# PENDING LITIGATION AGAINST REGISTERED LAND

CAROLINE A. NEEDHAM*
*Sydney, N.S.W.*

*In provinces with the Torrens system of land title registration a litigant can give notice of litigation pending against land by entering a certificate of* lis pendens *or caution in the register of land titles. This has the effect of preserving the litigant's rights, such as they may be, until his claim is determined by the court. Failure to enter a certificate or caution contemporaneously with the commencement of litigation may result in defeat of the litigant's claim before judgment or decree, should a third person deal with the land when there is no notification in the register.*

*Dans les provinces qui sont dotées d'un système Torrens d'enregistrement des titres de propriété immobilière, un plaideur peut indiquer qu'un certain immeuble est l'objet d'un litige, en faisant enregistrer un certificat de* lis pendens *ou un* caveat *au bureau où est enregistré cet immeuble. Ce certificat protège les droits du plaideur, quelqu'ils soient, jusqu'à ce que le litige ait été tranché par le tribunal saisi. L'absence d'enregistrement du certificat ou du* caveat *dès le début du litige peut faire perdre ses droits sur l'immeuble au plaideur avant le jugement si un tiers fait affaire concernant cet immeuble.*

## *Introduction*

In all provinces with the Torrens system of land title registration a litigant, whether plaintiff or defendant, can give notice of litigation pending against land by an entry in the register of land titles. In the western provinces of Canada the Acts authorize the registration or filing of a certificate of *lis pendens* against the title to land which is the subject of litigation. In Ontario and Prince Edward Island a caution is registered instead of a certificate.[1]

* Caroline A. Needham, of the Faculty of Law, University of Sydney, N.S.W., Australia; Visiting Associate Professor, University of British Columbia, Vancouver, in Spring 1982 when this article was prepared.

[1] Land Title Act, R.S.B.C. 1979, c. 219, s. 213; Land Titles Act, R.S.A. 1980, c. L-5, s. 137(1); The Real Property Act, R.S.M. 1970, c. R30, s. 148(2) and Queen's Bench Act, R.S.M. 1970, c. C280, s. 87; The Land Titles Act, R.S.S. 1978, c. L-5, s. 164; Land Titles Act, R.S.O. 1980, c. 230, s. 135(1) and Judicature Act, R.S.O. 1980, c. 223, s. 38; Land Titles Act, R.S.P.E.I. 1974, c. L-6, s. 62. Provision for notification of pending or imminent proceedings in the land titles register is also made by other provincial statutes. See Builders Lien Act, R.S.B.C. 1979, c. 40, ss 25, 26; Mortgage Brokers Act, R.S.B.C. 1979, c. 283, s. 7(3); Securities Act, R.S.B.C. 1979, c. 380, s. 27(3); Trade Practice Act, R.S.B.C. 1979, c. 406, s. 14(4); Wills Variation Act, R.S.B.C. 1979, c. 435, s. 8(2); Mechanics' Lien Act, R.S.M. 1970, c. M80, s. 22; Wills Act, R.S.M. 1970, c. W150, s. 39(1); Collection Agencies Act, R.S.O. 1980, c. 73, s. 19; Estates Administration Act, R.S.O. 1980, c. 143, s. 17(8); Mechanics' Lien Act, R.S.O. 1980, c. 261, s. 24(2);

The criteria for registration of a certificate or caution differ somewhat among the provinces. Most require that the litigant be claiming an estate or interest in the land. Some, less strict, authorize the registration of a certificate if some title to or interest in the land is called in question. The purpose of these provisions is, broadly, to enable a person with a disputed claim to land or an interest therein to give notice of his claim to persons proposing to deal with the land and to preserve his rights, such as they may be, until the matter is resolved in court. However the Acts do not, except to a very limited extent, prescribe the effect of registration or failure to register a certificate or caution. This can be ascertained only by considering the purpose of the enabling provisions in the light of their historical background and in the context of the land title registration system as a whole.

The doctrine of *lis pendens* was developed at general law to prevent the frustration of suits and actions in respect of land by alientation *pendente lite*. Without such a doctrine a landowner could defeat a claim against his land by conveying the land before judgment or decree to a third person who, not being a party to the litigation, would not be bound by the court's decision. The plaintiff would be obliged to commence his proceedings *de novo* against the purchaser or mortgagees, as the case might be, subject to being defeated again by the same course of action, so that conceivably it could be impossible to bring a suit or action to a successful conclusion. It was to overcome this problem that the courts developed the doctrine of *lis pendens*, whereby a person who acquires land or an interest in land while litigation is pending in respect thereof is bound by the plaintiff's claim if it is successful, whether or not the grantee had notice of the litigation when he acquired his estate or interest. Thus is *Bellamy* v. *Sabine*[2] mortgagees who took a mortgage after the commencement of a suit against the mortgagor and while the suit was pending were precluded from setting up their title against the plaintiff, even though they were "entirely ignorant" of the plaintiff's right to question the mortgagor's title. As explained by Lord Cranworth M.R.:[3]

> Where a litigation is pending between a Plaintiff and a Defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence.

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Mortgage Brokers Act, R.S.O. 1980, c. 265, s. 26; Motor Vehicle Dealers Act, R.S.O. 1980, c. 299, s. 16; Real Estate and Business Brokers Act, R.S.O. 1980, c. 431, s. 18; Securities Act, R.S.O. 1980, c. 466, s. 16.

[2] (1857), 1 De G. & J. 566, 44 E.R. 842.

[3] *Ibid.*, at p. 847 (E.R.).

Although the doctrine usually operates against a defendant, it also applies to prevent alienation by a plaintiff to the prejudice of a defendant who has a claim against the plaintiff's land.[4]

It is sometimes assumed that the general law doctrine of *lis pendens* is founded on notice. Some judicial statements have been made suggesting that a purchaser or mortgagee is bound because he is deemed to have notice of any pending litigation. But this is not the true principle. The purchaser or mortgagee is bound by the outcome of the litigation, not because he is deemed to have notice of it, but because as a matter of policy the law does not allow a litigant party to give to others, pending the court's decision, title to or rights over the property in dispute so as to prejudice the other party. This was made clear in *Bellamy* v. *Sabine* where it was held that:[5]

> The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is, as I think, a doctrine common to the Courts both of law and of equity, and rests, as I apprehend, upon this foundation—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail.

The strict general law doctrine worked hardship on persons who dealt with land for value and without actual notice that it was the subject of pending litigation. To overcome this, legislation was introduced in England in 1839. The Judgments Act, 1839[6] authorized the filing of a memorandum of *lis pendens* with the senior master of the Court of Common Pleas and provided that a purchaser or mortgagee who had no actual notice of litigation against the land would not be affected by it unless a memorandum had been filed.

The general law doctrine of *lis pendens* is in force in the Canadian provinces and territories and is applicable to land under a title registration system except in so far as it is modified or excluded by statute. In *Syndicat Lyonnais du Klondyke* v. *McGrade*[7] the Supreme Court of Canada held that the doctrine was part of that body of English law received as the law of the Yukon in 1870, the prescribed date for determining the applicability of English law. It has also been held that the doctrine was received as part of the law of Ontario[8] and it may safely be assumed to apply in the other provinces as well.

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[4] *Bellamy* v. *Sabine*, *ibid.*, at p. 848 (E.R.).

[5] *Ibid.*, per Turner L.J., at p. 849 (E.R.). See also, the observations of Lord Cranworth M.R. at p. 848, which were quoted and approved in *Syndicat Lyonnais du Klondyke*, v. *McGrade* (1905), 36 S.C.R. 251 (S.C.C.) per Idington J., at p. 273 and in *Ruthig* v. *Stuart Bros. Ltd* (1923), 53 O.L.R. 558 per Middleton J., at p. 561.

[6] 2 and 3 Vict. c. 11, s. 7.

[7] *Supra*, footnote 5.

[8] *Brock* v. *Crawford* (1908), 11 O.W.R. 143; *Ruthig* v. *Stuart Bros Ltd*, *supra*, footnote 5; *Reid* v. *Carr* (1924), 26 O.W.N. 204.

Although the general law doctrine is *prime facie* applicable, the statute of 1839 was classified as a "purely local" enactment which was not received as law by the Canadian provinces. In *McGrade* it was held that:[9]

> That part of the law of England that provides for the registration of notice of *lis pendens* and the restriction of the law as expressed in the maxim of *pendente lite nihil innovetur*, so that innocent purchasers *pendente lite* might be protected, is not in force in the Yukon. The registration provisions in England being of a purely local character were not carried into the Yukon by the general introduction of English law. Counsel wisely abstained from arguing that they were.

