

EXPOSING THE FAILINGS OF OUR BETTERS: bad laws don't improve with age

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ABSTRACT

A continuing tension exists between practising lawyers (practitioners and judges) who are unable to choose which cases make up their work and the academic gadflies who may cherry-pick. The standard academic method is to treat most decisions of the lower courts as beneath contempt, decisions of the appeal courts as obviously unsound, and to begrudge those of the highest court as right but for the wrong reasons (and to delight in pointing out the logical flaws). This gadfly offers his analysis of a 'wrong' decision in land law that has stood for nearly half a century and recently been reaffirmed as 'correct'.

INTRODUCTION

[1] Associated with my recent research in the Department of Geomatics was the problem associated with an incomplete land title register. The ideal espoused by the originators of land title registration was that of a complete and comprehensive central public register, administered by a centralised public authority and available for public inspection such that community confidence may be reposed in the register and its integrity.¹ The purpose of the register is that one who wishes to investigate and ascertain the legal rights or obligations associated with any particular land parcel or lot need only inspect the register. Such an investigator 'need not and indeed, must not concern themselves'² with interests not disclosed upon the register. An alternative formulation is that provided in an authoritative and detailed comparative study of international land title registration schemes: 'title is not affected by anything not shown on the register. It is not only unnecessary but also impossible to establish a right in the land by other means.'³

[2] The neophyte researcher is then dismayed to learn quite early that these absolute statements regarding the integrity of the register are not justified, the register is less than perfect and there exist 'overriding' interests not disclosed on the supposedly conclusive register but which still bind the proprietor or owner of the land⁴ and may also bind those wishing to deal with that proprietor. Examples of such overriding interests include unpaid municipal rates, charges, and taxes including land tax, public rights of way, easements, and the rights of a tenant in occupation. How are people able to ascertain such 'hidden' interests that are not recorded in the register? Why does a registered title system designed to be complete within itself permit such off-register interests?

[3] Somewhere during the last 140 years the fundamental principle of a complete and comprehensive register, the ideal espoused by the originators of land title registration, has been lost. Why? Certainly the parliaments responsible for passing the various land title registration statutes have participated by enacting express provisions providing for exceptions to the fundamental principle.⁵ In addition to the express exceptions provided for by parliament, the courts have inferred similar exceptions to the fundamental principle when interpreting these statutes; that is, the courts have held that these same statutes contain implied exceptions to the fundamental principle of a comprehensive and conclusive register.

[4] While some commentators have noted with regret that the courts have mistakenly imported traditional general land law principles into the title registration statutes⁶ another has complained that the unwarranted importation of these principles has created uncertainty and complexity in a system designed to provide predictability and simplicity and which is still capable of doing so if only the courts would give a fair reading to the words of the statutes and not insist upon subjecting the statutes to general law principles.⁷

[5] This paper analyses a 1958 decision of the Supreme Court of Victoria: *King v Smail*.⁸ While contemporary legal theory holds that decisions prior to that of the watershed *Frazer v Walker*⁹ in 1967 are suspect in that there previously was a failure to recognise that title was based upon registration and registration alone, there still exist indications that *King v Smail* remains ‘good’ law. To this day the decision has not been overruled.

A HARD CASE

[6] In 1958 at the time Justice Adam decided *King v Smail* there was no federal legislation dealing with restrictions on the ability of a debtor or bankrupt to dispose of his or her property. Thus the judge was faced with the scenario all too common enough today despite the existence of federal laws regulating the tracing of a bankrupt’s property: that of the impoverished corporate high-flyer living in the swankiest suburbs and being driven about in imported limousines and dining in none but the best restaurants — all courtesy of an indulgent wealthy spouse or generous friend. The suspicions of the unpaid creditors are that the wealth of the spouse or friend ultimately was derived from the now impecunious bankrupt debtor.

[7] Thus it was in 1958 that Justice Adam was the only defence for the unpaid creditors. Some weeks prior to the husband (King) declaring bankruptcy, he generously transferred to his wife his interest in a parcel of land. Thus, upon declaring bankruptcy, he could truthfully omit from the listing of his assets that parcel of land in which he no

longer held an interest. It goes without saying that Mr King gave the interest to his wife without receiving from her any corresponding value or benefit. Were there monies paid or owing by Mrs King then these monies would necessarily be included in the listing of the husband's assets. This ruse was sufficient to delay the creditors' trustee (Smail) from discovering the true state of affairs for several weeks. Once discovered, the trustee acted to protect the creditors' interest in the land by way of caveat asserting the unpaid creditors' rights to have their debts secured against the land. The action before the judge was by Mrs King to compel the trustee to remove the caveat upon the land.

[8] The nub of the problem facing the creditors' trustee is that the title register is supposedly conclusive and unimpeachable — this after all is the whole *raison d'être* of land title registration. Upon registration, the person entered in the register as the proprietor has good and unassailable title to the land. That is the essential and fundamental principle of title registration. Mrs King has been registered as the proprietor of the land. This is the law. Obviously justice required that the creditors' interests be protected at the expense of the scheme devised by the bankrupt debtor to place an asset of his beyond the reach of the creditors. Was it possible for Justice Adam to both do justice and keep to the windward side of the law?

