UNDERSTANDING INDEFEASIBILITY UNDER THE VICTORIAN TRANSFER OF LAND ACT

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INTRODUCTION

The central concept in Torrens system legislation is the principle of indefeasibility. It is commonly thought that once a title is recorded on the register, not only is the title created by the act of registration, but upon registration the statute will guarantee the validity of that title and confer upon it an immunity from any attack. Whilst it seems to be universally acknowledged that indefeasibility will result from the registration of title, controversy nonetheless exists as to when indefeasibility will attach to a registered title. The line of battle is drawn between those who favour the view of immediate indefeasibility and those who prefer the concept of deferred indefeasibility. It is dubious whether the various protagonists in this debate can be all grouped behind such simple labels. For instance, the deferred indefeasibility camp in turn divides according to two basically different approaches. There are those who rest their case on the basis that the registration of a void instrument cannot confer an indefeasible title in favour of the registrant even when that person is a *bona fide* purchaser for value.[1] Alternatively, there are those who place paramount importance on s. 43 of the Transfer of Land Act 1958 as being fundamental to the statutory scheme of indefeasibility.[2] That section can be briefly described as providing that when a transferee of a registered proprietor deals with the registered proprietor he shall be relieved of the requirements of notice. The proponents of this view argue that this provision implies that indefeasibility only attaches to those titles which have been registered by a person who has acquired his title and entered the transaction on the faith of the register.

Between 1934 and 1967 the principle of deferred indefeasibility dominated the judiciary's approach to the Torrens system. Then in 1967 the case of *Frazer v. Walker*[3] went to the Privy Council from the New Zealand Court of Appeal. Although on the facts of the case the issue of immediate versus deferred indefeasibility was not raised, their Lordships nevertheless

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1 See Taylor W., 'Scotching *Frazer v. Walker*' (1970) 44 *Australian Law Journal* 248.

2 See the judgment of Dixon J. in *Clements v. Ellis* (1934) 51 C.L.R. 217.

3 [1967] 1 A.C. 569.

seized the opportunity to expound on the matter. The decision very clearly rejected both approaches to deferred indefeasibility.[4] In addition the decision fastened upon the New Zealand equivalent of s. 42 of the Transfer of Land Act as being the key section which constructs the indefeasibility principle. Section 42 provides that the title of a registered proprietor shall be absolutely free of all encumbrances except those notified on the register or those specifically mentioned in that section. At the same time the judgment of Lord Wilberforce laid the basis for an entirely new justification for the deferred indefeasibility argument. Having stated the importance of the New Zealand equivalent of s. 42 and having articulated an immediate indefeasibility approach his Lordship then went on to say: 'In doing so they (their Lordships) wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant.'[5] This so-called *in personam* exception, as will be explained later, in effect amounts to deferred indefeasibility.

DEFEASIBILITY DISSECTED

This analysis of indefeasibility will begin with an examination of the ways in which a title can be rendered defeasible. As far as it is possible to ascertain, the title of a fee simple holder can be attacked in any one of five ways.

A title may be impeached, at least in theory, when the title-holder claims an interest which is not known to the law. The decision of *Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor*[6] provides an example of this kind of attack. In reality, in so far as indefeasibility under the Torrens system is concerned, an attack of this nature raises no real problems since the interests claimed by title-holders are almost entirely those which are within the contemplation of the law.

Having established that the estate or interest, forming the subject of the dispute, is one known to the law, the next category of defeasibility concerns the identity of the proprietor of that estate or interest. This form of defeasibility relates directly to the question of title and thus involves a contest as to who can claim the title to that particular estate or interest. Naturally enough this form of defeasibility is of central importance in Torrens system legislation.

Once it is clear who is the proprietor of a recognized estate or interest in land, the priorities issue constitutes the third form of defeasibility of title. Where there exist two or more interests in the same parcel of land and where the rights stemming from those interests cannot be exercised

[4] See *Mayer v. Coe* [1968] 2 N.S.W.R. 747; *Breskvar v. Wall* (1971) 126 C.L.R. 376.
[5] [1967] 1 A.C. 569, 585.
[6] (1937) 58 C.L.R. 479.

consistently with each other, then it is necessary that the enforcement of one interest take precedence over the other. The title to that estate or interest which loses priority is defeated at the point of enforcement.

The fourth category of defeasibility concerns a title to an estate or interest in land which forms the subject of a proprietary interest. In other words the title and the proprietary rights encompassed in that title constitute the subject-matter of a further interest. This additional interest is therefore not an interest in land but rather an interest in an interest in land. A typical example of such an interest is the equitable rights of a beneficiary under a trust. The right of a beneficiary to require his trustee to account for rents and profits received from the land provides a good illustration. The subject-matter of that beneficial right is not the land but rather the rents and profits derived from that land. His right directly relates to the rents and profits and only indirectly relates to the land, being the source of those rents and profits. The right of a beneficiary to call upon the trustee to convey the legal title to him is again a right related directly to the legal title and only indirectly related to the land constituting the subject of that title. The right to compel the trustee to exclude strangers from the land is again a right directly concerned with the exercise of the trustee's legal right of exclusion. In other words the subject-matter of that right is not the land but rather the trustees's legal chose in action. In these instances defeasibility occurs because the assignment of the title and the exercise of the rights incidental thereto are constrained by the imposition of obligations enforceable in equity. Although this form of defeasibility is commonly regarded as an example of a priorities contest, it is submitted that it is quite distinguishable from the priorities situation because there is no conflict between two or more competing interests in land. Rather the conflict occurs between an interest in land and an interest in that interest in land.

