

negligence from, amongst other things, the equitable doctrine embodied in *Norton v. Lord Ashburton*?⁴ In the authors' view Sir Owen Dixon did the wrong thing when in *Brunker v. Perpetual Trustee Co. Ltd.*,⁵ he sanctioned the use of the principle of *Milroy v. Lord*⁶ as a test to determine whether a volunteer transferee of an estate in land under the Real Property Act had acquired a statutory right to the registration of an instrument in his favour.

An impression that the authors are opposed to all change would be incorrect for they see scope for further development of equitable doctrine in some areas. For example, they point to the increasing reliance on equitable protection of confidential information which is being placed by commercial interests who are dissatisfied with the patents system. For further evidence of the vigour of equity the authors might have referred to the speech of Lord Wilberforce in *Re Westbourne Galleries*.⁷ The authors are not entirely unyielding in their devotion to logic. For example, they are prepared (p. 160) to accept on grounds of convenience the illogical but beneficial proposition that the right of an assignee of future property where the consideration is executed is a right of a higher kind than a right in contract. Although the authors seem pleased that equity is not to be presumed to be past the age of child-bearing (p. 722) they endorse the view of Bagnall, J. in *Cowcher v. Cowcher*⁸ that equity's "progeny must be legitimate—by precedent out of principle". It is reassuring to know that equity really is fertile and that there is no need to rely on the approach of Kenyon, M.R. in *Jee v. Audley*.⁹

Meagher, Gummow and Lehane is a very welcome accretion to Australian legal literature and is more likely to be a possession for all time than many other works.

H. A. J. FORD*

Baalman, The Torrens System in New South Wales (2 Ed.), by R. A. Woodman¹ and J. P. Grimes,² Sydney, Law Book Company Limited, 1974, xxxii + 503 pp. \$25.50.

Reading an annotated version of a long-standing and important statute such as the New South Wales Real Property Act 1900 is rather like revisiting an art gallery. The highlights are familiar but it is surprising how much of significance is tucked away in the corners. The second edition of the late John Baalman's *Torrens System in New South Wales* is hardly intended to be read at one or two sittings. Yet the exercise is one that could usefully be attempted by both practising and academic lawyers not only to bring themselves up-to-date, but to refresh their understanding of how the Torrens system works. The 24 years since publication of the first edition of *Baalman*, which earned a reputation as something of a classic in the literature of the Torrens system, have seen many fundamental changes in law and practice, some of which have been effected by legislative amendments (most notably in New South Wales the Real Property (Amendment) Act 1970) and some by judicial legislation

⁴ (1914) A.C. 932.

⁵ (1937) 57 C.L.R. 555.

⁶ (1862) 4 De G.F. & J. 264.

⁷ (1973) A.C. 360.

⁸ (1972) 1 W.L.R. 425 at 430.

⁹ (1787) 1 Cox 324.

* LL.M. (Melb.), S.J.D. (Harvard), Professor of Commercial Law, University of Melbourne.

¹ Associate Professor of Law, University of Sydney.

² Examiner of Titles, Land Titles Office, Sydney.

(such as the landmark cases of *Frazer v. Walker*³ and *Breskvar v. Wall*⁴). The authors of this edition (one of whom assisted Mr. Baalman with the first) have therefore had much new ground to cover.

Like the casebook, the annotated statute has virtues and drawbacks as a means of presenting information and ideas. One advantage of the annotation is that case law interpreting the legislation can be presented in a convenient and accessible form, at least for those who have more than a passing acquaintance with the legislation. Another advantage is that the philosophy and practices of the administrators of the legislation can be stated clearly, in the form of comments on the sections specifying their powers and duties.⁵ On the other hand annotations often appear to lose sight of the underlying legal principles that transcend or even conflict with the legislative structure established by the draftsman. Since this structure is not always conducive to clear and rational exposition of legal doctrine the presentation of the annotator may suffer. A related problem is the tendency of annotators, insofar as they direct themselves to law reform at all, to eschew consideration of far-reaching changes in favour of a discussion of minor amendments needed to clarify subsidiary parts of the legislation. Moreover exclusive concentration on the legislation of one State can encourage a parochial approach to an exposition of the law unless the author consciously attempts to cast his net widely. This point is not merely of academic importance. While practitioners in New South Wales, for example, may not be interested in the law elsewhere in Australia from the point of view of comparative jurisprudence, the courts and commentators in other States or even overseas jurisdictions may have much to offer to those attempting to analyse the law of New South Wales.

