

THE LENGTH OF A TITLE SEARCH IN ONTARIO

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This article deals with the statutory provisions which in the Ontario registry system regulate the length of a vendor's chain of title and which in some cases extinguish claims against the land. The main focus of the article is analysis of new provisions on the topic which were introduced in 1981. However, in order to place these provisions in context the author outlines the history of relevant conveyancing law and practice in both England and Ontario, and he reviews the effect of previous legislation on the same topic.

Il s'agit dans cet article des dispositions législatives qui réglementent, dans le système d'enregistrement de l'Ontario, la longueur de la chaîne des titres d'un vendeur et qui, dans certains cas, amène l'extinction du droit à un bien-fonds. L'auteur s'intéresse particulièrement à l'analyse des nouvelles dispositions apportées dans ce domaine en 1981. Pour replacer ces dispositions dans leur contexte, l'auteur fait, à grands traits, l'histoire du droit des transferts et de la pratique qui s'y rapporte en Angleterre et en Ontario et passe brièvement en revue l'effet de la législation antérieure dans ce domaine.

Introduction

In 1981 a new Part III of the Ontario Registry Act was enacted.¹ It deals with proof of title by a vendor of land and determines the appropriate length of a search; it also has corresponding provisions which extinguish claims against land on the ground of their antiquity. This is a topic of great importance, and the new provisions were clearly intended to make major changes in conveyancing law and practice.

The statutory treatment of this topic goes back to 1929, when the Investigation of Titles Act² was passed. Despite the practical importance of the topic and also despite the age and obscurity of parts of the provisions, there is only a small handful of relevant cases. The main reason for this lack of case law is probably cautiousness. The two leading cases³ on the Investigation of Titles Act took a cautious, conservative view causing

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¹ Registry Amendment Act, S.O. 1981, c. 17, s. 4, adding a new Part III to the Registry Act, R.S.O. 1980, c. 445. They were passed as part of the package of reforms being dealt with by the Ontario Ministry of Consumer and Commercial Relations in its Province of Ontario Land Registration and Information System (known as POLARIS).

² S.O. 1929, c. 41.

³ *Re Headrick and Calabogie Mining Co. Ltd.*, [1953] 4 D.L.R. 56, [1953] O.W.N. 761 (Ont. C.A.); *Algoma Ore Properties Ltd. v. Smith*, [1953] 3 D.L.R. 343, [1953] O.R. 634 (Ont. C.A.).

it to depart as little as possible from the existing law and practice. Conveyancing lawyers will also tend to be cautious. If there is a doubt about the effect of a provision they will take the interpretation that is least open to risk. Even if a purchaser, or his lawyer, is prepared to take a less cautious position he has to be mindful of the attitude that the next purchaser, and his lawyer, may adopt.⁴ The cautiousness is, however, not without cost. There are two main aspects to this. The first is that in most cases an unduly lengthy search will not affect the ultimate outcome. In many cases, no adverse claim will be revealed. Even where an apparent claim is disclosed, it will generally prove to be of no practical importance: for example, it may from the beginning have been a technical claim with no real substance; it may have expired according to its terms; or it may have been extinguished by the operation of the Limitations Act.⁵ Nevertheless, the unduly lengthy search and the consideration of possible claims is costly, both in terms of lawyers' time and in terms of delay. The second sort of costs that may be caused by cautious treatment of these provisions is that it may enable a purchaser to raise a plausible, but practically trivial, problem about the vendor's title as an excuse to escape from a transaction that for other reasons has become undesirable. Establishment of the vendor's title, in the face of such tactics, will be unusually costly because, for example, of the time spent in negotiating, or the costs involved in obtaining relevant information, or the costs incurred in litigation. Moreover, the problem is exacerbated if the cautiousness of courts causes them to hold a title to be defective merely because of the presence of old and shadowy claims.

