ARTICLES

*Rosalind F. Atherton**

DONEES, DEVISEES AND TORRENS TITLE: THE PROBLEM OF THE VOLUNTEER UNDER THE REAL PROPERTY ACTS

The objects of the *Real Property Act*, or 'Torrens system'[1] as it has become known after its principal initiator, Sir Robert Richard Torrens[2], are "to give security and simplicity to all dealings with land by providing that the title shall depend upon registration, that all interests

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1 In this paper the system will either be referred to as the Torrens system or by reference to the *Real Property Act*; the legislation will be described as either Torrens statutes, or similar expressions, or as *Real Property Acts*.

2 There is a considerable body of literature on the introduction and authorship of the legislation. Perhaps the most outstanding work here includes D Pike,

shall be capable of appearing or being protected upon the face of the registry, and that a registered title or interest shall never be affected by any claim or charge which is not registered".[3]

The focus of the Torrens system was upon independence of title. The Register was to provide the source for that title, not the chain of title which preceded it. It was, in short, 'not a system of registration of title but a system of title by registration', as it has since been described in the High Court.[4] The 'indefeasibility of title'[5] under the Act would cut off the necessity for the retrospective examination of titles that governed conveyancing of 'old system' lands. The 'dependent or derivative title' of such lands was seen by Torrens as the principal offender of 'the grievous yoke of English Property Law'.[6] After the first *Real Property Act* 1858,[7]

'Introduction of the *Real Property Act* in South Australia' (1960) 1 *Adel LR* 169; DG Whalan, 'The Origins of the Torrens System and its Introduction into New Zealand' in GW Hinde (ed), *The New Zealand Torrens System Centennial Essays* (Butterworths,Wellington, New Zealand, 1971), chapter 1 (and see the references noted in n 12, at p 3); RTJ Stein, 'Sir Robert Richard Torrens and the Introduction of the Torrens System' (1981) 67(2) *JRAHS*, 119-131; see also the 1984 volume of *South Australiana*, vol 23 no 25, which was a special issue commemorating the centenary of Torrens' death; 'Title by Registration: Its History and Nomenclature', chapter 1 in RTJ Stein and MA Stone, *Torrens Title* (Butterworths, North Ryde, 1991).

3 This was one of the opening statements in the *Report of the Real Property Law Commission* in November 1861, a Commission of five appointed to review the working of the Real Property Act 1858: Parl Paper No 192 (1861). Torrens was one of the Commissioners.

4 *Breskvar v Wall* (1971) 126 CLR 376 per Barwick CJ at 385.

5 RR Torrens, *The South Australian System of Conveyancing by Registration of Title* (Register and General Observer Printing Offices, Adelaide, 1859), p 9. This was Torrens' own book on the *Real Property Act* 1858 (SA). The term 'indefeasibility of title' was included in the heading to the paramountcy provision in the *Real Property Law Amendment Act* 1858 s 20. The term has now been included in the following Australian legislation: *Land Title Act* 1994 (Qld) ss 38, 169, 170; *Real Property Act* 1886 (SA) ss 10, 69; *Land Titles Act* 1980 (Tas) s 40.

6 Torrens, above n 5, 44. He also described it as growing 'like a noxious fungus, absorbing all the vital elements of the country's wealth': 'Mr Torrens' Lecture at Kapunda on the South Australian *Real Property Act*', *Observer*, 21 May 1859, p 2, included as document no 13 in R Stein (ed) 'Sir Robert Richard Torrens, 1814-1884: Select Documents', (1984) 23(25) *South Australiana* 1, 20 at 23. In the same speech he referred to conveyancing in a system of dependent titles as involving the study of 'a bagful of sheepskins': *ibid* at 23.

7 *Real Property Act* 1857-58 (SA). The Act came into force on 1 July 1858. A copy of the Act as amended by the *Real Property Law Amendment Act* 1858 is included in Torrens, above n 5.

the South Australian example was followed widely in Australia, New Zealand and Canada.[8]

The object of cutting off retrospective investigation of title was to be achieved through what has been described as the 'curtain' and 'mirror' principles of Torrens title.[9] The curtain principle provides that the Register is the sole source of information; claims to equitable interests which lie beyond the curtain are of no concern. The mirror principle provides that the Register reflects accurately and completely the status of the title. Torrens spoke about this in promoting the legislation: each registered proprietor would hold directly from the Crown; through a process of surrender of title and a new grant from the Crown,[10] thereby achieving the independence of title that Torrens saw as the key to his reform. Innocent parties affected by the application of this indefeasibility were to be protected through recourse to a special fund, the Assurance Fund, established to support the guarantee of title which the system provided.

The notion of indefeasibility was contained in the 1858 Act as follows:

> 33. Every certificate of title or entry in the register book shall be conclusive, and vest the estate and interests in the land therein mentioned in such manner and to such effect as shall be expressed in such certificate or entry valid to all

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8 JE Hogg, *Registration of Title to Land Throughout the Empire* (Toronto, 1920), ch 1 details the principal legislative history up to the date of publication. See also TBF Ruoff, 'Systems of Land Tenure and Transfer in the Commonwealth and Empire - Their Advantages and Disadvantages', *Record of the Commonwealth and Empire Law Conference* - London 20-27 July 1955 (The Solicitors' Law Stationery Society Ltd, London, 1956), 320 at 327 n 3; D Kerr, *The Principles of the Australian Lands Titles (Torrens) System* (Australia: Law Book Co, 1927) 1-4. The legislation was introduced in the other Australian jurisdictions as follows: *Real Property Act* 1861 (Qld); *Real Property Act* 1862 (Tas); *Transfer of Land Act* 1862 (Vic); *Real Property Act* 1862 (NSW); *Transfer of Land Act* 1874 (WA).

9 Both principles are described in Ruoff, above n 8, 328-331 and developed in his book, *An Englishman Looks at the Torrens System: Being Some Provocative Essays on the Operation of the System after One Hundred Years* (Law Book Co, Sydney, 1957); and see R Stein, 'The "Principles, Aims and Hopes" of Title by Registration' (1983) 9 *Adel LR* 267.

10 Torrens, above n 5, 9; RR Torrens, 'After dinner speech at a public dinner at Salisbury', *South Australian Register*, 1 June 1857, included in *Speeches of Robert R Torrens, Esq explanatory of his measure for Reform of the Law of Real Property: to which is appended copy of the bill passed by the House of Assembly of South Australia* (1857), 6 at 8; and South Australia, *Parliamentary Debates*, 4 June 1857, 204 (R Torrens).

> intents, save and except as in hereinafter provided in the case of fraud or error.

This is known as the 'paramountcy' provision.[11] It remains in essentially similar form in the present legislation.[12] Reinforcing the paramountcy provision in the present legislation are several other provisions: a notice provision, protecting the registered proprietor against notice of unregistered interests; and ejectment and protection (damages) provisions, protecting the registered proprietor from claims for recovery of possession of the land and for monetary compensation.[13] Interests which were not on the Register were not ignored, however, and could be protected through the mechanism of a caveat.[14]

From the outset the operation of the idea of indefeasibility attracted questions: how indefeasible was an indefeasible title; and when did it become so? Professor Douglas Whalan, a leading scholar in the history of Torrens title, summed it up in this way:

> No other part of Torrens system law has created such diversity of judicial and academic opinion as that concerned with indefeasibility and the effect of registration under the Torrens Act. The principal reason is that this is

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11 The indefeasibility provision in *Real Property Act* 1860 (SA) s 41 and *Real Property Act* 1861 (SA), s 40, use this term in a marginal note: 'Estate of registered proprietor paramount'.

12 *Real Property Act* 1900 (NSW) s 42(1); *Land Title Act* 1994 (Qld) s 38; *Real Property Act* 1886 (SA) s 69; *Land Titles Act* 1980 (Tas) s 40; *Transfer of Land Act* 1958 (Vic) s 42(1); *Transfer of Land Act* 1893 (WA) s 68; *Land Titles Act* 1925 (ACT) s 58; *Real Property Act* (NT) s 69. A comparison of the various provisions is found in AJ Bradbrook, SV MacCallum and AP Moore (eds), *Australian Real Property Law* (North Ryde: Law Book Co, 2nd ed 1997) [4.21].

13 Notice: *Real Property Act* 1900 (NSW) s 43; *Land Title Act* 1994 (Qld) s 169(2); *Real Property Act* 1886 (SA) ss 186-7; *Land Titles Act* 1980 (Tas) s 41; *Transfer of Land Act* 1958 (Vic) s 43; *Transfer of Land Act* 1893 (WA) s 134; *Land Titles Act* 1925 (ACT) s 59; *Real Property Act* (NT) ss 186-7. Ejectment: *Real Property Act* 1900 (NSW) s 124; *Land Title Act* 1994 (Qld) s 123; *Real Property Act* 1886 (SA) ss 192, 207; *Land Titles Act* 1980 (Tas) s 149; *Transfer of Land Act* 1893 (WA) s 199; *Land Titles Act* 1925 (ACT) s 152; *Real Property Act* (NT) ss 192, 207. Protection: *Real Property Act* 1900 (NSW) s 135; *Land Title Act* 1994 (Qld) s 169(2)(b); *Real Property Act* 1886 (SA) s 207; *Land Titles Act* 1980 (Tas) s 42; *Transfer of Land Act* 1958 (Vic) s 44(2); *Transfer of Land Act* 1893 (WA) s 202; *Land Titles Act* 1925 (ACT) s 159; *Real Property Act* (NT) s 207.

14 See for example the discussion in Bradbrook, MacCallum and Moore, above n 12, [4.81]ff.

> the point at which the doctrines of the general law and the Torrens statutes meet most forcefully; from earliest times it has proved to be a flash-point.[15]

Indefeasibility was never an absolute concept. The first paramountcy provision set out above included 'fraud or error' as specific exceptions. These have been refined and extended both by statutory amendment to include, for example, wrong description of land, the omission of easements and certain unregistered leases;[16] and, by judicial interpretation, to include what has become known as in personam exceptions, where the registered proprietor's own conduct has given rise to the interest or is seen to justify judicial intervention.[17] Further, the indefeasibility of title of the registered proprietor under the *Real Property Act*, by application of ordinary principles of statutory interpretation, has also been held to be subject to later overriding statutes.[18]

The question 'which has transcended all others', according to Professor Whalan, was as to when 'the magical protective armour of indefeasibility' was 'donned' by a title.[19] This question has been considered most dramatically in the context of void or voidable transactions[20] and has been expressed as a question of 'deferred' versus 'immediate' indefeasibility, whether indefeasibility applies immediately on registration or not.[21] It has also arisen in the context of registered proprietors who have become registered not as purchasers or mortgagees,[22] but as volunteers, for

15 DJ Whalan, *The Torrens System in Australia* (Sydney: Law Book Co, 1982), 297.

16 Bradbrook, MacCallum and Moore, above n 12, [4.36]ff.

17 *Frazer v Walker* [1967] 1 AC 569; *Bahr v Nicolay (No2)* (1988) 164 CLR 604. See the discussion in Bradbrook, MacCallum and Moore, above n 12, [4.68]-[4.72].

18 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603; *Miller v Minister of Mines* [1963] AC 484 (PC); *Pratten v Warringah Shire Council* (1969) 90 WN (Pt 1) (NSW) 134. See for example the discussion in Bradbrook, MacCallum and Moore, above n 12, [4.65]-[4.67].