The second edition of *Baalman* displays many of the virtues and faults to be expected of an annotated statute. However, like the first edition, much of which is retained intact, the second edition minimises most of the faults usually found in annotations and must be regarded as among the best of its kind in Australia. It is generally clear, detailed and well presented. The authors have shaken off some of the less sensible constraints imposed by the vagaries of successive generations of Parliamentary draftsmen. In particular the provisions dealing with restrictive covenants and easements which for reasons best described as obscure are found in the Conveyancing Act 1919 have been included in this edition. This innovation does not entirely overcome the difficulty that many legislative provisions of great importance to the Torrens system are to be found outside the Real Property Act and therefore do not receive detailed treatment in this work. For example, Part VII, Division 3 of the Real Property Act dealing with mortgages of Torrens system land must be read in conjunction with Part VII of the Conveyancing Act. The Conveyancing Act provisions are of course mentioned in *Baalman*, but are not analysed to the same extent as those in the Real Property Act, although the assiduous practitioner has other sources of reference available to him.⁶

Perhaps the greatest virtue of the second edition of *Baalman* is the detailed examination of the Registrar-General's powers and responsibilities under the Act. This examination includes valuable information as to the approach taken in practice by the Registrar-General to the exercise of those powers and responsibilities. These matters are specially significant in the light of the 1970 amendments, which streamlined the machinery of registration, clarified and extended the Registrar-General's powers and introduced a number of innovations designed to solve difficulties encountered in administering the

³ (1967) 1 A.C. 569.

⁴ (1971) 126 C.L.R. 376.

⁵ Baalman himself had these advantages in mind in preparing the first edition: see Preface, p. iii. This preface is omitted from the second edition, which contains no statement of the authors' objectives.

⁶ See, e.g. Stuckey, *The Conveyancing Act 1919-1969* (1970) 200-245.

system.⁷ The amendments highlight the extent to which the law of real property, like other areas of "private" law, has become tinged with the characteristics of so-called "public" law. To an increasing extent, the rights of parties claiming interests in land may depend on the manner in which the Registrar-General exercises his discretionary powers, rather than on any formal action taken by a court. The authors of *Baalman* recognise this by devoting special attention to the Registrar-General's administrative powers as affected by the 1970 amendments. For example, there is a very useful discussion of the Registrar-General's powers to require production of instruments, correct errors and omissions in the register and record caveats on his own initiative.⁸ All of these powers, of course, can affect the rights of individuals. The discussion includes much information not readily available in published form on current and past departmental practices and on the intention of the 1970 amendments.

The stress quite properly laid by the authors on the Registrar-General's discretionary powers raises some questions about legislative reforms to the Torrens system in New South Wales. The 1970 amendments to the Real Property Act were heavily influenced by the views of the Registrar-General and his officers and indeed the original draft bill was prepared by Mr. Grimes, one of the authors of this edition of *Baalman*. The draft bill and the supporting documents were not made available to the public, although it appears that several interested persons and bodies were asked for their comments on the bill.⁹ It is perhaps a little unfortunate that the process of consultation was not extended further, since some amendments arguably place the interests of the administrators of the Torrens system ahead of those of the users. More regrettable is the fact that the opportunity was not taken to introduce more sweeping amendments to the Real Property Act to clarify and improve the rules governing disputes between private parties. Reform of "lawyer's law", such as that embodied in the Real Property Act, does not occur with such frequency as to allow an opportunity for a thorough review to slip by. While the second edition of *Baalman* is not notable for its emphasis on the need for legislative reforms (and in a work directed mainly to practitioners criticism on this ground would not be warranted), the authors do point to a number of anomalies and examples of bad draftsmanship in the Act. For example they repeat Mr. Baalman's own criticism of the drafting of s. 126 (concerning the course of action required of a person who has been deprived of an estate or interest in land and wishes to claim compensation for his loss),¹⁰ and draw attention to deficiencies in the provisions governing mortgages of Torrens system land.¹¹ In pointing out the need for drafting improvements the authors follow the approach of Mr. Baalman in the first edition and indeed it is depressing to observe that some of the matters referred to by him in that edition still await attention from Parliament.