Transactional equities or mere equities constitute the fifth category of defeasibility. A transactional or mere equity is a right enforceable in equity to have the legal effect of a transaction modified or abrogated. Examples of such equities are the equity of rectification, the equity to have a deed set aside for fraud and the right to the rescission of a contract for innocent misrepresentation or mistake. The effect of these equities is to render the legal consequences of a transaction voidable. Thus if the legal consequence of a transaction is the assignment of title and the effect of that transaction is subject to one of the above equities, although the assignment of that title may be initially valid it may, if the equity is enforceable, be rendered void. In this type of case the title is defeasible because the transaction from whence that title was acquired is voidable in equity. As is clearly indicated in the case of *Latec Investments Ltd v. Hotel Terrigal Pty Ltd*[7] such equities are enforceable under the Torrens system. However they are

[7] (1965) 113 C.L.R. 265.

not enforceable as against any person who has acquired either a legal or equitable interest on the strength of the voidable transaction who is a *bona fide* purchaser for value and without notice that that transaction is voidable in equity.

THE PROTECTION OF TITLE UNDER THE TRANFER OF LAND ACT

An examination of the key sections of the Transfer of Land Act indicates that the intention of the legislature was to protect registered titles in a graduated manner. The initial task is to identify the estates and interests which are to enjoy the safeguards provided under the Act. It is clear from s. 40(1) of the Act that the interests designated for protection are those legal interests in land capable of registration under the Act and which are in fact registered. The section is something of an all or nothing provision.

> Subject to this Act no instrument until registered as in this Act provided shall be effectual to create vary or extinguish or pass any estate or interest or encumbrance in on or over any land under the operation of this Act, but upon registration the estate or interest or encumbrance shall be created varied extinguished or pass in the manner and subject to the covenants and conditions specified in the instrument or by this Act prescribed or declared to be implied in instruments of a like nature.

Section 52 of the Property Law Act requires, subject to some exceptions, that all legal interests in land be created by deed. As can be seen from s. 40(2) of the Transfer of Land Act the requirement of a deed, with respect to those legal interests in land coming under the Act, is substituted by the registration of an instrument. Thus if one is seeking to acquire a legal interest in Torrens system land, which under the general law can only be created by a deed, it is essential in acquiring that interest, to have it registered under the Act. If, however, the interest claimed is one arising by operation of law then its existence will not depend on registration. Similarly if the interest is equitable and its creation under the general law does not depend upon the execution of an instrument, but, rather is created by a transaction which is either evidenced by an instrument or which can be proven by sufficient acts of part performance, then the existence of that interest is not dependent on registration.[8]

Having registered a registrable interest the person claiming that interest has gained protection from the first category of defeasibility. The interest is definitively one which has been properly or formally created and exists within the contemplation of the law. The second category of defeasibility concerns a direct attack on title where the proprietorship to that interest is challenged. Section 41 of the Act is directed to that problem.

> . . . and every Crown grant or certificate of title registered under this Act shall be received in all courts as evidence of the particulars therein and of the entry thereof in the Register Book, and shall be conclusive evidence that the person named in such grant or certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.

[8] See *Barry v. Heider* (1914) 19 C.L.R. 197 *per* Isaacs J.

It is quite apparent from this provision that a person registered as a proprietor of an estate of interest in land is granted indefeasibility of title within the narrow meaning of that expression. In other words, that person is beyond doubt the legal proprietor of the estate or interest accorded to him by the register. Thus, if a person acquires a registrable interest and is named on the register as the proprietor thereof he will have obtained protection from the first two categories of defeasibility.

Section 42 of the Act bears on the third form of defeasibility, namely the priority problem. That provision resolves priority questions on the following basis. The fee simple estate of a registered proprietor is given priority over all estates and interests in land subject only to those estates, interests or rights in land which are registered on the certificate of title as encumbrances. That is the effect of s. 42(1) apart from two exceptions which are not material to the present discussion. Section 42(2) creates what are known as 'paramount' interests. They include six categories of interests specified in that sub-section which are to take priority over both the fee simple and registered encumbrances. Those interests are: (a) conditions, reservations and exceptions contained within the Crown grant, (b) the rights of an adverse possessor, (c) public rights of way, (d) easements, (e) the interest of a tenant in possession and (f) certain unpaid rates and taxes which operate as charges upon the land.

The existence of paramount interests indicates that registered interests were not intended to be given an absolute protection from an attack which takes the form of the third category of defeasibility. This must follow once it is recognized that paramount interests take priority over registered interests. Therefore the protection granted can only be one of partial indefeasibility.

