If this argument is valid, there is the further anomaly that where the estate has no "administrator" the surviving joint tenant will have to pay the duty assessed on the deceased's interest; this follows from s.34 and *Re Busby*.[28] Thus the joint tenant's liability to or freedom from duty will depend on the incidental question as to whether or not there is an "administrator".

Kitto, J. seemed to regard as conclusive the consideration that a surviving joint tenant *cannot* be affected by a process of apportionment which the administrator carries out.[29] It is respectfully submitted that "apportionment" as described in *Perpetual Trustee Co. Ltd.* v. *Adams* and the other cases mentioned above could be effectively utilized by an administrator against a stranger to the actual estate, clumsy though the process may be. "Apportionment" is a difficult word in this section, as has often been pointed out, yet it must be interpreted so as to involve the creation of some sort of rights and liabilities between the administrator and the other persons referred to in s.35; otherwise it will be meaningless. As has been pointed out, apportionment among holders of notional estate was clearly contemplated by the legislature prior to the amendment to the section in 1942. There is no reason why it should not still be practically possible.

Conclusion

Eastgate's Case has not made the law as to death and estate duties any easier. Notably, the anomalies in ss.29, 34, 35 and 35A of the Estate Duty Assessment Act have, it is submitted, been increased by the majority's decision. A rewording of parts of these sections so as to take more clearly into account the fact that "estate" under the Act includes two distinct types of property, notional and actual estate, would be the most appropriate solution. But in the meantime, the most manageable line of approach is that of Menzies, J., that is, to consider the Act as assimilating notional and actual estate and to disregard the artificialities that may arise when words strictly appropriate to actual estate only are used in reference to both.

The executor seems to have won on the swings but lost on the roundabouts. He may now call on another High Court authority to the effect that a very clear expression of intention is required in the will to prevent him recovering from recipients of notional estate the duty assessed on it. However, a surviving joint tenant has been granted an immunity against him as regards Federal estate duty. Both these points are, of course, important ones for practitioners to bear in mind, both in the drafting of wills and in advising on the administration of deceased estates.

M. R. CHESTERMAN, B.A., Case Editor—Fourth Year Student.

PROTECTION TO A PURCHASER BEFORE REGISTRATION UNDER THE REAL PROPERTY ACT

I.A.C. (FINANCE) PTY. LIMITED v. *COURTENAY AND OTHERS*

In 1930 a section was added to the Real Property Act (N.S.W.) which was a model of obscurity and unintelligibility. Perhaps for this reason there has been little written on its meaning and effect, and it was thirty years before it arose for judicial determination. It has now been considered by the New

[28] (1930) 30 S.R. (N.S.W.) 399.
[29] (1964) 37 A.L.J.R. 479 at 483.

South Wales Supreme Court and by the High Court, and their decisions are the subject of this note. The subject matter itself dictates a brief introduction and a fairly close analysis of the references to s.43A of the Real Property Act in the judgments delivered.

THE PROBLEM DEFINED

"It is beyond dispute that until a purchaser has actually become registered as proprietor he cannot claim a statutorily indefeasible title."[1] Section 43A,[2] it is agreed by all, is intended to confer some degree of protection on a purchaser of an interest in land under the Real Property Act before he actually becomes registered. The extent to which it does this is the matter in dispute, and it is proposed to consider the possible interpretations of the section before considering which, if any, the courts favoured. In this task, at least in the first instance, the words of the section will be given their literal meaning, in an attempt to divine what the legislature must be presumed to have intended.[3] In particular, s.43A was added by the 1930 amending act,[4] which also amended s.42 and inserted a proviso to s.74. The reference to notice "against which (the registered proprietor) was not protected" in s.42(d) has been taken to refer to the protection purported to be granted by s.43A and the two provisions have been construed in close conjunction.

Interpretation has centred around the question whether the notional legal estate conferred by s.43A is a "common law" legal estate, or a statutory legal estate.

(a) A Notional Common Law Legal Estate: Since the estate is to be conferred "for the purpose only of protection against notice",[5] it should not be conferred

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[1] J. Baalman, *Commentary*, 1951, 170; see s.41 as to acquiring registered title; ss.42, 45, 124, 135 as to the advantages which accrue to the "registered proprietor" or person "registered as proprietor". As to the ineffectiveness of s.43 until registration, see below.

[2] Where a reference to a section appears without more, the reference will be to the Real Property Act (N.S.W.) 1900-1956.

[3] The "literal rule" laid down by Tindal, C.J. in the *Sussex Peerage Case* (1844) 11 Cl. & F. 85 at 143; also *Abley* v. *Dale* (1851) 11 C.B. 378 at 391; 138 E.R. 519, 525.

[4] Conveyancing (Amendment) Act, 1930—No. 44, 1930, s.38(b).

[5] S.43A reads:

43A. (1) For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act, taken by a person under an instrument registrable, or which when appropriately signed by or on behalf of that person would be registrable under this Act shall, before registration of that instrument, be deemed to be a legal estate.

(2) No person contracting or dealing in respect of an estate or interest in land under the provisions of this Act shall be affected by notice of any instrument, fact, or thing merely by omission to search in a register not kept under this Act.

