

CONVEYANCING UNDER THE ONTARIO REGISTRY ACT: AN ANALYSIS OF THE PRIORITY PROVISIONS AND SOME SUGGESTIONS FOR REFORM

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I. *The Purposes of The Registry Act.*¹

The common law system of conveyancing was expensive, time-consuming and perilous. The validity of a vendor's title depended upon the validity of the title of the person through whom the vendor claimed, which in turn depended upon the previous history of dealings with the land. For a purchaser of land to be completely satisfied that the vendor had good title, it was necessary for the purchaser to investigate each transaction and document in the vendor's chain of title right back to the original Crown grant. In jurisdictions where it was impossible or very difficult for the vendor to prove title over such a lengthy period, it was customary for the purchaser to agree to accept a clear title stretching back for a period defined in the contract of sale or fixed by legislation.² But even where the period of commencement of title was fixed in this way, it was still necessary for the purchaser to undertake complex and lengthy searches.

The fixing of the period of commencement of title did not, of itself, extinguish the interest of a third party in the land. If the interest was legal it was enforceable against the purchaser regardless of his lack of notice. The terms of the bargain between

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¹ For a detailed discussion of this matter see Risk, *The Records of Title to Land: A Plea for Reform* (1971), 21 U. of T.L.J. 465.

² The practice of English conveyancers was to require proof of title over the preceding sixty years or to the first good root of title prior to that period. This period was reduced by the Vendor and Purchaser Act 1874, 37 & 38 Vict., c. 78, s. 2 to forty years and further reduced by the Law of Property Act 1925, 15 & 16 Geo. 5, c. 20, s. 44 to thirty years. Finally in 1969 it was reduced to fifteen years, see Law of Property Act 1969, 17-18 Eliz. II, c. 59, s. 23. For the Ontario provisions, see Registry Act, R.S.O., 1970, c. 409, s. 111.

the vendor and the purchaser could not affect an outstanding legal interest in a third person. If the interest was equitable it was not enforceable against a *bona fide* purchaser of the legal estate for value without notice. Of course notice included constructive notice (the case where a purchaser should have discovered the existence of an interest) as well as actual notice. The fact that the equitable interest arose before the period of commencement of title generally enabled the purchaser to argue that he had not omitted to make reasonable and proper searches. Thus he did not have constructive notice and took free from the interest.

One of the difficulties inherent in the common law conveyancing system was the insecurity of the purchaser. After the conveyance even the most careful purchaser might find that the land was subject to some outstanding legal interest which affected its value or that he held the bare husk of a legal title as trustee for another. Investigation of the chain of title would not protect him against interests created by operation of law, such as dower, or contained in documents which the vendor had fraudulently abstracted from the chain.³ If a document in the chain of title was forged, (for example, a discharge of mortgage) or if a document contained a drafting defect (for example, incorrect words of limitation) the purchaser might not get the title for which he had bargained. If the purchaser's solicitor was careless and did not discover the existence of an outstanding equitable interest the purchaser would take his land as trustee, his only consolation being the right to sue his solicitor.

Apart from the great difficulty in guaranteeing the purchaser a good title, the process of title investigation required considerable expertise and was lengthy and expensive. Moreover, searches had to be repeated afresh on each dealing with the land. While this might enrich the lawyer it was not in the interests of a community in which land dealings were common. Thus in all common law jurisdictions the last three hundred years of property law have been interspersed with efforts to make conveyancing cheap, simple, and safe.

Efforts to simplify conveyancing fall into two main groups. They may be described as "deeds registration" systems and "title

³ For example, see *Pilcher v. Rawlins* (1872), 7 Ch. App. 259. In that case, the position of the purchaser-trustee was saved by the fact that the vendor received a discharge of a mortgage fraudulently although he had not disclosed the existence of the mortgage to the purchaser and had abstracted the mortgage document from the chain of title.

registration" systems. The deeds registration systems seek to provide on the register a complete record of all the documents relating to the land in question. In this way title investigation is simplified for the purchaser, and title verification is made less onerous for the vendor. The existence of a public record of title to land ensures that ownership of a particular piece of land can generally be discovered, and this is useful for governmental purposes. The deeds register enables the holder of an equitable interest created by document to protect the interest by registration of that document, thus ensuring that any later purchaser will take with notice.

However, systems of deeds registration go only a short way towards the goal of simplicity and safety in conveyancing. The register is a register of documents and not of interests. Thus, interests arising otherwise than by document, for example by operation of legal or equitable principles, do not appear on the register and the register is never a mirror of the state of title. Nor does the registration of a document *per se* guarantee that that document is free of defects. The registrar assumes no responsibility as to the effect of an instrument, the instrument as it is, is simply registered. If the document is forged or possesses some other flaw, registration is ineffective, and does not cure any defects in title.

Deeds registration legislation generally provides an inducement for the registration of instruments by conferring priority on registered instruments over unregistered instruments. This represents a partial inroad on the common law scheme of priorities, but the scheme is only modified, not swept away. The system of deeds registration does not provide a guaranteed title for the purchaser and thus leaves intact many of the defects of the old common law conveyancing system.

In contrast the system of title registration is designed to ensure that a purchaser who becomes registered attains an indefeasible title subject only to statutory exceptions and to the exceptions shown on the register. A purchaser of the land need not investigate the past history of the title, for past history becomes irrelevant. As long as the purchaser buys from a person on the register and becomes registered himself, he is protected. Thus, the process of title investigation becomes increasingly simplified. An unregistered instrument which is not protected by the means provided may be defeated by the registration of a subsequent instrument. If loss is suffered as a result of a mistake on the register, compensation is provided. Registration of title

legislation also provides simple documents for common transactions such as the sale, the mortgage, and the lease, and the "printed form" aspect of most titles registration legislation simplifies conveyancing even further.

In Ontario, despite the existence of land titles registration legislation since 1885, deeds registration legislation still regulates two-thirds of the land in the province. The 1885 Land Titles Act applied only to the City of Toronto and the County of York.⁴ The Act did not bring under its operation land which had already been alienated from the Crown in these areas. It merely provided that owners of land in the areas covered by the Act could apply to have their land registered. As a result, most of the land in Toronto, or comprised in the old York County, remains under the operation of the Registry Act⁵ even today. The Land Titles Act of 1887 extended the application of titles registration legislation to a number of areas in Northern Ontario.⁶ Land already alienated from the Crown when the Act came into operation was not automatically brought on to the Register, but land alienated after 1887 in the areas to which the Act applied automatically came on to the Land Titles Register.⁷ Since the major part of Northern Ontario was alienated after 1887, most of Northern Ontario land is under the operation of the Land Titles Act, although a number of old town sites are still largely governed by the Registry Act. By successive amendments and proclamations of areas, the Land Titles Act is now applicable to about ninety per cent of Ontario.⁸ However, with the exception of Northern Ontario, most Ontario land is still in practice governed by the deeds registration system, for generally speaking, land only comes on to the Land Titles Register by application of the owner.⁹

The wide application of the Ontario Registry Act means that it is still extremely important today. At the core of any deeds registration legislation lies the system for regulating priorities conflicts between more than one registered instrument, and between an instrument which is registered and one which is unregistered. It is this system which provides the incentive for registration of documents, and which thereby seeks to ensure

⁴ Land Titles Act 1885, 48 Vict., c. 22, s.2.

⁵ *Supra*, footnote 2.

⁶ Land Titles Act 1887, 50 Vict., c. 16, s. 1 (Districts of Algoma, Thunder Bay, Muskoka, Parry Sound and Nipissing).

⁷ Land Titles Act 1887, *ibid.*, s. 2.

⁸ Land Titles Act, R.S.O., 1970, c. 234, s. 3.

⁹ But see Land Titles Act, *ibid.*, s. 34.

the Register is a complete record of the documents affecting title. Since the priority provisions lie at the heart of deeds registration, this article focuses mainly upon these provisions by discussing their virtues and defects and suggesting some worthwhile reforms. In addition brief reference is made to other legislative provisions affecting priorities in land under the Registry Act.

II. *Administration of The Act.*

Although this article focuses primarily on the priority provisions, a brief introduction to the administration of the Act, and the making of searches under it, is necessary. Early deeds registration legislation divided Ontario into registry divisions, in each of which a Land Registry Office was situated.¹⁰ Each office is managed by a Registrar¹¹ and the Director of Land Registration is responsible for the control and co-ordination of the whole system.¹² In most areas, the land titles office and the office for deeds registration are housed in the same building, but this is not the case in Metropolitan Toronto.

Originally, documents affecting land were indexed alphabetically. This system had obvious flaws, since a title could only be searched if the names of persons claiming interests in the land were known. The alphabetical index was closed on January 1st, 1972¹³ but for many years before this date it was of little importance. In 1865, an additional, geographical index was opened, and it is this "Abstract Index" which is the main key for the title searcher today. Land under the Registry Act is divided into units. (These may be lots in concessions in townships or lots on plans of subdivisions.) Each lot is the subject of a separate entry (a separate page) in the Abstract Index. All documents registered against a specific piece of land are assigned a number, and the number and a brief description of the document and its contents are entered against the relevant piece of land. The title searcher uses the Abstract Index to discover the documents affecting the land and then examines each document individually.¹⁴ A document which has been registered but reference to which has been accidentally omitted from the Abstract Index is, nevertheless, effective to defeat any subsequent claimant.¹⁵

¹⁰ See now Registry Act, *supra*, footnote 2, ss 4, 5.

¹¹ Registry Act, *ibid.*, s. 8.

¹² Registry Act, *ibid.*, s. 6.

¹³ Regulation 9(b).

¹⁴ Registry Act, *supra*, footnote 2, s. 20.

¹⁵ *Lawrie v. Rathbun* (1876), 38 U.C.Q.B. 255.

In addition to the Abstract Index, the Registrar keeps a General Register Index.¹⁶ A number of documents which are not registered against specific parcels are indexed alphabetically in the General Register Index. Documents which are not required to contain legal descriptions of the land are contained in this Register as well as documents which contain information relevant to disposition of property interests without being dispositions of interests themselves. Wills, letters probate, letters of administration, general bars of dower and powers of attorney are alphabetically indexed in the General Register Index.¹⁷ Provision is made for the entry in the abstract index of an instrument that has already been registered generally.¹⁸ In addition, the Registrar keeps a by-law index which lists registered municipal by-laws as well as certain orders of the Ontario Municipal Board.¹⁹

Thus a competent title searcher will consult the Abstract Index and check all documents listed there. The General Register Index will also be checked and any documents registered in the name of a person appearing on the chain of title, which appear to be relevant, will be perused. In addition, he or she will search at the County Sheriff's Office for writs of execution appearing against the name of a person whose name is on the chain of title, and will contact the relevant government departments in order to ascertain whether any statutory liens are enforceable against the land.²⁰

The above description illustrates that the deeds registration system does not greatly reduce the work to be done by a conscientious title searcher. He is still obliged to examine each document in the chain of title, paying careful attention to any defects, although the existence of the geographical index makes it easier for him to ascertain precisely what the relevant documents are. Even where a document is registered as part of the chain of title a fundamental defect may render the title impeachable. The main

¹⁶ Registry Act, *supra*, footnote 2, s. 18(6), (7).

¹⁷ Registry Act, *ibid.*, s. 18(6).

¹⁸ Registry Act, *ibid.*, s. 23(2). See also s. 73 on the effect of a general registration.

¹⁹ Registry Act, *ibid.*, s. 18(1)-(5)

²⁰ Until recently the most important liens were liens to secure the payment of corporations tax, succession duty and retail sales tax. The Ontario Law Reform Commission Report on Land Registration (1971) stated that at least twenty-five statutes created liens of the government, nineteen creating liens against specified land, and six creating liens against all land owned by the debtor. It appears that the liens to secure payment of corporations tax and retail sales tax will be abolished in the near future.

purpose accomplished by the deeds registration system is to ensure that all documents affecting the land are actually on record. This purpose is accomplished by providing that registered documents prevail over unregistered ones, then ensuring that holders of interests have an incentive to register the documents under which they take.

Thus the crucial provisions of any deeds registration system are the provisions governing priorities between registered instruments and between registered and unregistered instruments. These are discussed below.