19 Above n 15.

20 For example: *Gibbs v Messer* [1891] AC 248; *Boyd v Mayor etc of Wellington* [1924] NZLR 1174; *Frazer v Walker* [1967] 1 AC 569; *Mayer v Coe* (1968) 88 WN (Pt 1) (NSW) 549; *Ratcliffe v Watters* (1969) 89 WN (Pt 1) (NSW) 497; *Schultz v Corwill Properties Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 529; *Breskvar v Wall* (1971) 126 CLR 376; *Grundy v Ley* [1984] 2 NSWLR 467; *Tessmann v Costello* [1987] 1 Qd R 283.

21 See p 125.

22 References to 'purchasers' in this paper will include mortgagees and others acquiring registered interests for valuable consideration.

example by way of gift (as donees); as the beneficiary of a deceased estate through a will (as devisees); or as the heir or next-of-kin on intestacy.

Prior to the introduction of the *Real Property Acts*, questions of priorities gave preference to the bona fide purchaser for value without notice of earlier equitable interests, who would take free of such interests.[23] A volunteer who acquired the legal estate could not stand in such a position but was bound by prior equitable interests whether the person had notice of them or not. What was the position of the volunteer under the Torrens statutes? Did the volunteer who became registered as proprietor take an indefeasible title, a title independent of any limitations in the title of the prior registered proprietor, or was that title still qualified by prior equitable interests as it would have been if the land were under old system title? Did the volunteer gain an indefeasible title, or was that only to be enjoyed by a purchaser for value from such a person? In this paper I will explore the judicial response to these questions and then consider them in their historical context. In particular, I wish to consider what Torrens and the other South Australian land law reformers might have thought about the question at the time the legislation was first developed and to juxtapose this with the deliberations of modern reformers.

THE JUDICIAL RESPONSE

In Australia and Canada there have been two broad responses to the question of the title of the registered volunteer: the first, to consider the volunteer subject to earlier interests, as in old system title; the second, to accord the volunteer indefeasibility. The cases reflecting the first approach are represented by the Victorian Supreme Court decision of *King v Smail*[24] and the Saskatchewan Court of Appeal decision of *Imperial Bank v Esakin.*[25] Although an indefeasible title could be acquired from a

23 See for example, P Butt, *Land Law* (Law Book Co, North Ryde, 3rd ed, 1996) [1940]-[1947], pp. 657-662; EI Sykes and S Walker, *The Law of Securities* (Law Book Co, North Ryde, 5th ed, 1993) 386-397; Bradbrook, MacCallum and Moore, above n 12, [3.14]-[3.41].

24 [1958] VR 273. See also *Chomley v Firebrace* (1879) 5 VLR (Eq) 57; *Biggs v McElister* (1880) 14 SALR 86; *Crow v Campbell* (1884) 10 VLR (Eq) 86; *Ovenden v Palyaris* (1974) 11 SASR 41; *Official Receiver v Klau* (1987) 74 ALR 67; *Rasmussen v Rasmussen* [1995] 1 VR 613.

25 [1924] 2 DLR 675 (Sask CA) (devisee cannot hold any better title than the testator). See also *Coventry v Anable* (1911) 4 SLR 425; *Kaup and Kaup v Imperial Oil Ltd* [1962] SCR 170 (SC) *Sim v Sim* [1981] Sask D 2206-02 (QB) (purchaser could recover land from volunteer through action for specific performance) - discussed in *Matkowski Estate and Matkowski* (1983) 27 Sask R 1; and see R Carter 'Does Indefeasibility Protect the Title of a Volunteer? A

volunteer by a purchaser for value, the volunteer's title was not indefeasible but subject to such interests as affected the predecessor in title. In some jurisdictions this was made expressly clear in the legislation.[26] The cases reflecting the second approach are represented by the New South Wales Court of Appeal decision of *Bogdanovic v Koteff*,[27] in which it was held that the registered volunteer was not subject to an unregistered interest which had been created by the predecessor in title.

To set the issue in context and to show the kinds of interests that may be in conflict in such cases, it is instructive to consider the facts of *Bogdanovic v Koteff*.[28] The dispute focused on a house in Annandale, a suburb of Sydney. Mrs Bogdanovic, now in her 70s, claimed she had been promised an interest in the house by its then registered proprietor, Spiro Koteff.[29] Spiro had left the house to his son Norman in his will and Norman was now the registered proprietor. Norman relied on his registered title to recover possession of the house. The Court of Appeal agreed that Mrs Bogdanovic had an equitable interest of some kind in the land,[30] so the

Comment on *Matkowski Estate and Matkowski* and *Sim v Sim*' (1984) 49 *Sask LR* 329.

26 Hogg, above n 8, 106-7 refers for example to the Ontario statute of 1914.

27 (1988) 12 NSWLR 472. See also *Hamilton v Iredale* (1903) 3 SR (NSW) 535; Hogg, above n 8, 107.

28 *Ibid.*

29 Mrs Bogdanovic and her late husband had rented a part of Spiro's house when he lived in Leichhardt. They moved with him to the neighbouring suburb of Annandale, continuing to pay him rent. Mrs Bogdanovic's husband died in 1977. In evidence she said that Spiro asked her to look after him, in return for which she could remain in the house for her lifetime ('until I alive'): from the evidence at first instance: *Koteff v Bogdanovic* (Unreported, Supreme Court of New South Wales, Young J, 13 October 1986) 1-2. Mrs Bogdanovic claimed firstly that the property was held on trust for her for her life. The claims in the alternative were: (i) that she and Norman were each beneficially entitled as tenants in common in the property in proportions to be determined by the court; and (ii) that she had a licence at law or in equity to remain living in the property until she died.

30 There are many hurdles to the enforceability of such 'housekeeper contracts': for instance, that there was no contract at all, there being no intention to enter legal relations; that, if there was a contract, it was not in writing as required under the various aliases of the *Statute of Frauds*; and, in the absence of writing that there was no sufficient act of part performance, the housekeeping and/or nursing not being referable of their own nature to a contract relating to the grant of an interest in land. See for example, *Maddison v Alderson* (1883) 8 App Cas 467; *Re Edwards* [1958] Ch 168; *Wakeham v Mackenzie* [1968] 1 WLR 1175; *Ogilvie v Ryan* [1976] 2 NSWLR 504; *Thwaites v Ryan* [1984] VR 65; *Schaefer v Schuhmann* [1972] AC 572. An alternative path of argument in such cases has been that there is a constructive trust: *Ogilvie v Ryan* [1976] 2 NSWLR 504.

issue focused on indefeasibility: could Norman take free of her interest by relying on his registered title? Could he recover possession of the house?

One established exception to indefeasibility is fraud. But this involves some dishonesty or 'moral turpitude' of the person whose title is in question.[31] Norman knew that Mrs Bogdanovic lived in the house before and after his father's death, but he was not aware of any agreement between them. Even had he known of their agreement, that of itself may not have been enough to attack his title on the basis of fraud, as it is expressly provided in the notice provision that notice 'of any trust or unregistered interest...shall not of itself be imputed as fraud'.[32] There had to be something more to be 'fraud'. Had he entered into some discussions with his father or Mrs Bogdanovic whereby he undertook to respect the arrangement his father had made with her, there may have been some basis for attacking his registered title on the basis of fraud or the in personam exception.[33] However, all that Norman did here was to inherit the property through the will of his father and become registered as proprietor accordingly. He was a volunteer, but he was not 'fraudulent' in the *Real Property Act* sense. Had he been a purchaser there was no doubt that he would have taken free of Mrs Bogdanovic's equitable interest. Did his position as a volunteer place him in a different category? The Court of Appeal held that it did not: the title acquired by Norman on registration attracted the full consequences of indefeasibility under the Act, regardless of his status as a purchaser or a volunteer.

The basis of the decision in *Bogdanovic v Koteff*[34] was the principle of immediate indefeasibility as determined by the Privy Council in *Frazer v Walker*[35] and approved by the High Court in *Breskvar v Wall*.[36] Immediate indefeasibility emphasised the paramountcy provision in the legislation.[37] The earlier leading case of *Gibbs v Messer*[38] had emphasised

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31 *Wicks v Bennett* (1921) 30 CLR 80 at 91; *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210; *Loke Yew v Port Swettenham Rubber Co* [1913] AC 491.

32 *Real Property Act* 1900 (NSW) s 43. See above n 13, the reference to notice provisions.

33 See for example *Bahr v Nicolay (No 2)* (1988) 164 CLR 604.

34 (1988) 12 NSWLR 472.

35 [1967] AC 569.

36 (1971) 126 CLR 376

37 '..As registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him'.[1967] AC 569 at 581 per Ld Wilberforce.

38 [1891] AC 248.

the notice provision over the paramountcy provision. An example of the notice provision is that contained in the *Real Property Act* 1900 (NSW):

> 43. Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchaser money or any part thereof, or shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

In *Gibbs v Messer*[39] the title of a registered mortgagee was in issue. As he had not 'dealt with the registered proprietor', but with a forger who had invented one for the purpose of extracting funds fraudulently from him, it was held that the mortgagee gained no protection under this notice provision, and, therefore, no protection under the paramountcy provision.

In *King v Smail*[40] this approach was applied to the case of a volunteer. Adam J considered that if volunteers gained no protection under the notice provision, they would be outside the indefeasibility provision:

> The protection given by [the notice provision] to a registered proprietor, ie a legal owner of land, against the consequences of notice actual or constructive of trusts or equities affecting his transferor has point when the legal owner is a purchaser for value. A purchaser for value has by virtue of this section the immunity from prior equities of a bona fide purchaser of the legal estate without notice under the general law. On the other hand to confer on a mere volunteer immunity from the consequences of notice would be illusory, for as already stated the volunteer was, on well-settled rules of equity, subject to equities which

39 *Ibid.*
40 [1958] VR 273.

> affected his predecessor in title whether with or without notice of such equities.[41]

He held, therefore, that the holder of an unregistered prior interest could prevail over the registered title of the volunteer and therefore maintain a caveat in respect of such claim.

What if emphasis were placed on the paramountcy provision rather than the notice provision as in *Frazer v Walker*?[42] Adam J anticipated the response in this way in *King v Smail*:

> [If the paramountcy provision]...is to be read as the key section of the Act and effect given to it regardless of other provisions and the implications to be drawn from them, the applicant's contention [that she gained an indefeasible title notwithstanding that she was a volunteer] would appear to be unanswerable...In terms [the paramountcy provision] itself draws no distinction between persons becoming registered proprietors for value and mere volunteers. What is relevant is that a person has become the registered proprietor.[43]

In the light of *Frazer v Walker*,[44] the conclusion anticipated by Adam J in the passage above was precisely the conclusion reached by the New South Wales Court of Appeal in *Bogdanovic v Koteff*.[45] Is it a necessary conclusion, however? In *Rasmussen v Rasmussen*,[46] on facts very similar to those in *Bogdanovic*,[47] Coldrey J of the Supreme Court of Victoria decided that there was more in the question than just the application of the immediate indefeasibility approach in *Frazer v Walker*:[48] *King v Smail*[49] could not simply be regarded as a decision that could be bound up with the outmoded deferred indefeasibility cases. He pointed out that neither

41 *Ibid* at 277-8.
42 [1967] AC 569.
43 [1958] VR 273 at 275-6.
44 [1967] AC 569.
45 (1988) 12 NSWLR 472.
46 [1995] 1 VR 613.
47 (1988) 12 NSWLR 472. In *Rasmussen* the facts involved the assertion of an interest under a constructive trust against a registered devisee.
48 [1967] AC 569.
49 [1958] VR 273.

