NOTICE AND FRAUD IN THE TORRENS SYSTEM: A COMPARATIVE ANALYSIS

PETER BUTT*

Section 43 of the Real Property Act 1900 (N.S.W.) provides, so far as is relevant to this discussion:

> 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 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.

The section has legislative counterparts in New Zealand and all other Australian States.[1] There are slight differences in wording in some of the counterparts, but s. 43 of the New South Wales Act may be taken as sufficiently representative.

The concluding part of this provision ("and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud") has been interpreted in widely divergent ways by the Australian courts on the one hand and by the New Zealand courts on the other. It might have been expected that a similar provision in a similar statute on each side of the Tasman would have been interpreted in a similar manner, and while this is partly true as regards s. 43 and its equivalents,[2] it is by no means true as to the concluding portion of that section.

The object of this article is to discuss the two interpretations of the concluding words of the section. It will be suggested that the result of the New Zealand interpretation has been to deprive the section as a whole of any operative effect, while the result of the Australian inter-

* Lecturer in Real Property, University of Sydney.

1 Transfer of Land Act 1958 (Vic.), s. 43; Real Property Acts 1861-1976 (Qld.), s. 109; Real Property Act 1886-1975 (S.A.), ss. 72 and 186; Transfer of Land Act 1893-1972 (W.A.), s. 134; Real Property Act 1862 (Tas.), s. 114 (1) and (2); Land Transfer Act 1952 (N.Z.), s. 182 (formerly Land Transfer Act 1870, s. 119; Land Transfer Act 1885, s. 189; Land Transfer Act 1915, s.197).

2 For example, that the protection of s. 43 and its equivalents is not available until registration. In Australia, see Cowell v Stacey, (1887) 13 V.L.R. 80 at 84; The Baker's Creek Consolidated Gold Mining Co. v Hack, (1894) 15

pretation has been to give it the utmost efficacy. For that reason, it will be suggested that the Australian interpretation is to be preferred.

FRAUD IN THE TORRENS SYSTEM

The opening words of the section, "Except in the case of fraud", and the concluding words, referred to above, make it important to advert briefly to the concept of "fraud" in the context of Torrens legislation. The obvious starting point is the judgment of the Privy Council in *Assets Company Limited v Mere Roihi,* where the Board said, speaking of the use of the term "fraud" in the New Zealand Land Transfer Acts of 1870 and 1885, "by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud . . . "[3]. This statement was repeated by the Privy Council in *Waimiha Sawmilling Company Limited v Waione Timber Company Limited,* where their Lordships, after reiterating that "fraud clearly implies some act of dishonesty", went on to say:

N.S.W.L.R. (Eq.) 207 at 223-224; Templeton v The Leviathan Pty. Ltd., (1921) 30 C.L.R. 34 at 54-55; Lapin v Abigail, (1930) 44 C.L.R. 166 at 182, 188, 203 (not overruled on appeal on this point, see *sub nom.* Abigail v Lapin, [1934] A.C. 491 at 509); Courtenay v Austin, (1961) 78 W.N. (N.S.W.) 1093, and on appeal *sub nom.* I.A.C. (Finance) Pty. Ltd. v Courtenay, (1963) 110 C.L.R. 550 at 572-573, 582; Jonray (Sydney) Pty. Ltd. v Partridge Bros. Pty. Ltd., (1969) 89 W.N. (Pt. 1) (N.S.W. 568 at 576. In New Zealand, see The Solicitor-General v Mere Tini, (1899) 17 N.Z.L.R. 773 at 779; Webb v Hooper, [1953] N.Z.L.R. 111 at 114. On the unfortunate way in which this requirement of registration has reduced the section's scope for operation, and placed the purchaser of Torrens Title land at the point of settlement, pending registration, in a less secure position than the purchaser of Old System title land, see D. J. Whalan, "The Position of Purchasers Pending Registration", in *The New Zealand Torrens System Centennial Essays* (1971), 120 at 121-124, and D. J. Whalan, "The Meaning of Fraud under the Torrens System", (1975) 6 *N.Z.U.L.R.* 207 at 211-213.

3 [1905] A.C. 176 at 210. It is clear from the judgment that their Lordships regarded the term "fraud" as having the same meaning in all the indefeasibility provisions of the Act. Thus, "fraud" in s. 55 of the Land Transfer Act 1885 (s. 62 of the 1952 Act) has the same meaning as in s. 189 (s. 182 of the 1952 Act). This must be taken to overrule the statement in Saunders v Cabot (1885) 4 N.Z.L.R. (C.A.) 19 at 32, where "fraud" in the then equivalent of s. 62 was said to mean fraud "as ordinarily understood in Courts of Equity", but fraud under the then equivalent of s. 182 was said to be limited to "fraud apart from and outside of knowledge of some existing trust or interest". That the term "fraud" means the same in both sections is apparent also from Waimiha Sawmilling Company Limited v Waione Timber Company Limited, [1923] N.Z.L.R. 1137 at 1173 per Salmond J., and Efstratiou, Glantschnig and Petrovic v Glantschnig, [1972] N.Z.L.R. 594 at 603 (C.A.). The New South Wales Court of Appeal has recently held that "fraud" for the purposes of s. 126 of the Real Property Act 1900 (N.S.W.)

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear.[4]

And on several occasions, the Privy Council has been at pains to point out that colonial courts, in construing the term "fraud" in the Torrens context, should beware of mixing too much equity with their statutory interpretation.[5]

This narrow meaning of the term "fraud" in Torrens statutes had already been anticipated in a number of Australian and New Zealand decisions[6], and, of course, after the *Assets Company case,* was expressly adopted. For example, in *Butler v Fairclough,*[7] Isaacs J. said that what was contemplated by "fraud" was "actual fraud, moral turpitude". Griffith C.J. said that it imported "personal dishonesty or moral turpitude".[8] These phrases were endorsed a few years later in *Wicks v Bennett,* where Knox C.J. and Rich J. said that "fraud", as that term was used in the Victorian equivalent of s. 43, means "something

---

(the assurance fund provision) goes further: " . . . the section should be construed so as to embrace all frauds within the ordinary legal meaning of that term."—per Glass J.A. in Parker v Registrar-General of New South Wales, [1977] 1 N.S.W.L.R. 22 at 25.

4 [1926] A.C. 101 at 106-107.

5 See Baalman, *The Torrens System in New South Wales* 202 (2nd ed., 1974); Assets Company Limited v Mere Roihi, supra note 3 at 210-211, 212; Haji Abdul Rahman v Mahomed Hassan [1917] A.C. 209 at 216; Abigail v Lapin, supra note 2 at 505.

6 In New Zealand, see National Bank v National Mortgage and Agency Company, (1885) 3 N.Z.L.R. (S.C.) 257 at 262-263 per Richmond J.: "The term 'fraud' as used in [s. 119 of the Land Transfer Act 1870] must be understood as actual fraud . . . Therefore to a large extent . . . the statute puts an end to the operation of the doctrine of constructive notice"; George v Australian Mutual Provident Society, (1885) 4 N.Z.L.R. (S.C.) 165 at 172 per Richmond J.; Smith v Essery and Brown, (1891) 9 N.Z.L.R. 449 at 462 per Williams J.: "fraud [in s. 119] means actual fraud as distinguished from constructive or equitable fraud", and at 467-468 per Conolly J. In Australia, see Robertson v Keith, (1870) 1 V.R. Eq. 11 at 14 per Molesworth J.: "I should instance, as to what might be deemed fraud under the Act, collusion between proprietor, vendor, and vendee, to defeat an equitable interest, or means taken by the vendee to induce a person having equitable interests not to enforce his right or lodge a caveat" (for an example, see Colonial Bank of Australasia v Pie, (1880) 6 V.L.R. Eq. 38 and 186); Conroy v Knox, (1901) 11 Q.L.J. 112 at 124; Gregory v Alger, (1893) 19 V.L.R. 565 at 574 per Williams J.: " 'fraud' . . . means moral turpitude, actual dishonest dealing, and I do not think that it includes what is known as 'constructive fraud' ", and at 575 per Hood J.

7 (1917) 23 C.L.R. 78 at 97.

