PUBLIC RIGHTS AND OVERRIDING STATUTES AS EXCEPTIONS TO INDEFEASIBILITY OF TITLE

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[The article outlines two exceptions to the indefeasibility of registered title: public rights of way which are 'paramount interests' under the Torrens legislation, and interests created by other overriding statutes. Drawing on the criticisms of Pratten v Warringah Shire Council *made by Young J in* Quach v Marrickville Municipal Council, *the author argues that failure to distinguish between the two exceptions has flawed the reasoning in several leading cases. The path by which this confusion occurred is traced, and the author advocates a return to the orthodox principles for resolving a conflict of statutes as applied by a majority of the High Court in* South-Eastern Drainage Board (SA) v Savings Bank of South Australia.*]*

I INTRODUCTION

It has been suggested that the doctrine of precedent plays a different role in the interpretation of statutes from its part in the development of the common law.[1] Whereas the common law evolves by means of a process of deduction and induction, the interpretation of statutes is deductive only. Deduction involves the application of a general rule to the facts of a particular case. Induction is the process by which decisions made sporadically by previous courts in specific instances are generalised and explained by a comprehensive principle or set of principles.[2] The doctrine produced by the synthesis of previous cases becomes in turn what the American jurist Judge Cardozo called a 'new stock of descent' from which decisions in subsequent cases can be deduced.[3]

In the case of statutes, the legislative text provides the only authoritative source of principle. As Windeyer J observed in *Damjanovic & Sons Pty Ltd v Commonwealth*,[4] the words of the statute always provide the major premise, leaving no room for the erection of secondary principles of law independently of the statute. It follows that for the purpose of interpreting a particular statute, prior judicial decisions on the construction of similar provisions in different statutes can be of no more than persuasive value.[5]

That these two rules are not always strictly observed in the interpretation of

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The author gratefully acknowledges the assistance of Professor Marcia Neave for her comments on an earlier draft of this article.

1 *Damjanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390, 408-9; Sir Owen Dixon, *Jesting Pilate: and Other Papers and Addresses* (1965) 13; D Pearce and R Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988) 3-4.

2 The decision of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 is often cited as an example of the establishment of a new doctrine by inductive reasoning.

3 Benjamin Cardozo, *The Nature of the Judicial Process* (1st published 1921, 1963 ed) 49.

4 (1968) 117 CLR 390, 408-9.

5 *Ogden Industries Pty Ltd v Lucas* [1970] AC 113, 127; Pearce and Geddes, above n 1, 3-4.

legislation affecting property rights is illustrated in cases such as *Pratten v Warringah Shire Council*[6] and *Trieste Investments Pty Ltd v Watson*[7] in which judges review prior decisions in search of general principles for resolving conflicts between the Torrens statutes and other enactments. In discussing the grounds on which the prior cases were decided, matters which are indicators of legislative intent in a particular statute are at times treated by the learned judges as secondary principles of law. Previous decisions on other statutes are examined not so much to discover principles for interpreting the statutes but to identify classes of unregistered rights which 'stand outside the Torrens System', immune from defeat by registered title, and which can by a process of analogy be extended to cover the particular right in question.

II THE INDEFEASIBILITY PROVISIONS

Professor Hinde summarised the objectives of the Torrens System with admirable succinctness as follows:

> The Torrens System was designed to confer three great benefits on landholders and conveyancers — first, a complete and reliable register which would show on its face all the facts relative to the registered proprietor's title; secondly, the protection against loss which, under the general law, could result from defects in a vendor's or mortgagor's title; and thirdly a State guarantee of the truth of the facts shown on the register.[8]

The kernel of the Torrens System of title to land is the principle of indefeasibility of registered title. While there are variations in the way that the principle is expressed in the Torrens statutes of the various States and Territories, all have a version of a provision known generically as the paramountcy section.[9] Section 42 of the Transfer of Land Act 1958 (Vic), for example, provides that a registered proprietor of land shall, except in the case of fraud, hold the land subject to encumbrances notified on the certificate of title but absolutely free from all other encumbrances whatsoever, subject to exceptions specified in the section. The core principle of indefeasibility affirmed in that section is reinforced by the auxiliary provisions in ss 40-44.[10]

The principle has two limbs, each of which is only imperfectly achieved. The first is retrospective in its effect. Except in the case of fraud, the title is valid despite any irregularities leading up to its registration. It is the registration and not the instrument or underlying transaction that serves as the source of title.

6 [1969] 2 NSWR 161 (*Pratten*).

7 (1963) 64 SR (NSW) 98 (*Trieste*).

8 G Hinde, 'The Future of the Torrens System in New Zealand' in J Northey (ed), *The A G Davis Essays in Law* (1965) 77, 127-8.

9 See Transfer of Land Act 1893-1991 (WA) s 68; Real Property Act 1886 (SA) s 69; Land Titles Act 1980 (Tas) s 40; Real Property Act 1861-1992 (Qld) s 44; Real Property Act 1900 (NSW) s 42.

10 Recent cases in Victoria raise another important issue of whether these sections provide for immediate or deferred indefeasibility: *Chasfild Pty Ltd v Taranto* [1991] 1 VR 225; *Vassos v State Bank of South Australia* [1993] 2 VR 316; *Eade v Vogiazopoulos* (Supreme Court of Victoria, Smith J, 22 December 1992). The issue raised in these cases does not directly impinge on the points pursued in this article.

Therefore the title is immune from challenge on the grounds of defects such as might have invalidated an interest under the general law system of conveyancing. Secondly, a registered interest takes priority over unregistered interests and over subsequently registered interests in order of registration. To each limb of the principle there are numerous exceptions. Some of the exceptions are provided expressly or impliedly by the Torrens statutes themselves, some are exceptions permitted by the courts, and some arise from the provisions of overriding statutes which conflict with the indefeasibility provisions.

Apart from intrinsic exceptions to indefeasibility created by the Torrens statutes themselves, unregistered interests created under other statutes may take priority over that of the registered proprietor if an overriding statute so provides. The provision for priority of the unregistered interest may be expressly stated in the parent statute or may arise by necessary implication from its terms.[11]

III TYPES OF OVERRIDING STATUTES

It has been said by many commentators that the greatest threat to achievement of the objectives of the Torrens System is posed by the numerous statutes which create interests in land without the need for them to be registered or otherwise recorded in the register.[12] Professor Hinde suggested that the rights created by overriding statutes are of three kinds.[13] The first kind are interests which depend upon registration to be enforceable against the registered proprietor's successors. Interests of this kind are in no way inconsistent with the Torrens System. The second kind are rights which do not need to be registered but which override registered interests by force of the statute that gave rise to them.[14] The third type of rights are those which are capable of registration but which will affect the title even if unregistered.[15]

The first type of right identified by Professor Hinde hardly merits being considered the work of an overriding statute. The creation of a statutory interest dependent for its efficacy upon registration involves no conflict with the Torrens provisions so long as priority remains in order of registration. The two remaining classes of statutory interest differ from each other only on the question of whether there is provision for the interest to be recorded on the register. The reason for making the distinction owes much to judicial pronouncements in several cases that the indefeasibility normally accorded a registered proprietor only avails against other registrable interests.[16] As Professors Sykes and Walker

[11] *Miller v Minister for Mines* [1963] AC 484, 498 (*Miller*).

[12] L Esterman and J O'Keefe, 'The Impact of Other Statutes on the Land Transfer System' in G Hinde (ed), *The New Zealand Torrens System Centennial Essays* (1971) 210, 212; Hinde, above n 8, 79.

[13] Hinde, above n 8, 87; this tripartite classification was also used by Professor Whalan: Douglas Whalan, *The Torrens System in Australia* (1982) 338-40.

[14] An example of such a right is the mining licence under the Mining Act 1926 (NZ) considered in *Miller* [1963] AC 484.

[15] An example of such a provision is Local Government Act 1919 (NSW) s 398 (now repealed) considered in *Pratten* [1969] 2 NSWR 161.