III. *Historical Background.*

The first, abortive attempt to introduce deeds registration in England was in 1592. Numerous unsuccessful attempts were made in the succeeding two centuries,²¹ finally culminating in the introduction of legislation covering Yorkshire and Middlesex in the eighteenth century.²² The first Canadian deeds registration Act was passed by the legislature of Upper Canada in 1795.²³ It has been suggested that the impetus for the Canadian Act was not provided by the English experience, but rather by the introduction of a central land registration system in New England around the middle of the seventeenth century. Many of the loyalist refugees to Canada from the United States were familiar with the concept of land registration and with the system of priorities provided by registration.²⁴ However, even if this was the case, the 1795 Act closely resembled the English (and particularly the Middlesex) legislation in its terms.

²¹ Hayton, *Registered Land* (1973), pp. 9-10.

²² Middlesex Registry Act 1708, 7 Anne, c. 20. In the case of Yorkshire, separate Acts covered each of the three Ridings: West Riding: (1703), 2 and 3 Anne, c. 4; (1706-7), 6 Anne, c. 20; (1706-7), 6 Anne, c. 62; East Riding: (1706-7), 6 Anne, c. 62; North Riding: (1734-5), 8 Geo. 2, c. 6. These Acts were repealed and replaced by the Yorkshire Registries Act 1884, 47 and 48 Vict., c. 54. Both the Middlesex and the Yorkshire Registries have ceased to operate. Middlesex Deeds Act 1940, 3 and 4 Geo. 6, c. 34.

²³ 35 Geo. III, c. 5. The Act was entitled, "An Act for the Public Registering of Deeds, Conveyances, Wills and Other Conveyances".

²⁴ The first American deeds registration Act was passed in Massachusetts in 1640. See Beale, *The Origin of the System of Recording Deeds in America* (1907), 18 *The Green Bag* 335; George L. Haskins, *Beginnings of the Recording System in Massachusetts*, [1941] *Boston U.L. Rev.* 281; P. H. Marshall, *An Historical Sketch of the American Recording Acts*, [1955] *Cleveland and Marshall L. Rev.* 56.

As will be seen below the interpretation of the priority provisions presently contained in the Ontario Act is extremely difficult. Many of the difficulties arise from the fact that the various sections came into the Registry Act at different times, frequently as a response to specific problems. The result of this piecemeal approach is that it is virtually impossible to fit the sections together in any manner that is analytically convincing. For this reason it is considered worthwhile to briefly describe the history of the priority provisions now contained in the Registry Act (sections 69-73) with the hope that this may throw some light on the meaning of the various sections.

Historically, the priority provisions contained in deeds registration legislation fall into two main groups. The first, older kind of provision could be described as an "avoidance provision", and is epitomized by section 2 of the 1795 Act. Its purpose is to avoid unregistered documents in a conflict between registered documents and unregistered ones, thus giving an incentive to register. The section provided that after a patent from the Crown had been issued and a memorial for an instrument affecting the land had been registered, any later unregistered instrument affecting the land was fraudulent and void against a subsequent purchaser or mortgagee. The avoidance provision did not appear to deal directly with a conflict between two registered instruments. It spoke to a conflict between an instrument prior in time which had not been registered, and a later instrument which had been registered.²⁵ The method of registration was by registration of memorial of the instrument, rather than by registration of the instrument itself. The avoidance provision with the changes noted below is still contained in the present Registry Act.

Some minor procedural amendments were made to the Act in the succeeding years, but it was not until 1851 that major changes were made. The 1851 Act brought an end to the distinction between registered and unregistered titles. Henceforth, it was not necessary that a memorial affecting the land be first registered before the avoidance provision commenced to operate at all and the provision applied to all unregistered instruments as against later purchasers or mortgagees.²⁶ In addition the Act provided that an instrument the memorial of which was registered "shall be deemed effectual both in law and equity according to the priority of the time of registering such memorial".

²⁵ Armour, *Titles* (4th ed., 1925), p. 58.

²⁶ 13 & 14 Vict., c. 63, s. 3.

It is curious to note that the section went on to provide that priority between unregistered deeds was to be governed both in law and in Equity by the time of execution. This was to some extent a statement of the common law position but went further than it, by applying also to equitable interests. Its application would give the holder of an earlier equitable interest priority over a later legal interest, regardless of notice, though it does not appear to have been applied in this way. This part of the section must be read in the context of the fact that the section commenced with a statement that "the doctrine of tacking had been found productive of injustice"²⁷ and possibly was intended to deal only with priority conflicts attracting the tacking doctrine.²⁸

Hitherto there had been no provision that registration of a document constituted notice of that document to subsequent purchasers. This fact had caused difficulties in the context of tacking and was remedied by the enactment of section 8 in the 1851 Act which provided that registration of a document would constitute notice of the document in equity. Thus it appears that both the priority provision and the notice provision were originally prompted by problems arising from the doctrine of tacking. Prior to the enactment of these provisions a registered first mortgagor could claim priority in respect of further advances made after the registration of a second mortgage if he had no notice of the second mortgage when he made the further advance. Until the enactment of section 8 the fact that the second mortgage was registered would not preclude the first mortgagee from arguing that he lacked notice, and he could hence claim priority.²⁹ While the purpose of the priority provision contained in section 4 may have been to prevent tacking in respect to further advances, the provision seems to have had a wider effect and to have dealt with all cases of conflicts between registered deeds. The more recent deeds registration legislation

²⁷ *Ibid.*, s. 4.

²⁸ The difficulties caused by the doctrine of tacking in the context of the Registry Act are discussed below. The doctrine of tacking had several aspects. For example it permitted a third mortgagee who had advanced money without notice of the existence of a second mortgagee, to gain priority over the second mortgagee, in respect of the third mortgage by buying out the legal estate of the first mortgagee. It also permitted a first mortgagee who made a further advance to gain priority in respect of the advance over second or subsequent mortgagees of which he had no notice at the time the mortgage was made. S. 4 was enacted to abolish the doctrine of tacking.

²⁹ *Street v. Commercial Bank of the Midland District* (1844), 1 Gr. 169.

in other jurisdictions has dispensed with an avoidance provision and has simply provided that documents take effect according to their date of registration, and not their date of execution.³⁰ Ontario seems also to have reached this result by the enactment of section 4 although this was not the original purpose of the section.

The various Acts were consolidated in 1859 but the 1859 Act did not make any major changes.³¹ In 1865 further changes were made. Hitherto registration had been by memorial of the instrument in question as it still is in many other jurisdictions. Armour suggests that this was "to avoid disclosures to the public as to titles".³² The 1865 legislation provided that a duplicate original of the title should be deposited in the Registry Office and transcribed in the books at length.³³ The fact that the whole of the document forms part of the Register is the reason that landowners in Ontario do not have possession of the documents making up their chain of title, as in England or Australia in the case of land not under the Torrens system.

It has been seen that under the 1851 Act registration of a document gave notice for the purposes of a Court of Equity of the interests of the person claiming under that document. The 1865 Act³⁴ provided that priority of registration should prevail, except in *cases of actual notice*. Curiously, in the case of the avoidance provision no express statutory exception was made for the case where the subsequent purchaser or mortgagee had actual notice of the prior instrument. The section was entirely silent as to the effect of notice, but it had frequently been held that a court with equitable jurisdiction would not permit the avoidance provision to be used as an instrument of fraud, and accordingly would prevent a purchaser with notice of a prior instrument at the time of his transaction from obtaining priority by registration.³⁵ Thus, after 1865 the priority provision contained an exception for actual notice but the avoidance provision did not. The question then arose whether notice was a

³⁰ C.S.U.C., 1859, c. 89. In particular, see ss 47, 53 and 56. See for example, Property Law Act 1958 (Vict.), s. 6, Registration of Deeds Act 1897-1961 (N.S.W.), s. 12. The Irish Registry Acts (1708), 8 Anne, c. 10 and (1706-7), 6 Anne, c. 5 also contained a priority provision as well as an avoidance provision.

³¹ *Ibid.* In particular, see ss 47, 53 and 56.

³² Armour, *op. cit.*, footnote 25, p. 60.

³³ 29 Vict., c. 24, s. 65. See also (1868), 31 Vict., c. 20, s. 52.

³⁴ *Ibid.* See also (1868), 31 Vict., c. 20, s. 67.

³⁵ The same result was reached under the Middlesex legislation. See *Le Neve v. Le Neve* (1747), Amb. 436, 26 E.R. 1172.

material consideration in a Court of law as well as in a Court of Equity. After some initial difficulty the Court of Common Pleas finally decided that the defence that a prior registrant had taken with actual notice of a prior interest was available in a Court of law, as well as in a Court of Equity.³⁶ The legislation was superseded by the passing of a later Act in 1868,³⁷ and an Act passed in 1873³⁸ provided that registration of a document should give notice both at law and in equity. The same Act also inserted an express exception for actual notice into the avoidance provision.³⁹ Thus, the words of the present Act dealing with actual notice derive from 1873. By 1873, the legislation had virtually assumed the form that it takes today.

This brief discussion of the history of the priority provisions indicates the piecemeal manner in which the underlying philosophy of the Act was constructed. The lengthy genesis of the sections, explains why they fit together poorly, at times overlapping and at times contradicting each other. Any attempt to interpret and analyse the sections rationally is, at best, a salvage operation. This is illustrated in the discussion of the key sections which appears below. The time has long since passed when a review and redraft of these provisions should have taken place.

IV. *The Avoidance Provision.*

The central priority provisions of the Ontario Registry Act are contained in sections 69-73.⁴⁰ Section 69(1) provides as follows:

After the grant from the Crown of land, and letters patent issued therefor, every instrument affecting land or any part thereof shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice unless the instrument is registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims.⁴¹

This provision is similar in effect to that contained in the 1795 Act,⁴² with the addition of the exception relating to notice

³⁶ *Millar v. Smith* (1874), 23 U.C.C.P. 47.

³⁷ 31 Vict., c. 20.

³⁸ 36 Vict., c. 17, s. 4, amending s. 66 of the 1868 Act, *supra*, footnote 33.

³⁹ *Ibid.*, s. 7, amending s. 64 of the 1868 Act, *supra*, footnote 33.

⁴⁰ *Supra*, footnote 2.

⁴¹ Under s. 69(2) an exception is made in favour of certain leases. This is discussed *infra*. See also s. 69(3) which provides that the section does not extend to certain municipal by-laws.

⁴² *Supra*, footnote 23, s. 2. This provision also dealt with the registration of devises.

which was inserted in the legislation in 1873.⁴³ An avoidance provision of this kind was contained in the Middlesex and Irish legislation and is still part of the law in South Australia.⁴⁴

A number of difficulties arise in the interpretation of section 69.

A. *The Meaning of "fraudulent and void".*

A prior unregistered instrument is only fraudulent and void *as against* any subsequent purchaser or mortgagee for valuable consideration without notice. It was held in *McVity v. Tranouth*⁴⁵ that an unregistered instrument is effective between parties to the instrument, though not as against any subsequent purchaser or mortgagee. In that case, S took a conveyance from one of the respondents and registered it. Later, he executed a reconveyance to both the respondents and by forging a certificate of registration upon the reconveyance, led the respondents to believe that the reconveyance had been registered. Later he mortgaged the land to the appellants who registered the mortgage.

Clearly the mortgagees' registered mortgage prevailed over the unregistered reconveyance of the respondents. However, the respondents argued that because the reconveyance was fraudulent and void, their possession of the land was adverse to S, and to the appellants as S's successors in title. Since the date of the reconveyance the limitation period had run, and it was argued that the mortgagees' right of action was barred by the respondents' adverse possession. The argument failed. The Privy Council held that the respondents' possession of the land was not adverse to S since between S and the respondents the deed of reconveyance was perfectly valid. Since the mortgagees' right of action did not accrue until the date of the mortgage in 1895, and the writ was issued in 1903, the Statute of Limitations was no defence to the respondents' action.

Although the words of the section appear to void the prior instrument in its entirety, it has been held⁴⁶ that the prior

⁴³ *Supra*, footnote 38, s. 4.

⁴⁴ See footnote 22. Irish Registry Act, *supra*, footnote 30, s. 5. This Act also contained a priority provision, see s. 4. Registration of Deeds Act 1935-1973 (S.A.), s. 10.

⁴⁵ [1908] A.C. 60.