(3) Registration under the Registration of Deeds Act, 1897 shall not of itself affect the rights of any person contracting or dealing in respect of estates or interests in land under the provisions of this Act.

Other sections referred to are ss.43, 42(d) and 74.

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 of the estate or interest in question is or was registered, or to see to the application of the purchase 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.

42. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same, subject to such encumbrances, liens, estates or interests as may be notified on the folium of the register-book constituted by the grant or

unless it will protect against notice. If the prior estate of which notice is gained is a legal estate, then notice is irrelevant, for the person taking an interest would not, at least until registration, take free of it even if unaffected by notice—the rule "*non dat quod non habet*" would operate. Thus s.43A would have no operation, and the reference in s.42(d) to notice against which the registered proprietor was not protected is rendered redundant; for there is no short-term legal tenancy complying with that section against which the registered proprietor is protected by s.43A. Assuming the reference to protection in the former section to be to s.43A, the registered proprietor would take subject to *all* such legal short-term tenancies of which he gets notice before registration.

If the prior estate of which notice is gained is an equitable estate, then again notice is irrelevant, for the equity prior in time would take priority whether or not the holder of the subsequent equitable estate had notice of it. Priority between equities is governed by the maxim "*qui prior est tempore potior est iure*", unless there is some separate ground for postponing the prior equity, and absence of notice on the part of the holder of the subsequent equity is not of itself ground for postponement.[6] An identical restriction on s.42(d) will result.

Only if a refinement turning upon payment of purchase price is considered is s.43A given room on the present interpretation to operate. If a purchaser for value has no notice of an equitable estate when he pays the purchase money, but gets notice between payment and obtaining the legal estate, he may even after such notice hold the legal estate free of the equity—"*tabula in naufragio*". But he may not do so if getting in the legal estate would involve a breach of trust of which he had notice; he would then be a party to the breach of trust.[7] In this special case there is therefore scope for protection against notice. An interest which would, but for s.43A, be only an equitable interest subject to the prior trust and also subject to the possibility of loss,

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certificate of title of such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever except . . .

(d) a tenancy whereunder the tenant is in possession or entitled to immediate possession and an agreement or option for the acquisition by such a tenant of a further term to commence at the expiration of such a tenancy, of which in either case the registered proprietor before he became registered as proprietor had notice against which he was not protected.

Provided that—

(i) The term for which the tenancy was created does not exceed three years; and

(ii) in the case of such an agreement or option, the additional term for which it provides would not, when added to the original term, exceed three years; and

(iii) the registration of the proprietor is after the commencement of the Conveyancing (Amendment) Act, 1930.

74. So long as any caveat remains in force prohibiting the transfer or other dealing with land, the Registrar-General shall not, except with the written consent of the caveator or his agent, enter in the register-book any memorandum of transfer or other instrument purporting to transfer or otherwise deal with or affect the land, estate, or interest in respect to which such caveat is lodged:

Provided that nothing in this section shall prevent the entry in the register-book of a memorandum of transfer or other instrument presented for registration before and awaiting registration at the time of the lodgment of the caveat and not afterwards withdrawn.

[6] *Lapin* v. *Abigail* 44 C.L.R. 166 per Knox, C.J.; *Phillips* v. *Phillips* (1861) 4 De G.F. & J. 208 at 215.

Throughout this note it is assumed that the transaction is for valuable consideration, and that payment of the consideration and receipt of the registrable instrument take place simultaneously. In the report of the High Court proceedings, Taylor, J. seems specifically to limit his remarks in this way (37 A.L.J.R. 350 at 359), and the complexities arising if the normal settlement procedure is not followed are extreme. On this assumption, too, the possible operation of s.43A to rebut laches need not arise.

[7] *Perham* v. *Kempster* (1907) 1 Ch. 373.

due to notice of the trust, of its capacity to be transformed into an unencumbered legal estate, would be protected against the effect of the notice by a notional advancement of the acquisition of the legal estate.[8]

(b) A Notional Statutory Legal Estate: This view leads to complete circuity when considered in relation to a prior short-term tenancy within s.42(d), whether legal or equitable. We must, it seems, only apply s.43A when to do so would confer protection against notice. To see when notice will be detrimental s.42(d) must be consulted; but it says notice will be detrimental only if the purchaser is not protected against it. When is the purchaser protected against notice? See s.43A. This alone would indicate that the section is not to be given such an interpretation, and further objections pertinent even apart from s.42(d) will be noted when considering the judgment of Kitto, J. in the case under discussion. He alone took the view that the notional legal estate is identical to that possessed by a registered proprietor under the Real Property Act, and operates to advance the protection given by s.43.[9]

(c) A Special Statutory Legal Estate: It is a third possibility that "legal estate" means a common law estate, but one which is to be free from all outstanding prior legal estates except those preserved by s.42(d). Thus a great objection in regard to prior short-term tenancies could be evaded. Section 42(d) seems to recognise that a subsequent registered estate may be free of such leases of which the taker of a registrable transfer had no notice, and even some of which he had notice. On the other hand, how can an exception as to tenancies preserved by s.42(d) be made to the general words of s.43A? The justification for creating what is in essence a third type of legal estate seems remote, in particular when, as will be seen, a degree of operation can be given to s.43A by giving it an interpretation which probably does no greater violence to its literal meaning.

