THE TORRENS SYSTEM

THE INSECURITY OF PURCHASERS UNDER THE TRANSFER OF LAND ACT, 1893

The year 1948 marks the 90th anniversary of the introduction of the Torrens System of land titles in Australia. The first Torrens Statute was passed in South Australia and became law on the 2nd July, 1858, and was followed in substance in Queensland in 1861, in New South Wales, Victoria and Tasmania in 1862, in New Zealand in 1870, and in Western Australia in 1874. The 1874 Act of Western Australia was later repealed and replaced by the existing Transfer of Land Act, 1893. It is somewhat surprising, and is indeed a tribute to the system embodied in the Act, that no major amendment has been made to the present Act since that time. This is something which is by no means confined to Western Australia but is also a feature of the Torrens Statutes of the other States of the Commonwealth.

It is submitted, however, that this static tendency is not because no amendment has been found necessary to the Act over the past 55 years, but rather because the defects of the system only become apparent on infrequent occasions. That the system, meritorious as it is, has its defects has been recognised by the legal profession for some considerable time but the method of remedying those defects is a matter on which it is difficult to secure unanimity. It is proposed in this article to review some of the deficiencies of the system as affecting purchasers and to make suggestions as to how they might be cured. Although it is proposed to confine this very general survey to the working of the Act in Western Australia, the similarity of the other Torrens Statutes in Australia and of the Victorian and Tasmanian Acts in particular make the subject of more than local interest.

INSECURITY OF PURCHASER BEFORE REGISTRATION.

In a system of land titles, the ostensible object of which is to give certainty to title and protection to persons dealing with registered proprietors, it is difficult to appreciate why some means have not been found whereby security could be conferred on a purchaser on payment of the purchase money and prior to actual registration. It is this very insecurity of a purchaser pending actual registration which constitutes one of the worst defects of the system.

SETTLEMENT PRACTICE.

In Western Australia, and no doubt this applies also in some other jurisdictions, it is the almost universal practice to effect settle-

ments and pay over purchase and mortgage moneys on acceptance of documents across the counter at the Titles Office. It is well recognised that the check given to documents at this stage is only a preliminary one, but the practice has grown of accepting it as between the parties as a final check and indeed as actual registration (which of course it is not) for the purposes of settlement. Occasions are not infrequent where after a lapse of some days or perhaps weeks the whole dealing is suddenly rejected by the Registrar owing to the existence of some flaw which had not been previously noticed. The position of a purchaser or mortgagee is then an unenviable one. Money has been paid or advanced on unregisterable documents. In most cases the other parties are sufficiently co-operative and the defect is remedied, but that does not alter the fact that in a proper system these things should not occur. A Commissioner of Titles, anxious to defend the present system, might well answer that with well-drawn documents these things rarely occur. But the Torrens System is a system of title by registration and documents are merely vehicles for the purpose of bringing that about. Registration therefore depends on acceptance of documents by the Registrar, and it is the delay between acceptance and actual registration which causes most difficulty.

The main reason why vendors and persons discharging mortgages insist on settlement on acceptance of documents for registration instead of waiting for actual registration is that, once accepted for registration, documents cannot be withdrawn unless all parties to the dealing consent: and once there is actual registration by the signature of the Registrar, the dealing is irrevocable and parties can only be placed back in their former position by the execution and registration of fresh instruments. These risks are more than vendors and mortgagees are prepared to undertake.

PROVISIONAL REGISTRATION.

The need is apparent for a proper and final check of documents before settlement and before the dealing becomes unilaterally irrevocable. It is suggested that one solution to the problem would be to institute a system of provisional registration which would not become absolute until lodgment of the written consents of all parties to the dealing; such consents to be given within a requisite time after notice from the Registrar that the dealing is provisionally registered. Failing receipt of such consents by the Registrar within the required time, the dealing should lapse, so that if settlement has not been effected the parties will be returned to their original positions and no one will be prejudiced.