8 Id. at 90.

more than mere disregard of rights of which the person sought to be affected had notice".[9] And in *Stuart v Kingston*, Starke J. expressed the view that no definition of fraud could be attempted, so various were its forms and methods,[10] but was prepared to say:

> Fraud will no longer be imputed to a proprietor registered under the Act unless some consciously dishonest act can be brought home to him. The imputation of fraud based upon the refinements of the doctrine of notice has gone.[11]

NOTICE AND FRAUD—THE PROBLEM POSED

It is one thing to gather together a number of eminent and consistent judicial dicta as to the meaning of "fraud" within the Torrens legislation. It is quite another to explain in any satisfactory fashion the actual decisions in the cases from which the dicta are drawn. For it is here that there emerges the inconsistent approaches of the Australian and New Zealand courts to the interpretation of the concluding words of s. 43. The equitable doctrine of notice, actual and constructive, is founded upon the view that the taking of an interest after notice of a prior interest is a species of fraud.[12] Under the provision being discussed, however, knowledge of the existence of any trust or unregistered (i.e. equitable) interest is not *of itself* to be imputed as fraud. Where the difficulty arises is "in the demarcation of the line between knowledge or notice that is not to be treated as fraud, and notice that under particular circumstances must be treated as fraud."[13]

It will be convenient at the outset to deal with two decisions of the Privy Council relevant to the question. The first is *Loke Yew v Port Swettenham Rubber Company Limited*.[14] The facts were as follows.

9 (1921) 30 C.L.R. 80 at 91.

10 The courts have always been reluctant to define "fraud" exhaustively. See per Lord Hardwicke in Lawley v Hooper, (1745) 3 Atk. 278 at 279 (26 E.R. 962 at 963): "The Court very wisely hath never laid down any general rule beyond which it will not go, lest other means of avoiding the equity of the Court should be found out."; per Lord Redesdale in Webb v Rourke, (1806) 2 Sch & Lef. 661 at 667: "If a case arises of fraud or presumption of fraud to which even no principle already established can be applied, a new principle must be established to meet the fraud . . . for the possibility will always exist that human ingenuity in contriving fraud will go beyond any cases which have before occurred."

11 (1923) 32 C.L.R. 309 at 359 (See also per Knox C.J. at 329). For other cases, see Friedman v Barrett. Ex parte Friedman, [1962] Qd.R. 498 at 512; Achatz v De Reuver, [1971] S.A.S.R. 240 at 250. In New Zealand, see Mayor of Lower Hutt v Hayes, (1913) 32 N.Z.L.R. 969 at 978.

12 Stuart v Kingston, (1923) 32 C.L.R. 309 at 359 per Starke J., citing Le Neve v Le Neve, 2 White & Tudor's L.C. (7th Ed.) 175.

13 Hogg, *Registration of Title to Land throughout the Empire* 142 (1920).

14 [1913] A.C. 491.

> Eusope was registered as proprietor of 322 acres of land in Selangor. Loke Yew was in possession of part of that area (58 acres) under certain unregistered instruments. Had the instruments been registered, Loke Yew would have had sole entitlement to the 58 acres. The Rubber Company purchased from Eusope the whole of the 322 acres, with notice of Loke Yew's unregistered interest, and (through its agent) made a statement in writing that it would "make its own arrangements with" Loke Yew. The understanding was that it would pay Loke Yew for his interest. The purchase price paid to Eusope made allowance for the amount the Company would have to pay Loke Yew for his inteerst. The Company registered its transfer and then sought to eject Loke Yew without any genuine attempt to pay him for his interest.

The Privy Council held that the registered title of the Rubber Company was defeasible for fraud.[15] The statement by the Company that it would make its own arrangements with Loke Yew was a fraudulent misrepresentation of its true intention, made for the purpose of inducing Eusope to sign a transfer of the whole of the 322 acres. The transfer of a clear title to the Company had been obtained by deliberate fraud. It was therefore not necessary for their Lordships to deal with the question of the extent to which mere notice by a purchaser of unregistered interests can amount to fraud. The Rubber Company had more than mere notice—it had acquired title by deliberate and fraudulent misrepresentation.[16]

The second case is *Waimiha Sawmilling Company Limited v Waione Timber Company Limited*,[17] the facts of which were:

> The registered proprietor granted the Sawmilling Company the right to cut and take away timber growing on his land. The Sawmilling Company lodged a caveat to protect its interest. The registered proprietor then purported to determine the agreement, alleging breaches of covenant, and obtained two court orders, one to the effect that he had validly terminated the agreement, and the other that the caveat be withdrawn. Meanwhile, he had

15 S. 7 of the Registration of Titles Regulation 1891.

16 There were two other grounds on which the Privy Council found for Loke Yew: first, the power of the Court to order rectification of the Register (as to this, cf. Sackville & Neave, *Property Law Cases and Materials*, 379-380 (2nd ed., 1975), and Harrison, *Cases on Land Law*, 613-614 (2nd ed., 1965); see also Baalman, supra note 5 at 528); second, the Rubber Company had become a trustee of the land for Loke Yew under a provision in a local statute (see [1913] A.C. at 504-506). These matters were discussed by Starke J. in Stuart v Kingston, supra note 12 at 359-361. For another case where the registered title of a Company was impeachable for the fraudulent misrepresentation of its agent in acquiring its interest, see Ex parte Batham; Re the Land Transfer Act 1885, (1889) 6 N.Z.L.R. 342 at 346.

17 Supra note 4.

> entered into an agreement to sell the land to a promoter for the timber company. As soon as the order removing the caveat was made, the registered proprietor executed a transfer of the land to the promoter, which was registered 10 days later. At the time of execution of the transfer and registration, the promoter knew that the Sawmilling Company had lodged an appeal against the earlier decisions. The appeal was subsequently successful. The Sawmilling Company then brought an action against the Timber Company claiming that the latter's registered title was subject to its rights under the original agreement. Its chief argument that the purchaser had acquired title by fraud. The fraud was alleged to be in the haste with which the sale was completed and the transfer lodged for registration in the face of pending litigation, which, if successful, would have prevented registration of the transfer.

The Privy Council held there was no fraud within the meaning of the Land Transfer Act 1915 (N.Z.), ss. 58 and 197 (now ss. 62 and 182 of the Land Transfer Act 1952). After discussing the nature of fraud (see passages above), their Lordships said that to constitute fraud, the act "must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest."[18] Here there had been a judgment to the effect that the interest as claimed did not exist. There could be no fraud in acting on the faith of an existing judgment, and in strengthening one's position by speedy completion, even in the fact of a pending appeal which might establish the existence of that interest. "If knowledge of the interest itself does not affect a registered proprietor, knowledge that steps are being taken to assert that interest can have no more serious effect."[19] As Salmond J. had expressed it in the Court below:

> Knowledge . . . that an adverse claim exists, that it may possibly be well founded, and that it will be destroyed by an alienation of the property, is not in itself sufficient to stamp the transaction as fraudulent within the meaning of the Land Transfer Act.[20]

NOTICE AND FRAUD—THE NEW ZEALAND ANSWER

The approach of the New Zealand courts to the concluding words of s. 43 and its equivalents ("knowledge that any such trust or

18 Id. at 107.

19 Id. at 108. *A fortiori* there can be no fraud in acting in the face of a possible right which no steps at all have been taken to assert, as in Nicholson v The Bank of New Zealand (1894) 12 N.Z.L.R. 427, esp. at 441.

20 Supra note 3 at 1175. Similarly, in R v Price (1904) 24 N.Z.L.R. 291 at 306-307, it was held that the requirement of actual fraud will not be met by proof of constructive fraud from the rule that ignorance of the law is no excuse.

unregistered interest is in existence shall not of itself be imputed as fraud"), was settled towards the end of last century. An oft-cited statement of the interpretation adopted is by Richmond J. in *Locher v Howlett*:

> It may be considered as the settled construction of this enactment that a purchaser is not affected by knowledge of the mere existence of a trust or unregistered interest, but that he is affected by knowledge that the trust is being *broken*, or that the owner of the unregistered interest is being *improperly deprived* of it by the transfer under which the purchaser himself is taking.[21] (Emphasis added.)

(The term, "improperly", used by Richmond J. in this passage is, perhaps, unfortunate. It is not helpful that a word with such wide connotations should be the key word in an important statement of principle. It will be seen that the object of the section under discussion is to remove from the scope of the Act the doctrines of equitable fraud.[22] That being so, it is suggested that "improperly" must be read here as "fraudulently".[23])

It will be apparent from the above passage that there are two "limbs" to the operation of the concluding words of the section. The first concerns knowledge of the existence of a trust: a purchaser is not affected by mere knowledge of the trust, but he is affected by knowledge that the trust is being broken. The second concerns knowledge of the existence of an unregistered interest: a purchaser is not affected by mere knowledge of the unregistered interest, but he is affected by knowledge that the owner of the unregistered interest is being improperly (fraudulently) deprived of it by the transfer under which the purchaser himself is taking. In considering the decided cases, it will be convenient to discuss each of the two limbs separately.

(a) *Cases involving knowledge of breach of trust.*

The first reported case involving the New Zealand counterpart of s. 43 (then s. 119 of the Land Transfer Act 1870), in the context of

21 (1894) 13 N.Z.L.R. 584 at 595-596: followed in Merrie v McKay, (1897) 16 N.Z.L.R. 124 at 127; Kirkpatrick & Barclay v Hutchison, (1904) 23 N.Z.L.R. 665 at 670; Waimha Sawmilling Company Limited v Waione Timber Co. Ltd., supra note 3 at 1150-1151, 1173.

