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## Torrens Title in North Carolina - Maybe a Hundred Years Is Long Enough

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## **Torrens Title in North Carolina—Maybe a Hundred Years Is Long Enough**

JOHN V. ORTH\*

*For over a century, North Carolina property owners have been offered an alternative to the traditional deed and recording system. Title to land may instead be entered in the Torrens system of registered titles. Under the Torrens system, the court determines the state of the title and issues a certificate, which is held in the registry with a copy given to the registered owner. The certificate provides conclusive evidence of ownership and of any liens or encumbrances on the property. Unlike titles evidenced by deeds, Torrens titles are not subject to loss by adverse possession, and transfer of a Torrens title is a simple process of changing the certificate in the registry and issuing a new certificate. A darling of Progressive law reformers in the late nineteenth and early twentieth centuries, nineteen states eventually adopted the Torrens system, although many later had second thoughts and abandoned the system. In 1913, North Carolina became the tenth state to adopt a Torrens Act. North Carolina's experience with Torrens was in many ways typical: a Progressive campaign for adoption, complete with promises of economy and efficiency; adoption followed by a burst of registrations; dwindling registrations as the system's practical shortcomings became apparent; ultimate disuse except in rare (and somewhat questionable) circumstances. But unlike many other states that experimented with the Torrens system, North Carolina has not repealed its Torrens Law; at least not yet. Beginning in 2002, litigation in Eastern North Carolina has drawn renewed attention to the Torrens system and prompted questions about its continued usefulness in the state.*

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## INTRODUCTION

Throughout the long history of the common law, lawyers have labored to provide secure titles to land. In the earliest days, conveyancers used livery of seisin—transfer of title by the ceremonial delivery of a piece of turf cut from the land—to ensure public recognition of a change of ownership.<sup>1</sup> When deeds replaced livery as the means of conveyance, transfer out of the public view became possible, leading to uncertainties about the state of any given title. A brilliant conveyancer in the seventeenth century invented warranty deeds, including covenants for title,<sup>2</sup> and thus created a new standard practice in the real estate business.<sup>3</sup> Beginning in the last quarter of the nineteenth century, promoters organized title insurance companies, offering additional security.<sup>4</sup> But in both cases the remedy for loss of title is damages—against the covenantor or against the insurer—not possession of the land.<sup>5</sup> To assist in securing the right to

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1. See KENELM EDWARD DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY WITH ORIGINAL AUTHORITIES 146–52 (4th ed. 1892).

2. The history of covenants for title is traced to Sir Orlando Bridgman. RICHARD R. POWELL AND PATRICK J. ROHAN, POWELL ON REAL PROPERTY § 904, at 1035 n.51 (Abr. ed. 1968) (citing WILLIAM HENRY RAWLE, A PRACTICAL TREATISE ON THE LAW OF COVENANTS FOR TITLE § 13 (5th ed. 1887)). Bridgman (1608–1674) is also credited with having “invented the form of strict settlement employed by the dynastic landowning families until very recent times.” A.W.B. SIMPSON, BIOGRAPHICAL DICTIONARY OF THE COMMON LAW 76 (1984).

3. See 2 WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 23.02[1], at 23-6 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2016) [hereinafter WEBSTER'S VOL. 2] (“Most conveyances are by general warranty deed. The most numerous and common of the types of conveyances in an ordinary chain of title are those of general warranty.”).

4. Apparently in response to the decision in *Watson v. Muirhead*—holding a conveyancer not liable for a mistake based on a professional opinion—Pennsylvania authorized the offering of title insurance and the first title insurance company was organized in 1876. See *Watson v. Muirhead*, 57 Pa. 161, 168 (1868); Edward H. Cushman, *Torrens Titles and Title Insurance*, 85 U. PA. L. REV. 589, 607 (1937).

5. See 1 WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 11.06, at 11-7 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2016) [hereinafter WEBSTER'S VOL. 1]

possess, which is what good title confers, state legislatures created a system for the public recording of deeds, beginning with pioneering statutes in pre-Revolutionary Massachusetts.<sup>6</sup> Recording, which provided the opportunity to examine the evidence of title, coupled with legal protection of good faith purchasers against unrecorded deeds,<sup>7</sup> marked a major advance. Later, marketable title acts limited the necessary scope of the title search.<sup>8</sup> The recent computerization of land records now makes searches much easier.<sup>9</sup> Finally, statutes of limitation barring untimely claims created the possibility of “limitation titles”<sup>10</sup>—titles not derived from prior owners but giving possessors original titles enforceable at law.<sup>11</sup>

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(“The usual recovery for breach of a covenant of seisin, or for breach of the covenant of the right to convey, is the purchase money paid to the covenantor, plus interest thereon.”); *see also* WEBSTER’S VOL. 2, *supra* note 3, § 27.14, at 27-21 to 27-22 (“Under an owner’s policy of title insurance, the measure of damages for actual loss due to complete failure of title is the lesser of the fair market value of the property or the title policy limit.”).

6. *See* George L. Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U. L. REV. 281 (1941). *See also* Statute of Enrollments, 27 Hen. VIII, ch. 16 (1535) (requiring the enrollment of transfers of estates “of enheritaunce and freehold”). Sir Francis Moore’s invention of conveyance by lease and release, neither of which were subject to enrollment, rendered the statute nugatory. A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* 188–90 (2d ed. 1986).

7. A “pure race” recording act, such as the North Carolina Connor Act, protects the first to record against prior unrecorded deeds without reference to notice. N.C. GEN. STAT. § 47-18 (2015).

