ADVERSE POSSESSION AND THE REAL PROPERTY ACT

BY ROSEMARY OSBORNE*

> Mr Lawson: . . . Is it a fact that there is no provision in the New South Wales Real Property Act whereby persons holding land by adverse possession upwards of 25 years and paying rates thereon can secure a title to it? Is it a fact also that in Victoria under the Transfer of Land Act, which is similar to the Real Property Act of this state, there is such provision? Is it a fact that this is holding up improvements and development of property, and will the Minister look into the position with a view to introducing legislation that will grant a similar title to that conferred by the Victorian Act?[1]

Adverse Possession, Prescription and the Real Property Act 1900 (N.S.W.)

Where land in New South Wales is held under Old System title an occupation of that land inconsistent with the rights of the true owner will extinguish, at the expiration of a prescribed period, the remedy and therefore also the title of the true owner. The person in adverse possession gains a new possessory title despite the fact that his original entry on the land was wrongful. The prescribed period of possession in N.S.W. is provided for in the Limitation Act 1969 (N.S.W.); it is twelve years for private land and thirty years for Crown land.

Where, however, the land is held under Torrens Systems title section 45 of the Real Property Act bars a person from acquiring title to the land by adverse possession. The section provides:

> No title to land adverse to or in derogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any statute of limitation relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of such statute.

The justification for this section becomes apparent when the rationale for the existence of the Real Property Act is examined and compared with that of the Limitation Act 1969 (N.S.W.) and its forerunners.

The aim of the Real Property Act as its preamble states is "to consolidate the Acts relating to the declaration of title to land and the facilitation of its transfer". It seeks to replace a system in which title is proved by the cumbersome procedure of producing title documents (where these exist). At common law under the *nemo dat qui non habet* principle the purchaser acquires no better title than the one which the vendor is able to convey. This means that costly and time consuming searches are also necessary to ensure that the vendor gives good title to the land.

The Real Property Act eliminates both shortcomings by a system of state registration of title. The operative act to transfer title is performed by the Registrar when he registers the instrument. Section 41 provides:

> No instrument till registered in a manner herein before prescribed, shall be effectual to pass any estate or interest in any land under the provisions of this

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1. N.S.W. Parl. Deb., 28 March 1963, 3864.

resident solicitor. The land is bought and sold on the basis that the vendor hands over the title deeds, sometimes roughly endorsed, in return for the purchase price. Unless the registered proprietor or his descendants can be traced the occupier must be satisfied with an equitable title. Later transactions must be handled as if Old System land were involved which defeats the purpose for which the Real Property Act was introduced.[18]

Abandonment: It may be that the registered proprietor has abandoned the land which others (often the purchasers from the original squatter) have occupied and paid rates on for generations. In some cases substantial improvements have been made whilst in others uncertainty of title has deterred development as the risk always remains that the registered proprietor will return and claim the land. One writer blames uncertainty of title for the ugly gaps and unsightly shanties to be found in the streets of many country towns.[19]

Deceased estates: This involves cases in which persons have bought land included in a deceased estate but because of an omission in connection with probate have been denied title by the court because of the possibility of some future claim by heirs who cannot be traced.[20]

Boundary encroachments: These may have arisen because the builder did not develop the housing estate in accordance with the estate plan. In other cases insufficient permanent markers may exist from which boundary blocks can be determined and an adjoining owner may have built fences and even buildings on land which was not his. In many cases the encroachment will have occurred without any objection because the real owner of the land never entered into actual occupation of all the land described in his certificate of title.

Easements of support: At common law every building acquires after twenty years a prescriptive easement of support. If during this twenty years the land is brought under the Real Property Act this is probably prevented. In densely settled areas, especially where buildings are wall-to-wall, this result is unsatisfactory as it leaves the owner of a building powerless, in the absence of an express agreement, to prevent a neighbour excavating the soil to the boundary and thereby causing the collapse of the owner's building.[21] Of course, if negligence can be established, he may have a remedy.

