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## Registration-of-Land-Titles Act: The Ohio Torrens Law

Leona M. Hudak\*

THE ORIGINAL REGISTRATION OF LAND TITLES ACT was adopted by the Ohio legislature in 1896.<sup>1</sup> Commonly known as "the Torrens Law"<sup>2</sup> or "the land registration law"<sup>3</sup> in this and the other states where it has been promulgated, it comprises Chapters 5309 and 5310 of the Ohio Revised Code (ORC). These statutes are not to be confused with the general recording laws of the state which apply to the recording of instruments conveying, encumbering, or otherwise affecting title to real property.<sup>4</sup>

The basic difference between the two is that under the Torrens Law the *title* to land is registered, while under the latter, the *evidence* of such title (i.e., deed) or matters affecting it, are recorded. It should be emphasized that the Torrens Law is not a mere modification of the Ohio recording laws, but a separate and distinct system. In Cuyahoga County, for example, approximately 40,000 parcels of realty are registered in accordance with the provisions of ORC 5309 and 5310; some 385,000 others follow the general recording statutes.<sup>5</sup> In Ohio, as in other states, registration of land has been mostly confined to large urban areas.<sup>6</sup>

The purpose of registration of land under the Torrens system is to make its title readily ascertainable to third parties<sup>7</sup> by means of an official certificate on file in the county recorder's office, which shows the exact status of the title to the land in question and does away with secret liens and hidden equities.<sup>8</sup>

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<sup>1</sup> Maher, *Registered Lands Revisited*, 8 W. Res. L. Rev. 162 (1957). It was declared unconstitutional in *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 575, 47 N.E. 551 (1897). In 1912 the Ohio Constitution, Art. II § 40 was amended to permit the passage of laws providing for such a system of land title registration. It conferred judicial powers upon county recorders and county engineers in certain matters arising under its operation. See OHIO REV. CODE §§ 5309.03 and 5309.20.

<sup>2</sup> This method of registering title to land is named after Sir Robert Torrens, who drew up the first "Torrens Law" which was enacted in 1858 in South Australia. It was patterned after an Australian practice of certification of ships which visited various ports where they were exposed to the imposition of liens. The system of transferring title to the ships made their marketability very successful. Sir Torrens applied the same principle to land. Maher, *supra* note 1.

<sup>3</sup> 47 OHIO JUR. 2d, *Registration of Land Titles*, § 1, at 190 (1961).

<sup>4</sup> See 47 OHIO JUR. 2d, *Records and Recording*, § 23 *et seq.* (1961).

<sup>5</sup> Personal interview with Mr. Alex Carlino, Ass't Supervisor, Torrens Examiners, Cuyahoga County Recorders Office, on May 5, 1971.

<sup>6</sup> Maher, *supra* note 1, at 169; R. KRATOVIL, *REAL ESTATE LAW*, at 154 (5th ed. 1969).

<sup>7</sup> Amrich v. Boyle, 136 Ohio St. 325, 25 N.E.2d 850 (1940); 47 OHIO JUR. 2d, *supra* note 3, § 2, at 191.

<sup>8</sup> Curry v. Lybarger, 133 Ohio St. 55, 11 N.E.2d 873 (1937); 47 OHIO JUR. 2d, *supra* note 3, § 2 at 191. Hale v. McChesney, 100 N.E.2d 95 (C.P., Summit County, 1951) has held that the purpose of the Torrens Act is to secure by decree of court a title

(Continued on next page)

## The Original Registration

### 1. Parties

Any person or corporation<sup>9</sup> who is seized of a fee interest or a perpetual leasehold estate in land<sup>10</sup> may personally or through his authorized agent have title to this land registered in the county where the land is situated.<sup>11</sup> If the title is to be registered under the Torrens system for the first time, an application has to be made by complaint, as in the commencement of any civil action, filed in the probate or common pleas court.<sup>12</sup>

All persons on whose behalf the application is made are designated as plaintiffs.<sup>13</sup> If more than one person joins in the application, each must have a common and like interest in the property.<sup>14</sup> If the applicant derived title from a tax sale or tax deed, it must have been established and confirmed by a valid judgment or decree of a court of competent jurisdiction; or it must show that the applicant and those from whom he claims title have been in the actual, undisputed, and adverse possession of the land under such title for at least twenty-one years and have paid all taxes and assessments legally levied against the property for at least ten years preceding the filing of the application.<sup>15</sup>

If the applicant is married, his or her spouse must give assent to the registration by an indorsement on the application, witnessed and acknowledged in the same manner as a deed; or by a separate instrument similarly witnessed and acknowledged, which is filed with the application. If the applicant and spouse are separated and living apart, or either one refuses to consent to the application of the other, such assent is not necessary. The nonassenting spouse is simply named a party defendant.<sup>16</sup>

A nonresident may apply to register title to land by appointing a resident as his agent and giving the latter's address, so that service of notice can be made in any matter arising in connection with the application.<sup>17</sup>

(Continued from preceding page)

to land impregnable against attack, to make a permanent and complete record of exact status of title, with all liens, and encumbrances and claims against it, and to protect registered owners against all claims or demands not noted on the back of the registration of titles.