It is my chief purpose in this article to analyse the current investigation of title provisions. The provisions themselves, and—even more so—the attitudes of people accustomed to dealing with them, can only be properly appreciated in the light of the previous law and practice. First, therefore, I shall outline the historical background to the statutory provisions, and my main aim in doing so is to highlight the differences between English and Ontario law and practice. Secondly, I shall consider the statutory predecessors to the new provisions, mainly from the point of view of judicial interpretation of them. This should be of value in attempting to show the changes made by the new provisions. Thirdly, I shall analyse the current provisions. Finally, I shall conclude briefly with some general comments about the effect of this legislation.

⁴ See P.E. Basye, *Clearing Land Titles* (1953), p. 16; B.J. Reiter, R.C.B. Risk and B.N. McLellan, *Real Estate Law* (2nd ed., 1982), p. 281; J.C. Payne, *The English Theory of Conveyances Prior to the Land Registration Acts* (1955), 7 *Alabama L. Rev.* 227, at p. 228.

⁵ R.S.O. 1980, c. 240.

I. *Historical Background: England*

At common law, title to land is not absolute. It is based on possession and it is relative to the rights of others. We say that a person owns land when he has a better right to possession of it than others.⁶ Moreover, a vendor can only prove his title by showing "that he got it lawfully from someone else, and that someone else from someone else, and so on".⁷ Obviously, routine methods for demonstration of the required proof of title are necessary and, in England at least (where ordinarily there would be no evidence of the starting point of a title), there had to be some limit on how far back the vendor was required to show the antecedents of his title.

The practice for proof of title in England was generally established during the course of the eighteenth century,⁸ and it was rationalized and formulated by text writers in about the first half of the nineteenth century.⁹ It was essentially a private system. There was no registry for title documents affecting land in most of the country,¹⁰ and the relevant documents were ordinarily held by the current owner of the land.

Proof of title was facilitated by the use of an abstract.¹¹ This consisted of a summary of documents and events relevant to the vendor's title. In the developed practice it was prepared by the vendor at his own expense and it was delivered to the purchaser who could "insist upon an abstract, and [was] not bound to wade through the deeds".¹² The purchaser then had a period (which was usually fixed by the contract) in which to examine the vendor's title and to make objections and requisitions. There were two main parts to this process. First, the vendor (usually by his solicitor) "verified" the abstract by,

... producing for examination by the purchaser or his solicitor the original deeds or documents abstracted, and the probates or office copies of the wills and other

⁶ See R.E. Megarry and H.W.R. Wade, *Law of Real Property* (4th ed., 1975), pp. 1009-1010; J. Williams, *Law of Real Property* (24th ed., 1926), p. 703.

⁷ F.H. Lawson and B. Rudden, *Introduction to the Law of Property* (2nd ed., 1982), p. 51; J. Williams, *op. cit.*, footnote 6, p. 716; M. Neave, *Conveyancing Under the Ontario Registry Act: An Analysis of the Priority Provisions and Some Suggestions for Reform* (1977), 55 Can. Bar Rev. 500, at p. 500.

⁸ See J.C. Payne, *In Search of Title* (Part I) (1961-62), 14 Alabama L. Rev. 11, at pp. 24-25.

⁹ T.C. Williams, *The Contract of Sale of Land* (1930), p. xvii. See, e.g., J.H. Dart, *Vendors and Purchasers of Real Estate* (1st ed., 1851); R. Preston, *Abstracts of Title* (1818-19); E. Sugden, *The Law of Vendors and Purchasers* (1st ed., 1805).

¹⁰ Registries were set up in two areas of the country—Yorkshire and Middlesex—in the eighteenth century. For citations dealing with these registries see Neave, *loc. cit.*, footnote 7, at p. 506, n. 22; R.C.B. Risk, *The Records of Title to Land: A Plea for Reform* (1971), 21 U.T.L.J. 465, at p. 467, n. 6.