[16] *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603, 633 (Evatt J); *Trieste* (1963) 64 SR (NSW) 98, 102 (Herron CJ).

have pointed out, this proposition cannot be correct, as registered title overrides unregistered equities unless they are enforceable against the registered proprietor *in personam*. The better view is that the registrability of a statutory interest is simply one factor to be considered in determining whether the statute that gave rise to the interest was intended to override the Torrens provisions.[17]

The type of overriding statute considered in this article is that which authorises the creation of proprietary interests in land which bind the land whether the interests are registered or not. This is only part of a wider problem presented by a myriad of statutes authorising decisions to be made affecting land by creating rights over it, such as easements or rights of access or entry, or by imposing charges or obligations upon owners of land.[18] Purchasers of the land may be affected by administrative decisions the existence of which is in many instances difficult to discover before purchase.[19]

Another type of overriding statute is that which prohibits, in specified circumstances, the creation or the acquisition of an interest, or the conclusion of a transaction that underlies the creation or acquisition of an interest.[20] Where a registered interest arises in circumstances accompanied by a contravention, the other statute may conflict with the indefeasibility provisions which ordinarily validate titles despite underlying defects. This type of overriding statute raises issues not directly relevant to those examined in this article.

A *Compulsory acquisition*

There are three main types of statutes that create interests in land which are effective without registration. The first are the statutes authorising the compulsory acquisition or resumption of land. The Land Acquisition and Compensation Act 1986 (Vic) provides a single set of procedures for the compulsory acquisition of interests in land for public purposes. A number of the provisions of the Act are directed to ensuring that the register presents an accurate account of the acquisition proceedings. Under s 10 of the Act, where an acquiring authority intends to acquire an interest in land it must without delay lodge with the Registrar notice of its intention, and the Registrar must then

[17] Edward Sykes and Sally Walker, *The Law of Securities: An Account of the Law Pertaining to Securities Over Real and Personal Property Under the Laws of Australian Jurisdictions* (5th ed, 1993) 492-3; for a similar view see Peter Butt, *Land Law* (2nd ed, 1988) 532.

[18] Law Reform Commission of Victoria, Discussion Paper No 3, *The Torrens Register Book* (October 1986) 8-9; Law Reform Commission of Victoria, Report No 12, *The Torrens Register Book* (November 1987) 3-7, 12-15.

Ms Jude Wallace, formerly the Commissioner in charge of the VLRC's reference on land law, said that an unpublished survey undertaken by the Commission in the mid 1980's identified some 250 provisions of this type in Victorian statutes: discussion with the author, 29 September 1993.

[19] Information concerning decisions affecting land made under the majority of these statutes is not available from Victoria's Landata computer-based land information system. The Sale of Land Act 1962 (Vic) s 32(2)(e) requires pre-contract disclosure by vendor to purchaser of particulars of certain government actions namely any notice, order, declaration, report, recommendation or approved proposal affecting the land of which the vendor might reasonably be expected to have knowledge: Law Reform Commission of Victoria, Discussion Paper No 3, above n 18.

[20] An example of such a provision is Industrial Arbitration Act 1940 (NSW) s 88B (now repealed) considered in *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1.

make the appropriate endorsement on the certificate of title. A person served with a notice of intention to acquire must not without the consent of the authority enter into any transaction respecting the land. Section 24 provides that the interest in the land vests in the acquiring authority upon publication in the *Government Gazette* of a notice in accordance with s 19 that declares the interest to be acquired. The acquiring authority is required by s 54 of the Transfer of Land Act 1958 (Vic) to apply to the Registrar of Land Titles for registration of the interest as soon as practicable thereafter.

The effect of these provisions is that there should be little occasion for prospective purchasers of land to be misled as to the state of the title where a compulsory acquisition is involved. The possibility that the register may be incorrect between publication of the notice and registration of the new interest is remedied by the requirement of prompt notification to the Registrar. Purchasers are further protected by the requirement that at the time of vesting the notice of intention to acquire must be 'live' in the sense that it has not lapsed or been withdrawn.[21]

B *Vesting incidental to other decisions*

There exist provisions which vest land in governmental authorities as an incidental effect of other decisions. An example of such a provision may be found in the recently repealed s 528(2) of the Local Government (Miscellaneous) Act 1958.[22] The subsection provides that, subject to complying with certain procedural requirements, a local council may by resolution discontinue a road if it is of the opinion that the road or part of the road is not reasonably required for public use. Upon publication of the resolution in the *Government Gazette*, 'the land being the road or part of the road discontinued shall vest in the municipality until if the resolution so provided it is sold'.[23]

The subsection does not require that the Registrar of Land Titles be notified or that the interest be registered, except where the council resolves to retain the land for municipal purposes. In that case s 528(2)(bb) provides that s 54 of the Transfer of Land Act 1958 (Vic) applies as if the council were an 'acquiring authority' for the purposes of that section, which obliges the council to apply for registration as soon as practicable after the vesting.[24]

[21] Land Acquisition and Compensation Act 1986 (Vic) ss 6, 15 and 16; S Morris, *Land Acquisition and Compensation: Proposals for New Land Acquisition and Compensation Legislation: Report to the Minister for Planning, Victoria*, (1983) 31. The Lands Acquisition Act 1989 (Cth) has similar provision for the lodgement with the Registrar of pre-acquisition declarations and compulsory registration declarations: ss 23, 38, 41 and 51.

[22] The short title to this Act was formerly the Local Government Act 1958. It was renamed by Local Government (Consequential Provisions) Act 1989 s 4(3). The parent provision of s 528(2) was enacted by the Local Government (Amendment) Act 1954 (Vic) s 22 and was judicially considered in *Treasury Gate Pty Ltd v Rice* [1972] VR 148. Section 528 was repealed with effect from 7 December 1993 by the Local Government (Miscellaneous Amendments) Act 1993 (Vic) s 25: see below n 28.

[23] Local Government (Miscellaneous) Act 1958 (Vic) s 528(2)(a).

[24] A provision similar to the repealed s 528(2) is to be found in the Planning and Environment Act 1987 (Vic) s 44 which deals with the closure of roads by amendment to a planning scheme.

The definition of 'road' for the purpose of s 528(2) is not restricted to public roads but includes a private road or land over which an easement of right of way has been granted by the owner in fee in a transfer.[25] The power can therefore be used to divest the holders of registered interests. This possibility was illustrated recently in *Costante v Preston City Council*.[26] The respondent council resolved to discontinue a road which comprised a lane on private land of which a third party was registered proprietor and over which the appellant held a registered easement. The Full Court of the Supreme Court of Victoria held that the resolution was invalid because the council had failed to comply with the mandatory procedural requirements of the subsection. Fullagar J, delivering the judgment of the Court, remarked that if the provision had been successfully invoked in the particular case it would have had the following effects, which he described as 'drastic':

> The result will be that the registered proprietor of the land has his fee simple expropriated in favour of the municipality without any entitlement to compensation, and the registered proprietor of the easement of way will have his own easement extinguished without any entitlement to compensation, and then the municipality may sell the fee simple in the road to any purchaser and keep the proceeds of sale for itself.[27]

Although it did not arise as an issue in the *Costante* case, it may be added that an effective exercise of the power might lead to an inaccuracy in the register, since the vesting of land in the council and the divesting of the two registered interest-holders would be effected by force of statute rather than by registration.[28]

C *Lesser interests in land*

The third group of statutes are those which authorise the creation of lesser interests in land in favour of government authorities or others, and which run with the land without the need for registration. These include various types of mining and petroleum tenures under Commonwealth and State legislation and also debts charged upon land. In 1979 s 88(2) of the Transfer of Land Act (Vic) was amended to permit registration of a charge on land, easement or any other right affecting land when it is acquired under statute. Despite this facility, certain charges are effective without registration, for example a charge under

25 Local Government (Miscellaneous) Act 1958 (Vic) s 528(2)(g).

26 (1994) 81 LGERA 155 (*Costante*).