22 Solicitor-General v Mere Tini, supra note 2 at 779.

23 See Waimha Sawmilling Company Limited v Waione Timber Company Limited, supra note 3 at 1165, where Hosking J. expresses the view that any other conclusion would be contrary to the Assets Company Case, supra note 3.

knowledge of breach of trust, is *National Bank v National Mortgage and Agency Company.*[24]

> Trustees under a will mortgaged the trust realty to the National Bank. The manager of the Bank, through conversations with the trustees and beneficiaries and a previous dealing with the trust property, had notice of the nature of the trusts of the will, and knew that the trustees had no power to mortgage the trust property to the Bank. The mortgage was registered.

Richmond J., after stating that s. 119 altered the rule of Equity that constructive notice of a prior equitable right may amount to fraud, said that the term "fraud" in the section must be understood as meaning "actual fraud".[25] Certainly, "cases of *bona fide* mistakes" seemed to come within the protection of the section,[26] but the Act did not "go so far as to shelter a purchaser who takes with full knowledge that the transfer to himself will unjustly deprive the true owner of his property without adequate compensation."[27] This was a case, in the opinion of Richmond J., "of accepting from A a transfer of property belonging to B, with which A to the knowledge of the purchaser had no right to deal."[28] The transaction was an actual fraud, against which the Bank was not protected by s. 119.[29]

With this case may be contrasted *George v Australian Mutual Provident Society,*[30] decided by the same judge six months later.

> Trustees had re-settled trust property in contravention of the terms of the trust. Despite the "very gross irregularities" (as Richmond J. described them), the trustees had throughout acted honestly, and there had been no misapplication of trust funds. In particular, George became registered as sole trustee in contravention of the terms of the trust, which required that there be

24 (1885) 3 N.Z.L.R. (S.C.) 257.

25 Id. at 263 (see above, n. 6).

26 Ibid. See also Waimiha Sawmilling Company Limited v Waione Timber Company Limited, supra note 3 at 1155. For a case involving a bona fide mistake with no fraud (although s. 119 was not argued) see Jonas v Jones, (1883) 2 N.Z.L.R. (S.C.) 15, esp. at 19, where registration rendered the mistake irreversible; had the land concerned been under Old System title, rectification would have been ordered: cf. Sutherland v Peel (1864) 1 W.W. & a'B 18. Two subsequent cases have declined to follow Jonas v Jones, but they must sit rather uneasily in the light of the now established doctrine of immediate indefeasibility: Watson v Cullen (1886) 5 N.Z.L.R. (S.C.) 17, and Taitapu Gold Estates Ltd. v Prouse [1916] N.Z.L.R. 825.

27 Supra note 24 at 265.

28 Ibid.

29 Cf. Erena Pou v Nicholson, [1923] N.Z.L.R. 256 at 263, for a case going the opposite way on the facts. For a sequel, see Sweet v Tanui, [1931] G.L.R. 164.

30 (1885) 4 N.Z.L.R. (S.C.) 165.

> two trustees. He contracted to sell the trust property to the defendant Society. The Society had full knowledge of the irregularities, and refused to settle on the ground that its knowledge would amount to fraud within s. 119.

Richmond J. distinguished his earlier decision on the basis that here there was no "actual fraud". In the *National Bank Case* there had been "a distinct expropriation of the beneficial owners"; no such misapplication of the trust funds was involved here.[31] Although he did not say so expressly, he no doubt had in mind that the purchase here would not (to use his words in the *National Bank Case*) "unjustly deprive" the beneficiaries of their entitlement. All that was involved was a defect in the constitution of the trust—more precisely, in the manner of appointment of the trustees. Indeed, reading the two cases together the principle which emerges seems to be this: to purchase with knowledge of breach of a trust will not amount to fraud on the part of the purchaser, for the purposes of s. 119, unless the purchaser also knows that the purchase will "unjustly deprive" the beneficiaries of their interest.[32] In the words of Richmond J., to be affected by fraud the purchaser must have notice not only of the trusts but also of "the nature of the trusts".[33]

The third case to which reference must be made is *Smith v Essery and Brown*.[34]

> Essery was trustee of the will of Smith's father. As security for and part payment of a personal debt which Essery owed to Brown, Essery, with the active co-operation of the deceased's widow, mortgaged one parcel of the trust realty to Brown and transferred another to him absolutely. Brown had no actual notice of the terms of the deceased's will, but knew the property involved was trust property. He also instructed a solicitor to act on Essery's transmission application, so that the mortgage and transfer could be effected as expeditiously as possible.

Prendergast C.J. and Edwards J. held that the mortgage and transfer were procured through fraud, as that term was to be understood in s. 119. In the judgment of the Chief Justice, while Essery's knowledge that a trust was in existence was not of itself to be imputed as fraud, knowledge that the trustee was using trust funds to pay his

31 Id. at 172.

32 See also Penlington v Bell, (1904) 24 N.Z.L.R. 551 at 552; Toko Reihana v Moore, (1890) 8 N.Z.L.R. 315.

33 Supra note 4 at 262. This phrase was picked up in Smith v Essery and Brown, (1891) 9 N.Z.L.R. 449 at 469, 471.

34 Supra note 6.

personal debts amounted to knowledge of a breach of trust, and that in turn amounted to fraud. He was "colluding with the executor in the breach of trust".[35] The following passage demonstrates Prendergast C.J.'s view of the section:

> The Land Transfer Act does not provide that the person dealing with a registered proprietor is not to be affected with constructive notice of a breach of trust, but only that he is not to be affected with notice of the trust. The Act, though it provides that he is not concerned to inquire, does not provide that, if he is informed of the breach without inquiry, he shall not be affected.[36]

That the same view was shared by Edwards J. is clear from the following passage in his reasons:

> In my opinion the protection given by [s. 119] must be limited to transactions in which, although there may be knowledge that a trust or unregistered interest exists, such knowledge is not equivalent to the knowledge that a breach of trust or fraud must necessarily or presumably be committed in the transaction.[37]

His view of the facts was that Brown must necessarily or presumably have known that the transactions involved a fraud or breach of trust: it was "inconceivable that he could have supposed that such dealing with the trust property was authorized by the trusts of the will."[38] His conduct showed such "reckless disregard of the plain duty he owed to those interested under the trusts . . . as to amount in law to fraud."[39]

Williams and Conolly JJ., on the other hand, felt that the conduct of Brown did not amount to fraud for the purposes of s. 119. Williams J. was of the opinion that the term "fraud" in s. 119 indicated actual (as distinguished from constructive or equitable) fraud[40], or "a want of personal good faith" on the part of the transferee:[41] that is, "the term fraud in this section implies a want of *bona fides*".[42] The distinction the section draws, he said, is between negligent failure to inquire (even gross negligent failure) on the one hand, and want of *bona fides,*

35 Id. at 459.
36 Ibid.
37 Id. at 473.
38 Id at 474.
39 Id. at 478.
40 Id. at 462, see supra n. 6.
41 Id. at 464.
42 Ibid. See also Williams J's decision in Nicholson v Bank of New Zealand, supra note 19 at 441; Kirkpatrick & Barclay v Hutchison, supra note 21 at 671.

on the other;[43] and want of *bona fides* is a question of fact in all the circumstances.[44] Here, on Williams J's view of the facts, Brown was grossly negligent in accepting trust property in payment of the trustee's personal debts, but he did not act *mala fide*: the case was not one where "the transaction itself must have been from its nature undoubtedly fraudulent to the knowledge of Brown."[45] It was a case of gross negligence, but not of actual fraud. Similarly with Conolly J.: Brown was negligent in failing to inquire into the trustee's title, but short of evidence of a "fixed purpose to avoid knowing more" fraud could not necessarily be imputed.[46]

To some extent, the different conclusions reached by Prendergast C.J. and Edwards J. on the one hand, and Williams and Conolly JJ. on the other, can be attributed to their different views of the facts. But the difference goes deeper than that. For the view of Prendergast C.J. and Edwards J. is really based upon the premise that *constructive* notice of a breach of trust amounts to fraud for the purposes of s. 119. That is, with respect, to fly in the face of the spirit of the provision, and even, it is arguable, of its very words. The view of Williams and Conolly J., on the other hand equates "fraud" with "mala fides", and even gross negligence to inquire, in the absence of *mala fides*, will not amount to fraud. That, it is suggested, is the approach to be preferred. It is consistent with both the letter and spirit of the provision, and accords with the judicially accepted meaning of the term "fraud" in the Torrens legislation.