<sup>9</sup> OHIO REV. CODE § 5309.05.

<sup>10</sup> *Id.* § 5309.06.

<sup>11</sup> *Id.* § 5309.05. A person or persons may deal through an attorney in fact, authorized by an instrument signed, witnessed, acknowledged, and recorded as a deed. A corporation may deal through its agent or attorney, authorized by vote of its board of directors. Any person under disability may apply by his legal guardian or trustee.

<sup>12</sup> OHIO REV. CODE § 5309.08; 47 OHIO JUR. 2d, *supra* note 3, § 11 at 200; OHIO REV. CODE § 5309.02 confers concurrent jurisdiction on the courts of common pleas and probate in all matters relating to registered lands; 47 OHIO JUR. 2d, *supra*, note 3, § 8 at 198. OHIO REV. CODE § 5309.09 gives a detailed list of data which make up the contents of the application.

<sup>13</sup> OHIO REV. CODE § 5309.05; 47 OHIO JUR. 2d, *supra* note 3, § 9 at 199.

<sup>14</sup> *Id.* § 5309.08; 47 OHIO JUR. 2d, *supra* note 3, § 9 at 199.

<sup>15</sup> *Id.* § 5309.07.

<sup>16</sup> *Id.* § 5309.10; 47 OHIO JUR. 2d, *supra* note 3, § 9 at 199-200.

<sup>17</sup> *Id.* § 5309.11.

All persons having an interest or claiming to have an interest in the land, whom the decree will affect, other than the plaintiff-applicant and his assenting spouse, along with owners of adjoining and/or abutting property, including governmental bodies with roadways, are joined as parties defendant. All persons not so named are included and designated as defendants under the caption "all other persons, if any, having any right or interest in or lien upon the lands, or having any part thereof, described herein." Defendants under disability are represented by guardians ad litem or trustees,<sup>18</sup> whose duties, compensation,<sup>19</sup> and fees<sup>20</sup> are governed by statute.

### 2. Nature of the Action

The complaint, filed in the probate or common pleas court, is in the form of an application. The action—in-rem—<sup>21</sup> is similar to a suit to quiet title to the land involved in the applicant, although the procedure and requirements differ.<sup>22</sup> The contents<sup>23</sup> of the application are governed in minute detail by statute, as are its filing, recording, and indexing.<sup>24</sup> Plats of survey and an abstract of title for 75 years prior to filing must accompany the application.<sup>25</sup> If the applicant dies before the final decree, the proceeding continues in the name of his surviving spouse, heirs, and/or devisees.<sup>26</sup>

Anyone claiming an interest in the land or anyone who may be affected by a decree allowing registration of its title may file an answer or cross-petition to the application on or before the answer day,<sup>27</sup> or at a time set by the court, which shall set out his objections, his claimed interest, and/or his desired relief, including demand for registration of title in his name. Such pleading must be under oath and subscribed by the maker.<sup>28</sup>

### 3. Notice

Generally, all notices under the Ohio Torrens Law are served as required by the rules for service of summons or like notices. Interested parties may waive notice and enter appearances as in other civil actions, in which service of notice is dispensed with.<sup>29</sup> Additionally, the clerk of court must advertise in a newspaper of general circulation, cause copies of such notice to be sent to defendants by registered mail, and cause his attested copy of such notice to be posted in a conspicuous

<sup>18</sup> *Id.* § 5309.12.

<sup>19</sup> *Id.* § 5309.17.

<sup>20</sup> *Id.* § 5309.15.

<sup>21</sup> *Stewart v. Kellough*, 104 Ohio St. 347, 135 N.E. 608 (1922).

<sup>22</sup> *Levenson v. Wolfson*, 42 Ohio App. 318, 182 N.E. 111 (1931); *Maher*, *supra* note 1, at 165; 47 OHIO JUR. 2d, *supra* note 3, § 7 at 197.

<sup>23</sup> OHIO REV. CODE § 5309.09.

