# THE TRANSFORMATION OF TORRENS'S SYSTEM INTO THE TORRENS SYSTEM

The first Act introducing Torrens's system of registration of title was passed in South Australia in 1858, but later Acts of 1858, 1860, and 1861 left little of the original measure and transformed the system by altering the basic principle on which it rested. It was this transformed system that was adopted elsewhere, and the system now known as the Torrens System is very different from that originally put forward by Torrens. This article will trace the steps by which the transformation occurred.

Torrens's original system was based on a principle framed by him in view of what he regarded as the ultimate source of existing defects in the law of real property. In his book "The South Australian System of Conveyancing by Registration of Title"[1] he sets out a formidable list of these defects, and then declares: "The defects objected to above have all a common source—'*The dependent nature of titles*'."[2] What he had in mind was the chain of title which in most cases a person must establish when he has contracted to grant an interest in land. If the intending grantor holds by immediate grant from the Crown to himself the proof is simple and absolute; but ordinarily he has a line of predecessors, and the validity of his title depends on the validity of the title of each predecessor through whom (or by adverse possession against whom) he claims. He must show a chain of title either back to a Crown grant (rarely possible in England) or, failing this, back to a root of title over a period long enough to raise a strong probability that the title, not having been challenged within that period, is valid. At common law the title had to be traced back for at least sixty years, but even when this was done the grantee obtained only a probable and not an absolutely proved title.

1. Published in 1859. In the preface Torrens explains the origin of his interest in the subject, and the source of the central idea of his system.
   "Twenty-two years have now elapsed since my attention was painfully drawn to the grievous injury and injustice inflicted under the English Law of Real Property by the misery and ruin which fell upon a relation and dear friend who was drawn into the maelstrom of the Court of Chancery, and I then resolved some day to strike a blow at the iniquitous institution.
   My official employment in the Customs service during seventeen years made me conversant with the Law of Shipping; and having just so much acquaintance with the principles of our Constitution and Law as ordinarily forms part of the education of an English gentleman, I was enabled to perceive that my object might be attained by applying to land the principles which regulate the transfer of shipping property. I at that time introduced the proposition to the consideration of my friends, the present Chief Justice, Sir Charles Cooper, and Mr. W. B. Belt, since one of the solicitors of the Lands Titles Commission, and their reasoning against it convinced me that it was both feasible and effectual."
2. p. 8.

If, as Torrens thought, the evils of the existing system flowed from this uncertain and expensive method of showing title, the remedy was to make every case the simple case first mentioned above, *i.e.*, to make every holder of the fee simple an immediate grantee from the Crown. Accordingly, Torrens says, "as a first principle, the South Australian Real Property Act creates 'independent titles'; retrospective investigation is cut off; each proprietor of the fee holds direct from the Crown subject to such mortgages, charges, leasehold or other lesser estates as may exist or be created affecting the land. . . ."[3] And again, "transfers are conducted on the principle advocated by His Honour Mr. Justice Barry . . . the existing title being surrendered to the Crown, and a fresh title issued from the Crown vesting the estate in the transferee indefeasibly."[4]

Section 33 of the original South Australian Real Property Act,[5] which received the Royal Assent in January, 1858, gives effect to this principle. It reads as follows:—

> "33. Every certificate of title or entry in the register book shall be conclusive, and vest the estate and interests in the land therein mentioned in such manner and to such effect as shall be expressed in such certificate or entry valid to all intents, save and except as is hereinafter provided in the case of fraud or error."

This provision, it will be seen, did not confer an absolutely indefeasible title, for it contained the exception of cases of fraud and error, in which cases a registered interest could be cancelled. Thus there could be retrospective investigation of a proprietor's title. However, later provisions dealing with cancellation for fraud or error[6] were subject to provisoes protecting the bona fide purchaser for value, so that the claim that "retrospective investigation is cut off" was justified in relation to bona fide purchase. But it was the protection of the bona fide purchaser, not the operation of registration as a grant, that produced this effect.

By being made subject to exceptions, Torrens's original conception could not be fully effectual in itself for its main purpose, and it was not long maintained. Not only were further exceptions to indefeasibility introduced, but even the principle that registration operates as a new grant was abandoned, in form at least if not in practical effect.