This therefore brings us to s. 43 and the protection granted with respect to the fourth category of defeasibility, namely the contest between an interest in land and an interest in that interest in land. This issue raises the most controversial matter dealt with in this article. In fact the preceding material should be regarded as introductory, as merely setting the stage, and as explaining the broad approach, contained within the Act, as to the general problem of defeasibility of title. The solution to the fourth category of defeasibility contained within s. 43 will now be considered in detail.

THE ROLE OF SECTION 43

It is submitted that s. 43 was designed to protect the fee simple estate of a registered proprietor from the imposition of certain equitable interests and in particular the trust when those interests were created or imposed on a predecessor in title to the registered proprietor. It may be thought that the registered proprietor is given that protection by virtue of s. 42. If that view is correct it would mean that one would have to regard the equitable interest of a beneficiary under a trust as being an interest in land.

For reasons which will be elaborated now that concept of a trust would not be strictly correct.

Sir Edward Coke in defining a use[9] described it in the following manner:

> A confidence reposed in some other, not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land, and to the person touching the land, for which the *cestui que use* has no remedy but by subpoena in the Chancery.[10]

This definition may be objectionable for other reasons but in so far as it asserts that the interest of the beneficiary is not one issuing out of the land but rather is one which issues out of or is annexed to the estate in the land it is to be regarded as an extremely useful definition. This definition has been approved by eminent writers on equity such as Lewin.[11] The concept of the beneficial interest being an interest in an interest is consistent with a number of definitions put forward by writers such as Underhill.[12]

A somewhat different definition of a trust was offered by Mr Justice Story:

> A trust, in the most enlarged sense in which that term is used in English jurisprudence, may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof.[13]

Such a definition would suggest that the equitable interest of the beneficiary under a trust is an interest in land, rather than being one step removed. In the decision of *Barry v. Heider*[14] the judges of the High Court seem to have assumed that an equitable interest under a trust is an interest in land. Similarly Adam J. in *King v. Smail*[15] appears to have made much the same assumption. Without going into the details of the facts of those cases it is sufficient to say that in both instances it was argued that because an equitable interest is a direct interest in land, certain consequences would follow under Torrens system legislation. In both instances the bench resisted those consequences. However, in neither case did any judge challenge the initial premise which was common to both arguments by asserting that an equitable interest under a trust is not a direct interest in land.

To assume that the beneficial interest under a trust is merely the equitable equivalent of the legal fee simple clearly overlooks the effect of a series of cases in the area of conflict of laws. It has been firmly held that under Anglo-Australian law a court cannot entertain an action with respect to the title to land situated outside the jurisdiction of the court.[16] Thus if A was a fee simple proprietor of land situated in New South Wales and

[9] This definition could be equally applicable to a trust.
[10] Co. Litt. 272(b).
[11] See Mowbray W. J., *Lewin on Trusts* (16th ed. 1964) 4.
[12] See Keeton G. W. and Sheridan L. A., *The Law of Trusts* (10th ed. 1974) 4.
[13] See Story J., *Commentaries on Equity Jurisprudence* (3rd English ed. 1920) 394.
[14] (1914) 19 C.L.R. 197.
[15] [1958] V.R. 273. A similar assumption has also been made with respect to the equitable interests of a tenant in possession under s. 42(2)(e). See *Burke v. Dawes* (1938) 59 C.L.R. 1; *Downie v. Lockwood* [1965] V.R. 257.
[16] *The British South Africa Company v. The Companhia de Moçambique* [1893] A.C. 602.

he wished to recover possession of that land he could only sue in that state. There is, however, an important exception to this rule. *In personam* actions relating to land situated outside the jurisdiction of the court may nevertheless be entertained by the court[17] if those actions concern the enforcement of a 'personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the *locus* of the immovable property'.[18] If we take the example given above, and if one assumes that A, having regained possession of his New South Wales land, were to enter into a contract of sale of that land with B, the importance of the above exception in the context of this article can be seen clearly. If B were to seek a decree of specific performance against A he is not confined to bringing his action in New South Wales only. An action seeking a decree of specific performance over land situated outside the jurisdiction very clearly comes within the above exception.[19]

If B were to bring his action in Victoria, by serving A personally with process while he was in Victoria, B would be enforcing his title to an equitable fee simple estate in land situated in New South Wales. If the equitable fee simple estate of a beneficiary under a constructive trust is merely the equitable equivalent of a legal fee simple estate then the above exception makes little sense. If actions for the enforcement of the rights of a legal fee simple holder are treated as actions relating to title to land then the same would be true of actions for the enforcement of the rights of equitable fee simple holders if the latter estate was the exact equivalent of the former. The very existence of this exception clearly indicates that legal and equitable fee simple estates are far from being analogous. One is an estate in land and hence it involves the title to that land, the other concerns 'personal obligations' which the fee simple proprietor owes to a beneficiary. The equitable interest is clearly not an interest in land but rather is a bundle of *in personam* rights which the beneficiary enjoys as against the fee simple proprietor (trustee) with respect to his legal title.