There may be administrative and perhaps other difficulties in such a scheme, and there may be other means of overcoming the awkward situations that arise under the present system, but of the need for some reform in this matter there can be no question. A particular case in point was *Templeton v. Leviathan Pty. Ltd.* [1]

[1] (1921) 30 C.L.R. 34.

which arose under the Victorian Act. Here a dealing consisting of a transfer and first and second mortgages was rejected by the Registrar some eight months after lodgment and presumably after settlement, and the defect was one which could not be remedied. After such a lapse of time it would often be most difficult, even if not impossible, to put the parties back in their former position, assuming moneys have been paid over on lodgment of documents.

THE PROBLEM OF CLEMENTS v. ELLIS.

The case of *Clements v. Ellis* [2] disclosed another defect in the working of the system. In this case a forged discharge of mortgage was lodged simultaneously with a transfer in favour of a purchaser who had contracted to buy free from encumbrances. The fraud was perpetrated by an agent who had obtained possession of the certificate of title; both vendor and purchaser were innocent parties. The purchaser had dealt solely with the vendor and had nothing to do with the discharge of the mortgage.

Nevertheless, it was held by the Supreme Court of Victoria that he had dealt, not on the faith of the Register, but on the faith of what he thought it would be if the encumbrances were properly discharged, and therefore the title remained subject to the mortgage. On appeal the High Court was evenly divided and the decision of the Supreme Court was affirmed. This unsatisfactory case was a distinct blow to the working of the system and caused some lack of confidence at the time, but there is no practical method of avoiding the risk which has been made apparent by this case. To be protected against such a contingency a purchaser would have to break off negotiations until such time as the vendor could produce a clear title. This in many cases and for obvious reasons would be quite impossible.

The position was put by Evatt, J., in his judgment [3] in the following words: "If the principle of the judgment appealed from were accepted, proposing purchasers of Torrens land would be obliged to go behind the register in order to ascertain the validity of every registered discharge of mortgage or other registered dealing, whenever any such registration is effected between the commencement of the negotiations for purchase and the registration of the clean transfer from vendor to purchaser. Indeed, by the same reasoning, the purchaser should have to inquire into the genuineness of every transaction by virtue of which the vendor himself became registered after the commencement of such negotiations. This, of course, is the very reverse of what the statute intends. If any such antecedent forgery deprives a person of his registered title his remedy is to be against the statutory assurance fund, and not against an honest purchaser who registers and accepts a registered title."

The answer would appear to lie in an amendment to the Act to give a purchaser the protection which he appears to deserve.

[2] (1935) 51 C.L.R. 217, at 271.
[3] At 271.

FORGERY—DEALING WITH REGISTERED PROPRIETORS.

It is suggested also that the same amendment should cover all cases of forgery of documents under the Act. It has always been a *sine qua non* of indefeasibility that a purchaser must deal with the registered proprietor. If unknowingly he deals with a forger the forged transfer can be set aside (*Gibbs v. Messer*). [4]

In many cases it is not practicable for a purchaser to make the inquiries which would be necessary to establish positively that he is dealing with the person whose name appears on the Register Book. Parties do not always appear personally. More often than not a vendor or mortgagee is represented by a solicitor or agent who for that purpose holds the duplicate title or mortgage instrument.

It seems distinctly unfair that the loss, in such circumstances, should fall on the innocent purchaser who has dealt in all good faith with a person who is in possession of the duplicate title. The loss should fall either on the Assurance Fund or on the person entitled to hold the duplicate title and by whose act the possession of such duplicate title has fallen into dishonest hands. The additional security to be obtained by increasing the obligations of the Assurance Fund may, of course, mean an increase in fees adequate to enlarge the Fund; and perhaps its liability might have to be limited for a time, but the slight additional cost would be more than outweighed by the advantages offered.

PROTECTION FROM EQUITIES PRIOR TO REGISTRATION.