The same conclusion was reached for Ontario in *Brock* v. *Crawford*[10] and for Saskatchewan in *Re Removal of Certificate of Lis Pendens*[11] and *Re Registration of Certificate of Lis Pendens*.[12] As a result the registration or filing of a memorandum or certificate of *lis pendens* in the register is not permitted unless authorized by a statute of the forum.[13]

The doctrine of *lis pendens*, being based on considerations of public policy, it is not restricted in its application to land under the old common law system but is equally applicable to land in a title registration system. Although the Torrens statutes provide that persons dealing with the registered owner of land are not affected by notice of unregistered interests in the land, these "notice provisions"[14] do not, without more, exclude the doctrine since it does not rest on equitable concepts of notice. In *McGrade* Idington J. stated:[15]

> Is it, therefore, to be taken for granted that so valuable a right as plaintiff, or those in a position like him, have in the lands . . . are left without protection especially when we consider that he had, by the doctrine of *lis pendens*, in the English law for so long such complete protection, and that the scope and purview of this "Land Titles Act" was only to furnish a system of registered titles and interests in land?
>
> I am inclined to think that there is much to be said for the position that respondents may take in claiming that having regard to the scope and purview of the "Land Titles Act" it was never intended to sweep away . . . rights such plaintiff had at the time of the appellants' purchase.

The statute he was there considering did not provide any procedure for notifying litigation in the register. Where there is a statutory procedure provided for registration of a certificate of *lis pendens* or caution, it is

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[9] *Supra*, footnote 5, per Idington J., at p. 271.

[10] *Supra*, footnote 8.

[11] (1913), 5 W.W.R. 794 (Sask.).

[12] (1915), 7 W.W.R. 1217 (Sask.).

[13] *Syndicat Lyonnais du Klondyke* v. *McGrade*, *supra*, footnote 5; *Re Removal of Certificate of Lis Pendens*, *supra*, footnote 11; *Winnipeg Paint and Glass Co.* v. *Lackman*, [1923] 3 W.W.R. 361 (Man.); *A-G Can.* v. *Lanart*, [1936] O.W.N. 285.

[14] All the Acts listed, *supra*, footnote 1, contain standard "notice provisions": B.C., s. 29; Alta, s. 195; Man., s. 77; Sask., s. 237; Ont., s. 75(1); P.E.I., s. 52. Except in Ontario and P.E.I. this protection is confined to persons dealing with the registered owner of the land.

[15] *Supra*, footnote 5, at p. 275.

submitted that this supersedes the general law doctrine and impliedly excludes it. Failure to register a certificate where authorized is calculated to mislead persons proposing to deal with the land, so that it would be unjust for a litigant to be able to invoke the protection of the strict general law doctrine, particularly as against a third person who had no notice of his claim. Even a purchaser with notice of the claim should be entitled to disregard it if it is not notified in the register by the procedure provided. So although the Acts do not in terms require that a certificate or caution be registered when litigation is commenced, it is considered that a litigant who fails to use the procedure provided by the Acts risks defeat of his claim in whole or in part by a purchaser, mortgagee or other person who acquires the land or an interest therein before his claim is established in court.

In Manitoba and Ontario it is expressly provided that the institution of an action in which any title to or interest in land is brought in question shall not be deemed notice of the action or proceeding to any person not a party to it until a certificate of *lis pendens* has been registered.[16] The apparent intention of these provisions is to exclude the general law doctrine as regards claims which can be protected by registration of a certificate or caution although, for the reason already pointed out, the reference to notice is misleading.

If however no certificate or caution can be registered because the litigation does not fall within the statutory criterion, it has been held that the general law doctrine remains applicable so that a purchaser or mortgagee, whether with or without notice, acts at his peril.[17]

The effect of registration of a certificate of *lis pendens* or caution will now be considered. From now on a reference to a "certificate of *lis pendens*" is intended to include a caution registered in lieu in Ontario and Prince Edward Island.

### I. *The Effect of a Certificate of Lis Pendens.*

Registration of a certificate of *lis pendens* ensures that any person subsequently dealing with the land will take subject to the outcome of the litigation, whether or not he had actual knowledge of the claim. By registration of a certificate of *lis pendens* a litigant gives notice of his claim to persons proposing to deal with the land, prevents any alteration of the register except subject to his claim and may perhaps improve his position as against the holders of other unregistered interests in the land. As stated in *Robinson* v. *Holmes*:[18]

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[16] Man. Queen's Bench Act, *supra*, footnote 1, s. 87(1); Man. Registry Act, *supra*, footnote 1, s. 63; Ont. Judicature Act, *supra*, footnote 1, s. 38(1).

[17] *Ruthig* v. *Stuart Bros. Ltd*, *supra*, footnote 5; *Reid* v. *Carr*, *supra*, footnote 8.

[18] (1914), 5 W.W.R. 1143, at p. 1145, 17 D.L.R. 372 (B.C.).

> The registration of the *lis pendens* by the plaintiff is the means provided for the plaintiff to protect his interests and give notice to other parties that he claimed an interest in the property and was seeking to enforce his rights by action.

A certificate of *lis pendens* does not in itself constitute or create any charge over the land against which it is registered.[19] As explained in *Bull* v. *Hutchens*[20] per Lord Cranworth M.R.:[21]

> [T]he *lis pendens* is merely notice of some claim, made in respect of the property which is the subject of the suit, but . . . it does not, of itself, create an incumbrance apart from the equity on which the litigation is founded.

Even in those provinces where a certificate is "registered" rather than "filed", a certificate does not elevate the litigant's claim to the status of a registered interest for purposes of priorities nor attract the indefeasibility of title accorded by the Acts to registered estates and interests. It was held in *Robinson* v. *Holmes*[22] that a question of priority between a registered charge and a claim in respect of which a certificate of *lis pendens* had been lodged was not covered by a statutory direction[23] that priority between two registered charges depends on the time of the respective applications for registration. Macdonald J. held that:[24]

> The wording of this section is not apt as applied to a *lis pendens* as it does not create an "estate or interest" and is simply a notice that an estate or interest is claimed by the party bringing the action.
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> In my opinion, whatever rights Beeks may have possessed in his action, the registration by him of a *lis pendens* did not create any interest in the land which was legally or equitably assignable. . . .

The main purpose and effect of a certificate of *lis pendens* is to give notice that the land is the subject of a dispute in which the plaintiff (or defendant) is claiming title to or some interest in the land. However a certificate of *lis pendens*, like a *caveat*, gives notice of the litigant's claim only to persons subsequently dealing with the land, not to someone who acquired his estate or interest before the certificate was registered. A certificate which is not registered until after completion of a sale or mortgage does not operate retrospectively to give the purchaser or mortgagee notice. In *Sanderson* v. *Burdett*[25] the plaintiff registered a certificate

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[19] *Bull* v. *Hutchens* (1863), 32 Beav. 615; *Molsons Bank* v. *Eager* (1905), 10 O.L.R. 452; *Robinson* v. *Holmes*, *ibid.*; *Esquimalt & Nanaimo Rwy. Co.* v. *Granby Consolidated Mining, Smelting & Power Co. Ltd*, [1919] 3 W.W.R. 147, [1920] A.C. 170, 48 D.L.R. 279 (P.C.) (B.C.); *Rudland* v. *Romilly* (1958), 26 W.W.R. 193 (B.C.); *contra* statements in *McTaggart* v. *Toothe* (1884), 10 P.R. 261 (Ont.); *Peck* v. *Sun Life Assurance Co. of Canada* (1904), 11 B.C.R. 215, 1 W.L.R. 302; *Vallstrom* v. *Staff*, [1950] 1 W.W.R. 1080, [1950] 3 D.L.R. 637 (B.C.) in relation to the former wording of the B.C. Act which provided for registration of a *lis* "as a charge".

[20] *Ibid.*

[21] *Ibid.*, at p. 618.

[22] *Supra*, footnote 18.

[23] Now s. 28 of the B.C. Land Title Act, *supra*, footnote 1.

[24] *Supra*, footnote 18, at pp. 1146-1147 (W.W.R.).

[25] (1869), 16 Gr. 119 (Ont.), aff'd without dealing with this point, 18 Gr. 417.

of *lis pendens* after the defendant had made a conveyance to purchasers who had no notice of the plaintiff's action at the date of completion of the sale. It was held that the purchasers were entitled to rely on the defence of *bona fide* purchaser for value without notice:[26]

> [The purchasers] had no notice of the plaintiff's claim, but counsel for the plaintiff contended, that they were bound by the registration of *lis pendens* on the 31st December, 1867, their deed not having been registered until the 16th January following. But their deed was executed, and their purchase money paid, on the 20th November, 1867; and registration before notice was not necessary to entitle them to set up this defence.