Although one of the objects of the Real Property Act is to substitute certainty and security for uncertainty,[22] paradoxically in these situations title to land would be more certain if the land were not subject to that Act and therefore subject to the Limitation Act 1969 (N.S.W.) under which the passage of time cures all defects in title.

Existing Methods by which a Squatter May Become Registered as Proprietor

In a limited number of situations a possessory title may be converted into a registered one.

Firstly, the provisions of the Trustee Act 1925 (N.S.W.) can be used. In cases where a registered proprietor has been paid the purchase price, the court has power under

18. Wheeler, "The House that Torrens Built – Adverse Possession" (1945) 18 A.L.J. 343, relates a case in which the original registered proprietor had a sufficiently unusual name to enable him to be traced – only to find that he had migrated to Queensland where he had been speared in 1890 leaving no known heirs.

19. Wheeler, *id.*

20. Qld Parl. Deb., 16 November 1952, 1275.

21. Baalman, "Easements under the Torrens System" (1944) 18 A.L.J. 186, 190.

22. Jessup, "The House That Torrens Built" (1945) 18 A.L.J. 302.

section 5 of the Act to declare a constructive trust and make a vesting order in favour of the purchaser or an assignee of the purchaser.[23] These provisions, however, are of limited value as they can only be used in the present context, where the applicant already has an equitable title and is seeking to perfect his title by way of conveyance from the registered proprietor.

Secondly, in areas where rates are required to be paid[24] it is possible for the squatter to buy the property he occupies if he is prepared to pay for it in a sale for non-payment of rates owing for more than seven years.[25]

Thirdly, to facilitate orderly development in situations where the squatter is also a developer, the council may resume the land[26] and after registering it in its name transfer it to the developer.

Fourthly, where a person has encroached on his neighbour's property he may be able to persuade the neighbour to sell him the land; he can then apply to become the registered proprietor of part of a block of land. As the conveyance of part of a block of land would probably amount to a subdivision of land within the meaning of the Local Government Act 1919 (N.S.W.), council permission would have to be obtained.[27]

Fifthly, under the Encroachment of Buildings Act 1922 (N.S.W.) a person may apply to a court for the determination of the boundary between adjoining properties. The court, in its discretion (and usually on payment of compensation[28]) may order the land on which the building encroachment has occurred, to be transferred to the encroacher or may order that he be granted an easement of support.[29] Apart from the Encroachment of Building Act, an equity may exist where it is possible to prove acquiescence on the part of the adjoining owner and ignorance on the part of the encroaching party that the land upon which he built was not his own. In *Ramsden* v. *Dyson and Thorton*[30] Lord Cranworth said that:

> If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere with his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own.

Sixthly, where there has been an accretion to land abutting the sea or a river the title to the land may be construed by a court to include the accretion. It follows that the register no longer accurately describes the land and application to the Registrar-General to have the register corrected may be made pursuant to section 12(d) of the Real Property Act under which the Registrar-General may correct an error in the register.[31]

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23. Trustee Act 1925 (N.S.W.) ss 70, 71.

24. In the Western division, for example, there are no shires and only certain of the larger towns are municipalities – land outside their boundaries is not liable for rating.

25. Local Government Act 1919 (N.S.W.) ss 602-605.

26. *Id.*, s. 532(3).

27. Facto, "Problem of the Encroaching Building" (1941) 15 A.L.J. 11; *Cf.* McKenzie, "Encroachment of Buildings" (1941) 15 A.L.J. 84.

28. The payment of compensation is not mandatory. See Encroachment of Buildings Act 1922 (N.S.W.) s. 3(2). Where compensation is ordered minimum amounts are set – see s. 4(1).

29. *Re W. H. Marsh* (1941) 59 W.N. (N.S.W.) 17.

30. (1866) Vol. 1 L.R. H.L. 129, 140. For a recent trend in this direction see *E. R. Ives Investment Ltd* v. *High* (1967) 1 All E.R. 504.