THE STRUCTURE OF THE ACT

[9] At issue in the case of *King v Smail* was whether section 43 of the Victorian *Transfer of Land Act* meant what it said or, as contended by the trustee for the creditors, the protection provided by that section only extended to *bona fide* (in good faith) purchasers for value — that is, arm's-length good-faith buyers not in collusion with the seller and paying a fair and reasonable price. If the trustee's contention was correct then Mrs King's interest in the land would be subject (and inferior) to that of the trustee with the consequence that the attempt to put the land beyond the reach of Mr King's creditors would fail because Mrs King had not purchased her interest in the land; she had acquired it by way of a gift from her husband.

[10] At the outset, one has to express admiration for the chutzpah of the trustee's counsel. The plain words of the section were against him and it must have been with some trepidation that he advanced the proposition that a requirement of 'bona fide purchaser for value' must be inferred when construing section 43. One can only imagine the relief felt by him when Justice Adam deigned to even consider the issue. One is reminded of Justice Robert Jackson's riposte in response to an untenable proposition advanced by counsel appearing before the US Supreme Court: 'I don't mind being amused but I refuse to be made a laughing stock!'¹⁰

[11] The section provides:

Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any land shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

[12] Thus, on its face, it would appear that any registered proprietor (except where there is fraud) is protected by section 43 and in turn is sheltered by the paramount title provided by section 42. Conversely, where there is fraud, then section 44 provides that only those registered proprietors who are bona fide purchasers for value may gain the shelter of section 42. Thus it appears that the statute distinguishes between proprietors only where there is a case of fraud. Where there is fraud, the class of proprietors enjoying the section 42 paramount title is restricted to that special class of proprietors who have been registered after purchasing the land and who have paid valuable consideration (money or money's worth) for the land. Otherwise, pursuant to section 43, *all* proprietors (including donees of gifts) enjoy the section 42 paramount title. Mrs King enjoyed the benefit of section 42 by way of section 43 without the need for establishing herself as a bona fide purchaser for value. Mrs King was the donee of a gift of land from her husband and, not having paid money or money's worth, would have been unable to establish herself as a bona fide purchaser for value.

[13] I observe that to impose the requirement of bona fide purchaser for value in section 43 appears to negate the discrimination imposed by the statute — why distinguish between instances of registration according to whether there was fraud if the end result is the same? Why separate out proprietors according to whether there was fraud involved if, ultimately, all proprietors must satisfy the requirement of being a bona fide purchaser for value? This appears to be what was suggested to Justice Adam by the trustee's counsel and was taken up by the justice in his decision.

THE REASONING IN THE JUDGMENT

[14] Justice Adam proceeded as follows; first he observed that section 42 (paramountcy of registered title) is the key section of the Act and that section itself draws no distinction between persons becoming registered proprietors for value and mere volunteers.¹¹ Thereafter he held that there is the highest authority that it is not permissible to read

section 42 in isolation: the cases of *Gibbs v Messer* and *Clements v Ellis* were referred to. The justice then considered those sections of the Act where there were express references to ‘any bona fide purchaser for value’¹², ‘transfer for valuable consideration’¹³, and ‘disposition for valuable consideration’¹⁴ and concluded that these express references extended to the whole statute and as a consequence, the purpose of the statute was not to confer indefeasible and paramount title on mere volunteers who had become registered as proprietors.

[15] In arriving at his conclusion Justice Adam had also considered that the terms of section 43 afforded strong confirmation that volunteers gain no protection from the Act¹⁵ and concluded that mere volunteers are not within the protection of section 43 because of well settled rules of equity that a volunteer obtained a title subject to the same interests affecting the transferor. That is, if Mr King’s interest in the land was subject to the interests of his creditors, then the interest of Mrs King was also subject to the interests of those creditors. It is difficult to ascertain the reasoning behind Justice Adam’s conclusion although he does offer a hypothetical example of a section 43 that would protect mere volunteers. At page 278 of the case report he suggests that a section worded similarly to the actual section 43 with the words ‘notice actual or constructive of’ omitted would suffice to extend the protection to volunteers. To assist the reader, the thrust of section 43 is reproduced here with the suggested omission within square brackets — thus, on Justice Adam’s reading, the section as reproduced here does not confer protection upon volunteers but the same section with those words omitted does:

... no person contracting or dealing with ... the registered proprietor of any land ... shall be affected by [notice actual or constructive of] any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; ...

[16] It is suggested here that an essential premise for this conclusion was the reliance upon ‘well settled rules of equity’ when, by the express terms of section 43, ‘any rule of law or equity to the contrary’ has no application to the section. The interpretation also requires a suspension of disbelief in that the legislative draftsman has already demonstrated familiarity with the phrase ‘bona fide purchaser for valuable consideration’ in the immediately following section 44, yet has elected to refer to such purchasers by nothing more than the inclusion of the words ‘notice actual or constructive of’ in section 43. If Justice Adam’s reasoning is correct then it is necessary to conclude that the draftsman was but a frustrated cryptic crossword compiler!