27 Ibid 156-7.

28 Amendments to the Local Government Act 1989 (Vic) effected by the Local Government (Miscellaneous Provisions Act) 1993 (Vic) remedy the problem with respect to statutory vesting of title arising from council actions after 7 December 1993. Section 203(2) of the Local Government Act 1989 (Vic) provides that a 'public highway' (as defined) vests in the Council of the municipal district in which it is located. 'Roads' which are not public highways vest in the Council by operation of s 207B only as a consequence of actions taken by the Council in exercise of its powers under Schedule 10, such as an action to discontinue a road. In that event s 207D(2) provides that the Council must notify the Registrar of Land Titles. There remains a risk that a vesting of title that occurred by operation of s 528(2) before the amendments commenced may not be recorded in the Register: see also below n 43.

s 24(2) of the Fences Act 1968 (Vic) for a proportion of the cost of a vermin-proof fence.[29]

Unpaid land tax and any unpaid rates and other charges discoverable from a certificate issued under specified enactments are expressly excepted as 'paramount interests' under s 42(2)(f) of the Transfer of Land Act 1958, and therefore present no conflict between the statutes creating them and the Torrens provisions.

IV PRINCIPLES FOR RESOLVING A CONFLICT OF STATUTES

To determine the effect of another statute upon the operation of the Torrens legislation it is first necessary to ascertain whether the provisions are in conflict. The requirement of a conflict is met if the other statute on its proper construction provides for an unregistered interest to be enforceable against the registered proprietor. Unless modified by another statute the indefeasibility provisions would normally have the effect of conferring on the registered proprietor an interest free from unregistered interests other than those expressly excepted and those rights enforceable *in personam*.[30]

A *Later statutes abrogate earlier statutes*

If a conflict is found to arise, it is necessary to determine which statute prevails. The principles for resolving conflicts between earlier and later statutes of the same legislature are well established. As expressed in the maxim *leges posteriores priores contrarias abrogant*,[31] the later statute normally prevails to the extent of the inconsistency. This may be described as an implied repeal *pro tanto* of the earlier statute, meaning that the application of the earlier statute to cases covered by the later statute is abrogated. There is an exception to this rule expressed in the maxim *generalia specialibus non derogant*.[32] A statute that lays down general principles will not be taken to override an earlier statute which makes special provision for the same subject matter or for a particular class of it.

The *leges posteriores* principle is based upon the constitutional doctrine that a Parliament cannot bind its successors. The force of the doctrine is illustrated by the High Court's decision in *South-Eastern Drainage Board (SA) v Savings Bank of South Australia*.[33] Section 6 of the Real Property Act 1886 (SA) (the Torrens statute for South Australia) provided that any later Act inconsistent with it was not to apply to land under the Torrens System unless expressed to be enacted 'notwithstanding the provisions of the Real Property Act 1886'. This represented an attempt to protect the Torrens statute from implied repeal by

[29] Cf Vermin and Noxious Weeds Act 1958 (Vic) s 20 under which the land becomes charged upon deposit with the Registrar of a certificate as to the debt.

[30] *Frazer v Walker* [1967] 1 AC 569.

[31] Later laws abrogate prior contrary laws.

[32] General things do not derogate from special things.

[33] (1939) 62 CLR 603 (*South-Eastern Drainage Board*).

later inconsistent legislation. The South-Eastern Drainage Amendment Act 1900 (SA) s 14 provided that the amount of drainage-construction costs apportioned to a landowner under the Act was to be a first charge on the land of the landholder. By s 65 of the South-Eastern Drainage Act 1926 (SA) and s 66 of the South-Eastern Drainage Act 1931 (SA) the amount of drainage maintenance rates, fines and interest were also to be a first charge on land. The Drainage Acts were enacted later than the Real Property Act 1886 but contained no provision in the terms of s 6 of that Act.

In 1908, the subject land had become charged with an amount for the landowner's proportion of the cost of construction of a drain. Under the Drainage Acts the amount was a first charge on the land. In 1912 the Savings Bank of South Australia had taken a security interest in the land by way of registered mortgage. From 1930 to 1936, drainage maintenance rates were declared and remained unpaid. These also became a first charge on land under the Drainage Acts. The charges were unregistrable, and the Real Property Act 1886 did not expressly provide for unregistered statutory charges to be an exception to the indefeasible title of a registered proprietor.[34] The Bank argued that the Drainage Acts created unregistered charges which could not take priority over a registered mortgage.

The High Court approached the matter by considering first, whether there was an inconsistency between the Drainage Acts and the Real Property Act; secondly, which should prevail if the two were in conflict and thirdly, the extent to which the overridden Act was modified. All judges except Evatt J found that there was an inconsistency, and that despite the absence of a provision such as that described in s 6 of the Real Property Act 1886 (SA), the Drainage Acts prevailed as the later enactment. While the existence of s 6 was relevant in interpreting a later statute, if the intention to override the Real Property Act was clearly manifested the later statute would prevail despite the absence of the prescribed word formula.

The result of the implied repeal was that the charges under the Drainage Acts took priority over the Bank's registered mortgage. It was not possible to reach an accommodation between the two enactments whereby the priority of the charges over registered interests depended on their prior registration.

Evatt J concurred in the decision, but took a different view of the relationship between the two statutes. He agreed that if there were an inconsistency the Drainage Acts would override the Real Property Act despite non-compliance with the formula prescribed by s 6, but found that there was no conflict because the Real Property Act on its true construction gave to a registered proprietor a title conclusive only against other registrable interests.[35]

B *Special Measure*

It has on some occasions been argued that the indefeasibility provisions might

[34] Real Property Act 1886 (SA) s 69; cf Transfer of Land Act 1958 (Vic) s 42(2)(f).

[35] *South-Eastern Drainage Board* (1939) 62 CLR 603, 633.

be saved from implied repeal by later inconsistent statutes on the ground that the Torrens statutes are a special measure making provision for a particular class of interests in land, namely land under the operation of the Torrens land title system.[36] This proposition has become increasingly untenable as the vast majority of land alienated by the Crown in all jurisdictions is now under the operation of the scheme. It cannot be applied to the extent of rendering the later statute ineffectual or depriving the later statute of all but a residual field of operation.

In *Lane v Symonds*[37] the Supreme Court of South Australia rejected a submission that the Mining Act 1930 (SA), which was expressed to apply to 'all private lands in the State' should be read as impliedly excluding land under the operation of the Real Property Act 1886 (SA). Noting that all lands alienated since 1886 were under the operation of the Real Property Act, Piper J said:

> The maxim *generalia specialibus non derogant* was urged upon me, but I do not see that that can have any application, it cannot be applied to the extent of depriving important enacting words of nearly all their meaning, or of turning the latest generality into a small exception.[38]

While there is no longer any prospect in Australia of invoking the *generalia specialibus* maxim to save the Torrens statutes from being overridden by a later inconsistent statute, an earlier statute may be preserved from being overridden by the Torrens legislation if it can be classed as a special measure.

This appears to be the ground for the Privy Council's decision in *Miller*.[39] Mining licences issued under an earlier statute, the Mining Act 1926 (NZ), were held to override an interest registered under the Torrens statute for New Zealand, the Land Transfer Act 1952. The Mining Act set up a separate registration system for mining licences. The later-enacted Land Transfer Act made no provision for them to be registered under that Act. The Judicial Committee thought that Parliament could not have intended, when enacting the Mining Act, that mining licences should be liable to be overridden by the indefeasibility provisions of the Land Transfer Act. The court's thinking seems to have been influenced by the circumstance that a predecessor statute to the Land Transfer Act 1952 was in force at the time that the Mining Act was enacted.