⁴⁶ *Weir v. Niagara Grape Co.* (1886), 11 O.R. 700; *Armour, op. cit.*, footnote 25, pp. 95-96.

instrument is only "void" to the extent necessary to give effect to the later interest of the purchaser or mortgagee. If A conveys a fee simple estate in Blackacre to B, who fails to register and later fraudulently conveys the fee simple estate to C who registers, C's interest takes effect to the total exclusion of B, and the *nemo dat quod non habet* principle has no application. On the other hand, if the interests of B and C are mortgages, C's mortgage takes priority over B's and B may enforce his security after the satisfaction of C's prior interest.

B. *Conflicts Between Unregistered Instruments.*

It is not clear whether the later instrument must become registered in order to defeat the prior instrument. The major part of the section states unequivocally that every instrument which affects land is fraudulent and void against a subsequent purchaser or mortgagee. No express requirement is made that the subsequent purchaser or mortgagee register in order to obtain the benefits of the section. The proviso to the section precludes avoidance of the prior instrument if it is registered before the registration of the instrument under which the subsequent purchaser claims. It is arguable that the proviso does not operate unless at least one instrument is registered. In all other cases the first statement in the section is applicable. On this view, it may be argued that all earlier instruments are fraudulent and void against later ones regardless of whether those later ones are registered. If this view of section 69 is correct, the Act has completely overturned existing legal and equitable principles governing priorities. For example, if A, the holder of a fee simple estate in Blackacre, fraudulently conveys the same land to B, C and D, in that order, section 69 simply confers priority on the person who happens to receive the last instrument in question, in other words, to D. This would be the case regardless of the nature of the interests of each of the claimants.

This interpretation has little justification. Since no claimant has attempted to protect himself by registering, and since all claimants are equally careless, there seems little reason for arbitrarily preferring D. The purpose of the Registry Act is to encourage registration so that the Register may provide a complete record of written instruments affecting title to the land. In order to ensure that the record of title is complete, benefits are conferred upon those who register. In this context, it is clearly useful to overturn the common law and equitable principles governing priorities. But little is achieved by conferring priority on someone who fails to register except the sledge hammer effect of

punishing all except the last claimant for not registering. It is argued that although the words of section 69 may support the view that it applies even to a conflict between unregistered instruments, the courts would confine it to conflict where at least one of the instruments in question is registered. Indeed, the words "before the . . . registration of the instrument under which the subsequent purchaser or mortgagee claims" imply that registration of the second instrument is required.

The argument that section 69 governs conflicts between unregistered interests does not appear to have ever been put to a court, either in the case of the Ontario legislation or the equivalent legislation in other jurisdictions, but both courts⁴⁷ and text writers⁴⁸ have always assumed that despite the words of section 69, its operation should be confined in the manner suggested. This view, is also supported by the preamble to the 1795 statute which provided as follows:⁴⁹

... whereas it seems to be a desirable measure to establish a Register in each County or Riding within the said province; that when the said lands shall be so confirmed, if any, or any part of the same stuff be transferred or alienated by any Deed of sale, Conveyance, Enfeoffment or Exchange, or by Gift, Devise or Mortgage, a memorial of such transfer or alienation shall be made for the better securing and more perfect knowledge of the same; . . .

As already mentioned, the forerunner to section 69 had no operation *at all* until a memorial of at least one prior instrument had been registered.⁵⁰ It would be whimsical in the extreme if the Act required registration of a memorial of one instrument before registration could advantage later instruments, but did not require those instruments to be registered themselves, before the holders of interests could rely upon registration. Despite the fact that the requirement that the land be "registered land" has now disappeared, the rest of the section is similar in form to the original 1795 legislation, and it would appear that its effects should be the same. It is argued below that section 69 should be repealed, but if the section is retained in the legislation, it

⁴⁷ See for example, *Le Neve v. Le Neve*, *supra*, footnote 35, per Lord Hardwicke, at p. 1175 (E.R.); *Agra Bank Ltd v. Barry* (1874), L.R. 7 H.L. 147, per Lord Cairns L.C. It is also an implicit assumption in *Edwards v. Gilboe*, [1959] O.R. 119, per McKay J.A.

⁴⁸ *Supra*, footnote 23.

⁴⁹ Armour, *op. cit.*, footnote 25, pp. 58-59, 93. Hogg, *Deeds Registration in Australia* (1st ed., 1908), Ch. VIII.

⁵⁰ *Jones v. Cowden* (1874), 36 U.C.Q.B. 495, at p. 500.

should be re-drafted to make it quite clear that the section governs conflicts only in the case where at least one instrument is registered.

This could be achieved by the insertion of the words italicized below:

After the grant from the Crown of land, and letters patent issued therefor, every instrument affecting land or any part thereof shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without notice, *claiming under an instrument which is registered*, unless the prior instrument is registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims.

C. *Negative Operation of Section 69.*

The second difficulty in construing section 69 is that it operates negatively by penalizing for failure to register, rather than positively, by expressly conferring priority upon the prior registrant. This creates difficulties where a conflict arises between a later executed and registered instrument, and an instrument which is both executed and registered first, but which would not at common law take priority over the later instrument. For example, X executes an instrument conferring an equitable interest upon A who registers. Later X executes an instrument conferring a legal interest upon B who takes for value without notice and who also registers.⁵¹ It is clear that A's interest is not avoided as against B because A has satisfied the requirement of the proviso. It is not so clear that A takes priority over B for section 69 does not expressly confer priority upon the prior registrant. In his discussion of the similar provision in force in South Australia, Hogg tentatively concluded that the avoidance provision by itself would not be sufficient to confer priority upon A in these circumstances.⁵² This seriously limits the effectiveness of registration, and undermines the policy of the Act. It was to overcome the difficulty caused by the negative operation of avoidance provisions that many jurisdictions preferred to expressly confer *priority* upon the earlier registrant rather than to provide that unregistered instruments were fraudulent and void.⁵³

⁵¹ It will be seen below that this problem is now dealt with by both ss 70 and 73. The argument below is intended to illustrate that s. 69 no longer serves any useful purpose. Thus, at this point, its effect is considered standing alone.

⁵² Hogg, *op. cit.*, footnote 49, pp. 99, 113-114, 116.

⁵³ See, for example, Property Law Act 1958 (Vict.), s. 6, Registration of Deeds Act 1897-1967 (N.S.W.), s. 12.

The problem described above is solved by a reference to section 70 which appears to clearly confer priority upon A in this circumstance. Section 69, therefore, serves no useful purpose and should be repealed.

V. *The Priority Principle.*

A. *Introduction.*

It has been seen that the negative operation of section 69 created difficulties. It was to overcome these difficulties that the forerunner to section 70 was inserted in the legislation in 1865.⁵⁴

Section 70 provides as follows:

Priority of registration prevails unless before the prior registration there has been actual notice of the prior instrument by the person claiming under the prior registration.⁵⁵

In the case of a conflict between a prior equitable interest which is registered first, and a later legal interest which is registered subsequently, the equitable interest prevails over the later legal interest, even where the holder of the legal interest takes without notice.⁵⁶ This overcomes the difficulty caused by the negative operation of section 69.⁵⁷ Since prior registered instruments prevail over later registered instruments (regardless of whether the documents create legal or equitable interest) no purpose is served by the retention in the legislation of section 69. However, the present drafting of section 70 does cause some difficulties, particularly when section 70 and section 69 are read side by side. These difficulties are discussed below.

B. *Conflicts Between Registered and Unregistered Instruments.*

The drafting of section 70 is less than fortunate. Read literally, section 70 appears to deal only with a conflict between two registered instruments and not a conflict between a registered and an unregistered instrument. In *Peebles v. Hyslop*, Boyd C.J. said:⁵⁸

Read critically, I would say that [section 70] applies when the registration of both instruments is in question, which is not this case.

⁵⁴ *Supra*, footnote 33.

⁵⁵ See also s. 45(4).

⁵⁶ This problem is also solved by s. 73 which provides that registration of an instrument constitutes notice of the instrument.

⁵⁷ *Darbyshire v. Darbyshire* (1905), 2 C.L.R. 787.

⁵⁸ (1914), 30 O.L.R. 511, at p. 514, 19 D.L.R. 654, at p. 656.

After judgment had been given and entered upon, Hyslop had his written licence registered, but in the litigation and before us, there is but one registration, *i.e.*, that of the plaintiff. His claim as pleaded and provided fits in exactly with the provision of [section 69]. . . .

Boyd C.J., thus left open the question of whether section 70 dealt with a conflict between a registered and an unregistered instrument.

In most cases it will not be material to enquire whether section 70 deals with a conflict between an unregistered instrument and a registered instrument. In such a conflict, the registered instrument will generally take priority either under section 69 or under the common law. If X conveys his legal fee simple in Blackacre to A who registers the conveyance, and X later fraudulently conveys the same land to B who fails to register, A will on any analysis have priority over B. A's conveyance is not fraudulent and void under section 69 since A has registered. Therefore, since it is effective to confer legal interest upon A it must have priority over B's conveyance even if section 70 deals with the conflicts between two registered instruments. If, by contrast, B registers and A fails to do so, A's interest is fraudulent and void against B under section 69. Similar results will follow in the case of a conflict between a legal interest created and registered prior to an unregistered equitable interest and an equitable interest created and registered prior to a later unregistered equitable interest. If the prior interest is registered and the subsequent interest unregistered, the prior interest will prevail on any analysis, even if its holder cannot rely on section 70. If the latter interest is registered and the former interest unregistered, the former interest will be avoided against the latter by section 69.

However, there is one case which is more complex. If X conveys an equitable interest to A who registers, A's equitable interest is not avoided against any later instrument. But as already seen, section 69 operates negatively. Suppose X then conveys a legal interest to B who is a *bona fide* purchaser (leaving aside any question of notice arising out of A's registration)⁵⁹ and B fails to register. If section 70 deals only with priority conflicts between two registered instruments, it is irrelevant to this conflict, and A's interest may be defeated. Such a view of section 70 achieves an absurd result, for if B registers his interest later, he brings the conflict within the terms of section 70 and his interest is defeated, but if he fails to register,

⁵⁹ The question of notice is discussed below.

the terms of section 69. apply and (apart from questions of priority) do not clearly operate to confer priority upon A. Such a view of section 70 makes nonsense of the policy of the Act. It also means that section 70 does not fill the gap caused by the negative operation of section 69. On the other hand, if section 70 does provide for (a) conflicts between registered instruments and (b) conflicts between registered and unregistered instruments, section 73 discussed below is largely redundant.

Another difficulty arises if the dictum in *Peebles v. Hyslop*⁶⁰ is correct. The fact that the words of section 69 are appropriate to a conflict between an unregistered instrument and a registered instrument, and that the words of section 70 deal with a conflict between registered instruments, would be of less importance if the exceptions made in both sections were identical. However this is not the case.

Section 69 operates only in favour of a purchaser or mortgagee for valuable consideration without actual notice. Section 70 appears to confer priority upon a registered instrument over a later registered instrument regardless of whether the prior transaction was voluntary and in excepting the case of notice appears to fix the relevant time for notice as the date of registration rather than the date of execution of the instrument. This is apparent from the use of the words "unless before the prior registration there has been actual notice". Moreover section 70 appears to require notice of the instrument, as opposed to notice of the interest. If section 69 is confined to priorities conflicts between registered and unregistered instruments, and section 70 to conflicts between registered instruments, some extraordinary consequences may follow. These are illustrated by the following examples.

A mortgages his land to B who does not register. Later, A executes a deed of gift to C who registers. If section 70 has no application to a conflict between unregistered and registered instruments the case is governed by section 69. Section 69 does not render B's interest fraudulent and void against C, because C is not a purchaser for value. Thus B's interest prevails. But if B is foolish enough to register his mortgage after C has registered his deed of gift, the case falls within the words of section 70 and B loses priority. The absurdity of this result again suggests that section 70 should apply to conflicts between unregistered and registered instruments as well as to conflicts

⁶⁰ *Supra*, footnote 58.

between registered instruments. This, of course, does not solve the problem of whether section 70 protects volunteers, and this point is discussed below.

It will also be seen that while both section 69 and section 70 contain an exception for notice it has been suggested that a different time for notice applies in the case of section 69 than in the case of section 70. This is due to the use of the words "unless before the prior registration" in section 70. If section 70 is confined to conflicts between registered instruments, results of the kind already described in the context of gifts may also be obtained in the context of notice. In 1865 in *Fuller v. Goodwin*⁶¹ the Supreme Court of New South Wales discussed the effect of a priority provision somewhat similar in its terms to the Ontario case. The contest was between an unregistered deed and a registered deed. It was held that the registered deed took priority over the unregistered one, notwithstanding that the section was silent on the effect of unregistered instruments. The court said:⁶²

...it would be an absurd construction that because the Legislature has indiscreetly used this word "priority" in the enactment, a different result could be obtained by the first taker's failure to register at any time.