¹¹ See E. Sugden, *Law of Vendors and Purchasers* (14th ed., 1862), p. 405 *et seq.*

¹² Sugden, *ibid.*, p. 406. See also T.C. Williams, *Law of Vendor and Purchaser* (4th ed., 1936), p. 123.

documents, of which the originals cannot be produced; also by furnishing proper evidence of every fact material to title.¹³

The purpose of this was to enable the purchaser (or, usually, his solicitor) to check that the matters dealt with in the abstract were what they purported to be.¹⁴ The second part of the process was the examination of the abstract and this was ordinarily done by conveyancing counsel, instructed by the purchaser's solicitor, who would also put forward objections and requisitions arising out of the abstract.¹⁵

Because proof of title to land depended on showing previous dealings with the land and because generally there was no obvious point at which the proof would commence, some conventional rule was necessary. The rule eventually established was that, in the absence of contractual provision to the contrary, the vendor was required to show a chain of title back to a good root of title at least sixty years old.¹⁶ A frequently cited definition of what was a good root of title is that of T. Cyprian Williams:¹⁷

... [It] must be an instrument of disposition dealing with or proving on the face of it (without the aid of extrinsic evidence) the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified, and showing nothing to cast any doubt on the title of the disposing parties.

This conventional rule had the effect of limiting the vendor's obligation to prove his title; and, consequently, it provided a starting-point for the abstract. Its effect was limited in three important and closely related ways. First, it only applied in the absence of contrary contractual provision. The parties were free to bargain for a longer or (and this was more typical) a shorter period.¹⁸ Secondly, the title proof period did not generally affect the claims of third parties. There is one important qualification to this which is well expressed by Marcia Neave:¹⁹

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

¹³ Williams, *op. cit.*, footnote 6, pp. 716-717.

¹⁴ See Sugden, *op. cit.*, footnote 11, p. 411.

¹⁵ See Sugden, *ibid.*, pp. 411-412.

¹⁶ It seems that it was Dart who first clearly formulated the rule so as to include the concept of a good root of title: Williams, *op. cit.*, footnote 9, p. xvii, n. 20. Various reasons have been advanced for the sixty year period. See: W. Hayes, *An Introduction to Conveyancing* (2nd ed., 1835), pp. 152-160, 178-180; Williams, *op. cit.*, footnote 6, pp. 652-653; Sugden, *op. cit.*, footnote 11, p. 865; A.H. Marsh, *The Period from which the Title to Real Estate must be Traced by a Vendor thereof* (1884), 4 Can. Law Times 97.

¹⁷ *Op. cit.*, footnote 12, p. 124.

¹⁸ See Williams, *op. cit.*, footnote 6, pp. 717-718.

¹⁹ *Loc. cit.*, *supra*, footnote 7, at pp. 500-501. The progressive reduction of this period in England (see footnote 45, *infra*) has had the effect of changing the period over which constructive notice operates. See *Re Cox and Neave's Contract*, [1891] 2 Ch. 109 (Ch. D.).

against the purchaser regardless of his lack of notice. The terms of the bargain between 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.

The third important limitation on the effect of the proof of title period is that it did not determine the quality of the title to which the purchaser was entitled; it was only concerned with the length of the affirmative proof of the vendor's title.²⁰ Consequently, the purchaser could make an objection to the vendor's title based on a defect arising from a document or event that preceded the commencement of the title proof period.²¹ Moreover, it seems that in the process of verifying the abstract, the vendor could be required to produce all the title documents—not just those comprised in the abstract.²² In addition, on completion the purchaser's entitlement to the title documents was not restricted to those within the title proof period.²³

II. Historical Background: Ontario

The English law and practice was generally imported into Upper Canada, but there were important differences. Vendors' abstracts were not used as consistently as they were in England. There were two main reasons for this. First, the low value of land sold would often not justify the use of the complex system of conveyancing established in England. This was particularly true in the early period of Upper Canada and it was compounded by the scarcity of persons with expertise in the English conveyancing practice.²⁴ Secondly, statutory reform in Ontario made the need for vendors' abstracts less acute than in England. In England, these abstracts were an integral part of an essentially private system under which the title documents were

²⁰ See Williams, *op. cit.*, footnote 12, pp. 113-115; E.D. Armour, *The Investigation of Titles to Real Property in Ontario* (4th ed., 1925), pp. 37-38.