Frazer[50] nor *Breskvar v Wall*[51] were cases concerning volunteers: in both cases the registered proprietor was a purchaser for value; nor was *King v Smail*[52] considered by the court.

Decisions like *King v Smail*[53] and *Imperial Bank v Esakin*[54] were based on a construction of the legislation as a whole and particularly a number of sections in which a distinction is made between purchasers for value and, by implication, volunteers. The first group of provisions that distinguish between purchasers and volunteers are the provisions collectively described as the 'ejectment' provisions.[55] Taking the New South Wales provision as an illustration, the relevant parts provide (emphasis added):

> 124 No proceedings ... for possession of any land...shall lie or be sustained against the person registered as proprietor thereof...except in any of the following cases, that is to say:-
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> ...
>
> (d) The case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud.
>
> (e) The case of a person deprived of, or claiming, any land included in any folio of the Register for other land by misdescription of such other land, or of its boundaries as against the registered proprietor of such other land not being a transferee thereof bona fide for value.
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> ...
>
> And in any case, other than as aforesaid, the production of the folio of the Register...shall be held in every Court to be an absolute bar and estoppel to any such proceedings or

50 [1967] AC 569.
51 (1971) 126 CLR 376.
52 [1958] VR 273.
53 *Ibid.*
54 [1924] 2 DLR 675.
55 Above n 13. These provisions act to support the paramountcy provision.

> action...any rule of law or equity to the contrary notwithstanding.

Section 124 does not preclude the bringing of proceedings for the recovery of the land as against a person registered through his or her own fraud;[56] nor does its prevent proceedings for recovery of land against a person registered as proprietor as a volunteer in the two listed cases, the volunteer taking from a fraudulent proprietor and the volunteer taking from a proprietor where boundaries have been misdescribed: being persons 'deriving otherwise than as transferees for value', volunteers are indirectly excluded from its terms.

Secondly, there are complementary provisions which deal with claims for monetary compensation against registered proprietors, described as 'protection' provisions.[57] Again taking the New South Wales provision as an illustration, the relevant parts provide (emphasis added):

> 135 Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages as aforesaid, or to proceedings in the Supreme Court or District Court for possession of land or other proceedings or action for the recovery of land, or to deprivation of the estate or interest in respect to which he is registered as proprietor, *any purchaser or mortgagee bona fide for valuable consideration* of land under the provisions of this Act...

This section makes an apparent exception in the case of volunteers, they not being 'purchasers or mortgagees bona fide for valuable consideration'. They are not protected under this provision from proceedings for possession of the land or proceedings for damages.

Where the line of cases represented by *King v Smail*[58] considered that these provisions made an important distinction in the legislation in the treatment of volunteers, what is the implication of the principle in

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56 And to that extent s 124 complements the paramountcy provision, which lists 'fraud' as an express exception to indefeasibility. Such fraud has to be sheeted home to the person who has become registered or his or her agents - *Assets Co v Mere Roihi* [1905] AC 176 at 210, and, under s 124, proceedings for the recovery of land are not precluded.

57 Above n 13.

58 [1958] VR 273.

Bogdanovic v Koteff[59] with respect to provisions such as these? If the volunteer is to be regarded as acquiring an indefeasible title, could not the volunteer defend proceedings to recover possession or damages by relying simply on his or her indefeasibility of title under the paramountcy provision? If so, the protection provisions would be read subject to the interpretation of the paramountcy provision: as the paramountcy provision would be read up, the ejectment and protection provisions would be read down. But there is a third approach, represented by the Saskatchewan decision in *Matkowski v Matkowski Estate and Matkowski*,[60] namely, that the volunteer does get an indefeasible title subject only to the express qualification in the legislation, where the volunteer has acquired title through the fraud of a registered proprietor as stated in the ejectment provisions.[61] There is academic support for each of the three approaches.[62]

In examining the position of volunteers as registered proprietors these provisions lead one to pose a range of questions. Why do they make reference to purchasers? Are they important to a consideration of the position of volunteers in regard to indefeasibility of title? What would Torrens himself have thought about the problem? Did he think about it? Did others think about it at the time the legislation was being introduced and refined? If they did so, would they agree with the approach in *King v*

59 (1988) 12 NSWLR 472.

60 (1983) 27 Sask R 1, discussed in Carter, above n 25.

61 See above n 13. This point was also made for example in dicta in *McKinnon v Smith* [1925] 4 DLR 262 (Man CA), Prendergast JA at 275; and in *Coventry v Annable* (1911) 4 SLR 425 Lamont JA expressed the view that if a transferee got on the register without consideration the remedy of the true owner was an action for damages rather than an action for the recovery of the land: this is referred to in *Imperial Bank v Esakin* [1924] 2 DLR 675, Lamont JA at 680.

62 In support of volunteers not gaining indefeasibility of title: Hogg, above n 7, 826, 828, 832-3, 919; J Baalman, *The Torrens System in New South Wales* (Sydney: Law Book Co, 1951) 149-50; the successor to Baalman, RA Woodman and KG Nettle, *The Torrens System in New South Wales* (Sydney: Law Book Co, 1985) (looselaf) at 347-348; GW Hinde, 'Indefeasibility of Title Since *Frazer v Walker*' chapter 2 in Hinde, above n 2, 33 at 53-55; DG Whalan, 'The Torrens System in New Zealand - Present Problems and Future Possibilities', chapter 8 in Hinde, above n 2, 258 at 271; Bradbrook, MacCallum and Moore, above n 12, para [4.64]. In favour of indefeasibility: Stein, n 9, 274 n 30 considered that decisions like King v Smail [1958] VR 273 were incorrect on the basis that each certificate of title was to operate as a regrant from the Crown. In favour of a qualified approach: DH Thom, *The Canadian Torrens System* (Burroughs & Co, Calgary, 1912), 154-157, 195, 249-59.

Smail[63] and *Rasmussen v Rasmussen*;[64] or that in *Bogdanovic*;[65] or *Matkowski*?[66] Did they approach the problem in the same way?

HISTORICAL REVIEW

The references in the present legislation to purchasers for value are certainly curious at the first encounter. It is, after all, the language of the old land law: the bona fide purchaser was the quintessential creation of equity jurisprudence.[67] To consider what Torrens himself thought about the issue of volunteers we are assisted by the fact that he wrote about the system he was introducing as a book and in letters, and he spoke about it both inside and out of Parliament. In looking at what others might have thought about the issue, we find that there were two formal reviews of the Real Property Act in South Australia within its first 25 years of operation,[68] and there were many amendment or consolidation Bills that prompted considerable discussion in the Parliamentary arena.

At the forefront of Torrens' mind when working on the legislation were purchasers and mortgagees. In introducing the first Real Property Bill on 4 June 1857 he sought:

> to give confidence and security to purchasers and mortgagees through the certainty that nothing affecting the title can have existence beyond the transactions of which they have notice in the memoranda endorsed on the grant.[69]

His interest in security of title was both personal and philosophical. The personal interest lay in the experience of a relation and friend who, he wrote, 'was drawn into the maelstrom of the Court of Chancery'.[70] His

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63 [1958] VR 273.

64 [1995] 1 VR 613.

65 (1988) 12 NSWLR 472.

66 (1983) 27 Sask R 1 (QB).

67 'Equity's darling', according to Maitland: FW Maitland, *Collected Papers*, ed HAL Fisher (Buffalo: WS Hein, 1981, first published Cambridge University Press, 1911), vol iii.

68 South Australia, *Report of the Real Property Law Commission, with Minutes of Evidence and Appendix*, Parl Paper No 192 (1861); South Australia, *Report of Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts; together with Minutes of Evidence and Appendix*, Parl Paper No 30 (1873).

69 South Australia, *Parliamentary Debates*, House of Assembly, 4 June 1857, 204.

70 Torrens, above n 5, v-vi. He repeated this in his Dublin paper in 1863: *Transfer of Land by 'Registration of Title' under the 'Torrens System'* (Dublin: Hodges,

philosophical interest lay in his commitment to economic liberalism, influenced no doubt in part by his father, Colonel Torrens, a well-known political economist and one of the founders of the colony of South Australia.[71] The liberal commitment to the establishment of the free market in land propelled considerable interest in simplified conveyancing and influenced the great wave of law reform seen in the establishment and work of the British Real Property Commissions of the 1830s.[72] Torrens (the son) expressed this in the description of his proposed land title system as serving 'a great economic principle' through the encouragement of investment of capital in land,[73] which would work both to the benefit of purchasers and lenders.[74]

Where Torrens did refer to volunteers he did so by referring to them principally in the negative. A scenario he used in illustration several times was of a purchaser seriously prejudiced by the arrival of an earlier claimant in the guise of the devisee or heir as 'rightful owner' who turned up to reclaim the land once an invalid link in the chain of title was discovered, 'plus all the capital of the parties who, innocent of all fraudulent intent, may have invested their fortunes in buildings and other improvements on the land.'[75] The example he gave in his own book on the South Australian system continued this theme:

Smith and Co, 1863), a speech delivered to the Society for Promoting the Amendment of the Law, iii. (A copy of this publication is held in the State Library of New South Wales). Torrens gave more detail of the example of a friend in his second reading speech: 'Speech delivered in the House of Assembly on Wed Nov 11 - Order of the Day - Real Property Amendment Bill', *Speeches of Robert R Torrens*, above, n 10, 12 at 14. (The *Hansard* account simply refers to Torrens having made a 'voluminous' speech in support of the Bill but provides no detail).

71 Col Torrens published his own work promoting the idea of the colony, *Colonization of South Australia* (London: Longman et al, 1835). His newspaper, the *Traveller*, was regarded as 'one of the most important newspaper organs of Liberal politics': JS Mill, *The Measure of Value* 1822, ed JH Hollander (Baltimore: Johns Hopkins Press, 1936), introduction.

72 There were four separate studies between 1829 and 1833, the second of 1830 considered a proposal to establish a general registry of deeds and instruments affecting land. A brief summary of the reform movement of the nineteenth century is found in AWB Simpson, *A History of the Land Law* (Oxford: Clarendon Press, 2nd ed, 1986), ch 11.

73 Torrens' Dublin paper, above n 70, 9.

74 *Ibid* 17-18 (the value of land as a source of credit was raised by the facility and security offered by the system).

75 Torrens' Dublin paper, above n 70. Torrens' Kapunda speech, above n 6 includes a similar example of a son who takes as heir in the supposed absence of a will of his father and then sells the property to a purchaser, whose title is upset

> Certain lands in South Australia passed through the assignees of an insolvent in India to purchasers. Of this a block of 13 1/2 acres, value 150 pounds, was subsequently sold off in allotments as a township, and houses and improvements placed upon it by the purchasers to the value of 5,000 pounds. Upon other portions of the estate situated in the City of Adelaide, and worth from 1,200 pounds to 1,500 pounds, a bishop's palace, a chapel, and schoolhouse, also dwelling-houses of superior class, were erected, to the value of 7,000 to 8,000 pounds, when a question was raised as to the validity of the title given by the Indian Insolvent Court, and the Supreme Court of South Australia declared the heir-at-law of the insolvent, then deceased, to be entitled to the entire property.
>
> Here the English law, as administered by the Supreme Court, in restoring to the rightful heir his patrimony, worth some sixteen hundred pounds, would bestow upon him therewith the patrimony of persons innocent of any fraudulent intention, amounting to at least twelve thousand pounds. Instances of this kind are more frequent than is generally imagined. They do not always obtain the notoriety attaching to proceedings in the courts of law, because the parties frequently surrender without litigation, aware that the expenses of a chancery suit would swallow up the entire property. [76]

Under the *Real Property Act* the volunteer, in a scenario like this in the guise of the devisee and 'rightful owner', was prevented from claiming against the purchaser as registered proprietor.