[17] Justice Adams discussion of section 43 is unsatisfactory in that it leaves the reader seeking the linkage between his formulation of the issue requiring resolution and his conclusion wherein he provides the resolution. He may have inadvertently forgotten that

his judgment would be interpreted by lesser mortals incapable of filling in the missing steps in his thought process. The deficiency in his reasoning is not made good by his discussion of section 43 being quoted verbatim some four decades later when the same issue arose in the case of *Rasmussen v Rasmussen*.¹⁶

AUTHORITY OF TEXTS

[18] This has two aspects — the authority of texts before the 1958 decision of Justice Adam and of those since. Although the issue had been hypothetically considered by the text writers, it had not previously been the subject of a judicial decision. Justice Adam was called upon to make a judicial determination. At the time of the case, Fox¹⁷ had argued persuasively against the proposition advanced by most other text writers.¹⁸ The majority of texts opined that section 43 was only protective of bona fide purchasers for value without notice, that is, buyers in good faith paying a fair purchase price and wholly unaware of any irregularities regarding the vendor's right to sell. Beyond noting the opinion of Fox, and that it was an exception to the other texts which supported his own conclusion, Justice Adam did not offer any analysis of the opinions of the text writers or any refutation of the argument of Fox.

[19] It may be that Justice Adam felt constrained by the ancient legal traditional view that no writer can be cited as an authority in his lifetime. Unlike artistes whose status and collectibility are enhanced upon death¹⁹, there is no suggestion that the value of the deceased law book author's *œuvre* has been increased because of its finite size and the impossibility of it being further added to — it is only pop musicians and popular paint daubers for whom it can be said that death is a good career move. For this we can be thankful; it is bad enough that the widow of Kurt Cobain can proclaim herself to be the current generation's Yoko Ono without the surviving spouses of bookish lawyers proffering unrequested and unwanted autographs.

[20] The ancient legal tradition may be founded upon a theory that the most recent books by dead authors represent the distillation of their matured views after a lifetime of study and contemplation, at least in the cases where death was from natural causes after a long and fruitful life. A text by a young beginning barrister written solely in the hope of learning the rudiments of a subject should not be accorded high authority merely because the young author met a premature death by omnibus shortly after completing the book. Nor should an early edition written by a young author gain authority only through the passage of time and the ultimacy of mortality. Similarly, an earlier text written many years ago by a recently deceased author should not be accorded the same value as an authority as those written shortly before the author's death.

[21] Following upon Justice Adam's decision, the subsequent text writers do not engender confidence. The subsequent issues of Voumard²⁰ uncritically accepted the authority of *King v Smail* for so long until the by-then-retired Justice Adam ceased to be the consulting editor for the text. The current edition of Voumard²¹ leaves the reader in no doubt as to the current editor's disagreement with the *King* decision.

[22] Similarly, the subsequent (second) edition of Fox (1989) squibbed the issue by eschewing any opinion whatsoever — one could at least expect either a robust defence of the view from the original edition or a concession that the opinion expressed in the earlier edition had been overtaken by Justice Adam's decision. The silence is deafening!

[23] While most current commentators note the current status of *King v Smail* as an authority in Victoria and the opposing views in other jurisdictions, some have fallen into the trap of seeing more in the decision than Justice Adam put in. For example, Bradbrook *et al*²² state that section 43 is a provision suggesting that it is only a purchaser who gains protection and Neave includes section 43 along with those sections — sections 44(2), 52, & 110(3) — which expressly refer to purchases within their terms.²³ Worse still is the encyclopaedic *Laws of Australia*²⁴ which states that '[w]ith the exception of Queensland, the Torrens statutes are not clear on whether an indefeasible title is conferred upon a registered proprietor who takes as a volunteer. None expressly exclude volunteers. However, some refer to purchasers' and cites the Victorian section 43 as an example.

AIDS TO STATUTORY INTERPRETATION

[24] Unavailable at the time to Justice Adam were those provisions of the *Acts Interpretation* Acts that expressly permit resort to the Parliamentary Debates and the sidenotes or headings to the statutes. In fact, at the time of his 1958 judgment Justice Adam was precluded from utilising these as aids to interpretation. Given the shortcomings of these aids we should be thankful.

[25] For example, the sidenote to the NSW *Real Property* Act 1900, section 43(1) — the equivalent to section 43 of the Victorian *Transfer of Land* Act 1958 and in fact identically worded — reads: 'Purchaser from registered proprietor not to be affected by notice.' The sidenote to the Victorian section 43 is headed 'Persons dealing with registered proprietor not affected by notice.' The actual text of section 43(1) does not justify the conclusion drawn by the person responsible for the NSW sidenote because the actual words used: 'person contracting or dealing with or taking or proposing to take a transfer' cannot be equated to 'purchaser'. In the NSW case of *Bogdanovic v Koteff*,²⁵ the Justices of Appeal in that State were not misled by this sidenote when

determining the same issue as in *King v Smail*. It is clear that this single example demonstrates the dangers of resorting to the use of sidenotes as an aid to interpretation.