31. *Verrall* v. *Nott* (1939) 39 S.R. (N.S.W.) 89; Moore, "Land by the Water" (1968) 41 A.L.J. 532; Brereton, "Accretion under the Torrens System" (1932) 5 A.L.J. 328.

For some time there was speculation that title by adverse possession might be acquired in the period between the death of the registered proprietor and the registration of an application (pursuant to section 93 of the Real Property Act) by which title in the land would be transferred to the deceased's executors or heirs. According to this view section 45, taken literally, seemed only to protect the title of the registered proprietor and in this interim there is no such person.[32] In *Spark* v. *Meers*[33] Mr Justice Hope put an end to such speculation. His Honour decided that "title" in section 45 refers to the estate or interest of the registered proprietor which continues to exist after his death and is deemed to rest in the Public Trustee pursuant to section 61 of the Wills Probate and Administration Act 1898 (N.S.W.). Upon the granting of probate or letters of administration the estate vests, restrospectively to the time of death, in the executor or administrator pursuant to section 44 of that Act. The executor or administrator or another person claiming from or through the deceased can then apply to be registered as proprietor pursuant to the transmission application.[34] There is thus no hiatus in the protection given by the register to the interest in land described in the title.

The Position in other Jurisdictions

The existing means of converting a possessory title into a registered one are clearly inadequate. A purchaser under an informal conveyance, for example, may not wish to incur the trouble and expense of applying to a court of equity for a vesting order; moreover there is no way in which a squatter in an area where rates are not levied can obtain title to the land. Most other jurisdictions in which a system of title by registration operates have avoided the difficulties encountered in New South Wales by providing, at least in some circumstances, for the aquisition of title by adverse possession.

Western Australia and Victoria have applied the general law of adverse possession *mutatis mutandis* to land under the Torrens System. Section 42(2)(b) of the Transfer of Land Act 1958 (Vic.) and section 68 of the Transfer of Land Act 1893 (W.A.) specifically exempt from the paramountcy of title of a registered proprietor any rights subsisting under any adverse possession of the land. In this way protection is given to the interest in the land which the squatter has acquired. Whilst the squatter's interest is paramount even before registration,[35] the Acts provide that he may apply to be entered on the register. In addition, machinery exists whereby a person who holds a possessory title to land by virtue of *bona fide* occupation of land inconsistent with actual title measurements, but who has not held this title for the required period, can acquire a legal title by applying to have the register altered in his favour.[36] Similarly, provisions exist by which the Registrar, in cases of completed purchase, is able to vest the title in favour of the purchaser who has entered into occupation.[37]

South Australia, Queensland and New Zealand, in the last thirty years have each amended their legislation to cope with cases in which the registered proprietor has

32. Note, (1962) 35 A.L.J. 408; G. W. Hinde (ed.), *The New Zealand Torrens System: Centennial Essays* (1971) 181.

33. [1971] 2 N.S.W.L.R. 1.

34. For a comment on this case see (1972) 46 A.L.J. 298.

35. *Kirk* v. *Sutherland* (1949) V.L.R. 33.

36. Transfer of Land Act 1958 (Vic.) s. 99(1); Transfer of Land Act 1893 (W.A.) s. 170. See also Real Property Act 1862 (S.A.) s. 223.

37. Transfer of Land Act 1958 (Vic.) s. 47; Transfer of Land Act 1893 (W.A.) s. 183.

either transfered "title" to the land informally or abandoned the land altogether.[38] The provisions of all three[39] permit a person in possession of land in circumstances such that if the land were not subject to the Torrens System he would have acquired title by virtue of the provisions of a limitation statute to apply to the Registrar for the issue of a new certificate of title. Until the register is actually altered the person whose name appears on it retains title to the land and is not affected by reason of the fact that a squatter is in possession. The public is thus able to rely on the register at all times.

