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**INSPIRED LAW REFORM OR QUICK FIX?
OR,
‘WELL, MR TORRENS, WHAT DO YOU RECKON NOW?’
A REFLECTION ON VOLUNTARY TRANSACTIONS
AND FORGERIES IN THE TORRENS SYSTEM**

ABSTRACT

Sir Robert Richard Torrens sought to solve a problem confronting land dealings in South Australia. He did this by propelling the introduction of a system of title registration that cut proof of ownership free from the shackles of prior uncertainties or muddiness. This became known as ‘the Torrens System’. This article looks at the Torrens system through the imagined eyes of Torrens himself on the occasion of the 150th anniversary of the introduction of the first Real Property Act 1858 (SA). It contemplates what Torrens himself may have thought of the developments in the law of real property under ‘his’ Act through a reflection on voluntary transactions and forgeries.

I INTRODUCTION

In 1994 I came to Adelaide to undertake research on Torrens title. I had been teaching Property law — that wonderful *mélange* (or perhaps ‘*blancmange*’) of history and pragmatism — since 1984 and, having mastered the intricacies of perpetuities and other student tortures of the common law and equity in relation to land law, I had become more and more intrigued with Torrens title. The case law seemed to be entranced by Torrens title. It was spoken of in reverent tones as a ‘system’ of title — title by registration, not a system of registration of title, was the leitmotif of Torrens cases and a sense of harmony wafted through the judgments.

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But then I came across — as I had to teach it — *Bogdanovic v Koteff*,¹ a decision of the New South Wales Court of Appeal, and it bugged me. So much so that I went to Adelaide to try to find some answers. It also led me eventually to write it up as an article.² But the story — as most research stories do — ended up raising as many questions as it answered. It also left me ‘hungry’ to explore the story further. It made me wonder just what Torrens would have thought. Would the issue — and the judgment — have bugged him too? What would he ‘reckon’ now?

Let us begin, though, with a return to *Bogdanovic*.

The dispute focused on a house in Annandale, a suburb of Sydney. Mrs Bogdanovic, then in her 70s, claimed she had been promised an interest in the house by its then registered proprietor, Spiro Koteff.³ Spiro had left the house to his son Norman in his will; and Norman was now the registered proprietor. Norman relied on his registered title to recover possession of the house. The New South Wales Court of Appeal agreed that Mrs Bogdanovic had an equitable interest of some kind in the land,⁴ so the issue focused on indefeasibility: could Norman take free of her interest by relying on his registered title? Could he recover possession of the house?

¹ (1988) 12 NSWLR 472 (*Bogdanovic*).

² Rosalind Atherton, ‘Donees, Devisees and Torrens Title: The problem of the volunteer under the Real Property Act’ (1998) 4(2) *Australian Journal of Legal History* 121. I have drawn heavily on that paper in this article.

³ Mrs Bogdanovic and her late husband had rented a part of Spiro’s house when he lived in Leichhardt. They moved with him to the neighbouring suburb of Annandale, continuing to pay him rent. Mrs Bogdanovic’s husband died in 1977. In evidence at the first instance she said that Spiro asked her to look after him, in return for which she could remain in the house for her lifetime (‘until I alive’): *Koteff v Bogdanovic* (Unreported, Supreme Court of New South Wales, Young J, 13 October 1986) 1–2. Mrs Bogdanovic claimed firstly that the property was held on trust for her for her life. The claims in the alternative were: (i) that she and Norman were each beneficially entitled as tenants in common in the property in proportions to be determined by the court; and (ii) that she had a licence at law or in equity to remain living in the property until she died.

⁴ There are many hurdles to the enforceability of such ‘housekeeper contracts’: for instance, that there was no contract at all, there being no intention to enter legal relations; that, if there was a contract, it was not in writing as required under the various aliases of the *Statute of Frauds*; and, in the absence of writing that there was no sufficient act of part performance, the housekeeping and/or nursing not being referable of their own nature to a contract relating to the grant of an interest in land. See, eg, *Maddison v Alderson* (1883) 8 App Cas 467; *Re Edwards* [1958] Ch 168; *Wakeham v Mackenzie* [1968] All ER 783; *Ogilvie v Ryan* [1976] 2 NSWLR 504; *Thwaites v Ryan* [1984] VR 65; *Schaefer v Schuhmann* [1972] AC 572. An alternative path of argument in such cases has been that there is a constructive trust: *Ogilvie v Ryan* [1976] 2 NSWLR 504.

One express exception to indefeasibility is fraud. But this involves some dishonesty or ‘moral turpitude’ on the part of the person whose title is in question.⁵ Norman knew that Mrs Bogdanovic lived in the house before and after his father’s death, but he was not aware of any agreement between them. Even *had* he known of their agreement, that of itself may not have been enough to attack his title on the basis of fraud, as it is expressly provided that notice ‘of any trust or unregistered interest ... shall not of itself be imputed as fraud’.⁶ There had to be something more to be ‘fraud’. Had he entered into some discussions with his father or Mrs Bogdanovic, whereby he undertook to respect the arrangement his father had made with her, there may have been some basis for attacking his registered title on the basis of fraud or what has become known as the ‘in personam’ exception.⁷ However, all that Norman did was inherit the property through the will of his father and become registered as proprietor accordingly. He was a volunteer, but he was not ‘fraudulent’ in the *Real Property Act* sense. Had he been a purchaser there was no doubt that he would have taken free of Mrs Bogdanovic’s equitable interest. Did his position as a volunteer place him in a different category? The Court of Appeal held that it did not: the title acquired by Norman on registration attracted the full consequences of indefeasibility under the Act, regardless of his status as a purchaser or a volunteer.

The basis of the decision in *Bogdanovic* was the principle of immediate indefeasibility as determined by the Privy Council in *Frazer v Walker*⁸ and approved by the High Court in *Breskvar v Wall*.⁹ The concept of indefeasibility is tested best at the margins. This is where we find volunteers; but it is also where we find forgers — or at least their innocent victims. In both cases there is an inherent unfairness: where the forgery victim may lose title through no fault of their own; and the registered volunteer gains a windfall and overreaches an earlier unregistered interest. They are both examples that we should put to Mr Torrens. In this article I will endeavour to do so. There are others, too: we may wish to ask him about the expansion of what have become known as rights ‘in personam’, later statutes and competitions between and among unregistered interests. But we will save those conversations for another day.

First a word about ‘indefeasibility’.¹⁰

⁵ *Wicks v Bennett* (1921) 30 CLR 80, 91; *Assets Co Ltd v Mere Roihi* [1905] AC 176, 210; *Loke Yew v Port Swettenham Rubber Co* [1913] AC 491.

⁶ *Real Property Act 1900* (NSW) s 43.

⁷ See, eg, *Bahr v Nicolay* (No 2) (1988) 164 CLR 604.

⁸ [1967] AC 569 (*Frazer*).

⁹ (1971) 126 CLR 376.

¹⁰ Robert R Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859) 9. This was Torrens’ own book on the *Real Property Act 1858* (SA). The term ‘indefeasibility of title’ was included in the heading to the paramountcy provision in the *Real Property Law Amendment Act 1858* (SA) s 20. The term has now been included in the following Australian legislation: *Land Title Act 2000* (NT), heading to Division 2, Subdivision 2; *Land Title Act 1994* (Qld) ss 38, 169–70; *Real Property Act 1886* (SA) ss 10, 69; *Land Titles Act 1980* (Tas) s 40.

II INDEFEASIBILITY

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

33. Every certificate of title or entry in the register book shall be conclusive, and vest the estate and interests in the land therein mentioned in such manner and to such effect as shall be expressed in such certificate or entry valid to all intents, save and except as in hereinafter provided in the case of fraud or error.

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

Indefeasibility was never an absolute concept. The 1858 provision above included ‘fraud or error’ as specific exceptions. These have been refined and extended in two ways. First, by statutory amendment to include, for example, wrong description of land, the omission of easements and certain unregistered leases; and secondly, by judicial interpretation, the expansion of in personam exceptions, where the registered proprietor’s own conduct has given rise to the interest or is seen to justify

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

¹² *Real Property Act 1900* (NSW) s 42(1); *Land Title Act 1994* (Qld) s 38; *Real Property Act 1886* (SA) s 69; *Land Titles Act 1980* (Tas) s 40; *Transfer of Land Act 1958* (Vic) s 42(1); *Transfer of Land Act 1893* (WA) s 68; *Land Titles Act 1925* (ACT) s 58; *Land Title Act 2000* (NT) s 39. A comparison of the various provisions is found in Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (3rd ed, 2002) [4.21].

¹³ See on notice provisions: *Real Property Act 1900* (NSW) s 43; *Land Title Act 1994* (Qld) s 184(2); *Real Property Act 1886* (SA) ss 186-7; *Land Titles Act 1980* (Tas) s 41; *Transfer of Land Act 1958* (Vic) s 43; *Transfer of Land Act 1893* (WA) s 134; *Land Titles Act 1925* (ACT) s 59; *Land Title Act 2000* (NT) s 188(2). See on ejectment provisions: *Real Property Act 1900* (NSW) s 124; *Land Title Act 1994* (Qld) s 184(2) (b); *Real Property Act 1886* (SA) ss 192, 207; *Land Titles Act 1980* (Tas) s 149; *Transfer of Land Act 1893* (WA) s 199; *Land Titles Act 1925* (ACT) s 152; *Land Title Act 2000* (NT) s 192. See on protection provisions: *Real Property Act 1900* (NSW) s 135; *Land Title Act 1994* (Qld) s 184(2)(b); *Real Property Act 1886* (SA) s 207; *Land Titles Act 1980* (Tas) s 42; *Transfer of Land Act 1958* (Vic) s 44(2); *Transfer of Land Act 1893* (WA) s 202; *Land Titles Act 1925* (ACT) s 159; *Land Title Act 2000* (NT) s 188(2)(c).

¹⁴ See, eg, A Bradbrook, S MacCallum and A Moore, above n 12, [4.81]-[4.96].

judicial intervention.¹⁵ Further, the indefeasibility of title of the registered proprietor under the *Real Property Act*, by application of ordinary principles of statutory interpretation, has also been held to be subject to later overriding statutes.¹⁶ However, the question ‘which has transcended all others’, according to Professor Douglas Whalan, is when ‘the magical protective armour of indefeasibility’ is ‘donned’ by a title.¹⁷

‘Immediate indefeasibility’ emphasises the paramountcy provision in the legislation.¹⁸ The earlier Privy Council case of *Gibbs v Messer*¹⁹ had emphasised the notice provision over the paramountcy provision. An example of a notice provision is that contained in the *Real Property Act 1900* (NSW):

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

The point of this provision was to reinforce the distancing of registered title from equitable doctrine, particularly that concerning purchasers with *constructive* notice. A purchaser who knew, or *ought to have known*, about existing equitable interests, would be bound by them. The goal of the notice provision was to say that purchasers could rely on the register, and not be concerned about things that they may possibly, or potentially could know, if they relentlessly pursued the old, time-consuming and costly methods of searching titles. It reinforced the importance of the register as the source of relevant information about title — and the irrelevance of the industry of title searching of prior times, which required new searches with each and every transaction.

¹⁵ *Frazer v Walker* [1967] 1 AC 569; *Bahr v Nicolay* (No2) (1988) 164 CLR 604. See A Bradbrook, S MacCallum and A Moore, above n 12, [4.36]-[4.77].

¹⁶ *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603; *Miller v Minister of Mines* [1963] AC 484; *Pratten v Warringah Shire Council* (1969) 90 WN (Pt 1) (NSW) 134. See, eg, A Bradbrook, S MacCallum and A Moore, above n 12, [4.65]-[4.67].

¹⁷ Douglas Whalan, *The Torrens System in Australia* (1982) 297.

¹⁸ ‘as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him’: [1967] AC 569, 581 (Wilberforce LJ).