The distinction between dealings before and after registration of a certificate is clearly illustrated by *Wallace* v. *Smart*.[27] The plaintiff registered a certificate of *lis pendens* against the land of a mortgagor after the mortgagee had in purported exercise of his power of sale entered a contract for sale with a purchaser who had no notice of the plaintiff's claim at the date of the contract. It was held that the purchaser was protected as a *bona fide* purchaser for value without notice[28] to the extent of monies paid before registration of the *lis*, being a deposit of $55.00, but not as to the balance of the purchase price paid after the plaintiff notified his claim by registration of the certificate.

A certificate of *lis pendens* operates to give notice only as regards fresh dealings with the land after the certificate is registered. Money payments made pursuant to a pre-existing contractual relationship with the registered owner do not constitute a new dealing with the land, so that the payer is not affected with notice in relation to those payments. In *Peck* v. *Sun Life Assur. Co. of Canada*[29] a purchaser entered a contract for sale of land whereunder the purchase price was payable by instalments. The agreement was registered as permitted by the British Columbia statute. The plaintiff subsequently commenced proceedings to set aside the vendor's title under a statute relating to fraudulent conveyances and registered a certificate of *lis pendens* in respect of the action. There was a saving clause in the statute which protected purchasers without notice against such claims. The purchaser, having no actual notice of the commencement of litigation, continued to pay instalments pursuant to the agreement for more than a year after registration of the certificate. It was held that the certificate did not give notice to the purchaser while he was merely acting in performance of the prior agreement, so that he was protected by the saving clause to the extent of the payments made without actual knowledge of the *lis*. In *Bain* v. *Pitfield*[30] the same result was reached but by different reasoning.

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[26] *Ibid.*, at p. 127.

[27] (1912), 19 W.L.R. 787, 22 Man. R. 68.

[28] The mortgage being granted by a deed absolute in form was held to confer a power of sale only in favour of a purchaser for value without notice.

[29] *Supra*, footnote 19.

[30] (1918), 9 W.W.R. 1163, 26 Man. R. 89, 28 D.L.R. 206.

The court assumed in that case that a purchaser under a contract for sale by instalments does receive notice of the plaintiff's claim if a certificate of *lis pendens* is registered after the date of the contract, but held that the purchaser is protected against such notice by the notice provisions found in all Torrens Acts that persons dealing with the registered owner are not affected by notice of any unregistered interest in the land.

It is considered that the reasoning in *Peck* is preferable to that in *Bain*. A certificate of *lis pendens* is analogous to a *caveat* in that both are designed to give notice of outstanding claims to the land[31] and it is established by high authority that a *caveat* does not affect a purchaser with notice as regards payments after the date of the *caveat* made in performance of an agreement entered before the *caveat* was lodged. In *Grace* v. *Kuebler*[32] the defendants entered an agreement to purchase land by instalments. Before completion the vendor transferred the land to the plaintiff, subject to the agreement, and also assigned to the plaintiff the purchase monies due under the agreement. The plaintiff did not register the transfer but registered a *caveat* claiming an interest in the land as transferee. The defendants, who had no actual notice of the transfer or assignment, subsequently paid the balance of the purchase price to their original vendor. The Supreme Court of Canada held that the plaintiff's *caveat* did not give notice to the defendants so as to prevent the application of the general law rule that a payment by a debtor to his creditor without notice of an assignment of the debt is a valid payment which *pro tanto* discharges the debtor's liability. The payment was a good payment which gave the defendants the right to receive a transfer of the land, even though made after registration of the *caveat*. Duff J. concluded that:[33]

> There is nothing in [the Act] pointing to the conclusion that a *caveat* is intended to operate as a warning against the mere payment of money.

Anglin J. stated that:[34]

> [The *caveat*] would, no doubt, be notice of [plaintiff's] interest in the land to persons subsequently dealing with it—but not to persons in the position of [defendants]. . . . In merely making their payments they were not persons subsequently dealing with it to whom registration [of the caveat] in the interval would be notice.

The reasoning in *Peck* is consistent with the approach of the court in *Grace* v. *Kuebler*. Considerations of convenience also dictate that a purchaser under an instalment contract should not be affected with notice by a subsequently registered *lis*. As pointed out in *Peck*:[35]

> Otherwise, consider the purchaser's position. . . . No such payments could be safely made except at the Land Registry Office after search for intervening registrations.

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[31] This analogy was drawn by Macdonald J. in *Robinson* v. *Holmes*, *supra*, footnote 18, at pp. 1145-1146 (W.W.R.).

[32] (1917), 56 S.C.R. 1, [1917] 3 W.W.R. 983 (S.C.C.) (Alta).

[33] *Ibid.*, at p. 991 (W.W.R.).

[34] *Ibid.*, at p. 986 (W.W.R.).

[35] *Supra*, footnote 19, at pp. 226-227 (B.C.R.).

The practical effect of registering a certificate of *lis pendens* is that anyone proposing to deal with the land is obliged to look into the litigant's claim to decide whether or not he should proceed with the transaction. If the claim does not appear to be well founded there is nothing to prevent him from going through with the deal. But generally a prospective purchaser or mortgagee will refuse to proceed until the certificate is removed from the title or the litigant's claim has been finally disposed of in court. For this reason a certificate of *lis pendens* has been described as "an *ex parte* injunction"[36] which prevents alienation *pendente lite*. A fuller explanation was given by Riddell J. in *Brock* v. *Crawford*:[37]

> [N]o rights are given by the certificate—the whole effect is that notice is given that rights are being claimed. . . . Of course, any one desiring to deal with the land, and seeing the certificate registered, may examine the records of the Court and satisfy himself as to the validity or otherwise of the claim set up. If he thinks it baseless, he may disregard the warning: but he need not fear the document itself as conferring any rights upon anyone.
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> To a certain extent, however, the registration acts as a cloud upon the title; and, in actual practice, purchasers or mortgagees are deterred from dealing with such land.

Should there be a dealing *pendente lite* a certificate of *lis pendens* has the further effect, like a *caveat*, of preventing the registration of any instrument except subject to the *lis*. In Ontario and Prince Edward Island this is expressly provided by the Acts.[38] Elsewhere the Acts do not in terms so provide, but the position is the same. Before the registrar can register any instrument dealing with the land he must be satisfied that it confers a good, safe-holding and marketable title upon the person seeking registration, and while the land or some interest in the land is in dispute in a pending suit the registrar cannot be satisfied of this. Thus the registrar is not justified in registering any instrument free of the *lis* after a certificate of *lis pendens* has been registered.

The registrar is not obliged to refuse registration completely. He may in his discretion decline to register the instrument, or he may register it "subject to" the *lis*, depending upon the nature of the litigant's claim. If the litigant is claiming a charge or lien over the land or some other interest less than the fee simple, the proper course is for the registrar to register an instrument tendered for registration "subject to" the *lis*. Where the litigant claims to be entitled to the fee simple the registrar should refuse registration completely. In *Esquimalt and Nanaimo Rwy. Co.* v. *Granby Consolidated Mining, Smelting & Power Co. Ltd* the Privy Council, on appeal from British Columbia, held that:[39]

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[36] *Finnegan* v. *Keenan* (1878), 7 P.R. 385, at p. 387 (Ont.).

[37] *Supra*, footnote 8, at p. 146.

[38] In these provinces, where a caution is registered instead of a certificate of *lis pendens*, the registrar is expressly prohibited from registering any dealing which is inconsistent with a caution: Ont. Land Titles Act, *supra*, footnote 1, s. 130(1); P.E.I. Land Titles Act, *supra*, footnote 1, s. 60(3).

[39] *Supra*, footnote 19, at p. 283 (D.L.R.).

> It appears to their Lordships to be contrary to common sense to hold that an interest in land, which may, as the result of a pending lawsuit, be found to-morrow to be non-existent, should be treated to-day, by one who knew of the existence of this suit, as an indefeasible fee, since that term means an estate in fee simple held under a good safe holding and marketable title. A *lis pendens* may be described by any name the Legislature chooses to bestow upon it, whether appropriate or inappropriate. But the giving of the name does not stay the action which constitutes the *lis*. That, however miscalled, may go on to its appointed end.
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> It appears to their Lordships that while the title of the respondent company was being actively assailed by this pending suit, the Registrar, who in this case is also the Examiner of Titles, and therefore a judicial officer, would be acting entirely within his powers in refusing, as he has refused, to register the respondent company's title as an indefeasible fee.