²¹ Armour, *ibid.*, p. 38; Sugden, *op. cit.*, footnote 11, p. 427; March, *loc. cit.*, footnote 16, at p. 102. Contractual provisions to restrict a purchaser's right to make objections in respect of the vendor's title prior to the root of title were, apparently, common. S. 3(3) of the Conveyancing Act, 1881 (now s. 45(1)(b) of the Law of Property Act, 1925) enacted a similar provision in England. Its effect is not completely clear. See L.E. Emmet on Title (18th ed., 1983), p. 139; W.J. Williams, *Contract for the Sale of Land and Title to Land* (4th ed., 1975), pp. 518-519; E.P. Wolstenholme and B.L. Cherry, *Conveyancing Statutes* (13th ed., 1972), vol. I, p. 115.

²² Armour, *op. cit.*, footnote 20, p. 38.

²³ Armour, *ibid.*; Sugden, *op. cit.*, footnote 11, p. 427.

²⁴ See T.W. Taylor, *The Investigation of Titles to Estates in Fee Simple* (2nd ed., 1873), pp. iv-vi.

retained by the owners of the land. In Ontario, the registry system created a public depository of title documents, and it progressively obviated the need for abstracts. The first Registry Act was passed in 1795.²⁵ Its effect was limited in important ways. First, registration was not compulsory, although it was in fact rarely omitted.²⁶ Secondly, the Act provided for an alphabetical (according to names of makers of instruments) rather than a geographical index. Thirdly, the Act provided for the registration of memorials of documents rather than the documents themselves, and the memorials were required only to state factual details about the nature of the documents (such as the date, the parties, the land affected) and not to summarize the effect of the document.²⁷ “. . . [T]he policy of the law [was] to avoid disclosures to the public as to titles, but to give to intending purchasers or mortgagees such information as to the title as could be given consistently with this policy.”²⁸ This policy is also relevant to the fourth point: the Act directed the Registrar to make searches “as often as required”, and to “give certificates . . . under his hand, if required by any person”.²⁹ It did not provide that the books of the Registry or the memorials should be shown to persons who wished to make a search of them.³⁰ These limitations on the effect of the registry system were progressively reduced. An Act of 1865³¹ marked a decisive change in policy. It introduced a geographical index. It provided that a duplicate original should be deposited in the registry office and transcribed at length in the books. By section 18 of the same Act the Registrar was required “upon being tendered the legal fees for so doing” to “exhibit the original registered instrument, and also the books of the office relating thereto when the party desires to make a personal inspection of such books . . .”. “Thus”, as Armour put it in 1925, “the whole title is spread upon the books and is open to the public view”.³²

The registry system consequently contributed to the lack of need for vendors' abstracts.³³ It also changed the practice of verification of the

²⁵ 35 Geo. III, c. 5.

²⁶ See Armour, *op. cit.*, footnote 20, p. 58.

²⁷ See Taylor, *op. cit.*, footnote 24, p. 25-33.

²⁸ Armour, *op. cit.*, footnote 20, p. 60.

²⁹ S. 8

³⁰ Armour, *op. cit.*, footnote 20, p. 83.

³¹ 29 Vic., c. 24.

³² *Op. cit.*, footnote 20, p. 60.