The discussion outlined above has taken the words "for the purpose only of protection against notice" in their literal meaning. From its first appearance it has been pointed out that the section should be construed as if it read "protection against prior equitable interests of which notice may be obtained" instead of "protection against notice".[10] To this it has been replied that "the section must be construed as it is and not as it might have been framed".[11] It will be seen that, faced with the difficulties of a literal interpretation of the section, two of the judges felt constrained to abandon this principle.

Section 43A survived until 1961 without a judicial interpretation, but then came before Hardie, J. in *Courtenay* v. *Austin*.[12]

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[8] When the purchaser obtains registration, he will be protected under s.43 in the absence of fraud; so in the result the position would be the same. But the position under consideration is that of the purchaser prior to registration, which must be decided on general equitable principles; s.43A is an addition to these.

It is curious to note that Dr. Helmore when editing Millard's *Law of Real Property in N.S.W.* (1948) seems at p. 99 to restrict the section as above set out, but in his *The Law of Real Property (N.S.W.)* (1961) at pp. 349-50, is less explicit and gives an example of the section in operation not involving a breach of trust. He says:

> Thus assume A, a registered proprietor, enters into a contract for sale to B, and into a subsequent contract for sale to C, who has no notice of B's contract. C pays his purchase money and then learns of B's contract. If C takes a transfer in registrable form he takes priority over B's earlier contract for purchase.

[9] In all the above discussion is to be seen the valuable article of P. R. Watts in 6 *A.L.J.* 85.

[10] See P. R. Watts, *loc. cit.* at 86; B. A. Helmore, *The Law of Real Property (N.S.W.)* 349.

[11] P. R. Watts, *loc. cit.*

[12] (1961) 78 W.N. (N.S.W.) 1082. (All unaccompanied page references will be to the reports of this case in the Supreme Court of New South Wales or in the High Court, as the context demands.)

THE FACTS OF THE CASE

The facts which are somewhat involved are set out fully and lucidly in the judgment of Hardie, J., to which the reader must refer. For the purpose of this note they may be summarized as follows:

On 24th February, 1958, Miss Austin contracted to sell a certain area of land to Mr. Courtenay and three others. On 23rd July, 1958, settlement of the transaction took place at the office of the vendor's solicitor, and, as a mortgage back was involved, the transfer and the mortgage documents were retained by him and subsequently lodged at the Land Titles Office for registration. They were uplifted by him and withdrawn from registration on 22nd April, 1959, which it was found he was not authorized expressly or impliedly to do.

In the meantime Miss Austin had been negotiating to sell the same land to Denton Subdivisions Pty. Ltd., and contracts were exchanged on 17th September, 1959. Seven days later a further contract was signed by which Mr. Courtenay and his companions resold the land to Miss Austin; this resale was never completed. The sale from Miss Austin to Denton Subdivisions Pty. Ltd., however, was settled at the office of the vendor's solicitor on 23rd November, 1959. It was found that prior to settlement the solicitor for Denton Subdivisions Pty. Limited had "acquired notice of a positive and unambiguous nature that the plaintiffs (Courtenay and others) had been the owners of the subject land at the date when Miss Austin had agreed to sell it to the Denton Company. . . . Nothing . . . justified the conclusion that . . . Miss Austin and not the plaintiffs was at that date the beneficial owner of the land."[13] At this settlement an advance on mortgage was made by I.A.C. (Finance) Pty. Limited. The transfer from Miss Austin to Denton Subdivisions Pty. Limited and the first mortgage were lodged at the Land Titles Office on 25th November, 1959.

Denton Subdivisions Pty. Limited in January, 1960, negotiated a further loan on the security of the land with Hermes Trading and Investment Pty. Limited, and this transaction was settled on 28th January. The second mortgage was lodged on 10th February, 1960. None of the instruments was ever registered.

Courtenay and his associates commenced a suit in Equity for specific performance of the agreement of 24th February, 1958, seeking an order that the defendant, Miss Austin, relodge the memorandum of transfer pursuant thereto. They commenced another suit against Denton Subdivisions Pty. Limited, the two mortgagees, Miss Austin and the Registrar-General, claiming a declaration that they were entitled to have the transfer to them registered in priority to the transfer to Denton Subdivisions Pty. Limited, and to the two mortgages given by that company. Both suits were heard together.

THE DECISION OF HARDIE, J.

Since the case is noted only on the interpretation of s.43A, it is not proposed to consider all the findings of the learned judge. Suffice it to enumerate his opinions as follows:

1. Section 43A is a legislative recognition of the substance of the principles adopted and applied by the courts in *Barry* v. *Heider*,[14] *Abigail* v. *Lapin*,[15] and *Brunker* v. *Perpetual Trustee Co. Limited*,[16] namely, that although an unregistered instrument passed no estate or interest in the land (see s.41(1)),

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[13] p. 1088.
[14] (1914) 19 C.L.R. 197 at 216.
[15] (1934) A.C. at 500.
[16] (1937) 57 C.L.R. 555 at 599.

the transaction behind the instrument created an equitable estate or interest entitled to the protection of the courts of equity. The rights of parties with competing claims were to be determined in accordance with the well-settled principles of equity.

