APPROACH TO THE TORRENS SYSTEM

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The primary cause of trouble in the interpretation of the Torrens System is obscurity of language in the various Acts, which has been aggravated by an awkward arrangement of the sections. But dissension in their judicial interpretation cannot all be put down to those factors. Some of it is attributable to a failure to recognise the fact that the Torrens System is not just a novel form of land registration which has been superimposed on common law conveyancing, but an administrative philosophy in its own right. If every judge who has interpreted the Torrens System could have approached his task with a consciousness of that fact, it is possible that there would have been fewer differences of opinion.

Not only is such an approach justified by the Rule in *Heydon's Case*[2] which requires consideration to be given to the mischief intended by the Act to be remedied; but it is practically dictated either by the titles or the preambles of the various Acts, which proclaim the general legislative intention to simplify or facilitate conveyancing. The main danger in approaching any Act with a preconception of its object, lies in being unable to recognise and admit when the preconception is proved to be a misconception. But guarding against that possibility is merely a matter of self-discipline.

Professor W. N. Harrison (in a recent article[3]) is avowedly opposed to preconceptions of that nature. He commences his article by describing two alternative schemes for the interpretation of an Act, namely —

(1) "approaching it with a preconception of its general effect", which he seems to infer is somewhat illicit, and which "it is wise to avoid"; or

(2) "to take the Act section by section (not forgetting, of course, that it

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[1] The occasion for the writing of this review-article is the publication by Professor W. N. Harrison of an article on the controversial subject of "Indefeasibility of Torrens Title" ((1954) 2 *University of Queensland Law Journal* 206). There is so much disparity between the various Torrens Acts, and so much judicial dissension in the interpretation of them, that it would require quite a lengthy book to do justice to the subject. Even then, it would be found that there are several fundamental issues which, because of conflicting case law, can only be discussed inconclusively. The present paper arises out of the publication of Professor Harrison's article, but, just as the space permissible in a journal article is inadequate for a subject of such complexity, so is the space permissible in a journal review inadequate to do justice to the article. This paper is therefore restricted to little more than a discussion of the general approach to the Torrens Acts, with brief reference to some of Professor Harrison's more controversial sub-titles.

[2] (1584) 3 Co. Rep. 7b.

[3] *Loc. cit.*

must be read as a whole) and to see how far each section, examined without preconception, but in the light of other sections, alters the general law". This method he considers to be "the better plan".

The difference between those two methods of approach is something like the difference between a bird's-eye view and an ant's-eye view. A bird poised aloft would be able to see both the structure itself and the surrounding landscape. It would be more likely than the ant to appreciate why the structure was put there at all, and have expectations of what it will find on descending to examine the parts in more detail.

Choosing the formic method of going systematically from section to section, always on the same plane, is comparable to the self-inflicted handicap of the ascetic who sets out to solve a jig-saw puzzle, and who scorns to take a legitimate look at the picture on the box. There is always the risk that he may not solve the puzzle. Some jig-saws are very difficult; and if the pieces are ill-drawn, or badly cut, the puzzle may not be solvable at all. If one or two of them are overlooked, it will be fatal to the result. Anyone who sets out to solve the Torrens jig-saw needs all the aids to interpretation properly available to him.

Having selected the formic method of approach, one would have expected Professor Harrison not only to commence with, and pay strict attention to, s. 1,[4] but also to throw in the title and preamble for good measure, as they have been repeatedly cited by courts seeking to discover the legislative intention. Instead, with the observation — "After some preliminary provisions, each Act begins with a procedure for bringing under the Act land not subject to it" — he dismisses the very important section which repeals all inconsistent laws. That section[5] sets the stage for the new form of statutory title about to be created, and colours the whole aspect of the structure which follows it. No doubt it was this repealing section more than any other which enabled the Privy Council in *Haji Abdul Rahman* v. *Mahomed Hassan*[6] to say that it was "here dealing with a totally different land law, namely a system of registration of title contained in a codifying enactment".