¹⁹ [1891] AC 248.

There are elements in the notice provision that seem to be at odds with the concept of immediate indefeasibility. In *Gibbs v Messer*, the title of the registered mortgagees was in issue. As they had not ‘dealt with the registered proprietor’, but with a forger (the nefarious solicitor, Creswell) who had invented one (‘Hugh Cameron’) for the purpose of extracting the funds fraudulently from them, the mortgagees (Mr and Mrs MacIntyre) were held to have gained no protection under this notice provision, and, therefore, no protection under the paramountcy provision.

While *Frazer* effectively quarantined *Gibbs v Messer* to its facts (the fictitious proprietor),²⁰ the underlying tension in the provisions surfaced in the context of volunteers (those who acquired title other than having paid fully for it) and forgers — both before, and after, *Frazer*. The earlier cases can perhaps be seen as looking back to the deferred indefeasibility camp, where indefeasible title was regarded as ‘deferred’ until a purchaser for value who had dealt with the (real, non-fictitious) registered proprietor had become registered. The later cases, however, need to be explained or considered on a different basis.

III VOLUNTEERS AND INDEFEASIBILITY

Writing in 1920, in a masterly treatise on registration of title ‘throughout the Empire’, James Edward Hogg anticipated that there would be problems in relation to volunteers, caused principally by the conflicting — or absent — indications in the legislation itself:

In some jurisdictions the registration statutes themselves draw a clear distinction between purchasers for value and persons who become registered as owners otherwise than in consequence of a transaction for value, and proceed to except the volunteer from the conclusive effect of the register. In the majority of the jurisdictions this is not done, or is done in special cases only, the question of the conclusiveness of the register where volunteers are concerned being left to be dealt with for the most part by case law. Even in the statutes that draw the distinction most clearly between voluntary transactions and transactions for value, the ground is not completely covered by the enactments, so that the law must be settled largely by judicial decision in all jurisdictions.²¹

How prescient. I will work through the judicial decisions that have tackled the problem and then endeavour to unravel the legislation itself to uncover just how it came to generate the confusion that it clearly has.

²⁰ In 2000 the NSW legislature expressly amended the NSW legislation to define ‘fraud’ as including ‘fraud involving a fictitious person’, the intent of which ‘seems to have been to quash the residual operation of *Gibbs v Messer*’: Peter Butt, *Land Law* (5th ed, 2006), [2017].

²¹ James Edward Hogg, *Registration of Title to Land Throughout the Empire* (1920) 106.

The pre-*Frazer* position in relation to volunteers is epitomised in the Victorian case of *King v Smail*,²² in which Adam J considered that if volunteers gained no protection under the notice provision, they would be outside the indefeasibility provision:

The protection given by [the notice provision] to a registered proprietor, ie a legal owner of land, against the consequences of notice actual or constructive of trusts or equities affecting his transferor has point when the legal owner is a purchaser for value. A purchaser for value has by virtue of this section the immunity from prior equities of a bona fide purchaser of the legal estate without notice under the general law. On the other hand *to confer on a mere volunteer immunity from the consequences of notice would be illusory, for as already stated the volunteer was, on well-settled rules of equity, subject to equities which affected his predecessor in title whether with or without notice of such equities.*²³

He held, therefore, that the holder of an unregistered prior interest could prevail over the registered title of the volunteer — an example of deferred indefeasibility. In other words, *some* registered proprietors may be able to pass an indefeasible title to another, although not qualify for such title themselves — just like the volunteer in *King v Smail*.

What if, in such a case, emphasis were placed on the paramountcy provision, rather than the notice provision, as occurred later in *Frazer*? Adam J anticipated the response in this way in *King v Smail*:

[If the paramountcy provision] ... is to be read as the key section of the Act and effect given to it regardless of other provisions and the implications to be drawn from them, the applicant's contention [that she gained an indefeasible title notwithstanding that she was a volunteer] would appear to be unanswerable ... In terms [the paramountcy provision] itself draws no distinction between persons becoming registered proprietors for value and mere volunteers. What is relevant is that a person has become the registered proprietor.²⁴

In the light of *Frazer*, the conclusion anticipated by Adam J was *precisely* the conclusion reached by the New South Wales Court of Appeal in *Bogdanovic*.

²² [1958] VR 273. The case involved a transfer from a husband to his wife of his interest in their jointly held property by way of gift, subject to a mortgage already registered on the title. A month later the husband went bankrupt. The issue was whether the registration of the transfer to the wife gave her indefeasibility or whether she took subject to other interests — in this case the interest of the trustee for the creditors.

²³ *Ibid* 277–8 (emphasis added).

²⁴ [1958] VR 273, 275–6.

In *Rasmussen v Rasmussen*,²⁵ well after *Frazer* and on facts very similar to those in *Bogdanovic*,²⁶ Coldrey J of the Supreme Court of Victoria decided that there was more to the question than just the application of the immediate indefeasibility approach in *Frazer*; and that *King v Smail* could not simply be regarded as a decision that could be bound up with the outmoded deferred indefeasibility cases (like *Gibbs v Messer*). He pointed out that neither *Frazer*, nor *Breskvar v Wall*, were cases concerning volunteers. In both cases the registered proprietor was a purchaser for value and *King v Smail* was not considered by the court. Coldrey J commented:

Whilst granting the importance of what has become known as the ‘paramouncy provisions’ of the Torrens statutes ... there is an *overriding principle of fairness* which ought to permit a person whose equity in land will be defeated by the actions of the penultimate registered proprietor in donating such land to a volunteer to enforce that equity in the land against such volunteer albeit that the volunteer has become the registered proprietor of it. A distinction in the application of the indefeasibility provisions to a bona fide purchaser for value and a mere volunteer is, in my view, both rational and principled. On the one hand it recognises the desirability of commercial certainty in property transactions and on the other allows full play to equitable precepts.²⁷

In *Conlan v Registrar of Titles*²⁸ the issue of volunteers came up in Western Australia. Justice Owen gave thorough consideration to the distinct lines of authority represented by *King v Smail* and *Rasmussen*, on the one hand; and *Bogdanovic*, on the other. He was particularly concerned about the use of the notion, suggested by Coldrey J in *Rasmussen*, that ‘general notions of fairness’ might be used ‘as a means of implying further exceptions into the statutory scheme’.²⁹ This, he thought, ‘is apt to raise as many questions as it will answer’.³⁰ Justice Owen concluded that volunteers should acquire an indefeasible title; and that ‘if the registered interest is to be defeated it must be attacked according to one of the exceptions recognised by the [Act] or at law’.³¹ ‘In so concluding’, commented Professor Peter Butt in the *Australian Law Journal*,

[Owen J] adopted some comments expressed in this column in 1992, to the effect that public confidence in the Torrens system requires registration to be ‘rock-solid’. Any other approach diminishes the effect of registration and returns us to the uncertainties of old system title, for it compels an

²⁵ *Rasmussen v Rasmussen* [1995] 1 VR 613 (‘*Rasmussen*’).

²⁶ (1988) 12 NSWLR 472. In *Rasmussen* the facts involved the assertion of an interest under a constructive trust against a registered devisee.

²⁷ *Rasmussen v Rasmussen* [1995] 1 VR 613, 634 (emphasis added). See also *Valoutin Pty Ltd v Furst* (1998) 154 ALR 119.

²⁸ (2001) 24 WAR 299 (‘*Conlan*’).

²⁹ (2001) 24 WAR 299, [194].

³⁰ *Ibid*.

³¹ *Ibid* [200]. Justice Owen cited with approval the article by Peter Radan, ‘Volunteers and Indefeasibility’ (1999) 7 *Australian Property Law Journal* 197.

investigation into the history of transactions—an investigation that Sir Robert Torrens was at pains to abolish with his new system of title by registration.³²

There are several questions to be answered. How did *King v Smail* and *Bogdanovic* reach such diametrically different conclusions regarding the position of the registered volunteer? Does public confidence *require* registration to be ‘rock-solid’ with respect to volunteers? Would Robert Torrens have been at pains to abolish previous interests as against a registered volunteer?

IV OPPOSED CONCLUSIONS

Decisions like *King v Smail* and *Rasmussen* were based on a construction of the legislation as a whole, and particularly a number of sections in which a distinction is made between purchasers for value and, by implication, volunteers. The first group of provisions that do so are the provisions collectively described as the ‘ejectment’ provisions. Taking the New South Wales provision as an illustration, the relevant parts provide (emphasis added):

124 No proceedings ... for possession of any land ... shall lie or be sustained against the person registered as proprietor thereof ... except in any of the following cases, that is to say:—

...

(d) The case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against *a person deriving otherwise than as a transferee bona fide for value* from or through a person so registered through fraud.

(e) The case of a person deprived of, or claiming, any land included in any folio of the Register for other land by misdescription of such other land, or of its boundaries as against the registered proprietor of such other land *not being a transferee thereof bona fide for value*.

...

And in any case, other than as aforesaid, the production of the folio of the Register ... shall be held in every Court to be an absolute bar and estoppel to any such proceedings or action ... any rule of law or equity to the contrary notwithstanding.

Section 124 does not preclude the bringing of proceedings for the recovery of the land as against a person registered through his or her own fraud.³³ Nor, it seems,

³² Peter Butt, ‘Indefeasibility of title and “volunteers”’ (2001) 75 *Australian Law Journal* 219.

³³ And to that extent s 124 complements the paramountcy provision, which lists ‘fraud’ as an express exception to indefeasibility. Such fraud has to be sheeted home to the person who has become registered or his or her agents: *Assets Co v Mere Roihi* [1905] AC 176, 210; and, under s 124, proceedings for the recovery of land are not precluded.

does it prevent proceedings for recovery of land against a person registered as proprietor as a volunteer in the two listed cases, the volunteer taking from a fraudulent proprietor and the volunteer taking from a proprietor where boundaries have been misdescribed: being persons ‘deriving otherwise than as transferees for value’, volunteers are indirectly excluded from its terms.

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

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

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

Cases like *Bogdanovic* and *Conlan* read the paramountcy provision over these provisions. If the volunteer is to be regarded as acquiring an indefeasible title, the volunteer can defend proceedings to recover possession or damages by relying simply on indefeasibility of title under the paramountcy provision. As the paramountcy provision is ‘read up’, the ejectment and protection provisions are ‘read down’. In examining the position of volunteers as registered proprietors these provisions lead one to pose a range of questions. The references in the present legislation to purchasers for value are certainly curious at the first encounter. It is, after all, the language of the old land law: the bona fide purchaser was the quintessential creation of equity jurisprudence.³⁴ Why do sections make reference to purchasers — and to notice? Are they important to a consideration of the position of volunteers in regard to indefeasibility of title? Are they simply reinforcing provisions? The further, more tantalising question, is what Torrens himself would have thought about the problem? *Did* he think about it? Did others think about it at the time the legislation was being introduced and refined? If they did so, would they agree with the approach in *King v Smail* and *Rasmussen*; or that in *Bogdanovic* and *Conlan*; or altogether differently? Did they approach the problem in the same way? And what if we start examining the position of those who have gained title — or lost it — through forged instruments? Surely there were similar elements of unfairness at work there?

³⁴ ‘Equity’s darling’, according to Frederic William Maitland: Herbert Albert Laurens Fisher (ed), *The Collected Papers of Frederic William Maitland* (1981) vol 3, 530.