³³ Armour is a very conservative book and is heavily influenced by the English tradition. Even in its 4th edition, published in 1925, Armour assumes the use of vendor's abstracts, and he explicitly recommends that they should be demanded in matters of importance (at p. 32), but he recognizes that “the purchaser's solicitor in investigating the title nearly always depends upon a registrar's certificate of registered instruments, sometimes called a registrar's abstract, or upon a personal search of the registered title . . .” (*ibid.*).

proof of title since duplicates of the title documents were available to the public and could thus be directly searched by the purchaser.³⁴

The Ontario practice on one important matter was unclear. In England, the normal period for proof of title (until changed by statute) was a period commencing with a good root of title at least sixty years old. One commentator, T.W. Taylor, took the view that this rule did not apply in Ontario. He considered that normally the investigation should go back to the Crown grant since "the reasons for [the English rule] do not appear to apply to this country".³⁵ He did not explain in what ways circumstances in Ontario differed from those in England. It seems, however, that the main point was that in England titles had generally no discoverable origin; it was, consequently, essential that some conventional rule be established to provide a starting point for the proof of title. In Ontario, titles derived from the Crown grant. There was, therefore, a definite starting point even in the absence of any conventional rule. In addition, the English rule could have no application to titles derived from Crown grants that were made within sixty years of the dealing in question, which for a period of sixty years from the establishment of the province necessarily would be all titles.³⁶

Taylor's view was repudiated by another commentator, A.H. Marsh, writing in 1884.³⁷ He argued that the well-settled rule of English property law was part of the body of English law received into Ontario.³⁸ He also considered that the English rule was appropriate for Ontario circumstances—at least by 1884, since by then considerable time had elapsed since many Crown grants were made and "the experience of conveyancers shows the difficulty of tracing many old titles notwithstand-

A purchaser's right to a vendor's abstract was removed (subject to contractual stipulation) by s. 2 of the Vendors and Purchasers Act, S.O. 1926, c. 41. See now Vendors and Purchasers Act, R.S.O. 1980, c. 520, s. 4(a). The purchaser's right to a vendor's abstract—in the absence of relevant statutory or contractual provision—was asserted by Duff J. with respect to British Columbia in *Newberry v. Langan* (1912), 47 S.C.R. 114, at pp. 124-126.

³⁴ Armour deals with searching by a purchaser: *op. cit.*, footnote 20, pp. 87-89. See *O'Connor v. Beatty* (1878), 2 O.A.R. 497, at pp. 503-504 (Ont. C.A.).

³⁵ *Op. cit.*, footnote 24, at p. 2. The "normally" is explained by the fact that Taylor expressly excepted the case where a certificate or deed was given under An Act for Quieting Titles.

³⁶ Cf. Marsh, *loc. cit.*, footnote 16, at p. 97. Two other points may be relevant. First, even under the English rule a relevant Crown grant had to be included in an abstract even if it was made prior to a good root of title at least sixty years old. See Sugden, *op. cit.*, footnote 11, p. 553; Williams, *op. cit.*, *supra*, footnote 12, p. 114. Second, the existence of the registration system in Ontario made proof of title less difficult and therefore made an arbitrary shortening of the period for proof less necessary. See Marsh, *ibid.*

³⁷ *Loc. cit.*, footnote 16, at pp. 97-98.

³⁸ By the statute 32 Geo. III, c. 1. (Property and Civil Rights Act).

ing the aid given by the registered records".³⁹ Armour, also, repudiated Taylor's position and put the weight of his authority behind the view that the English rule applied in Ontario.⁴⁰ Nevertheless, despite Armour's influence, it seems that the controversy was never settled and that, prior to the coming into force of the Investigation of Titles Act in 1930, many conveyancers routinely traced titles back to the Crown grant.⁴¹

III. *The Investigation of Titles Act*⁴²

The Act was passed in 1929 and it took effect on June 1, 1930.⁴³ The fundamental provision was section 3(1), which provided as follows:

From and after [the 1st day of June, 1930,] no person in dealing with land shall be required to show that he is lawfully entitled to such 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, and no claim which has been in existence longer than the said forty years period shall affect such land, unless such claim shall have been acknowledged or specifically referred to or contained in an instrument registered against such land within the said forty year period or unless a notice is registered against such land as provided in subsections 3, 4, and 5 . . .⁴⁴

Two obvious and related purposes were carried out by the provision. First, it established that a vendor generally need not prove a chain of title from the Crown grant; a conventional period for proof of title was provided. Secondly, the period adopted was forty years rather than the common law period of sixty years. This was in accordance with current English practice since statute had changed the period to forty years in England.⁴⁵ However, the Act went far beyond the mere reception into Ontario of English law and practice.⁴⁶ The extinguishment of claims

³⁹ *Loc. cit.*, footnote 16, at pp. 97-98.