A number of safeguards are incorporated to prevent the registered proprietor from being deprived of title except in the two circumstances mentioned. Firstly, every application is scrutinized by the Registrar who may dismiss it if he thinks it has no merit.[40] Secondly, widespread publicity is given to the application by advertisements and by the service of specific notice.[41] Thirdly, any person with any kind of interest in the land can lodge a caveat to prevent the applicant from becoming registered as proprietor of the land.[42] In Queensland and South Australia if the Registrar is satisfied that the caveator is the registered proprietor of the land or has derived an estate or interest through him he must refuse the squatter's application. However, if the caveator is the proprietor of an easement, or in Queensland's case, an estate less than fee simple,[43] a certificate of title may be issued subject to the caveator's interest. Provision exists for any dispute as to the nature or existence of the caveator's interest to be determined by a court.[44] In New Zealand a person has an absolute right of objection only if his interest is a fee simple estate, an estate for life or in remainder or an estate by way of executory limitation.[45] If the caveator has an equitable or beneficial interest he must first establish this to the satisfaction of the Registrar. Upon being given the opportunity, the caveator must then register his interest or satisfy the Registrar that his interest is of a nature that is not capable of being converted into a registrable interest.[46] If the caveator succeeds in one of these alternatives and has an equitable fee simple estate in the land the Registrar must reject the squatter's application.[47] If the caveator has a lesser estate, whether legal or equitable, the

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38. The parliamentary debates in the respective jurisdictions explain the rationale for the change; Qld Parl. Deb., 12 November 1952, 1195; N.Z. Parl. Deb., 12 September 1963, 1869, 17 October 1963, 1869; S.A. Parl. Deb., 12 December 1945, 1281, 18 December 1945, 1364.

39. Real Property Acts Amendment Act 1952 (Qld.) s. 50(1); Land Transfer Amendment Act 1963 (N.Z.) s. 3; Real Property Amendment Act 1945 (S.A.) s. 80a. For a discussion of this legislation see G. A. Jessup, *Forms and Practice of the Lands Titles Office of South Australia* (4th ed. 1963): G. W. Hinde (ed.) *The New Zealand Torrens System; Centennial Essays* (1971); Phillips, "The Land Transfer and Property Law Amendments Acts 1963" [1964] N.Z.L.J. 110, 129; Kelly, "Queensland Torrens Acts Amendments. The Real Property Acts Amendment Act 1952" (1953) 6 Aust. Conveyancer 2, 4.

40. Real Property Acts Amendment Act 1952 (Qld.) s. 54; Land Transfer Amendment Act 1963 (N.Z.) s. 6; Real Property Act Amendment Act 1945 (S.A.) s. 80c, d.

41. Real Property Acts Amendment Act 1952 (Qld.) s. 55; Land Transfer Amendment Act 1963 (N.Z.) s. 7; Real Property Act Amendment Act 1945 (S.A.) s. 80e.

42. Real Property Act Amendment Act 1952 (Qld) s. 56(1); Land Transfer Amendment Act 1963 (N.Z.) s. 8; Real Property Act Amendment Act 1945 (S.A.) s. 80f.

43. Real Property Act Amendment Act 1945 (S.A.) s. 80 f(3); Real Property Acts Amendment Act 1952 (Qld.) s. 56 (2).

44. Real Property Acts Amendment Act (Qld.) ss 56(3), 56(4); Real Property Act Amendment Act 1945 (S.A.) ss 80f(4), 80f(5).

45. Land Transfer Amendment Act 1963 (N.Z.) s. 9.

46. *Id.*, ss 10, 12.

47. *Id.*, s. 10.

Registrar can issue the squatter with a certificate of title, but that title must be subject to the legal or equitable interest of the caveator.[48]

In Tasmania the courts have held,[49] and the Legislature has confirmed,[50] that the statute of limitations applies to land under the Torrens System. The courts, however, held that the squatter's possession was adverse to the certificate of title rather than the interest of the registered proprietor. Consequently whenever an alteration was made to the register, irrespective of whether the squatter had been in possession for the limitation period, time began to run afresh. A newly issued certificate of title "acts like a wet sponge and wipes the slate clear".[51] This result was altered in 1974 by an amendment to the Real Property Act 1862 (Tas.).[52] Although the registered proprietor continues to be able to defeat by a registered dealing an unregistered title acquired by adverse possession[53] time does not begin to run afresh whenever a dealing with the land is registered unless the squatter's interest has actually crystallized. This enables the squatter to add together periods of adverse possession against successive registered proprietors.