8. *See* LEWIS M. SIMES, *THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION: A TREATISE WITH MODEL ACTS 6–16* (1960). In North Carolina, Professor James Webster advocated the adoption of a marketable title act. James A. Webster, Jr., *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina via Marketable Title Legislation*, 44 N.C. L. REV. 89 (1965). The North Carolina General Assembly responded by adopting the Real Property Marketable Title Act in 1973. N.C. GEN. STAT. §§ 47B-1 to -9 (2015).

9. *See* WEBSTER’S VOL. 2, *supra* note 3, § 21.01, at 21-3 (“A paradigm shift in title examination has taken place and continues to evolve and improve because of the advent of user-friendly computer web pages and easily searchable data bases.”). The computerization of land records has led Professor Webster’s successors as editors of his treatise on North Carolina property law to question the continuing need for marketable title legislation. *Id.* § 25.01[2], at 25-3 to 25-5.

10. While the term never caught on in North Carolina, other states use “limitation title” to describe titles to land granted by a successful claim for adverse possession. *See, e.g.*, *Natural Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 198 (Tex. 2003) (discussing whether defendants had properly perfected a “limitation title” through adverse possession of a lapsed leasehold estate).

11. *See, e.g.*, N.C. GEN. STAT. § 1-40 (2015) (“No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other

This congeries of devices came together to provide a workable albeit cumbersome system. Beginning in the mid-nineteenth century in the then recently settled British colony of South Australia, where “land speculation” had led to “muddled titles,”<sup>12</sup> a new system developed that radically simplified the process for securing titles. Sir Robert Torrens created a new system of registered titles within the Real Property Act of 1858.<sup>13</sup> Apparently inspired by the straightforward process of documenting ownership in the shipping industry,<sup>14</sup> Torrens title is a government-certified title document for real property that supplants the traditional deed.<sup>15</sup> The official certificate of title resides in the registry and lists the exact state of the title, including any liens or encumbrances; the owner receives a duplicate certificate.<sup>16</sup> Spreading rapidly throughout Australia and other British colonies and today ubiquitous in the common law world, the Torrens system eventually reached the United States.<sup>17</sup>

A darling of American law reformers in the late nineteenth and early twentieth centuries, legislation first authorized Torrens titles in Illinois in 1895.<sup>18</sup> By 1917, eighteen more states made Torrens available.<sup>19</sup> So

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persons for 20 years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability.”)

12. BRUCE KERCHER, *AN UNRULY CHILD: A HISTORY OF LAW IN AUSTRALIA* 130 (1995) (describing the Torrens System as “Australia’s legal gift to bourgeois land holding”).

13. *Real Property Act 1858* (SA) (Austl.).

14. *See* 1 CLINTON P. FLICK, *ABSTRACT AND TITLE PRACTICE* § 221, at 188–89 (2d ed. 1958).

15. *See* ROBERT TORRENS, *AN ESSAY ON THE TRANSFER OF LAND BY REGISTRATION* 11 (1882) (The Torrens system creates a “registry of titles” instead of a “registry of deeds”).

16. *See* PETER BUTT, *LAND LAW* § 20.03, at 745 (6th ed. 2010) (“Torrens proposed a single document evidencing title to each parcel of land. On this document—the ‘certificate of title’—would be recorded all transactions affecting the land.”).

17. On Torrens’s export to Canada and for references to studies of its spread elsewhere, *see* GREG TAYLOR, *THE LAW OF THE LAND: THE ADVENT OF THE TORRENS SYSTEM IN CANADA* (2008).

18. An Act Concerning Land Titles, §§ 1–94, 1895 Ill. Laws 107, 107–29, *invalidated by* *People v. Chase*, 46 N.E. 454, 459 (Ill. 1896) (holding the statute unconstitutional because it attempted to confer judicial power on the registrar); 1897 Ill. Laws 141, *validated as revised*, *People v. Simon*, 52 N.E. 910 (Ill. 1898). Ohio’s Torrens Act, 1896 Ohio Laws 220, was also held unconstitutional. *State v. Guilbert*, 47 N.E. 551 (Ohio 1897) (holding the statute unconstitutional due to inadequate notice requirements). After the Ohio Constitution was amended in 1912, OHIO CONST. art. II, § 40, a new Torrens Act was passed in 1913, 1913 Ohio Laws 914.

19. California (1897), Massachusetts (1898), Oregon (1901), Minnesota (1901), Colorado (1903), Washington (1907), New York (1908), North Carolina (1913), Ohio (1913), Mississippi (1914), Nebraska (1915), South Carolina (1916), Virginia (1916), Georgia (1917), North Dakota (1917), South Dakota (1917), Tennessee (1917), and Utah

familiar was the system to the general public that the Progressive novelist Sinclair Lewis could casually refer to it in his 1922 best seller, *Babbitt*.<sup>20</sup> But, by then, enthusiasm for the system had already begun to fade. No more states joined the list of adoptees.<sup>21</sup>

In 1931 Professor Frederick C. McCall surveyed the American experience with the Torrens system over its first thirty-five years.<sup>22</sup> Based on information he gathered in the late 1920s from “practicing attorneys, judges, law professors, and registration officials in the various states,”<sup>23</sup> Professor McCall concluded that with few exceptions—notably Massachusetts and Minnesota<sup>24</sup>—legal practitioners rarely used Torrens titles. In fact, in several jurisdictions, he said “the law appears to have been still-born.”<sup>25</sup> Although the National Conference of Commissioners on Uniform State Laws adopted a Uniform Land Registration Act in 1916,<sup>26</sup> it came too late, and the Commissioners withdrew it as “obsolete” in 1934.<sup>27</sup>

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(1917). See Frederick C. McCall, *The Torrens System—After Thirty-Five Years*, 10 N.C. L. REV. 329, 329–30 (1931).