V ON THE TRAIL

For the life of me I couldn't understand how 'the system' supported the windfall to Norman Koteff in *Bogdanovic*. I wanted to know what Torrens would have thought. 'What do you reckon?', I would have liked to ask him. So I went to Adelaide to see if I could find some answers and I learned *lots* about Torrens. It only fuelled my curiosity as to what he would have thought — what he would think — about all kinds of developments in 'his' system. Thankfully, Torrens personally wrote about the system he was introducing, as a book and in letters, and he spoke about it both inside and out of Parliament. In fact, he could hardly keep quiet about it. He was an excellent salesman! So much so that one Parliamentarian said that 'the Real Property Act appeared to be nearly as irresistible as the influenza'.³⁵

Moreover, in unravelling what *others* might have thought about the legislation, we find that there were two formal reviews of the Real Property Act in South Australia within its first 25 years of operation,³⁶ and there were many amendment or consolidation Bills that prompted considerable discussion in the Parliamentary arena. Clearly there was much confusion — or at least many questions — concerning the 'Torrens system'.

VI INTO THE TORRENS MIND

Torrens *really* disliked the existing law of real property, which he described as 'complex and cumbrous in its nature, ruinously expensive in its working, uncertain and perplexing in its issues, and specially unsuited to the requirements of this community'.³⁷ He thought that the Chancery court was an 'iniquitous institution'³⁸ and that his friends had been duded by it.³⁹ He also *really* disliked lawyers. The only ones who would disagree with his assessment of the 'evils' of the existing

³⁵ South Australia, *Parliamentary Debates*, House of Assembly, 1860, [385], 12 July 1860 (George Morphet).

³⁶ South Australia, *Report of the Real Property Law Commission, with Minutes of Evidence and Appendix*, Parl Paper No 192 (1861); South Australia, *Report of Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts; together with Minutes of Evidence and Appendix*, Parl Paper No 30 (1873).

³⁷ South Australia, *Parliamentary Debates*, House of Assembly, 1857–58, [202], 4 June 1857 (Robert Torrens).

³⁸ R Torrens, *The South Australian System of Conveyancing*, above n 10, vi.

³⁹ Robert Torrens, *Speeches of Robert R Torrens, Esq explanatory of his measure for Reform of the Law of Real Property: to which is appended copy of the bill passed by the House of Assembly of South Australia* (1857); Robert Torrens, *An Essay on the Transfer of Land by Registration under the duplicate method operative in British Colonies* (1882) 14–15.

law, he said, were ‘those who live by their perpetuation’.⁴⁰ Lawyers got ‘the oyster’, while the litigants got ‘the shell’.⁴¹

At the forefront of Torrens’ mind when working on his scheme were those who suffered from those evils — namely, purchasers and mortgagees. In introducing the first Real Property Bill on 4 June 1857, he sought

to give confidence and security to purchasers and mortgagees through the certainty that nothing affecting the title can have existence beyond the transactions of which they have notice in the memoranda endorsed on the grant.⁴²

His interest in security of title was both personal and philosophical. The personal interest lay in the experience of a relation and friend who, he wrote, ‘was drawn into the maelstrom of the Court of Chancery’.⁴³ He recounted other such stories from the hustings and on other public occasions.⁴⁴ His philosophical interest lay in his commitment to economic liberalism, influenced no doubt in part by his father, Colonel Torrens, a well-known political economist and one of the founders — founding fathers, even — of the colony of South Australia.⁴⁵ The liberal commitment to the establishment of the free market in land propelled considerable interest in simplified conveyancing and influenced the great wave of law reform seen in the establishment and work of the British Real Property Commissions of

⁴⁰ South Australia, *Parliamentary Debates*, House of Assembly, 4 June 1857, [202] (Robert Torrens).

⁴¹ After dinner speech at the Public Dinner at Salisbury for the *South Australian Register*, 1 June 1857, in Robert Torrens, *Speeches*, above n 39, 7.

⁴² South Australia, *Parliamentary Debates*, House of Assembly, 4 June 1857, [204] (Robert Torrens).

⁴³ R Torrens, above n 10, v-vi. He repeated this in Dublin: Robert Torrens, ‘Transfer of Land by “Registration of Title” under the ‘Torrens System’ (Speech delivered at the Society for Promoting the Amendment of the Law, Dublin, 1863), iii. Torrens gave more detail of the example of a friend in his second reading speech: ‘Speech delivered in the House of Assembly on Wed Nov 11 — Order of the Day — Real Property Amendment Bill’ in R Torrens, *Speeches*, above n 39, 12–14. (The *Hansard* account simply refers to Torrens having made a ‘voluminous’ speech in support of the Bill but provides no detail).

⁴⁴ See, eg, ‘Mr Torrens’ Lecture at Kapunda on the South Australian *Real Property Act*, *Observer*, 21 May 1859, document 13 in R Stein, ‘Sir Robert Richard Torrens 1814–1884: Select Documents’ (1984) 23(25) *South Australia* 1.

⁴⁵ Col Torrens published his own work promoting the idea of the colony: *Colonization of South Australia* (1835). His newspaper, the *Traveller*, was regarded as ‘one of the most important newspaper organs of Liberal politics’: J H Hollander (ed), *John Stuart Mill: The Measure of Value* (1936), Introduction. Robert Torrens considered that he and his father could ‘almost be styled the founders of the Colony’, a comment he made in a letter he wrote to George Fife Angas in 1875: South Australia, *Report on Letter from Sir R R Torrens re Amendment of Real Property Act*, Parl Paper No 42 (1875).

the 1830s.⁴⁶ Torrens (the son) expressed this in the description of his proposed land title system as serving ‘a great economic principle’ through the encouragement of investment of capital in land,⁴⁷ which would work to the benefit of both purchasers and lenders.⁴⁸

It is not surprising that Torrens had purchasers and mortgagees in mind in South Australia. The colony had been developed on the principle of land purchase, and buying and selling land was its *raison d’être*. As Professor Douglas Pike stated very aptly, ‘[i]n its beginnings South Australia was a land job’.⁴⁹ The colony was only 20 years old when Torrens introduced his Real Property Bill into its very recently elected House of Assembly in June 1857; and since its foundation on 28 December 1836 there had been much activity in land dealing. By 28 December 1857 the population of the colony had reached 109 917 and 1 557 740 acres of land had been alienated from the Crown,⁵⁰ comprised in some 70 000 land titles.⁵¹ Land speculation was rife;⁵² and land titles were in *serious* disarray. Pike estimated that it was probable that the documents for three-quarters of the titles had been lost.⁵³ There had been a number of fires in public offices;⁵⁴ land sales raced ahead of

⁴⁶ There were four separate studies between 1829 and 1833, the second of 1830 considered a proposal to establish a general registry of deeds and instruments affecting land. A brief summary of the reform movement of the nineteenth century is found in AWB Simpson, *A History of the Land Law* (1986) ch 11. The connection between this work and the reforms in South Australia is considered to some extent in Antonio Esposito, ‘A New Look at Anthony Forster’s Contribution to the Development of the Torrens System’ (2007) 33 *University of Western Australia Law Review* 251.

⁴⁷ Robert Torrens, *Transfer of Land by ‘Registration of Title’ under the ‘Torrens’ System* (1863) 9.

⁴⁸ *Ibid* 17–18 (the value of land as a source of credit was raised by the facility and security offered by the system).

⁴⁹ Douglas Pike, ‘Introduction of the *Real Property Act* in South Australia’ (1960) 1 *Adelaide Law Review* 169.

⁵⁰ Edwin Hodder, *The History of South Australia from its foundation to the year of its jubilee* (1893) vol 1, 313.

⁵¹ F Rogers, Commissioner for Lands and Emigration, to Herman Merivale, Permanent Under Secretary of State for the Colonies, 29 April 1858, Document No 15, in R Stein, above n 44, 29–30.

⁵² The ‘mania’ in land speculation is described in Ralph M Hague, *History of the Law in South Australia 1836–67* (MA thesis, pre-1837, the date of donation to the State Library of South Australia), 1420.

⁵³ D Pike, above n 49, 172, relying on South Australian Register, 8, vii, 1856; 23, vii, 1856; South Australia, *Report of the Real Property Law Commission, with Minutes of Evidence and Appendix*, Parl Paper No 192 (1861) [102]. Pike’s estimation that there should have been something like 40 000 separate titles by the mid-1850s is considerably lower than that of Rogers (above n 51).

⁵⁴ Two fires are noted in E Hodder, above n 50, vol 2: 22 January 1838 — the Land and Survey Office was destroyed by fire destroying many public documents; January 1841 — fire at Government House destroyed many important public documents. It is not clear whether land title documents were affected by either fire, but they are indicative of the fragility of paper records in the early days of the colony. D Pike,

surveying;⁵⁵ and many titles were in the hands of people who were not resident in South Australia.⁵⁶

In consequence, the validity of many titles was in serious doubt. Torrens considered that the number of faulty titles was ‘enormous’,⁵⁷ including, it seems, some of his own.⁵⁸ Castles and Harris concluded, in fitting terms, that the situation was ‘like a time bomb — threatening to destroy what for many was their main source of wealth and status in the community’.⁵⁹ The spectre of Torrens’ friend in India was a real one. Torrens mentioned him in his speech delivered in the House of Assembly on the Real Property Amendment Bill in the early heat of an Adelaide summer on Wednesday 11 November 1857.⁶⁰ He was an officer in the Indian army, who had built a mansion and plantations, and who, after a flaw was discovered in the title, lost not only the land but ‘upwards of 20 000 pounds expended on it in buildings and improvements and was entirely beggared by law expenses’.⁶¹

South Australia in the 1850s needed a land title system that was sure and reliable for those who wished to invest their capital in land and would not cost a fortune in searching fees. Torrens provided it — motivated by his work as Controller of Customs (and hence experience with ship ownership), as the Registrar of Deeds, and the bad luck of friends and acquaintances. He was elected to the

above n 49, 173, refers to a fire in 1839 which completely destroyed the then survey record and surveyors’ field books. In the Minutes of Evidence presented to the Real Property Commission in 1861, there is also reference to a ‘great fire at the Port’ in which the deeds belonging to the building society were all burnt: South Australia, *Report of the Real Property Law Commission, with Minutes of Evidence and Appendix*, Parl Paper No 192 (1861), Minutes of Evidence, Question 10, 2–3, Registrar-General (Torrens).

⁵⁵ See, eg, D Pike, above n 49, 173; South Australia, *Minutes of Evidence of the 1861 Commission: Report of the Real Property Law Commission, with Minutes of Evidence and Appendix*, Parl Paper No 192 (1861).

⁵⁶ A Castles and M Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia 1836–1986* (1987) 175. Pike cites an estimate that ‘almost a third’ of titles were held by people outside the colony, mainly in Britain: D Pike, above n 49, 172.

⁵⁷ ‘Mr Torrens’ Lecture at Kapunda’, above n 44.

⁵⁸ As he was reputedly a considerable speculator in land, such matters would have affected him personally: Peter Howell, *Sir Robert Richard Chute Torrens* (2004) Oxford Dictionary of National Biography <http://www.oxforddnb.com/view/article/27566> at 29 October 2009 comments that ‘his land speculations throughout Australasia made him despised as a rogue and swindler’ and that the ‘dubious validity’ of many of his title deeds prompted him to join ‘a twenty-year-old crusade to simplify, cheapen, and expedite all dealing in land, by introducing the registration of titles’

⁵⁹ A Castles and M Harris, above n 56.

⁶⁰ The heat of Adelaide summers at this time is recalled in Robert Harrison, *Colonial Sketches: or, Five Years in South Australia, with Hints to Capitalists and Emigrants* (1862), ch 2; ii and 125. For example, for November 1860, 5 days exceeded 90° F.

⁶¹ R Torrens, *Speeches*, above n 39, 14.

first Parliament in South Australia after it became self-governing in 1856, on the strength of his platform of land law reform. ‘The hour for action seemed to have arrived’, he said.⁶² Action indeed was his aim: he introduced the *Real Property Act* in the first session of that Parliament.