The same argument may be made in Ontario, although the New South Wales Act does not contain the avoidance section to deal with unregistered instruments.

It is suggested that both section 69 and section 70 should be construed as applying to conflicts between registered and unregistered instruments and that the suggestion of Boyd C.J., in *Peebles v. Hyslop*⁶³ should be rejected.

However, in order to put the matter beyond all shadow of doubt section 70 should be re-drafted to clearly extend to a conflict between a registered and an unregistered instrument as well as a conflict between two registered instruments. It is suggested that the draft section set out below would achieve this result:

The interest of the holder of an instrument made for valuable consideration and registered under this Act, and the interest of any

⁶¹ (1865), 4 N.S.W.S.C.R. 66.

⁶² *Ibid.*, at p. 68.

⁶³ *Supra*, footnote 58. See also *Whitehead v. Trustee of Estate of Lach General Contractors Ltd et al.* (1974), 46 D.L.R. (3d) 500, at p. 508 (Ont. C.A.). But see *Thomson v. Harrison*, [1927] 3 D.L.R. 526 (S.C.C.).

person claiming through or under that person, whether or not taking for valuable consideration, in respect of the lands conveyed or affected by such instrument, shall have priority over the interest of a holder of any unregistered instrument and over the interest of a holder of any subsequently registered instrument, conveying or affecting the same lands in any manner whatsoever.

The exception for the case of actual notice could be dealt with by the addition of a proviso in the following terms:

Provided that the preceding priority provision shall not apply where the person claiming under the registered instrument or his solicitor or agent, has actual notice of the existence of an interest arising out of a prior unregistered instrument affecting the same land at the time of execution of the instrument under which he claims.⁶⁴

The inclusion of such a section would clearly make section 69 redundant and the section should accordingly be repealed.

VI. *Claimants Through Registered Owners.*

The application of sections 69 and 70 is complex in a case where the holder of an interest relies upon the registration of his predecessor in title and not upon his own registration in order to claim priority. This difficulty is best illustrated by an example. If A, the holder of a fee simple estate in Blackacre conveys Blackacre to B, and subsequently conveys the same piece of land to C who registers the conveyance, it is clear that under section 69, B's conveyance is void against C. Suppose however, that B in turn conveys to E and C in turn conveys to D, and that E registers his conveyance from B, before D registers his conveyance from C. (This could occur if the conveyance to E by B was made prior to C registering his conveyance from A.) If section 69 is applied it appears that since B's interest is fraudulent and void as against C, B's conveyance to E is ineffective on the basis of *nemo dat quod non habet*. The words "against any subsequent purchaser or mortgagee" appear to confirm this result. If this approach is followed, the holder of a conveyance which is voided by non-registration can never pass any interest, despite the fact that his grantee may register before other claimants. The approach encourages registration at the earliest stage (that is, it encourages B to register), but later claimants through B who themselves register gain no advantage by registering since the title of B is defective.

⁶⁴ The policy questions relating to actual notice are discussed below.

On the other hand it may be argued that if section 70 is applied, E has priority over D by virtue of his prior registration. In other words, the claimants in conflict are E and D, and priority between them must be decided only by reference to the documents under which they claim. On this view it may be argued that it is irrelevant that in a conflict between E and B, B would win, because here the conflict is between E and D. This approach certainly makes the task of the title searcher easier, for he does not have to consider the possibility that an earlier document in the chain of title may have been rendered fraudulent and void by virtue of section 69. The difficulty with the suggestion lies in the position of C. If B conveys the land to E before C has attempted to dispose of it, it is clear that as between C and E, C has priority by virtue of his prior registration. However can E effectively prevent C from disposing of the land by asserting that his registered conveyance will take priority over the registered conveyance of any transferee from C? It appears that he should not be able to do so, and that the defeat of B's interest by C's prior registration should mean that any person claiming through B is in no better position than B would have been. Of course, this result explains why it is imperative for the title searcher to examine each transaction in the chain of title in detail, in order to ensure that the avoidance provision has not operated at some earlier point.

The writer is unaware of any case which specifically deals with this problem,⁶⁵ but the general tendency of the courts to accentuate section 69 rather than section 70 would seem to favour D over E in the example given above.

The problem is more dramatically illustrated if in the example given above, E registers but D fails to register. Here both section 69 and section 70 suggest that E's interest should prevail in a conflict between D and E. D's interest, if created prior to E's would appear to be fraudulent and void as against E, and E's interest would appear to take priority by virtue of its prior registration. However, if the view is taken that B's conveyance is avoided as against C, it would seem to follow that B has nothing to pass to E, and thus E's registration of the conveyance cannot validate it. If the solution to the first problem lies in the fact that B's conveyance is avoided, the same result must

⁶⁵ See however *Andrews v. Taylor* (1869), 6 W.W. and A.B. (L) 223; *Smith v. Deane* (1889), 10 L.R. (N.S.W.) (Eq) 207; *Muir v. Dunnnett* (1864), 11 Gr. 85.

be reached in the second situation, although it is less attractive, because of D's failure to register.

A similar problem arises in the case where the competition is between a volunteer who claims through a prior registered owner, and a person registered subsequently. For example, A sells Blackacre to B who fails to register, and then sells the same piece of land to C who registers. C then makes a gift of the land to his wife, who registers the deed of gift. Is C's wife entitled to rely upon her husband's priority in order to assert her claim over B's. It has been seen that at present section 70 makes no reference to volunteers although section 69 only operates to make conveyances fraudulent and void against purchasers and mortgagees for valuable consideration. Assuming that a similar restriction must be read into section 70, it is argued a person who takes title through a registered donor who has already acquired priority should be protected in the same way as the donor. If the opposite view is reached, then whenever a gift is made the donee runs the risk of being defeated by a claimant under a prior conveyance, even if that conveyance has occurred in the far-distant past.⁶⁶

The above discussion illustrates the complexity of both the avoidance provision and the priority provision. If, as suggested, section 69 were repealed section 70 should be redrafted to ensure that a claimant through a person who had already attained priority, is entitled to rely upon the priority of his predecessor in title. The re-drafted section 70 appearing above should achieve this result.

⁶⁶ A similar problem arises in the context of a person without notice of the prior interest claiming through a person who cannot rely upon the priority provision because he has actual notice of the prior interest.

In *Heney v. Kerr* (1914), 30 O.L.R. 506, the assignee of a mortgage coming third in point of time, claimed priority over the second mortgagee by virtue of the registration of the third mortgage before the second mortgage. It was held that the assignee of the third mortgage took subject to the second mortgage because his assignor had actual notice of the second mortgage at the time he granted the third mortgage.

However, the decision in the case is strengthened by the fact that the court took the view that the assignee himself had actual notice of the prior second mortgage.

There does not appear to be a decision covering the case where a claim is made through a person who claims priority and who does not have actual notice of the prior interest, by a person who does himself have actual notice of the prior interest. See however *Maidment v. Spencer* (1949), 23 M.P.R. 185, [1949] 3 D.L.R. 596 (Nfld). See also *Ferguson v. Zinn*, [1933] 1 D.L.R. 300 (Ont. S.C.).

VII. *Cases Where the Avoidance Provision and the Priority Provision do Not Operate.*

A. *Volunteers.*

When the deeds registration legislation was first enacted volunteers were not given the advantage of the avoidance provision. Presumably the rationale for this omission was the fear that the registration provisions might be used as an instrument for fraud if donees were protected. Of course the Act does not *penalize* a volunteer who would otherwise take priority at common law. For example if A conveys land to a friend B as a gift, and later sells the land to C, B will be protected so long as he has registered his deed of gift. If he fails to register he will be defeated, like any other person who fails to register. However if A first sells the land to C, and then conveys it to B, who registers, B is in no better position by reason of his registration.

By some curious oversight, the priority section, section 70 makes no exception for the case of volunteers, though section 69 requires that the subsequent purchaser or mortgagee takes for valuable consideration. This omission is rectified by the re-drafted section 70 above.

In a contest between an innocent donee and an innocent purchaser of the same piece of land it seems rational to favour the purchaser. However once priority has already been obtained by a purchaser that purchaser should be able to make a gift of the land without taking the risk that an old claim may be revived against the donee. For this reason the re-drafted section 70 protects a registered donee who claims through a registered purchaser for valuable consideration who has already gained priority in respect of an earlier transaction.

B. *Notice — Meaning of the Term.*

Sections 69 and 70 make an exception for the case where the holder of the registered instrument has actual notice of the prior interest, or in the case of section 70, of the "prior instrument".

The expression, "actual notice", has been restrictively interpreted. If there is upon the register an earlier instrument which states that the land is held "on trust" a subsequent registrant does not have actual notice of the interest of the beneficiaries of that trust. This appears to be the case even where the trust is specifically named. The later registrant has no obligation to

enquire as to the objects of that trust, and since his notice of the trust is only constructive, he is entitled to rely upon his registration to confer priority upon him over the beneficiaries.⁶⁷ The registration of an assignment of a purchaser's interest under a contract of sale, does not give actual notice of the contract of sale.⁶⁸

Where the person claiming under the prior instrument is in possession of his land his possession does not give actual notice of his interest to a later registrant. Thus, the holder of a registered interest takes priority over a person claiming under a prior unregistered instrument who is in possession of the land. There is one exception to this principle, contained in section 69(2). Section 69(2) provides as follows:⁶⁹

This section does not extend to a lease for a term not exceeding seven years where the actual possession goes along with the lease, but it does extend to every lease for a longer term than seven years.

This section appears to protect both legal and equitable lessees who have actually taken possession of the land, though there may be some question about the position of the equitable lessee in view of the provisions of section 71, which are discussed below. If a lessee in possession of the land who may rely upon the protection of section 69(2), obtains a lease for a further term, which commences on the termination of the first lease, and fails to register the second lease, the second lease will not prevail against a subsequent registrant. Section 69(2) does not operate except where there is both a present lease and possession under it, and in the example given above the possession is possession under the first lease.⁷⁰ However, a lease under which the lessee is in possession and which is made for a term of

⁶⁷ *Re McKinley and McCullough* (1919), 46 O.L.R. 535, 51 D.L.R. 659 (A.D.); *Re Seperich and Madill*, [1946] O.R. 864, [1947] 1 D.L.R. 901 (H.C.); *Elevated Construction Ltd v. Nixon, et al.*, [1970] 1 O.R. 650, 9 D.L.R. (3d) 232 (H.C.). This later case appears to be inconsistent with *Re Thompson and Jenkins*, [1928] 4 D.L.R. 564 (Ont. S.C.). As to the burden of proving absence of notice see *Re Bouris and Button* (1975), 9 O.R. (2d) 305 (H.C.).

⁶⁸ *Orsi et al. v. Morning et al.*, [1971] 3 O.R. 185, 20 D.L.R. (3d) 25 (C.A.); but see Registry Act Amendment Act, S.O., 1972, c. 133, s. 12 (amending s. 22), which provides that a notice of agreement of purchase and sale may now be registered. Despite this amendment, it appears that the decision in *Orsi et al. v. Morning et al.*, would be the same unless the new procedure of registering a notice of agreement of purchase were adopted.

⁶⁹ *Supra*, footnote 2.

⁷⁰ *Davidson v. McKay* (1867), 26 U.C.R. 306.

less than seven years, is protected by section 69(2) despite the fact that it contains a covenant for renewal for a further term which added to the original term, extends the period beyond seven years.⁷¹ It is not clear whether section 69(2) protects assignees of leases which fall within the terms of this sub-section. However, in principle it would appear that the sub-section should be interpreted to protect such assignees. Although section 69(2) protects a lessee in possession, such a lessee may also protect his interest by registration provided that the lease is created by a registrable instrument.