Changes in the common law effected by later sections would no doubt have been equally effective without this express repeal. Nevertheless it is a beacon pointing directly to that fundamentally important section[7] which extracts from common law instruments all of their operative force, and transfers that force to the acts of the Registrar in certifying title and endorsing memorials of registration. As *Isaacs* and *Rich* JJ. said in *The Commonwealth* v. *N.S.W.*:[8] "It is not the parties who effectively transfer the land, but it is the State that does so, and in certain cases more fully than the party could". This section is no doubt the principal basis for the aphorism — "The register is everything" — which originated in New Zealand[9], was adopted by the Privy Council in *Waimiha* v. *Waione*[10] and has recently been much to the fore in a series of Canadian cases of which *C.P.R.* v. *Turta*[11] is representative. Yet there is no evidence in Professor Harrison's article to show that it had any substantial influence on his reasoning.

One of the expectations which could arise from a contemplation of the

[4] The Torrens System in Queensland is found in The Real Property Act of 1861 (25 Vict. No. 14), as amended, and the system in New South Wales is found in the Real Property Act, 1900 (No. 25 of 1900), as amended. Hereafter, the Act in which a section is to be found is indicated by prefixing "Q." or "N.S.W.", as the case may be, to each reference to a section number.

[5] Q. s. 1; N.S.W. s. 2 (4).

[6] (1917) A.C. 209.

[7] Q. s. 43; N.S.W. s. 41.

[8] (1918) 25 C.L.R. 325, 342.

[9] *Fels* v. *Knowles*, (1906) 26 N.Z.L.R. 604.

[10] (1926) A.C. 101.

[11] (1954) 3 D.L.R. 1.

repealing section is that subsequent sections are going to replace the common law conveyance with something which, at least in its operative function, will bear some resemblance to a conveyance. This resemblance is discernible in a series of sections which could be described as the core around which the rest of the Act is constructed.

The sections which provide for bringing land under the Act have little resemblance to any part of a conveyance. They are more in the nature of scaffolding for the erection of the register-book, on which[12] shall be recorded particulars of all instruments affecting the land to which it relates. Just as a conveyance usually has a prefatory recital of the grantor's seisin or ownership, so the Act paves the way for dispositions of land by creating these folia on which current ownership is to be recorded. And it is important — very important — to remember that the folia included Crown Grants as well as certificates of title. For that fact influences, or should influence, the interpretation of what has become one of the most controversial sections, the section which deals with "every certificate of title" (as distinct from "the register-book") as evidence.

The section previously mentioned which devalues common law instruments and imparts magic to the Registrar's seal[13] is possibly the most important section in the Acts. It is certainly the most revolutionary. Yet Professor Harrison does not mention it. Without grasping the full significance of this section it is difficult to understand the Torrens philosophy that "The register is everything".

The section commences in a negative way by extracting from unregistered instruments the conveying force which their equivalents would have under the common law. It then positively transposes that force, not to the registered instrument, but to the act of registration. "No instrument until registered . . . shall be effectual to pass any estate or interest . . . but upon the registration of any instrument in the manner hereinbefore prescribed, the estate or interest specified in such instrument shall pass . . ." These are the words which correspond to the operative words of a conveyance. But it is the action of a government official in placing a memorial of registration on the folium of the register-book, rather than a re-valued instrument, which effects the change of ownership, and makes the register "everything". The instrument signed by the parties, and which under the common law would effect its own mutations, is nothing more than the medium which motivates the Registrar into effecting them. And even when that instrument is a nullity, it has been held by the Privy Council in *Creelman* v. *Hudson Bay Co.*[14] that a registration based on it is still an effective registration unless set aside at the instance of the proper person before some innocent third party acquires a title based on it.

The courts have read into this operative section the qualification that unregistered instruments are not devalued in equity. There can be little doubt that such was the legislative intention. Still, it might have been better if the Courts had refrained from this act of judicial legislation, and, by giving the section its literal meaning, had forced the legislature to clarify its intention (as South Australia has done) by parliamentary amendments. But even with this judicially authorised departure from the literary meaning, it is still unrealistic to speak (as Professor Harrison does throughout his article) of "unregistered legal interests"; because once land has been brought under the Act, the only common law interests which can affect it are those (such as short-term tenancies) to which the Act does not apply. Torrens legislation knows only two kinds of interest — "registered" and "unregistered". To divide the latter into those which would,

[12] As N.S.W. s. 32 provides.
[13] Q. s. 43; N.S.W. s. 41.
[14] (1920) A.C. 194.

and those which would not, have been equities had they occurred in a different conveyancing sphere, could be an unproductive and possibly misleading occupation.