It is not the object of this article to advance an exhaustive or universal definition of a trust. Nor is it necessary to assert that the trust concept invariably involves the existence of an interest within an interest. It may be that in certain contexts the trust may properly be regarded as legal and equitable estates with one being the mirror-image of the other. The trust could conceivably manifest itself in different forms on different occasions. As Meagher, Gummow and Lehane have observed:[20]

[17] *Penn v. Lord Baltimore* (1750) 1 Ves. Sen. 444; 27 E.R. 1132.
[18] *Deschamps v. Miller* [1908] 1 Ch. 856, 863.
[19] *Richard West and Partners (Inverness) Ltd v. Dick* [1969] 2 Ch. 424.
[20] See Meagher R. P., Gummow W. M. C. and Lehane J. R. F., *Equity: Doctrines and Remedies* (1975) 83.

> An examination of the nature of equitable estates and interests demonstrates that in equity there is no system or hierarchy of property concepts which, once comprehended, is a sufficient guide for all purposes and at all times.

Assuming that there are alternative ways of viewing the trust, the specific question to be answered is which of these possible models applies under the Transfer of Land Act.

Section 4 of the Transfer of Land Act, the definition section, describes land as follows:

> 'Land' includes any estate or interest in land.

This definition provides us with the means of resolving one of the major contradictions posed by the Transfer of Land Act. Section 40(1) states that no estate, interest or encumbrance shall be created varied extinguished or passed 'in on or over any land under the operation of this Act' by an instrument unless that instrument is registered. Section 89(1) states: 'Any person claiming any estate or interest in land under any unregistered instrument . . . may lodge with the Registrar a caveat. . . .' The problem presented by these two provisions is how can one claim an interest in land under *any* unregistered instrument if by s. 40(1) no such interest could be created or passed by such an instrument unless it was registered. Surely s. 89(1) is not contemplating the case of a person claiming an interest which by s. 40(1) could not exist in law. The whole thrust of the case law concerning caveats is that a caveat will not lie for the protection of an interest which does not exist in law.

The resolution of this conflict can be achieved by altering the meaning of the term 'land' as it is used in the two sections. If 'land' was to mean just simply 'land' in one section and if it was to mean 'an estate or interest in land' in the other, the inconsistency would be removed. However, that leaves us with the question of which meaning should be attributed to which section. Section 89(1) is primarily concerned with the protection of equitable interests under the Torrens system,[21] whereas s. 40(1) is primarily concerned with the creation and registration of legal interests under Torrens system land. This can be seen by looking at s. 40(2) which states:

> Every instrument when registered shall be of the same efficacy as if under seal and shall be as valid and effectual to all intents and purposes as a deed duly executed and acknowledged or other appropriate form of document.

Under the general law a legal interest in land must be created by deed.[22] It is therefore quite obvious that s. 40(2) of the Transfer of Land Act replaces that requirement, with respect to Torrens land, with the requirement of registration. As Griffith C.J. stated in *Crowley v. Templeton*[23] '. . . the Transfer of Land Act is to substitute title by registration for title by deed'.[24] Therefore it is safe to conclude that s. 40 is concerned primarily with the creation of legal interests in land.

[21] See *Barry v. Heider* (1914) 19 C.L.R. 197 *per* Griffiths C.J.
[22] See s. 52 Property Law Act (1958).
[23] (1914) 17 C.L.R. 457.
[24] *Ibid.* 462.

If s. 40 concerns the creation of legal interests and if s. 89 is concerned with the protection of equitable interests and if the meaning of the term 'land' as used in both sections must differ, then it would seem reasonable to say that 'land' as referred to in s. 40 means simply 'land', whereas that expression when used in s. 89 means both 'land' and an 'estate or interest in land'. If this proposition is correct it would strongly suggest that the draftsman of the Act regarded equitable interests, and in particular equitable interests under a trust as interests in an estate or interest in land and not as direct interests in land. It would therefore follow that the register established under the Act was intended to record on its face only those estates or interests directly in land. Thus it would seem most appropriate to prevent, as is done in s. 37, the entry of a trust on the register.

SECTIONS 42 AND 43

It is against this background, I believe, that an understanding of the relationship between ss. 42 and 43 can best be achieved. Section 42 states that:

> Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are notified on the Crown grant or certificate of title but absolutely free from all other encumbrances whatsoever. . . .

Encumbrance is defined in section 4 of the Act as follows:

> in respect of any land includes any estate interest mortgage charge right claim or demand which is or may be had made or set up in to upon or in respect of the land.

Section 43 states:

> 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 land shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding . . .

The plain effect of s. 43 is to relieve a person contracting or dealing with a registered proprietor of the requirement of notice. It has been held that the benefit of s. 43 can only be gained on becoming registered.[25] Thus the operation of the section is confined to introducing a modification to the general law rule governing a competition between a prior equitable interest and a subsequent legal interest. Under the general law a competition of that nature will be resolved in favour of the holder of the subsequent legal interest only when he is a *bona fide* purchaser for value without notice. The effect of s. 43 is to modify that position by favouring the holder of the subsequent legal interest not only when he is *bona fide* for value without notice, but also when he has dealt with the previous registered

[25] *Templeton v. The Leviathan Pty Ltd* (1921) 30 C.L.R. 34; *IAC (Finance) Pty Ltd v. Courtenay* (1963) 110 C.L.R. 550.