It is not clear whether the protection given to lessees under section 69(2) is applicable also under section 70. If section 70 deals only with conflicts between registered instruments, protection of lessees under unregistered instruments is irrelevant to the section. The omission of protection for unregistered lessees in section 70 thus supports by implication the view that the section is confined to a conflict between registered instruments. If, on the other hand, section 70 confers priority upon a prior registered instrument over any earlier instrument which is either unregistered or registered subsequently, it is strange that it contains no express exception in favour of lessees. As will be seen below, in order to reconcile sections 69 and 70 it is necessary to read a number of limitations contained in section 69 into section 70. The omission of a reference to leases in section 70 is another example of the difficulty in reconciling the two sections. If section 69 is repealed, it is suggested that the exception in favour of short-term leases should be written into section 70. This could be accomplished by the addition of a further proviso to the re-drafted section 70 above. It is suggested that the words "where the actual possession goes along with the lease" are inelegant and imprecise. Since the purpose of the proviso is to protect the tenant in possession of the land, the section could read as follows:

Provided also that the preceding priority provision shall not apply to confer priority upon the holder of a registered instrument, over the interest of a tenant in possession of the land under an unregistered lease, for a term not exceeding seven years.

The use of the words "actual notice" gives rise to two other problems. First section 69 simply refers to a subsequent purchaser or mortgagee without notice. In contrast section 70 refers to "actual notice of the prior instrument". Thus it may be argued that if the holder of an interest registers his instrument knowing

⁷¹ *Latch v. Bright* (1869), 16 Gr. 653.

that X claims an interest in the land, but unaware of the instrument under which X claims, the registered holder does not fall within the words of section 70. If this argument is accepted, the registered holder would be entitled to rely upon the protection conferred by section 70, but not upon the protection conferred by section 69.⁷² Again this is an absurd result. It is overcome by the proviso to the re-drafted section 70 appearing above. Secondly, does "imputed notice" prevent a registrant relying upon the protection conferred by either of these sections? For example, suppose that C's solicitor is aware that B has a prior interest acquired under an unregistered instrument. He does not tell C, and C's later instrument is registered. Does C take free of the interest since he had no actual notice of it, his only notice being imputed? Authority on this question is conflicting, but, it is suggested that actual notice of a prior instrument in an agent should be treated as actual notice to the principal and as sufficient to postpone the registered instrument.⁷³ As a matter of policy, it seems that this is clearly the preferable view. In these circumstances C should be subjected to B's interest, or all purchasers and mortgagees would be well-advised to instruct their solicitors not to advise them of the existence of outstanding unregistered instruments. It is clear, however, that where a solicitor only has constructive notice of the existence of a prior interest a later registrant will not take subject to it. The re-drafted section 70 makes it clear that the concept of actual notice extends to this situation.

C. *Time of Actual Notice.*

It has been held that a person who takes a conveyance or mortgage, and subsequently acquires actual notice of a prior unregistered interest before he becomes registered is entitled to the protection of section 69. Even before the words relating to notice were inserted in section 69 Courts of Equity gave relief to the holder of a prior unregistered instrument against the holder of a later registered instrument, where the registrant had actual notice of the existence of the prior instrument. This

⁷² On this point see *Smith v. Thornton* (1922), 52 O.L.R. 492 (A.D.); *Bickley et al. v. Romanow et al.*, [1965] 1 O.R. 61, 46 D.L.R. (2d) 622 (Cy Ct). These cases suggest that notice of the interest is sufficient.

⁷³ *Tunstall v. Trapess* (1829), 3 Sim. 301; *Richards v. Brereton* (1853), 5 Ir. Jur. 336; *Agra Bank v. Barry*, *supra*, footnote 47. Note however that these were not cases dealing specifically with the Ontario legislation. See also *Toronto v. Rudd*, [1952] O.R. 84 (H.C.); *R. v. Waters* (1957), 9 D.L.R. (2d) 649 (Ont. C.A.).

was seen as part of the equity jurisdiction to prevent a statute being used as an instrument for fraud.⁷⁴ In taking this view, the Courts of Equity applied the general equitable principle that notice acquired after the conveyance had been made did not lead to postponement of the purchaser or mortgagee to the prior interest.

Difficulty arises in applying the same reasoning to section 70, since that section provides that priority prevails "unless before the prior registration" there has been actual notice of the prior instrument. These words suggest that the crucial time for notice in the case of section 70 is the time of registration. As already seen the crucial time for notice under section 69 is the time that the conveyance or mortgage was executed. In *Rose v. Peterkin*⁷⁵ Strong J. discussed the history of the forerunner to section 70 in the following words:

At the time the original Act, from which the revised statute was consolidated, was passed the jurisdiction of law and equity in the Province of Ontario was administered by separate courts. In a court of law a case might frequently arise, and did frequently arise where the legal prior title depended on prior registration, entitling a subsequent purchaser to priority over another claiming under a prior unregistered deed passing the legal estate. In such a case, owing to the different principles acted on with reference to the effect of notice by courts of law and Courts of Equity, the earlier grantee could not succeed at law, even though his adversary admitted the fact of notice; to obtain relief on that ground the first purchaser was compelled to resort to a Court of Equity, although the court of law could just as well have awarded him the same relief. It seems, therefore, very obvious that it was to remedy the inconvenience and injustice which arise in cases of this kind that [the forerunner to section 70] was passed. . . .

Although it does not affect the present decision in any way, I think it not out of place to point out here, that the rule as to notice embodied in the [forerunner to section 70] is much more stringent than that recognized in the decisions either upon the English or Irish Registry Acts. As Mr. Justice Patterson has remarked in his judgment notice after a purchaser has acquired his title and paid his purchase money, this before he has registered his deed, is, by the express words of the section, sufficient to postpone him. This seems a very harsh rule and is one which never prevailed in equity but is in direct opposition to the previous authorities . . .; and also contrary to the analogy afforded by the doctrine or taking an equitable priority generally, by which a purchaser or mortgagee without notice could at any time, and after having had notice, protect himself by giving him a prior legal estate. It is true that Lord Cairns in *Agra Bank v. Barry*⁷⁶ speaks of notice

⁷⁴ See *Millar v. Smith*, *supra*, footnote 36, at p. 55, per Gwyne J.

⁷⁵ (1885), 13 S.C.R. 677, at pp. 709-710.

⁷⁶ *Supra*, footnote 47.

before registration being sufficient, but as the point did not arise, and as all the authorities and reasonings to be discovered on the point are against such a rule, I take this to have been unintentional. Having regard to the terms of the [forerunner of section 70], a purchaser is hardly safe unless his conveyance is executed in the Registry office so that it may be placed upon record without allowing an interval for subsequent notice. Indeed this practice of executing deeds in the Registry office is said in a late case in the English Court of Appeals actually to prevail in the North riding of Yorkshire, though for a less urgent reason than that which calls for it in Ontario.⁷⁷

If Strong J. is correct⁷⁸ and section 70 confers no protection on a person, who after taking his mortgage or conveyance but before registration acquires actual notice of a prior interest, great difficulty arises in reconciling section 69 with section 70. An example illustrates the difficulty. A mortgages his fee simple estate in Blackacre to B, who fails to register. A subsequently mortgages the land to C who does not have actual notice of B's prior unregistered mortgage. However, before C registers, B informs C of his interest. If section 70 applies it appears that C has lost his priority because he had notice of B's interest by the time of registration. On the other hand, if section 69 applies, C's lack of notice at the time of the execution of mortgage protects him.

Obviously, the most attractive solution to this difficulty is to interpret "actual notice" in section 70 in the same way it has been interpreted under section 69, while recognizing that this does some violence to the clear words of the section. In *Peebles v. Hyslop*,⁷⁹ as already seen, it was suggested that a conflict between an unregistered instrument and a later registered instrument was governed by section 69, and a conflict between two registered instruments was governed by section 70. If the time of notice is different under section 69 and section 70, then in the example above, peculiar results may follow. If the conflict is governed by section 69, because it is a conflict between a prior unregistered instrument and a later registered instrument, C will take priority over B since he has not had notice of his interest at the date of taking his conveyance. However, if B later registers, the conflict

⁷⁷ This practice is still followed in Ontario today, despite its manifest inconvenience.

⁷⁸ In *Millar v. Smith*, *supra*, footnote 74, at p. 54, Hagarty C.J., suggested that this was a drafting defect, which would be remedied if the legislature had its attention called to it. One hundred years later the legislature has still not acted. Gwyne J. also pointed out the anomaly, but took the view that the words of the section would have to be strictly applied.

⁷⁹ *Supra*, footnote 58.

is brought within the terms of section 70, and the fact that C had notice of B's interest before registration would mean that B's interest took priority over C's. The whimsicality of this result suggests that the time of notice should be the same for both sections.⁸⁰

The re-drafted section 70 makes the time of notice "the time of execution of the instrument" under which the purchaser claims, thus giving effect to the more lenient view expressed by Strong J. in *Rose v. Peterkin*.⁸¹

D. *Registration as Notice.*

Section 73(1) of the Act provides as follows:

The registration of any instrument under this or any former Act shall constitute notice of the instrument to all persons claiming any interest in the land, subject to such registration, notwithstanding any defect in the proof of registration, but nevertheless it shall be the duty of the Registrar not to register any instrument except on such proof as is required by this Act.⁸²

It has been seen that registration of a document conferred notice of that document upon subsequent purchasers. However it was held that this did not apply where, for some reason, the registration was defective. The registration of a document had been held defective for a number of reasons including such trivial ones as the omission of the occupation of a witness,⁸³ and the omission of the given name of a mortgagor's wife.⁸⁴ If the registration was held defective the document was regarded as unregistered and a later registrant did not take subject to the prior interest, despite the fact that the document was physically on the register. However in 1873 an amendment to the previous 1867 Act provided that registration would confer notice "notwithstanding any defect in the proof for registration". (The requirements

⁸⁰ In *Millar v. Smith*, *supra*, footnote 74, the point that the fore-runner to s. 70 applies only to a conflict between two registered deeds, does not appear to have been taken. As to the time at which an instrument is registered, see Registry Act, *supra*, footnote 2, s. 77.

⁸¹ *Supra*, footnote 75.

⁸² See also sub.-ss (2) — (4). In particular sub.-s. (2) provides that sub.-s. (1) does not apply to an instrument registered in the by-law index or on a general register unless certain conditions are satisfied.

⁸³ *Robson v. Waddell* (1865), 24 U.C.R. 574.

⁸⁴ *Boucher v. Smith* (1862), 9 Gr. 347; for some other examples of the doctrine of defective registration see Armour, *op. cit.*, footnote 25, pp. 61-62.

relating to proof for registration are now contained in sections 25-28 of the Registry Act.)

Whilst section 73 may be relied upon in the case of a defective registration⁸⁵ its general usefulness appears limited. If an instrument is registered it takes priority over all later registered instruments regardless of notice.⁸⁶ Thus the statement that registration constitutes notice of an instrument is generally redundant. Unfortunately however the courts have tended to rely on the notice concept of section 75, rather than the priority concept of section 70, and this has led to some puzzling reasoning.

There has been a series of cases in which a purchaser under a contract of sale has registered an assignment of his equitable interest under the contract of sale to himself. This procedure was followed because the contract itself was not in registrable form.⁸⁷ In *Re Sutherland and Volos and Lebopal Realty Ltd.*⁸⁸ the Ontario Court of Appeal held that a purchaser was entitled to register such an assignment and that it should not have been struck off the abstract of title. The Conveyancing and Law of Property Act⁸⁹ provides "A person may convey property to or vest property in himself in like manner as he would have conveyed the property to or vested the property in another person". Thus the assignment was effective. Since the document identified the parties and the land, and described the interest transferred by reference to a transaction connected with the title to the land shown on the abstract the document would be registered. Laskin J.A. (as he then was) did warn that:⁹⁰

A document in registrable form is accepted for registration without regard at that time to what it is intrinsically worth; that is a matter of contestation between competing claimants to the land and any interest therein that is affected by the registration.

⁸⁵ Note also the qualification on s. 73(1) contained in s. 73(2). S. 73(2) provides that the general notice provision does not apply to an instrument registered in the by-law or to certain instruments registered only upon the general register, but note that a document is regarded as registered even if it has not reached the abstract.

⁸⁶ *Darbyshire v. Darbyshire*, *supra*, footnote 57. However for an example of a case where s. 73 might prove useful see *White v. Lauder Developments Ltd* (1975), 9 O.R. (2d) 363 (C.A.).

⁸⁷ Under Registry Act Amendment Act, *supra*, footnote 68, s. 12 (amending s. 22) a notice of agreement of purchase and sale may now be registered. See also s. 73(4).

⁸⁸ (1967), 62 D.L.R. (2d) 11 (C.A.).

⁸⁹ The provision is now contained in R.S.O., 1970, c. 85, s. 42.

⁹⁰ *Supra*, footnote 88, at p. 18.