(b) *Cases involving knowledge of the existence of an unregistered interest*

There are numerous New Zealand cases where knowledge by a purchaser of the existence of an unregistered interest has led to an

43 Cf. per Edwards J. in Fels v Knowles, (1906) 26 N.Z.L.R. 604 at 619-620, speaking of Robert Torren's objective that all trusts should be excluded from the register: " . . . a person dealing *honestly* with the registered proprietor should not be called upon to look further than the register, and should be entirely unaffected by any breach of trust committed by the registered proprietor with whom he dealt." (Emphasis added.) And at 623: "The mere fact that a person dealing with a registered proprietor knows that such registered proprietor is trustee under a will certainly does not make it necessary to make inquiry as to his powers, unless there is something in the nature of his dealings with the trust property to give notice of the fact that he is dealing fraudulently with it: Smith v Essery and Brown."

44 Supra note 6 at 463-465. See also Matai v The Assets Company (1887) 6 N.Z.L.R. 359 at 363.

45 Supra note 6 at 466.

46 Id. at 469.

imputation of fraud on the part of the purchaser, despite the clear words of the section that "knowledge that any such . . . unregistered interest is in existence shall not of itself be imputed as fraud". The classic early case is *Merrie v McKay*.[47]

> The registered proprietor agreed in writing to grant a lease to Merrie for 10 years. Merrie entered into possession. The lease was not registered, nor was any caveat lodged. The land was sold to three successive purchasers, each of whom took with notice of the lease and each of whom registered his transfer. McKay was the third. McKay argued that he was not obliged to recognize Merrie's claim to the land. His title could only be defeasible for fraud, and knowledge of the existence of Merrie's unregistered interest did not itself amount to fraud.

Prendergast C.J. held that McKay's registered title was subject to Merrie's unregistered interest. He accepted the passage from Richmond J.'s judgment in *Locher v Howlett*[48] as the "settled construction" of the section, and went on to say that whether the matter was looked at before or after McKay acquired title, fraud was made out:

> If the defendant acquired the title intending to carry out the agreement with the plaintiff, there was no fraud then; the fraud is in now repudiating the agreement, and in endeavouring to make use of the position he has obtained to deprive the plaintiff of his rights, under the agreement. If the defendant acquired his registered title with a view to depriving the plaintiff of those rights, then the fraud was in acquiring the registered title.[49]

It is worth noting that in *Locher v Howlett*,[50] Richmond J. had said in effect that an *intention* to repudiate the unregistered interest was not necessary. In his view,

> where the circumstances of the case are such as should raise in the mind of a purchaser a *strong suspicion* that the transaction in which he is engaged is fraud on the right of another, he is

47 Supra note 21.

48 Supra note 21 at 595-596 (quoted above).

49 Supra note 21 at 127-128 (approved by the Court of Appeal in Waimiha Sawmilling Company Limited v Waione Timber Company Limited, supra note 3 at 1169; see also Webb v Hooper, supra note 2 at 114). Prendergast C.J. followed his own decision in Finnoran v Weir, (1887) 5 N.Z.L.R. (S.C.) 280, where the facts were the same except that the lease was for less than 3 years (and so, at that point in time not able to be registered), and there were not intermediate purchasers.

50 Supra note 21. The facts of the case were quite remarkable, and evinced from Richmond J. the tongue-in-cheek remark that the purchaser must have been aware that he was "in all probability buying a law suit" (at 497).

> bound to go no further in it without full enquiry, and . . . to omit such enquiry is a *want of honest dealing*. Voluntary ignorance is in law generally equivalent to knowledge.[51] (Emphasis added.)

This statement is not easy to reconcile with the words of the section itself: "no person . . . shall be affected by notice direct or constructive of any . . . unregistered interest". It goes perilously close to importing into the Torrens concept of fraud the doctrines of equitable fraud. A statement which goes even closer (and perhaps oversteps the mark into equitable fraud) appears in *Thomson v Finlay,*[52] where Williams J. held that a purchaser who bought with express notice of an unregistered lease held his registered title subject to that lease. He said:

> On the point whether, in view of the provisions of the *Land Transfer Act* as to notice, the purchasers are bound, I think there can be no question. If there is a valid contract affecting an estate, and the estate is sold expressly subject to that contract, it would be a distinct moral fraud in the purchaser to repudiate the contract, and *the Act does not protect moral fraud.*[53] (Emphasis added.)

It is not necessary to discuss in detail other early cases involving notice of unregistered interests. They all support the principle, espoused in *Locher v Howlett,* that while a purchaser is not affected by mere notice of an unregistered interest, he is affected by notice that the owner of the unregistered interest is being deprived of it by registration of the transfer under which the purchaser is taking. And in this context, *actual* notice is not necessary. It is sufficient that the purchaser knew enough to make it his duty as an honest man to hold his hand, and either to make further enquiries before purchasing, or to purchase subject to the claimant's rights rather than in definance of them. If, knowing as much as this, he proceeds without further enquiry to purchase with intent to disregard the claimant's rights, if they exist, "he is guilty of that wilful blindness or voluntary ignorance which, according to the authorities, is equivalent to actual knowledge, and

51 Id. at 597-598 (words reminiscent of those of the Privy Council in the Assets Company Case, supra note 3 at 210); followed in Kirkpatrick & Barclay v Hutchison, supra note 21 at 671, and Waimiha Sawmilling Company Limited v Waione Timber Company Limited, supra note 3 at 1176.

52 (1886) 5 N.Z.L.R. 203 at 207.

53 See comments to the same effect by Edwards J. in Pukuweka Sawmills Ltd. v Winger [1917] N.Z.L.R. 81 at 103, and by Salmond J. in Waimiha Sawmilling Company Limited v Waione Timber Company Limited, supra note 3 at 1169.

therefore amounts to fraud".[54] Some of the cases are listed below.[55]

A brief reference to two more recent decisions will serve to illustrate the way the line is drawn. The first is *Webb v Hooper*.[56]

> Webb was in possession of a shed on land purchased by Hooper. Webb's right to possession derived from an agreement made with Hooper's predecessor in title. The agreement was not of a kind which could be registered under the *Land Transfer Act* 1915. No caveat had been lodged to protect it. Before completing his purchase, Hooper had full notice of Webb's rights in relation to the shed. Hooper claimed that registration of his transfer defeated Webb's claim to possession.

Stanton J. accepted the well-established rule that fraud for the purposes of s. 197 of the Land Transfer Act 1915 meant "moral fraud or dishonesty of some sort,"[57] and held that on the facts Hooper must have intended either to take the property subject to Webb's rights or, by registration, to defeat them. In either case, any claim after registration to hold the land discharged from those rights would be fraudulent and dishonest.[58] The second decision is *Harris v Fitzmaurice (Gruar, Third Party)*.[59]

> Fitzmaurice was in possession of premises under a lease for five years with an option of renewal for a further five years. The

54 Waimaha Sawmilling Company Limited v Waione Timber Company Limited, supra note 3 at 1175 per Salmond J. (applied by the Court of Appeal in Efstratiou, Glantschnig and Petrovic v Glantschnig, supra note 3 at 603). Cf. Katene Te Whakaruru v Public Trustee, (1893) 12 N.Z.L.R. 651 at 662: "To constitute fraud, there must be knowledge—not necessarily full knowledge, but at least a suspicion or inkling—that a wrong is being done. A man cannot be unconsciously guilty of fraud."

55 See Millard v Cowdrey, (1894) 14 N.Z.L.R. 12; Loudon v Morrison (1895) 14 N.Z.L.R. 245 at 251; Kirkpatrick & Barclay v Hutchison, supra note 21 (where, on the facts, fraud was not found); Strang v Russell, (1905) 24 N.Z.L.R. 916 at 928; Wellington City Corporation v Public Trustee, [1921] N.Z.L.R. 423 at 432-434; Dillicar v West, [1921] N.Z.L.R. 617 at 631 (where the purchaser himself had set up the unregistered interest he was attempting to repudiate, as in Smith v Holroyd, [1922] N.Z.L.R. 256); Bevan v Tatum, [1927] N.Z.L.R. 909 at 912; Boundy v Bennett, [1946] N.Z.L.R. 69 at 74, 75 (where fraud was not proved); McCrae v Wheeler, [1969] N.Z.L.R. 333 at 337; *Efstratiou, Glantschnig and Petrovic v Glantschnig*, supra note 3 at 601-603 (a case involving the most extraordinary circumstances, but, in view of the finding of the trial judge that the purchaser had been a party to the scheme to deprive the equitable holder of her interest, not such an "extreme" case—cf. Whalan, supra note 2 at 227-228). See also Morrison v Song Hing [1949] N.Z.L.R. 101 at 104-105.

56 Supra note 2.

57 Id. at 113.

58 Cf. Maori Trustee v Kahuroa, [1956] N.Z.L.R. 713 at 721.

59 [1956] N.Z.L.R. 975.