proprietor, and irrespective of whether he has notice. Thus, under the Torrens system, the holder of a subsequent legal interest can take that interest free of any prior equitable interest if he is either *bona fide* for value without notice, or if he is *bona fide* for value and has dealt with the previous registered proprietor. It therefore follows that s. 43 is of no advantage to a registered proprietor who is merely *bona fide.*

If we were to regard an equitable interest as an encumbrance within the meaning of s. 42 it would render s. 43 pointless. Under s. 42 a *bona fide* registered proprietor of land is to hold that land subject to the encumbrances notified on the title but absolutely free of all other encumbrances except those mentioned in s. 42(1) and (2). Apart from the equitable interests of a tenant in possession[26] no other equitable interests could be categorized within any of the exceptions mentioned in s. 42, nor could they be noted as encumbrances on the title. Thus if equitable interests are encumbrances then a registered proprietor can hold his fee simple estate absolutely free of such interests so long as he is *bona fide.* He need not establish that he has given valuable consideration, nor would he be required to show that he dealt with the registered proprietor. Thus if the *bona fide* registered proprietor is a mere volunteer, under this view of s. 42, he would be able to take free of prior equitable interests.

This was precisely the issue in *King v. Smail.*[27] In that case Adam J. was required to determine who would succeed in a competition between a prior equitable interest and a subsequent fee simple estate held by a mere volunteer who was registered on the title. His Honour held, following *Gibbs v. Messer*[28] and *Clements v. Ellis,*[29] that before a registered proprietor can enjoy the benefit of s. 42 he must first come within the protection of s. 43. Thus a mere volunteer could not claim immunity under s. 42. Whilst the result in *King v. Smail* is quite acceptable, the line of reasoning adopted by Adam J. can no longer be considered sound in light of the decision in *Frazer v. Walker.*[30] The whole thrust of that decision and the decision of the High Court in *Breskvar v. Wall*[31] was to hold that s. 42 was not to be read down because of the existence of s. 43.

The problem posed in the aftermath of *Frazer v. Walker* is whether the result in *King v. Smail* must be reversed if a similar question arose today. If the answer to this question is to be derived from the broad framework set out in *Frazer v. Walker* the only basis upon which the result in *King v. Smail* could be supported is the so-called *in personam* exception. However there are clear and obvious difficulties in attempting to define the ambit of

[26] See s. 42(2)(e).
[27] [1958] V.R. 273.
[28] [1891] A.C. 248.
[29] (1934) 51 C.L.R. 217 *per* Dixon J.
[30] [1967] 1 A.C. 569.
[31] (1971) 126 C.L.R. 376.

the *in personam* exception. The Privy Council in *Frazer v. Walker* certainly made no attempt to comprehensively define the scope of this exception. On the basis of a thorough analysis of the case law Mr Steven has concluded[32] that this exception contemplates the enforcement of contractual or fiduciary obligations incurred by the registered proprietor. Thus if a registered proprietor enters into a contract of sale and subsequently refuses to complete the contract, the purchaser will be able to seek specific performance against him. In gaining a decree of specific performance the purchaser is enforcing as against the registered proprietor an equitable interest under a constructive trust arising out of the contract of sale.[33] If that equitable interest is to be regarded as an encumbrance within the meaning of s. 42 then to enforce a decree of specific performance against the registered proprietor would mean that he does not hold his title 'absolutely free'. Thus the supposed return to a literal interpretation of the key sections of the Act, ushered in by *Frazer v. Walker*, was both short-lived and half-hearted.

Alternatively we may regard those interests, which are of a contractual or fiduciary nature and which are enforceable against a registered proprietor as interests within interests and not as direct interests in land, and are therefore not encumbrances within the meaning of s. 42. Thus the *in personam* exception may be maintained without doing violence to a literal interpretation of the Act. If that is so, and it is the primary object of this article to assert that very proposition, then s. 42 offers a registered proprietor no protection against adverse claims coming within the *in personam* exception. To gain that kind of protection one must turn to s. 43 which operates at a level above that of s. 42; namely at the level of interests within interests. Furthermore the protection given by s. 43 is very limited; it relates only to those registered proprietors who are *bona fide* for value and who have dealt with the previous registered proprietor. However it should be remembered that this protection is supplementary to the protection granted by the general law to registered proprietors who are *bona fide* for value without notice.

To return to the problem posed earlier; namely, would the result in *King v. Smail* be now reversed? The answer is no. The equitable interest which arose in that case was an interest under a trust and thus was an interest in an interest and therefore was outside the scope of s. 42 and came within the scope of s. 43. Given that the registered proprietor was a mere volunteer neither the protection granted by s. 43 nor the protection granted by the general law could be of any advantage to such a person. Nor, in accordance with this analysis, would it make any difference that it was not the registered proprietor who was responsible for the creation of that

[32] See Stevens L. L., 'The *in personam* Exceptions to the Principle of Indefeasibility' (1968-71) 1 *Auckland University Law Review* 29.
[33] *Lysaght v. Edwards* (1876) 2 Ch.D. 499.

equitable interest, but rather her predecessor in title. If a registered proprietor should create an *in personam* claim, based in equity on a fiduciary relationship (that is a trust relationship), that claim can be enforced against all subsequent registered proprietors, unless they are either *bona fide* for value without notice or they are *bona fide* for value and have dealt with the previous registered proprietor.