The original Act came into operation in July, 1858, and within six months it was heavily amended by the Real Property Law Amendment Act,[7] assented to in December, 1858. The Amending

3. p. 9.
4. p. 34.
5. 21 Vict. No. 15.
6. ss. 92 *et seq.*
7. 22 Vict. No. 16.

Act repealed seventy sections of the original Act, as well as parts of several other sections, and replaced them with provisions that substantially altered the original measure. It is the system as it stood after this Amending Act that Torrens describes in his book, but the passages quoted above apply rather more accurately to the original Act than to the amended Act.

Section 20 of the Amending Act replaced s. 33 of the original Act. It introduced further exceptions to indefeasibility, but retained the principle that registration vests a title in the person registered.

> "20. Notwithstanding any error or omission in the observance of any formality herein prescribed to be observed in bringing land under the operation of this Act, and excepting in the case of frauds, and so far as regards any wrong description of any land, or of its boundaries, or the omission or misdescription of any right-of-way or other easement, created in, or existing upon, any land under the operation of this Act, every certificate of title or entry in the register-book, signed by the Registrar-General, shall absolutely vest the estate or interest in the land therein mentioned, in the manner and to the effect expressed in such certificate of title or entry, and the registered proprietor of such estate or interest in the said land, shall be secure from eviction or disturbance or adverse claim, in respect of any estate, right, or interest in the said land, which is not declared in such certificate of title, or entry on the register-book, or in the instrument referred to in such entry."

These early Acts were replaced by the Real Property Act of 1860,[8] and this Act omitted the declaration that a certificate or entry in the register book vests a title in the person registered. Instead there was a development of another principle already partly stated in s. 20 of the second Act; and s. 41 of the Act of 1860 established what is now regarded as the central principle of the Torrens system, that a registered proprietor holds subject to interests registered, but free of interests not registered. This notable provision reads as follows:—

> "41. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which, but for this Act, might be held to be paramount, or to have priority, and, except in the case of fraud, the registered proprietor of land, or of any estate or interest in land under the provisions of this Act, shall hold the same subject to such encumbrances, liens, estates, or interests, as may be notified, by entry or memorial, on the

8. 23 & 24 Vict. No. 11.

> folium of the register book, constituted by the land grant, or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, except the estate or interest of a proprietor claiming the same land under a prior certificate of title, or under a prior grant registered under the provisions of this Act, and except as regards the omission or misdescription of any right of way or other easement, created in or existing upon any land, or the wrong description of any land, or of its boundaries."

An equally important provision of the Torrens legislation also takes something close to its settled form in this Act. This is the provision protecting the bona fide purchaser for value. Section 120 of the Act contains the proviso:—

> "Provided also, that nothing in this Act contained shall be interpreted to subject to any action of ejectment, or for recovery of damages, any purchaser or mortgagee *bona fide* for valuable consideration, of any land under the provisions of this Act, although his vendor or mortgagor may have been registered as proprietor through fraud or error, or may have derived from or through a person registered as proprietor through fraud or error, whether by wrong description of land, or of its boundaries, or otherwise."

On the other hand another provision supporting indefeasibility of title which appears in later Torrens Acts—the provision that a certificate is conclusive evidence—does not appear in this Act in its fully developed form. The original Act contained a provision (s. 30) that a certificate is to be received as evidence of the particulars therein set forth and of their being entered in the register book. The 1860 Act makes the addition that the certificate shall be conclusive evidence that the property comprised in it has been duly brought under the Act. But it does not provide that the certificate shall be conclusive evidence as to interests registered, a provision which first appears in the Queensland Act of 1861.

There was a further revision of the Torrens legislation in 1861. In February of that year a Real Property Law Commission was appointed, with Sir Charles Cooper C.J. as chairman and Torrens as one of the other members. The Commission made an elaborate inquiry into the working of the new system, and drafted a new measure to replace the existing Act, which became law as the Real Property Act of 1861.[9] The changes made were mainly in matters of detail, affecting the practical working of the system, but there was a further addition to the exceptions to indefeasibility,

9. 24 & 25 Vict. No. 22. For memoranda accompanying the draft Bill and for the Report, see Parl. Proc. S.A., 1861, Vol. III, Papers 186 and 192.

viz., the title of any person adversely in actual occupation when the land was brought under the Act. On the other hand the indefeasibility provisions were strengthened by the provision, in s. 33, that a certificate of title—