> lease was not registered. Harris purchased the property at auction, knowing that Fitzmaurice was in possession, but not kowing of the existence of the actual lease, and having been informed by the auctioneer that the tenant was in possession on a weekly tenancy only. The property was sold "subject to the existing tenancies (if any)".

Cooke J. held that upon registration of his transfer, Harris took free of the tenant's rights under the actual lease. On the evidence, there was no dishonesty at the time of the purchase: Harris fully intended to recognize the existence of the only tenancy about which he had been informed, namely, a weekly tenancy. It was impossible to regard him as fraudulent simply because he sought to insist that he should not be called upon to recognize the existence of a tenancy of a very different nature and of which he was unaware before registration. There was no element of dishonesty on his part.[60] The distinction between the two cases is clear: in the first, the purchaser had express notice of the occupant's rights prior to completion of the purchase; in the second, the purchaser received such notice only after settlement and registration,[61] and it was not fraudulent on his part to endeavour to render them ineffective against himself.

The final New Zealand case to which reference must be made is the Court of Appeal decision in *Sutton v O'Kane*.[62]

> O'Kane sought a declaration that the Suttons held their land subject to a right of way in favour of his land. It appeared that the parties' predecessors in title had intended to create a registered right of way over the Suttons' land in favour of O'Kane's land, but no registrable instrument creating such a right of way had ever been prepared. Nevertheless, the predecessors in title had assumed that a right of way had been created and had used the land accordingly. Before the Suttons purchased their land, they were informed that it was subject to "a legal right of way" (as

60 Id. at 978. A similar result was reached in an earlier South Australian case, but for different reasons: Rounsevell v Ryan & Sons Limited, [1910] S.A.L.R. 67 at 71-72.

61 It is apparent that in both decisions the crucial point of time at which the presence of fraud must be tested was regarded as the date of *registration*, not completion of the purchase: [1953] N.Z.L.R. at 114 and [1956] N.Z.L.R. at 978. In New South Wales, however, the crucial point of time is probably the date of completion, because of s. 43A of the Real Property Act, 1900 (as interpreted in Courtenay v Austin, supra note 2 at 1093-1094; I.A.C. (Finance) Pty. Limited v Courtenay, supra note 2 at 584-585, and Meriton Apartments Pty. Ltd. v McLaurin & Tait (Developments) Pty. Ltd. (1976) 50 A.L.J.R. 743). S. 43A has no equivalent in the other Australian States or New Zealand.

62 [1973] 2 N.Z.L.R. 304.

> the land agent described it). After settlement, they allowed O'Kane to use the right of way. However, about 12 months after they became registered as proprietors, they discovered that no right of way had ever been formally created, and refused to allow O'Kane to use it any further.

The Court of Appeal were unanimous that an *equitable* right of way had been created by the present proprietors' predecessors in title,[63] but were divided as to whether it was enforceable between the present proprietors. The majority (Wild C.J. and Richmond J.) held it was not enforceable. Their reasoning was that at all times up until they were advised of the true position, the Suttons had allowed O'Kane to use the way. They had assumed that a legal way existed. There was no suggestion of fraud during that period. It was only when they learned that O'Kane had no *legal* right to cross their land that they changed their attitude. That was not a wrongful disregard of O'Kane's unregistered interest. As Wild C.J. put it:

> For a person who has accepted a situation upon an erroneous belief to stand on his rights when he discovers their true nature might well be less than generous but in my view it is not dishonest . . . I do not think it is fraudulent repudiation simply to disavow obligations that are found not to exist.[64]

In the words of Richmond J., the Suttons' action was "inconsiderate to an extreme degree", "highly unreasonable" and "selfish", but he found it "impossible to describe their conduct as *dishonest*".[65] In any case, in his opinion the section contemplated some form of dishonest conduct by the purchaser *before* registration, not after.[66] Here there was no evidence whatsoever of dishonesty up to that point of time.

Turner P. dissented. In his view, the Suttons' title was defeasible for fraud. His judgment involved two main points. The first was that the fraud need not necessarily precede registration: it may supervene upon registration. That is,

> even though the transferee may have taken title bona fide, intending to give due recognition to the obligations which notice of an unregistered interest might impose upon him, yet a subsequent change of heart, resulting in an ultimate determination to resile

63 There had been an agreement for valuable consideration between the predecessors in title to grant an easement, and equity would regard it as granted: supra note 62 at 314, 319, 340.

64 Id. at 314.

65 Id. at 347.

66 Id. at 346, to that extent disapproving suggestions in earlier cases that dishonest dealing *after* registration was fraud: e.g. Merrie v McKay, supra note 21 at 127-128 (see above, text to n. 49 and authorities cited in n. 49).

> from the obligations which honesty enjoined upon him, may after registration, render him guilty of fraud.[67]

The second main point was that "fraud" under the Land Transfer Act meant "dishonesty", and if it were dishonest in the circumstances of the case for the registered proprietor with a clear title to repudiate an unregistered interest, that would be fraud.[68] And "dishonesty" was not restricted to the notion of taking from a man what is *legally* his: it was what was his "in honour, or in equity", that it was *dishonest* to take.[69] Whether an act was *dishonest* did not necessarily depend upon whether it was made *legitimate* by law. There was one question to be asked in all cases: "In all the circumstances of this particular case was it *dishonest* to refuse to recognize the unregistered interest?"[70] Here, the Suttons were aware before they purchased that the land was subjct to a right of way. They repudiated the right of way after they became registered. That was dishonest and amounted to fraud. The fact that they did not know that the right of way was not registered, but existed only in equity, could not make any difference.[71] In the words of the learned President:

> I am quite unable . . . to perceive that the fact that the Suttons did not know, when they took their transfer, that the right of way was unregistered, can have the slightest relevance in deciding whether their subsequent repudiation of the right of way of which they knew was honest or dishonest.[72]

It will be argued at the conclusion of this article, that the approach taken by the Australian Courts to the relation between notice and fraud is to be preferred to that of the New Zealand Courts. To that extent, the views of the majority in *Sutton v O'Kane* are, with respect, to be preferred to those of Turner P. But it would seem that Turner P's judgment is more in line with the earlier New Zealand line of authority than those of his fellow judges. For there is nothing in the earlier cases to justify the conclusion that it is not fraud to repudiate an

67 Supra note 62 at 324. Turner P. discusses this point exhaustively at 323-331.

68 Id. at 321: That "fraud" for the purposes of the Act means "dishonesty" cannot now be doubted. However, one recalls Lord Reid's warning in another context, of the dangers in substituting a different word for the one actually used by the Legislature: few words have exact synonyms, and by substituting another, the courts are going dangerously close to usurping the legislative function: "The meaning of an ordinary word of the English language is not a question of law." See Cozens v Brutus, [1973] A.C. 854 at 861.

69 Supra note 62 at 322.

70 Id. at 330.

71 Id. at 331.

72 Id. at 335.

unregistered interest on the simple ground that it was believed, at the date of settlement or registration, that the interest was registered. Whatever the differences in juridical nature, there is no difference, as far as *user* of the servient tenement is concerned, whether a right of way is enforceable at law or in equity: the servient tenement is subject to the same *practical* restrictions in either case. The fact that it turns out to be enforceable in equity rather than at law is not relevant to the question whether it is dishonest to repudiate it. It is a different situation to that in *Harris v Fitzmaurice*[73] where the alleged lease of which the purchaser had notice (a tenancy from week to week) was of a radically different practical nature than the actual unregistered interest (a lease for five years with an option of renewal for a further five years).

NOTICE AND FRAUD—THE AUSTRALIAN ANSWER

The direct dichotomy between the New Zealand and Australian interpretations of s. 43 and its counterparts is highlighted by the New South Wales case of *James A. Munro Ltd. v Stuart.*[74]

> Munro, the registered proprietor, had executed leases over its land. The leases were not registered. Munro sold the land to Stuart. Prior to execution of the contract, copies of the leases were produced to Stuart. The contract itself provided that the property was sold "subject to existing tenancies". After registration of the transfer, Stuart proceeded to eject the tenants, relying on his clear certificate of title. Munro (facing threatened action by the tenants for breach of his covenant for quiet enjoyment) sought a declaration that Stuart held the land subject to the unregistered leases.

Harvey J. accepted that Stuart's intention all along had been to deliberately deprive the lessees of their interests by registration of the transfer he received from Munro, but nevertheless held there was no fraud on his part. He was careful to point out that there had been no agreement between Munro and Stuart that Stuart would recognize the leases.[75] Referring to s. 43, Harvey J. said that a purchaser with knowledge of the existence of an unregistered interest was entitled to proceed to completion. The "clear words" of the section indicated that

> a purchaser may shut his eyes to the fact of there being an unregistered interest, and need not take any consideration of the persons who claim under the unregistered interest.[76]

73 [1956] N.Z.L.R. 975.