In discussing the basic principles underlying the interpretation of the

⁷ See, e.g. the new s. 12A which empowers the Registrar-General to give notice to a person who is not a party to a dealing that the dealing has been lodged for registration. If the person given notice does not take steps within the time specified in the notice to restrain the Registrar-General from registering the dealing he waives any claims he otherwise may have against the Registrar-General in respect of the registration of the dealing. The purpose of the new provision is to allow the Registrar-General, in cases where the propriety of registration is doubtful, to cast the onus on any person who might be adversely affected to protect his own interests.

⁸ See the discussion of s. 12, pp. 22-41. See also the annotations to Part IV of the Act concerning primary applications: pp. 48 ff.

⁹ New South Wales Parliamentary Debates, Legislative Assembly, 26 February 1970, pp. 3657-3658 (the Hon. J. C. Maddison, Minister for Justice).

¹⁰ P. 392.

¹¹ Pp. 282 (drafting of ss. 56 and 57), 290 (placing in the Act of ss. 60, 63 and 64), 292 (anomalies concerning the mortgagee's remedies of entering possession and appointing a receiver).

Real Property Act the authors handle the issues adequately, with full citation of decided cases, although the presentation often lacks Mr. Baalman's flair for the expression of controlled indignation. What, for example, has prompted the removal of Mr. Baalman's observation that in their approach to the construction of the caveat provisions "the courts seem to have displayed some of the inelasticity which characterised the mediaeval attitude towards writs"?¹² While the authors' references to case law are thorough, the limitations imposed by the annotations technique have their effect on the presentation of general legal principles, as indeed they did in the first edition. There is, for example, no sustained analysis of the philosophy which lies behind the Torrens system of title registration and which has often if not consistently influenced the approach of the courts. Similarly, the examination of the competing theories of deferred and immediate indefeasibility, a matter which lies at the heart of the Torrens system, is inadequate for those seeking a thorough exposition of principle and wishing to understand fully the implications of cases like *Travinto Nominees Pty. Ltd. v. Vlattas*.¹³ The statutory exceptions to indefeasibility are dealt with at some length but the treatment of the so-called "in personam" exception to indefeasibility recognised in *Fraser v. Walker*, is not explored in depth despite its practical importance. The tendency on occasions to recite a series of headnote-type summaries of cases or even of extracts from cases detracts from the value of the work as a constructive tool for students and, one would think, for practitioners as well.¹⁴ These defects are a little puzzling since the authors do engage in detailed and careful analysis of the case law on some issues, as for example in an intriguing examination of the difficulties of reconciling some portions of the judgments in *I.A.C. (Finance) Pty. Ltd. v. Courtenay*¹⁵ and *Jonray (Sydney) Pty. Ltd. v. Partridge Bros. Pty Ltd.*¹⁶ on the question of the "successive" effect of s. 43A¹⁷ (which accords a measure of protection to a purchaser obtaining a registrable dealing before registration of that dealing). The discussion of issues of principle would be improved also by more frequent reference to worthwhile contributions in the periodical literature and other secondary sources. *Baalman* does include some references of this character, primarily to articles appearing in the *Australian Law Journal*, but much of value is omitted.¹⁸

These criticisms notwithstanding, it is clear that the second edition of *Baalman*, like the first, will play an important role as a reference work in the New South Wales Torrens system. Perhaps it is not inappropriate to add a hope that in the future *Baalman* will prove equally useful in other Australian jurisdictions. As Barwick, C.J. remarked in *Breskvar v. Wall*, it is "a matter for regret that complete uniformity of [the Torrens] legislation has not been achieved" in Australia.¹⁹

R. SACKVILLE*

¹² P. 222 (1st edition).

¹³ (1973) 47 A.L.J.R. 279.

¹⁴ The treatment of the 'fraud' exception to indefeasibility does not attempt to develop any coherent statement of principle, and is limited to presenting a series of fact situations encountered in reported cases: p. 200 ff.

¹⁵ (1963) 110 C.L.R. 550.

¹⁶ (1969) 89 W.N. (N.S.W.) (Pt. 1) 568.

¹⁷ Pp. 215-7.

¹⁸ One important source not cited in *Baalman* is G. W. Hinde (ed.), *New Zealand Centennial Essays on The Torrens System*. (1971).

¹⁹ (1971) 126 C.L.R. 376, 386.

* Professor of Law, University of New South Wales.