The judgment does not explain why the intention evinced by the earlier Mining Act was not overridden by the later re-enactment of the Land Transfer Act. The question is whether Parliament intended, at the time of enacting the Land Transfer Act, to override the earlier Act. Parliament's intent is not to be found by examining the terms of the earlier Act alone, as Parliament might have changed its mind in the period between enactments. In reaching its con-

[36] Ibid 616-7 (Latham CJ).

[37] [1932] SASR 439.

[38] Ibid 446. See comments to similar effect by James Hogg, *The Australian Torrens System: Being a Treatise on the System of Land Transfer and Registration of Title Now in Operation in the Six States of the Commonwealth of Australia, the Colony of New Zealand, and Fiji and British New Guinea* (1905) 80.

[39] [1963] AC 484, 498.

clusion that the Mining Act prevailed, the Privy Council emphasised that the mining licence was not a registrable interest under the Land Transfer Act, and that a separate registration scheme was established under the Mining Act. These factors were indicators of Parliament's intention that mining licences should be an exception to the conclusiveness of the registered proprietor's title. It is implicit in the decision that these factors established the status of the Mining Act as a special measure from which Parliament presumably did not intend to derogate when enacting the later Act.[40]

V DIFFICULTIES IN DETERMINING WHICH IS THE LATER STATUTE

In the *Miller* case the Land Transfer Act 1952 (NZ) had been re-enacted in consolidated form after the Mining Act was enacted. The case illustrates a special difficulty in applying to the Torrens legislation the normal rules for resolving a conflict of statutes. For the purpose of applying the *leges posteriores* rule it is necessary to ascertain whether the Torrens statutes are of earlier date than the statutes with which they are in conflict.[41] Since they were first enacted in the last century, the Torrens statutes have in some jurisdictions been repealed and re-enacted by consolidating Acts.[42] This complicates the question of determining the relevant enactment date. The issue could arise, for example, in the case of a conflict between two Victorian statutes contemporaneously re-enacted in consolidated form, namely the Transfer of Land Act 1958 and the Local Government Act 1958.[43]

Where provisions have been re-enacted in a consolidation, the relevant date for applying the *leges posteriores* principle is generally the date of the consolidation, not the date on which the provisions were originally enacted in the predecessor statute. In *Bennett v Minister for Public Works (NSW)* a consolidation was taken to impliedly repeal an inconsistent statute enacted only 18 days earlier even though, as Griffith CJ said, it was quite possible that the effect was the result of inadvertence rather than legislative intent.[44]

The principle may apply even where the effect of the consolidation of two sets

[40] The *generalia specialibus* argument had been urged upon the Judicial Committee on behalf of the successful respondent, and had been applied by the New Zealand Court of Appeal whose unanimous judgment it affirmed: *Miller v Minister for Mines* [1961] NZLR 820.

[41] The date of enactment is normally taken to be the date of assent: *Morgan v 15 Bannerman Street Pty Ltd* [1971] 1 NSWLR 601; see also Interpretation Act 1987 (NSW) s 22(1). However in *Black v Director-General of Education* [1982] 2 NSWLR 714 the NSW Court of Appeal held by a majority that for purposes of determining which of two statutes displaced the other, the relevant date was not the date of enactment but the date of effective operation or commencement.

[42] In Victoria, the Torrens legislation was consolidated in 1890, 1915, 1928, 1954 and 1958. The last consolidation for New South Wales was in 1900, and for New Zealand in 1952. True consolidations are to be distinguished from the re-organisation of Acts by way of reprints or incorporated Acts, which are not re-enacted by Parliament.

[43] Both Acts were assented to on 30 September 1958 and commenced on 1 April 1959. The potential for conflict between s 528(2) of the Local Government Act and the Transfer of Land Act is discussed above: see nn 22-8 and accompanying text. The recent repeal of s 528(2) does not affect accrued rights and interests arising from its operation prior to repeal: Local Government (Miscellaneous Amendments) Act s 25; Interpretation of Legislation Act 1984 (Vic) s 14(2); *Ex Parte Registrar-General; Re Council of the Municipality of Randwick* (1951) 52 SR (NSW) 220.

[44] (1908) 7 CLR 372, 378.

of legislation is to reverse an implied repeal arising from the previous order of enactment. In *Maybury v Plowman*[45] an earlier Act had been impliedly repealed in part by a later inconsistent Act. The later Act was consolidated in 1900 and the earlier Act was consolidated in 1901. A majority of the High Court accepted, without finding it necessary to decide the point, that the relationship between the two Acts had been altered by the reversal of their dates of enactment. Barton ACJ disagreed, observing that where a particular state of the law depended on an established relationship between two Acts, a mere consolidation should not be taken to have intended to change the law.[46]

The *leges posteriores* rule, like all the canons of construction, is not absolute but is founded on presumption of Parliament's intent. The majority view in *Maybury v Plowman* presses the rule too far. It must be weighed against the competing canon that a consolidating Act is assumed not to change the law.[47] The presumption should be particularly strong against change brought about by a sidewind, as where provisions that had previously been restricted by inconsistent statutes are rendered fully effectual once more when re-enacted in a consolidation.[48] The Interpretation Acts of six Australian jurisdictions now direct courts towards an interpretation that promotes the object and purpose of the consolidating Act.[49] Parliament's intention is not difficult to ascertain, as the Explanatory Papers accompanying a consolidating Act normally state what changes in the law, if any, are intended.[50]

The interpretation legislation of all States and the Commonwealth provides that the repeal of a repealing Act does not, in the absence of a contrary intention, revive the previous law.[51] In Victoria and the Commonwealth the provision is specified to include implied repeals[52] while in the other States the application of the provision to an implied repeal *pro tanto* is attended by some doubt.[53] But a consolidation only repeals the previous law to re-enact it contemporaneously in a new form, and there is no moment at which the substance of the old enactment ceases to be in force.[54] The problem in applying the *leges posteriores* rule to a consolidating Act arises not from the Act's repealing effect but from the re-enactment of the old provisions. The interpretation provision

45 (1913) 16 CLR 468.

46 Ibid 476 (Barton ACJ).

47 *Riddle v R* (1911) 12 CLR 622.

48 *R v Kruger* (1977) 17 SASR 214, 218 (Bray CJ); Pearce and Geddes, above n 1, 156-8.

49 Interpretation Act 1987 (NSW) s 33; Interpretation of Legislation Act 1984 (Vic) s 35(a); Interpretation Act 1984 (WA) s 18; Acts Interpretation Act 1915 (SA) s 22; Acts Interpretation Act 1901 (Cth) s 15AA.

50 According to the Explanatory Paper to the 1958 consolidation, the last consolidation made only two minor amendments to the Transfer of Land Act 1958 (Vic), neither affecting the indefeasibility provisions. The Real Property Act 1900 (NSW) is preceded by a Commissioner's Memorandum and Certificate declaring the extent of the changes to the law intended by the consolidation.

51 Interpretation Act 1987 (NSW) s 28; Acts Interpretation Act 1915 (SA) s 16; Interpretation of Legislation Act 1984 (Vic) s 14; Acts Interpretation Act 1954 (Qld) s 19; Interpretation Act 1984 (WA) s 34; Acts Interpretation Act 1931 (Tas) s 14(1); Acts Interpretation Act 1901 (Cth) s 7.

52 Interpretation of Legislation Act 1984 (Vic) s 14(3); Acts Interpretation Act 1901 (Cth) ss 7, 8A.

53 *Aarons v Rees* (1898) 15 WN (NSW) 88, 90 (Simpson J), discussed in Pearce and Geddes, above n 1, 116.

54 Samuel Edgar, *Craies on Statute Law* (7th ed, 1971) 362.

does not assist in determining which of two conflicting Acts is to be regarded as the later enactment for the purpose of repealing the other by implication.