74 (1924) 41 S.R. (N.S.W.) 203n.

75 Had there been such an agreement, there would presumably have been fraud: Loke Yew v Port Swettenham Rubber Company Limited, supra note 14.

The result was that it was not fraud for the purposes of s. 43 for Stuart to repudiate the tenants' claims.

Harvey J., in *Munro v Stuart,* expressly followed the earlier New South Wales case of *Oertel v Hordern.*[77] In that case also, the purchaser had notice prior to execution of the contract of the existence of a lease, having been advised by the tenant in writing of its terms, yet A. H. Simpson C.J. in Eq. held that it was not fraud for the purposes of s. 43 for the purchaser to rely upon his clear certificate of title and eject the hapless tenant. The learned Chief Judge in Equity considered two of the New Zealand cases discussed earlier in this article[78] and concluded that the ratio to be drawn from them was that a transferee who takes with notice of an unregistered interest, and with notice that the holder of the unregistered interest does not consent to the transfer, is guilty of fraud, and will be prevented from relying upon the registration of his transfer as against the holder of the unregistered interest.[79] But those New Zealand decisions were, he felt, inconsistent with two earlier Australian decisions[80] which had held, in circumstances similar to those before him, that the actions of the purchaser did not amount to fraud for the purposes of s. 43. He felt bound to follow the two Australian decisions.

When one looks at the early Australian decisions, it is apparent that from the start the courts showed a distinct disinclination to adopt the interpretation of the section followed in New Zealand. There was, it is true, some indecisive wavering towards apostasy,[81] but on the whole the view taken was that a purchaser is entitled to disregard entirely notice of unregistered interests and to proceed to registration of his

76 Supra note 74 at 206.

77 (1902) 2 S.R. (N.S.W.) Eq. 37. This case was regarded by J. E. Hogg, "Notice and Fraud in Land Registries," (1913) 29 *L.Q.R.* 434 at 440, as inconsistent with the later Privy Council decision in Loke Yew's Case, supra note 14, but any doubts about the correctness of Oertel v Hordern have long since been dispelled: see authorities cited infra, note 83 and cf. J. R. Innes, "Notice and Fraud in Registration of Title to Land", (1915) 31 *L.Q.R.* 397 at 399.

78 The National Bank of New Zealand v National Mortgage and Agency Company, supra note 6, and Locher v Howlett, supra note 21.

79 Supra note 77 at 45. Quaere whether the New Zealand cases have any real regard to whether or not there is notice that the unregistered holder does not consent to the transfer.

80 Robertson v Keith, supra note 6 and Cooke v The Union Bank (1893) 14 N.S.W.R. Eq. 280.

81 Maddison v McCarthy (1865) 2 W.W. & a'B 151 at 156 (where, however, the purchaser with notice was not yet registered: and see the remarks of Molesworth J. in Robertson v Keith, supra note 6 at 15-16); Chomley v Firebrace,

transfer in the sure knowledge that the unregistered interest will be defeated thereby.[82]

Certainly, there is no doubt that in recent times the Australian courts have steadfastly set their faces against the New Zealand approach.[83] Two recent South Australian decisions will suffice to illustrate. In *R. M. Hosking Properties Pty. Ltd. v Barnes*,[84]

(1879) 5 V.L.R. Eq. 57 at 72 (which case, however, has been explained on the basis that the transferee was a volunteer, both in the decision itself at 72, 73-74, and in other cases, such as Crow v Campbell, (1884) 10 V.L.R. 186 at 194, Smith v Essery and Brown, supra note 33 at 468, 486-487, and King v Smail, [1958] V.R. 273 at 278); Droop v Colonial Bank of Australasia, (1880) 6 V.L.R. Eq. 228 at 233 (where, however, there were additional factors depriving he mortgagee Bank of an indefeasible title—and quaere whether the same result would be reached today in the light of Frazer v Walker, [1967] 1 A.C. 569—cf. the discussion in Smith v Essery and Brown, supra note 33 at 474); Richards v Jones, (1865) 1 S.A.L.R. 167 at 167. Reference may also be made to Biggs v McEllister (1880) 14 S.A.L.R. 86 at 115, 116 to the effect that the section does not protect volunteers (approved on appeal, sub nom. McEllister v Biggs, (1883) 8 App. Cas. 314), and Howard v Currie, (1879) 5 V.L.R. Eq. 87, where the interpretation of the Victorian equivalent of s. 43 (Transfer of Land Statute, No. 301 (Vic), s. 50) was raised in argument but not dealt with by Molesworth J., perhaps because the purchaser with notice was not registered.

82 Robertson v Keith, supra note 6 at 14 (this aspect of the decision not being affected by doubts expressed in Cunningham v Gundry (1876) 2 V.L.R. Eq. 197 at 203); Cullen v. Thompson (1879) 5 V.L.R. Eq. 147 at 153; Cowell v Stacey, supra note 2 at 84, obiter; Lake v Jones (1889) 15 V.L.R. 728 at 730; Gregory v Alger, supra note 6 at 574; Cooke v The Union Bank, (1893) 14 N.S.W.R. 280 at 282; St. George v Burnet, (1876) 10 S.A.L.R. 47 at 54; Rounsell v Ryan & Sons Limited, [1910] S.A.L.R. 67 at 71-72; Josephson v Mason, (1912) 12 S.R. (N.S.W.) 249 at 256-257. Two cases which seem to take a mid-course between the Australian and New Zealand approaches are, firstly, Biggs v McEllister, supra note 81 at 116 per Boucaut J.: "Although [the section] says that direct knowledge of a trust is not 'of itself to be imputed as fraud', it does not say that direct knowledge of a fraud is not to be imputed as fraud." (cf. with the approach taken by the court in this case, to the way in which fraud on the part of a solicitor may affect the title of his client, the approach of Street J. in Schultz v Corwill Properties, (1969) 90 W.N. (N.S.W.) (Pt. 1) 529 at 539-542); secondly, Frankline v Ind, (1883) 17 S.A.S.R. 133 at 160-164, where, however, there was actual fraud by *participatio criminis*.

83 Wicks v Bennett, (1921) 30 C.L.R. 80 at 91, 94-95 (approving Oertel v Hordern, supra note 77); Stuart v Kingston (1923) 32 C.L.R. 309 at 328-331, 343, 359; Friedman v Barrett, ex parte Friedman, supra note 11 at 504, 512-513 (see W. D. Duncan, "Friedman v Barrett Fifteen Years On", [1977] *Q. Law Soc. J.* 31); Mills v Stokman (1967) 116 C.L.R. 61 at 78 per Kitto J.: "merely to take a transfer with notice or even actual knowledge that its registration will defeat an existing unregistered interest is not fraud: Real Property Act 1900 (N.S.W.), s. 43."

84 [1971] S.A.S.R. 100.

> Tenants were in possession under an unregistered lease for a term of 2 years. The registered proprietor sold the land to a purchaser who had notice, at the date of exchange of contracts, of the existence of *some* kind of lease, and, by the date of completion, of the *actual* lease. The purchaser acknowledged the existence of the lease to the vendor, but made no agreement that he would observe the lease.[85] On registration of his transfer, the purchaser accepted rent for some time, and then sought to eject the tenants.

Walters J. held that the purchaser was entitled to remove the tenants. There was, he said, no actual fraud on the part of the purchaser, and mere notice of the tenants' unregistered interest did not amount to fraud. Applying *Munro v Stuart*[86] and *Oertel v. Hordern*,[87] he said

> To hold that mere notice of the unregistered interest of the [tenants] amounts to fraud would, in my opinion, stultify the provisions of s. 72. I think that in enacting the section, the legislature meant that a bona fide purchaser might disregard the fact of there being an unregistered interest and need not take into consideration the rights of persons claiming under that unregistered interest.[88]

Then, in *Achatz v De Reuver*,[89]

> a weekly tenant had been granted an option to purchase. No caveat was lodged to protect the option. A purchaser bought the premises with notice of the tenancy but not of the option. The day before the proposed settlement, the tenant (through his solicitor) informed the purchaser that he intended to immediately lodge a caveat. The caveat was, however, not lodged until 11 a.m. the next day, by which time the sale had been completed and the transfer lodged for registration.

Hogarth J. held that there was no "actual" fraud on the part of the purchaser in settling the purchase and lodging the transfer for registration in the face of knowledge that the tenant intended to protect his interests by lodging a caveat. No caveat had in fact been lodged

85 Although not raised in the judgment, such an agreement might have founded an argument based on actual fraud: Loke Yew's Case, supra, note 14.

86 (1924) 41 S.R. (N.S.W.) 203 at 205.