An assertion that the operations of ss. 42 and 43 are mutually exclusive, with the first functioning at the level of direct interests in land and the second functioning at the level above that, namely the level of interests within interests, is not to advance a proposition which is entirely new. This view has found expression in the judgment of Kitto J. in *I.A.C. (Finance) Pty Ltd v. Courtenay*.[34] In that case His Honour stated:

> Until registration, a person who has dealt with a registered proprietor cannot have more than an equitable interest, for until that event even a registrable instrument cannot pass the estate or interest which it specifies: s. 41.[35] After registration, he holds, by virtue of s. 42, free from all encumbrances, liens, estates or interests not notified on his certificate of title (with immaterial exceptions); but this does not exclude equitable interests: *Barry v. Heider; Great Western Permanent Loan Co. v. Friesen; Abigal v. Lapin*. Even as regards equitable interests he has a degree of immunity by virtue of s. 43. But the immunity under that section is limited: it is only such immunity as is created by exonerating him from the effect of notice of any trust or unregistered interest.[36]

Before leaving this part of the analysis it would be desirable for me to attempt a classification of those interests which are in land and those which are interests in interests. Quite obviously any interest which is registered as an encumbrance on the title must be regarded as a direct interest in land. Section 42 treats all such interests as directly competitive with the fee simple estate and hence these must be viewed as interests in land. On the other hand any equitable interest, created by an agreement, in which the grantor is required to execute an instrument, which when registered creates an encumbrance within the meaning of s. 42, is prior to registration an interest in an interest. This follows from the fact that whether the interest to be registered is a fee simple, mortgage, lease, restrictive covenant, easement, *profit à prendre* or whatever, the agreement to create or assign such an interest establishes a constructive trust between the grantor and the grantee under which the beneficial interest of the grantee is necessarily an interest in an interest.

Miscellaneous interests such as equitable charges and liens which may not fit the above classifications can be categorized by reference to the exception to the 'local action' rule in conflicts. Under that rule, it will be recalled, a court will not entertain an action relating to the title to land situated outside the jurisdiction. However there is an exception to this rule with respect to actions which seek to enforce personal obligations relating

[34] (1962-63) 110 C.L.R. 550.
[35] This refers to the N.S.W. equivalent of s. 40(1) of the Transfer of Land Act.
[36] (1962-63) 110 C.L.R. 550, 571, 572. Sections 42 and 43 of the N.S.W. Act are the same as ss. 42 and 43 of the Transfer of Land Act.

to such land of either a contractual, fiduciary or conscionable nature. Those interests, whose enforcement would come within the local action rule, will roughly equate with direct interests in land. Whereas those interests capable of enforcement by actions which come within the exception to that rule will normally fit within the category of interests in interests. It should not be forgotten that this last criterion is clearly subject to the two criteria mentioned above.

If an interest is a registered encumbrance, then it is a direct interest in land, and the fact that it can be enforced by an action which comes within the exception to the local action rule cannot alter a classification which is created under s. 42 of the Transfer of Land Act. For instance an action of foreclosure under a mortgage over foreign land has been held to come within the exception.[37] That fact, however, would not change the fact that a registered mortgage is by virtue of s. 42 a direct interest in land. It must also follow that if an interest under a constructive trust is an interest in an interest then all such interests must come within that same classification. It would appear that equitable liens and charges, which cannot be registered and which are not interests under a constructive trust can only be classified according to this distinction which has been developed in conflicts. Actions enforcing equitable charges are treated as coming within the exception;[38] liens, however, may not come within it.[39]

PROTECTION AGAINST TRANSACTIONAL OR MERE EQUITIES

The final category of defeasibility of title is when a transaction upon which a title is derived is rendered voidable in equity. The equity of rectification, the equity to have a deed set aside for fraud or the equity to have a contract rescinded all consist of a right enforceable in equity to have the legal effect of a transaction either modified or abrogated. Whilst these equities are enforceable against a person who was not a party to the transaction, the range of enforceability is nevertheless quite limited. They are not enforceable against third parties who have acquired either a legal or equitable interest *bona fide* for value without notice that the transaction through which their title or interest is derived is voidable in equity. Since a mere equity is a right enforceable in equity to have the legal effect of a transaction abrogated or modified, it follows that to have notice of a mere equity you must have notice that the particular transaction is defective. In *Smith v. Jones*[40] it was held by Upjohn J. that a tenant's possession did not give notice to a purchaser of the reversion of the existence of an equity of rectification relating to his tenancy agreement. A person's occupation of land will only give notice of his equitable interests and not his mere

[37] *Toller v. Carteret* (1705) 2 Vern. 494, 23 E.R. 916; *Paget v. Ede* (1874) L.R. 18 Eq. 118.
[38] *Duder v. Amsterdamsch Trustees Kartoor* [1902] 2 Ch. 132.
[39] *Narris v. Chambres* (1861) 29 Beav. 246; 54 E.R. 621.
[40] [1954] 2 All E.R. 823.

equities. The reason is obvious. A person's possession of land can only be relevant to those interests he has which relate either directly or indirectly to that land. The possession cannot be considered relevant or indicative of rights which relate not to the land but rather to a transaction.