How did his system apply in the case of those who were not the investors he had in mind, however, but took registered titles without having paid fully, or at all, for them — as volunteers? And how would it work where some took advantage of the system where forged instruments were involved? To look at such questions and to consider how Torrens and his contemporaries would have responded to them, I found that I had to piece together the development of the legislation, from Torrens’ first Act in 1857–58 to the last piece in the South Australian legislative development of the *Real Property Act*, after five more Acts and many more Bills, the *Real Property Act 1886* (SA), which remains the principal Act in South Australia. The answers were not straightforward, nor were they constant. They also leave many questions remaining to be answered today, some of which owe their origins to the very manner of the development of the legislation in its early years.

VII BUILDING THE ‘TORRENS SYSTEM’

First, I am taking it as a given that we can call it ‘the Torrens system’. He was clearly the instigator in the Parliamentary arena and he had his own ideas in the drafting, although he also had precedents and helpers — all of which he acknowledged.⁶³ There was also the felicity of his name — the ease with which it could become a noun, a verb and an adjective.⁶⁴ (The ‘Hübbe’ or ‘hanseatic’ system just doesn’t have the same impact!⁶⁵) But it was ultimately ‘the Torrens factor’ that won the day — his name, his energy and his application. And he was regarded publicly as a hero, a giant, a very Goliath, for taking on land titles — and lawyers who, according to a contemporary of Torrens’ remarked that:

It is not improbable that the days of the majority of colonial lawyers are numbered. About four years ago [1858] they were advancing swimmingly in the plundering line, that a legal millennium in South Australia might be supposed to have arrived, when unfortunately for their peace of mind a Goliath [sic] appeared in the shape of a civilian of no legal training whatever, who undertook to bring their mysteries to the scrutiny of common sense, and

⁶² R Torrens, above n 10, vi.

⁶³ See, eg, his speech in introducing the first reading of the bill: South Australia, *Parliamentary Debates*, House of Assembly, 1857–58, [201] 4 June 1857 (Robert Torrens).

⁶⁴ S Rowton Simpson commented that the word ‘torrens’ has ‘passed into the American version of the English language’ and where Torrens title had been introduced ‘the process of original registration is frequently designated as “torrensing the title”’: S Rowton Simpson, *Land Law and Registration* (1976), 68.

⁶⁵ Although it did lend itself to Dr Greg Taylor’s catchy chapter title, ‘Hamburger to go!’: Greg Taylor, ‘A Great and Glorious Reformation’ – Six Early Australian Legal Innovations (2005) ch 3.

produced a Bill entirely upsetting the old system of conveyancing, and by a public registration of title made the transfer of land as cheap and expeditious as any other commercial transaction, and in fact sounded the death knell of slow conveyancing in the colony of South Australia. A discordant wail broke forth from the despairing hair-splitters, who first smiled contentedly at the folly of an ignoramus attempting to understand and explode their favourite amusements connected with their profession; but when the people almost unanimously determined to have the reformation, they exhibited, in many cases, an illustration of the external appearance of the knight with a sorrowful countenance, and tried humility as an interesting change from their former pretensions.⁶⁶

Building the system can be seen in two major legislative chapters: the first group from 1858–1861; the second, from 1873–1886. Torrens was directly involved in the first chapter; in the second he was only a correspondent, so the development of the system was in the hands of others.

A *The First Acts: 1858–1861*

The first Act, the *Real Property Act 1857–58*, assented to on 27 January 1858,⁶⁷ was followed by a substantial amending Act later that year in the *Real Property Law Amendment Act 1858*.⁶⁸ Within two years both these Acts had been replaced by the *Real Property Act 1860*.⁶⁹ This in turn was replaced completely by the *Real Property Act 1861*,⁷⁰ following the report of a Commission established to examine the workings of the legislation.⁷¹ In the legislation in this early period volunteers were touched on principally in the provisions which dealt with the transmission of title on the death of the registered proprietor. Other voluntary transactions were referred to mainly indirectly, in provisions dealing with the extent of protection to be given to a registered proprietor.

Transmissions in consequence of the death or insolvency of the registered proprietor were subject to close scrutiny.⁷² The *Real Property Law Amendment*

⁶⁶ R Harrison, above n 60, 114–15.

⁶⁷ No 15 of 1857–58.

⁶⁸ No 16 of 1858, assented to on 24 December 1858.

⁶⁹ No 11 of 1860.

⁷⁰ No 22 of 1861.

⁷¹ South Australia, *Report of the Real Property Law Commission, with Minutes of Evidence and Appendix*, Parl Paper No 192 (1861). The Commission's fourteen-page report of November was accompanied by 127 pages of *Minutes of Evidence* and a draft Bill which was passed by early December of the same year.

⁷² The provisions were quite different in the second Act from the Acts of 1860 and 1861. The provisions are as follows: *Real Property Act 1858* (SA) ss 41–2, 44–5; *Real Property Law Amendment Act 1858* (SA) ss 53–4, 56, 58–9 (which replaced the provisions in the earlier Act); *Real Property Act 1860* (SA) ss 80–1, 83–4 (which replaced the provisions of the earlier Acts). A comparison of the provisions is made in J E Hogg, above n 21, 31–2 (1858 Amending Act), 34 (1860 Act).

Act 1858 (SA) provided that no certificate of title could issue after the death of a registered proprietor until a grant of representation had been obtained.⁷³ The executor or administrator could become registered as proprietor after a process of advertisement,⁷⁴ and could transfer title through sale to a purchaser or mortgagee bona fide for value.⁷⁵ The heir or devisee could apply to be registered himself or herself, but the application had to be considered by the Supreme Court and the Court could direct any caveat to be entered for the protection of the interests of ‘such other persons (if any) as may be interested in the said land’.⁷⁶ It was a considered, deliberative process. So if this had been the relevant legislation, Norman Koteff could not have defeated Mrs Bogdanovic, as the Court would certainly have uncovered her interest through this process of vetting.

The provisions of the *Real Property Act 1860* (SA) and the *Real Property Act 1861* (SA) were somewhat different from the earlier Act, but were similar to each other.⁷⁷ Under the 1860 Act, the heir or devisee could apply to the Supreme Court to be registered and the Court again could enter appropriate caveats for the protection of other interests.⁷⁸ In the *Real Property Act 1861* (SA), following the recommendations of the 1861 Commission⁷⁹ (of which Torrens himself was a Commissioner), the matter was to be referred to the Lands Titles Commissioners, analogous to the making of original applications, instead of being referred to the Court; and a procedure for advertisement was spelled out as it had been in the *Real Property Amendment Act 1858* (SA).⁸⁰ The change in procedure was prompted by ‘the great expense attendant on applications to the Supreme Court in applications of this nature’.⁸¹ There were still questions left to be resolved concerning the position of devisees, but these had to wait for the later review of the legislation in 1873.⁸² But the key point for our purposes now, is that if there were interests outstanding, the devisee could not be registered simply. Once registered, however, what was the nature of the devisee’s interest? Did the registered devisee then gain an indefeasible title?⁸³

⁷³ *Real Property Law Amendment Act 1858* (SA) s 56.

⁷⁴ *Real Property Law Amendment Act 1858* (SA) s 57. Hogg sees in these provisions the anticipation of the later assimilation of the representative into a ‘real’ as well as a ‘personal’ representative which was not achieved formally until the *Real Property Act 1878*: J E Hogg, above n 21, 31.

⁷⁵ *Real Property Law Amendment Act 1858* (SA) s 58.

⁷⁶ *Real Property Law Amendment Act 1858* (SA) s 59.

⁷⁷ *Real Property Act 1860* (SA) ss 83–4; *Real Property Act 1861* (SA) ss 78–80.

⁷⁸ *Real Property Act 1860* (SA) s 84.

⁷⁹ *South Australia Report of the Real Property Law Commission, with Minutes of Evidence and Appendix*, Parl Paper No 192 (1861).

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

⁸¹ *South Australia Report of the Real Property Law Commission, with Minutes of Evidence and Appendix*, Parl Paper No 192 (1861), 2 (‘Sections 79–80. Transmission of freehold by will or intestacy’).

⁸² See also R Atherton, above n 2, 139–40.

⁸³ See *ibid*.

Torrens' own answer to this question is revealed to some extent in the course of the taking of evidence as Commissioner in the Real Property Law Commission in 1861.⁸⁴ Torrens and Mr W C Belt, one of the Solicitors to the Lands Titles Commission appointed in consequence of the first Act, were discussing the matter of transmissions in the context of deceased estates.⁸⁵ Belt was concerned about 'the consequence of the certificate of title giving indefeasibility of title to land'.⁸⁶ The Chairman, the Chief Justice Sir Charles Cooper, suggested that the title could become indefeasible 'after a certain time', to which Belt responded that 'it would be very desirable to give a qualified certificate of title'.⁸⁷ Torrens interjected:

Do you not think, Mr Belt, that point is met by the clause which makes the supposed heir-at-law or devisee liable for pecuniary compensation to the rightful heir or the rightful devisee, in case of an error in the decisions of a Court of Justice, such compensation being further guaranteed by the assurance fund: does not that provide the appropriate remedy?⁸⁸

What Torrens had in mind were particular (not very well worded) provisions in the first Act. For example, s 92 provided that if the Court had declared a person to be the lawful heir — that is, the heir had been registered after a review of the transmission application — and another person was deprived of an estate or interest in consequence of that registration, the person deprived 'may bring and prosecute an action at law ... for the recovery of damages against the person' registered. But, if that registration occurred 'through error or misconception' of the Court (and not through fraud) the person registered might choose to transfer the land in lieu of paying damages.

Belt was unhappy:

I do not think it is a sufficient remedy as regards the persons who are found to be really entitled to the land.

Torrens pressed further:

Do you not consider that, if he gets full value, with all costs to which he is entitled, that he is placed in as good a position as he can be?⁸⁹

'No', thought Belt:

⁸⁴ South Australia, *Report of the Real Property Law Commission, with Minutes of Evidence and Appendix*, Parl Paper No 192 (1861) Minutes of Evidence.

⁸⁵ *Ibid* 101; [1820].

⁸⁶ *Ibid* [1826].

⁸⁷ *Ibid* [1826–27].

⁸⁸ *Ibid* [1828].

⁸⁹ *Ibid* [1829].

It certainly is a poor satisfaction to be driven into a lawsuit under any circumstances; and it may be found difficult to recover the compensation under the provisions of the Real Property Act.⁹⁰

However, the Commissioners did recommend a reduced role for the Court. Applications were first to be considered by the Registrar General;⁹¹ and only in the case of contested applications should the matter be left to the Court. It was essentially an assimilation of the process for transmissions to that for considering applications to bring land under the Act. This was not only to avoid the expense of application to the Court,⁹² but also to counter the evident reluctance of the judges to pronounce a decision ‘which may bar altogether the rights of parties who are not before the Court’.⁹³ This reference was significant: if volunteers were *not* to obtain an indefeasible title, how would a decision of the court in respect of an application by a volunteer ‘bar altogether’ the rights of parties not before the Court who might have an outstanding claim? Clearly the understanding was that registration of the transmission application gave an indefeasible title; hence the importance of the process for scrutinising the application for registration.⁹⁴

The notice provision, which first appeared the 1860 Act as s 104, also corroborated the significance of registration in saying that (emphasis added):

A transferee, *whether voluntary or not*, of land under the provisions of this Act, shall not be affected by actual or constructive notice of any claims, rights, titles or interest other than those which have been notified or protected by entry in the registry book, according to the provisions of this Act, any rule of law or equity to the contrary notwithstanding⁹⁵

That registration conferred indefeasibility was also the understanding when the Real Property Bill 1861 (SA) was being debated.⁹⁶ The Hon George Fife Angas and the Hon Henry Ayers considered that the proposed process in relation to transmissions was ‘a dangerous one’.⁹⁷ Angas considered that ‘a more arbitrary, unjust, iniquitous clause had never been introduced into any Bill in any Legislature in the colonies’.⁹⁸ He wanted it struck out.⁹⁹ He saw himself as standing up ‘to

⁹⁰ Ibid. Belt was a strong proponent of the assimilation of the rules of descent to land to the rules for succession to personalty — a matter also under discussion at the time. Given Torrens’ own distaste for lawyers, one is tempted to say, ‘touché!’