In *Templeton v. Leviathan* [5] it was laid down that the immunity which, by section 179 of the Victorian Act (W.A., section 134), a purchaser is to enjoy from the effect of notice of unregistered interests is only to be afforded to him if and when he becomes registered and not before. Until he becomes so registered it is open to any adverse claimant to step in and assert his claim. It is clear, therefore, that, in order to obtain the benefit of indefeasibility and of the priority provisions of sections 53 and 58, the dealing must be actually registered. Until actual registration the maxim "qui prior est tempore, potior est iure" applies, and a purchaser is liable to be defeated by a prior equitable interest unless the latter has lost his priority by some act or omission on his part which has induced the purchaser to believe that there was no outstanding equity. It must be conceded of course that, in general, the failure of the equitable holder first in time to lodge a caveat will be sufficient to postpone his claim (*Abigail v. Lapin*), [6] but this cannot be relied on in all cases and a purchaser may still be defeated by a prior equity even where he has searched and found no caveat, e.g.,

[4] (1891) A.C. 248.
[5] (1921) 30 C.L.R. 34.
[6] (1935) 51 C.L.R. 58.

as against beneficiaries under a trust instrument. At this stage he is in a worse position than a purchaser of land under general law title. The latter taking the legal estate bona fide and for value without notice of any prior interest is protected against prior interests by the rule that "where the equities are equal the law shall prevail." Possession of the legal estate gives him a superiority which a purchaser under the Act does not enjoy prior to registration.

An attempt was made to cure this defect in New South Wales in 1930 by an amendment to the Real Property Act, 1900, made by the Conveyancing (Amendment) Act, 1930, which introduced a new section 43A. This section provides that, for the purpose only of "protection against notice," the estate in land under the Act taken by a person under a registrable instrument shall, before registration, be deemed to be a legal estate.

The wording of this section has provoked some criticism [7] which certainly seems to some extent justified, but the idea behind the section is a sound one, i.e., that a bona fide purchaser for value without notice should have, before registration, protection against adverse equitable interests which happen to be prior in point of time, irrespective of any question whether the holders of the prior equities have prejudiced their rights by failure to lodge a caveat. For example, under this section, a purchaser taking bona fide for value and without notice from a trustee selling in breach of trust would be protected against the beneficiaries after obtaining his transfer and before registration. This is at least a step in the right direction.

Another noteworthy provision in section 43A is that a purchaser is not to be affected by notice by omission to search in a register not kept under the Real Property Act. This is a refreshing change from the legislative practice in most other States of indiscriminately creating statutory charges which affect land under the Torrens System without the lodgment of a caveat or the registration of any instrument on the certificate of title.

INSECURITY OF PURCHASER AFTER REGISTRATION.

The foregoing are not matters which are obvious from a reading of the Act. They are more in the nature of latent defects which have only become apparent over the years. It is proposed now to deal with what might be called the statutory exceptions to the rule of indefeasibility of title, or those interests to which the title of a purchaser is subject even after registration. These are contained in section 68 of the Act which provides:

"68. Notwithstanding the existence in any other person of any estate or interest whether derived by grant from the Crown or otherwise which but for this Act might be held to be paramount or to have priority the proprietor of land or of any estate or interest in land under the operation of this Act shall except in case of fraud

[7] 6 A.L.J. 85.

hold the same subject to such encumbrances as may be notified on the folium of the register book constituted by the certificate of title; but absolutely free from all other encumbrances whatsoever except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser. Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations exceptions conditions and powers (if any) contained in the grant thereof and to any rights subsisting under any adverse possession of such land and to any public rights of way and to any easements acquired by enjoyment or user or subsisting over or upon or affecting such land and to any unpaid rates and to any mining lease or license issued under the provisions of any statute and also where the possession is not adverse to the interest of any tenant of the land notwithstanding the same respectively may not be specially notified as encumbrances on such certificate or instrument."

This is a familiar section in most, if not all, Torrens Statutes although the number and nature of the exceptions therein are the subject of considerable variation even amongst the States of the Commonwealth.

Shortly the effect of the section is to declare the estate of the registered proprietor paramount except in the case of fraud and subject to certain other exceptions the principal ones of which are:

(a) adverse possession,

(b) easements,

(c) the interest of any tenant.

Previously we have been inquiring into the pitfalls which beset a purchaser prior to registration. These statutory exceptions, however, are the risks he undertakes even after registration.

Adverse possession.