It is not surprising that Torrens had purchasers and mortgagees in mind in South Australia. The colony had been developed on the principle of land purchase: as Professor Douglas Pike stated very aptly, '[i]n its beginnings South Australia was a land job.'[77] The colony was only 20 years old when

by the claim of a devisee when a will is discovered. Torrens contrasts the injury that occurs in South Australia with the situation in England: in South Australia the purchaser usually acquires 'wild bush' and did the improvements at his own cost, whereas in England there were usually buildings and improvements on the land already.

76 Torrens, above n 5, 26. Torrens stated further that he was aware of three such cases pending in the colony.

77 Pike, above n 2, 169.

Torrens introduced his Real Property Bill into Parliament in June 1857 and since its foundation on 28 December 1836 there had been much activity in land dealing. By 28 December 1857 the population of the colony had reached 109,917 and 1,557,740 acres of land had been alienated from the Crown,[78] comprised in some 70,000 land titles.[79] Land speculation was rife[80] and land titles were in serious disarray. Pike estimated that it was probable that the documents for three-quarters of the titles had been lost.[81] There had been a number of fires in public offices;[82] land sales raced ahead of surveying;[83] many titles were in the hands of people who were not resident in South Australia.[84]

The validity of many titles was in serious doubt. Torrens considered that the number of faulty titles was 'enormous'.[85] Castles and Harris concluded in fitting terms that the situation was 'like a time bomb, primed to injure or

78 Hodder, above n 8, vol 1, 313.

79 F Rogers, Commissioner for Lands and Emigration, to Herman Merivale, Permanent Under Secretary of State for the Colonies, 29 April 1858, Document No 15, in Stein, above n 6, 29, 30.

80 The 'mania' in land speculation is described in RM Hague, 'History of the Law in South Australia 1836-67', MA thesis, pre-1837 (the date of donation to the State Library of South Australia), 1420.

81 Pike, above n 2, 172, relying on *South Australian Register*, 8, vii, 1856; 23, vii, 1856 and the *Report from the Real Property Law Commission* (1861), above n 68, evidence Q 102. Pike's estimation that there should have been something like 40,000 separate titles by the mid-1850s is considerably under that of Rogers, above n 79.

82 Two fires are noted in Hodder, above n 8, chronology at the end of vol 2: 22 January 1838 - the Land and Survey Office was destroyed by fire destroying many public documents; January 1841 - fire at Government House destroyed many important public documents. It is not clear whether land title documents were affected by either fire, but they are indicative of the fragility of paper records in the early days of the colony. Pike, above n 2, 173, refers to a fire in 1839 which completely destroyed the then survey record and surveyors' field books. In the *Minutes of Evidence* presented to the Real Property Commission in 1861, there is also reference to a 'great fire at the Port' in which the deeds belonging to the building society were all burnt: *Report of the Real Property Law Commission* (1861), above n 68, *Minutes of Evidence*, Question 10, 2-3, Registrar-General (Torrens).

83 See for example Pike, above n 2, 173 and the *Minutes of Evidence* of the 1861 Commission, above n 68.

84 AC Castles and MC Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia 1836-1986* (Wakefield Press, Adelaide, 1987) 175. Pike cites an estimate that 'almost a third' of titles were held by people outside the colony, mainly in Britain: Pike, above n 2, 172.

85 'Mr Torrens' Lecture at Kapunda on the South Australian *Real Property Act*', above n 6.

even destroy not only their main source of wealth, but also their status in the community'.[86] South Australia in the 1850s needed a land title system that was sure and reliable for those who wished to invest their capital in land. Torrens provided it. He was elected to the first Parliament in South Australia after it became self-governing in 1856 on the strength of his land law reform platform and he carried this through in the *Real Property Act* introduced in the first session of that Parliament. But how did his system apply in the case of those who were not the investors he had in mind, but took registered titles as volunteers? To look at this question and to consider how Torrens and his contemporaries would have responded to it, it is necessary to piece together the development of the legislation, from Torrens' first Act in 1857 to the last piece in the South Australian legislative development of the *Real Property Act*, after five more Acts and many more Bills, the *Real Property Act* of 1886, which remains the principal Act in South Australia. The answer was not straightforward, nor was it constant.

THE FIRST ACTS - 1858-1861

The first Act, the *Real Property Act* 1857-58, assented to on 27 January 1858,[87] was followed by a substantial amending Act later that year in the *Real Property Law Amendment Act* 1858.[88] Within two years both these Acts had been replaced by the *Real Property Act* 1860.[89] This in turn was replaced completely by the *Real Property Act* 1861,[90] following the report of a Commission established to examine the workings of the legislation.[91] In the legislation in this early period volunteers were touched on principally in the provisions which dealt with the transmission of title on the death of the registered proprietor. Other voluntary transactions were referred to mainly indirectly, in provisions dealing with the extent of protection to be given to a registered proprietor.

Transmissions in consequence of the death or insolvency of the registered proprietor were subject to close scrutiny.[92] The *Real Property Amendment*

86 Castles and Harris, above n 84, 175.
87 No 15 of 1857-58.
88 No 16 of 1858, assented to on 24 December 1858.
89 No 11 of 1860.
90 No 22 of 1861.
91 Above n 68. The Commission's fourteen-page report of November was accompanied by 127 pages of *Minutes of Evidence* and a draft Bill which was passed by early December of the same year.
92 The provisions were quite different in the second Act from the Acts of 1860 and 1861. The provisions are as follows: *Real Property Act* 1858 s 41, 42, 44, 45;

Act 1858 provided that no certificate of title could issue after the death of a registered proprietor until a grant of representation had been obtained.[93] The executor or administrator could become registered as proprietor after a process of advertisement;[94] and could transfer title through sale to a purchaser or mortgagee bona fide for value.[95] The heir or devisee could apply to be registered himself or herself, but the application had to be considered by the Supreme Court and the Court could direct any caveat to be entered for the protection of the interests of 'such other persons (if any) as may be interested in the said land'.[96] The provisions of the *Real Property Act* 1860 and the *Real Property Act* 1861 were somewhat different from the earlier Act, but were similar to each other.[97] The executor or administrator could become registered proprietor in respect of charges and leasehold interests.[98] Under the 1860 Act the heir or devisee could apply to the Supreme Court to be registered and the Court again could enter appropriate caveats for the protection of other interests.[99] In the *Real Property Act* 1861, following the recommendations of the 1861 Commission,[100] (of which Torrens himself was a Commissioner) the matter was to be referred to the Lands Titles Commissioners, analogous to the making of original applications, instead of being referred to the Court and a procedure for advertisement was spelled out as it had been in the *Real Property Amendment Act* 1858.[101]

What would be the status of devisees or heirs once the registration had been secured? Did they acquire indefeasibility of title? The *Real Property Amendment Act* 1858 stated that where the executor or administrator became registered as proprietor, the representative held subject to the

Real Property Law Amendment Act 1858 ss 53, 54, 56, 58, 59 (which replaced the provisions in the earlier Act); *Real Property Act* 1860 ss 80, 81, 83, 84 (which replaced the provisions of the earlier Acts). A comparison of the provisions is made in Hogg, above n 7, 31-32 (1858 Amending Act); 34 (1860 Act).

93 *Real Property Law Amendment Act* 1858 s 56.

94 *Ibid* s 57. Hogg sees in these provisions the anticipation of the later assimilation of the representative into a 'real' as well as a 'personal' representative which was not achieved formally until the *Real Property Act* 1878: Hogg, above n 7, 31.

95 *Real Property Law Amendment Act* 1858 s 58.

96 *Ibid* s 59.

97 *Real Property Act* 1860 ss 83-84; *Real Property Act* 1861 ss 78-80.

98 *Real Property Act* 1860 s 83; *Real Property Act* 1861 s 78.

99 *Real Property Act* 1860 s 84.

100 See p 134.

101 *Real Property Act* 1861 ss 79-80. The period of advertisement was clarified in a further short amending Act, the *Real Property Act Amendment Act* 1869-70 s 4.

rights or interests of the devisee or heir, or any other person interested in the land, although the representative could pass a good title to a purchaser bona fide for valuable consideration.[102] There was no similar proviso where the heir or devisee obtained a certificate of title by applying to the Court.[103] The two later Acts contained a proviso in relation to devisees or heirs who became registered.[104] The proviso in the *Real Property Act* 1861 (SA) s 80 was as follows:

> Provided always, that the person registered...or any executor or administrator, or the Curator of Intestate Estates, when registered in respect of any mortgage, encumbrance, or lease, shall hold such land, estate, or interest in trust for the persons and purposes to which it is applicable by law; but for the purpose of any dealing with such land, estate, or interest under the provisions of this Act, he shall be deemed to be absolute proprietor thereof.

Executors and administrators, who could stand in the deceased's shoes with respect to personal property and chattels real, were subject to the interests affecting the deceased's title, but what of devisees and heirs with respect to the real property? This proviso could be interpreted as making the registered title subject to interests 'to which it is applicable by law', namely outstanding unregistered interests, but this is not immediately clear. If the proviso did operate in this way in relation to devisees and heirs as well as executors and administrators it does not sit comfortably with the procedure for dealing with transmission applications. If devisees and heirs were considered to be subject to outstanding interests by virtue of the proviso, why would it be necessary for the Registrar to enter a caveat to protect outstanding interests: would not they be 'protected' by the defeasible status of the volunteer's registered title (at least while the title remained in the volunteer's hands)? Or was it rather that the title would be indefeasible once the process of title examination was complete? By the time of the later review of the legislation in 1873 the position of devisees was one the Commissioners were concerned to clarify.[105]

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102 *Real Property Law Amendment Act* 1858 s 57.

103 *Real Property Law Amendment Act* 1858 s 59.

104 *Real Property Act* 1860 s 84; *Real Property Act* 1861 s 80.

105 The proviso can be traced into some of the Canadian legislation and it has been considered there as placing devisees and heirs in the same position as executors, although in this legislation it appears in much plainer terms: *Imperial Bank of Canada v Esakin* [1924] 2 DLR 675 (Sask CA) at 676, Haultain, CJS; 680, Lamont JA; 687, Martin JA. Carter, above n 25, 330 cited in addition: *St*

Torrens' understanding of the position of devisees is seen to some extent in the course of the taking of evidence as Commissioner on the Real Property Law Commission in 1861.[106] Torrens and Mr W Belt, one of the Solicitors to the Lands Titles Commission, were discussing the matter of transmissions in the context of deceased estates.[107] Belt was concerned about 'the consequence of the certificate of title giving indefeasibility of title to land'.[108] Torrens responded:

> Do you not think, Mr Belt, that point is met by the clause which makes the supposed heir-at-law or devisee liable for pecuniary compensation to the rightful heir or the rightful devisee, in case of an error in the decisions of a Court of Justice, such compensation being further guaranteed by the assurance fund: does not that provide the appropriate remedy?[109]

It seems that what Torrens had in mind were the provisions in the first Act. The damages provision expressly made reference to a person who might be declared to be the lawful heir, in addition to those who might be deprived of the land through fraud and other causes.[110] If the 'supposed' heir or devisee were granted a certificate of title erroneously by the Court which assessed the transmission application at the time, then, as Torrens interpreted the provision, the lawful heir or devisee could claim damages directly against the registered supposed heir or devisee. The title was protected, but the registered volunteer might be personally liable. The first Act did not contain the proviso that appeared in the later Acts, but Torrens now in 1861, and from the position of Registrar-General, revealed his understanding firstly that the title of the devisee was secure but there would be personal liability.