In practice, the rules for resolution of a conflict of legislation are sufficiently flexible that courts can achieve a sensible outcome regardless of the date order of the two statutes. An inconsistent provision in another statute may prevail over the Torrens legislation either as a later enactment or, if of earlier date, as a special measure. This appears to have been implicit in the approach in *Miller* taken by the Privy Council, although the court did not expressly deal with the effect of re-enactment of the Land Transfer Act.

VI THE PUBLIC RIGHTS EXCEPTION AND OTHER STATUTES

If the right created by the other statute is of a kind that falls within an intrinsic exception to indefeasibility, it is unnecessary to wrestle with the difficulties of determining which is the later statute and whether the statute creating the right is a special measure. The rules for resolving conflict of statutes need not be invoked where the Torrens statute itself allows for the unregistered statutory right to be enforced against the registered proprietor. It is necessary only to establish that the right falls within the protected class.

An example is a statute that authorises a governmental instrumentality to acquire land for the purposes of a public highway. In all States save New South Wales and Queensland public rights of way are one of the exceptions to indefeasibility specified in the Torrens statutes.[55] Public rights of way are also known as highways, and include public footways as well as carriageways.[56] They are rights not confined to a class of the public but enjoyed in common by all the Crown's subjects.[57] Highways are not easements, but at common law arose from the owner's dedication of the surface of the land to the public for the purpose of passage.[58] Public rights of way can also be created by statute. Both methods of creation are applicable to land under the Torrens scheme.[59]

It has long been recognised that even in the absence of an express exception for them such as exists in the Victorian legislation, public rights of way are an implied exception to the indefeasibility of a registered interest under the Torrens statutes of Australia and New Zealand.[60] In *Vickery v Municipality of Strathfield*[61] the defendant council attempted to exercise a statutory power to make and open a street over the plaintiff's land. The exercise of power was *ultra*

[55] Transfer of Land Act 1958 (Vic) s 42(2)(c); Transfer of Land Act 1893-1991 (WA) s 68; Real Property Act 1886 (SA) s 86; Land Titles Act 1980 (Tas) s 40(3)(c) (where omitted or misdescribed).

[56] *Rangeley v Midland Railway Co* (1868) 3 Ch App 306, 311; *Halsbury's Laws of England* (4th ed, 1975) vol 14, 21; (4th ed, 1981) vol 21, 182.

[57] *Halsbury's Laws of England* (4th ed, 1975) vol 14, 21.

[58] Ibid. See also *Vickery v Municipality of Strathfield* (1911) 11 SR (NSW) 354 (*Vickery*).

[59] *Vickery* (1911) 11 SR (NSW) 354, 364; *Martin v Cameron* (1894) 12 NZLR 769; *Turner v Walsh* (1881) 6 AC 636.

[60] *Vickery* (1911) 11 SR (NSW) 354; *Ex Parte Louis Le Gould* (1864) 1 QSCR 130; *Martin v Cameron* (1893) 12 NZLR 769; *Turner v Walsh* (1881) 6 AC 636.

[61] (1911) 11 SR (NSW) 354.

vires because of non-compliance with the mandatory requirements of the statute for assessment and payment of compensation. The land was held to be a public highway nevertheless, on the ground that the dedication of the land as a highway was presumed from evidence of public user. The rights of highway arose under common law principles, not by force of statute.

Rich AJ held that the public rights were enforceable against the then registered proprietor and his successors despite the existence of a certificate of title that made no mention of the rights. He said that public rights of highway are enforceable against a registered proprietor on two separate grounds: firstly, that the language of s 42 of the Real Property Act 1900 (NSW) provides indefeasibility only against interests of a kind capable of existing in an individual, and secondly, that public highways lie wholly outside the Torrens system because a dedication of land for a highway is unregistrable.[62]

Vickery's case was not a case of rights prevailing over registered title by force of overriding statute. The rights arose at common law and fell within an implied exception to the indefeasibility provisions. Yet the decision in *Vickery's* case has influenced judicial thinking even in cases where the right in question is one vested by statute in a governmental instrumentality. For example in *Trieste Investments Pty Ltd v Watson* Herron CJ said that a resumption of land under statutory authority for the purposes of a road stood outside the Torrens System, and cited *Vickery's* case as authority.[63] The tendency to mingle the public right of way exception with the interpretation of other statutes was evident also in the judgment of Street J (as he then was) in *Pratten*[64] and in 1990 the convergence of 'public and statutory rights' was taken by Young J in *Quach v Marrickville Municipal Council* to be settled law.[65]

One reason for the reliance on the intrinsic exception in some cases of conflict of statutes is the existence of an area of overlap. Where land dedicated as a highway becomes vested by statute in an acquiring authority for the purposes of a public road, the public rights of user are not necessarily extinguished.[66] The rights once created cannot be extinguished except under legislation. A statute may extinguish them expressly, or by necessary implication.[67] Unless the statute provides otherwise, the public right of way may exist concurrently with the title vested in the authority. In these circumstances two types of unregistered right may conflict with that of the registered proprietor of the land, namely, the statutory interest of the acquiring authority, and the public right of user.[68] For

[62] Ibid 362-3.

[63] (1963) 64 SR (NSW) 98, 103.

[64] [1969] 2 NSWLR 161.

[65] (1990) 22 NSWLR 55 (*Quach*).

[66] *Chief Commissioner for Railways and Tramways (NSW) v Attorney-General (NSW)* (1909) 9 CLR 547. The High Court accepted that the rights of the public to pass and repass along the land continued after the land had vested in the local council for the purpose of a road under the Local Government Act 1906; *Bouquey v District Council of Marion* [1932] SASR 32; *Metters v District Council of West Torrens* [1910] SASR 1.

[67] *Corporation of Yarmouth v Simmons* (1878) 10 Ch D 518; *Chief Commissioner for Railways and Tramways (NSW) v Attorney-General (NSW)* (1909) 9 CLR 547.

[68] This is not the type of competition of proprietary rights that we are accustomed to seeing in Torrens

the purpose of determining whether the land is subject to a public highway, it is unnecessary to show that both rights are exceptions to the indefeasibility of the registered title. If either right is enforceable against the registered proprietor, the proprietor holds the land subject to the public highway.

A *Trieste Investments v Watson*

The issue for decision by the New South Wales Supreme Court in *Trieste*[69] was whether there had been an 'error, omission or misdescription' within the meaning of s 127(1) Real Property Act 1900 (NSW) in a certificate of title issued to the plaintiff which did not disclose that part of the land had been resumed for a public road under the Public Roads Act 1902-1923 (NSW). The plaintiff did not challenge the paramountcy of the Crown's interest, but contended that the omission of any record of the resumption in the Register entitled it to recover damages against the Registrar-General as nominal defendant. The plaintiff had purchased the land in reliance on the Register, and incurred loss in that it was not the proprietor of the whole of the land described in the Register but only of part. The case was heard and determined on demurrer.

The majority, comprising Herron CJ and Nagle J, found that there was no 'error, omission or misdescription', Nagle J on the ground that there was no requirement that the resumption be registered, and Herron CJ on the ground that the resumption was at the relevant date unregistrable. In their separate judgments both judges also observed that the plaintiff's case overstated the degree of conclusiveness of the Register, and therefore the reliance that should be placed upon it by prospective purchasers. The apparent indefeasibility conferred by a certificate of title is qualified. It is subject to public rights of user whether noted on the Register or not, as established in *Vickery's* case. It is also subject to other exceptions collectively termed inherent rights in Hogg's *The Australian Torrens System*.[70] Quoting from the judgment of Evatt J, Herron CJ cited the *South-Eastern Drainage Board* case as authority for the existence of one class of the rights:

> An example of such an inherent right is a statutory charge on lands for the construction costs and rates of drainage schemes. These, it was held, formed a first unregistered charge over all such land including land under the Real Property Act and thus took priority over the holder of a registered mortgage: *South-Eastern Drainage Board (SA) v Savings Bank of South Australia*.[71]

The passage shows an approach that looks for classes of rights that have been held to override registered title. By contrast, the approach taken by the majority in the *South-Eastern Drainage Board* case looks to the interpretation of the statute creating an unregistered right to determine whether the right is to have

System priority disputes.