II. *Enforcement of the Litigant's Claim Against Third Parties.*

Difficult questions arise where a third person who was not implicated in the events giving rise to the litigation has dealt with the land in which the litigant is now claiming an estate or interest. If the litigant's claim proves to be well founded against the previous owner whose actions gave rise to the claim, is it enforceable against the land after the rights of an innocent purchaser or mortgagee have intervened?

This is a matter of some complexity because of the many different fact situations which may arise. Did the litigant's claim arise before or after the third person dealt with the land? When was the litigation commenced? How promptly was a certificate of *lis pendens* entered in the register of land titles? The principles applicable will vary according to the sequence of events and the nature and status of the competing claims to the land. The facts of each case must therefore be carefully analysed with particular attention directed to the following questions:

1. Did the third person deal with the land *ante litem* or *pendente lite*?
2. If *ante litem*, was the dealing made before or after the litigant's claim or interest arose?
3. If *pendente lite*, was the dealing before or after registration of the certificate of *lis pendens*?
4. What is the status of the third person's estate or interest? The position may be that:
   (i) the interest is registered; or
   (ii) the third person has lodged his instrument for registration but it is not yet registered; or
   (iii) the instrument has been neither registered nor lodged for registration.
5. If (iii) above, what is the nature of the litigant's claim? Does he seek a court order to:
   (a) declare that he has an existing estate or interest in the land, such as a beneficial interest under a trust; or

(b) set aside a transaction for fraud or mistake to revest in him a previously held estate or interest; or
(c) confer on him some estate or interest in the land which he did not have previously?

The following discussion assumes that the third person did not himself create the estate or interest which the litigant is claiming. Otherwise he would of course be bound *in personam*. The question being considered is whether a litigant is entitled to enforce a claim to land against a third person who has dealt with the land but was not involved in the events giving rise to the litigant's claim.

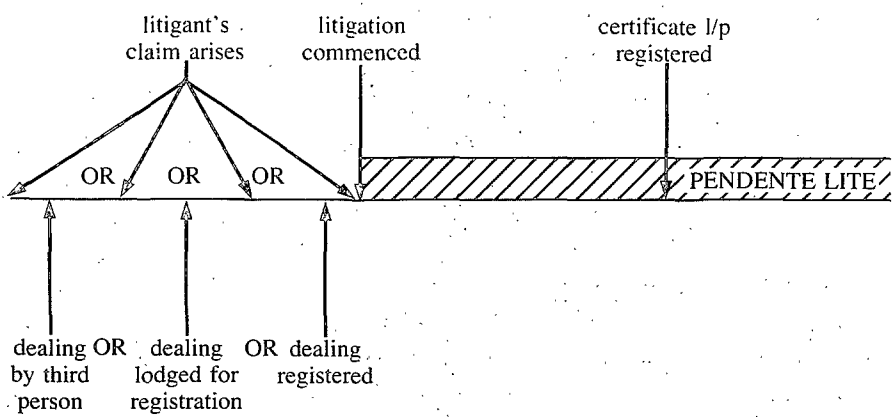
Three main fact patterns can occur, with variations, as illustrated by the diagrams below. It will be seen that the diagrams isolate three points of time in respect of the litigant's claim:

(i) when the claim arises;
(ii) when litigation is commenced;
(iii) the date of registration of a certificate of *lis pendens*.

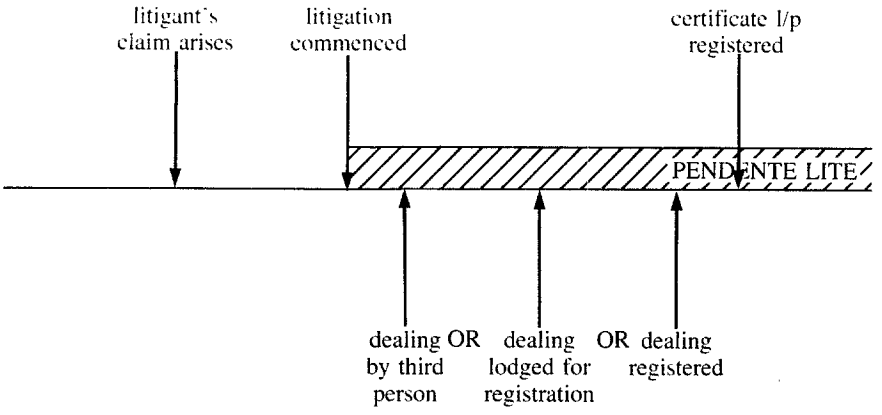
Attention is further directed to the three main stages in the third person's transaction with the land:

(i) when the dealing is made;
(ii) when the dealing is lodged at the land title (registry) office for registration;
(iii) the date of registration.

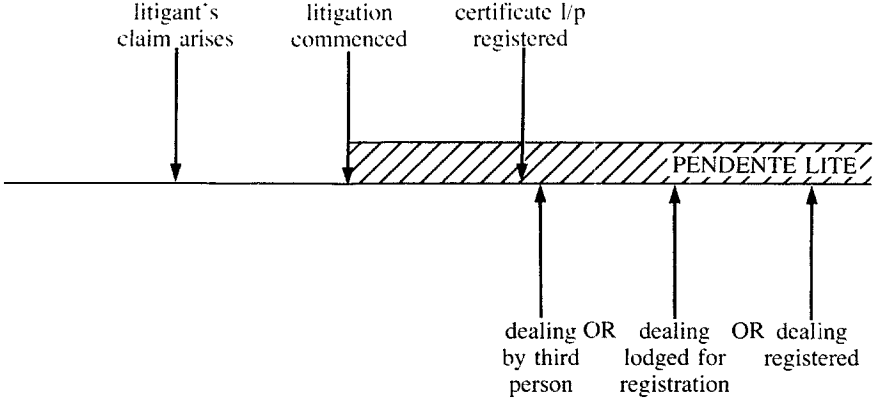
Priorities depend on the stage the litigation has reached and how far the third person has progressed towards registration.




*—Third person dealt with the land before litigation was commenced.*




—*Third person dealt with the land after the commencement of litigation but before registration of a certificate of lis pendens.*




—*Third person dealt with the land after registration of a certificate of lis pendens.*

Each of these situations will be considered in turn.

A. *The Third Person Dealt with the Land Before Litigation Was Commenced.*

The first diagram shows the situation where a third person has dealt with land *ante litem*, either before or after the occurrence of the events which allegedly give rise to the litigant's claim against the land. The purchaser or mortgagee, having dealt with the land *ante litem*, is not within the mischief which the general law doctrine of *lis pendens* was designed to prevent. There is no reason of principle or policy why he should be bound

by the outcome of litigation which had not been commenced when he dealt with the land. As stated in *Peck* v. *Sun Life Assurance Co. of Canada*:[40]

> The doctrine of *lis pendens* is merely an application of the maxim of forensic policy *interest rei publicae ut sit finis litium*. A litigant party is not permitted by alienation pending the suit to defeat the rights, or delay the proceedings of his adversary; for if so, the litigation by successive assignments might be rendered interminable: [*Bellamy* v. *Sabine* (1857), 1 De G. & J. 566, at pp. 578, 580 and 584, quoted]. From the statement of the rule, and the ground on which it rests, it is sufficiently obvious that it cannot be applied to persons who have acquired interests before the commencement of litigation, so as to affect such interests . . . for such persons can once for all be ascertained, and if necessary made parties to the action. But while this limitation is obviously involved in the very nature and object of the rule, it must be equally obvious that the rule does apply to such persons in respect of interests acquired after the commencement of litigation.

Taking first the case where the third person has already registered his transaction when litigation is commenced, so that he is the registered owner of the land or a charge over the land. It will be recalled that in *Peck* the plaintiff entered and registered an agreement for sale but before completion the defendant company commenced an action to set aside the vendor's title as a conveyance in fraud of creditors. It was held that to the extent that the plaintiff's interest under the agreement was acquired *ante litem* it was not affected by the subsequent commencement of proceedings. This result is clearly correct. The basic principle of the Torrens system of land title registration is that the registered owner of land has, subject to certain exceptions, an indefeasible title, which is free of unregistered claims or interests created by a predecessor in title. Although the litigant's claim might have been successfully asserted against the land or charge in the hands of the previous owner it is defeated once a third person becomes the registered owner, without fraud and not being liable *in personam* to the litigant. This is so although the third person is joined as a party to the action. He is entitled to resist the litigant's claim as a matter of law and cannot be subjected to it by this procedure.