2. Despite the apparent restriction of the words "for the purpose only of protection against notice . . . " (discussed above), their meaning is to be gathered from the use of the word "notice" in s.43A(2), s.42(d) and s.43. They are to be construed as conferring protection in the specified circumstances "against unregistered estates of (*sic*) interests of which no notice was acquired before settlement but of which notice was or might be received after settlement and before registration of the particular dealing".[17] His Honour looked to the purpose of the section and departed from its literal meaning in order to give it a wider field of operation; he referred to the restrictive interpretation noted above. Support for his view was derived from the proviso to s.74, also inserted in 1930, and the object of both additions, *viz.*, that a transferee or mortgagee shall be protected in the period between settlement of the transaction and registration, in particular against notice of outstanding equitable interests.

3. "It is not necessary in this case to consider the effect and operation of s.43A(1) in relation to registrable instruments arising out of transactions not supported by valuable consideration, nor to consider what effect and operation the sub-section has when a person who takes a registrable instrument does not lodge it for registration until some time after its coming into his possession. The subsection undoubtedly assumes that lodgment for registration shall be effected immediately or at any event promptly; however, it does not so provide."[18]

4. "No express provision is made in the section for the position where there are, as in the present case, two persons claiming, adversely to each other, to be entitled to be registered as proprietors of the same land pursuant to transfers from the same registered proprietor. A possible view of the section is that it has no application to such a case."[19]

His Honour found it unnecessary to decide.

5. In s.43A(1) the phrase "legal estate" does not mean the statutory legal estate, but "a notional legal estate attracting the doctrine of a *bona fide* purchaser for value without notice, i.e., an estate which prevails over and over-reaches outstanding equitable estates and interests of which the person taking the notional legal estate had no notice at the time of receipt of the unregistered but registrable instrument".[20]

6. "The section does not protect the transferee against equitable estates of which it has notice not amounting to fraud, as does s.43."[21] Since it was found Denton Subdivisions Pty. Limited had notice of the plaintiffs' interest at the time it received its transfer, s.43A could not help the company.

7. The mortgages from Denton Subdivisions Pty. Limited to I.A.C. (Finance) Pty. Limited and Hermes Trading and Investment Pty. Limited, which were in registrable form but not immediately registrable, since they were executed not by Miss Austin, the registered proprietor, but by the company claiming under a transfer in a registrable form from Miss Austin, were not "instrument(s) registrable" within s.43A(1). It was not necessary to decide whether the memorandum of mortgage in favour of Hermes Trading and Investment Pty. Limited failed to qualify due to an error in the testimonium clause.

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[17] At 1093-4.
[18] At 1094.
[19] At 1094.
[20] At 1094. We must assume His Honour means the purchase money is handed over at the same time; if not, his statement may be queried. See n.6.
[21] At 1094.

Hardie, J., it will be noted, did not advert to the position of prior unregistered legal estates, that is, short-term leases; in fact, his language appeared specifically restricted to prior equities.[22] Further comment on the interpretation his judgment evidences must await consideration of the view of the High Court.

THE HIGH COURT

Appeal was brought by Denton Subdivisions Pty. Limited, Hermes Trading and Investment Pty. Limited, and I.A.C. (Finance) Pty. Limited, and heard before Dixon, C.J. and Kitto and Taylor, JJ. The three separate judgments differ so fundamentally that it is proposed to deal with them separately.[23]

Dixon, C.J. was of the opinion that s.43A was inapplicable in the present case.

> This case raises no question of the priority which a registrable instrument may take as a dealing made *bona fide* on the state of the register as against a prior unregistered dealing. Here the title prior in time existed in the form of a registrable instrument lodged for registration, and the competition is with a later registrable instrument made in pursuance of a later transaction.
>
> Whatever be the meaning of s.43A, it cannot give priority to the later dealing over the earlier in circumstances like this.[24]

It would seem the Chief Justice meant, in the second paragraph quoted, to back up his opinion that the section is inapplicable, rather than further observe that the interpretation of the section argued for was incorrect. He answers the query raised by Hardie, J. (see point 4 above) in the negative. The role of s.43A as an extension of s.43 will be discussed shortly, and the reference to registers other than Real Property Act registers in s.43A(2) and (3) certainly indicates that the content of the register is all the purchaser need look to. However, it is not possible to draw any more than this from the judgment.