⁴⁰ *Op. cit.*, footnote 20, pp. 33-34. For judicial approval of Armour's view see *Finnegan v. Dzus*, [1956] O.R. 69, at pp. 73-74 (Ont. H.C.).

⁴¹ See, Topics of the Month: Searching of Titles to Real Estate Simplified in Ontario (1929), 7 Can. Bar Rev. 713; Report of Committee on Noteworthy Changes in Statute Law (1929), 14 Proc. Can. Bar Assn., p. 242. For discussion of the position in the U.S.A. see A.J. Casner (ed.), *American Law of Property*, vol. IV (1952), pp. 683, 687; L.M. Simes and C.B. Taylor, *The Improvement of Conveyancing by Legislation* (1960), p. 3; Payne, *loc. cit.*, footnote 8, at pp. 34-35.

⁴² S.O. 1929, c. 41.

⁴³ The Act came into force on June 1, 1929, except for s. 3(1) which came into force on June 1, 1930. In addition, s. 3(3) gave persons having claims more than 40 years old one year from June 1, 1929, in which to register notices of claim.

⁴⁴ I shall refer to the first part of the subsection ending with the word "aforesaid" as the "length of search" provision; the remaining part I shall refer to as the "extinguishment of claims" provision.

⁴⁵ Vendor and Purchaser Act, 1874, s. 1 (37 & 38 Vic., c. 78). The period has twice been further reduced in England: to thirty years by s. 44(1) of the Law of Property Act, 1925 (15 Geo. 5, c. 20); and to 15 years by s. 23 of the Law of Property Act, 1969, c. 59.

⁴⁶ Similar legislation had previously been passed in Iowa and this probably had an influence on the Ontario legislation. The Ontario Investigation of Titles Act was, how-

provision had no English counter-part;⁴⁷ it did, however, appropriately fit into Ontario law and practice. The length of search provision was directed at the vendor's power to convey the land; by itself, it did not determine whether in fact he would have a good title. In particular, outstanding common law claims against the land could still be valid against the vendor and his purchaser even if they arose prior to the forty year period. Under the English system, the possibility of such claims did not seriously affect conveyancing practice since the purchaser would ordinarily have no means of discovering them (and most would in fact be irrelevant, for example, because they had come to an end by their own terms or because they had been extinguished by limitation statutes). In Ontario it was different, both because the evidence of claims was preserved in the registry and because the purchaser was able to search for them.⁴⁸ The extinguishment of claims provision was, therefore, a necessary provision in order to prevent cautious purchasers, or their solicitors, continuing to search the vendor's title for a period longer than that laid down by the length of search provision. It did this (subject to certain exceptions) by extinguishing claims that arose prior to the forty-year period and that were not preserved by the registration of a statutory notice or by being "specifically referred to or contained in an instrument registered against such land within the said forty year period".

Two main points were the subject of doubt after the passing of the Investigation of Titles Act. First, did the forty-year period mentioned in the length of search provision mean an absolute period of forty years, or did it mean a period of at least forty years commencing with a good root of title? The orthodox view was that the provision did implicitly require that the period commence with a good root of title.⁴⁹ This, I suggest, was

ever, an original piece of legislation and it itself had considerable influence on legislation in a number of states of the U.S.A. Legislation adopted in Michigan was heavily influenced by the Ontario statute and the Michigan legislation became the model for other states, both directly and indirectly, by being the basis for the "Model Marketable Title Act". This latter piece of model legislation was the product of a joint undertaking of Michigan Law School and a committee of the Section of Real Property, Probate and Trust Law of the American Bar Association. The project was directed by Professor Lewis Simes and it produced three publications, the most important of which is Simes and Taylor, *op. cit.*, footnote 41.