Registration gives no protection against rights which any person may have acquired in the land by adverse possession. Under the Limitation Act, 1935, the period is 12 years after which the true owner is barred and his title extinguished. The Transfer of Land Act makes provision for giving title to adverse possessors (sections 222-5). In the interest of development and progress this is a sound and very useful provision, but that is no reason why a purchaser from the registered proprietor should be subject to the risk that some other person has already acquired a title by adverse possession without any notation or caveat appearing on the Register Book and without taking any step to secure a registered title. Continuous physical occupation is not essential in a claim by adverse possession,

and it may well be that an inspection of the property by an intending purchaser would fail to reveal the fact that some person other than the true owner is in possession.

If a person has acquired title by adverse possession there seems no reason why he should not lodge a caveat pending his application to be registered. Incidentally the machinery provided by the Act (sections 22-25) for giving title by adverse possession are deficient in themselves. Under the Victorian Act (sections 87-100), a title acquired by adverse possession is free from all encumbrances which have been extinguished by such possession. There is no similar provision in the Western Australian Act. Consequently the Registrar has no power to cancel any encumbrances which may exist on the title and which have been extinguished by the adverse possession.

Easements.

In Western Australia and also in Victoria the title of a registered proprietor is subject to all easements affecting the land notwithstanding that they are not noted as encumbrances on the Register Book. Easements may arise by express or implied grant or by prescription. Their existence is not always apparent on the ground, and even the most careful inspection may not reveal them to a purchaser; yet his registered title will be subject to them. The section speaks of "any easements acquired by enjoyment or user or subsisting over or upon or affecting such land . . . ." It is therefore extremely wide and would include easements acquired by express or implied grant or by prescription either at common law or under the Prescription Act 2 and 3 Will. IV, c. 71. [8] The more generally known easements are rights of way, rights of support to land and buildings, and rights to light and air, but the list of easements the law will permit is by no means closed and new and novel kinds of easements may not be beyond the bounds of possibility in the future. Griffith, C.J., in the *Commonwealth v. Registrar of Titles (Vic.),* [9] foresaw future easements for the passage of aeroplanes, for the passage of an electric current, for the free passage of a flash from a heliograph station, and even for the sun's rays. The difficulty of ascertainment of such easements must increase with their novelty. It is unfair that a purchaser should, after registration, become subject to the burdens of an undisclosed easement without means of finding out its existence.

There is a good case for requiring all easements to be either registered or disclosed by caveat. The possible hardship to dominant owners by such a requirement would be outweighed by the improvement to the system as now in operation. The acquisition of rights to light and air has been limited in Western Australia by the Light and Air Act, 1902, as amended by No. 26 of 1922. Since this Act, a right to light or air can only arise by express grant and cannot be granted for more than 21 years except with the written approval

[8] Adopted by 6 Will. IV, No. 4.
[9] (1918) 24 C.L.R. 348, at 354.

of the Governor. The Act requires the deed of grant to be registered but no particular register is specified. Presumably registration under the Registration of Deeds Ordnance, 1856, would satisfy the provisions of the Act, but if this is so, an unfortunate purchaser of land under Torrens title must also search in the Deeds Office to ascertain whether or not the title to the land being purchased is subject to any such rights.

Interest of any tenant.

The purchase of land under general law title always involved enquiries as to the rights of persons in possession owing to the operation of the doctrine of constructive notice. At common law, a purchaser is deemed to have notice of the rights of persons in possession, and he ignores them at his peril. This, of course, is still the position of a purchaser of land under Torrens title prior to registration. After registration a purchaser in New South Wales, Queensland or South Australia obtains a title paramount to that of the person in possession (except short-term tenancies). This is not so, however, in Western Australia, nor in Victoria or Tasmania. The Acts of those States expressly except "the interest of any tenant" from the indefeasibility section.

At first sight one would be inclined to conclude that the phrase "interest of any tenant" meant what it said, and that only tenant rights, qua tenant, survived the paramount title conferred on a purchaser by the Act, but in *Sandhurst Mutual Building Society v. Gissing* [10] the Full Court of Victoria held that a purchaser in possession under a contract of sale came within the meaning of the word "tenant" and consequently the registered title was subject to his rights not only qua tenant but also qua purchaser. In the opinion of the Full Court the word "tenant" must be deemed to include at least every tenant who is in actual occupation and holds under some landlord, and every interest in the land of such a tenant which grows out of, and is not disseverable from his right to continue in occupation as a tenant, is protected by the terms of the section against the claim of the proprietor under a certificate of title.