This clear principle is somewhat obscured by provisions[41] in the Acts of British Columbia and Manitoba that the title of a registered owner is subject to a certificate of *lis pendens* registered after the issue of the certificate of title. It is submitted that these provisions must be taken to be directed only to situations where the registered owner has himself created the claim or interest which is the subject of the litigation and is therefore bound *in personam*. Although these provisions, read literally, could apply to the situation under discussion they are quite inappropriate, and should not be applied, where the registered owner is a "third person" who was not involved in the creation of the litigant's claim or interest and whose certificate of title was issued before litigation was commenced.

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[40] *Supra*, footnote 19, at p. 222 (B.C.R.).

[41] B.C., ss. 23(1)(h), 25(1)(g); Man., s. 57(1)(g) of the Acts listed *supra*, footnote 1. Compare B.C., s. 30; Man., s. 125(3) as to enforcement of a mortgage after registration of a certificate of *lis pendens*. Discussed further at footnote 57.

The foregoing is subject to one possible qualification. If the litigant's claim arose before the third person dealt with the land and the third person had notice of the claim or the facts giving rise to it when he acquired his interest, it is arguable that such notice may amount to fraud within the meaning of the Acts so that the registered owner will not prevail. The indefeasibility of title accorded by registration is expressly stated to be inapplicable where the registered owner obtained his interest by "fraud". Unfortunately the Acts do not define what is meant by fraud in this context. The notice provisions clearly show an intention that notice of an unregistered interest should not *per se* constitute fraud so that something more, some actual dishonesty, is required to preclude indefeasibility. However, the courts have at times been reluctant to give up the equitable doctrine of constructive fraud and the position remains unclear in some provinces, as will be mentioned again later.[42] Suffice it to say for the moment that it is considered that notice of a disputed claim should not, without more, constitute fraud rendering the title of the registered owner liable to be set aside.

If the third person has applied to register his estate or interest when the certificate of *lis pendens* is registered, but the instrument has not yet been registered, he is entitled to proceed to registration free of the *lis*. In *Rudland* v. *Romilly*[43] and *Canada Permanent Mortgage Co.* v. *Registrar of Titles*[44] it was held that the registration of a certificate of *lis pendens* does not affect the rights of a *bona fide* purchaser or mortgagee who dealt with the land *ante litem* and applied for registration before the certificate was registered and without notice of any outstanding claim. This principle was extended in *Re Saville Row Properties Ltd*[45] to apply even where the third person acquired the land with notice that there was or might be some outstanding claim. It is the expressed intention of the Torrens Acts that persons dealing with a registered owner shall not be affected by notice of unregistered claims or interests, so that provided the third person has dealt with the registered owner he should be protected by the notice provisions of the Acts. In the above-mentioned cases the third person had in fact dealt with the land after the occurrence of the facts which allegedly gave rise to the litigant's claim, but was nonetheless held entitled to prevail by virtue of having lodged his instrument for registration before the institution of proceedings. *A fortiori* a third person will prevail where his estate or interest was acquired before the litigant's claim arose. Again, the third person should have priority whether or not he is joined as a party to the litigation.

If the third person has neither registered his interest nor lodged his instrument for registration when the certificate of *lis pendens* is registered,

[42] *Infra*, at footnotes 58 and 59.

[43] *Supra*, footnote 19, discussed further at footnote 63.

[44] (1967), 58 W.W.R. 9 (B.C.), discussed further at footnote 66.

[45] (1969), 7 D.L.R. (3d) 644 (B.C.), discussed further at footnote 68.

he cannot rely on either the principle of indefeasibility or the *Rudland* v. *Romilly* principle, which applies only where an application for registration has been made. The rights of the litigant and the third person must therefore be determined by the general law rules governing priorities, applied in the context of the Torrens system of land title registration. In doing so it is important to keep in mind that although the litigant has registered a certificate of *lis pendens*, the estate or interest which he is claiming remains unregistered. The competition is between two unregistered claims, which for purposes of priorities are regarded as roughly analogous to and governed *prima facie* by the same rules as equitable claims and interests under the general law.

These rules can only be touched on in this article. Priorities depend on a number of considerations, most importantly the nature of the competing claims and which was the first to be created or to arise. The interest of the third person, embodied in an unregistered transfer or mortgage, will be treated on the same basis as an equitable proprietary interest under the general law. But the litigant's claim may be less easy to classify. If the litigant claims to be entitled to some existing proprietary interest in the land, the claims of the litigant and the third person are of equal status. But the litigant may be seeking to assert what has been described as a "mere equity" to set aside a transaction for fraud or mistake and thereby regain an estate or interest in the land of which he has been deprived. In this case the litigant's claim is rather weaker than the interest of the third person. Alternatively the litigant may claim no present or previously held proprietary interest, but is asking the court to grant him some new interest in the land.

The rules applicable will vary according to the nature of the litigant's claim. Stating the position broadly:

(1) If the litigant claims (successfully) an existing proprietary interest it will have priority over the unregistered interest of the third person if the litigant's interest was the first in time and he has not committed any misleading conduct.[46] Conversely, if the third person's unregistered interest was the first in time the litigant will prevail only if there was some postponing conduct on the part of the third person.

(2) If the litigant seeks (successfully) to assert a mere equity to set aside a transaction for fraud or mistake he will prevail against an unregistered third person who dealt with the land after his claim arose, not being a *bona fide* purchaser or mortgagee without notice of the claim.[47] Conversely, a mere equity is not enforce-

[46] *Friesen* v. *G.W. Permanent Loan Co.*, [1924] 3 W.W.R. 883 (P.C.) (Sask.); *Abigail* v. *Lapin*, [1934] A.C. 491 (P.C.) (N.S.W.).

[47] *Utterson Lumber Co.* v. *Rennie* (1892), 21 S.C.R. 218; *Latec Investments Ltd* v. *Hotel Terrigal Pty. Ltd* (1965), 113 C.L.R. 265 (H.C. of Aust.) (N.S.W.).

able against a subsequent *bona fide* purchaser or mortgagee of either a legal or equitable estate for value and without notice of the claim.

(3) If the interest is conferred on the litigant by court order, it depends on the terms of the court order whether the purchaser or mortgagee will be bound.

In determining priorities the court should also take into account any delay by the litigant in commencing proceedings or registering a certificate of *lis pendens*, which may have mislead the third person into dealing with the land in the belief that there were no outstanding claims to the land. Similarly any misleading conduct by the third person, such as a failure to apply promptly for registration or failure to enter a *caveat*, should be considered.

In the past the courts have not gone into these questions. Rather they have held simply that a third person who has dealt with the land is not affected by the *lis* if he had no notice of the litigant's claim when he acquired his interest. In *Clergue* v. *McKay*[48] the plaintiff was the purchaser under a contract for sale of land which the vendor resold and conveyed to a third person. The third person dealt with the land *bona fide* and without notice of the plaintiff's contract. After the conveyance was made, but before it was registered, the plaintiff commenced a suit for specific performance of his contract and registered a certificate of *lis pendens* in respect thereof. It was held that the plaintiff's claim would not prevail against the third person (Heath), notwithstanding that the conveyance was unregistered:[49]

> . . . Heath was a *bona fide* purchaser without notice of the plaintiff's contract for the full consideration expressed in the deed. The deed was executed and (though this seems nonmaterial: R.S.O. 1897, ch. 119, sec. 36) a considerable part of the purchase money was paid at least ten days before the action was brought. Heath's title as purchaser *ante litem* was then complete . . . and although he had not registered his deed.

A similar situation arose in *Leftley* v. *Moffat*.[50] Again a registered owner, after making a contract for sale to the plaintiff, conveyed the land to third persons who completed the transaction but did not register their conveyance before the plaintiff commenced an action against the vendor for specific performance and registered a certificate of *lis pendens* in respect thereof. It was held that the plaintiff's claim was not enforceable against the third persons who had completed their purchase before litigation was commenced:[51]

> Neither the issue of the writ nor the registering of the certificate of *lis pendens* has any effect upon preceding and executed transactions. That was settled as long ago as

[48] (1903), 6 O.L.R. 51, aff'd 8 O.L.R. 84.

[49] *Ibid.*, at p. 57.

[50] (1925), 57 O.L.R. 260.

[51] *Ibid.*, at p. 264.