For discussion of legislative influences see: Simes and Taylor, *op. cit.*, Appendix B; R.W. Aigler, Clearance of Land Titles—A Statutory Step (1945-46), 44 Mich. L. Rev. 45; W.E. Barnett, Marketable Title Acts—Panacea or Pandemonium? (1967-68), 53 Cornell L.Q. 45, at pp. 46-47.

⁴⁷ The English rule could, however, have the effect of defeating equitable interests. See the text, *supra*, at footnote 19.

⁴⁸ Cf. Payne, *loc. cit.*, footnote 8, at pp. 39, 44.

⁴⁹ This was the view expressed by F.G. Mackay J.A. (with whom Pickup C.J.O. agreed) in *Algoma Ore Properties Ltd. v. Smith*, *supra*, footnote 3, but Hogg J.A. expressed a contrary view in the same case. Mackay J.A.'s view is also implicit in the reasoning and decision in *Re Headrick & Calabogie Mining Co.*, *supra*, footnote 3. The

also the better view. Admittedly, it is surprising that the legislation did not explicitly contain a good root of title requirement if one was intended. The provision would not, however, work without *some* additional implied requirement. As I have already argued, the primary purpose of the forty-year period was to provide affirmative proof that the vendor had title to the property. The mere absence of competing claims to the property does not do this; there must be some instrument or event that provides affirmative proof of vesting of the title in the vendor.⁵⁰ This view is also supported by the use of the term "chain of title" since it carries a suggestion of linkage between two or more things, and this suggests that the vendor must prove his title by reference to an antecedent event or instrument. Once this is accepted, it is then reasonable to assume that the legislation impliedly required that the chain of title must *commence* (as it must under the common law rule) with a good root of title, and that the common law principles determining what was a good root of title applied to the statutory provision.

The second main point about the Investigation of Titles Act concerned the relationship between the length of search and the extinguishment of claims provisions. This point can best be explained by comparing two cases. The earlier case, *Re Headrick and Calabogie Mining Co. Ltd.*,⁵¹ seems to be based on the view that the period of forty years referred to in both the length of search provision and the extinguishment of claims provision was the same period and that the two provisions worked in tandem. The facts were as follows. The respondent, which derived title from deeds of conveyance of mineral rights registered in 1882 and 1899, claimed to be entitled to the mineral rights in the land. The appellant derived title from a deed of conveyance, made in 1940, which purported to deal with the land without excepting the minerals, and his vendor obtained title by a similar conveyance made in 1938. The appellant applied in 1952 for an order that he was entitled to the land free from the claim of the respondent to the mineral rights. His claim was rejected. A period of more than forty years had expired from the date of last registration of the respondent's claim (1899) not only at the date of the application to court (1952) but also at the date of conveyance to the appellant (1940). Nevertheless, the Ontario Court of Appeal held that this did not extinguish the respondent's claim:⁵²

decision in *Re Layton & Yankou*, [1950] O.W.N. 337 (Ont. H.C.) seems to be based on a contrary view. See B. Laskin, *Conveyancing—Title Search Under a Document Registry System—Ontario Experience* (1953), 31 Can. Bar Rev. 1029, for a discussion of these cases.

⁵⁰ Cf. Reiter, Risk and McLellan, *op. cit.*, footnote 4, pp. 443-444.

⁵¹ *Supra*, footnote 3.

⁵² *Ibid.*, at pp. 57-58 (D.L.R.), 762 (O.W.N.). Note, for the purposes of the quotation in the text, that what was originally s. 3 has been renumbered as s. 2 in consolidations subsequent to the original Act.