87 Supra note 77.

88 Supra note 84 at 103 (section 72 of the South Australian Act provides: "Knowledge of the existence of any unregistered estate, interest, contract, or trust shall not of itself be evidence of want of bona fides so as to affect the title of any registered proprietor."). On the facts, it was held that acceptance of rent by the purchaser did not create a fresh relationship of landlord and tenant binding on the purchaser; for a similar case, see Josephson v Mason, supra note 82 at 259-261.

89 Supra note 11.

before lodgement of the transfer, and "[Mere] notice, even actual knowledge by the plaintiff . . . of the defendant's prior equitable interest, does not of itself constitute fraud".[90]

CONCLUSION—THE AUSTRALIAN ANSWER PREFERRED

It is clear, therefore, that the Australian and New Zealand approaches to the question of when notice amounts to fraud are irreconcilable. They will often lead to opposite results on the same set of facts. In New Zealand, the rights of the occupant in possession under an unregistered instrument will nearly always be fully protected against a purchaser with notice;[91] in Australia, they will be completely destroyed.[92] It remains to consider which of the two approaches is to be preferred.

It seems clear that the legislative purpose of s. 43 and its counterparts was to banish from the Torrens System the equitable doctrines which equated notice with fraud. In earlier times, the legislature had attempted to abolish the equitable doctrines of notice in the context of old system deeds registries, but had been singularly unsuccessful: the courts had shown a distinct tendency to superimpose upon the legislation, and against its spirit, the doctrines the legislation was designed to abolish.[93] And, it is submitted, this same judicial tendency to minimise the reform in the law which the staute by its framers was intended to effect[94] has been apparent in the New Zealand decisions on the section under review. For, in saying that while *mere* knowledge of the existence of a trust or unregistered interested is *not* fraud, notice, even constructive, that the trust is being broken or that registration of the transfer by the purchaser will effectively deprive the unregistered holder of his interest *is* fraud, the legislative provision is being emasculated. What possible purpose can the provision have, if not to protect a purchaser with notice against the consequences of his notice?

90 Id. at 250.

91 E.g. Webb v Hooper, supra note 2. The only exceptions will be in situations such as occurred in Harris v Fitzmaurice (supra) and Sutton v O'Kane (supra).

92 E.g. Oertel v Hordern, supra note 77; Munro v Stuart, (1924) 41 S.R. (N.S.W.) 203n.

93 In England, on the Middlesex Registry Act 1708, s. 1 see Le Neve v Le Neve, (1747) Amb. 436 at 442 (27 E.R. 291 at 301); on the Yorkshire Registries Act 1884, s. 14, cf. Battison v Hobson, [1896] 2 Ch. 403 at 412. In New South Wales, on the Registration of Deeds Act 1898, s. 12, see Jones v Collins, (1891) 12 N.S.W.R. (L.) 247; Marsden v Campbell, (1897) 18 N.S.W.R. (Eq.) 33 at 38.

94 Hogg, supra note 77.

If the New Zealand interpretation is given full sway, the purchaser of Torrens title land is, in this respect, in exactly the same position as the purchaser of old system land: once affected by notice, even constructive, he must stay his hand or suffer the consequences. By holding on to the equitable doctrines of notice the force and intent of the statute has been corroded.[95]

The Australian approach, on the other hand, gives full effect to both the spirit and letter of the provision. Unless there is "actual" fraud, the purchaser, upon registration, is entitled to disregard entirely unregistered interests of which he had notice, direct or constructive, prior to registration.[96] Moreover, that interpretation not only gives full effect to the intention of s. 43, but is consistent with the judicially accepted philosophy of the Torrens System as a whole. For it is always *open* to the holder of an unregistered interest either to lodge his instrument for registration or (if his interest is not contained in an instrument, or, if contained in an instrument, the instrument cannot be put into registrable form[97]) lodge a caveat. So, the Australian cases say, if under s. 43 the Act protects a purchaser against notice of prior unregistered interests, the holder of the unregistered interest must either register or caveat if he wishes to enforce his interest against purchasers with notice.[98] This, indeed, merely reflects the now well

95 On the "corrosive effect" on the Torrens System of general law notions and equitable doctrines, see D. J. Whalan, "The Torrens System in New Zealand", in *The New Zealand Torrens System Centennial Essays* 261-262 (1971).

96 The High Court has recently confirmed that the Real Property Act 1900 (N.S.W.), s. 43A will not protect a purchaser with notice at or before settlement: he must await registration before he will obtain protection under s. 43 (see Meriton Apartments Pty. Ltd. v McLaurin & Tait (Developments) Pty. Ltd., (1976) 50 A.L.J.R. 743 at 746, adopting the interpretation of s. 43A taken by Taylor J. in I.A.C. (Finance) Pty. Ltd. v Courtenay, supra note 2 at 584, by the New South Wales Court of Appeal in Jonray (Sydney) Pty. Ltd. v Partridge Bros. Pty. Ltd., supra note 2 at 576, and by Barwick C.J. in J. & H. Just (Holdings) Pty. Ltd. v Bank of New South Wales (1971) 45 A.L.J.R. 625 at 629).

97 There is, in any case, good authority to the effect that s. 43 and its counterparts does not apply to interests which are not *capable* of being registered under the Act (as distinct from interests which are capable of being registered, but are not): Gray v Urquhart, (1911) 30 N.Z.L.R. 37 at 59 (easement by prescription); Webb v Hooper, supra note 2 at 113 (right of occupancy in gross); Wilkinson v Spooner, [1957] Tas S.R. 121 at 131 (easement by prescription). See also Sutton v O'Kane, [1973] 2 N.Z.L.R. 304 at 316, 349, and W. D. Duncan, "The Creation and Protection of Unregistrable Interests in Land under the Real Property Acts Qld.", (1977) 3 *The Qld. Lawyer* 137 at 146-147.

98 Oertel v Hordern, supra note 77 at 47; Friedman v Barrett, supra note 11 at 504; R. M. Hosking Properties Pty. Ltd. v Barnes [1971] S.A.S.R. 100 at 104-105; Achatz v De Reuver, supra note 11 at 244-245.

If the New Zealand interpretation is given full sway, the purchaser of Torrens title land is, in this respect, in exactly the same position as the purchaser of old system land: once affected by notice, even constructive, he must stay his hand or suffer the consequences. By holding on to the equitable doctrines of notice the force and intent of the statute has been corroded.[95]

The Australian approach, on the other hand, gives full effect to both the spirit and letter of the provision. Unless there is "actual" fraud, the purchaser, upon registration, is entitled to disregard entirely unregistered interests of which he had notice, direct or constructive, prior to registration.[96] Moreover, that interpretation not only gives full effect to the intention of s. 43, but is consistent with the judicially accepted philosophy of the Torrens System as a whole. For it is always *open* to the holder of an unregistered interest either to lodge his instrument for registration or (if his interest is not contained in an instrument, or, if contained in an instrument, the instrument cannot be put into registrable form[97]) lodge a caveat. So, the Australian cases say, if under s. 43 the Act protects a purchaser against notice of prior unregistered interests, the holder of the unregistered interest must either register or caveat if he wishes to enforce his interest against purchasers with notice.[98] This, indeed, merely reflects the now well

95 On the "corrosive effect" on the Torrens System of general law notions and equitable doctrines, see D. J. Whalan, "The Torrens System in New Zealand", in *The New Zealand Torrens System Centennial Essays* 261-262 (1971).

96 The High Court has recently confirmed that the Real Property Act 1900 (N.S.W.), s. 43A will not protect a purchaser with notice at or before settlement: he must await registration before he will obtain protection under s. 43 (see Meriton Apartments Pty. Ltd. v McLaurin & Tait (Developments) Pty. Ltd., (1976) 50 A.L.J.R. 743 at 746, adopting the interpretation of s. 43A taken by Taylor J. in I.A.C. (Finance) Pty. Ltd. v Courtenay, supra note 2 at 584, by the New South Wales Court of Appeal in Jonray (Sydney) Pty. Ltd. v Partridge Bros. Pty. Ltd., supra note 2 at 576, and by Barwick C.J. in J. & H. Just (Holdings) Pty. Ltd. v Bank of New South Wales (1971) 45 A.L.J.R. 625 at 629).

97 There is, in any case, good authority to the effect that s. 43 and its counterparts does not apply to interests which are not *capable* of being registered under the Act (as distinct from interests which are capable of being registered, but are not): Gray v Urquhart, (1911) 30 N.Z.L.R. 37 at 59 (easement by prescription); Webb v Hooper, supra note 2 at 113 (right of occupancy in gross); Wilkinson v Spooner, [1957] Tas S.R. 121 at 131 (easement by prescription). See also Sutton v O'Kane, [1973] 2 N.Z.L.R. 304 at 316, 349, and W. D. Duncan, "The Creation and Protection of Unregistrable Interests in Land under the Real Property Acts Qld.", (1977) 3 *The Qld. Lawyer* 137 at 146-147.