> *Sanderson* v. *Burdett* (1869), 16 Gr. 119, and I think that principle has never been questioned.

Other cases have held that a third person will prevail even where he had notice of the plaintiff's claim before he dealt with the land. In *Bain* v. *Pitfield*[52] a purchaser entered an agreement for sale by installments with the registered owner of land, without notice that the plaintiff claimed a beneficial interest in the land under a trust. The plaintiff subsequently commenced proceedings for a declaration of his beneficial interest and registered a certificate of *lis pendens* against the land. It was held that the purchaser's rights were not affected by the *lis* and he was entitled to pay instalments even after registration of the certificate and thereafter to receive a clear certificate of title. Although the certificate of *lis pendens* gave notice of the plaintiff's claim, it was held that the purchaser was protected against such notice by the provision, which appears in all the Acts, that persons dealing with a registered owner shall not be affected by notice of any unregistered interests in the land. In *Cooper* v. *Anderson*[53] the plaintiff commenced proceedings to set aside the title of the registered owner for fraud and registered a certificate of *lis pendens* against the land after the registered owner had entered an agreement for sale by instalments with a third person, but before completion of that transaction. The purchaser under the agreement had no notice of the plaintiff's prior claim at the date of the agreement. It was held that the notice provision in the Act protected the purchaser against the notice given by registration of the certificate of *lis pendens*. The purchaser would not be affected by the litigation and could complete his transaction and acquire a title free of the plaintiff's claim. In *Cooper* the certificate was registered after the date of the contract. However the court considered that a purchaser would be equally protected against notice acquired before contracting:[54]

> In short, I take it that the contract is protected throughout from its inception to its termination by completion or otherwise.

These cases are open to criticism on the basis that they do not adequately investigate the nature of the plaintiff's claim. An examination of the facts of *Cooper* v. *Anderson* reveals that the plaintiff had a mere equity to set aside a conveyance for fraud, which according to general principles would be defeated by a subsequent *bona fide* purchaser without notice of the claim or the facts giving rise thereto. So the result would not differ from that reached by the court. But in the other cases the plaintiff was claiming an existing proprietary interest prior in time to that of the third person, so that the issue is more difficult to resolve and should, it is thought, have been resolved along the lines suggested above. The plaintiff as first in time would *prima facie* be entitled to priority, but it should be

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[52] *Supra*, footnote 30.

[53] (1912), 1 W.W.R. 848, 5 D.L.R. 218 (Man.), appeal allowed for non-joinder of interested party, (1912), 22 Man. R. 428, 1 W.W.R. 1092.

[54] *Ibid.*, at p. 852 (W.W.R.).

considered whether the plaintiff's conduct was misleading in any way. Further, it was assumed without discussion in both *Bain* and *Cooper* that an unregistered purchaser of land was protected by the notice provision in the Manitoba Act. It is not entirely clear whether such provisions will avail a purchaser who has neither obtained registration or lodged his instrument for registration.

If the third person is entitled to priority as a matter of principle, he can resist the plaintiff's claim even if he is joined as a party to the litigation. This point was made in *Clergue* v. *McKay*:[55]

> Heath was a purchaser *ante litem*, and as such was clearly a necessary party to the action. If he had been a party, he would have had all the notice that the registration of a certificate of *lis pendens* could have given him, but no one could have successfully contended that he was still not entitled to register his deed, or that if he omitted to do so, his defence of purchase for value without notice would have been affected thereby. This was the view of Mowat, V.-C., in *Sanderson* v. *Burdett* (1869), 16 Gr. 119, 127, and there is nothing in *Miller* v. *Smith* (1872), 23 C.P. 47, or any other cases to which I have been referred, which conflicts with it.

The foregoing is subject to the question of whether the registration of a certificate of *lis pendens* should override the general principles governing priorities so as to confer priority on the litigant. The traditional view on which the discussion has so far proceeded is that a certificate of *lis pendens*, like a *caveat*, is intended only to preserve the *status quo*. If the litigant's claim is to prevail it must do so on its own merits.[56] But in Alberta, Manitoba and Saskatchewan *caveats* have been given a more positive role, either by express statutory provision or by judicial decision. The registration of a *caveat* in those provinces confers priority on the *caveat* or over any unregistered interests in the land in respect of which a *caveat* has not previously been registered. By analogy, a certificate of *lis pendens* may in these provinces, though not elsewhere, have the effect of giving the litigant's claim priority if it is successfully established in court.

### B. *The Third Person Dealt with the Land after the Commencement of Litigation but Before Registration of a Certificate of Lis Pendens.*

A third person who deals with land *pendente lite* would have been bound by the outcome of the litigation under the strict general law rule, whether or not he had knowledge of the litigation. However, as stated at the outset, this rule should be regarded as impliedly displaced by the Acts where provision is made for registration of a certificate of *lis pendens*. The effect of a certificate of *lis pendens* on the rights of a third person who dealt with the land before the certificate was registered must therefore be determined by a consideration of the title registration statutes as a whole and by the decided cases.

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[55] *Supra*, footnote 48, at p. 58.

[56] See quotation at footnote 37, *supra*.

If the third person has registered his estate or interest before the certificate of *lis pendens* is placed on the title he should be unaffected by the litigant's claim. This is dictated by the basic principle of the Torrens system that a registered owner obtains on registration an indefeasible title free of any unregistered claims or interests created by the previous owner of the land or charge, as the case may be. It makes no difference that the new registered owner may be joined as a party to the litigation. As a matter of principle he is entitled to resist the litigant's claim, provided that he was not personally involved in its creation.

This principle seems at first sight to be infringed by the provisions in British Columbia and Manitoba which were mentioned earlier. The Acts of those provinces expressly declare that a certificate of title is not conclusive against, respectively, a "*lis pendens* or other matter noted or endorsed on the certificate or which may be noted or endorsed subsequent to the date of the issue of the certificate" and "any certificate of *lis pendens* issued out of a court in the province and registered since the date of the certificate of title".[57] These provisions are by way of an express exception to the indefeasibility of title of a registered owner of land. Their context suggests that they are intended to do no more than make it clear that a registered owner remains personally bound by claims arising from his own actions, notwithstanding that in other respects registration makes his title unimpugnable. The problem is that the provisions are not in terms restricted to *in personam* claims against the registered owner. Literally interpreted they make the title of a registered owner subject to the outcome of litigation if a certificate of *lis pendens* is registered against the land, although the claim is solely attributable to the actions of a previous owner. Admittedly the title of a registered owner is subject to certain enumerated and other exceptions. But these detract from the fundamental concept of a conclusive register and should be restricted so far as possible. The third person, in the situation under discussion, has availed himself of the protection of the Act by registering his instrument and should not be affected by the outcome of litigation arising from the acts of a predecessor in title in which he was not involved, if the litigation was not noticed in the register until after he dealt with the land. The litigant may be regarded as the author of his own misfortune by failing to take advantage of the statutory procedure provided for registration of a certificate of *lis pendens*. To hold otherwise would remove the incentive for litigants to promptly register certificates to notify their claims, as envisaged by the Act. These provisions should therefore, it is submitted, be restrictively interpreted to apply only where it is the existing registered owner who is allegedly responsible for the claim in respect of which proceedings have been instituted.

Again, the effect of actual notice must be considered. What if the third party knew that litigation was pending when he dealt with the land? Should

[57] *Supra*, footnote 41.

such knowledge constitute fraud within the meaning of the Acts so that his registered title will not be conclusive, under the "fraud" exception to indefeasibility? In *Syndicat Lyonnais du Klondyke* v. *McGrade*[58] it was held to be fraud for a purchaser to take land knowing that an action was pending to set aside the conveyance to his vendor. This meant that the purchaser did not obtain an indefeasible title upon registration. However that was a particularly strong case since the purchaser had actual knowledge that the conveyance to his vendor was designed to defeat creditors. Bearing in mind the objects of the land title registration system it would be unwarranted to hold that a person who deals with land with notice of a disputed claim is guilty of fraud as contemplated by the Acts. The Acts provide that a person dealing with the registered owner shall not be affected by notice of any unregistered interest in the land and it is further provided, except in British Columbia, that notice of itself shall not constitute fraud. The clear intention of these provisions is to exclude the equitable doctrine of constructive notice which holds that notice of a prior interest in land is fraud. *A fortiori* notice of a mere disputed claim to the land should not constitute fraud.