The Commission appointed in 1861 conducted a thorough examination of the working of the Act and gave particular attention to transmissions of title on the death of the registered proprietor. The Commission recommended that instead of requiring an order of the Supreme Court the

Germain v Renault (1909) 12 WLR 169 (Alta SCTD); *Bremner v Trusts and Guarantee Company* [1928] 3 WWR 415 (Alta SCTD).

106 *Report of the Real Property Law Commission* (1861), above n 68, *Minutes of Evidence*.

107 *Ibid* p 101, Question 1820 ff.

108 *Ibid*, Question 1826.

109 *Ibid*, Question 1828.

110 *Real Property Act* 1858 s 92.

Registrar General be allowed to assess the matter[111] and that only in the case of contested applications should the matter be left to the Court. Why did the Commission recommend a simpler procedure? It was 'expedient' to apply the same principle to all cases of transmission and to avoid the expense of application to the Court,[112] but also to counter the reluctance of the Judges to pronounce a decision 'which may bar altogether the rights of parties who are not before the Court'.[113] This reference was significant. If volunteers were not to obtain an indefeasible title, how would a decision of the court in respect of an application by a volunteer bar altogether the rights of parties not before the Court who might have an outstanding unregistered interest? The Commission revealed its understanding that the grant of a certificate of title pursuant to a transmission application was to be regarded as indefeasible.[114]

When the proposed procedure for the registration of transmissions was brought into Parliament through the *Real Property Bill* 1861 it generated a heated debate.[115] Angas and Ayers considered that the process was 'a dangerous one'.[116] Angas considered that 'a more arbitrary, unjust, iniquitous clause had never been introduced into any Bill in any Legislature in the colonies'.[117] He wanted it struck out.[118] The nub of Angas' concern was clearly his understanding that on registration the title of the devisee or heir was indefeasible. Although the procedure enabled the lodging of a caveat, Angas saw this as unrealistic, 'because no individual absent from the colony could be informed of the fact in time to take action in the matter'.[119] He saw himself as standing up 'to protect those rights which would be affected by that most unjust measure'.[120] Ayers was very concerned as to the shortness of the time period before the granting of the certificate of title to the applicant and that this might lead to 'persons in the other colonies' being deprived of their property.[121] He

111 *Report of the Real Property Law Commission* (1861), above n 68, at x.
112 *Ibid.*
113 *Ibid.*
114 The Commission made no reference to the proviso in regard to outstanding interests which was included in the 1860 Act and repeated in similar terms in the 1861 Act.
115 South Australia, *Parliamentary Debates*, Legislative Council, 21 November 1861, 1207; 22 November 1861, 1218-1224.
116 South Australia, *Parliamentary Debates*, Legislative Council, 21 November 1861, 1207.
117 *Ibid* 1218.
118 *Ibid.*
119 *Ibid* 1219.
120 *Ibid.*
121 *Ibid* 1218.

considered that the time limit should be extended to a notice period of 12 months.[122] Notwithstanding such opposition, the provisions of the 1860 Act regarding transmissions on death were altered in the way proposed, so that applications by way of transmission were made analogous to applications to bring land under the Act.[123]

The position of the devisee or heir in the early legislation reveals a tension between a proviso of uncertain ambit and an understanding at least in the minds of some that on registration the devisee or heir would gain an indefeasible title. What of the volunteer who took as a voluntary transferee of a lifetime transaction rather than through a deceased estate? The answer to this question must be sought through an examination of the provisions which defined the protection to the registered proprietor. To the extent that the volunteer was not protected from claims, the title was 'less indefeasible' than the title of the purchaser. The paramountcy provision changed in wording between the first and fourth Acts, but the idea remained the same throughout: the title of the registered proprietor was 'conclusive', 'indefeasible', 'paramount'.[124] The three types of protective provisions to be considered are the ejectment, protection (damages) and cancellation provisions. The ejectment and cancellation provisions directly affected the registered title; the damages provisions affected the registered proprietor personally. They are grouped together in each Act and, although largely similar in wording, there is a shift in the language and the division of the subject matter as well as the coverage of the provisions. Through the broad definition of 'proprietor' in each of the Acts concerned, the ejectment and protection provisions which dealt with registered proprietors applied to devisees and heirs as well as lifetime transferees.[125]

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122 *Ibid.* Angas and Ayers were to continue to be antagonists of any amendment which they saw as attacking what they saw as the enormous benefits of indefeasibility of title. They were very vocal opponents of many of the clauses of Bills up to and including the Bill which led to the 1878 Act.

123 *Real Property Act* 1861 ss79-80.

124 *Real Property Act* 1858 s 33 (marginal note: 'Entry in register book conclusive'); *Real Property Law Amendment Act* 1858 s 20 (marginal note: 'Certificate of title and entry in register book indefeasible title'); *Real Property Act* 1860 s 41 and *Real Property Act* 1861 s 40 (marginal note: 'Estate of registered proprietor paramount').

125 For example, 'proprietor' was defined in s 3 of the *Real Property Act* 1860 as meaning 'any person seised or possessed of any estate or interest at law or in equity, in possession, in futurity, or expectancy, whether a life estate, or greater or less than a life estate, in any land'.

The ejectment provisions were similar to s 124 of the *Real Property Act* 1900 (NSW) which is set out above. They stated a general rule that ejectment proceedings could not be brought against a registered proprietor and provided for a list of exceptions.[126] The listed exceptions included the same provision which remains in many of the Acts today. If a person had been registered through fraud the fraudulent registered proprietor was not protected from proceedings to recover possession of the land and the registration could be cancelled. The same position applied to a person who had derived title through a fraudulent registered proprietor unless the person had taken bona fide for valuable consideration. Torrens summarised the operation of the provisions in the course of taking evidence in the 1861 Commission:

> The land could be recovered by ejectment from the fraudulent proprietor or from any volunteer deriving through him; but if sold, bona fide, for value to a person ignorant of the fraud the land could not be recovered from that person, but the person defrauded would have his action for compensation in money against the person who committed the fraud, and failing to recover from him full value and costs he would recover compensation from the Assurance Fund. [127]

The protection (damages) provisions all included cases of fraud,[128] but they diverged as to the other cases where such actions might lie. In the *Real Property Act* 1858 persons deprived of an estate or interest in land not only through fraud, but also through 'error, misrepresentation, oversight, or deceit' could bring an action against the person registered in consequence.[129] Where the deprivation of interest occurred through 'error or misconception' then the person liable to damages could opt to transfer

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126 *Real Property Act* 1858 s 91; *Real Property Law Amendment Act* 1858 ss 77, 78 and proviso to s 79; *Real Property Act* 1860 s 118 and proviso to s 120; *Real Property Act* 1861 s 124. The first Act does not include a distinction in its ejectment provision, but it does in its cancellation provision, allowing cancellation against a proprietor registered through fraud or misrepresentation and against volunteers taking through such proprietor: *Real Property Act* 1858 ss 91, 94.

127 *Report of the Real Property Law Commission* (1861), above n 68, *Minutes of Evidence*, Question 497, 22.

128 *Real Property Act* 1858 s 92; *Real Property Law Amendment Act* 1858 s 78; *Real Property Act* 1860 s 120; *Real Property Act* 1861 s 125.

129 *Real Property Act* 1858 s 92.

the land instead of paying damages.[130] The *Real Property Law Amendment Act* 1858 limited the occasions for actions for damages to actions against a person registered through fraud and volunteers claiming through such person.[131] The *Real Property Act* 1860 extended the right of action to situations where the loss of the interest was in consequence of fraud, but also 'in consequence of the issue of a certificate of title to any other person, or in consequence of any entry in the register book, or of any error or omission in any certificate of title, or in any entry in the register book'.[132] The *Real Property Act* 1861 was in similar terms.[133] Both the 1860 and 1861 Acts expressly stated that actions for damages could not be brought against purchasers for value.[134]

Was a volunteer exposed to a damages claim under these provisions? The answer to this must be considered inversely, namely, was a volunteer not protected from such a claim? The provisions in the first Act and the 1860 and 1861 Acts appear to be very broad and could extend to cases of volunteers becoming registered in the face of an outstanding interest if such cases could be described as 'errors' or 'oversights' in the language of the 1858 Act, or within the very general language of the 1860 and 1861 Acts, as for example the 'issue of a certificate of title to another person'. Only the second of the enactments limited the occasions of damages to cases of fraud, although the volunteer taking through the fraudulent registered proprietor could pay damages instead at the election of the person defrauded.[135] While the ejectment provisions only exposed the volunteer who took through a fraudulent registered proprietor to an action to recover the land, the damages provisions were not so tightly drawn. A registered proprietor could be liable in damages over the range of matters identified, although the title of the land was protected except in the listed instances. A volunteer may have been registered through an error or oversight for example (assuming a broad application of such terms), but not through fraud on anyone's part. In such a case the title to the land was secure, even in the hands of a volunteer, but the registered proprietor would not be protected from a damages claim unless the proprietor was a purchaser for value.

130 *Ibid* s 93.
131 *Real Property Law Amendment Act* 1858 s 78. But see also s 80.
132 *Real Property Act* 1860 s 120.
133 *Real Property Act* 1861 s 125.
134 *Real Property Act* 1860 s 120; *Real Property Act* 1861 ss 125, 126.
135 *Real Property Law Amendment Act* 1858 s 78. s 80 may have broadened this to some extent.

Under these provisions indefeasibility of title needed to be distinguished from questions of personal liability. The nature of the personal liability was left rather vague. It was described in s 120 of the 1860 Act as a right to prosecute an 'action-at-law' for 'damages'. Torrens was not a lawyer and his thinking, so far as it was expressed, appeared to be in language which sought to get away from anything to do with Chancery courts and principles of equity. He differentiated questions relating to the title from questions of compensation. This was expressed in his terms as 'damages' - a personal compensation to substitute for the loss of title to the land to which the person may otherwise be entitled. But it is not damages in the sense of common law damages, but more akin to equitable compensation.

The first of the notice provisions also appeared in the 1860 Act. Its wording makes it worthy of particular note (emphasis added):

> 104. A transferee, *whether voluntary or not,* of land under the provisions of this Act, shall not be affected by actual or constructive notice of any claims, rights, titles or interest other than those which have been notified or protected by entry in the registry book, according to the provisions of this Act, any rule of law or equity to the contrary notwithstanding: Provided always that nothing herein contained shall be held to deprive creditors of any rights or remedies given or provided by a statue passed in the thirteenth year of Her Majesty Queen Elizabeth, Chapter 5.