20. SINCLAIR LEWIS, *BABBITT* 168 (1922). George Babbitt, a fictional Midwestern real estate agent, attending a state meeting of realtors, learned “with startled awe . . . that he had been appointed a member of the Committee on Torrens Titles.” *Id.* For background on Sinclair Lewis, see RICHARD LINGEMAN, *SINCLAIR LEWIS: REBEL FROM MAIN STREET* 41–44, 335–45 (2002).

21. In 1917 the last five states—Georgia, North Dakota, South Dakota, Tennessee, and Utah—adopted the Torrens system. McCall, *supra* note 19, at 329–30.

22. *Id.* at 329.

23. *Id.* at 330 n.26.

24. *Id.* at 333 (The “[Torrens] system has probably been used more in Massachusetts than in any other state.”); *id.* at 333–34 (quoting a letter from “a prominent Minneapolis attorney” that the Torrens system “is used very extensively in the three larger counties of Minnesota”). See also Glendon J. Buscher, Jr., *One Hundred Years in the Law of the Land: A Retrospective of the Work of the Land Court Department of the Trial Court on the Occasion of Its One-Hundredth Anniversary*, 5 MASS. LEGAL HIST. 67, 89–90 (1999) (“The only state where Torrens now exists with any salience and regularity is Massachusetts.”); Dan Heilman, *Legal Matters: Torrens Law Cases Are Few but Crucial in Minnesota*, FIN. & COM. (Oct. 19, 2011, 2:02 PM), <http://finance-commerce.com/2011/10/legal-matters-torrens-law-cases-are-few-but-crucial-in-minnesota/> [<https://perma.cc/K7HD-JKS7>] (“The primary Torrens jurisdictions remaining in the U.S. are Massachusetts, Minnesota and Hawaii. In the Twin Cities [Minneapolis & St. Paul, Minn.], about 40 percent of the metro area is Torrens property.”).

25. McCall, *supra* note 19, at 343.

26. UNIFORM LAND REGISTRATION ACT (COMM. UNIF. STATE LAWS 1916), *reprinted in* 1916 A.B.A. REP. 428.

27. See 44TH CONFERENCE HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL MEETING 252–53 (1934) (reporting that only three states—Virginia, Utah, and Georgia (with modifications)—adopted the Uniform Act and that Utah abandoned the Act in 1933).

Not only did the surge of American adoptions cease, but over the decades since McCall wrote, almost half of the original adopting states repealed the system.<sup>28</sup> Even Illinois, once the pioneer, prohibited new registrations of Torrens titles as of January 1, 1992.<sup>29</sup>

### I. TORRENS TITLE COMES TO NORTH CAROLINA

North Carolina's experience with Torrens was in many ways typical: a Progressive campaign for adoption, complete with promises of economy and efficiency; adoption followed by a burst of registrations; second thoughts about the system as its practical shortcomings became apparent; and ultimate disuse except in rare (and somewhat questionable) circumstances. But unlike many other states that experimented with the Torrens system, North Carolina has not repealed its Torrens Law; at least not yet.

The campaign in North Carolina began early. North Carolina's reform-minded Chief Justice Walter Clark,<sup>30</sup> active in Progressive causes,<sup>31</sup> had been keeping track of progress at least since 1898 when Massachusetts

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28. John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 WM. MITCHELL L. REV. 61, 73 (1992) (“[Torrens] legislation has lapsed or has been repealed in nine [states].”). Six states—California, Mississippi, Nebraska, South Carolina, Tennessee, and Utah—were identified as having repealed their Torrens Acts prior to 1972. STAFF OF S. COMM. ON BANKING, HOUSING & URBAN AFFAIRS, 92D CONG., REP. ON MORTGAGE SETTLEMENT COSTS 22 n.40 (Comm. Print 1972). In addition, both North and South Dakota repealed their Acts in 1941. 1941 N.D. Laws 416; 1941 S.D. Sess. Laws ch. 217, § 2, 252.

29. Torrens Repeal Law, 1990 Ill. Laws 4001 (codified at 765 ILL. COMP. STAT. 40/1–9). See McCormack, *supra* note 28, at 65 n.11, 72 n.39, 106 (concluding that Torrens failed in Illinois because of incompetent personnel and that a recording system is cheaper and more efficient).

30. Walter Clark (1846–1924) served on the North Carolina Supreme Court from 1889 until his death in 1924, serving as Chief Justice from 1903 forward. See AUBREY LEE BROOKS, WALTER CLARK: FIGHTING JUDGE 60, 140 (1944); Willis P. Whichard, *A Place for Walter Clark in the American Judicial Tradition*, 63 N.C. L. REV. 287, 321–23 (1985).

31. At one time or another, Clark advocated the entire list of Progressive demands: (white) female suffrage, regulation of the railroads, nationalization of the telephone and telegraph, municipal ownership of utilities, postal savings banks, one-cent letter postage, popular election of senators, a graduated income tax, a tariff for revenue only, initiative, referendum, recall of elected officials (except judges), child labor laws, more public schools, extension of good roads, labor's right to organize, workers' compensation, the eight-hour day, and nationalization of energy sources (coal, oil, and water power). See BROOKS, *supra* note 30, at 93–98, 147–76, 183–84, 207–14.

adopted its Land Registration Act.<sup>32</sup> In 1910, writing to one of North Carolina's leading farmers, Clark described the advantages of the Torrens system.<sup>33</sup> He explained that the system "saves the expense of recording and proving deeds" as well as "the expense of having a title traced up and certified every time a conveyance is made."<sup>34</sup> The purchaser of a registered title, Clark explained, "gets a title that can not be questioned."<sup>35</sup> If the system were made available in North Carolina, he predicted that some landowners would "go into it" at once; the experience in states that had already adopted it, Clark wrote, is that "sooner or later they all go in."<sup>36</sup>