<sup>24</sup> *Id.* §§ 5309.08, 5309.13.

<sup>25</sup> *Id.* § 5309.09.

<sup>26</sup> *Id.* § 5309.22.

<sup>27</sup> *Id.* § 5309.16, q. v. for a detailed analysis of what constitutes answer day.

<sup>28</sup> OHIO REV. CODE § 5309.18; 47 OHIO JUR. 2d, *supra* note 3, § 11 at 200-201.

<sup>29</sup> *Id.* § 5309.94; 47 OHIO JUR. 2d, *supra* note 3, § 13 at 202.

place on the parcel of land included in the application—at least 14 days before answer day.<sup>30</sup>

#### 4. *Examiners of Title*

The court of common pleas of each county has authority to appoint attorneys at law to serve as examiners of title. Their qualifications, bonds, powers, duties, and fees are set by statute.<sup>31</sup>

After an application to register land is filed, the court orders it referred to an examiner, who personally searches the records for the past 75 years and thoroughly investigates all facts stated and all allegations made in the petition, or otherwise brought to his attention. He may join other necessary parties as defendants by amendment to the application or by court order. At the conclusion of his investigation, he files a report with the clerk of court, concluding with a certificate of his opinion regarding the title and the necessity—or lack thereof—for a resurvey of the land.

If his opinion is adverse to the applicant, the latter is allowed a reasonable time in which to elect to prosecute his action further, or to withdraw his application.<sup>32</sup>

If a defendant's answer raises an issue, either party may move for a hearing thereon, for which an examiner may be appointed to act as master, who subsequently has to submit a report of the evidence and his findings to the court.<sup>33</sup>

The court may order a survey made by the county engineer to determine boundaries and to prepare a more accurate and definite description of the land. It may also order durable monuments to be set by the engineer and referred to in the description. The expense of the survey and monuments—taxed as costs of the case—may be apportioned among litigants or be borne by the applicant. Notice is given to interested parties prior to the survey. The engineer is authorized to call witnesses, administer oaths, and take evidence, pursuant to the survey. His report, which indicates the existence or nonexistence of any dispute over boundary lines, is filed with the court.<sup>34</sup>

If, after his examination is over, in the opinion of the examiner, the applicant has a good title proper for registration, or if the applicant elects to proceed further in the face of an adverse opinion, the clerk of court must give notice of the application's substance and prayer in a newspaper of general circulation, designated by the applicant and at his expense, in the county where the land lies.<sup>35</sup>

#### 5. *Decree by Default; Finality of Order*

If no one files a timely answer or other plea to the application, made under the Torrens Law, the court may, upon motion of the applicant, order (1) a general default to be recorded (2) the application to

<sup>30</sup> *Id.* § 5309.16.

<sup>31</sup> *Id.* § 5309.04.

<sup>32</sup> *Id.* § 5309.14.

<sup>33</sup> *Id.* § 5309.20; 47 OHIO JUR. 2d, *supra* note 3, § 12 at 201-202.

<sup>34</sup> *Id.*

<sup>35</sup> OHIO REV. CODE § 5309.15; 47 OHIO JUR. 2d, *supra* note 3, § 13 at 202-203.

be taken for confessed (3) a decree to be entered confirming petitioner's title and registration of same, and (4) issuance of an original certificate of title by the county recorder, to the extent of the title so found. A final court order is contingent upon favorable certification by the title examiner, which is itself subject to court review.<sup>36</sup>

#### 6. Effect of Decree of Dismissal

If the court determines that the applicant does not have a title proper for registration, it may enter a decree, with or without prejudice, dismissing the application, in whole or in part, which shall bind the parties, their privies, and the land in respect to the issues tried and determined. A dismissal does not affect a cross-petition; it proceeds in the same manner as the original application. Applicable statutes of limitation in regard to the recovery of possession or title to any interest in land, or the enforcement of any lien or charge on such land, control and are given effect only in favor of or against the applicant.<sup>37</sup>

#### Operation and Effect of Registration

After the expiration of the time for appeal, the decree in rem of confirmation and registration of title is *absolutely conclusive* against all persons to the extent of the title so found, except if a person was deprived of land or any interest therein by a decree of registration obtained by fraud. In such case, the injured party may petition for a review within one year—or forever be barred—if no innocent purchaser for value, mortgagee, or other lienholder has acquired an interest in this land. If one has, the aggrieved party must proceed in tort against the wrongdoer (s).<sup>38</sup>