Both Kitto and Taylor, JJ. seem to consider the section applicable to the situation (although they agree it does not help the appellants).[25] However, Kitto, J. differs from Taylor, J. (and from Hardie, J. in the court below) on the operation of s.43A. The difference stems from His Honour's view that ". . . a registered interest is not . . . some special kind of statutory interest—it is a legal interest acquired by a statutory conveyancing procedure and protected from competition to the extent provided for by the Act, the nature and incidents provided by the general law".[26] With respect, it is submitted that a (common law) legal interest which is subject to and varied by the Act in important aspects (for example, by s.43 in even its truncated form), is in essence a special type of legal interest which for the sake of convenience may be called a statutory legal estate, and His Honour's view of the operation of s.43A clearly recognizes this, whatever differences of terminology there are.[27]

Accepting, therefore, that Kitto, J. regards the notional estate conferred by s.43A(1) as a statutory legal estate, his reasoning seems to be as follows: until registration, a purchaser cannot have more than an equitable interest—s.41. Therefore, he derives, in the period before registration, no priority over

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[22] At 1094. "Section 43A(1) . . . protects the transferee or mortgagee against the effect of notice . . . of outstanding equitable interests. . . ."

[23] Reported in 37 A.L.J.R. 350. [24] At 352.

[25] See below for a further discussion of this point.

[26] At 354.

[27] B. A. Helmore, *The Law of Real Property (N.S.W.)* (1961) at 324; D. Kerr, *Australian Lands Titles (Torrens) System* (1927) at 28, 34, n.4 and cases there referred to.

the holder of a pre-existing equitable interest from absence of notice,[28] and a provision that he is not to be affected by notice of prior interests has no application to him so long as he remains unregistered. Section 43 accordingly does not operate in favour of the purchaser before he becomes registered, that is, before he acquires a legal estate by registration.[29] Section 43A is addressed to this situation; the estate taken under a registrable instrument is given "the same immunity from the effect of notice as s.43 provides for registered estates or interests in virtue of their being legal estates or interests".[30] In the result, fraud apart, a purchaser may obtain a registrable instrument without troubling about any notice he may have received of a trust or unregistered instrument. Denton Subdivisions Pty. Limited would, if Courtenay's transfer had been effectively withdrawn from registration, be entitled to registration of its transfer notwithstanding that before the settlement of its purchase it had express notice of Courtenay's interest.

With respect, this conclusion is submitted to be open to serious doubts in principle and construction. While it may be desirable that an instrument once registered shall not be liable to attack on the ground of notice obtained beforehand of a prior unregistered interest; and while it is also desirable that the purchaser should equally be protected in the period between acquiring a registrable instrument and its registration—a period of administrative delay, generally after payment of the purchase price or mortgage moneys during which he has no further duties—granting of protection against interests of which he had notice before the transaction has reached the stage of his obtaining a registrable instrument is an extension which is undesirable and involves "a striking departure from a fundamental principle of the Torrens system".[31] The extension would also involve a departure from fundamental principles of Old System title; is it to be accepted that the purchaser of an interest in Torrens Title land is to be placed in a position so advantageous as to tend to irresponsibility? Conversely, are the holders of equitable estates or of the few permissible unregistered legal estates in Torrens Title land to be denied even a scintilla of the protection they would be entitled to were their land not under the Act? While s.43 has the operation it has been held to have—and it was not amended in 1930—what would otherwise be a logical method of enlargement of the protective provisions of the Real Property Act has serious faults. Although even invocation of "fundamental principle" cannot stand before legislative prescription, the amendment to s.74, passed at the same time as s.43A was added to the Act, indicates the latter section was not intended to have such a wide operation.

Moreover, on His Honour's view the notional (statutory) legal estate would never be invoked, because exactly the same reasoning by which His Honour concluded that s.43 would not operate until registration would lead to the result that there were no ill-effects of notice which would make them-

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[28] Here he refers to *Phillips* v. *Phillips* (1862) 4 De G.F. & J. 208 at 215, 216; 45 E.R. 1164 at 1166; *Abigail* v. *Lapin* (1934) A.C. 491 at 498, 499, 504.

[29] Let it be noted at this stage that Kitto and Taylor, JJ. decisively rejected the attempt to give s.43 some effect before registration. This is in line with previous decisions, e.g., *Templeton* v. *Leviathan Pty. Limited* (1921) 30 C.L.R. 34 at 54, 55. It is a reaffirmation by the High Court of a view on which the Privy Council has so far refused to commit itself (see *Abigail* v. *Lapin* (1934) A.C. 491 at 509) but would seem to bear out Baalman's forecast (*Commentary on the Torrens System* (1951) at 170) that "the addition of s.43A may preclude s.43 from ever being given its literal meaning, say in an appeal to the Privy Council".

[30] The quotation, and the reasoning, are found at 354.