The resemblance to a conveyance next moves to that which Professor Harrison calls the "paramountcy section", but which could perhaps be more appropriately described in this context as the "habendum section".[15] It states how " . . . the registered proprietor of land . . . shall . . . hold the same . . . " Certainly, paramountcy is definitive of the quality of the proprietor's holding, but he has first to have a holding before it can be given any particular quality. This section is just as important to the Torrens System as the habendum is to a conveyance. Consistently with the principle that the register is everything, this section disencumbers the proprietor's ownership from any interest not notified on the register-book, except those which it expressly mentions. His estate is made indefeasible. It is around some of these exceptions — fraud and error — that the major controversies have raged, but no attempt will be made in the space permissible here to discuss them.

So far as the core of the Act goes, it could finish with the habendum section, just as the functional part of a conveyance finishes with the habendum. There are later sections which expressly protect a registered proprietor from ejectment, or which, by defining his civil remedies, indirectly define the quality or quantity of his estate. But they add little, except by way of repetition, to the measure of indefeasibility conferred by the habendum section. They were probably inserted for more abundant clarity, and by way of confirming the habendum section. They have an effect on Torrens proprietorship comparable to the effect which covenants for title have in a conveyance. It might be said that the State, backed by its assurance fund, is here covenanting with the proprietors for quiet enjoyment, and all that.

Then there is the section described by Professor Harrison as the "notice section", but which is really an "exoneration from notice" section.[16] In the general scheme of the Act, it could have been said to occupy a position corresponding to that of an exoneration clause in a conveyance to trustee with powers. But in *Gibbs* v. *Messer*[17] the Privy Council decided that the section had other functions, and thereby laid the foundations of some of the major controversies on the Torrens System. Apart from that, it could be said that the main functions of this section are to qualify the generally accepted meaning of fraud, and to re-affirm the doctrine that "the register is everything".

The exoneration section could be described, by analogy to the Birkenhead legislation of the 1920's, as the Torrens "curtain". It was Torrens' substitute for the equitable doctrine of notice, which works so very awkwardly both for its victims, and for the person it is intended to protect. Lawyers nurtured on principles of English Equity find it difficult to assimilate the policy that for "notice" they must substitute "notification on the register-book". Nobody has admitted this difficulty more candidly than the Chief Justice of Canada who, in a minority judgment in *C.P.R.* v. *Turta*[18] considered that the exoneration section creates an "intolerable situation". However, there is a modern trend in judicial thought, particularly noticeable in Canada, to treat the section as meaning what it says. Australia still has a "settled law" inconsistent with that trend.

One of the most controversial sections of the Torrens system is that which Professor Harrison describes as the "evidence section"[19] but there is little to

[15] Q. s. 44; N.S.W. s. 42.
[16] See Q. s. 109; N.S.W. s. 43.
[17] (1891) A.C. 248.
[18] (1954) 3 D.L.R. 1. at 2. 3.
[19] Q. s. 33; N.S.W. s. 40.

show that he is conscious of this controversy. He cites *Marsden* v. *McAlister*[20] as an authority for the proposition that it is a major source of indefeasibility to which the paramountcy section should be read as a mere proviso. But he does not mention the opinion of Edwards, J., in *Mere Roihi* v. *Assets Co.*[21] where he said — "If this section is carefully examined it will, I think, be found that it means no more than this; that title may be proved in the courts by production of the certificate of title issued to the registered proprietor, instead of by production of the register".

Between those respective theories there is a very wide gulf. And it is probable that there are more judicial adherents for the *Marsden* v. *McAlister*[22] school of thought than for that of Edwards, J. The outstanding feature of this section is that it refers only to "certificates of title", a point which the former school appears to overlook. Had the section expressly said "duplicate" certificates of title, there would never have been a controversy; its object would have been perfectly clear. Reading the word "duplicate" into the section, as Edwards, J., did, is almost dictated by the omission of any reference to the Crown grants which comprise such a large portion of the register-book. It does less violence to the language than would be done by construing "certificate of title" to include "Crown grant", or, alternatively, to mean "register-book". Yet that would have to be done if the section is to be regarded as definitive of the measure of indefeasibility, instead of merely telling the courts how they are to react to a litigant who produces the duplicate certificate of title instead of the register-book.