[26] Similarly, resort to the Parliamentary Debates is of little assistance — the assistance is such as to be a positive hindrance. Several instances suffice to demonstrate this point. In supporting the passage of the bill that was later enacted as the *Encroachment of Buildings Act 1922 (NSW)*, the NSW Attorney-General referred to similar legislation that had been passed in New Zealand in 1908 and that the somewhat similar law in force in Victoria ‘works very well’.²⁶ That Victoria has never legislated for building encroachments and the New Zealand legislation of 1952 followed that of NSW by some three decades does not engender confidence in assertions contained within the NSW Parliamentary Hansard.

[27] Again, in 1979 when debating the amendments to the *Real Property Act*, the NSW members speaking in support made much of the fact that the proposed amendments avoided the difficulties encountered in Victoria with that state’s equivalent legislation. These statements were more politicians’ licence than related to the actual Victorian experience.

[28] When the Tasmanian and Queensland parliaments were respectively debating the passing of the Tasmanian 1980 *Land Titles Act* and the Queensland 1994 *Land Title Act* there was much made of the fact that the previous legislation had served the respective states well and the proposed replacement legislation was to consolidate and modernise the existing law without effecting substantive change to that law. In actual fact, both statutes were a radical departure from those they were replacing.

[29] Concluding this discussion of allowable aids to statutory interpretation the reader is reminded that the meaning of the statute under consideration must be in doubt or ambiguous before recourse to extraneous material is sought. Where the meaning is clear there is no need to invoke a tool only because the craftsman is not pleased with the clear meaning of the words used.²⁷ There is no rule of statutory interpretation that one must begin from the assumption that every statute contains obtuse hidden messages within an otherwise straightforward and easily understandable syntax.

REVERSE *ad hominem* ARGUMENT

[30] The usual *ad hominem* argument is related to the character of one’s opponent and not to the clarity of that person’s reasoning. For example, that ubiquitous and hypothetical legal personage Richard Roe beats his wife and mistreats his dog and is thus of bad character. Such a person of bad character cannot be trusted and the truthfulness of

anything stated by that person is suspect. Thus, when Roe asserts that the sum of three plus four equals seven ($3 + 4 = 7$), we should not give any credence to this assertion. Justice Adam adopted a reversal of this argument.

[31] The judgment of the English Privy Council in the case of *Gibbs v Messer* (on appeal from Victoria)²⁸ was given by the Scottish Law Lord Watson. In seeking to invoke a controversial part of the judgment in that case, Justice Adam stated that it was proper to assume that Lord Watson's words were chosen with characteristic care. That is, because John Doe assists little old ladies to cross the road, this adds to the credibility of any statement made by John Doe. Justice Adam would have done well to heed the words of the same Lord Watson (presumably chosen with characteristic care) regarding the authority of prior decisions related to public policy wherein he said that decisions 'however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal.'²⁹

BOUND BY THE HIGHEST AUTHORITY

[32] Justice Adam's reasoning is premised on the proposition that it is not permissible to read section 42 of the *Transfer of Land Act* 1954 in isolation from the other provisions in the statute. These highest authorities cited by him are the Privy Council decision in *Gibbs v Messer*³⁰ and *Clements v Ellis*,³¹ a decision of the High Court of Australia.

[33] With regard to the latter case it must be recalled that this decision was a tied vote where the High Court divided 3-3 on the question before it. Pursuant to section 23(2)(a) of the Commonwealth *Judiciary Act* 1903, the appeal fails and the decision appealed from is affirmed. This is but a pragmatic means of resolving a dispute before the courts and can hardly be described as satisfactory in deeming the dismissal of the appeal to be pursuant to a 'statutory majority'.

[34] The next question is the weight of authority of such a pragmatic decision that certainly binds the parties to the appeal for they have no higher court to appeal to or decline to do so. What is the authority of such a decision as a precedent for later cases? The accepted view is that of Justice Dixon as expressed in *Tasmania v Victoria*³² and later followed in re *Wakim*³³: it has no value as a precedent because a decision by a statutory majority carries no weight. Thus, contrary to Justice Adam's assertion, his highest authority of *Clements* is of the least authority or no authority whatsoever.

[35] Consider now the Privy Council decision in *Gibbs v Messer*. This was a decision where the judgment of the Privy Council (as delivered by Lord Watson) went beyond that

which was strictly necessary to determine the issue before it. The case decided that the assurance provisions of the Victorian *Transfer of Land* statute only protected those who actually dealt with and derived title from a proprietor whose name was on the register. The gloss added by Lord Watson was that a defrauded party whose title was not indefeasible could nonetheless pass on a valid (and indefeasible) title to a third party who purchased from them in good faith and for valuable consideration.