69 (1963) 64 SR (NSW) 98.

70 Hogg, *The Australian Torrens System*, above n 38, 804-20. Hogg used the term 'inherent rights' to describe a residual group of rights that were exceptions to the indefeasibility of registered title, being rights which under the general law were of legal or statutory origin, as opposed to equitable rights.

71 (1963) 64 SR (NSW) 98, 104.

priority over registered interests. Consistent with his search for classes of rights rather than principles of interpretation, Herron CJ preferred the minority view of Evatt J that the whole class of rates and charges imposed by statute are implied exceptions to indefeasibility.[72]

Since the issue in *Trieste* was one of compensation, the case belongs only indirectly to the stream of authority on overriding statutes and the Torrens System. The question of overriding statute was not in issue, the plaintiff having conceded that the Crown's interest prevailed over that of the registered proprietor because the Public Roads Act overrode the indefeasibility provisions of the Real Property Act. The majority's discussion of inherent rights was directed to showing that an intending purchaser could not expect the Register to reveal all the interests and encumbrances to which the land was subject. The majority sought to show that their interpretation of s 127(1) was broadly consistent with judicial pronouncements on the general approach to the Act. The judges reasoned that if the authorities show that a clean certificate of title confers no indefeasibility against unregistrable interests, the absence of any note of the interest on the Register cannot be said to be an 'error, omission or misdescription'.

B *Pratten v Warringah Shire Council*

If the intrinsic exception to indefeasibility for public rights of way recognised in *Vickery's* case was extended by the majority in *Trieste* to statutory resumptions of land for highways, Street J in *Pratten*[73] further extended it to a provision vesting land in councils for the purposes of drainage. Section 398 of the Local Government Act 1919 (NSW) which came into operation in 1920 provided:

> Where, in the subdivision of any land, there has been provision made for a drainage reserve (whether by agreement between the owner and the council or between the vendor and any purchaser, or by the marking on any plan exhibited to the public or lodged with the Registrar-General of words indicating the reservation of land for drainage) the land so provided for a drainage reserve is hereby vested in the council in fee simple for drainage purposes.

The section allowed for the vesting of land in the council without any requirement for registration. Nor was there any provision for the entry of the council on the Register prior to an amendment to the Real Property (Amendment) Act 1921. Section 14 of the amending Act authorised the Registrar to enter the council as proprietor on the Register, but only on the application of the council.

Pratten's case was not the first occasion on which s 398 was judicially considered. In *Ex parte The Registrar-General; Re the Council of the Municipality*

[72] There was in the Real Property Act 1886 (SA) no express provision for rates, taxes and charges to be an exception to the indefeasibility of registered interests; cf Transfer of Land Act 1958 (Vic) s 42(2)(f).

[73] [1969] 2 NSWLR 161.

of Randwick[74] it was held by the Full Court of the Supreme Court of New South Wales that upon s 398 commencing its operation on 1 September 1920, it vested in the council the land in a drainage reserve marked on a plan of subdivision deposited in 1912.[75] It followed from this decision that the lands in all drainage reserves created prior to 1 September 1920 by any of the means enumerated in s 398 vested in the respective councils immediately upon the commencement of s 398.

The plaintiff David Pratten was the registered proprietor of land which included a strip of land that had been marked as a drainage reserve on a deposited plan lodged with the Registrar-General in 1920. The council had not applied to the Registrar for entry of its interest on the Register, and had at no stage asserted a claim to the strip.[76] The land had been sold in 1924 and again to the plaintiff in 1968, and on each occasion the Registrar had issued a certificate of title showing the purchaser as the new registered proprietor.

The plaintiff sought a declaration that he held the land free from any rights of the council. He argued that he had by his registration as proprietor in 1968 acquired an indefeasible title free of any prior unregistered interest of the council arising under s 398. This was a point that had not been considered in the *Randwick Council* case.[77] Only two years before Pratten's application was heard, the Privy Council in *Frazer v Walker*[78] had decided that a registered proprietor obtains by registration an immediately indefeasible interest that is 'immune from adverse claims, other than those specifically excepted', and subject also to 'a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant'.[79] The Privy Council had not mentioned as an exception to indefeasibility interests of the kind vested in the municipality under s 398.

Applying the *Randwick Council* case, Street J found that the strip of land marked as a drainage reserve on the lodged plan had vested in the council on 1 September 1920, upon the coming into force of s 398. The Real Property Act was the earlier enactment and was not to be excepted from the operation of s 398 as a special measure. The question was to determine the extent to which s 398 modified the operation of the indefeasibility provisions. Street J identified the major issue as being:

[74] (1951) 51 SR (NSW) 220 (*Randwick Council*).

[75] The presumption against construing statutes as having retrospective operation was not infringed, even if the conditions for the provision's effect came into existence prior to its enactment.

[76] It had indeed on three occasions denied having any claim to the strip, in response to inquiries by the plaintiff's solicitors. In its unamended form, s 398 failed to provide for a procedure to ensure that the vesting came to the notice of the council, since the dedication of the land for drainage might have resulted from an agreement between the vendor and purchaser without the knowledge of the council.

[77] The *Randwick Council* case came before the Court by way of a case stated by the Registrar-General under s 123 of the Real Property Act 1900 (NSW), the Registrar-General having declined the council's application to be registered as proprietor in fee simple. The issue was whether the section applied to earlier subdivisions. The question of any conflict with the Real Property Act was not considered.

[78] [1967] 1 AC 569.

[79] Ibid 585.

> whether the statutory vesting of the land in the council has the effect of overriding the title asserted by the plaintiff to derive from his having subsequently become registered as the proprietor in fee simple of that land.[80]

The report of the case does not indicate what arguments on this issue were advanced for the plaintiff, although Street J referred to the question as 'having been closely and carefully argued on both sides with reference both to principle and to decided cases.'[81] Street J embarked on a lengthy review of the authorities, starting with Hogg's exposition on inherent rights. Like Herron CJ and Nagle J in the *Trieste* case, Street J examined the authorities in search of classes of rights that had been held to be immune from the indefeasibility of registered title. Once again *Vickery's* case was included in the collection along with other decisions that were true cases of overriding statute, such as the *South-Eastern Drainage Board* case and the *Miller* case.

In his survey of the authorities Street J matched facts with selected quotes from the judgments, without indicating what principles he drew from them relevant to the issue at hand. He prefaced his survey by stating that the authorities show that the exceptions to indefeasibility mentioned by the Privy Council in *Frazer v Walker* were not exhaustive, but appears to have found more specific guidance in this disparate collection as indicated by the opening words of his *ratio decidendi*:

> Guided by these authorities, it must in my view follow that the estate which became vested in the council in September 1920 vacated any further interest in the land in question on the part of the then registered proprietor. Thereafter it did not in law have the fee simple in the land. Nor was it able by transfer to call back, so to speak, that fee simple and vest it in a transferee. The absolute indefeasibility ordinarily flowing from registration (*Frazer v Walker* [1967] 1 All ER 649; [1967] 1 AC 569) will not avail where the fee simple has, by an overriding statute, been in effect removed from the registration scheme. Moreover not only was the then registered proprietor incapable of calling back his fee simple, but no act of the Registrar-General otherwise than consequent upon the written request of the council pursuant to s 14 of the Real Property (Amendment) Act 1921, could be recognized as effective to trench in any way upon the council's fee simple.[82]

The paragraph commences with an assertion that the person registered as proprietor at the time that s 398 vested the land in the council was left with no interest and therefore could convey none to a purchaser. This appears to resurrect the general law principle *nemo dat quod non habet*,[83] a doctrine generally considered to have no application to registered interests under the Torrens scheme.[84] It plainly contradicts the accepted understanding of registration as an original and not a derivative source of title, a doctrine which carries the consequence that a purchaser may obtain a better title than the vendor had.