The contents and indexing by the clerk of courts of the decree of land registration are governed by statute.<sup>39</sup> Upon journalization of the decree, the clerk of court must send a certified copy thereof, under court seal, to the county recorder, who transcribes or binds the decree in the register of titles. Each folio leaf or folium of the register is exclusively devoted to one title certificate, numbered consecutively. All memorials and notations pursuant to ORC 5309.02 through 5309.21 are entered on the folium constituting the last certificate of title to the land to which they relate. The recorder is authorized to make an exact duplicate, designated "Owner's Duplicate Certificate," and deliver it to the owner of the land or his attorney.<sup>40</sup>

A certificate of title *first* registered under the Torrens system must be designated "Original Certificate of Title . . ." in the register. Subsequent certificates to the same land are cross-referenced from the previous folium number *and* the original certificate number. Duplicate certificates may be issued to holders of lesser estates. Notations are made on the register of what duplicates are made and to whom they are issued.

<sup>36</sup> *Id.* §§ 5309.19, 5309.23.

<sup>37</sup> *Id.* § 5309.21.

<sup>38</sup> OHIO REV. CODE § 5309.23; 47 OHIO JUR. 2d, *supra* note 3, § 16 at 207-208.

<sup>39</sup> OHIO REV. CODE § 5309.24.

<sup>40</sup> *Id.* § 5309.25.

All certificates of title must contain an accurate plat and a clear, accurate description of the lands they represent.<sup>41</sup>

The county recorder must also obtain a signed and witnessed card from the owner of registered property, right, interest, lien, or charge—wherever practicable—giving his address. The card is kept on file by the recorder for verification of the genuineness of such person's signature in later transactions.<sup>42</sup>

A decree of registration and certificate of title, by provision of the Torrens Law, constitute an agreement running with the land which is binding on the applicant and his successors in title. All subsequent dealings with the registered land or any interest therein and all liens, encumbrances, and charges upon it are subject to the terms of the Law.<sup>43</sup>

Every applicant who without fraud on his part receives a certificate of title to land, pursuant to a decree of registration, and every subsequent purchaser for value of this land, shall hold the land free from all estates, encumbrances, and rights, except those noted and certain others specified in the land which may be in existence.<sup>44</sup> The official certificate of title and any certified copies thereof show the complete status of the title to the registered land.<sup>45</sup> The certificate indicates that the successful applicant has a right of property in the land to the exclusion of all other persons.<sup>46</sup> It is received as evidence in all the courts of the state and is considered conclusive as to all matters contained therein.<sup>47</sup> The status of the land, however, remains the same, as do the burdens and incidents attached to it.

Perhaps the most important statute within the Torrens Law is ORC 5309.34, which provides that no transferee of registered land, or any interest therein, or of any charge upon such land, 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. The transferee is not charged with notice of any unregistered interest. Even the knowledge that such interest exists will not impute fraud to the transferee if he takes title in good faith.

### The State of Ohio Assurance Fund

Before the county recorder issues to the successful applicant an original certificate of title, the latter must deposit with the clerk of courts an amount equal to 1/10 of 1% of the last assessment for general taxation of the registered property. The clerk transmits this money to the State Assurance Fund, in the state treasurer's office, which, in turn, invests it in certain securities specified by statute.<sup>48</sup>

<sup>41</sup> *Id.* § 5309.26.

<sup>42</sup> *Id.* § 5309.30.

<sup>43</sup> *Id.* § 5309.29.

<sup>44</sup> *Id.* § 5309.28; 47 OHIO JUR. 2d, *supra* note 3, § 16 at 207-208.

<sup>45</sup> *Vinewood Realty Co. v. Willowick*, 70 Ohio App. 74, 45 N.E.2d 148 (1942); 47 OHIO JUR. 2d, *supra* note 3, § 16 at 209.

<sup>46</sup> *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 575, 47 N.E. 551 (1897); 47 OHIO JUR. 2d, *supra* note 3, § 16 at 209.

<sup>47</sup> OHIO REV. CODE, § 5310.03.

<sup>48</sup> 47 OHIO JUR. 2d, *supra* note 3, § 20 at 213.