Later cases went on to consider the effect of the registration of an assignment of the purchaser's interest under a contract of sale, upon persons registering subsequently. (Most frequently such a question arose when the vendor re-sold the same piece of land to a third party.) It was held that registration of an assignment of a contract of sale from a purchaser to himself gave only constructive notice, not actual notice of the unregistered agreement for sale. Accordingly a later registrant did not take subject to the interest of the purchaser of the land who had registered his assignment.⁹¹

With respect to the learned judges, in this situation the fact that the subsequent registrant did not have actual notice of the contract of sale seems beside the point. The assignment is effective to confer an equitable interest in the land upon the purchaser (although he already had such an equitable interest under the contract of sale). The assignment is admittedly registrable, and has been registered. Surely the registration of the assignment document must confer priority upon its holder over all later registered documents. The fact that the purchaser gained this equitable interest originally through an unregistered contract of sale does not appear to be relevant. The Act does not require that all previous documents affecting a piece of land be registered, before the present holder of an interest can rely upon the priority provisions. It is suggested therefore, that the emphasis placed by the courts upon the "notice" provision to the detriment of the priority provision in section 70 undermines the purpose of the Registry Act. The purchaser has registered a document affecting the title to the land and yet the normal consequences of registration are denied to him.

The procedure of registering an assignment of an equitable interest under a contract of sale is no longer likely to be adopted. Section 22(8) now permits registration of a notice of an agreement of purchase and sale of land or an assignment of such an agreement. Section 73(4) provides that the registration of such a notice constitutes registration of the instrument referred to in the notice, and under section 73(1) this in turn constitutes notice of the contract of sale to all persons claiming an interest in the land.⁹² It is argued however that this amendment was

⁹¹ *Orsi et al. v. Morning et al.*, *supra*, footnote 68; *Chugal Properties Ltd v. Levine et al.*, [1972] 1 O.R. 158, 22 D.L.R. (3d) 410, *aff'd* 33 D.L.R. (3d) 512 n; *Re Willoughby et al. v. Knight* (1973), 1 O.R. (2d) 184, 39 D.L.R. (3d) 656 (H.C.); *Whitehead v. Trustee of Estate of Lach General Contractors Ltd* (1974), 46 D.L.R. (3d) 500 (C.A.).

⁹² Registry Act Amendment Act, *supra*, footnote 68.

unnecessary and that section 70 should have conferred priority upon the first purchaser of the land over any subsequent registrant, in *Orsi*.⁹³

The words of the re-drafted section 70 would seem to be sufficiently clear to confer priority upon the prior registered instrument in these circumstances,⁹⁴ without reference to the confusing concept of notice. However section 73 still remains to serve a useful purpose in the cases where the priority provisions do not operate or where proof for registration is defective.

VIII. Cases where Registration is Inoperative.

A. Void Instruments.

In some cases the registration of an instrument under the Registry Act confers a greater effect upon that instrument than it would possess at common law. In the case where A sells the same piece of land to two persons and the later grantee registers first, registration clearly validates a disposition which would otherwise be invalid, and abrogates the common law principle of *nemo dat quod non habet*. However, apart from this exception, registration does not cure fundamental defects in the instrument registered. Thus, a person who claims directly under a forged instrument or through a person who claims under a forged instrument is in no better position than he would have been at common law, even if the instrument is registered.⁹⁵ Similarly, a person who relies upon the registration of a contract signed by an "agent" who in fact lacks authority from his principal, is not able to enforce the contract against the principal, or to assert priority over a later registrant who takes under a valid contract.⁹⁶ A conveyance executed by a grantor who has been induced by fraud or mistake, or is fundamentally in error as to the nature of the document, is equally ineffective despite registration.⁹⁷ So is a conveyance or mortgage executed by a person who has not yet acquired title to the land in question.⁹⁸ Where the instrument is

⁹³ *Supra*, footnote 68.

⁹⁴ For another example of the emphasis placed upon s. 73 see *White v. Lauder Developments Ltd et al.*, *supra*, footnote 86.

⁹⁵ *In re Cooper*, *Cooper v. Vesey* (1882), 20 Ch. D. 611 (decision on the Middlesex Registry Act, 7 Anne, c. 20).

⁹⁶ *Wilde v. Watson* (1878), 1 L.R. Ir. 402 (decision on the Irish Registry Act); *Weeks v. Dale* (1888), 14 V.L.R. 159.

⁹⁷ *Sutherland v. Peel* (1864), 1 W.W. and A' B. 18.

⁹⁸ *Nevitt v. McMurray* (1886), 14 O.A.R. 126 followed in *McMillan v. Munro* (1898), 25 O.A.R. 288.

one whose registration is not permitted by statute, registration will not give it any greater effect than it would otherwise have had.

This is a serious problem in Ontario in the context of the Planning Act.⁹⁹ Section 29 requires compliance with certain procedures before land can be subdivided and before one piece of land can be severed from the remainder. A severance or subdivision which does not comply with the statutory procedures is void and registration does not validate it.¹⁰⁰

In Ontario a person who has searched the Register, inspected the land and carefully perused the document under which he takes, still runs the risk that an adverse claimant may be able to recover the land by establishing a fundamental but non-apparent flaw in one of the documents appearing on the Register. This limitation upon the effectiveness of land registration contrasts with the protection afforded a purchaser under a pure Torrens system; for it has now been held that even a void instrument, when registered under the Torrens system will confer an indefeasible title upon an innocent purchaser.¹⁰¹

This is the inherent defect in any system of deeds registration. It undermines the safety of conveyancing transactions and makes the careful investigation of the facts surrounding each document in the chain of title, absolutely imperative. No modification of the existing priority provisions would cure this problem, for it requires a totally different approach.

B. *Unregistrable Interests.*

Deeds registration legislation provides a means by which written documents may be registered,¹⁰² but makes no provision for the registration of interests which are created otherwise than by document. Such interests may arise by the operation of either legal or equitable principles. Examples of legal interests arising otherwise than by document are a wife's inchoate right to dower, the interest of a person in adverse possession of land, and the

⁹⁹ Planning Act, R.S.O., 1970, c. 342, s. 29.

¹⁰⁰ *Ibid.*, s. 29(7).

¹⁰¹ *Frazer v. Walker*, [1967] 1 A.C. 569; *Mayer v. Coe*, [1968] 2 N.S.W.R. 747; *Ratcliffe v. Watters*, [1969] 2 N.S.W.R. 146; *Breskvar v. Wall* (1971), 46 A.L.J.R. 68. But *quaere* whether this result would be reached under the Land Titles Act, *supra*, footnote 8.

¹⁰² For the definition of an instrument, see Registry Act, *supra*, footnote 2, ss 1, 18. See also s. 22.

interest of a yearly tenant, created by entry into possession and payment of rent. Examples of equitable interests arising without document are the interest of a person who is entitled to specific performance by reason of part performance of a contract, the interest of the vendor who has executed a conveyance but retains a lien over the land for the payment of the balance of purchase money, and the interest of a mortgagee with whom title deeds have been deposited.

It would have been both illogical and harsh to penalize for non-registration a person who was not permitted to register his interest. For this reason, a number of cases¹⁰³ held that registration did not confer priority over unregistrable interests as compared with interests which though registrable were unregistered. Thus, if A agreed to lease premises to B, and B went into possession or performed other acts amounting to part performance, B's equitable leasehold interest would be enforceable against a registered purchaser from A, as long as the purchaser could not defend himself on the basis that he was a *bona fide* purchaser for value without notice. In the above example, if B entered into possession and paid rent to A, he would probably also become a yearly tenant by operation of law and this interest would be enforceable against the purchaser even in the absence of notice. Thus priority conflicts between unregistrable interests and registered interests continued to be governed by the old legal and equitable principles and undermined still further the security provided by registration.

To some extent this situation was altered by the enactment of Registry Act, which in section 71 provides as follows:¹⁰⁴

No equitable lien, charge or interest affecting land is valid as against a registered instrument executed by the same person, his heirs or assigns, and tacking shall not be allowed in any case to prevail against the provisions of this Act.

The purpose of the section appears to have been to permit the defeat of unregistrable equitable interests by later registered interests thus increasing to some extent the security of a person

¹⁰³ *In re Burke's Estate* (1881), 9 L.R. Ir. 24 (mortgage by deposit); *White v. Hunter* (1868), 5 W.W. and A.B. (Eq.) 178 (mortgage by deposit); *Reilly v. Garnett* (1872), 7 L.R. Tr. 1 (specifically enforceable agreement for a lease); *White v. Neaylon* (1886), 11 A.C. 171 (specifically enforceable agreement); *Glenny v. Rathbone* (1900), 20 N.Z.L.R. 1 (adverse possession).

¹⁰⁴ *Supra*, footnote 2.

who registers his conveyance. However, the drafting of the section creates difficulties. The words "the same person" do not refer to any person mentioned earlier in the section. The reference to "a registered instrument" suggests that a conflict between an unregistrable equitable interest and an unregistered document creating a legal or equitable interest will continue to be solved by reference to general legal and equitable principles but this is not altogether clear. It also suggests that an unregistrable equitable interest will continue to be enforceable against the person creating it, though not as against a taker under a "registered instrument" executed by him. The reference to "his heirs or assigns" suggests that if the conflict arises between a successor to the person who was originally a party to the creation of the equitable interest, who either takes under a registered instrument or executes a registered instrument, he or his assign will be able to defeat the unregistrable interest. On its face, section 71 could abolish equitable interests entirely since it contains no express exception for equitable interests created by a registered document. This is clearly not its purpose. Nor does section 71 contain an exception for notice. It has been held, however, that a person who takes with actual notice of an unregistrable equitable interest is bound by it.¹⁰⁵

Section 71 does not deal with the problem of unregistrable legal interests such as dower,¹⁰⁶ adverse possession or leases arising by operation of law. Such interests are enforceable against later registered interests, even in the absence of notice.¹⁰⁷ In *Israel v. Leith*¹⁰⁸ it was held that an implied easement arising by virtue of the doctrine in *Wheeldon v. Burrows*¹⁰⁹ was enforceable against a subsequent purchaser of the servient tenement, despite

¹⁰⁵ *Forrester v. Campbell* (1870), 17 Gr. 379; *Rose v. Peterkin*, *supra*, footnote 75, at p. 704; *Cooley v. Smith* (1877), 40 U.C.R. 543. See also *Re Bouris and Button*, *supra*, footnote 67, at pp. 312-313.

¹⁰⁶ See however Registry Act, *supra*, footnote 2, s. 42 (5) and (6). These requirements if observed, make it easier to discover whether a dower claim may arise in the future.

¹⁰⁷ *Israel v. Leith* (1890), 20 O.R. 361; *Thornton v. France*, [1897] 2 Q.B. 143; *Glenny v. Rathbone*, *supra*, footnote 103. See also *Floyd v. Heska* (1974), 50 D.L.R. (3d) 161 (H.C.). Note that in *Re Bouris and Button*, *supra*, footnote 67, it was held that conveyances of land by livery of seisin may still be effected in Ontario. Since this method of transfer would enable legal interests to be conveyed without use of a document, it could make the provisions of the Registry Act, *supra*, footnote 2, entirely beside the point.

¹⁰⁸ *Ibid.* See also *Bickley v. Romanow*, *supra*, footnote 72.

¹⁰⁹ (1879), 12 Ch. D. 31 (C.A.).

its lack of registration and despite the purchaser's lack of notice.¹¹⁰ A similar argument would apply with respect to an easement arising by virtue of the doctrine of lost modern grant.¹¹¹

Section 71 is obviously designed to protect purchasers from taking subject to interests which cannot be discovered from the register. It seems arbitrary, however, that such interests, if legal, should continue to bind the purchaser in the absence of notice of any kind, while such interests if equitable should not bind a purchaser even with constructive notice. The traditional superiority of legal interests over equitable ones, does not appear a sufficient justification for the distinction in the context of the Registry Act.¹¹² The Act makes no provision for the protection of interests arising otherwise than by document.¹¹³ It is suggested that the holders of all interest arising by operation of law or equity should be able to protect them by the registration of a notice setting out the existence of the interest. This could be achieved by an extension of section 22(7).