[31] See P. R. Watts, *loc. cit.* 87, quoting Webb, J. in *Cowell* v. *Stacey* (1887) 13 V.L.R. 80 at 84. It is submitted that the fundamental principle stressed by Kerr, *Australian Lands Titles* (*Torrens*) *System* (1927) at 9 should not be departed from more than is necessary.

selves apparent until *actual* registration, and therefore no protection was needed until this time. This involves a strict attitude to the words "for the purpose only of protection against notice", but His Honour seems willing to adopt it.[32]

Kitto, J. does not refer to the problem discussed earlier of the relationship of s.43A to s.42(d), which would seem to present a major obstacle to his view. It is to be noted that Taylor, J. rejects the suggestion that "legal estate" means "estate of the registered proprietor", and that the section is intended to advance in point of time the protection afforded by s.43 on registration, on the convincing grounds:

(a) if this had been intended, it would have been a simple matter to say so;
(b) the obviously intended relationship of s.43A and s.42(d) precludes it;
(c) the presence of sub-sections (2) and (3) in s.43A similarly precludes it;
(d) were this so, notice either before or after the acquisition of a registrable instrument would be quite irrelevant. He therefore holds that s.43A can and should protect only against notice acquired subsequently to obtaining the registrable instrument.[33]

On two other points the judgment of Kitto, J. contains curious and, it is submitted, doubtful propositions. After stating that a purchaser may obtain a registrable instrument without troubling about notice received, he continues:

> Provided that he lodges his instrument for registration before the holder of a competing prior interest renders the purchaser's instrument no longer registrable by lodging a registrable instrument for registration or entering a caveat, s.36(1) will ensure that the purchaser obtains registration and thus obtains the protection of s.43 (see also s.36(3)).[34]

Surely lodgment of another registrable instrument does not *per se* detract from a right once obtained of the holder of the original registrable instrument? At any time prior to registration priority could be litigated, and it would not turn on s.36(1), but rather on the court's resolution on other grounds of the rights between two registrable instruments—as to which His Honour gives no hint. The view propounded by the learned judge leads him to the conclusion that Denton Subdivisions Pty. Limited could have gained priority if Courtenay's prior application for registration had been lawfully determined.[35] Making the procedural act of lodgment thus govern priority before registration (as distinct from priority of registration) is a novel proposition.[36]

Similarly, entry of a caveat confers no interest in the land in respect to

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[32] See at 354 where, after referring to these words, the learned judge says: "Something which is less than a legal estate is to be deemed a legal estate for the purpose of the protection against notice which s.43 provides for a legal estate."

P. R. Watts, *loc. cit.* 87, objects to a similar interpretation of the section on the ground, apparently, that due to the restricted interpretation of s.43 that section does not have any independent operation; rather, s.42 gives the protection against prior notice upon registration. He refers to Higgins, J. in *Templeton* v. *Leviathan Pty. Limited* (1921) 30 C.L.R. 34 at 69-70:

> . . . when a proprietor, B, is under an equitable obligation to A as to the land and by contract with C comes under an obligation to C, of the two equitable obligations that of A prevails—until registration of C. If C becomes registered, his right prevails over the right of A by virtue of sec. 72 (N.S.W. s.42) not of s.179 (N.S.W. s.43).

Therefore there is no operation of s. 43 which can be extended by s.43A. This interesting proposal, involving the destruction of both s.43 and s.43A, seems more doubtful, and it may be reading into the learned author's article something he would not for a moment have countenanced. Surely s.43 can operate even collaterally to s.42?

[33] At 359.
[34] At 354.
[35] At 355.
[36] It is denied by Taylor, J. in the same case at 361.

which it is lodged; it is only a delaying measure which allows time for initiation of litigation.[37] And although the proviso to s.74 may prevent even this delaying measure, before registration priority may still be litigated by a swift-acting purchaser; it is not correct in all circumstances to say that due to the proviso to s.74 "the holder of the competing interest will not be entitled to the intervention of a court of equity on the ground that the purchaser acquired his right to registration with notice of that interest".[38] Perhaps what lies behind His Honour's statement is the consideration that a notional legal estate once received confers protection against all competing interests, no matter (in his view) when notice thereof was received, and a caveat lodged to protect those interests will be ineffective; this may be so in itself, but it is not relevant when deciding whether the holder of a competing prior interest can prevent a purchaser from obtaining a notional legal estate or render his instrument no longer registrable by lodging a caveat. It is therefore submitted that the learned judge's proviso is against previous authority, and it may be doubted if it will remain unchallenged.

His Honour's use of s.36(1), however, explains how he can apply s.43A to a situation involving competing registrable transfers—the one first lodged takes priority. If, as is submitted, this is not a tenable position, the question arises once more.

Taylor, J. takes a view basically identical to that of Hardie, J. in the court below. It has already been noted that he rejects the interpretation adopted by Kitto, J. He takes as his starting point the consideration that ". . . s.43A of the Act . . . must have been enacted on the basis that the protection afforded by s.43 accrues only upon registration, and in an attempt to make appropriate provision in favour of a purchaser who having upon settlement obtained a registrable instrument has not yet obtained registration".[39] However, "no really satisfactory answer appears as to the meaning of the section. Read literally it accomplishes nothing".[40] Here he is referring to the considerations canvassed above that under the ordinary equitable principles a prior interest will prevail whether the later interest was acquired with or without notice of it, and that if the purchaser has paid his purchase money his position will not be worsened by notice subsequently acquired of a prior equitable interest provided he eventually gets in the legal estate. (He does not refer to the superior position of a trust as regards the doctrine of *tabula in naufragio*.)