Any person who, without negligence on his part, sustains loss or damage or is deprived of land or any interest therein, *after* the original registration of land, through fraud, error, omission, mistake, or misdescription in any certificate of title or in any entry in the register of titles, may bring an action in the common pleas court of the county where the land is situated against the treasurer of state and such officers and the sureties on their bonds as are within the jurisdiction of the court, to be compensated for his loss or damage.<sup>49</sup>

The attorney general shall appear and defend such action.<sup>50</sup> Where there are defendants other than the state treasurer, execution must be levied against them first. The unsatisfied portion of the judgment is then paid out of the assurance fund.<sup>51</sup> If at any time moneys therein are insufficient to pay any judgment in full, the unpaid balance gathers interest at the legal rate and is reimbursed with such interest out of the first assets coming into the fund.<sup>52</sup>

The statute of limitations on filing an action of this nature is six years from the time it accrued. If the person entitled to bring such an action is under a disability of minority, insanity, imprisonment, or service in the United States military forces, he may prosecute it within two years after the disability is removed.<sup>53</sup>

The filing of the above action against governmental officials acting within the scope of their duty does not preclude the complainant from suing other wrongdoers in tort for his loss, damage or deprivation of land or of any interest therein.<sup>54</sup>

A caveat in regard to these actions is in order. The aggrieved party must exhaust all actions and other remedies available to him before he can resort to suing the state in contract.<sup>55</sup>

### Subsequent Transfers

Once title to land has been registered under the Torrens system, every subsequent transferee, mortgagee, lessee, and encumbrancer holds subject to those interests which have been entered upon the registered certificate of title prior to such transfer.<sup>56</sup> A bona fide purchaser of registered land has the right to rely solely on the certificate of title, and he is not charged with liens not noted thereon.<sup>57</sup> No unregistered estate, interest, power, right, claim, contract, or trust can prevail against the title of a registered owner taken bona fide, for valuable consideration, or of any person bona fide claiming through or under him.<sup>58</sup>

<sup>49</sup> OHIO REV. CODE §§ 5310.05, 5310.06.

<sup>50</sup> *Id.* §§ 5310.07, 5310.08.

<sup>51</sup> *Id.* § 5310.09.

<sup>52</sup> *Id.* § 5310.10.

<sup>53</sup> *Id.* § 5310.12.

<sup>54</sup> *Id.* § 5310.07.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* § 5310.02.

<sup>57</sup> *Max v. Mitchell*, 6 Ohio L. Abs. 355 (1928); *Kohrmann v. Rausch*, 75 Ohio L. Abs. 113, 138 N.E.2d 22 (1956); *Annot.*, 42 A.L.R.2d 1387 (1955); 47 OHIO JUR. 2d, *supra* note 3, § 26 at 222.

<sup>58</sup> OHIO REV. CODE § 5309.34; 47 OHIO JUR. 2d, *supra* note 3, § 26 at 222.



Transfers of registered lands are made or entered in the county auditor's office and are subject to the same requirements and fees as provided by law for unregistered land.<sup>59</sup>

When a registered owner of a fee in real property wants to transfer his interest, he has to execute a deed or instrument of conveyance to the transferee. This may be done on his duplicate certificate of title in any form authorized by law. The transferee then has to present this instrument to the county recorder where the land is situated. If the latter finds that the transferor is entitled to make the transfer, he registers the title on a new folium in the register and enters thereon all memorials, notations, and memoranda to which the land is subject at the time of the transfer. He then issues a new certificate of title to the transferee, listing on it the latter's full name, address, marital status, and name of spouse.<sup>60</sup>

Before the transfer can be registered, either the transferor or the transferee has to deliver the transferor's duplicate certificate of title to the recorder. The recorder has to enter upon the appropriate folium of the register and upon the transferor's duplicate a memorandum cancelling the same, with such particulars of the transfer necessary for identification, including a cross-reference to the volume and folium of the register where the transferee's title appears.<sup>61</sup> The cancelled certificate of title is filed by its number in the recorder's office and preserved.<sup>62</sup>

The production of the owner's duplicate is authority from the registered owner to the recorder to enter a new certificate, which is binding upon the registered owner and upon all persons claiming under him, in favor of every bona fide purchaser for value and in favor of all persons holding under him.<sup>63</sup>

If the owner of registered land wants to transfer only a part of it, his certificate is cancelled; and new ones are issued by the recorder: one to him for the retained portion of the land and the other to the purchaser of the remainder.<sup>64</sup>

If the owner of registered land wishes to convey an estate less than a fee, he does so by means of a lawfully executed instrument, which contains the number of his certificate and other identification. The transferee of such estate presents this conveyance, together with the owner's duplicate certificate of title, to the county recorder, who memorializes the transferee's interest, giving all necessary data, upon the proper folium of the register and upon the reverse side of the owner's duplicate certificate.<sup>65</sup>

When an owner of registered land dies, testate or intestate, someone on behalf of his estate must, after the expiration of 30 days from

<sup>59</sup> OHIO REV. CODE § 5309.37.