[36] It is here suggested that that Lord Watson fell into the classic mistake of the judicial opinion in seeking to decide more than what was in dispute in the case actually before him. Thus, his dictum is no more than an expression of opinion unrelated to the issue determined. The danger of straying outside the bounds of the dispute before the court is the possibility of imposing a restraint upon later courts when they are called upon to decide that very issue. One of the unforeseen consequences of Lord Watson's *jurisimprudencia* was the necessity to pass amending legislation to the registered title statutes with regard to the sale of registered title land by the sheriff or an unpaid mortgagee where the vendor was not the registered proprietor. In one small misstatement Lord Watson had set at naught the existing provisions for such sales because the unfortunate purchasers were not dealing with the registered proprietor. Sections 52(3) and 77(4) of the *Land Transfer Act* were then necessarily amended to confer 'good' indefeasible title upon such purchasers who had not purchased from the registered proprietor. It may have been better had Lord Watson not chosen his words at all let alone with characteristic care.

THE AFTERMATH

[37] *King v Smail* lives on, unaffected by the 1967 reappraisal of registered land title effected by the Privy Council decision in *Frazer v Walker*³⁴ and the recognition by Parliaments of the fundamental basis of title registration — it is registration and registration alone that creates (and extinguishes) title and the register should correctly reflect the true state of the title. It may be that because the issue has not come before the appeal courts since 1958 then the decision awaits overturning. In the meantime it remains good law in Victoria.

[38] The issue has arisen in New South Wales where despite the sidenote to section 43(1) to the effect that a '[p]urchaser from registered proprietor [is] not to be affected by notice' it was held that a recipient of a gift (a volunteer) gains the protection of sections 42 and 43 of the NSW *Real Property Act 1900*: *Bogdanovic v Koteff*.³⁵ Both the Queensland and the Northern Territory parliaments have put the matter beyond doubt or dispute by expressly legislating for volunteers to gain the same protection as purchasers upon registration: *Land Title Act 2000* (NT) section 183; *Land Title Act 1994* (Queensland)

section 180. Although not acted upon, it is noted that one of the recommendations of the Tasmanian Law Reform Commissioner in his 1995 report was that there should be no distinction between purchasers and volunteers.³⁶ Also not acted upon was a similar recommendation by the Victorian Law Reform Commission.³⁷

[39] When the issue arose recently in the Federal Court³⁸ concerning a Victorian land dealing, Justice Finkelstein followed *King v Smail*. This case is now commented upon.

Silly cases make for silly law

[40] In the late 1980s a purchaser contracted to purchase a Toorak³⁹ mansion and paid a substantial deposit. The house and land was registered in the name of a daughter of one of Australia's high-flying corporate entrepreneurs who came unstuck with the dawn of the 1990s. The daughter's acquisition of the property was a gift from her doting dad prior to the onset of a rather serious financial downgrading. This is all so similar to the background of *King v Smail* and the efforts of the trustee to claw back the assets. However, in this case, the trustee (for the father's creditors) disavowed any interest in the property and it was the purchaser who was arguing that the vendor-daughter was unable to provide good title. What was his beef? As a bona fide purchaser for value his security of title was not in dispute once he was entered in the register as the registered proprietor. What was his beef?

[41] Well, of course by the time the litigation arose the property market had gone bust. Maybe it was a case where a financial institution which had agreed to provide a mortgage loan had reneged on the amount of the mortgage — perhaps they were a little leery of advancing seventy-five per cent of a late 1980s valuation when the 1990s valuation was dramatically lowered. Or, possibly the purchaser was unable to proceed with the purchase and was seeking to recover his deposit and also avoid heavy contractual damages for failing to proceed at the agreed sale price? Perhaps the purchaser merely wished to re-open negotiations with regard to the agreed purchase price in light of the fall in property values? Who knows?

[42] Thus the case came before the Federal Court with the purchaser contending that the vendor, being a beneficiary of a gift, was unable to provide title free of any interest held by the creditors of her dad's estate. Justice Finkelstein decided the case against the purchaser upon other grounds but did consider the issue of the indefeasible title of the volunteer in case the issue became germane on appeal. He decided that the law in Victoria remained that as enunciated in *King v Smail* by Justice Adam: a volunteer recipient of a gift did not acquire title free of those encumbrances that attached to the property when her generous dad was the registered proprietor.

[43] In this case the purchaser's chutzpah eclipsed that of the trustee Smail in his case against the volunteer Mrs King. On that basis I suggest that this introduction to a dissenting opinion of an Associate Justice of the US Supreme Court (as he was then) is relevant:

Dissenting opinions in previous cases have commented that 'great' cases, like 'hard' cases, make bad law. Today's opinion suggests that a third class of cases — silly cases — also make bad law.⁴⁰

Current texts and academic opinion

[44] There can be no doubt, in Victoria at least, that *King v Smail* remains good law. That is, until it is overruled. That of course does not justify all the conclusions drawn following the case. For example, whereas Justice Adam had to traverse a rough and rocky road before concluding that section 43 justified the inference that section 42 only conferred indefeasibility on purchasers but not on volunteers, some commentators have suggested that section 43 expressly refer to purchasers.⁴¹ A similar conclusion was drawn in another commentary wherein it was suggested that Justice Adam held that the other provisions of the Act (including section 43) explicitly protected purchasers for value.⁴²

Recent judicial opinion

[45] While the issue has not come before the Victorian appeals court since 1958, it was again considered by the Victorian Supreme Court in 1994.⁴³ In this instance the decision by Justice Coldrey in *Rasmussen v Rasmussen* followed *King v Smail*. It is unfortunate that his reasoning is similar to that of Justice Adam in *King v Smail* for its lack of clarity.