If this step were taken section 71 could be re-drafted and extended to cover all unregistrable legal or equitable interests which were not protected by such a notice. The draft could take the following form:

No legal or equitable interest which affects land, and which arises otherwise than by virtue of the execution of an instrument registrable in accordance with the provisions of this Act, shall be enforceable against the holder of any legal or equitable interest in the same land, arising out of an instrument made for valuable consideration and registered under this Act. Provided that this section shall not apply:

- (1) Where the holder of the interest under the registered instrument was a party to the creation of the unregistrable legal or equitable interest;

or

¹¹⁰ The alternative ground for the decision in *Israel v. Leith*, *supra*, footnote 107, was that if the grant of the dominant tenement was regarded as an express grant of the easement by virtue of the provision now contained in Conveyancing and Law of Property Act, *supra*, footnote 89, s. 15, the registration of the conveyance of the dominant tenement gave sufficient notice of the easement. See now, Registry Act, *supra*, footnote 2, s. 24.

¹¹¹ See *Vannini v. Public Utilities Commission of Sault Ste-Marie* (1972), 32 D.L.R. (3d) 661 (Ont. H.C.).

¹¹² *Supra*, footnote 2.

¹¹³ See however, s. 22(7) which permits registration of notice of a lease, a sub-lease, an assignment of a lease, a mortgage of a lease, an assignment of the lessor's interest on a lease, and a determination or surrender of a lease. See also s. 22(8).

- (2) Where the holder of the interest under the registered instrument has actual notice of the unregistrable legal or equitable interest at the time of execution of the instrument under which he claims;
or
- (3) Where the holder of the unregistrable legal or equitable interest has lodged a notice in accordance with the provisions of s. 22(7) prior to the registration of the instrument under which the holder of the registered legal or equitable interest claims.

If it were considered too harsh to require the lodging of a notice to protect claims such as a wife's inchoate right to dower or the interest arising out of adverse possession, these particular legal interests could be added to the exceptions already made above. An alternative approach would be to repeal section 71 altogether. This would have the virtue of treating all unregistrable interests in the same way. However, it would also render the position of the purchaser more precarious than it is at present. This approach therefore seems less desirable.

The re-drafted section 71 does not deal with the doctrine of tacking. This should be dealt with in a separate section providing as follows:

The doctrine of tacking shall not be allowed in any case to prevail against the provisions of this Act.¹¹⁴

IX. *Other Relevant Legislation.*

The purpose of this article is to analyse the priority provisions of the Ontario Registry Act, and to make some suggestions for their reform. However these provisions do not operate in a vacuum. In order to place the priority provisions in context it seems useful to briefly discuss some of the other legislation passed in Ontario, with the aim of simplifying conveyancing.

A. *Registry Act, Part III.*

This part of the Registry Act is derived from the Investigation of Titles Act, first enacted in 1929.¹¹⁵ In the absence of a contractual stipulation to the contrary, the practice of English conveyancers was to require the vendor to prove a good title stretching back at least sixty years. In 1874 the English Vendor and Purchaser Act¹¹⁶ reduced this period to forty years. Since that date it has been further reduced, first to thirty years and then

¹¹⁴ See also s. 72, which would be retained in its present form.

¹¹⁵ S.O., 1929, c. 41.

¹¹⁶ *Supra*, footnote 2.

to fifteen. The period in England is now "at least" fifteen years. It is not an absolute period because the vendor's chain of title must commence from a document which is a "good root of title", and that document may not be exactly fifteen years old. Thus, in England a vendor is obliged to prove his title over a period of fifteen years, or before that fifteen year period back to a good root of title.¹¹⁷ A good root of title has been defined as,

... a document which describes the land sufficiently to identify it, which shows a disposition of the whole legal and equitable interest contracted to be sold, and which contains nothing to throw any doubt on the title.¹¹⁸

Thus, for example, a conveyance by way of sale, or a mortgage of the whole of the land, would both be good roots of title.

The English example was followed in Ontario in 1929, by the enactment of legislation which provided that:

From and after the first day of June, 1930, no person in dealing with the land shall be required to show that he is lawfully entitled to the land as owner thereof through a good and sufficient chain of title, save and except during the period of forty years immediately preceding the date of such dealing as aforesaid.¹¹⁹

This forty-year period has not been shortened by subsequent legislation in Ontario but the shortening of the period would be one means of reducing the searches which must be made by a prospective purchaser. Despite the absolute terms of the section, it has been held in Ontario, as in England, that the requirement that the chain of title must begin with a good root is still applicable. As in England, the legislation of Ontario also contains a provision designed to shift the burden of proving certain matters related to the title from the vendor to the purchaser.¹²⁰ Thus, for example, recitals, descriptions and statements of fact contained in instruments twenty years old are deemed to be correct in the absence of evidence to the contrary.¹²¹

The provision set out above does not, of itself, affect the rights of third parties. It relates only to the satisfaction of the vendor's obligation to prove good title. However, if an equitable interest arises before the period of commencement of title, a

¹¹⁷ See *supra*, footnote 1.

¹¹⁸ *Re Lemon and Davies Contract*, [1919] V.L.R. 481, at p. 483 quoting from Williams, Vendor and Purchaser (2nd ed., 1911), p. 106.

¹¹⁹ The Investigation of Titles Act, *supra*, footnote 115. See now Registry Act, *supra*, footnote 2, s. 111.

¹²⁰ Vendors and Purchasers Act, R.S.O., 1970, c. 478, s. 1.

¹²¹ Compare this section with Investigation of Titles Act, R.S.O., 1960, c. 193, s. 2. See also Registry Act, *supra*, footnote 2, s. 15.

purchaser will not have constructive notice of the interest, unless he has actually searched. In these circumstances, the equitable interest will be defeated. This is unlikely to prove important in Ontario since in any case an unregistered equitable interest will be defeated by the provisions of the Registry Act, unless the purchaser has *actual notice* of it.

However, section 112 of the Registry Act goes further by attempting to extinguish claims against the land which have been in existence for more than forty years. Thus, the interests of third parties may be defeated by this provision.

Section 112 provides as follows:¹²²

112(1) A claim that has been in existence for longer than forty years does not affect land to which this Act applies unless the claim has been acknowledged or specifically referred⁴ to or contained in an instrument or a notice under this Part or under *The Investigation of Titles Act*, being chapter 193 of the Revised Statutes of Ontario, 1960, or any predecessor thereof, registered against the land within the forty-year period. 1966, c. 136, s. 52, *part*.

(2) Subsection 1 does not apply to,

- (a) a claim of the Crown reserved by letters patent or a claim of the Crown in unpatented land or in land for which letters patent have been issued, but which has reverted to the Crown by forfeiture or cancellation of the letters patent, or in land that has otherwise reverted to the status of unpatented Crown land;
- (b) a claim of the Crown or of a municipality in respect of any public highway or lane;
- (c) a claim of a corporation authorized to construct or operate a railway, including a street railway or incline railway, in respect of lands acquired by the corporation after the 1st day of July, 1930, and,
 - (i) owned or used for the purposes of a right-of-way for railway lines, or
 - (ii) abutting such right-of-way;
- (d) a wife's claim to an inchoate right to dower in land while her husband is wholly or in part the owner thereof;
- (e) a claim to an unregistered right-of-way or other easement or right that a person is openly enjoying and using;
- (f) a claim to a freehold estate in land or an equity of redemption therein by a person shown by the abstract index for the land as being so entitled prior to any forty-year period and continuously shown by the abstract index for the land during the forty-year period and thereafter as being so entitled; or

¹²² *Ibid.*, as to the meaning of the words "acknowledged or specifically referred to or contained in an instrument" see *Jakmar Developments Ltd v. Smith* (1973), 39 D.L.R. (3d) 379.

- (g) any claim imposed by a statutory enactment.
- (3) For the purposes of subsection 1,
 - (a) a wife's claim to an inchoate right to dower in land shall be deemed to be acknowledged in an instrument by which her husband alienates the land; and
 - (b) an instrument, to which section 65 applies, shall be deemed not to have been registered.¹²³

The purpose of section 112 is to extinguish old claims, other than those excepted, which have existed for longer than forty years, and which would otherwise amount to clouds on title. From the purchaser's point of view two kinds of interests may cause difficulty. It has been seen that legal interests such as dower rights, easements arising by long user, and interests arising out of adverse possession which cannot be registered are enforceable despite non-registration. In contrast, unregistrable equitable interests are defeated by section 71 of the Registry Act, except in the case of actual notice. If, as suggested above all unregistrable legal interests were extinguished against registered interests, there would be no need to include such interests within section 112. However, if this step were not taken it might be thought useful to extinguish unregistrable legal interests after they reached a certain age. However section 112 does not appear to achieve this effect. The section provides that a claim that has been in existence for longer than forty years does not affect land to which the Act applies, but the word "claim" is restrictively defined. Section 110 provides that a claim means "a right, title, interest claim or demand of any kind or notice whatsoever affecting land set forth in, based upon or arising out of a registered instrument". It appears that section 112 extinguishes only claims arising out of instruments, and not those arising by operation of law. (Curiously, however, the definition goes on to provide that "claim includes dower rights whether inchoate or otherwise", although dower rights arise by operation of a legal principle and not out of any instrument. Even more curiously, dower rights fall within the exceptions to section 112(1), set out in section 112(2).) Thus, section 112 does not protect purchasers from unregistrable legal interests the existence of which cannot be discovered from the Register.

The second type of claim that may cause difficulty is a claim arising out of an instrument registered prior to the forty-year period. For example, the abstract may show that a mortgage has been registered forty-five years previously, and has never

¹²³ S. 65 authorizes the deletion of certain entries in the Abstract Index.

been discharged. Claims of this kind, may cause difficulties for both the purchaser and the vendor. The vendor will find his land less saleable because of the possible cloud on title. The purchaser will be reluctant to take the risk of buying a law suit. It may be impossible to trace the mortgagee or his successors. Obviously it is useful to provide some procedure for the automatic extinction of such stale claims. Section 112 clearly disposes of claims of this kind, where the claim in question is not listed among the exceptions.¹²⁴

Where such an interest is still alive and it is desired to protect it the Act provides for registration of a notice of the claim, and when a notice has been registered, the claim will not be extinguished for forty years from the date of registration.¹²⁵ A notice may be re-registered within forty years from the date of its original registration.¹²⁶ Thus a title searcher must not only search back forty years, or to a good root of title, but must also ensure that notices have not been registered to protect interests originally arising more than forty years previously.

Section 113(2) also provides that a notice of a claim that has expired may be re-registered if there has been no intermediate registered dealing with the land.

For example, X is the holder of an easement (not openly enjoyed or used), which was created by a deed registered in 1880. In 1910 the land is conveyed to A. In 1915 X registers a notice of the easement to prevent its extinction in 1920. X is obliged to re-register the notice in 1960 if he wishes to protect the easement against a subsequent purchaser. However, if he fails to re-register the easement by 1960, and the fee simple interest is still in the hands of A, he will be able to re-register the notice and the easement will continue to be enforceable against A.

Section 112(2) lists a number of exceptions to the extinction principle. The exceptions made are very wide and tend to reduce the effect of the forty-year rule. Most of the interests which are not excepted are likely to cause little trouble anyway. The section appears to have the effect of extinguishing undischarged mortgages (which would in any case be dealt with by the provisions of the Limitations Act) restrictive covenants, and profits à prendre created by registered documents. It does not extinguish easements

¹²⁴ For another example of an interest that was extinguished, see *Zygocki v. Hillwood* (1975), 12 O.R. (2d) 103.

¹²⁵ Ss 113, 112(1).

¹²⁶ S. 113(2) and (3).

openly used or enjoyed,¹²⁷ or dower rights (which are likely to prove clouds on title),¹²⁸ two kinds of interests likely to cause problems.

Where the holder of a fee simple interest in land, or of an equity of redemption was registered prior to the forty-year period, but there have been no subsequent dealings with the fee simple or the equity of redemption, there is no need to lodge a notice to protect the interest. Thus persons who have the full legal and beneficial interest in the land are protected simply by virtue of the fact they are on the register.¹²⁹

In the foregoing discussion it is assumed that the forty-year period for extinction of interests is an absolute period. In the case where a notice has been lodged for the protection of an interest, and the notice has expired, this is clearly the case. More difficulty arises when it is argued that because the interest itself was registered prior to the forty-year period, and no notice has been registered the interest has been extinguished.