⁹¹ Ibid x.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ The Commission made no reference to the proviso in regard to outstanding interests which was included in the 1860 Act and repeated in similar terms in the 1861 Act.

⁹⁵ *Real Property Act 1860* (SA) s 104.

⁹⁶ South Australia, *Parliamentary Debates*, Legislative Council, 21 November 1861, [1207]; 22 November 1861, [1218–24].

⁹⁷ Ibid 21 November 1861, [1207].

⁹⁸ Ibid [1218].

⁹⁹ Ibid.

protect those rights which would be affected by that most unjust measure'.¹⁰⁰ Being able to lodge a caveat was unrealistic: what of those absent from the colony; how could they be informed and take action in time?¹⁰¹ Notwithstanding such opposition, the provisions of the 1860 Act regarding transmissions on death were altered in the way proposed, making them analogous to applications to bring land under the Act.¹⁰²

Other volunteers — those who took through lifetime transactions as donees — fell to be considered through the general provisions of the Act: in particular, the ejectment, protection and cancellation provisions.¹⁰³ The ejectment and cancellation provisions directly affected the registered title; the damages provisions affected the registered proprietor personally. They are grouped together in each Act and, although largely similar in wording, there is a shift in the language and the division of the subject matter as well as the coverage of the provisions. Through the broad definition of 'proprietor' in each of the Acts concerned, the ejectment and protection provisions which dealt with registered proprietors applied to devisees and heirs as well as lifetime transferees.¹⁰⁴

The ejectment provisions were similar to s 124 of the *Real Property Act 1900* (NSW) which is set out above. In the 1861 Act the relevant section is also s 124. As a general rule, ejectment proceedings could not be brought against a registered proprietor except in defined circumstances.¹⁰⁵ These remain essentially the same in many of the Acts today, as noted above. If a person had been registered through fraud, the fraudulent registered proprietor was (and is) not protected from proceedings to recover possession of the land and the registration could (can) be cancelled. The same position applied to a person who had derived title through a fraudulent registered proprietor *unless* the person had taken bona fide for valuable consideration.

¹⁰⁰ Ibid.

¹⁰¹ Ibid [1218–19].

¹⁰² *Real Property Act 1861* (SA) ss 79–80.

¹⁰³ The paramountcy provision changed in wording between the first and fourth Acts, but the idea remained the same throughout: the title of the registered proprietor was 'conclusive', 'indefeasible', 'paramount': *Real Property Act 1858* (SA) s 33 (marginal note: 'Entry in register book conclusive'); *Real Property Law Amendment Act 1858* (SA) s 20 (marginal note: 'Certificate of title and entry in register book indefeasible title'); *Real Property Act 1860* (SA) s 41; and *Real Property Act 1861* (SA) s 40 (marginal note: 'Estate of registered proprietor paramount').

¹⁰⁴ For example, 'proprietor' was defined in s 3 of the *Real Property Act 1860* (SA) as meaning 'any person seised or possessed of any estate or interest at law or in equity, in possession, in futurity, or expectancy, whether a life estate, or greater or less than a life estate, in any land'.

¹⁰⁵ *Real Property Act 1858* (SA) s 91; *Real Property Law Amendment Act 1858* (SA) ss 77–8 and proviso to s 79; *Real Property Act 1860* (SA) s 118 and proviso to s 120; *Real Property Act 1861* (SA) s 124. The first Act does not include a distinction in its ejectment provision, but it does in its cancellation provision, allowing cancellation against a proprietor registered through fraud or misrepresentation and against volunteers taking through such proprietor: *Real Property Act 1858* (SA) ss 91, 94.

The protection (damages) provisions all included cases of fraud,¹⁰⁶ but they diverged as to the other cases where such actions might lie. In the *Real Property Act 1858* (SA), persons deprived of an estate or interest in land not only through fraud, but also through ‘error, misrepresentation, oversight, or deceit’ could bring an action against the person registered in consequence.¹⁰⁷ Where the deprivation of interest occurred through ‘error or misconception’, the person liable to damages could opt to transfer the land instead of paying damages.¹⁰⁸ The *Real Property Law Amendment Act 1858* (SA) limited the occasions for actions for damages to those actions brought against a person registered through fraud *and volunteers* claiming through such a person.¹⁰⁹ The *Real Property Act 1860* (SA) extended the right of action to situations where the loss of the interest was in consequence of fraud, but also ‘in consequence of the issue of a certificate of title to any other person, or in consequence of any entry in the register book, or of any error or omission in any certificate of title, or in any entry in the register book’.¹¹⁰ The *Real Property Act 1861* (SA) was in similar terms.¹¹¹ Both the 1860 and 1861 Acts expressly stated that actions for damages could not be brought against purchasers for value.¹¹²

While the ejectment provisions only exposed the volunteer who took through a fraudulent registered proprietor to an action to recover the land, the damages provisions were not so tightly drawn. A registered proprietor could be liable in damages over the range of matters identified, although the *title* of the land was protected except in the listed instances. A volunteer may have been registered through an error or oversight for example (assuming a broad application of such terms), but not through fraud on anyone’s part. In such a case the title to the land was secure, even in the hands of a volunteer, but the registered proprietor would not be protected from a damages claim unless the proprietor was a purchaser for value.

A volunteer’s title was not indefeasible, then, where the volunteer took through a fraudulent proprietor, but otherwise the title appeared secure. In other cases, even volunteers took a title which was protected (in relation to recovery of possession), if they had become registered in the face of outstanding interests. They were not subject to direct attack in relation to title, except in the express cases mentioned in s 124 of the 1861 Act, but they could be *personally* subject to damages namely monetary compensation. This was not as clear in the 1861 Act as in the earlier legislation, but reading the Acts and the surrounding discussion, this becomes clearer. Reading Torrens’ comments in the 1861 Commission also confirms that this is what he thought as well.

¹⁰⁶ *Real Property Act 1858* (SA) s 92; *Real Property Law Amendment Act 1858* (SA) s 78; *Real Property Act 1860* (SA) s 120; *Real Property Act 1861* (SA) s 125.

¹⁰⁷ *Real Property Act 1858* (SA) s 92.

¹⁰⁸ *Real Property Act 1858* (SA) s 93.

¹⁰⁹ *Real Property Law Amendment Act 1858* (SA) s 78. See also s 80.

¹¹⁰ *Real Property Act 1860* (SA) s 120.

¹¹¹ *Real Property Act 1861* (SA) s 125.

¹¹² *Real Property Act 1860* (SA) s 120; *Real Property Act 1861* (SA) ss 125–6.

The distinction between title and personal liability is spelled out in the recommendation of the 1861 Commission in relation to the compensation provision:

It is a principle of the existing Act to substitute for ejectment, as the remedy in case of wrongful deprivation of land, an action for compensation in money against the person on whose application the certificate of title was wrongfully issued, or who acquired the estate or interest by wrongful registration, thus transferring the liability *from the land* (which under the old law it would follow, into the hands of third parties) *to the person* of the individual who derived benefit from the error, with an ultimate guarantee from the assurance fund.

The Commission have decided on modifying this principle, to the extent of removing this liability from the applicant, or person registered as proprietor in error, to the assurance fund, upon transfer of the property to a purchaser *bona fide*, unless in such cases in which the error has been occasioned by misrepresentation on the part of such applicant or other person. The consideration that, under the provisions of the existing Act, a transferee *bona fide* is actually placed in a worse position, as regards liability, than that in which he would stand under the old law, has led to this conclusion.¹¹³

The general thrust of this early legislation was to confer indefeasible title on volunteers. If further confirmation of Torrens' understanding is needed, his essay published in 1882, two years before his death, is instructive. It was, as he described it, a 'compilation from papers read and addresses delivered on various occasions' over the previous 18 years¹¹⁴ and was written at the time of moves for the introduction of land reform legislation in the United Kingdom. One ground on which Torrens criticised the legislation being considered was that indefeasible title 'is given to purchasers only' which, he commented,

affords no inducement to holders to register, as they would not get their titles freed from technical defects and doubts, but would continue, as regards future dealings, such as leases, mortgages, encumbrances, &c., under the present law, subject to all its cost, uncertainties, and delays.¹¹⁵

The case of forgeries was also touched upon by the 1861 Commission. An example was posed by Mr Thomas Waterhouse to Mr William Bartley of a forged instrument and whether the certificate would be invalid because the signature

¹¹³ South Australia, *Report of the Real Property Law Commission, with Minutes of Evidence and Appendix*, Parl Paper No 192 (1861) 3 ('Compensation to persons deprived of land').

¹¹⁴ R Torrens, *An Essay on the Transfer of Land by Registration*, above n 39, v.

¹¹⁵ Ibid 41. The context may suggest that Torrens was not distinguishing purchasers from volunteers, but rather new acquirers of title from existing holders of title, but the gist of the comment is consistent with his views expressed elsewhere on volunteers.

was forged.¹¹⁶ Bartley said, simply, ‘It would not be good’. ‘But would it not in the case of a subsequent holder?’, asked Waterhouse. ‘It would still be from a forgery’, Bartley replied.¹¹⁷ At this point, Torrens intervened:

I think, Mr Bartley, if you look at the Act you will find that this would be a fraud and have to be dealt with under the Act — sections 118 and 120. The land could be recovered by ejectment from the fraudulent proprietor or from any volunteer deriving through him; but if sold, *bona fide*, for value to a person ignorant of the fraud the land could not be recovered from that person, but the person defrauded would have his action for compensation in money against the person who committed the fraud, and failing to recover from him full value and costs he would recover compensation from the Assurance Fund?¹¹⁸

‘Yes, it is so’, Bartley responded.¹¹⁹

What Torrens was clearly saying — in indefeasibility theory terms — was that, in the case of forgeries, registration conferred *deferred* indefeasibility, applying to an innocent purchaser and not a volunteer.

Torrens also thought that the procedure of registration itself was a hedge against the possibility of forgery. In his 1882 essay he cited the specific example of forged mortgage deeds and gave the following illustration:

Some time previous to the adoption of registration of title in South Australia, A deposited at the bank, by way of equitable mortgage, the deeds of his property, and subsequently executed a regular deed of mortgage of the same lands to B, accounting for the non-delivery of title deeds by saying that he had left them at his station many miles up country. B registered the mortgage deed, and thus obtained priority [under Registration of Deeds legislation]. The bank lost the money. This could not have happened had registration of title been in operation, because the registrar could not register without production of A’s certificate of title, which would be locked up in the banker’s safe, and a caveat lodged by the banker would afford complete protection.

Another case: A lodged £1 500 with his solicitor to be invested on mortgage. The solicitor forged a mortgage deed of lands of B for the amount, and registered it. For some years the interest was paid with exemplary punctuality. Ultimately, A and B happening to meet and becoming communicative, the fraud was discovered. The solicitor bolted. A lost his money. This could not have occurred had registration of title been in

¹¹⁶ South Australia, *Report of the Real Property Law Commission, with Minutes of Evidence and Appendix*, Parl Paper No 192 (1861), Minutes of Evidence, [495].

¹¹⁷ *Ibid* [496].

¹¹⁸ *Ibid* [497].