[46] Justice Coldrey in 1994 based his reasoning on that of Justice Adam in 1958 and cited⁴⁴ that passage of Justice Adam's already referred to.⁴⁵ In 1958 that passage of Justice Adam's was a *non sequitur* and its 1994 verbatim repetition does not in any way detract from its status as a *non sequitur*. In 1958 Justice Adam had formulated the issue to be determined and had then stated his conclusion without providing the link between the issue and his conclusion.

[47] Of a less satisfactory nature is the manner in which Justice Coldrey disposed of the judgment of the NSW Court of Appeal in the *Bogdanovic* case. Unlike Justice Adam four decades earlier, Justice Coldrey was constrained to explain why he was not persuaded to follow the NSW Court of Appeal which had held that, following the Australian High Court's decision in *Breskvar v Wall*⁴⁶, '[t]he broad proposition arrived at by Adam J in *King* was no longer good law.'⁴⁷

[48] Justice Coldrey did this by noting that the reasoning in *Bogdanovic* was founded upon the Privy Council decision in *Frazer v Walker* and the Australian High Court decision in *Breskvar v Wall* and that these cases were lacking in persuasive weight because both were ‘concerned not with the situation of a mere volunteer but with that of a purchaser for value’⁴⁸ and that ‘in neither case was the judgment of Adam J [in *King v Smail*] considered.’⁴⁹ Justice Coldrey then considered the later High Court decision in *Bahr v Nicolay (No 2)*⁵⁰ and concluded that this decision did not detract from the principle enunciated in *King’s* case.⁵¹ He continued ‘[t]hat case [*King v Smail*] was a carefully reasoned judgment and, with respect, I prefer it to that of the NSW Full Court in *Bogdanovic*. It is to be noted that *Bogdanovic* contains no discussion of the rationale for distinguishing between the indefeasibility of title of a purchaser for value as distinct from a mere volunteer.’⁵²

[49] Justice Coldrey’s rationalization of his preference for the *King v Smail* decision over that of *Bogdanovic* cannot remain without comment. The cases of *Frazer* and *Breskvar* were but the much belated recognition that registered land title was a wholly new system of land title and not a mere modification added upon traditional land law principles. While it is true that neither of these cases were concerned with a mere volunteer that is hardly sufficient cause to discard their value as authoritative statements of law — after all, Justice Adam had based his decision on two cases (one a Privy Council decision and the other from the High Court of Australia)⁵³ neither of which were concerned with mere volunteers. What is sauce for Justice Adam’s goose (and also that of Justice Coldrey) is surely sauce for the NSW Court of Appeal’s gander?

[50] And therein lies the reason why it was that the judgment of Justice Adam in *King* was not considered in the *Frazer* and *Breskvar* cases. Because the *King* judgment was wholly concerned with the indefeasibility of title of a volunteer it was wholly irrelevant to the issues being considered in the *Frazer* and *Breskvar* cases. Justice Coldrey would have us believe that *Frazer* and *Breskvar* are of minimal weight because they deal with issues unrelated to the issue being decided in the *King*, *Bogdanovic*, and *Rasmussen* cases. Thereafter their minimal weight is to be further reduced to nothing because of the failure of both the Privy Council and the High Court respectively to take the *King* decision into account when deciding the *Frazer* and *Breskvar* cases. Justice Coldrey appears to be blowing both hot and cold.

[51] Consequently it should not be noteworthy that *Bogdanovic* does not discuss the rationale for distinguishing between the indefeasibility of title of a purchaser for value as distinct from a mere volunteer. Given that both the NSW and Victorian sections 43 are in identical terms and provide no support for distinguishing between the two, what is

surprising is that both the *King* and *Rasmussen* judgments discuss the rationale for distinguishing between the indefeasibility of title of a purchaser for value as distinct from a mere volunteer. As discussed above, it is the following section 44 which distinguishes between the two but only where there is fraud involved. Without fraud, there is no need for distinguishing between the two and section 43 applies to *all* proprietors, be they mere volunteers or purchasers for value.

[52] I conclude that the decision in *Rasmussen* does not add any further weight to that of *King v Smail* and does not counter any of the criticisms offered here of *King v Smail*. For completeness it is here noted that when the issue arose in Western Australia recently, Justice Owen held that the equivalent to section 43⁵⁴ did not distinguish between purchasers for value and mere volunteers with the consequence that volunteers acquired indefeasible title upon registration.⁵⁵

A contrary argument?

[53] For 45 years the Victorian Parliament has not availed itself of the opportunity to ‘rectify’ Justice Adam’s decision in *King v Smail*. A ‘wrong’ decision may be overturned by a higher court or by legislative action. Whereas a higher court must await the arrival of a suitable case on point, the legislative body can act of its own initiative. Legal theory is that if the legislature is of the view that its will has been misinterpreted, it can enact corrective legislation. However, it is a mighty assumption that legislative silence (or inaction) means applause. It may mean no more than ignorance or indifference

The future — where to now?