"It is, however, not unreasonable to assume that the section was intended to achieve some object."[41] The learned judge concludes it operates to give the holder of a registrable memorandum of transfer priority over an earlier equitable interest when he has, without notice thereof, paid his purchase money and obtained his registrable instrument: he can then assert as against the prior equitable interest that "he has by virtue of the section a legal estate in the land acquired without notice of the earlier interest and he is, therefore, entitled to perfect his title by registration".[42] The legal estate thus notionally acquired is not the estate of a registered proprietor; it affords "at the most, the same measure of protection as that given at common law to a person who has acquired a legal estate in land without notice of some prior equitable interest".[43]

Since he found Denton Subdivisions Pty. Limited had notice of Courtenay's

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[37] *Walsh* v. *Alexander* (1913) 16 C.L.R. 293; *In re Hitchcock* (1900) 17 W.N. 62 *per* Owen, J.; *Butler* v. *Fairclough* (1917) 23 C.L.R. 78 *per* Griffith, C.J.
[38] Kitto, J. at 354.
[39] At 358.
[40] At 359.
[41] At 359.
[42] At 359.
[43] At 359.

interest at the time it acquired its registrable instrument, His Honour found it unnecessary to express any positive view as to the meaning of the subsection.

Taylor, J. also observed on the effect of the order of lodgment of transfers, and of lodgment of a caveat, and his remarks are the antithesis of the remarks of Kitto, J. noted above. He said:[44]

> What we are bound to determine is which of the two competing interests should be allowed to prevail and in resolving this question it is immaterial which was first lodged for registration. If this were not so little would be achieved by the lodging of a caveat to protect an unregistered instrument for the only purpose served by a caveat is to keep the matter in *statu quo* (italics supplied) for a limited time after an instrument dealing with a competing interest has been lodged for registration and so that the caveator may take the appropriate proceedings for the protection of his interest (*Walsh* v. *Alexander* (1913) 16 C.L.R. 293).

It is submitted that this is correct, for the reasons stated above.

Lastly, it may be mentioned that Taylor, J. agrees with Hardie, J. that the mortgagees—although they parted with their money without notice of Courtenay's interest—are not entitled to protection pursuant to s.43A and gives the same reason.[45] Kitto, J. did not refer specifically to this point.

THE APPLICATION OF THE SECTION

What is more serious than the difficulties and differences in the section is that, even as interpreted by Taylor and Hardie, JJ., it does not achieve the object on which the interpretation is founded, namely filling the gap between obtaining a registrable instrument and actual registration. For it seems no protection will be afforded against a legal or equitable interest of which notice is received after obtaining a registrable instrument where that interest was *created* after the registrable instrument is acquired.[46] Thus assume A, the holder of a prior equity, pays his purchase money at settlement and receives a registrable instrument, but before he becomes registered the vendor either purports to grant a legal short-term tenancy to B, or enters a contract of sale of the same property to C; then pending A's registration, B in any event and C, if he can find a ground of postponement of A's equity to his own, may still challenge A's priority.

This deficiency is the more obvious when the subsequent equity is itself evidenced by a registrable instrument. What is the result if two registrable instruments coexist, in each of the three following situations?

(a) A, the holder of a prior equity, gets a registrable instrument prior to the creation of B's equity and the subsequent obtaining by B of a registrable instrument.

(b) A, the holder of a prior equity, gets a registrable instrument after the creation of B's equity but before B obtains his registrable instrument.

(c) A, the holder of a prior equity, gets a registrable instrument only after B has obtained a registrable instrument evidencing his equitable interest.

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[44] At 361. [45] At 362.

[46] See Taylor, J. at 359 in "acquired without notice of the earlier interest"; even more specifically, Hardie, J. at 1093-4, "protection . . . against unregistered estates of (*sic*) interests of which no notice was acquired before settlement but of which notice was or might be received after settlement and before registration". At 1094:

> Section 43A(1) . . . protects . . . against the effect of notice, between the time of settlement and the time of registration, of outstanding equitable interests, *i.e.*, interests created before the date of settlement and brought to the notice of the transferee or mortgagee after settlement but before registration of the instrument in question.

Only in situation (a) is s.43A workable. Since the case in point is an example of that situation, is it to be implied from Dixon, C.J.'s refusal to apply the section that he does not agree with the interpretation of s.43A? In the remaining two situations there is an impasse in which both A and B can claim the benefit of the operation of the section; and even in the first situation B should be the purchaser who is favoured. Yet Taylor, J. does not advert to the possible impasse and concludes *that A (Courtenay) should gain the benefit of the section*, while Kitto, J. avoids the question on grounds previously submitted to be untenable.

In the light of this it is submitted that the view of Dixon, C.J. is to be preferred; s.43A is inapplicable in circumstances where conflicting registrable instruments coexist. It is unfortunate that His Honour gave no reasons for so holding, but it is suggested that an interpretation which is based on the apparent object of legislation but does not achieve that object is a curious phenomenon.