<sup>60</sup> *Id.* § 5309.40.

<sup>61</sup> *Id.* and § 5309.44.

<sup>62</sup> OHIO REV. CODE § 5309.41.

<sup>63</sup> *Id.* § 5309.44.

<sup>64</sup> *Id.* § 5309.40.

<sup>65</sup> *Id.* § 5309.42.

his death, apply to the probate court to have the title registered in his heirs and devisees according to their respective rights and interests. The decree of registration and certificate issued pursuant to this application are subject to the final settlement of the estate, which memorandum is cancelled when the act is accomplished.<sup>66</sup> If the will of the deceased owner empowers the executor to sell the registered property, the latter may deal with it as directed therein. The person who acquires title by virtue of such execution must then apply to the probate court, after notice to all interested parties, to have it registered and transferred.<sup>67</sup>

### Liens, Encumbrances, and Other Charges on Torrenized Land

Except as provided in ORC 5309.28, a Torrenized parcel of land is not subject to any mortgages, liens, and charges not memorialized on the registered certificate of title.<sup>68</sup> Also, no statutory or other liens, except taxes and assessments lawfully levied, and claims, or rights arising or existing under the laws or Constitution of the United States, prior to October 4, 1933, shall affect the title to such land, until after such lien is noted upon the registered certificate of title.<sup>69</sup> Thus, the controlling date of the lien is the date of its memorialization by the recorder in the register.<sup>70</sup> This applies to all charges against the land, including mechanic's liens, even though the Mechanic's Lien Law provides that workmen's liens shall attach from the date the labor was first performed or the material furnished.<sup>71</sup> Where the Mechanic's Lien Law and the Torrens Law conflict, the latter governs.<sup>72</sup>

The lien first to be noted on the certificate of title in the register is superior to the others.<sup>73</sup> The Torrens Law makes no provision for priorities of involuntary instruments.<sup>74</sup> It does, however, make express provision for entry and discharge of liens, encumbrances, judgments, executions, attachments, etc.<sup>75</sup> No suit, action, or proceeding in any court in regard to Torrenized land is a *lis pendens* or a notice to any person dealing with the land until a certificate of the pendency of the suit is filed with the recorder and memorialized by him on the last registered certificate of title to such land.<sup>76</sup>

<sup>66</sup> *Id.* § 5309.45.

<sup>67</sup> *Id.* § 5309.46.

<sup>68</sup> *Id.* § 5309.28.

<sup>69</sup> *Id.* §§ 5309.57, 5309.93; 47 OHIO JUR. 2d, *supra* note 3, § 24 at 218 and § 25 at 220.

<sup>70</sup> Gough Lumber Co. v. Crawford, 124 Ohio St. 46, 176 N.E. 677 (1931); 47 OHIO JUR. 2d, *supra* note 3, § 24 at 218-219.

<sup>71</sup> OHIO REV. CODE § 5309.57; 47 OHIO JUR. 2d 219, 220; *cf.* with 36 OHIO JUR. 2d 546, *Mechanic's Liens* § 94 (1959).

<sup>72</sup> Becker v. Wilson, 30 Ohio App. 340, 165 N.E. 108 (1929); Mizener v. Paul, 29 O.C.A. 33, 40 O.C.C. 484 (1918); 47 OHIO JUR. 2d, *supra* note 3, § 25 at 221.

<sup>73</sup> Gough Lumber Co. v. Crawford, 124 Ohio St. 46, 176 N.E. 677 (1931). Thus, a duly memorialized mortgage is prior to a mechanic's lien, entered later, although the work or labor were performed before the date of entry of the mortgage.

<sup>74</sup> *Id.*

<sup>75</sup> OHIO REV. CODE §§ 5309.47, 5309.56; 47 OHIO JUR. 2d, *supra* note 3, § 24 at 219-220.

<sup>76</sup> OHIO REV. CODE § 5309.58. Kohrman v. Rausch, 75 Ohio L. Abs. 113, 138 N.E.2d 22 (1956); 47 OHIO JUR. 2d, *supra* note 3, § 19 at 212.