[54] Although it has been argued elsewhere in support of a single uniform Australia-wide national registered land title system, perhaps an even more pressing problem is that of conflicting interpretations.⁵⁶ This article is concerned with section 43: south of the River Murray the words of section 43 mean that volunteers are excluded from the advantages of land title registration while the same words take on the opposite meaning north of the river. Unless the conflicting interpretations are resolved in the appellate courts of the two states or the state legislatures pass amendments to make clear the will of the respective parliaments, then the resolution awaits a suitable case on appeal to the High Court of Australia which is best placed to provide a conclusive and authoritative resolution of the opposing interpretations offered by the state courts. Pending these possible resolutions, the reader is referred back to the fundamental principle of a complete and comprehensive register.⁵⁷ The whole purpose of the registered land title statutes was to do away with the necessity of investigating the history of preceding transactions. This was to be achieved by placing reliance and confidence in the

register.⁵⁸ The decision in *King v Smail* retains the compelling necessity to investigate prior transactions, that is, the retention of ‘retrospectivity of title’⁵⁹ which was intended to be done away with by the passing of the Torrens registered land title statutes.

CONCLUSION

[55] It is fashionable today to disparage judicial interpretations of the Torrens registered title statutes prior to the watershed Privy Council decision in *Frazer v Walker*⁶⁰ on the basis that the courts had erroneously imported traditional general land law principles into the registered title statutes when the intention of the registered title statutes was to replace those principles.⁶¹ The decision of *King v Smail* could be included in this criticism although my argument is that this decision was incorrect long before *Frazer v Walker* provided the clarity usually associated with hindsight. I would go further and add that bad law, like bad wine, does not improve with age. Additionally, a bad vintage cannot be salvaged by pouring old 1950s wine into new 1990 bottles.

ENDNOTES:

* Biographic note —

A qualified civil engineer, the author changed careers as a consequence of his mum informing all and sundry (including total strangers) that her son was ‘the least civil person’ she knew. After studying law and practising as a barrister for two decades he suffered a mid-life crisis but was unable to afford the usual red sports car or to induce any gorgeous young thing to run away with him. Rejected and dejected, he allowed himself to be sucked into undertaking a PhD research degree in the Department of Geomatics involving the cross disciplines of land law and the public administration of the land title registry with particular regard to the resolution of land parcel boundary location discrepancies.

His thesis, *The effect of adverse possession on part of a registered title land parcel* (2003) is available at:

http://www.geom.unimelb.edu.au/research/publications/MMP_PhD.pdf
or <http://eprints.unimelb.edu.au/archive/00000328/01/Park.pdf>

¹ P Butt, ‘Conveyancing and Property: Indefeasibility of title and “volunteers”’, *Australian Law Journal*, vol. 76(4), 2002, 219.

² Theodore B F Ruoff, ‘An Englishman looks at the Torrens system: Part ii – Simplicity and the curtain principle’, *Australian Law Journal*, vol. 26, 1952, 162.

³ S Rowton Simpson, *Land Law and Registration*, Cambridge Univ Press, London, 1976, 176.

⁴ R E Megarry and H W R Wade, *The Law of Real Property*, 4th ed., Stevens, London, 1975, cxv.

⁵ *Transfer of Land Act 1958* (Vic.) section 42, *Transfer of Land Act 1893* (WA) section 68, *Land Registration Act 1925* (England) section 70.

⁶ For example, ‘Land law’, in A R Blackshield *et al* (eds), *The Oxford Companion to the High Court of Australia*, Oxford Univ Press, Melbourne, 2001, 415.

⁷ S Robinson, *Transfer of Land in Victoria*, Law Book Coy, Sydney, 1979, preface and *passim*.

⁸ [1958] Victorian Reports (VR) 273.

⁹ [1967] 1 Appeal Cases (AC) 569.

¹⁰ L Kalman, *Abe Fortas: a biography*, Yale Univ Press, New Haven, 1990, 140.

¹¹ [1958] VR 273 at pages 275-6.