CONCLUSIONS AND SUGGESTIONS

The only easy conclusion is that the meaning and effect of s.43A are by no means clear, and that the judgments evidence this difficulty. The view of Kitto, J., it has been submitted, is doubtful on grounds of construction and perhaps undesirable as well as doubtful in point of principle. The sounder view of those set out is that put forward by Hardie, J. in the Supreme Court and Taylor, J. in the High Court. Of the three learned judges just mentioned, only one, Kitto, J., adopted one of the interpretations outlined in the introduction to this note: the latter two, to overcome the difficulties there set out, found it necessary to abandon the literal wording of the section and look to the object of the legislation.[47] Even they did not specifically relate the section to prior short-term legal tenancies, and in fact restrict their language to prior equitable interests.[48] Thus even a liberal interpretation could not provide a full operation, though a substantial operation was thereby achieved.

It is one thing to analyze and criticize the judgments; it is another to suggest further avenues of interpretation. First, there seems no reason why the section should not extend to confer protection in some circumstances against equities created after the acquisition of a registrable instrument. Unless, however, this holds even when the subsequent equity is evidenced by a registrable instrument, it is likely to be a sterile extension. Examination of the three instances given above will show that an impasse in all three would result: that avenue is therefore closed. Next, is there an acceptable alternative to the statutory/common law designation of the notional legal estate? It has already been suggested that the most acceptable substitute is undesirable. Thirdly, can the words "for the purpose only of protection against notice" be further contorted to yield a more satisfactory result? It is submitted that the interpretation placed on them by Taylor, J. and Hardie, J. is in line with the purpose of the section as well as the maximum desirable deviation from literal meaning.

Thus, unsatisfactory though this may be, Taylor, J. and Hardie, J. seem to extract all it is possible to get from s.43A. It could not be expected that a section whose meaning has been obscure since 1930 should give rise to logical and unanimous conclusions. But the judgments in the instant case, where the applicability of the section is in doubt, its operation the subject

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[47] The rule in *Heydon's Case* (1584) 3 Co. rep. 76 may be called in their favour.

[48] See n.46 also *per* Taylor, J. at 359: "Does the section . . . operate to give the holder of a registrable memorandum of transfer priority over an earlier equitable interest. . . ." And further in the same paragraph.

of fundamental variance, and its treatment unsatisfactory, can only serve to confuse the law and further confound the conveyancer.

R. D. GILES, B.A., Case Editor—Third Year Student

MARSHALLING AND PROTECTED ASSETS

MILES v. *THE OFFICIAL RECEIVER*

In *Miles* v. *The Official Receiver*[1] the High Court[2] was invited to resolve a conflict of judicial opinion which had arisen concerning the application of the doctrine of marshalling to situations where statute partially protected assets of an insolvent estate against its liability for debts. The Court declined the invitation. It considered the matter to be ". . . one both of difficulty and far-reaching importance"[3] but was able to base its decision on independent grounds. The conflict of opinion remains. The issues with which it is concerned invite investigation and an endeavour to discover the true position.

The situation which arose in *Miles* is only to be understood against the background of the doctrine of marshalling as it was developed by the Court of Chancery in the eighteenth and nineteenth centuries, and it is to an examination of the doctrine that one must first turn.

I THE DOCTRINE OF MARSHALLING

In order for marshalling to be applicable there must be two claimants with claims against the same person; one claimant must be able to resort to either of two funds belonging to that person, while the other claimant is able to resort to one fund only.[4] Stated in general terms, the doctrine is that equity will not permit a person having available two funds to satisfy his claim, so to exercise his election between them that a party who has only one fund available is disappointed.

If A (hereinafter called "the double claimant") has the right to satisfy a claim against X from funds 1 and 2 while B (hereinafter called "the single claimant") has, subject to the prior right of A, the right to satisfy his claim from fund 1 only, it is clear that A may, by proceeding in the first instance against fund 1, either wholly or partially defeat the claim of B. If several conditions are satisfied, equity will intervene so that the election of A shall not disappoint B, the object being that both claimants be satisfied to the greatest degree possible. Equity will not interfere with the legal rights of A. It achieves its object by subrogating B to the claim of A against fund 2 to the extent that fund 1 would have satisfied his claim but for its depletion by A.

The doctrine does not operate in such a way as to give the single claimant B unlimited access to fund 2. The process of marshalling makes available to him a portion of fund 2 no greater than fund 1 would have remained if the double claimant A had not proceeded first against it.[5] Suppose A had had a claim for £500 on funds 1 and 2, B a claim on fund 1 for £600, and fund 1 is worth £500 and fund 2 £600. If A satisfied his claim wholly from fund 1, B stands in his place against fund 2 to the extent of £500, not £600.

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[1] (1963) 109 C.L.R. 501, 20 A.B.C. 214, 37 A.L.J.R. 86.
[2] Dixon, C.J., Menzies, Windeyer, JJ. Their Honours delivered a joint judgment.
[3] 109 C.L.R. 501 at 515.
[4] *Ex parte Kendall* (1811) 17 Ves. 513 at 520, 34 E.R. 199 at 201-2 per Lord Eldon, L.C.
[5] *Cradock* v. *Piper* (1846) 15 Sim. 301, 60 E.R. 633 (Shadwell, V-C.).