In 1913 North Carolina became the tenth state, and the first Southern state, to adopt a Torrens Act.<sup>37</sup> Similar to the procedure under other statutes, entry into the Torrens system in North Carolina begins with a petition to "the superior court of the county in which the land lies."<sup>38</sup> A petitioner in "peaceable possession of land within the State and claiming an estate of inheritance therein,"<sup>39</sup> provides a metes-and-bounds description of the land, a statement of how the land was acquired and whether it is presently occupied, and the names and addresses of all interested parties, including adjacent landowners.<sup>40</sup> The petitioner serves all interested parties with actual notice and others receive publication notice.<sup>41</sup> An official examiner of titles, who must be a licensed attorney,<sup>42</sup> holds a hearing and reports to the court on the state of the title.<sup>43</sup> If the examiner approves the

32. Letter from Heriot Clarkson to Walter Clark (Nov. 30, 1898), in 1 PAPERS OF WALTER CLARK 337 (Aubrey Lee Brooks & Hugh Talmage Lefler eds., 1948) (asking Clark to send a copy of the Massachusetts statute).

33. Letter from Walter Clark to S.H. Hobbs (Oct. 12, 1910), in 2 PAPERS OF WALTER CLARK 105 (Aubrey Lee Brooks & Hugh Talmage Lefler eds., 1950).

34. *Id.*

35. *Id.*

36. *Id.* at 106.

37. N.C. PUB. L. 1913, c. 90 (codified as amended at N.C. GEN. STAT. §§ 43-1 to -64 (2015)).

38. N.C. GEN. STAT. § 43-1 (2015).

39. *Id.* § 43-6. The full protection of the statute is available only to persons claiming "an estate of inheritance" in the land. *Id.* Persons claiming "an interest or estate less than the fee" may have their title established but "without the registration and transfer features." *Id.*

40. *Id.* § 43-8. If the petitioner is unable to describe the estate by metes and bounds, the clerk of court may order a survey. *Id.*

41. *Id.* §§ 43-9 to -10. "[T]he recital of the service of summons and publication in the decree or in the final judgment in the cause, and in the certificate issued to the petitioner . . . shall be conclusive evidence thereof." *Id.* § 43-10.

42. *Id.* § 43-4.

43. *Id.* § 43-11. "No judgment in any proceeding under this Chapter shall be given by default, but the court must require an examination of the title in every instance except as

title and no adverse claims are presented, the court confirms the petitioner's title and enters a decree for its registration, which is "conclusive evidence" of the state of the title.<sup>44</sup> The registrar then enters the certificate in the registry<sup>45</sup> and issues a duplicate to the owner.<sup>46</sup>

Once registered, the title is free of all claims not noted on the certificate "except in cases of fraud" to which the petitioner is privy or a party, cases "without valuable consideration paid in good faith," or cases in which the registration was "procured through forgery."<sup>47</sup> A Torrens title cannot be lost to adverse possession.<sup>48</sup> Any action challenging a registered title is barred unless filed within twelve months after registration.<sup>49</sup> An assurance fund is available to indemnify any person who lost an interest in the land "through fraud or negligence" in the registration or because of a mistake on the certificate or in the registry.<sup>50</sup> Actions for compensation from the assurance fund must be brought within three years of registration.<sup>51</sup> A registered owner may release the title from the Torrens

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respects the rights of parties who, by proper pleadings, admit the petitioner's claim." *Id.* § 43-11(d). Where evidence opposing a petition sufficiently raises questions as to the legal description of the land or whether the petitioner is the owner of the land, the opponent has a right to submit the issues to a jury. *Perry v. Morgan*, 14 S.E.2d 46, 49 (N.C. 1941).

44. N.C. GEN. STAT. § 43-12 ("Every decree rendered as hereinbefore provided shall bind the land and bar all persons and corporations claiming title thereto or interest therein; quiet the title thereto, and shall be forever binding and conclusive upon and against all persons and corporations, whether mentioned by name in the order of publication, or included under the general description, 'to whom it may concern'; and every such decree so rendered, or a duly certified copy thereof, as also the certificate of title issued thereon to the person or corporation therein named as owner, or to any subsequent transferee or purchaser, shall be conclusive evidence that such person or corporation is the owner of the land therein described, and no other evidence shall be required in any court of this State of his, her, or its right or title thereto. It shall not be an exception to such conclusiveness that a person is a minor, is incompetent, or is under any disability . . .").

45. *Id.* §§ 43-13 to -14.

46. *Id.* § 43-15.

47. *Id.* § 43-18. Good faith purchasers for valuable consideration from the registered owner take free of all claims not noted on the certificate. *Id.*

48. *Id.* § 43-21 ("No title to nor right or interest in registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession.").

49. *Id.* § 43-26. The statute of limitations for fraud or mistake is three years, but "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." *Id.* § 1-52(9).

50. *Id.* § 43-50. On registration, 0.1% of the value of the land as assessed for taxes is paid into the assurance fund which is held by the State Treasurer. *Id.* § 43-49. If the assurance fund is insufficient to cover a loss, the Treasurer makes up the deficiency out of unappropriated state funds, which are repaid out of future contributions to the assurance fund. *Id.* § 43-52.

51. *Id.* § 43-55.

system by filing a statement with the registrar; after release, the owner may convey the land by “any form of conveyance other than the certificate of title.”<sup>52</sup>

## II. NORTH CAROLINA’S SHORT-LIVED TORRENS TITLE BOOM

In 1914, in the first case to arise under the new Act, North Carolina Chief Justice Clark explained that the legislature had adopted the Act “at the wish of the landowners of the state, as evidenced by the proceedings of the Farmers’ Union, the Chamber of Commerce of many cities, and other organizations.”<sup>53</sup> As “a remedial statute,” the Torrens Law was “to be liberally construed . . . ‘so as to advance the remedy and repress the evil.’”<sup>54</sup> The head of rural outreach at the University of North Carolina was enthusiastic about its prospects, writing Clark in 1916: “I am hoping that this law can be simple, inexpensive, and speedily of state[-]wide application and scope.”<sup>55</sup> When experience demonstrated the need for certain improvements, Clark chaired a committee of the State Bar Association to draft amendments that were adopted in the following years.<sup>56</sup>

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52. *Id.* § 43-25.