¹¹⁹ *Ibid*.

operation, because, instead of the fraud being concocted in the privacy of the solicitor's office, the mortgagor, mortgagee, and attesting witnesses would be required to attend at the public office of the registrar or other authorised functionary to establish their identity by prescribed formalities, and produce B's certificate of title for endorsement of the mortgage by the registrar.¹²⁰

B *The Second Stage: 1873–1886*

Twelve years after the 1861 Act, there was a further substantial review of the working of the *Real Property Act* together with other legislation concerning the abolition of primogeniture and the assimilation of the devolution of real property to that applying to intestate personalty. Another Commission was established in 1872, this time without Torrens, who by then was living in England and serving in the House of Commons as the member for Cambridge. He had left South Australia on a two-year lecturing tour, but then decided to stay in England and seek election to Parliament there.¹²¹ The Commission reported in 1873 and its work provides further insights into the contemporary thoughts about the Torrens system.¹²²

The 1873 Commission revealed a clear conflict of understanding in relation to how indefeasibility worked in relation to volunteers. While the Commissioners understood that the principle of indefeasibility applied both to purchasers and volunteers,¹²³ Henry Gawler, one of the key participants in the review process, disagreed.¹²⁴ He considered that the references to purchasers in the notice, ejectment and protection provisions of the 1861 Act¹²⁵ made a clear distinction between purchasers and volunteers.¹²⁶ The Commissioners decided to clear up

¹²⁰ R Torrens, *An Essay on the Transfer of Land by Registration*, above n 39, 14–15.

¹²¹ According to P Howell, he wanted to leave the colony because 'he was so disgusted by the introduction of manhood suffrage, the ballot, and an elected upper house, when a new constitution was adopted in 1855–6', but could not sell his property due to the dubious nature of the titles. With the introduction of his system, he was able to realise his assets, return to England in 1862 and undertake lecturing tours advocating land-title reform: above n 58.

¹²² South Australia, *Report of Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts; together with Minutes of Evidence and Appendix*, Parl Paper No 30 (1873). The Report comprised 80 pages of Minutes of Evidence, together with an 11 page report and several addenda.

¹²³ *Ibid* [17]–[19].

¹²⁴ Gawler considered that the Commission's view as to the applicability of indefeasibility to volunteers was 'not borne out by the facts': South Australia, *Report on Real Property Amendment Bill, Report by Mr Gawler, accompanying Bill to Amend the Real Property Act, No 22, 1861*, Parl Paper No 47 (1874) 5; see also *ibid* [17]. Gawler was asked to draft the Bill which was eventually submitted to Parliament in 1874: South Australia, *Parliamentary Debates*, 1874, House of Assembly, [169], [795].

¹²⁵ *Real Property Act 1861* (SA) ss 114, 124, 126.

¹²⁶ While he thought that perhaps the indefeasibility section did not of itself lead to this conclusion, taken in connection with these other provisions Gawler concluded that 'there can be no doubt that the present Act makes a broad distinction between a

the confusion by making ‘a material alteration’ to limit indefeasibility expressly to a purchaser for valuable consideration.¹²⁷ Further, in order to ‘afford complete protection to bona fide purchasers for value, and *to remove the slightest doubt*’ as to the intention of the legislation, the Report recommended spelling out that the protection was aimed at purchasers for value in the notice provision.¹²⁸ The use of the expression ‘bona fide’ was also deliberate:

We have used the expression, ‘who have *bona fide* acquired it,’ to point to the material alteration we have introduced, namely, that of securing *to honest purchasers only* the possession of their land, whilst the present Act protects alike the honest purchaser and one who is endeavoring to place his property beyond the reach of his creditors, or to retain the possession of that which, in consequence of his own prudence or misfortune, ought to belong to them. So, in like manner, a person to whom land has been transferred by way of gift is protected, whilst it has been the policy of English law, since the reign of Queen Elizabeth, not to give such a person greater protection than would have been accorded to his predecessors.¹²⁹

The intention of the legislature, as they construed, ‘was only passing a law to simplify the mode of transferring property, but not to alter or to defeat the rights of property’.¹³⁰

We may tersely describe the effect of the [proposed amendments to the paramountcy clause] to be this—That it clears the title on the occasion of any transfer for valuable consideration. A person, therefore, has only to ask himself, ‘Have I honestly acquired this land by purchase?’ so as to assure himself of the indefeasibility of his title, and that he is the absolute and unqualified proprietor of the land mentioned in his certificate.¹³¹

The Commissioners also recommended making forged transfers an express exception to indefeasibility:

The question of the mode of dealing with titles obtained by means of forgery is one of very great difficulty. ... [We] have by a majority decided that even

purchaser and a volunteer – protecting the former, but not the latter’: South Australia, *Report on Real Property Amendment Bill*, Parl Paper No 47 (1874) 5. What Gawler failed to pick up was how the distinction was drawn in the earlier Acts. There was a distinction, but not in relation to indefeasibility insofar as this concerned the vulnerability of the title to be set aside. It was only in designated instances that the title could be impeached.

¹²⁷ South Australia, *Report of Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts; together with Minutes of Evidence and Appendix*, Parl Paper No 30 (1873) [18].

¹²⁸ *Ibid* [34] (emphasis added).

¹²⁹ *Ibid* [19] (emphasis added).

¹³⁰ *Ibid*.

¹³¹ *Ibid*.

where the purchaser was at the time of the purchase ignorant of the forgery, the transfer should be voidable so far as he and volunteers under him are concerned; but a subsequent purchaser for value should retain the land, and the defrauded proprietor should receive compensation of the Assurance Fund.¹³²

They were advocating deferred indefeasibility. In doing so they referred to evidence by Gawler:

We say that the first person who takes under a fraud, knowingly or unknowingly, is liable to be deprived of his interest; the second person, not a volunteer is not. The principle being that a purchaser or mortgagee for value is not subject to the liabilities of his predecessor, and therefore not bound to inquire into his title. Indefeasibility is merely the getting rid of the necessity of investigating the prior title, but you are not relieved from the consequences of your own acts, *or of any defect in the instrument under which you yourself immediately take*, so long as the land or security remains in your hands. *But if we also render the first and every other transferee of a mortgage, or the second transferee of the fee simple liable, we knock indefeasibility on the head.*¹³³

The deliberations of the Commission led to several Bills and considerable discussion before the *Real Property Act 1878* (SA) was finally passed. The distinction between volunteers and purchasers was made very clear in the Bills. The paramountcy and ejection provisions were expressly drawn in favour of purchasers for value; and the notice provision was amended as proposed.¹³⁴ The list of express exceptions to indefeasibility included forgery as a listed exception:

¹³² Ibid [67]. By a majority it was decided that even where the purchaser was at the time of the purchase ignorant of the forgery, the transfer should be voidable so far as he or she and volunteers under him or her were concerned, but a subsequent purchaser for value should retain the land, and the defrauded proprietor should receive compensation out of the Assurance Fund. Volunteers were also in a different position from purchasers. While the position with respect to purchasers was itself to be qualified in the case of forgery, volunteers would continue to be excluded from indefeasibility when deriving title from the honest purchaser from a forger.

¹³³ Ibid [1902] (emphasis added). Gawler's attitude is also seen in South Australia, *Report on Letter from Sir R R Torrens re Amendment of Real Property Act*, Parl Paper No 42 (1875) where he argued that 'forgery ought to render a certificate of title defeasible in the hands of the person who takes immediately under the forged document, but ... it should not be defeasible in the hands of a purchaser from him.'

¹³⁴ Using *Real Property Bill* No 6 of 1874 as the example: cl 54 (evidence); 55 (paramountcy); 56 (notice); 144 (protection). The two notable alterations of the prior law were in cl 55 and 56. Clause 55 began: 'Every proprietor, being a purchaser for valuable consideration ...'; clause 56 began: 'Except in the case of fraud, wherein he shall participate or collude, no person contracting or dealing with, or taking, or proposing to take a transfer for valuable consideration from the proprietor of any estate or interest ...'

VIII A certificate of title or other instrument obtained by forgery, although the proprietor at the time was ignorant of such forgery.¹³⁵

The proposed paramountcy section also included a proviso:

Provided always, that the title of a purchaser for valuable consideration shall not be defeasible on the ground that a certificate of title was obtained by any person under whom he claims title by means of fraud or forgery, or that a certificate of title or other instrument was obtained by any person under whom he claims, by means of an insufficient power of attorney, or from an infant, married woman under disability, or insane person, or that he derives title to the land from or through a proprietor erroneously registered as such by wrong description of boundaries of such land.

In 1875 Torrens himself commented on the amendments proposed by the Commission (and which had been rejected by the Legislative Council in the prior session) when he wrote to George Fife Angas that some of the proposed listed exceptions to indefeasibility

are objectionable, as still further shaking the principle of indefeasibility of title, without which retrospective examinations of the title with abstracts, &c, &c, &c, the fruitful sources of uncertainty, delay, and expense, reappears.¹³⁶

He particularly singled out the provision concerning forgery as ‘specifically objectionable on this ground’; and that the proviso ‘seems to be “a contradiction in terms” of the preceding portion of the section’.¹³⁷

The translation of the Commissioners’ work into legislation was a long slog. Before the 1878 Act was passed, there was a Bill worked through painstakingly in every intervening year after the presentation of the Report.¹³⁸ There was also a marked divergence of opinion in discussion as to the position of volunteers in relation to indefeasibility.¹³⁹ Despite all the discussion, the 1878 Act as finally passed did *not* include an amended paramountcy provision; and the specific recommendations of the 1873 Commission concerning forged transfers and purchasers for valuable consideration had to wait until the passage of the *Real Property Act 1886* (SA). Then they were included in s 69, which stated that the title of the registered proprietor was to be absolute and indefeasible, ‘subject only to the following qualifications’, including:

¹³⁵ *Real Property Bill*, No 6 of 1874 (SA) cl 55 VIII.

¹³⁶ *South Australia Report on Letter from Sir RR Torrens re Amendment of Real Property Act*, Parl Paper No 42 (1875).

¹³⁷ *Ibid.* Torrens also commented upon aspects of the amendments which seemed to ‘enlarge the jurisdiction of the Equity Court to an extent specially hazardous under existing circumstances’.

¹³⁸ *South Australia, Parliamentary Debates*, 1874, 1875, 1876, 1877.

¹³⁹ See R Atherton, above n 2, 151–2.

- I In the case of fraud ... Provided that nothing included in this sub-section shall affect the title of a registered proprietor who has taken bona fide for valuable consideration, or of any person claiming through or under him:

- II In the case of a certificate ... of title obtained by forgery ... in which case the certificate ... of title shall be void: Provided that the title of a registered proprietor who has taken bona fide for valuable consideration shall not be affected by reason that a certificate ... of title was obtained by any person through whom he claims title from a person under disability, or by any of the means aforesaid:

- III [Misdescription of boundaries] ... except as against a registered proprietor taking such land bona fide for valuable consideration, or any person bona fide claiming through or under him:

There was also the proviso at the end of the section:

Provided that no unregistered estate, interest, power, right, contract or trust shall prevail against the title of a registered proprietor taking *bona fide* for valuable consideration, or of any person bona fide claiming through or under him.

The paramountcy provision now drew a clear distinction between volunteers and persons taking bona fide for valuable consideration, although it did not include the blanket exemption that was suggested by the 1873 Commission. A volunteer who took through a fraudulent proprietor did not acquire an indefeasible title. This imported into the paramountcy section the qualification that had been included in the separate ejectment provisions of the earlier Acts.

The Commissioners in 1873 also considered the matter of procedure in the context of transmissions.¹⁴⁰ Sections 79–80 of the 1861 Act were seen to cause delay and sometimes ‘very heavy expense’ before devisees could become registered. As the descent of real and personal property had recently been assimilated,¹⁴¹ in consequence of which all property now passed to the executor or administrator, it was thought advisable to introduce a provision to mirror this in the Real Property Act.¹⁴² The real estate was to be transmitted to the executor or administrator,¹⁴³ who was to hold according to the trusts or dispositions of the will and subject to any trusts and equities which affected the deceased proprietor, thereby making the legal

¹⁴⁰ South Australia, *Report of Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts; together with Minutes of Evidence and Appendix*, Parl Paper No 30 (1873) [46]. See also R Atherton, *ibid*, 154–5.

¹⁴¹ *Law of Inheritance Act 1867* (SA).