In *Black v. Poole,* [11] following *Sandhurst Mutual Building Society v. Gissing,* the interest of a tenant for life in possession was held to be protected by this section. Then followed *Commercial Bank v. McCaskill* [12] (interest of unpaid vendor in possession) and *McMahon v. Swan* [13] (interest of lessee in option of purchase contained in lease). It is thus clear that in Victoria (and no doubt these cases would be followed in Western Australia) the words "interest of any tenant" have received an interpretation and an application as a result of which any person in actual occupation of the land obtains,

[10] (1889) 15 V.L.R. 329.
[11] (1895) 16 A.L.T. 155.
[12] (1897) 23 V.L.R. 10.
[13] (1924) V.L.R. 397.

as against any inconsistent registered dealing, full protection and priority for any equitable interest to which his occupation is incident, provided that at law his occupation is referable to a tenancy of some sort either at will or for years. Thus purchasers under contract of sale, lessees with options of purchase, life tenants and unpaid vendors, all these persons, when in possession, take priority without registration of any instrument or lodgment of a caveat. This interpretation has now stood for some eighty years and has been accepted and approved by the High Court in *Burke v. Dawes*. [14] Only legislative action or the Privy Council can now change it and the latter body is unlikely to do so at this distance of time.

Pollock in his First Book of Jurisprudence [15] pointed out that under a system of officially registered title to land the importance of possession, to which the law has clung for so many centuries, tended to diminish and might even "become a vanishing quantity." The Torrens Statutes of Western Australia and Victoria, however, unlike those of other jurisdictions, are endeavouring to maintain what must now be recognised as the inconsistency of preserving the ancient sacredness of possession in a modern system of title by registration. As has been said by a leading authority on the Torrens System these two States exhibit the feature of possession superior to registration in its extreme form. [16]

One logical and undesirable result of the judicial interpretation placed on the words "interest of any tenant" is that it has become unusual to register leases, even for long terms, in these jurisdictions. Lessees are content to rely on their possession as ample protection, which indeed it is, not only for their interest as lessees, but also for options of purchase or other equitable interests referable to their occupation. In large city buildings the task facing a purchaser of enquiring into the rights of the tenants might well be an almost impossible one. Similarly the occupation of farming and pastoral lands is not always apparent from inspection; yet inspect and enquire a purchaser must if he is to ensure that his title even after registration will not be overridden by some equitable interest which is not noted by caveat or otherwise on the title and which is protected by mere possession. If he proceeds, whether with or without enquiring, he takes subject to the rights of the person in possession, whatever they may be.

It is submitted that this is a matter which warrants an alteration in the law. Leases for terms over three years may be registered under the Act, and it should be obligatory either to register or to warn intending purchasers by caveat. There is no great danger involved in protecting short-term (three years or less) tenancies

[14] (1938) 59 C.L.R. 1.
[15] 6th ed., (1929) p. 192.
[16] Hogg, Registration of Title to Land Throughout the Empire, p. 76, 1920 edition.

without registration or caveat, but the protection should only extend to actual tenants' rights as such, and not to equitable interests such as have been held protected in the cases cited.

SUGGESTED CHANGES.

It is submitted that in the interests of purchasers and for inspiring greater confidence in the system the following changes would be justified:

1. The introduction of a stage of "provisional registration" to ensure final acceptance of dealings by the Registrar before settlement.
2. An amendment similar to the New South Wales section 43A to place a purchaser, who pays his money before registration, in the same position as a purchaser of the legal estate at common law, i.e., to protect him from prior equities of which he had no notice.
3. Innocent parties who suffer loss through the rectification of the Register following the registration of forged instruments to be compensated out of the Assurance Fund, the latter to be suitably enlarged, if necessary, for that purpose.
4. Section 68 to be amended to exclude from the exceptions therein:—
   (a) rights subsisting under any adverse possession,
   (b) easements,
   (c) the interest of any tenant except short-term tenancies, i.e., leases and tenancies not exceeding three years.

P. R. ADAMS.