53. *Cape Lookout Co. v. Gold*, 83 S.E. 3, 4 (N.C. 1914). *See also* *Empire Mfg. Co. v. Spruill*, 86 S.E. 522, 523 (N.C. 1915) (stating that the Torrens Law “was passed at the demand of the farmers and other owners of real estate”).

54. *Cape Lookout*, 83 S.E. at 5.

55. Letter from E.C. Branson, head of Dept. of Rural Social Economics, University of North Carolina, to Walter Clark (Sept. 23, 1916), in 2 PAPERS OF WALTER CLARK, *supra* note 33, at 314.

56. Letter from A.L. Brooks, President of the State Bar Assoc., to Walter Clark (July 31, 1916), in PAPERS OF WALTER CLARK, *supra* note 33, at 314 (asking Clark to chair a committee to recommend a revision of the Torrens Law and stating that “the farmers of North Carolina seem to be very much interested in this title system, and feel that at present it does not meet the demands of the times”); Letter from A.L. Brooks to Walter Clark (Aug. 4, 1916), in PAPERS OF WALTER CLARK, *supra* note 33, at 310 (acknowledging Clark’s willingness to chair the Torrens committee and stating that enactment of the Farm Loan Law “is going to make the Torrens Act very much more necessary in this state and greatly to be desired, particularly by the farmers” and that lenders “on farm first mortgages” would be able to reduce costs on titles in the Torrens system); Letter from H.Q. Alexander, member of the executive committee of the Farmers’ Union, to Walter Clark (Aug. 4, 1916), in PAPERS OF WALTER CLARK, *supra* note 33, at 312 (proposing that a committee of the officers of the Farmers’ Union meet with the bar association committee); Letter from A.L. Brooks to Walter Clark (Sept. 11, 1916), in PAPERS OF WALTER CLARK, *supra* note 33, at 313 (saying that the Torrens Act needs “to be so framed as to exclude judicial attack when its terms are properly complied with,” in order to assure foreign lenders). Amendments to the Torrens Act were adopted in 1915, 1917, and 1919. *See* N.C. PUB. L. 1915, cc. 128 and 245; N.C. PUB. L. 1917, c. 63; N.C. PUB. L. 1919, cc. 82 and 236.

As Clark predicted, some North Carolinians promptly registered their titles. It was not, however, the farmers who moved quickly, but big business.<sup>57</sup> Timber companies holding “large tracts of forest-covered swamp lands” in Eastern North Carolina were attracted by the opportunity to establish definite boundary lines in difficult terrain, often confused by vague legal descriptions in prior deeds.<sup>58</sup> Registration had the added benefit of eliminating the risk of loss to adverse possessors, difficult to prevent under the established system except by regular inspections.<sup>59</sup> Farmers who did register their titles often did so under a misapprehension.<sup>60</sup> In a 1914 case construing the Act, Chief Justice Clark explained that registration “assimilates the transfer of land to the transfer of stocks in corporations.”<sup>61</sup> Further, according to a report gathered by Professor McCall, “[i]t was thought by a great many intelligent farmers that if their lands were registered under the Torrens System they could take the certificates of title and hypothecate them with the banks for loans just the same as they would certificates of stock in some corporation.”<sup>62</sup> But of course, the grant of any security interest on a Torrens title had to be noted upon the certificate in the registry.<sup>63</sup>

Registrations soon dwindled.<sup>64</sup> Despite Clark’s optimistic prediction that eventually all landowners would go into the system, in 1931 Professor McCall reported that the North Carolina Torrens Law was “practically a

57. McCall, *supra* note 19, at 337–38 (Torrens is used primarily when there are “clearly defined economic interests to be served.”).

58. *Id.* at 337. Other than timber companies, early registrants included wealthy Boston sportsmen, who had acquired almost one thousand acres in Eastern North Carolina as a hunting preserve. *Id.* at 338.

59. *Id.* See N.C. GEN. STAT. § 43-21 (2015) (“No title to nor right or interest in registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession.”).

60. See, e.g., *Cape Lookout Co. v. Gold*, 83 S.E. 3, 4 (N.C. 1914). See also McCall, *supra* note 19, at 343–44 n.49.

61. *Cape Lookout*, 83 S.E. at 4. See also Editor’s Note, N.C. GEN. STAT. § 43-1 (Torrens “assimilates the transfer of land to the transfer of stocks.”).

62. McCall, *supra* note 19, at 343–44 n.49.

63. N.C. GEN. STAT. § 43-36(a) (“Whenever the owner of any registered estate shall desire to convey same as security for debt, it may be done . . . by a short form of transfer . . . signed and properly acknowledged by the parties . . . presented, together with the owner’s certificate, to the register of deeds, whose duty it shall be to note upon the owner’s certificate and upon the certificate of title in the consolidated real property records the name of the trustee, the amount of the debt, and the date of maturity of same.”).