¹⁴² *Real Property Bill* No 6 of 1874 cl 111. South Australia, *Parliamentary Debates*, House of Assembly, 22 June 1878, 115 (the Attorney-General, Hon C Mann). Cf *Real Property Law Amendment Act 1858* ss 53–59; J E Hogg, above n 21, 31–2.

¹⁴³ *Real Property Act 1878* (SA) s 36.

personal representative a real representative as well. Devisees or those taking on intestacy would then take from the executor or administrator.

Although the simpler procedure was introduced in the 1878 Act, the overall approach to indefeasibility was not introduced with any clarity until the 1886 Act. As the recommendations of the Commission were not fully adopted in relation to the broad approach to indefeasibility, the ambiguity which had appeared in relation to the earlier legislation was, if anything, exacerbated. If it were not clear that devisees and other volunteers did not take an indefeasible title, then the simpler procedure for the registration of transmissions did carry certain dangers. At least one correspondent to the *South Australian Register* expressed concern as to the effect of registration of heirs, devisees and legal personal representatives ‘with no enquiry or restraint’.¹⁴⁴ Without a thorough examination of the title in the Lands Titles Office prior to issuing the certificate of title to the devisee, the writer thought there was a danger that outstanding interests might be neglected.¹⁴⁵ As the distinction was not made clear in the paramountcy provision or otherwise, by including some qualification on the title,¹⁴⁶ the level of scrutiny became critical in the survival or not of interests which existed prior to the registration of the volunteer.¹⁴⁷ (*Exactly* the position in *Bogdanovic*).

The 1886 Act replaced all prior Acts. It picked up some of the recommendations of the 1873 Commission, but carried them through in a piecemeal fashion. The

¹⁴⁴ ‘The *Real Property Act*’, *South Australian Register*, 20 May 1882, included in E Opie, *Correspondence on the Real Property Act* (1882), 54–55. The pamphlet is held in Mortlock Library, Adelaide. Opie was not a solicitor but had had dealings with proving wills and obtaining letters of administration: see letter in *South Australian Register*, 24 December 1881, included *ibid*. The reference to ‘restraint’ in the quoted passage means caveat.

¹⁴⁵ *Ibid* 13. Opie refers to the case of *Brady v Brady* (1874) 8 SALR 219 which concluded that an entry in consequence of forgery was void. He used this ‘as an illustration of which way the amending Act should ... have gone’: namely, in favour of conclusiveness of the Register and careful examination of titles in the Lands Titles office before the entry is made, and the Assurance Fund picking up responsibility for difficulties that might occur.

¹⁴⁶ The possibility of a form of qualified title for devisees and heirs was put in the form of questions concerning the advisability of, for example, qualified certificates of title, which would become indefeasible after a fixed period of, say, five or 10 years. Gawler gave this proposal little support, seeing it as ‘merely introducing a sort of bastard Statute of Limitations’ and ‘equivalent to rendering the property no longer subject to the provisions of the Act’: South Australia, *Report of Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts; together with Minutes of Evidence and Appendix*, Parl Paper No 30 (1873) Minutes of Evidence, [1320]. Gawler thought that this would create great uncertainty and confusion amongst registered proprietors and ‘would be very hard upon outsiders; and the complications and inconveniences of the old system, which we have endeavoured to sweep away once for all, would return.’ While Gawler was in favour of the qualification of the indefeasibility of title of the volunteer, he did not wish to see the conveyancing system upset by the complication of different sorts of title.

¹⁴⁷ And assuming that s 37 did not cover the situation.

inference is much stronger that the volunteer is to be considered in a different position from a purchaser, but there remained many of the tensions and ambiguities which affected the earlier group of Acts.

VIII WELL, MR TORRENS, WHAT DO YOU RECKON?

Although the first *Real Property Act 1858* (SA) was passed very quickly, and with really very little discussion in Parliament — reportedly only taking one hour and seven minutes to work through the ‘four score clauses’¹⁴⁸ — some of its many issues, and the questions it begged, were resolved through the process of legislative iterations leading to the *Real Property Act 1886* (SA) — and not always in a direction that Torrens would have supported. Looking at the development of the legislation over this time there is an identifiable shift. The early legislation from 1858–1861 gave volunteers indefeasibility of title except in the particular instance listed in the ejectment provision, taking through a fraudulent registered proprietor, but did not preclude claims for monetary compensation from being brought against the volunteer. Torrens himself distinguished between questions affecting title and those concerning personal liability; and the first Act made this clearest in relation to deceased estates.

The 1873 Commission wanted to ensure that only purchasers would obtain the benefit of indefeasibility of title, but the lines drawn between questions of monetary compensation and indefeasibility of title became less clear as the Bills were worked over until the eventual passage of the 1886 Act. The issue was posed in terms of indefeasibility of title only.

This misses the point which Torrens made: that issues of title and compensation were separate ones; only for the purchaser should they be seen as requiring the same answer. The problem of volunteers was akin to the problem posed by forged transfers: if the so-called ‘curtain principle’¹⁴⁹ were to apply, then the fact of the absence of valuable consideration, or the forgery, should be irrelevant from the standpoint of the conclusiveness of the Register to the outside world. The question then should become one rather of compensation — by whom and for how much. The cases which have grappled with the problem of the volunteer have had to unravel the legislation without the benefit of an intensive examination of the background of the provisions. To find that the title of the volunteer *was* subject to prior interests was a reasonably accurate deduction of the law as it was summed up by the 1886 statute in South Australia, notwithstanding the ambiguities remaining. To find that the title of the volunteer was *not* subject to prior interests was a reasonably accurate deduction of the law as it was expressed in the 1861 statute in

¹⁴⁸ South Australia, *Parliamentary Debates*, House of Assembly, 1857–58, [385] (Mr Morphett). The battle for reform of property law had largely been waged in the public arena and propelled Torrens into Parliament, so it was almost a *fait accompli* by this time.

¹⁴⁹ Theodore B F Ruoff, *An Englishman Looks at the Torrens System: Being Some Provocative Essays on the Operation of the System after One Hundred Years* (1957) 28.

South Australia, except to the extent that there may have been a distinction made in the case of devisees and heirs after the examination of their title by the Court, or the specific circumstances indicated in, eg, the ejectment provision. The 1861 Act was pivotal in the development of Torrens legislation in other jurisdictions. Five of the principal statutes were taken directly or indirectly from this Act.¹⁵⁰ But it was only the first Acts that had the careful scrutiny of the devisee's application for registration that would have avoided the problem that became a case like *Bogdanovic*.

What, then, is the way to deal with volunteers? What about people like Norman Koteff, to return to the facts of a case like *Bogdanovic*? He is entitled to know what his position is with respect to property he inherits. He may want to expend capital and develop the property — something which Torrens himself considered should be encouraged and protected through a reliable register.¹⁵¹ He should know where he stands. The conclusiveness of the Register has proved a fundamental and vital principle of Torrens title — despite the attacks on this through a collection of overriding interests. Cases which work against this therefore detract from its 'rock solid' nature.¹⁵²

Three law reform bodies have had occasion to consider the problem in recent years. Each has recommended that volunteers should obtain indefeasibility of title. The Victorian Law Reform Commission suggested that:

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

*A registered title obtained through a gift by a person who is not fraudulent should be indefeasible.*¹⁵³

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

¹⁵⁰ *Real Property Act 1862* (Tas); *Real Property Act 1862* (Vic); *Land Transfer Act 1870* (NZ). The *Real Property Act 1862* (NSW) was taken directly from the Victorian Act of 1862 and the *Transfer of Land Act 1874* (WA) was taken from the Victorian Act of 1866: see J E Hogg, above n 21, 41.

¹⁵¹ R Torrens, *An Essay on the Transfer of Land by Registration*, above n 39, 22–3.

¹⁵² P Butt, above n 32, 44.

¹⁵³ Law Reform Commission of Victoria, *Discussion Paper No 6: Priorities* (1988) [10]. Such laws would be relevant in a case like *King v Smail*, if registration were seen to convey indefeasible title.

Volunteers who become registered as owners of interests of the kinds which can be registered are likely to spend money on land and involve it in their economic affairs and thus require assurance of ownership as much as do purchasers. The elaborate investigations required by the common law are as burdensome for volunteers as for purchasers, and the exposure to the risk of ownership being upset by someone further up the chain of title is just as harsh, once investment has been made in land. Part 5 of the Model Act, which deals with registration, therefore does not distinguish between purchasers, on the one hand, and volunteers or donees on the other.¹⁵⁴

The Queensland and Northern Territory legislatures implemented such recommendations in very simple provisions which state that ‘[t]he benefits [of registration] apply to an instrument whether or not valuable consideration has been given’.¹⁵⁵

This approach embodies the curtain and mirror principles of Torrens title and provides certainty in relation to titles. Extending indefeasibility expressly to volunteers — through lifetime transfers and through deceased estates — is supported by the objective of efficient and easy transfers of title,¹⁵⁶ and, through security of title, the development of the land is encouraged. This in itself can be argued to be a sufficient justification for including volunteers within the curtain of indefeasibility.¹⁵⁷ Both goals — efficiency and encouragement of investment — are particularly important where land is to be regarded as a commodity and to be treated like other property.¹⁵⁸

But is it fair? Clearly this question also arose for Coldrey J in *Rasmussen*. A devisee, like Norman, will take free of equitable interests created by the previous registered proprietor unless there is some basis for arguing some other exception to indefeasibility, such as the *in personam* exception as presently operating. However in this context it is much less likely that there has been some conduct upon which to base such an exception, given the current approach to it, than where the incoming registered proprietor is a purchaser. Notice by itself has been considered

¹⁵⁴ Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1990) 36–7; see also Peter Butt, ‘A Uniform Torrens Title Code?’ (1991) 65 *Australian Law Journal* 348; L A McCrimmon, ‘Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title’ (1994) 20(2) *Monash Law Review* 300, 310–15.

¹⁵⁵ *Land Title Act 1994* (Qld) s 165; *Land Title Act 2000* (NT) s 183.

¹⁵⁶ See, eg, Theodore B F Ruoff, ‘Systems of Land Tenure and Transfer in the Commonwealth and Empire – Their Advantages and Disadvantages’ (Paper presented at the Commonwealth and Empire Law Conference, London, 20–25 July 1955) 29.

¹⁵⁷ See, eg, Thomas W Mapp, *Torrens’ Elusive Title: Basic Principles of an Efficient Torrens’ System* (1978), 121–9.

¹⁵⁸ The commodification of real property was emphasised by Torrens in, for example, his second reading speech on 11 November 1857: R Torrens, *Speeches*, above n 39, 12–13.

insufficient.¹⁵⁹ A purchase is a negotiated transaction and it could well be that the basis of such negotiations is an undertaking to respect prior equitable interests — as in *Bahr v Nicolay (No 2)*.¹⁶⁰ By contrast, the process of inheritance through a will is a *passive* process and therefore places holders of prior equitable interests at a much greater risk, unless there is greater scrutiny of the process of registration in such a case — as indeed was the case in the earliest of the Torrens Acts. If a person holding an equitable interest does not lodge a caveat to protect that interest then that interest will ordinarily be defeated on registration of a transmission application to a beneficiary of the estate under the principle in *Bogdanovic*. The risk is heightened when one considers how unlikely it would have been for a person in Mrs Bogdanovic's position to lodge a caveat. One has a certain amount of sympathy with the indignation of George Fife Angus when the simplification of the process for registering devisees was being introduced in 1861.¹⁶¹ Perhaps he would have been a noble champion for Mrs Bogdanovic.