> "shall, except in any of the cases hereinafter otherwise provided, be conclusive evidence that the person named in such certificate of title or in any entry thereon, as seized of or as taking estate or interest in the land therein described, is seized or possessed of such land for the estate or interest therein specified. . . .[10]

From this review of the early legislation in South Australia it will be seen that within a few years there was a notable transformation of the general conception behind the scheme of indefeasibility of title. Torrens began with the idea that retrospective investigation of title (the source of the defects to be remedied) must be cut off, and that to this end registration should operate as the granting of a new title. The only qualification to this principle was that the existence of fraud or error could be inquired into, and a registered title based on fraud or error set aside except as against a person taking, as the original Act put it, "for bona fide valuable consideration."[11] The Acts of 1860 and 1861 replaced this simple and sweeping device by a combination of provisions which did not explicitly treat registration as a source of title, but instead, as to the title of a person registered, made the certificate evidence which was rebuttable only in certain cases (fraud, error, wrong description, etc.) and not rebuttable even in those cases where he was a bona fide purchaser for value, and, subject to the same and perhaps some further exceptions, prevented an interest from being enforced unless it was registered.

I have found no contemporary explanation of this change, but the reasons for it may be deduced from the original purpose of the legislation and the nature of the amending provisions. Torrens's main aim was to make the purchase of an interest in land simpler, safer, and cheaper, by barring retrospective investigation of title; and for this purpose it would have been sufficient to make the register conclusive in favour of the bona fide applicant who first brought land under the Act and the bona fide purchaser who subsequently dealt on the faith of the register. However, in his original Act, Torrens went further and laid down a broader principle of indefeasibility. Since "dependent titles" were the source of evil, he not unnaturally adopted "independent titles" as the remedy; and, as he said, "indefeasibility of title created by registration

10. The qualification at the beginning of this clause is, surprisingly, omitted from the Victorian and New South Wales Acts passed in 1862, but not from the Tasmanian Act.
11. See ss. 94, 98.

follows of necessity as a corollary to the principle of independent title."[12] But this would give protection in some cases where it was not necessary for his purpose, or might even cause injustice. This is recognised in the original exceptions of fraud and error; and the additions to these exceptions made by later Acts indicate a view that there were other cases where the certificate should not prevail. It was not necessary to make the protection of a registered proprietor so absolute that a neighbour should be deprived of an easement merely because it had been omitted from the certificate; and, more important, it was not necessary that a proprietor should in all cases be entitled to take advantage of an error as to parcels at the expense of the true owner of land wrongly included in a certificate. A long list of exceptions made somewhat unreal the declaration that registration vested a new title in the person registered. More particularly, the recognition of the exception of wrong description meant that there was no guarantee of parcels, and made it difficult to treat the certificate as a new grant of the land described in it. Of course, it might still have been maintained that the certificate operated as a grant, but as a grant which in the specially excepted cases would be wholly or partially invalid. But this would have been an artificial conception, and it must have seemed better to abandon the original principle, and instead to treat the certificate of title as being what its very name imported, rather than as a grant or source of title. The certificate could then be made conclusive in cases where this was necessary to achieve the purpose of the legislation, and open to challenge and correction in other cases where it was not necessary to protect the registered proprietor at the expense of others with a better claim. The one case where absolute protection was necessary was the case of the bona fide purchaser for value dealing on the faith of the register, and accordingly the changes which further qualified the general principle of indefeasibility were accompanied by an elaboration of the provisions that made the certificate conclusive in favour of the bona fide purchaser for value.

If the only object had been to make dealings safe and to avoid retrospective investigation of title (and this seems to have been Torrens's object) it would have been sufficient to protect the bona fide purchaser dealing on the faith of the register.[13] But apparently the legislature wished to go further and to ensure that once the land was on the register there should be no need thereafter to go back beyond the register. The registered proprietor was to begin with a clean sheet and have a reasonably unassailable title. But the provision which secured the position of the proprietor who first

12. The South Australian System of Conveyancing by Registration of Title, p. 9.
13. Cf. Baalman: Torrens System in N.S.W. 134.

brought land under the Act also worked for the benefit of subsequent registered proprietors. Unfortunately, the question how far it works for the benefit of proprietors who are not bona fide purchasers for value is a matter that has led to a still unresolved division of opinion amongst judges and text writers.

