. See also George, Cost of the Torrens System, 9 LAW. & BANK. 33 (1915); McDougal, supra note 108, at 1139-42.

The main argument advanced in opposition to the Torrens Act is that the cost of registering a title would be so enormous as to make the procedure economically prohibitive for the "ordinary" conveyance transaction. In fact, when the cost estimate for registration is determined on the basis of the administrative fees involved, the cost is comparable to that required for the recordation of a deed. The fees to be charged for the registration of a title are enumerated in § 88 of the Virginia Torrens Act. For a registration involving a parcel of land valued at $50,000, the cost would be as follows:

1. For docketing, indexing and filing the original petition ....................... $2.00
2. Publishing and mailing notices of the petition ................................. postage
3. Entry of the original certificate and issuance of the duplicate certificate .................................................. $2.00
4. Fee for examiner's report to the court, including the examination of title and findings of fact (one-tenth of one percent of the value of the land) .................................................. $50.00
5. For report of sheriff as to occupants on the registered land .................. $1.00
6. For the docketing, indexing or filing of any other paper submitted during the proceeding ................................................................. $1.00

The cost would be increased by any required court costs, an order of publication, if needed, and by any other fees allowed by law for administrative services in other cases but not specifically enumerated in the Act. The unknown factor in this cost estimate is the attorney's fee. If the attorney is familiar with the procedures of the Torrens Act, the time required to register a title would be no more than that required to record a deed and handle the closing. If the attorney has to educate himself with respect to the particulars of the Act, the fee would naturally be greater as the time required on the part of the attorney to register the title would have increased substantially. If an adverse interest has been asserted, the cost of either litigating the issue or seeking a settlement would be the same under either system, assuming of course that the vendee-client still desires the property. The only comparable fee not found under the record system which would be required under the Torrens Act is that charged for the time spent by the attorney before the court of land registration. But, when one considers that the result of these efforts is the declaration of a title absolutely indefeasible and that
COMMENTS

The Virginia Torrens Act as enacted by the General Assembly nearly six decades ago provides a viable alternative to the present recording system. The decided advantages of registering a title under the Torrens Act has been the main thesis of this comment. The Act provides for a judicial determination of title rather than an unofficial examination by the grantee's attorney as is the usual case under the present record system. The Act makes unnecessary the repeated examinations of the same title as a given parcel of land changes hands. The Act also obviates the necessity of "searching" a title back to the original certificate, since each Torrens certificate is conclusive proof of the state of the current title. The Act further provides for an assurance fund which serves as insurance against loss. The Act makes mandatory the maintenance of the original certificate of title at the registrar's office in the city or county wherein the land is located, thus greatly facilitating the quick determination of the status of a title. Finally, the cost of initial registration has been found to be relatively comparable to the cost of recording a deed, with the additional advantage that further conveyances of the registered land are considerably less expensive and time consuming to all the parties involved in the transaction.

With the value of the Torrens Act clearly demonstrated, why has utilization of the Act remained dormant for so long? The primary obstacle to full implementation of the provisions of the Act is the Bar's unfamiliarity with the necessity of obtaining costly title insurance has been avoided, the additional cost is well worth the expense.

131. "Besides clearing and registering the title and facilitating its transfer, the Torrens system practically guarantees, in behalf of the state, that the holder of a registered title has an absolute and indefeasible interest which can never be questioned on any ground whatever." Robbins, The Torrens System, 54 CENT. L.J. 282, 290 (1902). See also Swartzel, The Torrens Title Registration Lessens Litigation, 19 Ohio L. Bull. 679 (1922).


133. For one noted author's opinion as to the reason why the Torrens law has remained inactive see McCall, The Torrens System - After Thirty-Five Years, 10 N.C.L. Rev. 329, 341-50 (1932). An examination of the register of titles in Richmond revealed that only seventeen titles have been registered since the first title was registered in 1916. Six titles have been subsequently removed from the operation of the Act. Similar experiences were found in several other localities in the state.
with the system. In a recent survey, it was found that thirty-five percent of the Virginia lawyers questioned knew of the Torrens system of title registration and forty-two percent of those questioned were familiar with the fact that the Act is enacted into statute in Virginia. Because of this unfamiliarity on the part of those professionals who handle real estate matters, the lay public knows even less about its existence and provisions.

In addition to this general unfamiliarity with the Act, early active opposition on the part of certain vested interest groups, most notably real estate attorneys, title insurance companies, abstract companies, banks and mortgage institutions, cast the Act seemingly forever in an unfavorable light. Yet the anticipated threat to both the prestige and revenue of these vested interest groups never materialized, even in those states where there is active and extensive use of the Act.

It would appear that all three elements, unfamiliarity by the Bar, opposition by vested interests and public inertia, have contributed to its virtual stagnation. This fact is unfortunate. The Act has demonstrated its value in all of the foreign nations which have enacted a Torrens law. In those states which have actively used the Torrens system, successful experience

134. See Maher, supra note 132, at 162; McCall, supra note 133, at 347; Massie, supra note 26, at 367.

135. The survey, conducted during the month of August, 1974, canvassed the entire Property and Trust section of the Virginia State Bar, 110 attorneys.

136. See McCall, supra note 133, at 342-47. In analyzing the apparent inertia of the Torrens system as far as public use is involved, another factor to be considered is that the registration proceedings "savor strongly of a lawsuit." In particular, the "owner of property, the title to which is in a state of quiescence and is reasonably well-established according to the public records, hesitates to extend a call to the world at large and to his neighbors (the adjoining owners) in particular to come forward and present any objections they may have to his ownership of the land." Id. at 345. See also Note, The Torrens System of Land Registration in Virginia, 14 Va. L. Rev. 675, 677 (1928).

137. See Heinrich at 336; McCall, supra note 133, at 349.

138. "It is difficult to believe that fear of pecuniary loss is the sole, or even the primary, reason for the opposition of lawyers. This element enters into the feelings of many, perhaps, but lawyers have often submerged personal interests for the purpose of improving the law. Certainly this factor alone does not account for the widespread disapproval of land registration among attorneys." Heinrich at 337.

has been reported.\textsuperscript{140} The Torrens law addresses itself to many of the inherent weaknesses found in the present-day recording acts. Yet the Act must be actively implemented before its true value can be ascertained.\textsuperscript{141} It is in seeking this implementation that the members of the Virginia Bar must play an active role. The Torrens Act is deserving of serious consideration. The modernization of real property law is of vital interest to the Commonwealth and its citizens. It falls to the shoulders of Virginia attorneys, both as "legislators and as educators of the public in the law,"\textsuperscript{142} to decide whether they are "willing to let this great department of our law remain in its present condition - chaotic, uncertain, complex, and abounding in subtleties and refinements; and this, although it is practicable to make it as simple, clear and certain as any other part of our laws."\textsuperscript{143}

\textit{J.V.B. II}

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140. For the experience of just one state, North Carolina, see McCall, \textit{The Torrens System-After Thirty-Five Years}, 10 N.C.L. Rev. 329 (1932).
141. More than likely, as the system is vitalized those sections of the Act which are not particularly adaptable to Virginia's present conveyancing needs will become readily apparent and thus easily amendable. It is contended, however, that if never used, the advantages or disadvantages of the Act's suitability to Virginia will never be known. Furthermore, the actual mechanics of the Act may appear to be unduly cumbersome only because the typical practitioner is unfamiliar with it and in this particular instance, unfamiliarity breeds contempt. See Heinrich, at 337-38.
142. Heinrich, at 338.
143. Massie, \textit{supra} note 26, at 367.
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