Whenever the county recorder enters a memorial or notation, pursuant to the Torrens Law, it is carried forward on all succeeding certificates of title until it is extinguished in some lawful manner.<sup>77</sup>

Several other provisions of the Torrens system need to be pointed out: Title to registered lands cannot be acquired by prescription or adverse possession.<sup>78</sup> Leases for less than three years are not noted on a certificate of title.<sup>79</sup> A land contract holder in possession may file a certificate of adverse claim under ORC 5309.72 to protect his interest. A trust may be declared in registered land and any interest therein, but it must be disclosed; a trustee wishing to deal with the land must apply to the court for a construction of the intent of the trust.<sup>80</sup>

### Withdrawal from Torrens

Having obtained an original decree of registration and a certificate of title, the owner and his successors in interest must comply with the provisions of the Torrens Law, which constitutes an agreement running with the land, as heretofore noted.<sup>81</sup> All subsequent dealings with the same land are subject to its applicable provisions.<sup>82</sup>

Since 1957, however, any owner of land with a registered title may request a withdrawal of the same from registration by presenting the county recorder with an affidavit of such intention, properly executed and signed, and containing a description of the realty. Attached thereto must be the owner's duplicate certificate. The recorder registers the affidavit, and subsequently, upon order of court, he cancels the certificate of record. The title is then the same as that of other unregistered lands. Deeds and mortgages on the land must also be recorded afterward under general recording statutes.<sup>83</sup>

### Advantages and Disadvantages of the Torrens Law

The proponents of Torrenization note that although the original registration process is somewhat costly, since it entails a court action, an official adjudication of title by a governmental body is the result with insurance against loss provided through the state Assurance Fund—a benefit passed on to all succeeding transferees. Subsequent title searches and examinations are obviated each time the property changes hands (but note that many lenders require a title insurance policy nevertheless, which costs \$55 to obtain as opposed to \$100 for the ordinary title examination), for each new certificate is conclusive, and errors of omission and commission are chargeable to the bonded official employees perpetrating them. The original certificate of title is always available at the county recorder's office for examination, thus making

<sup>77</sup> OHIO REV. CODE § 5309.36.

<sup>78</sup> *Id.* § 5309.69.

<sup>79</sup> *Id.* § 5309.28.

<sup>80</sup> *Id.* § 5309.69; 47 OHIO JUR. 2d, *supra* note 3, § 23 at 216.

<sup>81</sup> OHIO REV. CODE § 5309.28.

<sup>82</sup> *Id.* § 5309.68; 47 OHIO JUR. 2d, *supra* note 3, § 22 at 216.

<sup>83</sup> OHIO REV. CODE §§ 5309.29, 5309.90 provide that lands once registered shall forever remain so. This is a legislative oversight. See Webster, *The Withdrawal of Lands from the Torrens Act*, 18 OHIO ST. L. J. 473 (1957).

the status of the title readily and easily determinable. Conveyance of the land is less expensive to the parties in the transaction. Financial institutions which are asked to advance money on buildings under construction, do so in the knowledge that mechanics' liens will not be superior in priority to their mortgages. The statutes within the Law are detailed, comprehensive and easy to follow, leaving little room for human error and obviating the need for construction and interpretation by the courts.<sup>84</sup> Transfer of ownership can be effected more speedily than under the conventional method. Administrative and clerical processes are thorough, and titles are freer from defect than those that are not registered.

Opponents of the Torrens Law note that the general purchaser of realty—the ordinary prudent man—distrustful of courts and lawyers, is loath to spend a great deal of time and money to prosecute a law suit simply to clear a title (a hazy concept to him). Resistant to change, he would rather rely—as he perhaps has done in the past—on title insurance and his land title search company.

Financial institutions have had to split their security, in cases of "blanket" mortgages applied for by borrowers, where one of the properties is registered. Such a mortgage cannot be imposed because no instrument affecting registered lands can be accepted by the county recorder unless it relates to these lands exclusively.

Another problem has arisen in regard to mortgages insured by federal governmental agencies. These are traded on a national scale, but the system of Torrenizing land in the various states where the legislature has promulgated the law is not uniform. Thus, a registered title is generally not accepted on the national market, and the buyer is forced to obtain an American Title Association policy—which is uniform in all states—to supplement it. This hikes the expense of transferring registered land on to a par with the registered.<sup>85</sup>

One of the most persistent attacks on the Torrens Law in the states where it exists has been in the form of questioning the constitutionality of the alleged taking of property without due process of law.<sup>86</sup> These actions have 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. However, the general statutory rules of procedure in regard to notifying such claimants have been held constitutional, and the actions have failed. Ohio, like other states, precluded further such objections to the Law by amending its constitution. This amendment also made provision for the granting of judicial powers to county recorders and other governmental officials, necessary to the administration of the various provisions of the Law.<sup>87</sup>

<sup>84</sup> Maher, *supra* note 1, at 162-4, 168-9.

<sup>85</sup> *Id.* at 169.