The first part of this section looked like the later notice provisions in its protection of the transferee from notice.[136] But its additional reference to voluntary transfers and the proviso referring to the statute *13 Elizabeth c 5* need consideration. The latter statute was directed at transactions which were in fraud of creditors by making conveyances or dispositions of property which were entered into with the intention to defraud creditors void against them. A companion statute was *27 Elizabeth c 4* which was passed for the protection of purchasers of land. It made void as against subsequent purchasers all conveyances or other dispositions made for the intent and purpose of defrauding them.[137]

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136 See above n 13, notice provisions.

137 A detailed exposition of both statutes is found in SW Worthington, *A Treatise on the Statutes of Elizabeth against Fraudulent Conveyances; The Bills of Sale Acts 1878 and 1882; and the Law of Voluntary Dispositions of Property* (London: Stevens and Haynes, 2nd ed, 1887). Part I provides a general overview of the operation of both statutes.

Section 104 acknowledged the continued operation of the creditors' provision. A transaction which was intended to defraud creditors would be voidable under *13 Eliz c 5*. A conveyance would not be avoided simply because it was voluntary, but a voluntary transaction might have given rise to an inference of the requisite intention if made when the transferor was deeply indebted.[138] A conveyance would not be avoided if the transaction were bona fide for value. The old statute has been overtaken now by State and Territory provisions and the provisions of the *Bankruptcy Act* (Cth).[139] The statute *27 Eliz c 4* operated more strictly in relation to voluntary conveyances. By interpretation it was considered that the mere fact that a conveyance was voluntary was proof that the transaction was fraudulent in relation to *27 Elizabeth c 4*.[140] Such a conveyance was void as against a subsequent conveyance for value. The Act was so interpreted that even if a purchaser had notice of the voluntary conveyance it made no difference to the protection of the purchaser under the Act.[141] The old statute was modernised in the *Law of Property Act* 1925 (UK) under which it was provided that voluntary transactions were voidable at the instance of the purchaser if made with the intent to defraud the purchaser; and the intention to defraud was not to be presumed from the absence of valuable consideration.[142] These provisions have been adopted in Australia.[143]

Both Elizabethan statutes were considered to apply in relation to Torrens title land.[144] But how did they work in this context? The provisions

138 *Ibid* p 35ff.

139 *Conveyancing Act* 1919 (NSW) s 37A(1); *Property Law Act* 1974 (Qld) s 228; *Law of Property Act* 1936 (SA) s 86(1); *Conveyancing and Law of Property Act* 1884 (Tas) s 40(1); *Property Law Act* 1958 (Vic) s 172(1); *Property Law Act* 1969 (WA) s 89(1); *Bankruptcy Act* 1966 (Cth) s 121. See EI Sykes and S Walker, *The Law of Securities* (Sydney: Law Book Co, 5th ed, 1993), 434-438.

140 *Lord Townshend v Windham* (1750) 2 Ves Sen 1 at 10; 28 ER 1 at 7; *Goodright v Moses* (1775) 2 W Bl 1019; 96 ER 559. See Worthington, above n 137, p 5.

141 See Worthington, above n 137, p 193. This attracted considerable criticism: *ibid* 194-5.

142 *Law of Property Act* 1925 (UK) ss 172-3. The *Voluntary Conveyances Act* 1893 (UK) provided that the mere absence of consideration was not to be imputed as fraudulent.

143 *Conveyancing Act* 1919 (NSW) s 37B; *Property Law Act* 1974 (Qld) s 229; *Law of Property Act* 1936 (SA) s 87; *Conveyancing and Law of Property Act* 1884 (Tas) s 41; *Property Law Act* 1958 (Vic) ss 173-4; *Property Law Act* 1969 (WA) ss 90-91. See Sykes and Walker, above n 139, 416-7.

144 See for example *Coleman v De Lissa* (1885) 6 NSWLR (Eq) 104; *Colechin v Wade* (1878) 3 VLR (Eq) 266; *Moss v Williamson* (1877) 3 VLR (Eq) 71; and other cases listed in Kerr, above n 8, 23-24 n 16. Hogg notes that *Voluntary Conveyances Act* 1896 (Vic) s 29 and *Conveyancing and Law of Property Act* 1898 (NSW) s 29 both refer to land under the Torrens Statutes as subject to the

deriving from *13 Eliz c 5* operate in the way of overriding legislation. While transactions for value were subject to the legislation, voluntary transactions would be the ones most likely to be affected as before.[145] The provisions deriving from *27 Eliz c 4* would apply differently from their operation under old system title. In relation to old system land it was not necessary for there to be a conveyance from the person taking under the voluntary conveyance to the purchaser, as the voluntary conveyance was simply avoided. However in the context of Torrens title land this would be necessary, the person taking under the voluntary conveyance being a registered proprietor under the *Real Property Act.*[146] Henry Gawler regarded this as working a 'practical repeal' of *27 Eliz c 4.*[147] In either case the liability of voluntary transactions to be set aside would qualify the title of the registered volunteer through overriding legislation.

The notice provision was considerably redrafted in the 1861 Act. The reference to voluntary conveyances was deleted, but the definition of transfer in the 1860 Act, which referred to transfers 'whether for valuable consideration or otherwise', was repeated in the 1861 Act.[148] In all the Acts from 1858 to 1861 the definition of transfer was wide enough to include transmissions as well as lifetime transfers. The inclusion of a voluntary transferee in the notice provision in the 1860 Act and in the definitions of transfer in both the 1860 and 1861 Acts was consistent with an approach that included volunteers within the broad application of indefeasibility: in this context the issue was whether the proprietor was

provisions of 27 Eliz c 4: Hogg, above n 7, 835 n 84; and see Hogg, above n 8, 109-110.

145 It is surprising not to have seen this raised in *King v Smail* [1958] VR 273 (above text at n 50), which seems to be a fairly strong example of a voluntary transaction entered into with the intention to defraud creditors. It was an application to remove a caveat, and perhaps in this context the argument under the other legislation was not raised as it would have required an application to set the transaction aside under the relevant legislation.

146 T A'Beckett, *Introduction and Notes to the Transfer of Land Statute of Victoria* (Melbourne: FF Bailliere, 1867), 47. Victoria passed a particular amendment in 1915 to provide that no voluntary conveyance was likely to be defeated under 27 Eliz c 4.

147 *Report of the Commission to Inquire into the Working of the Intestacy, Real Property and Testamentary Causes Act* (1873), above n 68, Appendix IX, *Memorandum by Henry Gawler*, xiv. Charles Fenn, solicitor, also considered that s 104 of the 1860 Act did away with 27 Eliz: *Report of the Real Property Law Commission* (1861), above n 68, *Minutes of Evidence*, 76, Question 1579.

148 *Real Property Act* 1861 s 3.

registered, not whether the proprietor had notice of earlier interests.[149] (It is interesting to remember that the notice provision was to prove central in the analysis in *King v Smail*[150] in reaching the opposite conclusion that volunteers were not to be accorded indefeasibility of title.) In the adoption of the legislation in other places, it was only Queensland which adopted the 1860 version of the section as s 109 *Real Property Act* 1861 (Qld), with the addition of the phrase 'except in the case of fraud'.

Under the legislation from 1858 to 1861 volunteers were included in the broad sweep of indefeasibility, although there were certain ambiguities. In the case of deceased estates, the tension has been identified between a proviso that appeared to subject heirs and devisees to outstanding interests and a procedure that implied indefeasibility. In the case of fraud a volunteer's title was not indefeasible where the volunteer took through a fraudulent proprietor, but otherwise the title appeared secure. However it seemed that in other cases even volunteers took a title which was protected (in relation to recovery of possession), if they had become registered in the face of outstanding interests. They were not subject to direct attack in relation to title except in the express cases mentioned in s 124 of the 1861 Act; but they could be personally subject to damages, monetary compensation. This was not as clear in the 1861 Act as in the earlier legislation, but reading the Acts and the surrounding discussion this becomes clearer. The Commissioners who were appointed in 1873 to make a substantial review of the Act considered that indefeasibility operated in favour of volunteers - and they sought to change it.[151]

THE SECOND STAGE - 1873 - 1886

Twelve years after the 1861 Act there was a further substantial review of the working of the *Real Property Act* together with other legislation concerning the abolition of primogeniture and the assimilation of the devolution of real property to that applying to intestate personalty. Another Commission was established in 1872, this time without Torrens who had departed to live in England after the 1861 Commission had concluded its work. The work of the second Commission in the early

149 The provision was described as a 'dangerous one' when the Bill was being debated in 1860, but this comment was directed towards the vulnerability of lessees; no comment was made on volunteers: South Australia, *Parliamentary Debates*, 2 August 1860, 535-6. The comment was made by Mr Glyde at 535.

150 [1958] VR 273. See p 126.

151 *Report of the Commission to Inquire into the Working of the Intestacy, Real Property and Testamentary Causes Act* (1873), above n 68, para 18.

1870s provides another insight into the contemporary thoughts about the Torrens system.[152]

Indefeasibility was one of the specific issues addressed and the status of volunteers received thorough consideration. During the deliberations it was apparent that there was tension in the understanding of the position of volunteers. The Commissioners understood that the principle of indefeasibility applied both to purchasers and volunteers.[153] Henry Gawler, one of the key participants in the review process, disagreed.[154] He considered that the references to purchasers in the notice, ejectment and protection provisions of the 1861 Act[155] made a clear distinction between purchasers and volunteers.[156] The divergence in understanding of the legislation in relation to volunteers is interesting in itself as providing some of the background to the later divergence in the case law, and confirmed some of the ambiguities that can be detected in the early legislation. It may also be seen as reflecting different understandings of what indefeasibility meant. It prompted the Commission to recommend that the matter be made expressly clear in the legislation by making 'a material alteration' in limiting indefeasibility expressly to a purchaser for valuable consideration.[157] Further, in order to 'afford complete protection

152 *Report of the Commission to Inquire into the Working of the Intestacy, Real Property and Testamentary Causes Act* (1873), above n 68. The Report comprised 80 pages of *Minutes of Evidence*, together with an 11 page report and several addenda.

153 *Ibid* paras 17-19.

154 Gawler considered that the Commission's view as to the applicability of indefeasibility to volunteers was 'not borne out by the facts': South Australia, *Report on Real Property Amendment Bill, Report by Mr Gawler, accompanying Bill to Amend the Real Property Act, No 22, 1861*, Parl Paper No 47 (1874), 5; and see *Report of the Commission to Inquire into the Working of the Intestacy, Real Property and Testamentary Causes Act* (1873), above n 68, par 17. Gawler was asked to draft the Bill which was eventually submitted to Parliament in 1874: South Australia, *Parliamentary Debates*, 1874, 169; 1874, 795.

155 *Real Property Act* 1861 ss 114, 124, 126.

156 While he thought that perhaps the indefeasibility section did not of itself lead to this conclusion, taken in connection with these other provisions 'there can be no doubt that the present Act makes a broad distinction between a purchaser and a volunteer - protecting the former, but not the latter': *Report on Real Property Amendment Bill* (1861), above n 154, 5. What Gawler failed to pick up was how the distinction was drawn in the earlier Acts. There was a distinction, but not in relation to indefeasibility insofar as this concerned the vulnerability of the title to be set aside. It was only in designated instances that the title could be impeached.