Whilst a mere equity is a proprietary right, in so far as it is enforceable against a person other than the grantor, its range of enforceability is the most limited and hence presents the least threat in terms of defeasibility of title. Nevertheless the Torrens system appears not to have overlooked the need to provide some protection from this kind of threat. The Transfer of Land Act provides that form of protection in s. 44(2) which states:

> But nothing in this Act shall be so interpreted as to leave subject to an action of ejectment or for recovery of damages or for deprivation of the estate or interest in respect of which he is registered as proprietor any *bona fide* purchaser for valuable consideration of land on the ground that the proprietor through or under whom he claims was registered as proprietor through fraud or error or has derived from or through a person registered as proprietor through fraud or error; . . .

When a person becomes the registered proprietor of an estate or interest which has been derived directly from a transaction, the legal effect of which may be abrogated or modified in equity, that person is registered through fraud or error. All transactional or mere equities relate to transactions which are characterized by fraud or error. In this context I would regard the word error as comprehending a mistake or a misrepresentation or where a document inaccurately represents an agreement, as in the case of the equity of rectification. Thus if a registered proprietor acquires his interest from a transaction which is voidable in equity he, nonetheless, will acquire no protection from s. 44(2). If, however, he should transfer his estate or interest to another registered proprietor who is *bona fide* for value that person will acquire protection from s. 44(2). He will be a registered proprietor who is *bona fide* for value and who acquired his interest from a registered proprietor who was registered through fraud or error.

Under the general law protection is not given to a person who is a party to the transaction in question; however it is given, as it is in s. 44(2), to the immediate successor in title, if that successor in title is *bona fide* for value without notice that the transaction was voidable. Therefore the only change s. 44(2) introduces is to remove the requirement of notice. The level of protection which is granted by that provision is the same as that provided by the preceding section, s. 43. Section 43 relieves a registered proprietor of notice of equitable interests, and s. 44(2) relieves that same registered proprietor of notice of mere equities.

PARAMOUNT INTERESTS

Before concluding I should deal with a possible anomaly in relation to the proposed analytical framework described in this article. The anomaly concerns the paramount interests under s. 42(2) of the Act, and in particular the interest of a tenant in possession under s. 42(2)(e). As I

have endeavoured to show s. 42(1) lays down a rule governing what may be called horizontal priority contests, namely contests between two or more direct interests in land. Section 43, on the other hand, modifies the general law rules governing what may be called vertical priority contests, namely contests between a direct interest in land and interests in that interest. It would appear that sections 42 and 43 are mutually exclusive and that the first is concerned with direct interests in land and the latter is concerned with a competition between a direct interest in land and interests in that interest. This assumption must now be questioned.

The category of interests protected under s. 42(2)(e) ('the interest . . . of a tenant in possession') unquestionably includes an interest in an interest in land. It has been held that the equitable interest, arising under a contract of sale, of a tenant in possession is protected under s. 42(2)(e).[41] If s. 42 is concerned only with competitions between direct interests in land, then why should it protect an interest in an interest? Are those authorities which have given the word 'interest' in s. 42(2)(e) such a broad meaning wrong? Or is the thesis which I have put forward wrong? Alternatively is it possible to reconcile the thesis which is being proposed with the current interpretation of s. 42(2)(e)?

In my view it is possible to provide such a reconciliation. The thesis which I have advanced does not limit s. 42 to controlling the competition between direct interests in land. That limitation on the role of s. 42 is in fact confined solely to sub-section one of that section. Sub-section two, which establishes the paramount interests, need not be limited to horizontal priority contests. In fact sub-section two can be seen as providing a hybrid form of protection. In so far as that sub-section establishes certain categories of interests as paramount interests then the obvious intention of the Parliament was to ensure that those interests prevail in both horizontal and vertical priority contests. Obviously if the intention is to make those interests paramount then they must be protected from both types of attack in terms of priorities. Thus it is not surprising that both types of interest (*i.e.* direct interests in land and interests in interests) are included in the category of paramount interests.

The operative words of s. 42(2) are '. . . the land which is included in any Crown grant certificate of title or registered instrument shall be subject to. . . .' The meaning of 'land' as used in this sub-section would include reference to direct interests in land. Thus the sub-section is saying all direct interests in land shall be subject to the following categories of interests. It would therefore follow that paramount interests whether they be direct interests in land or interests in interests, are not protected under s. 42(2)

[41] See *Burke v. Dawes* (1937) 59 C.L.R. 1; *Robertson v. Keith* (1870) 1 V.R. (E) 11; *Sandhurst Mutual Permanent Investment Building Society v. Gissing* (1889) 15 V.L.R. 329; *Chesterfield v. Pitisano* [1964] V.R. 709 and *Downie v. Lockwood* [1965] V.R. 257.

in a priority context from an interest in an interest. On the other hand if under both the general law and s. 43 a proprietor of a direct interest in land could take free of an interest in his interest he will nevertheless be subject to such an interest if it is a paramount interest. Thus the paramountcy conferred on those interests is nevertheless limited to being paramount over only direct interests in land. The sub-section confers no protection from an attack from an interest in an interest.