The greatest shortcoming of the legislation in both Victoria and Western Australia is that it fails to maintain the reliability of the register. Another shortcoming derives from the fact that limitation statutes are not concerned with the merits of a particular case but aim solely to ensure an end to litigation. As a result no provision exists to prevent the unscrupulous squatter, who literally steals land from becoming registered as proprietor.

Few would disagree that one who has bought land by an "off-the-register" dealing should be able to become registered provided he is able to satisfy the Registrar of this fact. It may also be expedient to permit a person to take land by open and notorious possession in circumstances in which it is reasonable to assume that the registered proprietor has abandoned his interest, but there is a vast difference between this and allowing title to be acquired by stealth thereby depriving unsuspecting persons of their rights.[54] This may quite easily occur at common law in sparsely populated areas. For example, a person squatting on land that he knows is rarely visited by the owner might, weighing the risks involved, deem it worthwhile to squat for the duration of the twelve-year limitation period despite the possibility of the owner returning and subsequently bringing an action of trespass.

The Tasmanian approach maintains the reliability of the register but like the Victorian and Western Australian approaches, allows indiscriminate conversion of possessory titles into legal ones. If the squatter has been in adverse possession for twelve years there is nothing the registered proprietor can do to prevent the squatter's becoming registered once the latter has applied for registration.[55]

Apart from the possibility of land stealing injustice may result in cases involving

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48. *Id.*, ss 11, 12.

49. *Featherstone* v. *Hanlon* (1886) Badger (No. 4), Tas. Digest col. 107; *Re Bartlett* (1907) 4 Tas. L.R. 26.

50. Real Property Act 1862 (Tas.) ss 146-156.

51. *Hunter* v. *Player* (1875) 9 S.A.L.R. 100, 102.

52. S. 156A.

53. S. 156.

54. Moss, "Conversion of Titles – Adverse Possession" (March, 1966) Law Soc. N.S.W. Journal 17.

55. Until the squatter lodges an application the registered proprietor can, of course, defeat the squatter's interest by registered transfer of the property to a third party. See Real Property Act 1862 (Tas.) s. 156.

boundary disputes. The proprietor may actually have known that his neighbour was encroaching but took no action because the irregularity was small and the expense of rectification great. Again there is little that the owner of property whose boundary is marked by a river can do if it changes course from time to time. In neither case has the registered proprietor abandoned his interest.

South Australia, Queensland and New Zealand have avoided this problem by permitting the registered proprietor to block attempts by the squatter to become registered by lodging a caveat. New Zealand and Queensland in addition prohibit acquisition of boundary land by adverse possession.[56] There is an additional reason for this. The Torrens System enables absolute and permanent certainty of boundaries to be achieved. To substitute for this certainty, ownership according to such unstable features as fences was regarded as a retrograde step.[57] The approach used by South Australia, Queensland and New Zealand is not beyond criticism. Whereas under the Tasmanian, Victorian and Western Australian approach injustice may result because the registered proprietor can under no circumstances prevent the squatter's becoming registered in his place, under the approach of the other States injustice may result because the Registrar must reject the squatter's application, at least if the registered proprietor of the fee simple lodges a caveat, regardless of the term of the possession by the squatter, or the circumstances under which he first obtained possession. For example, a case may arise in which the registered proprietor deliberately abandoned the land. A squatter took possession and substantially improved the land. Many years later when the descendants of the squatter apply for registration and notice is served on the descendants of the registered proprietor the latter are reminded of its existence and lodge a caveat. The Registrar *must* reject the squatter's application and the registered proprietor is free to proceed with an ejectment action to recover what may now be a very valuable piece of real estate.

Modification of Section 45 of the Real Property Act 1900 (N.S.W.)