[80] [1969] 2 NSWLR 161.
[81] Ibid 164.
[82] Ibid 166-7.
[83] One may not give what one does not have.
[84] Whalan, above n 13, 20.

The High Court in *Breskvar v Wall*[85] emphasised that a major innovation of the Torrens System was that the registration, rather than the transaction, became the source of title. In an oft-quoted passage, Barwick CJ summarised the radical change wrought by the Torrens System as follows:

> The Torrens system of registered title of which the [Real Property] Act is a form is not a system of registration of title but a system of title by registration. That which the Act describes is not the title which the registered proprietor formerly had, or which but for the registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.[86]

The inconsistency between the remarks of Street J and those of Barwick CJ quoted above were pointed out in *Quach*[87] by Young J, who expressed grave reservations about the correctness of the decision in *Pratten's* case.

But the decision of Street J did not rest solely on the dubious proposition that a divested registered proprietor could confer no title on a successor. The second limb of his reasoning in the passage quoted above examined the effect of s 398 of the Local Government Act 1919 (NSW), which he found to have a three-fold effect. Upon commencing to apply to the land, it first vests the fee simple interest in the council. Secondly, the registered proprietor's fee simple, being wholly inconsistent with that of the council, is lost once and for all. Thirdly, it removes the fee simple from the registration scheme unless and until the council applies to have its interest registered, 'whereafter registered dealings would have their normal effect and significance in accordance with the provisions of the Real Property Act.'[88] As a consequence the council's interest, so long as it remains unregistered, is paramount over any registered interest. This was intended by Street J to answer the argument, actually or potentially advanced for the plaintiff,[89] that the council's interest was liable to be defeated by the subsequent registration of an interest inconsistent with its own.

The proper construction of a provision such as s 398 is of great importance since there are other enactments which adopt a similar mode of expression, namely that in specified circumstances title to particular land 'vests' or 'is vested in' a public authority.[90] Street J did not canvass alternative constructions of s 398. A very different interpretation of the section was proposed by Young J in *Quach's* case, namely that the operative words 'the land ... is hereby vested in the council in fee simple' may be said to create a fee simple interest in the council at the moment that the section first commences to apply to the land. In the case of Pratten's land, that event took place on 1 September 1920.[91]

[85] (1971) 126 CLR 376.

[86] Ibid 385-6.

[87] (1990) 22 NSWLR 55, discussed below (see nn 99-105 and accompanying text).

[88] [1969] 2 NSWR 161, 167.

[89] As explained above (see n 81 and accompanying text), the report does not state what arguments were put forward for the plaintiff on this question.

[90] See, eg, Local Government Act 1989 (Vic) s 207B.

[91] It was decided in *Randwick Council* (1951) 52 SR (NSW) 220 that where the deposited plan was lodged prior to s 398 coming into effect, the section operated to vest the fee simple in the council

Thereafter the council's unregistered interest was liable to be defeated by the subsequent registration of an inconsistent interest, or by an interest acquired by adverse possession.[92] The statutory interest would override that of the registered proprietor who held title immediately before 1 September 1920, but would in turn be defeated by the subsequent registration of a transfer to the plaintiff in 1956.

The interpretation proposed by Young J is a narrower reading in that it restricts the operation of the section and the extent of its inconsistency with the Torrens statutes. The interpretation does not render the section nugatory. It is effective to vest title in the council, a title which the council can protect by registration in accordance with s 14 of the Real Property Act. But if the council fails to register, its title is left in a precarious position. The Act contains no procedure to ensure that the registered proprietor is notified of the acquisition of title by the council. There is every likelihood that subsequent registered interests will be innocently created, thereby destroying that of the council.

The interpretation proposed by Young J may be criticised as not promoting the probable intention of Parliament to ensure that land required for drainage purposes be placed under the control of the municipality. Section 33 of the Interpretation Act 1987 (NSW) now directs the courts to prefer a construction that would promote the purpose or object of the Act to a construction that would not promote that object or purpose.

For the purpose rule to apply, the provision must be capable of another construction. Street J asserted that the section has the effect of removing the fee simple from the registration system, but did not advance a construction to support the effect. Young J in *Quach's* case speculated as to the textual interpretation that underlay the conclusion of Street J:

> [S]urely that can only be the case if the statutes vesting the land operate not as a vesting once and for all but as a continuous prohibition on private persons obtaining any interest in the land.[93]

Street J appears to have taken the words 'is hereby vested' to have an ambulatory character, with the result that the title is vested in the council from the time that the statute commences to apply to the land and at every moment thereafter. Since the acquisition of any interest would derogate from the council's fee simple, the section prevents the acquisition of any inconsistent interest, whether registered or not.[94]

upon its commencement.

92 As discussed below (see n 100 and accompanying text), in *Quach's* case the council's title was held to have been extinguished. In Victoria the Limitation of Actions Act 1958 s 7 provides that no period of adverse possession can affect the right and title of the Crown in any land. However a municipal council is not an agent of the Crown unless controlled by a Minister or declared by statute to be an agent of the Crown: Peter Hogg, *Liability of the Crown* (2nd ed, 1989) 10, 250-1, 253.

93 (1990) 22 NSWLR 55, 63.

94 Street J did not consider the effect of the amendment (effective repeal) of s 398 by the Local Government (Validation and Amendment) Act 1922 (NSW) s 24. While the *Randwick Council* case established that the fee simple vested in councils was an accrued right that survived the repeal, the section made no express provision for the priority of the interest created (cf the repealed South-Eastern Drainage Act 1931 (SA) provision considered in the *South-Eastern Drainage Board* case,

His interpretation may be justified as giving the widest effect to the perceived purpose and intent of the statute. The statute evinces a clear intention that the council's interest should be effective without registration, therefore it must intend that the statutory title should be immune from defeat by registered interests.

While the conclusion of Street J as to the effect of the section may be defended on grounds other than those actually advanced by him, it is notable that the judgment does not approach the question as one of statutory construction. Street J appears to have extracted from earlier cases principles which arose from the terms of other statutes, and applied them as if those principles had an independent existence. For example, Street J stated that s 398 had the effect of removing the fee simple from the operation of the Torrens scheme, by which he apparently meant that the council's interest was immune from the paramountcy of the registered title. Young J thought that the concept was borrowed from the *South-Eastern Drainage Board* case where Starke J said, '[n]o room so far is left for the operation of the Real Property Act 1886, and the explicit and express provisions of the Drainage Acts must prevail.'[95] Starke J made the remarks to explain a construction of the Drainage Acts that found them to be wholly inconsistent with the Real Property Act with respect to the priority of the first charges created under the Drainage Acts. Young J in *Quach's* case pointed out that it was inappropriate to apply the remarks made by Starke J to the interpretation of a different statute:

> [The] words of Starke J were obviously correct with respect to the South Australian Drainage Act but it is very difficult to see how one can translate across those words to s 398.[96]

In my opinion Street J's view of s 398 is questionable because he did not approach it as a provision in conflict with the Torrens legislation and determine its effect by examining its text and purpose. He proceeded as if prior decisions on statutory interests laid down general principles applying to discrete classes of exceptions to indefeasibility. What seems to underlie his approach is the notion that statutory interests such as that of the defendant council belong to a class of inherent rights, concerning which there is an existing body of law. This was an error of the kind referred to by the Privy Council in *Ogden Industries Pty Ltd v Lucas*[97] where Lord Upjohn said:

> It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down in construing the Act rather than that found in the words of the Act itself.[98]

which stipulated that the charge was to be a first charge: (1939) 62 CLR 603, 628).

95 (1939) 62 CLR 603, 622.

96 (1990) 22 NSWLR 55, 64.

97 [1970] AC 113.