The difficulty arises in this way. It has been seen that the apparently absolute forty-year period contained in section 111 has been interpreted as subject to the common law requirement that the vendor prove his title back to a good root. Is the concept of the good root of title applicable to section 112 as well? If the vendor's chain of title commences with a conveyance made to his predecessor forty years previously, it is clear that a mortgage registered forty-two years previously and still undischarged is extinguished by section 112. But when the situation is reversed, the problem is more complex. If the vendor's good root of title is a conveyance made to his predecessor forty-five years previously, and forty-two years previously the land was mortgaged to X, does section 112 extinguish X's undischarged mortgage, so that it does not amount to a cloud on the vendor's title. It appears that section 112 should operate here, and that the forty-year period should be regarded as an absolute period, as it is in the case when a notice has been registered. Otherwise, the question whether an old interest has been extinguished will depend not only upon its age, but also upon what dealings appear both before and after it in the chain of title. Unfortunately, however,

¹²⁷ S. 112(2)(e).

¹²⁸ This effect appears to be achieved by a combination of s. 112(2)(d) and (3).

¹²⁹ S. 112(2)(f). See also *Algoma Ore Properties Ltd v. Smith*, [1953] 3 D.L.R. 343 (Ont. C.A.), which appears to weaken the effect of this section.

the section has been interpreted so that the forty-year period is not an absolute period with the result that, in the example given above, X's mortgage would not be extinguished.¹³⁰

Section 112 does simplify the task of the searcher by extinguishing interests which would otherwise obscure the clarity of the vendor's title, although in many cases this function is probably served almost as well by the Limitations Act.¹³¹ The section would be more effective if it had been interpreted as applying a definite forty-years rule in all these cases. This effect could be achieved by the addition of the words "Notwithstanding the date of commencement of title", to the beginning of section 112.

B. *Certification of Titles Act.*

The Certification of Titles Act¹³² provides a non-contentious procedure by which "the owner or any person claiming a fee simple estate in land"¹³³ may have the validity of his title investigated and certified. The procedure is commenced by application of the owner. The application must be supported by an applicant's statement under oath; a plan of survey; the title documents if any; and any other evidence of title; an abstract of title certified by the registrar of the registry division in which the land is situated showing a forty-year chain of title; a solicitor's abstract together with a statement of the solicitor stating he has investigated the title and believes the applicant to be the owner of the land, and certificates from various persons or bodies as to the non-existence of certain liens and writs of execution.¹³⁴

The investigation of title is an administrative procedure carried out by the Director of Titles, though provision is made for the hearing of adverse claims, and for appeal to the Supreme Court from the findings of the Director.¹³⁵ If the Director has found in favour of the title, a certificate of title is registered in the registry office of the registry division in which the land is situated.¹³⁶ The effect of registration of the certificate is to show conclusively that as of the date, hour and minute named therein,

¹³⁰ This appears to be the implication from *Re Headrick and Calabogie Mining Co. Ltd.*, [1953] 4 D.L.R. 56 (Ont. C.A.).

¹³¹ R.S.O., 1970, c. 246.

¹³² R.S.O., 1970, c. 59.

¹³³ *Ibid.*, s. 7(1).

¹³⁴ S. 7(2).

¹³⁵ Ss 11, 12.

¹³⁶ S. 15.

the title of the person described therein is absolute and indefeasible as regards the Crown and all persons subject only to the exceptions named therein.¹³⁷

The main purpose of this procedure is to establish a good root of title existing at a particular date. The procedure is likely to be employed by a person who owns land subject to a cloud on title which affects its marketability, but who can satisfy the Director of the basic validity of his title.

In addition, use of the certification procedure is compulsory where land which is within an area to which the Act applies is subdivided. No plan of subdivision of land within a certification area can be subdivided unless the title of the owner has been certified, or there has been a certification not more than five years from the date of registration of the plan. A number of exceptions exist to this requirement and for obvious reasons it is inapplicable if the land has been brought on to the Land Titles Register.¹³⁸

Finally, the Act provides for the establishment of an Assurance Fund which compensates persons wrongfully deprived of an estate or interest in the land by reason of certification. The fund is constituted from the fee paid by applicants for certification.¹³⁹

The procedure enacted by the certification of titles legislation is relatively simple and provides the owner of land with the means of establishing his title conclusively, without need for a dispute or for reference to a court. On the other hand, the continued existence of the procedure, combined with the existence of land titles legislation guaranteeing the title of a person on the land titles register seems wasteful in the extreme. If the Director of Titles can certify that the title of the applicant is conclusive and indefeasible as of the date of certification there seems no reason why he should not bring the land into the Land Titles Register forthwith, at least in areas to which the land titles system is applicable. If this procedure was adopted then not only the owner of land as of the date of certification, but also a subsequent owner would be entitled to rely on the indefeasibility of his title, subject only to the exceptions set out in the Land Titles Act.¹⁴⁰ The

¹³⁷ S. 16.

¹³⁸ S. 17.

¹³⁹ S. 18.

¹⁴⁰ Land Titles Act, *supra*, footnote 8, ss 51, 91.

procedures of title investigation employed by the investigators under the Certification of Titles Act are similar to those employed by those investigating the title of a person applying to bring his land under the Land Titles Act. Accordingly, it appears that where an application is made under the Certification of Titles Act, with respect to land within an area to which the Land Titles Act applies, the Director of Titles should be empowered to treat the application as an application to bring the land under the Land Titles Act, and to register the applicant as owner.

In any case the whole procedure is an excellent example of the process of treating the symptoms of a disease without attempting to discover its underlying cause.

C. *The Quieting Titles Act.*

The purpose of the Quieting Titles Act¹⁴¹ is similar to the purpose of the Certification of Titles Act.¹⁴² The Act provides a procedure under which the owner of a fee simple estate in land, a trustee for sale after fee simple, and any other person who has an estate or interest in land may petition the Supreme Court or a judge of the Supreme Court to have his title judicially investigated and its validity checked.¹⁴³ The petition must be supported by evidence of his title, of similar nature to the evidence required under the Certification of Titles Act, including a certificate of counsel or solicitor stating that he has investigated the title and believes the petitioner to be the owner of the estate he has claimed to be.¹⁴⁴ Provision is made for the hearing of adverse claims.¹⁴⁵ In the case of a contest, a judge may decide the matter on the evidence before him or he may refer the question to any matter involved therein to the Court of Appeal.¹⁴⁶ In addition, an appeal lies from the decision of the judge.

If the judge holds in favour of the petitioner's title he issues a certificate of title which is conclusive evidence of the absolute and indefeasible title of the person named therein subject only to the qualifications mentioned there.¹⁴⁷ It should be noted,

¹⁴¹ R.S.O., 1970, c. 396.

¹⁴² *Supra*, footnote 132.

¹⁴³ Ss 1 to 4. As to the estate or interest in land which will support an application see *Re Bouris and Button*, *supra*, footnote 67.

¹⁴⁴ Ss 5 to 8.

¹⁴⁵ S. 16.

¹⁴⁶ S. 17.

¹⁴⁷ S. 26.

however, that any claim of title under the Act is presumed to be subject to a number of listed exceptions unless the petitioner states the contrary.¹⁴⁸ These exceptions are not mentioned in the Certification of Titles Act. They include reservations contained in the original Crown grant, municipal charges, rates, taxes or assessments, the title or liens of adjoining owners, short term leases, public highways, rights of way, water courses and easements, and the right of the husband or wife of the petitioner to dower or courtesy.¹⁴⁹

It should be noted that the Quieting Titles Act contains no provision for an Assurance Fund. The main differences between the Quieting Titles Act and the Certification of Titles Act are as follows:

1. The former contemplates a court procedure, the latter an administrative procedure.
2. The conclusiveness of a certificate issued under the Quieting Titles Act is more assailable since provision is made for an application for re-investigation. Re-investigation will take place if the person aggrieved satisfactorily accounts for his delay in applying. Moreover, re-investigation will not affect the title of a person who after the date of the certificate has acquired, for valuable consideration any estate or interest in the land described in the certificate. Thus, the certificate is conclusive in favour of a transferee from the petitioner, but a certificate may be set aside against the original petitioner.¹⁵⁰
3. The Quieting Titles Act applies throughout Ontario, the Certification of Titles Act applies only within certification areas.
4. The Certification of Titles Act procedure is compulsory in the case of subdivisions within a certification area (subject to certain exceptions).
5. The Quieting Titles Act makes no provision for compensation of persons deprived of an estate or interest in land.

Since both Acts serve the same purposes in similar ways, it appears that the continued existence of both of them is unjustified. In general, the Certification of Titles Act procedure is preferred by applicants. Accordingly it is suggested that the

¹⁴⁸ S. 22.

¹⁴⁹ S. 22.6.

¹⁵⁰ S. 33. Under s. 33(2) a certificate of the presentation of the petition for re-investigation may be registered in the registry office. A transferee who registers after the registration of such a certificate will not be protected.

Quieting Titles Act should be repealed and the Certification of Titles Act extended to the whole of Ontario.

X. *Conclusions.*

In 1971 the Ontario Law Reform Commission recommended that an improved land title system should be the sole system for land registration in Ontario,¹⁵¹ and that the registry system presently in force should be abandoned. The writer agrees wholeheartedly with both the reasoning and the conclusion of the Commission, but considers that its speedy introduction is unlikely. Given that this is the case, it appears that it is worth-while to consider whether the priority provisions of the Registry Act should be improved.

While individual members of the legal profession often state that they are familiar with the registry system and that it works well in practice, an examination of the legislation reveals its obvious defects. Problems involving priorities may be the exception rather than the rule in conveyancing practice, but the chance that they may arise clearly makes title investigation more complex and expensive. The cure to the problem would be the compulsory application of the land titles system, but a temporary panacea may be found in the revision of the Registry Act. It seems incredible that the answer to a number of basic questions should not be readily ascertainable by an examination of the legislation and the cases interpreting it.

Some of the more obvious flaws in the priority provisions of the Registry Act could be remedied as follows:

1. Section 69 should be repealed.
2. Section 70 should be re-drafted so that it deals with the following problems:
 - (a) it should confer priority upon a registered instrument over an unregistered instrument, as well as confer priority upon an earlier registered instrument over later registered instruments.
 - (b) it should protect a purchaser who pays over the purchase money without notice of an outstanding interest, although he subsequently acquires notice before registration.
 - (c) it should protect a person claiming through a person who has already acquired priority.

¹⁵¹ *Op. cit.*, footnote 20.

It is suggested that the draft section set out below would meet these aims:

The interest of the holder of an instrument made for valuable consideration and registered under this Act, and the interest of any person claiming through or under that person, whether or not taking for valuable consideration, in respect to the lands conveyed or affected by such instrument, shall have priority over the interest of a holder of any unregistered instrument and over the interest of a holder of any subsequently registered instrument, conveying or affecting the same lands in any manner whatsoever.

Provided that the preceding priority provision shall not apply where the person claiming under the registered instrument, or his solicitor or agent, has actual notice of the existence of an interest arising out of a prior unregistered instrument affecting the same land at the time of execution of the instrument under which he claims.

Provided also that the preceding priority provision shall not apply to confer priority upon the holder of a registered instrument, over a tenant in possession of the land under an unregistered lease, for a term not exceeding seven years.

3. Section 71 should extend to unregistrable legal interests. This could be achieved by the draft section set out below:

No legal or equitable interest which affects land, and which arises otherwise than by virtue of the execution of an instrument registrable in accordance with the provisions of this Act, shall be enforceable against the holder of any legal or equitable interest in the same land, arising out of an instrument made for valuable consideration and registered under this Act. Provided that this section shall not apply,

- (i) Where the holder of the interest under the registered instrument was party to the creation of the unregistrable legal or equitable interest,

or

- (ii) Where the holder of the interest under the registered instrument or his solicitor or agent has actual notice of the unregistrable legal or equitable interest at the time of execution of the instrument under which he claims,

or

- (iii) Where the holder of the unregistrable legal or equitable interest has lodged a notice in accordance with the provisions of section 22(7) prior to the registration of the instrument under which the holder of the registered legal or equitable interest claims.

4. Section 22(7) should be extended to permit the lodging of a notice to protect any legal or equitable interest created otherwise than by registrable document.

5. The doctrine of tacking should be dealt with in a separate section in the following terms:

The doctrine of tacking shall not be allowed in any case to prevail against the provisions of this Act.

6. Section 73 should be retained in its present form.
 7. The above amendments should be combined with the addition of the words, "Notwithstanding the date of commencement of title" at the beginning of section 112.
 8. The Quieting Titles Act should be repealed.
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