There is much to support the extension of indefeasibility of title to volunteers. But there is also no reason for the devisee to receive a windfall simply because of the operation of the Torrens system. Why should Norman gain at Mrs Bogdanovic's expense? The only alternatives are a claim against the assurance fund; a claim against the estate; or a claim against the volunteer. Mrs Bogdanovic's claim against the legal personal representative presumably would be excluded on the basis of the protection given to representatives under probate legislation.¹⁶² What else could she do? As her claim was based — technically — on breach of trust she would, it seems, be excluded from the Assurance Fund in the particular jurisdiction.¹⁶³ In jurisdictions which have broadly-drawn eligibility grounds for making a

¹⁵⁹ The Court of Appeal left open the question of whether volunteers might be subject to unregistered interests of which they had notice when they acquired their interest. This suggestion is found in the vague reference in the concluding paragraphs of the judgment of Priestley JA, (1988) 12 NSWLR 472, 480: 'But if knowledge of the appellant's interest by Mr N Koteff before he became registered proprietor would enable her to assert her rights against him (a matter upon which it is unnecessary in this case to express any opinion) the material earlier referred to show there is no basis for holding Mr N Koteff knew anything which would put him on notice of those rights.' If this comment is not read in isolation but taken in the context of the reference to the assertion of personal rights against the registered proprietor, it is not notice alone which would be important but notice such as to provide the foundation for the assertion of a personal right in the manner established in other cases, such as *Bahr v Nicolay (No 2)* (1988) 164 CLR 604.

¹⁶⁰ (1988) 164 CLR 604.

¹⁶¹ South Australia, *Parliamentary Debates*, Legislative Council, 21 November 1861, [1218]–[1219] (George Fife Angus).

¹⁶² See for example, Ken Mackie and Mark Burton, *Outline of Succession* (1994) [13.17]–[13.18].

¹⁶³ The New South Wales provision, for example, expressly excludes claims based on the breach by a registered proprietor of, inter alia, a constructive trust: *Real Property Act 1900* (NSW) s 133(a).

family provision claim under Family Provision or Testator's Family Maintenance legislation, she may be able to base such a claim on dependency on the deceased.¹⁶⁴

It is appropriate that claims against personal representatives have limited duration in order to facilitate the administration of the estate. But what of the other claims? As I argued in my article in 1998,¹⁶⁵ Mrs Bogdanovic ought not to be left without a remedy. Her proprietary claim against the property was excluded by force of indefeasibility. Her claim against the executor was excluded by statutory protection. Why should her claim against the estate generally or against the assurance fund be precluded? The former would be complex.¹⁶⁶ The latter can be supported on the basis that she has only lost her interest through the operation of the Torrens system — by giving indefeasibility of title to the volunteer. But then why should the State pick up the compensation when the devisee has obtained a windfall? There is room to reconsider the approach Torrens had in mind, through monetary compensation from the one who benefits. In the absence of a clearly defined approach of this sort, the gut instincts of the judges who held the volunteer's title to be subject to prior interests have a certain appeal. That at least would not leave a Mrs Bogdanovic without a remedy.¹⁶⁷ Here I think Torrens may agree with me. He would want Norman to be able to develop the property, but the effective extinguishment of Mrs Bogdanovic's interest *because of* registration should not be left without compensation.¹⁶⁸

As for the consequences for forged instruments, South Australia is still the *only* jurisdiction in Australia which contains an express exception for forgeries. The other jurisdictions have subsumed the forgery issue within the concept of 'fraud'. But, despite the evident intentions of the law reformers of the 1870s, this provision, too, has been converted to the cause of immediate indefeasibility.¹⁶⁹

¹⁶⁴ *Family Provision Act 1982* (NSW) s 6(1), definition of 'dependant'; *Succession Act 1981* (Qld) s 40, definition of 'dependant'.

¹⁶⁵ R Atherton, above n 2.

¹⁶⁶ An example of judgment against the estate in a case where a woman lost her registered title when her ex-husband forged her signature in favour of a purchaser, is *Hermansson v Martin* (1982) 140 DLR (3d) 512. As this was a case of forgery, rather than breach of trust, a claim against the Assurance Fund was not precluded.

¹⁶⁷ Postscript: It is such a pity that *Bogdanovic v Koteff* (1988) 12 NSWLR 472 was not heard by the High Court. An application for special leave to appeal was made, but it was refused on 14 October 1988 as 'subsequent developments touching the applicant have deprived the application of any practical significance': S E Jones, 'The Once and Future "King" – the Fall and Rise of the Registered Volunteer: *Bogdanovic v Koteff* (1988) 12 NSWLR 472', (1989) 4 APLB 2, 4. This is also noted in A Bradbrook, S MacCallum and A Moore, above n 12, [4.64] n 272. Mrs Bogdanovic, now aged 78, had entered a nursing home and thus had no need to pursue her right of occupation in the Annandale property.

¹⁶⁸ See Elise Hilsted's suggestions for possible solutions: E Hilsted, 'Fraud and the Volunteer: Harmonisation of Principle in Australia' (2007) 11(1) *Journal of South Pacific Law* 116.

¹⁶⁹ See A Bradbrook, S MacCallum and A Moore, above n 12, [4.50]; Anthony Moore, 'Interpretation of the Real Property Act' (1987) 11 *Adelaide Law Review* 405.

The wording of the forgery exception in s 69(II) of the 1886 Act is complicated by its proviso (set out above). As explained by Professor Tony Moore, in the case of *Wicklow Enterprises Pty Ltd v Doysal Pty Ltd*:¹⁷⁰

O’Loughlin J read the provision as if it were expressed:

‘Provided that the title of a registered proprietor who has taken bona fide for valuable consideration shall not be affected by reason that a certificate of title was obtained

(a) by any person through whom he claims title from a person under a disability

or (b) by forgery

or (c) by means of an insufficient power of attorney’.

It is equally possible to read the section as if it were expressed:

‘Provided that the title of a registered proprietor who has taken bona fide for valuable consideration shall not be affected by reason that a certificate of title was obtained by any person through whom he claims title

(b) from a person under a disability

or (b) by forgery

or (c) by means of an insufficient power of attorney’.

Linguistically the problem is the scope of the disjunctive ‘or’.¹⁷¹

The provision proposed by the law reformers of the 1870s supports the analysis of Moore, and his conclusion that ‘history points in favour of deferred indefeasibility in forgery cases’.¹⁷² (So, too, does the provision reinforce the proposition that volunteers were to be considered differently from purchasers for value).

Moore’s argument was used, persuasively in the later case of *Rogers v Resi-Satewide Corporation Ltd*,¹⁷³ by von Doussa J to reject the construction given to s 69(II) by O’Loughlin J in *Wicklow*. Subsequent decisions, however, have pushed the pendulum back to *Wicklow*, leading David Wright to observe:

To take stock of the varying judicial constructions of the proviso it is obvious that there is a mess of obiter and ratio originating from minority judgments and other non-binding sources.¹⁷⁴

¹⁷⁰ (1986) 45 SASR 247 (*‘Wicklow’*).

¹⁷¹ A Moore, above n 169, 408.

¹⁷² Ibid 410.

¹⁷³ (1991) 29 FCR 219.

¹⁷⁴ David Wright, ‘Forgery and the *Real Property Act 1886* (SA)’ (1994) 16 *Adelaide Law Review* 227, 236.

After an examination of these cases Wright advocates in favour of the difference in South Australia from the other states and that, because of that difference and its history, ‘if forgery, insufficient power of attorney or legal disability is pivotal to the case then the guiding principle is deferred indefeasibility’.¹⁷⁵

At the same time as I was pursuing the cause of Mrs Bogdanovic, Elizabeth Toomey in New Zealand was also being ‘bugged’ by similar issues. Toomey was also bothered by unfairness, which she explored in an article in the *Canterbury Law Review*, focusing on fraud and forgery.¹⁷⁶ She suggests that the expansion of the in personam exception may be explained in part by the rigid adherence to immediate indefeasibility, and recommends instead a consideration of ‘discretionary indefeasibility’, drawn from the model Act proposed in Canada. The argument runs that the ‘basic flaw’ of immediate indefeasibility is that it makes all land titles ‘precarious’, if forged instruments can lead to immediately indefeasible titles.¹⁷⁷ Toomey refers to recommendations made by the Property Law and Equity Reform Committee in New Zealand in relation to the registration of forged and other void instruments:

- (a) Discretion can be given to the High Court, in cases where any void instrument has been registered, to either order that the former registered proprietor’s name be restored to the register or to declare that the title of the person who registered the void instrument be indefeasible.
- (b) Appropriate changes be made to the compensation provisions in the Act.
- (c) Detailed guidelines be provided in any amending legislation outlining matters which should be taken into account, but not restricting matters which the Court may see fit to consider.
- (d) The anomaly which exists with respect to a fictitious person (the ratio decidendi in *Gibbs v Messer* having been reduced to this, but not eliminated) be removed.¹⁷⁸

Toomey was bothered by unfairness. It is a profound thing — unfairness. It bothered Robert Torrens too. It was what motivated him — unfairness to friends; unfairness of ‘the system’. It would be a distinct irony if an absolute adherence to immediate indefeasibility *created* the very precariousness of title or unfairness that had motivated Torrens to introduce his system. The increasing speed of registration in an electronic environment only enhances the dangers with respect to forgeries and their impact in the context of registered titles.

Forgers, volunteers, and a range of other issues such as the width of the ‘in personam’ exception and the impact of overriding statutes, are the subject of ongoing questions — and challenges — for Torrens’ system. Was it an inspired law

¹⁷⁵ Ibid 243.

¹⁷⁶ Elizabeth Toomey, ‘Fraud and Forgery in the 1990s: Can our adherence to *Frazer v Walker* survive the strain?’ (1998) 5 *Canterbury Law Review* 424.

¹⁷⁷ Ibid 434.

¹⁷⁸ Ibid 436.

reform, or a quick fix? Well, it was both. That it was inspired — and necessary — is proven by its endurance and resilience, as well as its adaptability in many parts of the world, particularly those, like post-Soviet countries, where problems in proof of title require a centralised and potent solution. But it was also very much of a quick fix, and needed many other ‘quick fixes’ in its first 30 years of operation. As to what Mr Torrens would reckon now —

IX TORRENS’ LAST WORDS — AN IMAGINED CONVERSATION

‘Well, Mr Torrens — oh, sorry, forgive me, *do* let me congratulate you on the KCMG! And a GCMG too! Well deserved! Well, Sir Robert, if I may, what do you reckon? Volunteers? Forgers? What *did* you mean? Indefeasibility? Compensation? From whom? What should happen now?’

‘Mrs Croucher — oh, sorry, Professor Croucher, I should say. Stop asking me all those questions. I wasn’t thinking about all of those things!’

‘But, Sir Robert, there are *still* so many unanswered questions ...’

‘I guess that’s for the lawyers to work out. Whoops! Did I say that? Leave it to ‘academics’ then, shall we say. Got to dash! Got a ship to catch!’¹⁷⁹

‘Sorry, Sir Robert, this was a tad unfair of me to press you so on such matters, given what you have achieved. But — you were right about lawyers!’¹⁸⁰

¹⁷⁹ A reference (hopefully humorous!) to Torrens’ ship-catching effort as Collector of Customs when he arrested the ship *Ville de Bordeaux* in February 1841: see E Hodder, above n 50, 169; and R Stein, ‘Sir Robert Richard Torrens and the Introduction of the Torrens System’ (1981) 67(2) *Journal of the Royal Australian Historical Society* 119, 120.

¹⁸⁰ I have continued my study of Torrens, the man and the system, in the Alex Castles Memorial Lecture for 2008, presented in Adelaide on 26 August 2008, ‘“Carthago delenda est!” Sir Robert Richard Torrens and his Attack on the Evils of Conveyancing and Dependent Land Titles: A Reflection on the Sesquicentenary of the Introduction of his Great Law Reforming Initiative’, published in (2009) 11 *Flinders Journal of Law Reform* 197; and the Forbes Society for Legal History lecture, 6 November 2008, ‘150 years of Torrens — Too much, too little, too soon, too late?’, published in (2009) 31 *Australian Bar Review* 245. Some common elements of the story are found in each.