157 *Report of the Commission to Inquire into the Working of the Intestacy, Real Property and Testamentary Causes Act* (1873), above n 68, para 18.

to bona fide purchasers for value, and to remove the slightest doubt' as to the intention of the legislation, the Report recommended spelling out that the protection was aimed at purchasers for value in the notice provision.[158] The Commission also recommended making forged transfers an express exception to indefeasibility.[159]

The deliberations of the Commission led to several Bills and considerable discussion before the *Real Property Act* 1878 was finally passed. The distinction between volunteers and purchasers was made very clear in the Bills. The paramountcy and ejectment provisions were expressly drawn in favour of purchasers for value; and the notice provision was amended as proposed.[160] But it was not an easy transition through Parliament: there was a Bill presented and worked through many stages in every intervening year after the presentation of the Report until the 1878 Act was passed.[161] There was a marked divergence of opinion in discussion as to the position of volunteers in relation to indefeasibility. Some of the principal antagonists of the Bill were concerned by the references to purchasers in the Bills; that many titles would be unsettled.[162] Angas considered that indefeasibility would be jeopardised by 'the sweeping reintroduction of equity jurisdiction...under colour of the words "valuable consideration"'.[163]

158 *Ibid* para 34.

159 *Ibid* para 67. By a majority it was decided that even where the purchaser was at the time of the purchase ignorant of the forgery, the transfer should be voidable so far as he or she and volunteers under him or her were concerned, but a subsequent purchaser for value should retain the land, and the defrauded proprietor should receive compensation out of the Assurance Fund. Volunteers were also in a different position from purchasers. While the position with respect to purchasers was itself to be qualified in the case of forgery, volunteers would continue to be excluded from indefeasibility when deriving title from the honest purchaser from a forger.

160 Using *Real Property Bill* No 6 of 1874 as the example: cl 54 (evidence), 55 (paramountcy), 56 (notice); 144 (protection). The two notable alterations of the prior law were in cl 55 and 56. Clause 55 began: 'Every proprietor, being a purchaser for valuable consideration...'; clause 56 began: 'Except in the case of fraud, wherein he shall participate or collude, no person contracting or dealing with, or taking, or proposing to take a transfer for valuable consideration from the proprietor of any estate or interest....'.

161 South Australia, *Parliamentary Debates*, 1874, 1875, 1876, 1877.

162 South Australia, *Parliamentary Debates*, 2 July 1874, House of Assembly, 799; and 22 September 1874, 1757(Mr Lindsay). Lindsay, Angas and the Hon W Storrie all sought to have the words removed from the proposed paramountcy provision: *Parliamentary Debates*, 24 September, 1874, 1823 (Mr Lindsay); 20 July 1875, 452 (Mr Angas); 1 September 1875, 894 (Hon W Storrie).

163 South Australia, *Parliamentary Debates*, 23 July 1874, House of Assembly, 1057 (Mr Angas).

Others expressed similar concerns.[164] The Attorney-General in 1875, the Hon SJ Way, agreed with the recommendation put by the 1873 Commission that the words were important and that 'the voluntary alienee of property ought to stand in the same position as the original holder'.[165] Lindsay, however, thought this was 'an innovation' on the original Act. He pointed to the definition of 'transfer' in the 1861 Act as expressly including both transactions for value and those without.[166]

Despite all the discussion, the 1878 Act as finally passed did not include an amended paramountcy provision. The recommendations of the 1873 Commission concerning forged transfers and purchasers for valuable consideration had to wait until the passage of the *Real Property Act* 1886, which replaced completely the 1861 and 1878 Acts. In the 1886 Act it was spelled out that the title of the registered proprietor was to be absolute and indefeasible, 'subject only to the following qualifications', including:

> I In the case of fraud...Provided that nothing included in this sub-section shall affect the title of a registered proprietor who has taken bona fide for valuable consideration, or of any person claiming through or under him:
>
> II In the case of a certificate...of title obtained by forgery...in which case the certificate...of title shall be void: Provided that the title of a registered proprietor who has taken bona fide for valuable consideration shall not be affected by reason that a certificate...of title was obtained

164 The Hon W Storrie considered that the words 'went to the very root of the present Act': South Australia, *Parliamentary Debates*, 8 October 1874, Legislative Council, 1959. The Attorney General at the time of the 1874 Bill, the Hon C Mann, explained the introduction of the words in terms that suggest that he had in mind the law in relation to voluntary conveyances and their voidability as against creditors: 'What the *Real Property Act* professed to do was to make the certificate of title paramount except in case it had been obtained by fraud. These words were inserted to carry out that intention': 23 September 1874, 1823; and see 23 July 1874, 1068. The Chief Secretary in 1875, the Hon W Morgan, stated similarly that the provision was to provide for fraudulent transfers: 1 September 1875, 895. The combination of fraud and absence of valuable consideration Lindsay found 'ingenious': 23 September 1874, 1823. Continuing this analysis, Sir H Ayers referred to 'an idea very prevalent in the legal mind that absence of valuable consideration was synonymous with fraud': 1 September 1875, 895.

165 South Australia, *Parliamentary Debates*, 20 July 1875, 452-3.

166 South Australia, *Parliamentary Debates*, 20 July 1875, 453.

> by any person through whom he claims title from a person under disability, or by any of the means aforesaid:
>
> III [Misdescription of boundaries]...except as against a registered proprietor taking such land bona fide for valuable consideration, or any person bona fide claiming through or under him:

The paramountcy provision now drew a clear distinction between volunteers and persons taking bona fide for valuable consideration. There was not the blanket exemption from indefeasibility in the paramountcy section that was suggested by the 1873 Commission, but limited exemptions as spelled out in this provision. A volunteer who took through a fraudulent proprietor did not acquire an indefeasible title. This imported into the paramountcy section the qualification which had been included in the ejectment provisions of the earlier Acts.

One provision of the 1878 Act which followed on from the recommendations of the Commissioners in 1873 was designed to preserve the jurisdiction of equity courts in relation to agreements for sale and equitable interests generally, subject to a proviso in favour of registered purchasers.[167] The proposal to include this provision attracted a great deal of debate in regard to each Bill. It was also the subject of correspondence from Torrens himself. While it had become in a sense unnecessary, as the decision in the particular case was effectively overturned by the later decision in *Cuthbertson v Swan*,[168] its inclusion and the surrounding discussion reveal the continuing tension in relation to the approach to volunteers. Torrens, Lindsay, and Ayers agreed that the decision in *Lange v Ruwoldt*[169] was wrong, but they saw in the provision the potential of an expansion of equitable jurisdiction.[170] What it did was to tip the balance in the legislation in distinguishing between purchasers and volunteers in relation to indefeasibility. It carried with it the implication that unregistered interests could be enforced against those who were not registered purchasers. Although it did not include the words 'for value', it added to the other threads of implication which were pulling away from

167 *Real Property Act* 1878 s 68, prompted by the decision in *Lange v Ruwoldt* (1872) 6 SALR 75), which had decided that no agreement for the sale of land under the Act could be enforced against the holder unless in the form prescribed by the Act and registered under it.

168 (1877) 11 SALR 402

169 (1872) 6 SALR 75.

170 South Australia, *Parliamentary Debates*, 6 July 1875, 326 (Mr Lindsay); 5 November 1878, 1468 (Sir H Ayers quoting letter from Torrens), 1878, 1521.

the understanding that Torrens had in relation to the first Acts on the subject of volunteers. The provision was retained in the 1886 Act where the words 'for valuable consideration' were added.[171]

The Commissioners in 1873 also considered the matter of procedure in the context of transmissions.[172] Sections 79-80 of the 1861 Act were seen to cause delay and sometimes 'very heavy expense' before devisees could become registered. As the descent of real and personal property had recently been assimilated,[173] in consequence of which all property now passed to the executor or administrator, it was thought advisable to introduce a provision to mirror this in the *Real Property Act*.[174] The real estate was to be transmitted to the executor or administrator,[175] who was to hold according to the trusts or dispositions of the will and subject to any trusts and equities which affected the deceased proprietor, thereby making the legal personal representative a real representative as well. Devisees or those taking on intestacy would then take from the executor or administrator. The Bills did not include the proviso, in relation to taking subject to equities which affected the deceased, which appeared in earlier Acts. Given the overall approach to indefeasibility that was recommended it was not necessary to include it specifically. The devisee or heir would, as a volunteer, have been subject to unregistered interests in any event under the recommended changes to the paramountcy provision.

The simpler procedure was introduced in the 1878 Act but the overall approach to indefeasibility was not introduced with any clarity until the 1886 Act. The position of the devisee or heir had therefore to be deduced from the rather amibiguous provision that reached the 1878 Act in place of the earlier proviso, under which 'any person registered in place of a deceased proprietor' was to hold the land 'upon the trusts, and for the purposes for which the same is applicable by law, and subject to any trusts and equities upon, and subject to which the deceased...held the same'.[176] The language of this provision was appropriate for those taking in a representative capacity, but did not sit so comfortably in the case of those

171 *Real Property Act* 1886 s 249.
172 *Report of the Commission to Inquire into the Working of the Intestacy, Real Property and Testamentary Causes Act* (1873), above n 68, para 46
173 *Law of Inheritance Act* 1867 (SA).
174 *Real Property Bill* No 6 of 1874 cl 111. South Australia, *Parliamentary Debates*, 22 June 1878, 115 (the Attorney General, Hon C Mann). Compare ss 53-59 *Real Property Law Amendment Act* 1858; and see Hogg, above n 7, pp 31-32.
175 *Real Property Act* 1878 s 36.
176 *Ibid* s 37.

who took beneficially, as in the case of devisees and heirs.[177] This was repeated in the 1886 Act where it appears to be applicable to those taking in a representative capacity, given especially its location within the provision dealing with executors and administrators.[178]

As the recommendations of the Commission were not fully adopted in relation to the broad approach to indefeasibility the ambiguity which had appeared in relation to the earlier legislation was, if anything, exacerbated. If it were not clear that devisees and other volunteers did not take an indefeasible title, then the simpler procedure for the registration of transmissions did carry certain dangers. At least one correspondent to the South Australian Register expressed concern as to the effect of registration of heirs, devisees and legal personal representatives 'with no enquiry or restraint'.[179] Without a thorough examination of the title in the Lands Titles Office prior to issuing the certificate of title to the devisee, the writer thought there was a danger that outstanding interests might be neglected.[180] As the distinction was not made clearly in the paramountcy provision or otherwise by including some qualification on the title,[181] the

177 Gawler was certainly of the view that devisees and volunteers taking under the devisee should be bound by equities affecting the deceased proprietor: Gawler, above n 154, xiv.

178 *Real Property Act* 1886 s 180.

179 'The *Real Property Act*', *South Australian Register*, 20 May 1882, included in EAD Opie, *Correspondence on the Real Property Act* (Adelaide, 1882) 54 at 55. The pamphlet is held in Mortlock Library, Adelaide. Opie was not a solicitor but had had dealings with proving wills and obtaining letters of administration: see letter in *South Australian Register*, 24 December 1881, included *ibid.* The reference to 'restraint' in the quoted passage means caveat.

180 *Ibid* 13. Opie refers to the case of *Brady v Brady* (1874) 8 SALR 219 which concluded that an entry in consequence of forgery was void. He used this 'as an illustration of which way the amending Act should... have gone": namely, in favour of conclusiveness of the Register and careful examination of titles in the Lands Titles office before the entry is made, and the Assurance Fund picking up responsibility for difficulties that might occur.