In another way also the original conception seems to have had a permanent influence. Although indefeasibility of title was soon made subject to substantial qualifications, the system continued to be regarded as one which made the register conclusive as to title. Thus the report of the Commission which drafted the South Australian Act of 1861 contains the following general account of the system:—

> "The objects of the Real Property Act are to give security and simplicity to all dealings with land by providing that the title shall depend upon registration, that all interests shall be capable of appearing or being protected upon the face of the registry, and that a registered title or interest shall never be affected by any claim or charge which is not registered. By this system every one who acquires any estate or interest in land, upon being registered as owner thereof, obtains a title absolutely secure, as against every one whose claim does not appear upon the registry; and the two elements of simplicity and security as regards the acquisition of land appear to be effectively attained."[14]

This statement ignores the express exceptions to indefeasibility, and the continued possibility of enforcing equitable claims against a registered proprietor. As a general statement applicable to all cases it is far too absolute. However, in so far as it relates to the position of a bona fide purchaser (or other grantee) for value, it is substantially correct. General statements as to the effect of registration, like the one quoted above, are often incorrect because they confuse the protection given to a bona fide purchaser on the faith of the register with the more limited protection conferred by a certificate as such.[15]

*The System in Other Colonies.*

Queensland was the first of the other Australian colonies to adopt the Torrens system, and its Real Property Act of 1861 was a close copy of the South Australian Act of 1860, not the more

14. Parl. Proc. S.A., 1861, Vol. III, Paper 192.
15. The effect of the Act has also been overstated in the opposite direction. In *Oelkers v. Merry* (1872) (2 Q.S.C.R. 193), a case of competing certificates of title, bitter complaint against the Act was made in the course of argument by Lilley Q.C., afterwards Chief Justice of Queensland. He even went so far as to say, referring to the Queensland s. 44: "This is the supposed indefeasible section, but it will be found that it is not a bit better than the old conveyance. It is not a Parliamentary title such as the public was led to believe they got under the Act, and it is a delusion to suppose that it is indefeasible."

developed Act of 1861. Tasmania, Victoria, and New South Wales did not follow suit until a little later, and were able to model their Acts on the 1861 South Australian Act, though according to Hogg[16] the New South Wales Act was based on the Victorian Act, and so only indirectly on the 1861 South Australian Act. New Zealand had in 1860 adopted a registration system of general application (as distinct from an earlier system which operated in some areas only) based mainly on the English model; but in 1870 by its Land Transfer Act it adopted the South Australian system. In 1874 Western Australia copied the Victorian Transfer of Land Statute of 1866, which had replaced the original Victorian Real Property Act.

In New South Wales, Queensland, Tasmania, and New Zealand, although the original legislation has been amended from time to time, the general scheme of the Acts, particularly in relation to indefeasibility of title, has not been substantially modified; indeed the original Acts of Queensland and Tasmania continue to be the Principal Acts, and the present New South Wales Act of 1900 was largely a re-enactment of the original Act.

But in Victoria there was a rapid development of the original scheme, affecting indefeasibility of title as well as other features of the system. The Act of 1862[17] was extensively amended in 1863,[18] and amongst other changes there were several additions to the exceptions to indefeasibility, viz., reservations, exceptions, conditions, and powers contained in the original Crown grant, unpaid rates, and easements acquired by enjoyment or user. The 1866 Act[19] added further exceptions, viz., rights under any adverse possession, public rights of way, licences under the Mining Statute 1865, and the interest of any tenant in non-adverse possession.

The result is that in respect of indefeasibility the Acts of New South Wales, Queensland, Tasmania, and New Zealand form one group in which the relevant provisions are almost identical. In the Victorian and Western Australian Acts also the protecting sections are the same in general design; but these two Acts qualify the conclusiveness of the certificate (except in the case of the bona fide purchaser for value) to such an extent as to put them in a different class from the other four Acts mentioned.

In South Australia there has been a thorough revision of the earlier legislation, so that the present Act, the Real Property Act of 1886, differs substantially from the Acts of the other States and New Zealand. In particular the protecting provisions are recast to make them fuller and clearer. But their general effect resembles that of the first group of Acts rather than the Victorian Act.

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16. Australian Torrens System, 41, 45. 17. Real Property Act 1862, No. 140.
18. Act No. 180. 19. Transfer of Land Act 1866, No. 301.

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