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- ¹² Section 44(2).
- ¹³ Section 52.
- ¹⁴ Section 110(3).
- ¹⁵ [1958] VR 273 at page 277.
- ¹⁶ *Rasmussen v Rasmussen* [1995] 1 VR 613 at pages 631–2.
- ¹⁷ P Moerlin Fox, *The Transfer of Land Act 1954 with annotations*, Law Book Coy, Melbourne, 1957, 43.
- ¹⁸ J E Hogg, *The Australian Torrens System*, William Clowes, London, 1905, pages 832–3; J E Hogg, *Registration of Title to Land throughout the Empire*, Law Book Coy, Sydney, 1920, pages 106–9; H D Wiseman, *The law relating to the Transfer of Land*, Law Book Coy, Melbourne, 1931, 316; J Baalman, *The Torrens system in New South Wales: being a commentary on the Real Property Act, 1900, as amended and as affected by various other statutes*, Law Book Coy, Sydney, 1951, pages 149–50; D Kerr, *The Principles of the Australian Lands Titles (Torrens) System*, Law Book Coy, Sydney, 1927, 195.
- ¹⁹ Liam Houlihan, ‘Playing on, obscured by ghosts’, *The Australian* (17 April 2003) 17.
- ²⁰ For example, *The Law relating to the Sale of Land in Victoria*, 3rd ed., Law Book Coy, Sydney, 1978, pages 385–6.
- ²¹ *The Law relating to the Sale of Land in Victoria*, 5th ed., LBC Information Services, Sydney, 1995, ¶ 11 260 – see also ¶¶ 4 300, 11 250, and 11 280.
- ²² A J Bradbrook *et al*, *Australian Real Property Law*, 2nd ed., LBC Information Services, Sydney, 1997, ¶ 4.64.
- ²³ M Neave, ‘Towards a Uniform Torrens System: Principles and Pragmatism’, *Australian Property Law Journal*, vol. 1, 1993, 114 at pages 124–5.
- ²⁴ Volume 28, ¶3:33.
- ²⁵ (1988) 12 New South Wales Law Reports (NSWLR) 472.
- ²⁶ New South Wales Legislative Council Debates, 1 December, 1922, 2287 ff.
- ²⁷ Robinson, note 7, preface.
- ²⁸ [1891] AC 248.
- ²⁹ *per* Lord Watson at p 553 in *Nordenfeldt v Nordenfeldt Guns & Ammunition Co Ltd* [1894] AC 535.
- ³⁰ [1891] AC 248.
- ³¹ (1934) 51 Commonwealth Law Reports (CLR) 217.
- ³² (1935) 52 CLR 157.
- ³³ (1999) 198 CLR 511.
- ³⁴ [1967] 1 AC 569.
- ³⁵ (1988) 12 NSWLR 472.
- ³⁶ *Report on Adverse Possession and other possessory claims to land*, Report #10 of 1995, Parliament of Tasmania, Hobart, 1995.
- ³⁷ *Priorities*, Report #2, Law Reform Commission of Victoria, Melbourne, 1989, 5.
- ³⁸ *Valoutin v Furst* (1998) 154 Australian Law Reports (ALR) 119.
- ³⁹ A splendourous and highly desirable residential ‘address’ in Melbourne equivalent to the suburbs of Vacluse or Double Bay in Sydney and Peppermint Grove (Perth).
- ⁴⁰ *per* Rehnquist J (dissenting), *Larkin v Grendel’s Den*, 459 United States Supreme Court Reports (US) 116 at 127–8 (1982); 74 L Ed 297 at 308; 103 S Ct 505.
- ⁴¹ *Laws of Australia*, vol. 28, ¶ 3.33.
- ⁴² M Neave, ‘Towards a Uniform Torrens System: Principles and Pragmatism’, *Australian Property Law Journal*, vol. 1, 1993, 114 at pages 124–5; see also A J Bradbrook *et al*, *Australian Real Property Law*, 2nd ed., LBC Information Services, Sydney, 1997, ¶ 4.64.
- ⁴³ *Rasmussen v Rasmussen* [1995] 1 VR 613.
- ⁴⁴ *Rasmussen v Rasmussen* [1995] 1 VR 613 at pages 631–2.
- ⁴⁵ *King v Smail* [1958] VR 273 at pages 277–8 (see text at notes 15 and 16 above).
- ⁴⁶ (1971) 126 CLR 376.
- ⁴⁷ *Bogdanovic v Koteff* (1988) 12 NSWLR 472 at 480.

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- ⁴⁸ *Rasmussen v Rasmussen* [1995] 1 VR 613 at 632.
- ⁴⁹ *Ibid.*
- ⁵⁰ (1988) 164 CLR 604.
- ⁵¹ *Rasmussen v Rasmussen* [1995] 1 VR 613 at 633.
- ⁵² *Ibid.*
- ⁵³ See notes 30 and 31 above.
- ⁵⁴ Section 134 of the Western Australian *Transfer of Land* Act 1893.
- ⁵⁵ *Conlan v Registrar of Titles* (2001) 24 Western Australian Reports 299.
- ⁵⁶ L Griggs, 'The tectonic plate of Equity — establishing a fault line in our Torrens landscape', *Australian Property Law Journal*, vol. 10(1), 2003, 78 at 79.
- ⁵⁷ See text at notes 1–3 above.
- ⁵⁸ P Butt, 'Conveyancing and Property: Indefeasibility of title and "volunteers"', *Australian Law Journal*, vol. 76(4), 2002, 219.
- ⁵⁹ R Torrens, *The South Australian system of conveyancing by Registration of Title*, Register and Observer General Printing Office, Adelaide, 1859, 8.
- ⁶⁰ [1967] 1 AC 569.
- ⁶¹ S Robinson, *Transfer of Land in Victoria*, Law Book Coy, Sydney, 1979, preface and ch 6; 'Land law', in A R Blackshield *et al* (eds), *The Oxford Companion to the High Court of Australia*, Oxford Univ Press, Melbourne, 2001, 415.



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