Before suggesting the best approach for New South Wales to adopt, a number of factors which will bear on the form that the legislation will take must be pointed out:

Qualifying period: A decision must be made as to the period of adverse possession which a squatter must prove in order to establish a right to become registered. Should the period be the same as that which applies to Old System land – namely twelve years? Should a person who acquired land by an "off-the-register" dealing be made to wait such a long time?

Disability of registered proprietor: A related problem is that of how to deal with future interests – remainders and reversionary interests under which the right to possession has not yet accrued – and persons under a disability. Under the New Zealand legislation, for example, unless the squatter can negative disability on the part of the registered proprietor, he must prove thirty years adverse possession. If he is able to negative any disability he need only prove twenty years adverse possession. It is difficult to see (fraud apart) how any squatter can know, let alone prove, that the owner is not mentally ill or an infant.[58]

Crown land: Another problem is that of possession adverse to the Crown. Under the general law the period of adverse possession required in respect of Crown land is longer

56. Real Property Acts Amendment Act 1952 (Qld.) s. 47; Land Transfer Amendment Act 1963 (N.Z.) s. 21 (e) & (f).

57. Moss, note 54 *supra.*

58. Ruoff, "On Proving a Squatter's Title" (1953) *The Law Journal* 743; Land Transfer Amendment Act 1963 (N.Z.) s. 4.

than that required for other land,[59] the rationale being that much longer periods may elapse between visits by officials to Crown land and hence discovery of squatters.[60] New Zealand has overcome this difficulty by excluding Crown land from the provisions permitting acquisition of title by adverse possession. Land held in trust for public purposes and land held by local bodies is also excluded.[61]

Adverse possession by successive independent squatters: At common law possession by successive independent squatters can be added together.[62] This means that a situation may arise in which, as against the documentary title to the land, there has elapsed a prescribed period of adverse possession; the documentary title is thus barred. However, the most recent squatter on the land might not have been in occupation for the full limitation period, and his possessory title might thus not be sufficient to bar the possessory title of earlier squatters. Who should be registered as proprietor? This problem arises because it is impossible to employ a concept of relative titles under a system of title by registration – one person only can be regarded as the "owner". New Zealand's answer has been to require the squatter to prove some form of succession, purchase or right constituting sufficient chain of title in equity if he desires to rely on periods of adverse possession by earlier squatters.[63]

Status of sub-standard parcels: A decision must be made as to whether title should be conferred by occupation of sub-standard parcels, regardless of town planning provisions in the Local Government Act, or whether possessory title must be frustrated unless the occupied parcel corresponds to a lot in a lawful subdivision.[64]

Stale mortgages: Consideration should also be given to the question of conferring on the Registrar authority to cancel registration of stale mortgages.[65] South Australia, for example, permits the Registrar, if satisfied that the mortgagee's personal remedy has been barred by the Limitation Act, to make an entry to this effect in the register. Upon the making of this entry "the mortgage [is] . . . deemed discharged". The Land Transfer Act 1952 (N.Z.) confers this power on a court.[66]

Innocent acquiescence by registered proprietor: Care must be taken to protect a registered proprietor who has tolerated forms of occupation, for example, exclusive possession by a co-owner, in the belief that title by adverse possession cannot be acquired in Torrens System land.

Occupation by licence: The decision in *Hughes* v. *Griffin*[67] creates some problems. In that case it was held that to form a good root of title occupation must be "adverse" and that a licensee who originally occupies with the licensor's permission, cannot

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59. In the case of private land the period in New South Wales is twelve years, in the case of Crown land thirty years. Limitation Act 1969 (N.S.W.) s. 27.

60. Report of the New South Wales Law Reform Commission on *Limitation of Actions* (1967) para. 164.

61. Land Transfer Amendment Act 1963 (N.Z.) ss 17, 21.

62. See also Limitation Act 1969 (N.S.W.), s. 38.

63. Phillips, note 39 *supra,* 112.

64. Grimes, "Conversion of Title – Adverse Possession" (Dec., 1965) Law Soc. N.S.W. Journal 117.

65. *Ibid.*

66. Real Property Act Amendment Act 1945 (S.A.) s. 148(a); Land Transfer Amendment Act 1963 (N.Z.) s. 122.

67. [1969] 1 W.L.R. 23.

satisfy this requirement.[68] The decision is of significance because the possession of a purchaser in an "off-the-register" transaction may originally be referable to the leave and licence of the vendor.