The courts have nonetheless on occasion frustrated this policy. In *Peck* v. *Sun Life Assurance Co. of Canada*[59] for example it was suggested that certain claims, such as a claim to set aside a conveyance for fraud, are not "unregistered interests" within the meaning of these protective provisions so that a purchaser with notice of such a claim would be bound by it, if successful, as under the general law. This suggested distinction is overly technical and would produce the anomalous result that a person with notice of a disputed and perhaps unfounded claim to the land would be denied the statutory protection against notice, although if he had notice of an undisputed unregistered interest in the land he would be protected by the Acts. It is considered that the notice provisions should be interpreted in the spirit of the Acts. It is the clear policy of the Torrens system that persons proposing to deal with registered land should be able to rely on the register. Apart from certain enumerated exceptions, a prospective purchaser or mortgagee should be able to disregard any claims to the land which have not been notified in the register. If no certificate of *lis pendens* has been registered the third person is justified in proceeding without regard to the plaintiff's claim and such a dealing cannot reasonably be regarded as fraudulent in the context of a land title registration system.

The next situation to be considered is where the third person has lodged his instrument for registration but it is not yet registered. Ideally an instrument which is lodged for registration and is completely in order should proceed to registration immediately. But in practice registration takes from one day to longer than a week, depending on the land title

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[58] *Supra*, footnote 5.

[59] *Supra*, footnote 19.

(registry) office. A certificate of *lis pendens* however will be entered against the land as soon as it is received because it does not have to undergo scrutiny by an examiner of titles. During busy periods especially it may happen that a certificate of *lis pendens* is put in the register before an instrument which is already in the pipeline is registered. Should this happen the instrument is nonetheless entitled to proceed to registration and will be unaffected by the outcome of the *lis*. There are two possible lines of reasoning, both of which produce this conclusion.

The first is to treat the question as one of priorities between two competing claimants to the land, neither of whom have the status of registered owners, which competition is resolved by the application of the general law rules governing priorities between unregistered claims and interests in land. As seen earlier, priorities depend on the nature of the litigant's claim. At best the litigant's claim may relate to an existing unregistered proprietary interest which is already completely constituted and requires only a declaration by the court to confirm or clarify its existence. Since the third person's unregistered dealing is also an unregistered proprietary interest, we have a competition between two unregistered interests in the land. The general rule governing such a situation is that the first in time is entitled to priority unless he has by his conduct misled the second in time into dealing with the land in the belief that no prior interests existed. Since the third person dealt with the land *pendente lite* his interest was necessarily created after the litigant's claim arose or at least after the occurrence of the events which allegedly gave rise to the claim. The litigant is therefore the first in time. However, the failure of the litigant to register a certificate of *lis pendens* contemporaneously with the commencement of litigation may well be conduct which would justify a court in holding that he has lost the priority which is normally accorded to the first in time. There is no authority directly in point, but comparable conduct has caused loss of priority. Thus, it has been held[60] that where the first in time has a registrable instrument, failure to promptly lodge his instrument for registration is conduct which results in loss of priority as against the holder of a subsequently created unregistered interest who has applied for registration. Similarly, where the first in time has a *caveat*able interest it has been held[61] that failure to lodge a *caveat* promptly to protect his interest may, at least in combination with other misleading conduct, be cause for denying priority to the first in time. By analogy, failure to promptly register a certificate of *lis pendens* may defeat a litigant as against a subsequent unregistered interest. Assessing the relative merits of the claimants, it is submitted that the third person has the stronger claim to priority. The third person has sought the protection of the Act by lodging his dealing for registration, while the litigant has disregarded the Act by not

[60] *Re Pacific United Developers (1962) Ltd* (1965), 51 D.L.R. (2d) 93 (B.C.).

[61] *Friesen* v. *G.W. Permanent Loan Co.*, *supra*, footnote 46.

registering a certificate of *lis pendens* when he could have done so. By failing to use the statutory procedure provided to notify his claim he has misled the third person, who should be entitled to assume in the absence of a certificate of *lis pendens* that the registered title is unchallenged.

Clearly this should be so where the third person had no actual knowledge of the pending litigation when he dealt with the land. If the third person did in fact have notice of the litigation or of the facts giving rise to the claim, the litigant's failure to register a certificate of *lis pendens* is perhaps less significant. But it is considered that even so the third person should prevail. Although it is not entirely clear whether the notice provisions of the Acts are applicable before actual registration, it is submitted that by applying for registration the third party has brought himself sufficiently under the umbrella of the Act to be entitled to rely on the protection accorded against unregistered claims and interests. This view was taken in *Re Saville Row Properties Ltd*,[62] discussed below.

Another approach to the problem may be derived from the line of British Columbia cases starting with *Rudland* v. *Romilly*.[63] The situation under discussion is not strictly within the *ratio* of these cases, where the third person had in fact dealt with the land *ante litem*. But those cases enunciated the broad principle that a person who has lodged an instrument for registration should not be prejudiced by delays in the land title office, so that matters arising subsequent to an application for registration should not affect his right to proceed to registration. In *Rudland* v. *Romilly* the plaintiff on December 29th, applied for registration of a conveyance from Lindsay, the registered owner of the land. Because of delays in the land title office her conveyance was still unregistered on January 16th, when the defendant filed a notice of *lis pendens* against the land in respect of an action claiming that Lindsay had obtained the land from him by fraud. Wilson J. pointed out that:[64]

> The plaintiff here dealt with the registered owner of this property in good faith and without notice of the unregistered interest which the defendant claims in the property. She paid over her money, got her deed and applied to register it two weeks before the defendant, by filing a certificate of *lis pendens* gave notice of his claim of an interest. Only the delays inevitable in a busy land registry office prevented a certificate of title being issued to her before January 16 when the certificate of *lis pendens* was filed.

He continued:[65]

> A certificate of *lis pendens* is only a form of notice, and a notice which is only given after the whole transaction of purchase has been completed cannot affect the title of an honest buyer; this . . . is also explicit in *Peck* v. *Sun Life Assur. Co.* (1904), 1 W.L.R. 302, 11 B.C.R. 215 . . .

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[62] *Supra*, footnote 45.

[63] *Supra*, footnote 19.

[64] *Ibid.*, at p. 195 (W.W.R.).

[65] *Ibid.*

A similar situation arose in *Canada Permanent Mortgage Corp.* v. *Registrar of Titles*.[66] The plaintiff was a *bona fide* mortgagee which took a mortgage and applied for registration on January 7th, without notice of any impropriety on the part of the mortgagor Vistica. Vistica was not yet the registered owner of the land but had applied for registration as the owner in fee simple. The instruments were still in the land title office awaiting registration on February 3rd, when the registered owner filed a certificate of *lis pendens* against the land in respect of an action to set aside his conveyance to Vistica for fraud. It was held that the plaintiff's mortgage was entitled to proceed to registration unaffected by the *lis*. The Supreme Court of British Columbia took the view that the plaintiff should not be penalised merely because the land title office had been too busy to complete registration of the conveyance and mortgage before the certificate of *lis pendens* was filed. Such a position would be "intolerable for any innocent mortgagee".

This principle should be equally applicable in Ontario and Prince Edward Island, where a caution is registered instead of a certificate of *lis pendens*. In *Re Pacific United Developers (1962) Ltd*[67] it was held that a *caveat* lodged after an instrument had been lodged for registration would not prevent registration of the instrument.

The *Rudland* principle has been applied even where the applicant for registration had notice of the litigant's claim when he dealt with the land. Despite the uncertainty as to whether the notice provisions of the Acts can be invoked by an unregistered owner, it was suggested earlier that by lodging his dealing for registration an applicant has brought himself sufficiently within the operation of the Act to warrant the protection which is given against notice of unregistered interests in the land. In *Re Saville Row Properties Ltd*[68] the holder of an unregistered instrument which had been lodged for registration successfully invoked the notice provision of the British Columbia Act. The registered owner of land gave Frew Ltd. an option to purchase the land exercisable before March 27th. The option was not exercised by this date and on April 25th the registered owner conveyed the land to the plaintiff company, which applied for registration on April 28th. Frew Ltd. had previously applied to register the option on April 23rd, alleging an extension of time in which it was to be exercised. This application was not in order for registration and was rejected by the land registry office on August 1st, and not relodged. The plaintiff's conveyance was still awaiting registration in July, when Frew Ltd. commenced an action against the registered owner to enforce the option and filed a *lis pendens* against the land. It was held that the plaintiff was entitled to registration. Although the plaintiff admitted that it had notice of the

[66] *Supra*, footnote 44.

[67] *Supra*, footnote 60.