181 The possibility of a form of qualified title for devisees and heirs was put in the form of questions concerning the advisability of, for example, qualified certificates of title, which would become indefeasible after a fixed period of, say, 5 or 10 years. Henry Gawler gave this proposal little support, seeing it as 'merely introducing a sort of bastard Statute of Limitations' and 'equivalent to rendering the property no longer subject to the provisions of the Act': *Report of the Commission to Inquire into the Working of the Intestacy, Real Property and Testamentary Causes Act* (1873), above n 68, *Minutes of Evidence*, Question 1320 p 50, Gawler. Gawler thought that this would create great uncertainty and confusion amongst registered proprietors and 'would be very hard upon outsiders; and the complications and inconveniences of the old system, which we have endeavoured to sweep away once for all, would return.' While Gawler

level of scrutiny became critical in the survival or not of interests which existed prior to the registration of the volunteer.[182] The 1886 Act replaced all prior Acts. It picked up some of the recommendations of the 1873 Commission, but carried them through in a piecemeal fashion. The inference is stronger that the volunteer is to be considered in a different position from a purchaser, but there remain many of the tensions and ambiguities which affected the earlier group of Acts.

CONCLUSION

Looking at the development of the legislation from the first Act of 1858 through to the Act of 1886 there is an identifiable shift. The early legislation 1858-1861 gave volunteers indefeasibility of title except in the particular instance listed in the ejectment provision, taking through a fraudulent registered proprietor, but did not preclude claims for monetary compensation to be brought against the volunteer. Torrens himself distinguished between questions affecting title and those concerning personal liability and the first Act made this clearest in relation to deceased estates. There was some suggestion in subsequent Acts that devisees and heirs took subject to interests which affected the deceased proprietor, but this was not clearly drawn.

The 1873 Commission understood the legislation as working in favour of volunteers and purchasers alike and it wanted to change it so that only purchasers would get the benefit of indefeasibility of title. But the lines drawn between questions of monetary compensation and indefeasibility of title become less clear as the Bills got worked over until the eventual passage of the 1886 Act. The issue was posed in terms of indefeasibility of title only. This misses the point which Torrens made: that issues of title and compensation were separate ones; only for the purchaser should they be seen as requiring the same answer. The problem of volunteers was akin to the problem posed by forged transfers: if the curtain principle were to apply then the fact of the absence of valuable consideration or the forgery should be irrelevant from the standpoint of the conclusiveness of the Register to the outside world. The question then should become one rather of compensation: by whom and how much.

was in favour of the qualification of the indefeasibility of title of the volunteer, he did not wish to see the conveyancing system upset by the complication of different sorts of title.

182 And assuming that s 37 did not cover the situation.

The cases which have grappled with the problem of the volunteer have had to unravel the legislation without the benefit of an intensive examination of the background of the provisions. To find that the title of the volunteer was subject to prior interests was a reasonably accurate deduction of the law as it was summed up by the 1886 statute in South Australia, notwithstanding the ambiguities remaining. To find that the title of the volunteer was not subject to prior interests was a reasonably accurate deduction of the law as it was expressed in the 1861 statute in South Australia, except to the extent that there may have been a distinction made in the case of devisees and heirs. The 1861 Act was critical for the development of Torrens legislation in other jurisdictions. Five of the principal statutes were taken directly or indirectly from this Act.[183]

What, then, is the way to deal with volunteers? What about people like Norman Koteff, to return to the facts of a case like *Bogdanovic v Koteff*?[184] He is entitled to know what his position is with respect to property he inherits - he may want to expend capital and develop the property. He should know where he stands. The conclusiveness of the Register has proved a fundamental and vital principle of Torrens title - despite the attacks on this through a collection of overriding interests. Three law reform bodies have had occasion to consider the problem in recent years. All have recommended that volunteers should obtain indefeasibility of title. The Victorian Law Reform Commission suggested that:

> There is no reason to single out the registration of a land title for reversal simply because it arose out of a gift and not a contract. There are laws which prevent assets being stripped to defeat creditors, both in legislation dealing with fraudulent conveyances and in the *Bankruptcy Act* 1966 (Cth). These laws work compatibly with land registration by deeming certain transactions fraudulent and voidable by creditors, and by required the trustee in bankruptcy to register the trust before any third party acquires an indefeasible title. A registered title obtained through a gift by a person who is not fraudulent should be indefeasible.[185]

183 *Real Property Act* 1862 (Tas); *Real Property Act* 1862 (Vic); *Land Transfer Act* 1870 (NZ). The *Real Property Act* 1862 (NSW) was taken directly from the Victorian Act of 1862 and the *Transfer of Land Act* 1874 (WA) was taken from the Victorian Act of 1866: see Hogg, above n 7, 41.

184 (1988) 12 NSWLR 472.

185 Law Reform Commission of Victoria, , *Discussion Paper No 6: Priorities*, May 1988, para 10, p 5.

The Canadian Joint Land Titles Committee justified such an approach on the basis of economic incentive:

> Volunteers who become registered as owners of interests of the kinds which can be registered are likely to spend money on land and involve it in their economic affairs and thus require assurance of ownership as much as do purchasers. The elaborate investigations required by the common law are as burdensome for volunteers as for purchasers, and the exposure to the risk of ownership being upset by someone further up the chain of title is just as harsh, once investment has been made in land. Part 5 of the Model Act, which deals with registration, therefore does not distinguish between purchasers, on the one hand, and volunteers or donees on the other.[186]

The Queensland legislature implemented such recommendations in a very simple provision in the *Land Title Act* 1994:

> 165. The benefits of this Division apply to an instrument whether or not valuable consideration has been given.

This approach embodies the curtain and mirror principles of Torrens title and provides certainty in relation to titles. Extending indefeasibility expressly to volunteers (through lifetime transfers and through deceased estates) is supported by the objective of efficient and easy transfers of title[187] and, through security of title, the development of the land is encouraged. This in itself can be argued to be a sufficient justification for including volunteers within the curtain of indefeasibility.[188] Both goals, efficiency and encouragement of investment, are particularly important

186 Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada*, July 1990, 36-37; and see summary in P Butt, 'A Uniform Torrens Title Code?' (1991) 65 *ALJ* 348; LA McCrimmon, 'Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title' (1994) 20(2) *Mon LR* 300, 310-315.

187 See for example Ruoff, above n 9, 29.

188 See for example TW Mapp, *Torrens' Elusive Title: Basic Principles of an Efficient Torrens' System* (Edmonton: Alberta Law Review, 1978), 121-129.

where land is to be regarded as a commodity and to be treated like other property.[189]

But is it fair? A devisee, like Norman, will take free of equitable interests created by the previous registered proprietor unless there is some basis for arguing some other exception to indefeasibility, such as the in personam exception as presently operating. However in this context it is much less likely that there has been some conduct upon which to base such an exception given the current approach to it, than where the incoming registered proprietor is a purchaser. Notice by itself has been considered insufficient.[190] A purchase is a negotiated transaction and it could well be that the basis of such negotiations is an undertaking to respect prior equitable interests - as in *Bahr v Nicolay (No 2)*.[191]

The process of inheritance through a will is a passive process by contrast and therefore places holders of prior equitable interests at a much greater risk. If such a person does not lodge a caveat to protect his or her interest then that interest will ordinarily be defeated on registration of a transmission application to a beneficiary of the estate under the principle in *Bogdanovic v Koteff*.[192] The risk is heightened when one considers how unlikely it would have been for a person in Mrs Bogdanovic's position to lodge a caveat.

There is much to support the extension of indefeasibility of title to volunteers. But there is also no reason for the devisee to receive a windfall

189 The commodification of real property was emphasised by Torrens in, for example, his second reading speech on 11 November 1857: *Speeches of Robert R Torrens*, above n 10, 12 at 13. See also Buck, above n 8, 157ff.

190 The Court of Appeal left open the question of whether volunteers might be subject to unregistered interests of which they had notice when they acquired their interest. This suggestion is found in the vague reference in the concluding paragraphs of the judgment of Priestley JA, (1988) 12 NSWLR 472 at 480: 'But if knowledge of the appellant's interest by Mr N Koteff before he became registered proprietor would enable her to assert her rights against him (a matter upon which it is unnecessary in this case to express any opinion) the material earlier referred to show there is no basis for holding Mr N Koteff knew anything which would put him on notice of those rights.' If this comment is not read in isolation but taken in the context of the reference to the assertion of personal rights against the registered proprietor, it is not notice alone which would be important but notice such as to provide the foundation for the assertion of a personal right in the manner established in other cases, such as *Bahr v Nicolay (No 2)* (1988) 164 CLR 604.

191 (1988) 164 CLR 604.

192 (1988) 12 NSWLR 472.

simply because of the operation of the Torrens system. Why should Norman gain at Mrs Bogdanovic's expense? The only alternatives are a claim against the Assurance Fund; a claim against the estate; or a claim against the volunteer. Mrs Bogdanovic's claim against the legal personal representative would be excluded on the basis of the protection given to representatives under probate legislation.[193] What else could she do? As her claim was based on breach of trust she would be excluded from the Assurance Fund in the particular jurisdiction.[194] In jurisdictions which have broadly drawn eligibility grounds for making a family provision claim under Family Provision or Testator's Family Maintenance legislation, she may be able to base such a claim on dependency on the deceased.[195]

It is appropriate that claims against personal representatives have limited duration in order to facilitate the administration of the estate. But what of the other claims? Mrs Bogdanovic ought not to be left without a remedy. Her proprietary claim against the property was excluded by force of indefeasibility. Her claim against the executor was excluded by statutory protection. Why should her claim against the estate generally or against the Assurance Fund be precluded? The former would be complex.[196] The latter can be supported on the basis that she has only lost her interest through the operation of the Torrens system - by giving indefeasibility of title to the volunteer. But then why should the State pick up the compensation when the devisee has obtained a windfall?

There is room to consider again the approach Torrens had in mind, through monetary compensation from the one who benefits. In the absence of a clearly defined approach of this sort, the gut instincts of the judges who held the volunteer's title to be subject to prior interests, were

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193 See for example, K Mackie and M Burton, *Outline of Succession* (Australia: Butterworths, 1994) [13.17]-[13.18].

194 The New South Wales provision, for example, expressly excludes claims based on the breach by a registered proprietor of, inter alia, a constructive trust: *Real Property Act* 1900 (NSW) s 133(a).

195 *Family Provision Act* 1982 (NSW) s 6(1), definition of 'dependant'; *Succession Act* 1981 (Qld) s 40, definition of 'dependant'; *Administration and Probate Act* 1958 (Vic), s 91(1) ('person for whom the deceased had responsibility to make provision').

196 An example of judgment against the estate in a case where a woman lost her registered title when her ex-husband forged her signature in favour of a purchaser, is *Hermansson v Martin* (1982) 140 DLR (3d) 512. As this was a case of forgery, rather than breach of trust, a claim against the Assurance Fund was not precluded.

probably right. That at least does not leave Mrs Bogdanovic without a remedy.[197]

197 *Postscript:* It is such a pity that *Bogdanovic v Koteff* (1988) 12 NSWLR 472 was not heard by the High Court. An application for special leave to appeal was made, but it was refused on 14 October 1988 as 'subsequent developments touching the applicant have deprived the application of any practical significance': SE Jones, 'The Once and Future "King" - the Fall and Rise of the Registered Volunteer: *Bogdanovic v Koteff* (1988) 12 NSWLR 472', (1989) 4 *APLB* 2, 4. This is also noted in Bradbrook, MacCallum and Moore, above n 12, [4.64] n 243. Mrs Bogdanovic, now aged 78, had entered a nursing home and thus had no need to pursue her right of occupation in the Annandale property.