Degree of protection: Other problems which must be considered in any attempt to reform the law are those of acquisition of possessory interests against limited interests such as leases, whether there should be protection of equitable interests and the question of the extent to which title acquired should be burdened and benefited by rights notified on the register.[69]

Boundary encroachments: A decision must be made as to whether boundary encroachments should be handled in the same way as adverse possession of other land. New Zealand and Queensland, it will be recalled, do not permit acquisition by adverse possession by way of boundary encroachment.[70]

Prescriptive rights: Finally, a decision must be made as to whether acquisition of prescriptive rights should be allowed. The majority of an English Law Reform Committee[71] which investigated the process of acquisition of easements and profits a prendre by prescription recommended the abolition of prescriptive rights except in the case of easements of support. In their opinion no comparable social need to the need for certainty of title which adverse possession promotes exists in the case of prescriptive rights other than easements of support.[72] The Committee also pointed out that where a system of title by registration is in force prescriptive rights constitute a more troublesome infringement of the indefeasibility concept because such rights are unlikely to be visible on inspection of the land.[73]

With the above factors in mind it is submitted that changes of the following nature should be made to the existing New South Wales legislation to overcome the problems created by the absence of any straightforward means of acquiring title to land by adverse possession or prescriptive rights in or over land which is under the Torrens System.

(1) The Registrar should be empowered to make a vesting in cases of completed purchase. This solves the problem created by informal transfers without resort to the doctrine of adverse possession and thus avoids any difficulties which the decision in *Hughes* v. *Griffin*[74] may have created.

(2) The Encroachment of Buildings Act 1922 (N.S.W.) which provides "a realistic method of settling boundary disputes without seriously interfering with indefeasibility of title"[75] should be extended to cover not only buildings but other boundary encroachments. Any disturbance of the register will be a matter for a court which can decide whether compensation should be paid to the registered proprietor.

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68. There are no provisions of the Limitations Act by which permission is judged to be determined in the case of licensees. But compare tenancy at will where the relationship is determined by statute at the end of either one year or the particular period of the tenancy (Limitation Act 1969 (N.S.W.) s. 34). See Jackson, "The Legal Effects of the Passing of Time" (1970) 7 M.U.L.R. 407, 419. *Cf. Bridges* v. *Mees* [1957] 2 All E.R. 577.

69. Grimes, note 64 *supra.*

70. Note 56 *supra.*

71. Law Reform Committee, *Acquisition of Easements and Profits by Prescription* (1966) Cmnd 3100.

72. *Id.*, para. 32.

73. *Id.*, para. 34.

74. [1967] 1 W.L.R. 23.

75. T. E. F. Ruoff, *An Englishman Looks at the Torrens System* (1957) 23.

(3) An amendment to the Real Property Act 1900 (N.S.W.) should be introduced incorporating the following features:

(a) In order to protect a squatter's interest and at the same time preserve the reliability of the register, provision should be made to enable a squatter to lodge a caveat as soon as his possession has crystallized, irrespective of whether he applies at the same time to become registered as proprietor. Once a caveat is lodged no dealings with the land will be registered until the squatter becomes registered as proprietor and removes the caveat. If, however, the squatter omits to lodge a caveat his interest may be defeated by a registered transaction between the registered proprietor and a third party even though the registered proprietor's title has been extinguished by the squatter's adverse possession.

(b) A squatter whose interest is *inchoate* will not have his interest extinguished by a registered transaction between the registered proprietor and a third party. This means that the squatter can add together periods of adverse possession against successive registered proprietors. Preservation of the squatter's interest in this situation will not impair the reliability of the register.