[68] *Supra*, footnote 45.

existence of the option, the court held that it was protected against notice by what is now section 29 of the British Columbia Act and could thus be regarded as a *bona fide* purchaser without notice within the *Rudland* v. *Romilly* principle:[69]

> I cannot say that the petitioner is in bad faith merely because it relies upon the provisions of the statute.

This was a summary proceeding under what is now section 289 of the Act and the validity of the option was not determined by the court. The effect of the decision was that the plaintiff, having applied for registration, was entitled to prevail over the prior unregistered option even if valid and even though the plaintiff had notice of its possible existence.

The principle which emerges from these cases is that an instrument which has been lodged for registration is entitled to proceed to registration notwithstanding the subsequent registration of a certificate of *lis pendens* or *caveat*, provided that the application for registration was made *bona fide* and without notice of the litigant's claim. An applicant will be held to have acted without notice for the purpose of this principle if he had no actual notice of the claim or of the facts giving rise to it when he dealt with the land or having notice is protected by the notice provisions of the Acts.

However the court may decline to decide questions of priorities on an interlocutory application by a registered owner for cancellation of a certificate of *lis pendens*. In *Masse* v. *Hoolsema & Sons Ltd*[70] the registered owner of land entered a contract for sale which was subject to a condition. Believing that the purchaser would not complete the purchase he transferred the land to another person who applied to register his transfer. Before the transfer was registered the first purchaser registered a certificate of *lis pendens* in respect of an action claiming *inter alia* specific performance of his contract. The transferee applied to the court for cancellation of the certificate under what is now section 235 of the British Columbia Act, asserting on the basis of *Rudland* v. *Romilly* that the certificate was insupportable. The court considered that cancellation of the certificate would be tantamount to a refusal of specific performance and that a point of such importance should not be decided on an interlocutory application.

It is hoped that the *Rudland* principle will be generally applied. Once an instrument is lodged for registration at the land title (registry) office it should be entitled to proceed to registration unaffected by litigation which was not notified in the register when the instrument was lodged. Registration once effected relates back to the date the instrument was lodged for registration and this should be the time for fixing the rights of a person applying for registration. A certificate of *lis pendens* registered after that date should not alter the position. Otherwise an applicant would be completely at the mercy of the land title office. His substantial rights would

[69] *Ibid.*, at p. 647.

[70] (1977), 2 B.C.L.R. 348.

depend on the workload of the office and how swiftly instruments were being registered at the time his instrument was accepted for registration. This would have a detrimental effect on conveyancing practice. If an application for registration could be prejudiced by matters which become evident only after the instrument has been accepted for registration, completion could not safely take place until actual registration. As a matter of practical convenience, the *Rudland* rule facilitates land transactions by enabling payment of the consideration when a registrable instrument is received or, for the more cautious, when it is accepted for registration by the land title office.

For the purpose of the *Rudland* rule it should be irrelevant whether the third person dealt with the land before or after the litigant's claim arose. Further, the principle being one of substance it should apply even though the third person may be joined as a party to the litigation. In this respect one may criticise paragraph (3) of the statement in *Thom's Canadian Torrens System*[71] that:

> The result of *Rudland* appears to be, subject to s. 142 of the *Land Registry Act* and in the absence of fraud, to equate a clear right of registration to registration itself where,
>
> (1) The person claiming such a right is a *bona fide* purchaser for valuable consideration, and
>
> (2) The right has been acquired and registration thereof applied for prior to the filing of the certificate of *lis pendens*, and
>
> (3) Such a purchaser is not made a party to the *lis*, if he were the matter would then be 'before the court', . . .

To avoid equating an instrument which has merely been lodged for registration to a registered instrument, as done in the quotation, it is preferred to state the rule more simply, as follows:

> A certificate of *lis pendens* (or a caution, in Ontario and Prince Edward Island) does not operate to prevent the registration of an instrument which has been lodged with the registrar in registrable form before the certificate (or caution) is registered.

By "registrable form" it is meant that the instrument must be completely in order for registration:

(i) in the prescribed form, if any; and

(ii) properly executed and attested as required by the Act and accompanied by any required proof of execution; and

(iii) supported by any necessary documents, such as the duplicate certificate of title.

If there is any defect in the documentation which would justify rejection of the instrument by the registrar the *Rudland* principle should not be applied.

The last situation shown by the second diagram is where a third person has dealt with the land *pendente lite* but has neither registered his instrument nor lodged it for registration when the certificate of *lis pendens* is

[71] (2nd ed. by V. DiCastri, 1962), p. 675.

registered. Such a situation will rarely occur because in practice transfers, mortgages and other instruments are lodged for registration contemporaneously with or soon after completion of the transaction. However it is not the practice to register contracts for sale so that it could happen that a certificate of *lis pendens* is registered after a purchaser has entered a contract to buy land but before the transfer is made. Would the purchaser be bound by the litigant's claim, if successful?

In Alberta, Manitoba and Saskatchewan the registration of a certificate of *lis pendens* may override the usual priorities rules to confer priority on the litigant's claim in the same way that a *caveat* does in these provinces. Elsewhere a certificate of *lis pendens*, like a *caveat*, has no positive effect on priorities and the general priorities rules must be applied to determine whether the interest of the third person is entitled to prevail over the right or interest claimed by the litigant.

As seen earlier, if the litigant's alleged interest is proprietary in nature it would *prima facie* have priority over the unregistered interest of the third person since it was the first in time. However, in assessing the relative merits of the competing claimants the court might well consider that the litigant has committed misleading conduct which will preclude him from having priority. His failure to register a certificate of *lis pendens* immediately upon commencement of litigation may have misled the third person into dealing with the land on the assumption that there were no outstanding claims, so that it would be inequitable for him to prevail over the third person.

If the litigant's claim is a mere equity to set aside a transaction for fraud or mistake it will not prevail against a *bona fide* purchaser or mortgagee without notice. If the third person had notice of the litigant's claim, *quaere* whether he could rely on the notice provisions in the Acts in view of the fact that he has not yet registered or sought to register his interest.

C. *The Third Person Dealt with the Land after Registration of a Certificate of Lis Pendens.*

Any person dealing with land after registration of a certificate of *lis pendens* will take subject to the outcome of the litigation, whether or not he had actual knowledge of the claim. Any transfer or other dealing with Torrens title land is subject to the existing endorsements on the certificate of title, so that a third person who deals with land while a certificate of *lis pendens* is on the title takes subject to the rights of the litigant as established in court. This is clearly so if the dealing has been registered, since registration will necessarily have been made "subject to" the *lis*. Similarly if the instrument has been lodged at the land title (registry) office and is awaiting registration. In *Peck* v. *Sun Life Assurance Co. of Canada*[72] the

[72] *Supra*, footnote 19.

plaintiff, a purchaser under an agreement for sale by installments, took a conveyance of the land after the defendant company had registered a certificate of *lis pendens* against the land and applied for registration. It was held that the conveyance was in the circumstances "a fresh transaction" with the land which, having occurred after registration of the certificate, was subject to the rights of the defendant company as determined in the action.

In British Columbia there is now express provision in the Land Title Act that a plaintiff who registers a certificate of *lis pendens* and is subsequently successful in his action is entitled to claim priority over any application for registration made after registration of the certificate.[73] The statutory provision was applied in *Fraser River Ventures Ltd* v. *Yewdall*[74] where the plaintiff registered a certificate of *lis pendens* against land in respect of an action which was utlimately successful. Approximately one year after registration of the certificate work was done on the property which gave rise to claims for mechanics' liens. It was held that the plaintiff's claim was entitled to priority over the mechanics' liens which were filed after the certificate of *lis pendens* was registered.

*A fortiori* if the third person has not yet registered his interest nor even lodged his dealing for registration, he will be bound by the litigant's claim if successful. He dealt with the land while a certificate of *lis pendens* was entered in the register and a dealing with registered land is subject to all existing notifications on the title. The litigant, by using the procedure provided by the Act, has effectively protected his rights pending the court's decision.

It is clear from the foregoing that the proper procedure is to register a certificate of *lis pendens* or caution (in Ontario and Prince Edward Island) contemporaneously with the commencement of proceedings in respect of land. Registration of a certificate or caution ensures that the litigant's rights, such as they may be, are preserved until the matter is determined by the court. Failure to do so, where authorized, may result in defeat of the litigant's claim before judgment or decree should a third person deal with the land before notification is made in the register.

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[73] *Supra*, footnote 1, s. 31(a). A defendant who registers a certificate should also be entitled to the benefit of this provision.

[74] (1958), 27 W.W.R. 368 (B.C.).