98 Ibid 127.

C *Quach v Marrickville Municipal Council*

Despite its amendment in 1922, s 398 has continued to give rise to litigation because of the accrued rights and liabilities which arose under it in its original form. *Quach*[99] was the most recent of the trio of reported cases on the section. The case arose out of circumstances very similar to those considered by Street J in *Pratten's* case. A strip of land set aside in a subdivision for drainage purposes before 1920 had vested in the council upon the commencement of s 398, apparently without the knowledge of either the council or the then registered proprietor. The strip was included in land which was subsequently transferred to the plaintiffs who in 1956 purchased the land in reliance on a clean certificate of title. The plaintiffs sought a declaration that their registered interest was not affected by the fee simple interest created in the respondent council under s 398. The council by a cross-claim sought a declaration that it was entitled to become registered proprietor of the land.

Where the plaintiff in *Pratten's* case had been wholly unsuccessful in his action, Mr and Mrs Quach were granted a declaration restraining the defendant council from seeking registration as proprietor. They succeeded on a ground not considered in the *Randwick Council* case nor in *Pratten's* case, namely that the council's title to the strip that vested by the operation of s 398 had subsequently been extinguished by the plaintiffs' adverse possession.[100] The plaintiffs had occupied the whole of the land other than the stratum through which the defendant's drainage pipes passed and had paid rates to the council since 1956.[101] The plaintiffs' title was subject to appropriate rights of easement to the council for the purpose of drainage.

Quach's case is notable for the strong critique by Young J of two propositions of law which he takes to have been established by prior judicial decisions. The first critique, which has been discussed above, concerns the conclusions of Street J in *Pratten's* case as to the effect of the Registrar-General having issued a new certificate of title to a new registered proprietor after an overriding statute had vested the fee simple in the council. While *Pratten's* case was not binding upon him, Young J decided that it would not be in the interests of justice to depart from it and strike out on a new path. His second critique related to the extension of the public rights exception to indefeasibility to include what he called 'statutory rights'.

Sitting in the Equity Division of the Supreme Court of New South Wales, Young J commenced by doubting the correctness of the decisions in *Pratten's* case and the *Randwick Council* case that the council's unregistered statutory fee

[99] (1990) 22 NSWLR 55.

[100] Young J examined a number of authorities which hold that a title to a horizontal or vertical stratum of land can be obtained by adverse possession even if the owner's possession of another stratum or strata is not disturbed: *Rains v Buxton* (1880) 14 Ch D 537; *Williams v Usherwood* (1981) 45 P & CR 235; *Marshall v Taylor* [1895] 1 Ch 641; *Midland Railway Co v Wright* [1901] 1 Ch 738.

[101] The payment of rates by another has been said to constitute strong evidence of adverse possession: *Lord Advocate v Lord Lovat* (1880) 5 AC 273; *Kirby v Cowderoy* [1912] AC 599; *O'Neil v Hart* [1905] VLR 107; *Bank of Victoria v Forbes* (1887) 13 VLR 760.

simple prevails over the registered title:

> It may be that these cases rely on the decision of Rich AJ in *Vickery v Municipality of Strathfield*, and it may be that that decision should, in the light of modern circumstances, be re-examined by an appellate court.[102]

Young J plainly considered that previous cases had extended the public rights exception to indefeasibility established in *Vickery's* case to include statutory rights such as the title vested in councils by s 398. The following observation makes explicit a convergence of the two exceptions that had been implicit in the *Trieste* case and in *Pratten's* case:

> It has been well recognised, by both the textwriters and the authorities that, although it is the weakest point in the Torrens System, statutory and public rights will override an indefeasible title.[103]

He added that the council's fee simple is not a public right in the strict sense, the council having the fee simple and not merely a right to pass drains through the land. Although he disagreed with the extension of the public rights exception to include rights such as that of the defendant council, he took the usage to be too well settled for him to depart from it.[104]

The observations of Young J are further evidence that a stream of judicial opinion embraces a wide view of the public rights exception to indefeasibility. This view extends the class of public rights to include rights akin to private rights vested for public purposes in a government authority, and possibly includes other members of Hogg's class of 'inherent rights' such as rates and charges.[105]

VII CONCLUSION

It has been said that the implied exception for public rights of way is of an anomalous and very special kind.[106] The rights protected are those of the public, which lacks the legal persona to hold an interest as grantee. In its original limited sense the exception constitutes a minor and confined restriction upon the indefeasibility of registered title, one which usefully achieves a measure of consistency between the various jurisdictions despite the lack of express provision in two of the States.

Its extension beyond rights of user residing in the general public is not justified. As explained by Rich AJ in *Vickery's* case, the exception was founded on an implication from the Torrens statute itself. A provision that a registered proprietor holds the land free from all encumbrances, liens, estates or interests whatsoever is not wide enough to exclude rights of public user, which are none of these. The same cannot be said of an interest in land vested in an acquiring

[102] (1990) 22 NSWLR 55, 58.

[103] Ibid 61.

[104] Ibid.

[105] For example, the statutory charges in the *South-Eastern Drainage Board* case were cited by Herron CJ as examples of the inherent rights exception: see *Trieste* (1963) 64 SR (NSW) 98, 104.

[106] Sykes and Walker, above n 17, 454.

authority, nor of a statutory charge such as that considered in the *South-Eastern Drainage Board* case: both of these are true interests in land and are akin to rights of the kind capable of existing in an individual.

If the public rights exception to indefeasibility has been extended in the way suggested by Young J in *Quach's* case, it appears that the extension arose through confusion rather than by a process of reasoned choice. A failure of substantive analysis has contributed to the confusion between the public highways exception and the exceptions to indefeasibility resulting from overriding statutes. In those cases where a conflict between a Torrens statute and another statute has been identified, the courts have in some cases failed to identify clearly the principles applied to determine which statute prevails and the extent of the modifications to the Torrens provisions resulting from the implied repeal. This point was made by Cleary J of the New Zealand Court of Appeal in the *Miller* Case when he said:

> I think ... notwithstanding certain expressions to be found in some of the decisions, that the fundamental reason why statutory interests have been accorded priority over the registered title is neither because they were in the nature of easements nor because they aided some public purpose, but because the provision of the particular statute required that they have priority. It is true that one or both of the two matters mentioned have often been present in those cases, but the existence of those matters cannot be essential in order to enable it to be said that the statutory interests have priority over registered interests. The determination of the question must depend upon the purpose and interpretation of the statute under which the interest arises.[107]

As Cleary J noted in this passage, there has been a tendency to treat previous decisions on other statutes as if they established classes of rights that prevail over registered title, independently of the terms of the other statutes. *Pratten's* case illustrates that a failure to approach the task as one of statutory interpretation may lead to confusion concerning the extent of the right and the modifications it imposes upon the normal incidents of registered title.

The preferable approach is that adopted by the four majority judges of the High Court in the *South-Eastern Drainage Board* case. The first step is to examine the terms of the statute to determine whether there is an inconsistency with the Torrens legislation. Secondly, the court should decide, in accordance with the normal rules for resolving a conflict of legislation, which statute is to prevail. Thirdly, the modifications to the normal operation of the indefeasibility provisions necessary to give effect to the particular statute should be spelled out.

In determining the position of statutory rates and charges and other interests vested by statute in a public authority, the decided cases provide some guidance. Drawing on the judgment of Cleary J in the *Miller* case in the New Zealand Court of Appeal,[108] Professors Sykes and Walker propose four relevant considerations, namely:

[107] *Miller v Minister for Mines* [1961] NZLR 820, 839.
[108] Ibid 838-42.

> (a) whether the rights are registrable under the Torrens legislation; (b) the terms of the statute creating the right, viz whether it purports to give an immediate right subject to no conditions or contingencies; (c) whether the creating statute also creates its own registration system; and (d) whether private rights only are affected.[109]

It need only be added that the fundamental question is one of ascertaining whether and to what extent the other statute was intended to abrogate the Torrens legislation, the four factors above being merely indicators of legislative intent.

[109] Sykes and Walker, above n 17, 503.