(c) A proviso should be included that section 50(2) of the Conveyancing Act 1919 (N.S.W.) does not apply to Torrens System land.

(d) Applications for registration should be restricted to a squatter who claims to have been in possession of private land for a minimum of twelve years or thirty years if the land is Crown land as defined in section 55(1) of the Crown Consolidation Act 1913 (N.S.W.). It should be unimportant whether the squatter has been on the land himself for this entire period or whether his squatting completes the period of adverse possession required to bar the title of the registered proprietor *provided* he can prove an assignment or devolution from the earlier squatter or squatters on whose adverse possession he relies.

(e) An application should not be entertained if based on adverse possession of land held for public purposes, such as a public reserve or a drainage area.

(f) In a case where the mortgagor has remained in possession, adverse possession should be treated as commencing from the date fixed for redemption of the mortgage.[76] If the mortgagor remains in adverse possession for a period of twelve years thereafter the mortgagee's title should be treated as extinguished.

(g) The proposal to register a squatter's application should be advertised in a local newspaper (that is, one circulated and printed in the area in which the land is situated) and in a mass circulation newspaper. The advertisement should invite any person, including the holder of an equitable interest or an interest less than the fee simple estate, who wishes to dispute the application, to lodge a caveat within one month of the date on which the advertisement appeared in the newspaper. Specific notice should also be served on persons thought to have an interest in the land and a copy of the application notice posted in a conspicuous place on the land for one month.

(h) Where a caveat is lodged a court should decide the issue on its merits and in its discretion order the squatter or the owner to pay compensation, or order the squatter to take the certificate of title.[77] If the court decides that the squatter should be

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76. This follows the decision in *Purnell* v. *Roche* [1927] 2 Ch. 142. *Cf.* Real Property Act 1862 (Tas.). s. 158(1).

77. This approach enables justice to be done in such cases as *Sparks* v. *Meers* [1971] 2 N.S.W.L.R. 1.

registered as proprietor, a new certificate of title should be issued. This should be made subject to such encumbrances and appurtenances as the court specifies.

(i) Where a caveat has not been lodged and the Registrar is satisfied that the claim is made out, a new certificate of title should again be issued and should be made subject to such encumbrances and appurtenances as have not been determined or extinguished by the squatter's adverse possession according to the general law.[78]

(j) If the Registrar is not satisfied that the caveator has the interest which he claims to have the Registrar should give notice to this effect to the caveator. The caveator should then be permitted to take immediate *ex parte* proceedings to establish his title to the estate or interest.

(k) In order to protect the Registrar against claims by persons entitled to successive estates or persons with disabilities the Registrar should require the applicant to register a memorandum charging the land with any sum which might subsequently be awarded against the Registrar for his action in registering the squatter. Such a memorandum should not be required where all possible claims have already been barred by the Limitation Act 1969 (N.S.W.). In other cases the encumbrance should lapse when in accordance with that Act all possible claims have been barred.[79]

(4) In relation to the support of buildings by land and by other buildings a new system should be instituted along the lines suggested by the English Law Reform Committee.[80] No other prescriptive rights should be capable of being acquired in Torrens System land.

(a) A person should acquire no right of support against a neighbour unless, before starting to build, he serves notice upon his neighbour of his intention to try and settle the matter by agreement.

(b) If the neighbour objects the matter should be referred to a court which is empowered, if satisfied that the neighbour would be inhibited in the enjoyment or exploitation of his land by an easement of support, to determine that no right of support should be acquired except on the payment of compensation.

(c) If the matter is not disposed of by agreement and the neighbour makes no objection the person should be free to proceed with his building and acquire immediately all such rights of support against the neighbour as the building may require.

Although the above changes to existing New South Wales legislation are no panacea, it is submitted that they offer a more satisfactory solution to existing problems than the legislation in force in other jurisdictions.

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78. *Cf.* Real Property Act 1862 (S.A.) s. 151.
79. Limitation Act 1969 (N.S.W.) s. 51.
80. Note 71 *supra*, para. 89.