Professor Harrison takes a very orthodox stand on *Gibbs* v. *Messer*;[23] that is, orthodox by modern Australian standards rather than by those of Canada and other Torrens jurisdictions. Even in Australia there is an expanding school of thought which is coming to regard *Gibbs* v. *Messer*[24] as peculiar in its own right, without relying for that conclusion on the "explanation" of it in *Assets Co.* v. *Mere Roihi*.[25] It is certainly the genesis of much of the present confusion of thought in Torrens circles.

In a learned article on the "Necktie Case"[26] Sir Arthur Goodhart said that "*Re Polemis* hangs like an albatross around the neck of anyone who attempts to state in reasonably clear terms the general principles on which the law relating to damages is based". One is tempted to borrow that captivating simile and to apply it in a different field to *Gibbs* v. *Messer*,[27] but is immediately confronted with the question — "Who shot *Gibbs* v. *Messer*?"[28] The answer is — "The Privy Council, in the *Assets Case*!"[29] But unfortunately they only wounded it; and a wounded albatross is a much more uncomfortable necktie than a dead one.

Gibbs v. *Messer*[30] was the basis on which Sir John Salmond, in *Boyd* v. *Mayor of Wellington*,[31] composed his metrical cantation about the vacuity of registrations based on invalid instruments; which in turn became the basis of Dixon, J's. judgment in *Clements* v. *Ellis*[32] and of Owen, J's. judgment in *Caldwell* v. *Rural Bank*.[33] But in none of the three cases last mentioned was any reference made to *Creelman* v. *Hudson Bay Co.*[34] In that case the Privy Council refused to disturb a registration based on an ultra vires acquisition by a statutory

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[20] (1887) 8 N.S.W.L.R. 300.
[21] (1902) 21 N.Z.L.R. at 756.
[22] (1891) A.C. 248.
[23] (1887) 8 N.S.W.L.R. 300.
[24] *Ibid.*
[25] (1902) 21 N.Z.L.R. 756.
[26] (1952) 68 L.Q.R. 514, 530.
[27] (1891) A.C. 248.
[28] *Ibid.*
[29] (1902) 21 N.Z.L.R. 756.
[30] (1891) A.C. 248.
[31] (1924) N.Z.L.R. 1174.
[32] (1934) 51 C.L.R. 217.
[33] (1953) 53 S.R. (N.S.W.) 415.
[34] (1920) A.C. 194.

corporation, which was just as void as the acquisitions in *Boyd's Case*[35] and *Caldwell's Case*.[36] So that any philosophy based on Salmond, J's. statement that the estate of a registered proprietor "cannot pass by registration alone without a valid instrument", will need to find some satisfactory "explanation" of *Creelman* v. *Hudson Bay Co.*,[37] which, at the relevant times, was an authority binding all of the courts above mentioned.

There were dicta in the judgment delivered by Lord Buckmaster in *Creelman's Case*,[38] which support the reasoning of Roper, C.J. in Eq., in *Caldwell* v. *Rural Bank*;[39] but, not being necessary for the purposes of the Privy Council's decision, they are not authoritative. They cannot be adequately discussed in the space permissible here. The subject is mentioned merely to show how incomplete is a discussion on the effect of void instruments without taking into consideration all the implications of *Creelman's Case*.[40]

Nobody has ever been known to quarrel with the general statement in *Gibbs* v. *Messer*[41] descriptive of the Torrens principle — "The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register . . . " But on this very occasion two innocent proprietors, who had succeeded in the lower courts, were heavily penalised because they did not go behind the register to make sure that the proprietor was not a mythical person. Instead, they relied on the integrity of the register-book, believing no doubt (along with some very august tribunals) that "the register is everything". Moreover, unlike Mrs. Messer (to whom the lower courts had awarded compensation out of the assurance fund) they had no claim against that fund. They were deprived of their security, not through "fraud or error", but by a judgment of the Privy Council; and the Torrens Acts make no provision for such a contingency. That judgment, as we are bound to accept, declares the intention of the legislature. Of the impact which the declaration has made on subsequent trends in the law, more may be heard anon.

[35] (1924) N.Z.L.R. 1174.
[36] (1953) 53 S.R. (N.S.W.) 415.
[37] (1920) A.C. 194.
[38] *Ibid.*
[39] (1953) 53 S.R. (N.S.W.) 415.
[40] (1920) A.C. 194.
[41] (1891) A.C. 248.