CONCLUSION

The purpose of this article is to demonstrate that the concept of indefeasibility is considerably more complex than that which has been suggested in the debate between immediate and deferred indefeasibility. In order to understand indefeasibility one must first appreciate the ways in which a title can be defeated. Upon reaching that threshold, it then becomes clear, that in order to confer upon a title the character of indefeasibility, the problem will have to be approached in a number of different ways so as to provide different protections for the different types of defeasibility. Thus indefeasibility of title really implies a five part subdivision into the five different forms of indefeasibility.

It is interesting to note that the different protections, provided under the Act, are granted to different classes of registered proprietors. Thus the protection given against the second form of defeasibility, namely protection against a direct challenge to the title of an estate or interest, is granted to any person who is registered. There exists no other requirement in order to gain this protection other than the simple fact of registration. Section 42 which provides protection against the third form of defeasibility, a priorities contest, grants that protection only to *bona fide* registered proprietors. Sections 43 and 44(2) go one step further and limit the protection provided by those sections to those persons who are registered and who have dealt with or derived their title from the previous registered proprietor, and who are also *bona fide* for value. Thus, in order to acquire a title which is comprehensively indefeasible, in that it provides a complete protection from all forms of defeasibility, the title must be held by a person who is registered and who is either *bona fide* for value without notice, or who is *bona fide* for value and has dealt with the previous registered proprietor.

Thus comprehensive indefeasibility is tantamount to deferred indefeasibility and further such a conclusion is quite reconciliable within the framework of *Frazer v. Walker*. As I stated at the outset, the *in personam* exception in *Frazer v. Walker*, actually gives rise to this form of deferred indefeasibility. Furthermore this conclusion answers the problem posed by Warrington Taylor[42] of a thief who steals the duplicate certificate of title of the registered proprietor and executes a forged transfer in favour of a

[42] Taylor, *op. cit.* 252.

bona fide purchaser. The purchaser subsequently lodges the documents and becomes registered. Does he have immediately an indefeasible title? The answer is yes unless he is subject to an *in personam* action brought by the true owner. The basis of such an action would consist of the negligent failure of the purchaser to investigate his transferor's title which thus caused a loss of title to the true owner. Irrespective of whether such an action would be successful, the important point is that the problem posed by Warrington Taylor arises not from the analysis of *Frazer v. Walker* concerning indefeasibility, but rather from the limitations and uncertainties concerning the scope of *in personam* actions and remedies.

This point is demonstrated by varying the facts of that problem slightly. Suppose the original registered proprietor held his title on trust for a beneficiary who had lodged a caveat. Suppose also that the thief forged not only a transfer but also an authorization to remove the caveat. Whilst the innocent purchaser may be able to protect his registered title from an action brought by the true owner, he would not be able to resist a claim brought by the beneficiary. The only protection with respect to such a claim, which the Act offers the new registered proprietor, is contained in s. 43. Since he did not deal with the previous registered proprietor he cannot claim the benefit of that provision. Once the innocent purchaser was aware of the caveat he was thereafter fixed with notice of the equitable interest of the beneficiary.[43] Hence he would also be unable to claim the protection of the general law and thus would be incapable of resisting the claim of the beneficiary.

In short the criticisms made by Warrington Taylor with respect to the analysis of the principle of indefeasibility undertaken in *Frazer v. Walker* are misdirected. The interpretation, adopted by the Privy Council, of the key provisions of the Torrens legislation is perfectly acceptable. The real difficulties lie outside both the interpretation of those provisions and the way in which they were drafted. If, as Warrington Taylor suggests, a true owner in the fact situation which he constructs is entitled to a remedy as against an innocent, yet negligent, purchaser then that remedy ought to consist of an *in personam* action rather than of disrupting the internal order embodied in the principle of indefeasibility.

Even though one may be prepared to accept the thesis outlined in this article one may nevertheless question the need to develop such a theory. The answer to that objection is threefold. One, it describes, in a post *Frazer v. Walker* situation, the extent of the protection afforded to registered proprietors who are either volunteers or who are *bona fide* purchasers for value, who have not dealt with the previous registered proprietor and who are subject to notice under the general law. Two, this thesis describes the central importance of the *in personam* exception under the Torrens system

[43] *Jared v. Clements* [1902] 2 Ch. 399.

as well as fitting that exception into the legislative framework of indefeasibility. Three, the concept of indefeasibility is the intellectual nucleus of the Torrens system. That system not only seeks to provide a continuous record of those interests in or related to land but also it establishes the method by which those interests can be assigned. In short that system, to a large extent, shapes the legal relationships of people with land. It thus follows that indefeasibility is in fact the conceptual hub of those very complex and fundamental relationships which human beings have in respect of land. It would seem to me to be essential, if those relationships are going to remain stable and secure, that we develop a well-defined understanding of the complex nature of the hub of those relationships.