64. McCall’s investigation revealed that “most of the registrations were made in the early years after the system was adopted.” McCall, *supra* note 19, at 335. In the ten years immediately preceding McCall’s writing in 1931 the system had “hardly been used.” *Id.*

dead letter.”<sup>65</sup> The Torrens system failure in North Carolina may have been partly due to opposition from lawyers, who would lose the fees from frequent title searches,<sup>66</sup> or from title insurance companies, which would lose the chance to write policies.<sup>67</sup> But the failure may have been largely due to the reasonable reluctance of landowners to risk exposing flaws in their titles. As McCall explained,

[t]he 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.<sup>68</sup>

In addition, as McCall discovered, some North Carolinians suspected that “this new, ‘wild’ scheme” was simply “a means whereby rich men could seize the lands of the poor,”<sup>69</sup> a perception that has not yet disappeared.<sup>70</sup>

65. *Id.*

66. *Id.* at 337–49. See *Empire Mfg. Co. v. Spruill*, 86 S.E. 522, 522–23 (N.C. 1915) (stating that the Torrens Law “has not been looked on with favor by some [lawyers] who believe that the act will deprive them of fees for the investigation and making an abstract of titles”). See also Letter from H.Q. Alexander, member of the executive committee of the Farmers’ Union, to Walter Clark (Aug. 4, 1916), in 2 PAPERS OF WALTER CLARK, *supra* note 33, at 311 (reporting that he had “reason to believe that this law has not come into more general use because of the unfriendly attitude of the legal profession”). Before the Torrens system was adopted, Clark had optimistically expected lawyers to put the public good ahead of personal gain:

It has been charged that some lawyers oppose the bill because they dislike losing the fees for searching titles, drawing deeds, and land litigation, which will be cut off as under the Torrens System all titles are good. But the number of lawyers who view this question from the standpoint of their own interest is comparatively small. The great majority of lawyers who have really investigated the subject favor it, because of the great benefit it gives to the public . . . . Lawyers are naturally conservative, as you know, but when they are convinced that any movement is really in the public interests they are patriotic, and will favor it, whether it is to their personal interest or not.

Letter from Walter Clark to S.H. Hobbs (Oct. 12, 1910), in 2 PAPERS OF WALTER CLARK, *supra* note 33, at 106. To this day title examination represents “[a] large percentage of the legal work done in the State of North Carolina.” WEBSTER’S VOL. 2, *supra* note 3, § 21.01, at 21–23.

67. McCall, *supra* note 19, at 349–50.

68. *Id.* at 345.

69. *Id.* at 342–43.

70. In 2012 Nelson Taylor, who has practiced real estate law for fifty-seven years in Morehead City, admitted that in the past “folks weren’t as honest as they ought to have been and were doing this [Torrens] without notifying people who they knew had a claim . . . . People were getting decrees to title that they weren’t entitled to.” Phillip Bantz, *The Redheaded Stepchild of Land Registration*, N.C. LAW WEEKLY, Feb. 17, 2012. Taylor

### III. RECENT TORRENS LITIGATION: WILL *ADAMS CREEK* BE THE DEATH KNELL OF TORRENS TITLES IN NORTH CAROLINA?

Litigation that began in 2002 has drawn renewed attention to the Torrens system and prompted questions about its continued usefulness in the state. Two men, Melvin Davis and Licurtis Reels, who refuse to accept the finality of a registration of land that they believe belongs to their family,<sup>71</sup> have been imprisoned since 2011 for contempt of court.<sup>72</sup> Pieced together from judicial decisions,<sup>73</sup> the brothers' story begins in 1911, when their great-grandfather, Elijah Reels, purchased approximately sixty-five acres in the vicinity of Adams Creek.<sup>74</sup> The property was not described by metes and bounds but by reference to various landmarks, such as the property of adjoining landowners and a county road.<sup>75</sup> In January 1944, Carteret County took the tract of land for unpaid taxes, but the following month Elijah's son Mitchell (grandfather of Melvin and Licurtis) purchased the land for back taxes.<sup>76</sup>

In 1971 Mitchell Reels died intestate, survived by his wife and eleven children (or their heirs).<sup>77</sup> In 1976 Mitchell's daughter Gertrude, administrator of her father's estate and mother of Melvin and Licurtis, brought an action to determine the rights of Mitchell's heirs.<sup>78</sup> In that proceeding, the court held that the heirs owned the sixty-five-acre tract and another adjoining parcel of forty-five acres, also informally described.<sup>79</sup> In January 1978 Shedrick Reels, Mitchell's brother, petitioned to register

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said that his own grandfather "lost 50 acres in the Outer Banks to a fraudulent Torrens action." *Id.* But he said that "the courts became savvier about the law and the opportunity for underhandedness was greatly reduced." *Id.*

71. Jay Price, *For Two Carteret County Men, Waterfront Land is Worth Nearly Three Years in Jail*, NEWS & OBSERVER, Dec. 14, 2013 (Reels: "I been on that land all my life.").

72. Davis and Reels were imprisoned in Carteret County Jail on March 31, 2011. *Adams Creek Assocs. v. Davis (Adams Creek II)*, 746 S.E.2d 1, 4 (N.C. Ct. App. 2013), *discretionary review denied*, 748 S.E.2d 322 (N.C. 2013). More than five years later, they remain there. Philip Bantz, *Double Contempt Case Divides Court of Appeals*, N.C. LAW WEEKLY, Dec. 16, 2016.

73. *Adams Creek Assocs. v. Davis (Adams Creek I)*, 652 S.E.2d 677 (N.C. Ct. App. 2007), *motion for stay dissolved*, 662 S.E.2d 901 (N.C. 2008); *Adams Creek II*, 746 S.E.2d at 1.

74. *Adams Creek I*, 652 S.E.2d at 679.

75. *Id.*

76. Although described as Elijah's brother in *Adams Creek I*, 652 S.E.2d at 679, Mitchell is described as Elijah's son in *Adams Creek II*, 746 S.E.2d at 3.

77. *Adams Creek I*, 652 S.E.2d at 679.