<sup>86</sup> 47 OHIO JUR. 2d 192; 45 AM. JUR. 659, *Registration of Land Titles* §5; Annot., 11 A.L.R. 772 (1921).

<sup>87</sup> 47 OHIO JUR. 2d, *supra* note 3, § 3 at 193; OHIO CONST., art. 2, § 40, which reads: "Laws may be passed providing for a system of registering, transferring, insuring,

(Continued on next page)

Other disadvantages are that a land title company still has to do a U.S. Court and Tax Examination each time registered land is transferred. In order to avail oneself of the Assurance Fund, an injured registered title owner has to exhaust all other remedies first. It appears difficult to make a successful claim against the State Title Examiner. The Assurance Fund monies are inadequate to meet claims.

### **Power of Attorney in Fact under the Torrens Law**

A deed constituting a power of attorney in fact under the system of registration of land titles differs from the code provision for an instrument granting such a power to deal in unregistered realty.<sup>88</sup> Under the Torrens system the instrument must state the full names of the principal and the attorney, their residences, and post office addresses, the number of the certificate of title outstanding, and the volume and folio of the register. It must also contain a description of the land, exactly as contained in the certificate, the powers conferred on the attorney, and be duly signed and acknowledged in the same manner as a deed.<sup>89</sup>

The instrument must then be filed with the recorder and a memorial thereof entered upon the registered certificate, giving exact time of filing. Such a power of attorney can be revoked, but it must be done in writing. The revocation will take effect only when filed with the recorder and memorialized on the certificate.<sup>90</sup> In like manner, death does not revoke the power of attorney until notice thereof is memorialized on the certificate.<sup>91</sup>

### **Appellate Review**

Anyone aggrieved by a proceeding under the Torrens Law in either the probate or common pleas court may appeal on both questions of law and fact or on questions of law directly to the court of appeals from either court. The proceedings are in all respects the same as those in other civil actions.<sup>92</sup>

Anyone aggrieved by an action, finding, or decision of the county recorder may appeal to the Common Pleas Court by filing with the recorder, within three days after his entry, a written notice of appeal and by filing in the Common Pleas Court a complaint and bond within ten days thereafter.<sup>93</sup>

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and guaranteeing land titles by the state or by the counties thereof, and for settling and determining adverse or other claims to and interests in lands the titles to which are so registered, insured, or guaranteed, and for the creation and collection of guarantee funds by fees to be assessed against lands, the titles to which are registered; and judicial powers with right of appeal may by law be conferred upon county recorders or other officials in matters arising under the operation of such system."

<sup>88</sup> Cf. OHIO REV. CODE § 1337.01 with OHIO REV. CODE § 5309.74 and § 5309.75. OHIO REV. CODE § 1337.01 provides that a power of attorney for the conveyance, mortgage, or lease of any estate or interest in real property, must be signed, attested, acknowledged, and certified in the same manner as deeds, mortgages, and leases.

<sup>89</sup> OHIO REV. CODE § 5309.75; 2 OHIO JUR. 2d, *Agency*, § 38, at 70 (1953).

<sup>90</sup> OHIO REV. CODE § 5309.74; 2 OHIO JUR. 2d, *supra* note 89, at 77, 81.

<sup>91</sup> OHIO REV. CODE § 5309.74; 2 OHIO JUR. 2d, *supra* note 89, at 82.

<sup>92</sup> OHIO REV. CODE § 5309.84; 47 OHIO JUR. 2d, *supra* note 3, § 27 at 224.

<sup>93</sup> OHIO REV. CODE § 5309.83; 47 OHIO JUR. 2d, *supra* note 3, § 27 at 224.

**Conclusion**

Proceedings in probate or in common pleas court on an application to register title to land under the Torrens system (Chapters 5309 and 5310, ORC) create and recognize one estate in land—the registered title in place of a legal and an equitable estate. A successful suit produces a government-issued certificate of title consisting of the original folium in the register and an owner's certificate, upon both of which the condition of the title is set forth according to law.

The owner's title to the estate or interest in land is thereafter indefeasible except as provided in the statute or through the burdens noted on the certificate.

The land in question is thereafter always transferred by an entry on the register and issuance of a new certificate to the transferee. To leave the system, the owner must petition the county recorder in the manner prescribed by statute.

Any lien, encumbrance, etc. attaching to the land after the original registration is invalid unless duly memorialized on the register.

An indemnity (assurance) fund contributed to by the original registered applicant protects Torrenized landholders by compensating them for losses occasioned by any operational error of omission or commission under the various provisions of the Registration of Land Titles Act.