98 Oertel v Hordern, supra note 77 at 47; Friedman v Barrett, supra note 11 at 504; R. M. Hosking Properties Pty. Ltd. v Barnes [1971] S.A.S.R. 100 at 104-105; Achatz v De Reuver, supra note 11 at 244-245.

accepted view that in resolving equitable priorities under the Torrens System a person seeking the protection of the Act must avail himself of the safeguards the Act offers.[99]

[99] Butler v Fairclough, supra note 7 at 93-94, 97; Abigail v Lapin, supra note 2 at 502; J. & H. Just (Holdings) Pty. Ltd. v Bank of New South Wales, supra note 96; Osmanoski v Rose [1974] V.R. 523 at 528.

CONSUMER LEGISLATION IN SOCIO-ECONOMIC PERSPECTIVE: OBSERVATIONS FROM THE ENACTMENTS OF ONE STATE

ANTHONY DICKEY* AND PETER WARD**

One of the more disappointing features of the current interest in consumer legislation is the narrow way in which the various Acts involved are frequently considered. More particularly, studies and accounts of legislation of this kind are too often restricted to what the relevant Acts expressly concern. So they commonly deal with the aims of the statutory provisions within the context of the express terms of the Acts in question, with the success or failure of these Acts in achieving those aims, and if the study has a legal orientation, with the precise meaning of the words and individual sections employed in the legislation. But little else. Studies of consumer legislation, however, can clearly involve much more than this. In particular, given that legislation of this kind necessarily involves not just consumers, and not even just consumers and traders, but a dynamic socio-economic system in which both consumers and traders play active parts, any even moderately thorough study of consumer legislation must be concerned with the effects of the constituent statutory provisions on the general socio-economic system operating within the jurisdiction in question.

The objection to the prevalent narrow approach to consumer legislation is not however confined to the fact that it does not go far enough; it also includes the fact that such an approach tends to give a misleading impression of the function of consumer legislation and as a consequence obscures the full relationship between the various statutory provisions involved. Thus, under the narrow approach Acts or parts of Acts dealing with particular consumer problems are commonly treated as more or less discrete entities which may relate to other Acts or provisions by such obvious nexus as subject-matter or means of enforcement but which otherwise have little in common with each other apart from the fact that they all form part of a collection of statutes which have to do with consumers. It is not surprising, then, that resultant accounts of the consumer legislation of particular juris-

* Senior Lecturer in Law, University of Western Australia.
** Economist, Perth.

dictions often consist in essence simply of detailed catalogues of all the relevant Acts.[1] Similarly in respect of studies of the general consumer law of particular jurisdictions. These also often consist basically of catalogues, in this case of relevant statutes and case law assembled together under various subject-headings pertaining to consumer problems, consumer interests, or areas of consumer activity.[2]

Much important and useful information on consumers and the law has been, and can still be, obtained from studies of the kind just referred to. That fact is not called into question. The point to be made here, however, is that even more useful information can be gained from studies which go further by having as their focus the effect of consumer law on the general socio-economic system in which it must operate. From this functional point of view the various pieces of consumer legislation form a more coherent whole than is apparent under the narrow approach; in particular, the constituent provisions are seen to form a single set of devices which are designed to improve the position of consumers by affecting the operation of a given socio-economic system. In this paper we shall briefly examine some recent State consumer legislation from a socio-economic point of view in order to indicate the significance and value of studies of this kind, and also some of the problems which they disclose. Because we wish primarily to foster an approach rather than provide an exhaustive study we shall confine ourselves to the legislation of our own State, Western Australia, though as consumer legislation in Australia is reasonably uniform our observations will have general application to most other State and Territorial jurisdictions. We shall also restrict ourselves primarily to legislation since 1971, when consumerism may fairly be said to have come into its own in Western Australia.

Western Australian Consumer Legislation and Economic Theory

Prior to 1971 the Western Australian Parliament had over the years passed approximately fifteen Acts of particular benefit to consumers. The impression is gained, however, that they had rarely been passed with the same sense of concern for consumer welfare that has been evident in Parliament in more recent years. Occasionally they had even been introduced more as a result of pressure from self-interested

1 See, e.g., the account of Australian consumer legislation in K. C. T. Sutton, *The Law of Sale of Goods in Australia and New Zealand* 433-455 (2nd ed. 1974).

2 See, e.g., the U.K. work, Gordon Borrie and Aubrey L. Diamond, *The Consumer, Society and the Law* (3rd ed. 1973).

businesses and industries than by any strong consumer demand; the original Trade Descriptions and False Advertisements Act of 1936 is a good example in point.[3] In the early 1970s, however, the situation changed, as it had already done elsewhere in Australia. In 1971 Parliament passed the important Consumer Protection (now Affairs) Act which established a Bureau and a Council to protect and promote consumer interests. Since then—and clearly as much due to the activities of those two bodies as to increased public interest in consumer affairs—consumers legislation has been a regular feature of the legislative programmes of successive governments. For example, in 1973 Parliament passed the Unsolicited Goods and Services Act, the Pyramid Sales Schemes Act, and the Motor Vehicle Dealers Act. In 1974 it passed the Small Claims Tribunals Act, and in the following year it passed amendments to four of these new Acts to take into account experience gained since the respective principal Acts had come into effect. Amendments were also made during this period to earlier pieces of consumer legislation.

The economic system that all these Acts are intended to affect is, of course, nominally one of free enterprise. A system of this kind is based on the two-fold principle that the preferences of individuals should count and that traders should be free to enter and withdraw from markets in response to consumer demand. From the point of view of pure economic theory the ideal market within a free enterprise system for both consumers and producers is one where there is perfect competition; that is, where the goods and services available are homogeneous and traded at a single price, where there is perfect knowledge of the price of such commodities on the part of both buyers and sellers, and where there is such a large number of buyers and sellers that no individual buyer or seller is able to influence the prevailing price by his own action. Under such conditions market forces within a free enterprise system ensure both that industries produce the goods and services that the community as a whole most wishes to consume and that these goods and services (a) meet the minimum standards that the community at large is prepared to accept, (b) are produced in the most efficient manner possible given the existing state of technology, and (c) are available within those technological limits at the lowest possible price.[4]

[3] See the statement by the Minister for Employment when opening the Second Reading Debate of the original Bill; 97 L.A. Deb (W.A.), p. 422 (8 September, 1936).

[4] For a more detailed account of the economic principles outlined here, see Tibor Scitovsky, *Welfare and Competition* esp. chs. 2, 8, 20-21 (rev. ed. 1971).

Perfect competition is, however, a purely theoretical construct which cannot be achieved in practice. This is not necessarily a bad thing for there are certain important disadvantages which would attach to any market with such competition. For example, prices there would not necessarily be the lowest possible as perfect competition is incompatiable with the existence of economies of large-scale production. Scale economies can be gained only if few sellers exist within markets; perfect competition, however, requires the existence of a large number of firms in any market with the result that each business enterprise is relatively small, and this inhibits the development and application of those sophisticated production techniques which are conductive to lower costs of production.[5] Economists have accordingly constructed as the ideal market for a free enterprise system in the real world one where there is "effective", or "workable", competition. Competition of this kind involves a market situation which is similar to that which in principle attends a competitive industry but which nonetheless allows the community to reap the benefits of the lower costs which are associated with large-scale production.[6]

The principal point to follow from the economic theory which has just been referred to is that, all other things being equal, the more effective the competition within any free enterprise market the better the position of consumers within it.[7] Competition acts as a purifying agent within a free enterprise market; it provides an impersonal force which purges such markets of inefficient businesses and with them all forms of anti-consumer practices, particularly the manipulation of the price and quality of goods for the sole benefit of the businesses involved.[8] Accordingly, all other things being equal, the best consumer legislation is that which creates the most favourable conditions under which effective competition can thrive. Such legislation may, for example, break up monopolies or facilitate the establishment of new businesses in order to increase the number of firms within a particular market. Or it may require the disclosure of information concerning

5 See generally Paul A. Samuelson, Keith Hancock & Robert Wallace, *Economics* ch. 24 (2nd Aust. ed. 1975).

6 For a definition of effective competition in economic terms, see M. Brunt, "Legislation in Search of an Objective". in J. P. Nieuwenhuysen (ed.), *Australian Trade Practices: Readings* at p. 238 (1970).

7 We should emphasise that by "competition" we mean *price* competition, where businesses compete for the consumers' dollar by price cuts rather than by resorting to such devices as persuasive (as opposed to informative) advertising and the distribution of "free" gifts, all of which tend to raise the price of commodities to consumers.

8 See Tibor Scitovsky, supra note 4,, esp. chs. 2, 20-21.