78. *Id.*

79. *Id.* at 680.

waterfront land, apparently part of the larger Reels property.<sup>80</sup> Shedrick offered into evidence a recorded deed from his father, Elijah, dated 1950—six years after Elijah lost title—plus twenty-seven years of adverse possession (presumably counting from the date of the deed).<sup>81</sup> Mitchell’s heirs were named as interested parties in the proceeding and filed an answer in March 1978.<sup>82</sup> After a hearing, the examiner reported in January 1979 in favor of Shedrick.<sup>83</sup> On March 16, 1979, a local attorney, Claud R. Wheatly III, signed “a certification on behalf of the Mitchell’s heirs certifying ‘that they have received a copy of the Report of the Examiner of Titles . . . and that they have filed no exceptions thereto.’”<sup>84</sup> Accordingly, on March 19, 1979, the Superior Court of Carteret County entered a decree of registration and the Register of Deeds filed a certificate of title in the registry.<sup>85</sup> No one brought an action challenging the registration within the following twelve months, and no one sought compensation from the assurance fund during the three years after the decree. In 1983, more than four years after registration, a motion was filed to set aside the Torrens title

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80. *Id.* Shedrick petitioned to register 17.23 acres, but the Examiner of Titles concluded he owned only 13.25 acres. *Adams Creek II*, 746 S.E.2d at 3. The examiner found that the balance belonged to Mitchell’s heirs. *Adams Creek I*, 652 S.E.2d at 680. According to a member of the Reels family, Shedrick, now dead, lived in New Jersey and sold real estate; he alleged that he had occupied the property and subsequently rented it out. Price, *supra* note 71. Although the Adams Creek case has been assimilated to the “heirs property” problem, it does not fit the usual stereotype. See Meghan E.B. Pridemore, *Tides, Torrens, and Family Trees*, PROB. & PROP., May/June 2009, at 24. The problem usually arises in situations where land has passed by intestate succession over generations to multiple heirs, who now hold it as tenants in common. *Id.*

81. It is unclear whether the Examiner of Titles applied the basic twenty-year statute of limitations, N.C. GEN. STAT. § 1-40 (2015), or the seven-year statute of limitations where possession is under color of title. *Id.* § 1-38. “[I]f the grantee knows the deed is fraudulent, the deed should not qualify as color of title.” WEBSTER’S VOL. 1, *supra* note 5, § 14.11, at 14-20 (citing *Adams Creek II* as support). The case reports do not indicate the date on which the deed from Elijah to Shedrick was recorded.

82. *Adams Creek II*, 746 S.E.2d at 3.

83. *Id.*

84. *Id.* Although the court of appeals in *Adams Creek I* recognized that Wheatly had “represented at least one member of the Reels family in 1979” when the property was registered, and represented Adams Creek Associates in the present action against Melvin and Licurtis, it held that the trial court did not abuse its discretion by refusing to disqualify Wheatly because the Torrens registration proceeding and the trespass action were distinct actions. *Adams Creek I*, 652 S.E.2d at 686. Wheatly’s certification was described somewhat differently in *Adams Creek II*. Then the court noted Wheatly filed “a certification on behalf of the Mitchell’s heirs [sic] certifying ‘that they have received a copy of the Report of the Examiner of Titles . . . and that they have filed no exceptions thereto.’” *Adams Creek II*, 746 S.E.2d at 3.

85. *Adams Creek II*, 746 S.E.2d at 3.

on the grounds of fraud and failure to notify one of Mitchell's heirs, but apparently no action was taken on the motion.<sup>86</sup>

In 1982 Shedrick Reels filed a trespass action against Melvin Davis and his mother Gertrude Reels.<sup>87</sup> In 1984 the court entered summary judgment in favor of Shedrick, recognizing him as the owner of the land and ordering the defendants not to trespass.<sup>88</sup> Melvin was held in contempt and jailed for his refusal to comply but was soon freed after signing an order agreeing not to trespass.<sup>89</sup> In 1985 Shedrick and his wife released the property from the Torrens system, restoring it to the traditional title system, and conveyed the land by general warranty deed to two individuals doing business as Adams Creek Development.<sup>90</sup> The next year the purchasers conveyed the land to Adams Creek Associates, a limited partnership.<sup>91</sup>

In 2002 Adams Creek Associates filed a trespass action against Melvin and Licurtis.<sup>92</sup> In 2004 the court granted summary judgment in favor of the plaintiff.<sup>93</sup> Defendants filed a notice of appeal but did not

86. *Adams Creek I*, 652 S.E.2d at 682 (finding of fact number fourteen). The 1983 filing shows that the defendants "were aware of these issues by no later than 1983." *Id.* at 685. Thus, the cause of action was barred by the statute of limitations because they had discovered the "facts constituting the fraud" no later than 1983. *See id.* *See also* N.C. GEN. STAT. § 1-52(9) (outlining a three-year statute of limitation for fraud or mistake). The heir in question unsuccessfully tried to raise the issue of failure of notice again in federal district court in 2010. *Curley v. Adams Creek Assocs.*, No. 4:08-CV-21-H, 2010 U.S. Dist. LEXIS 110153, at \*1 (E.D.N.C. Oct. 15, 2010) (holding the claim barred by the *Rooker-Feldman* doctrine), *aff'd*, 409 F. App'x 678 (4th Cir. 2011).

87. *Adams Creek II*, 746 S.E.2d at 3.

88. *Id.*

89. *Adams Creek I*, 652 S.E.2d at 681. According to a newspaper account, Melvin denies signing the order. Price, *supra* note 71.

90. *Adams Creek II*, 746 S.E.2d at 3. *See* Deed from Shedrick Reels and wife to Monroe Johnson and Charles B. Bissette, Jr. d/b/a Adams Creek Development, dated Nov. 27, 1985, recorded at Book 529, Page 399, Carteret County Registry. The grantors' signatures were notarized in Passaic County, New Jersey. The reported North Carolina excise tax of \$65 suggests a purchase price well below the \$75,000 reported by a member of the Reels family. Price, *supra* note 71. In 2013, Carteret County listed its tax value as \$458,000. *Id.*

91. Deed from Monroe Johnson and Charles B. Bissette, Jr. d/b/a Adams Creek Development to Adams Creek Assocs., a North Carolina Limited Partnership, with Billie Dean Brown as General Partner, dated Sept. 8, 1986, recorded at Book 546, Page 330, Carteret County Registry. The reported excise tax was \$75.

92. *Adams Creek II*, 746 S.E.2d at 1 (identifying plaintiff in the caption as "Adams Creek Associates, a North Carolina Limited Partnership with Billy Dean Brown, General Partner").

93. *Id.* at 4. Plaintiff also "sought to remove the cloud on [its] title" created by a 1992 deed from Gertrude and others to Licurtis. *Id.* at 3. At some time after 1984 Licurtis apparently joined Melvin in occupancy of the property.

pursue it, and in 2005 the court dismissed the appeal.<sup>94</sup> In 2006 the defendants were held in civil contempt for trespassing in violation of the order and in criminal contempt for testifying under oath that they would continue to trespass.<sup>95</sup> The trial court did not impose a sentence.<sup>96</sup> In 2011 Adams Creek Associates filed a motion to hold Melvin and Licurtis in civil contempt for continuing to occupy the property and the court ordered them “imprisoned until their contempt is purged.”<sup>97</sup> As of October 15, 2016, defendants remain in the Carteret County jail.<sup>98</sup>

While the parties raised many issues in the course of this litigation, the fundamental issue throughout was the defendants’ refusal to recognize the validity of the registered title. The members of the Reels family are reported to believe that their land was stolen “via a murky conspiracy[,] among developers, local lawyers and judges, and members of their own family.”<sup>99</sup> Robert Torrens devised the system to render land titles certain;

94. *Adams Creek I*, 652 S.E.2d at 683. Notice of the motion to dismiss the appeal was served on the defendants’ attorney of record, N. Jerome Willingham, and on each defendant. *Id.* Defendants alleged that Willingham was later disbarred, but they failed to raise the issue in a timely fashion. *Id.* at 684.

95. *Id.* at 682–83. The court of appeals ruled that holding the defendants in both civil and criminal contempt did not violate Sections 5A-21(c) and 5A-23(g) of the North Carolina General Statutes, which prohibit finding a defendant in civil and criminal contempt for the same behavior, since the two rulings were based on different acts. *Id.* at 687. This holding was also followed in *State v. Revels*, No. COA16-318, 2016 N.C. App. LEXIS 1246, at \*6–7 (N.C. Ct. App. Dec. 6, 2016).

96. *Adams Creek I*, 652 S.E.2d at 687. “Rather, the order provides that, if defendants are again arrested for violation of the several orders directing them to stay off the subject property, they must post a \$500 bond before being released from custody.” *Id.*

97. *Adams Creek II*, 746 S.E.2d at 4. In June 2015, the North Carolina Supreme Court denied a pro se petition filed by Melvin and Licurtis for a writ of habeas corpus. *Davis v. Buck*, 772 S.E.2d 707 (N.C. 2015). Thereafter Terry Richardson, Melvin and Licurtis’s attorney in *Adams Creek II*, withdrew from the case. Phillip Bantz, *Brothers Held in Civil Contempt Since 2011 Refuse to Budge*, N.C. LAW WEEKLY, Oct. 15, 2015.

98. *Id.* Currently at more than five years, their time served is the longest ever served for civil contempt in North Carolina. *Id.* They remained in jail as 2016 drew to a close. See Bantz, *supra* note 72.

99. Price, *supra* note 71. The fear that the Torrens System could be manipulated finds an early precedent in a question reportedly asked during oral argument by Justice White of the U.S. Supreme Court. In a case challenging the constitutionality of the Massachusetts Torrens Law, Justice White wondered: “[W]hat is there in this law to prevent free and unbridled collusion between the Court and the lawyers and petitioners?” The Massachusetts Attorney General answered: “Absolutely nothing, Your Honor, except the traditional character of the Bench and Bar of Massachusetts.” See Frank W. Grinnell, *Story of the Land Court, 1898-1948*, 34 MASS. L.Q. 8, 17 (1949). The answer apparently satisfied Justice White, who joined the five-judge majority in narrowly rejecting the challenge to the law. *Tyler v. Judges of Court of Registration*, 179 U.S. 405 (1900) (dismissed for want of standing).

the certificate is “conclusive evidence” of the state of the title.<sup>100</sup> To that end, the opportunity to challenge the registration is limited and in this case, the Reels family did not effectively utilize it. But the unfamiliarity of the Torrens system, coupled with the suspicions long harbored by some North Carolinians about its fairness, help to make this case particularly difficult to resolve. The strength of the system can be perceived to disadvantage ordinary people.<sup>101</sup>

#### CONCLUSION

The Adams Creek litigation may be the occasion to reconsider the advantages of the Torrens system. Available in the state for the last hundred years, it has not been widely used, and it is difficult to foresee further registrations except in unusual situations. Standard methods of title assurance, familiar to lawyers and the general public alike, continue to provide reasonable security of title. As computerization of records spreads throughout the state, the traditional title search becomes easier and more reliable. Perhaps it is time to consider repeal or at least to prohibit further registrations. Intended to solve all the problems of security of title, the Torrens system in this state seems only to have created more.

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100. N.C. GEN. STAT. § 43-12 (2015).

101. A member of the Reels family is reported to have said:

We feel like we’ve never had our case heard in its entirety because we’ve never been before the court and started from A and went all the way to Z. We want a trial by jury, and real people—not just Carteret County that the other side has picked—and if we’re wrong, we’ll walk away.

Price, *supra* note 71.