... s. 2 of the Investigation of Titles Act does not extinguish rights or interests in land except in favour of a person who acquires title from one who is shown to be the owner through a good and sufficient chain of title during the 40-year period referred to.

On this basis the appellant could not rely on the Act since its vendor's chain of title revealed the conveyances of mineral rights in favour of the respondent.

A quite different view was taken by Cromarty J. in the more recent case of *Jackmar Developments Ltd. v. Smith*.⁵³ This case concerned a dispute between a vendor and a purchaser of land arising out of a contract made in 1969. The purchaser made a requisition with respect to an easement alleged to burden the land. The easement had been created by an instrument registered in 1915. In 1941 there had been a conveyance of the land to the vendor's predecessor in title and this conveyance made no mention of the easement. The conveyance to the vendor, which was registered in 1956, did specifically refer to the easement. Cromarty J. held that the easement had been extinguished. He did not refer to any previous authorities and his entire reasoning on this point is contained in these sentences:⁵⁴

The earliest instrument was registered on October 20, 1915. The 40-year period referred to in the Act therefore expired on October 19, 1955.

The last instrument was registered on February 20, 1956, four months after the expiration of the period.

Is the second instrument . . . one which falls within the words of the Act: " . . . unless the claim has been acknowledged or specifically referred to or contained in an instrument . . . registered against the land within the forty-year period . . . ".

In my opinion, it is not and therefore the easement did not affect the defendants and the requisition was not valid

This obviously assumes that there are two forty-year periods; that the period relevant to the extinguishment of claims provision runs forward

⁵³ (1974), 39 D.L.R. (3d) 379, 1 O.R. (2d) 87 (Ont. H.C.). See also *Re Lakhani & Weinstein* (1980), 31 O.R. (2d) 65 (Ont. H.C.).

⁵⁴ *Ibid.*, at pp. 385 (D.L.R.), 93 (O.R.). The decision in *Jackmar Developments v. Smith* is complicated by the changes in the form of the relevant legislation. The Investigation of Titles Act provision was applicable until it was repealed by the Investigation of Titles Repeal Act, S.O. 1964, c. 48 and replaced by Part III of the Registry Act (see footnote 59, *infra*). On the basis of *Re Headrick & Calabogie Mining Co.*, *supra*, footnote 3, these provisions, as I have argued in the text, were not effective to extinguish the easement in *Jackmar*. However, the contract in *Jackmar* was made in 1969 and judgment was given in 1973. It appears clear, therefore, that the relevant provisions were those in Part III of the Registry Act and not those in the Investigation of Titles Act. The provisions in Part III of the Registry Act do provide a reasonable basis for the decision in *Jackmar*, as I shall explain in the next paragraph of the text. Nevertheless, the provision quoted and apparently applied by Cromarty, J. in *Jackmar* was s. 2(1) of the Investigation of Titles Act, R.S.O. 1960, c. 193, although he stated in parenthesis that that was "(now the Registry Act, R.S.O. 1970, c. 409, s. 112)"; see pp. 385 (D.L.R.), 93 (O.R.).

from the date of registration of the instrument containing the claim in question; and that a claim might be extinguished by the extinguishment of claims provision despite the fact that the claim would be revealed by a search conducted in accordance with the length of search provision.

There are two main arguments in favour⁵⁵ of the approach taken in *Re Headrick and Calabogie Mining Co. Ltd.* First, the extinguishment of claims provision was, in a sense, ancillary to the length of search provision. Its purpose was to make it unnecessary for a person to search beyond the period laid down for the vendor's proof of title; it therefore (subject to certain exceptions) extinguished claims which would not be revealed by such a search. There was, so the argument goes, no reason to extinguish any other claims. Or, putting it the other way, there was no reason why the provision should extinguish a claim which would be revealed to the purchaser by a search during the period laid down by the length of search provision.⁵⁶ The second argument is based on the syntax of section 2(1). The subsection dealt with both length of search and extinguishment of claims in a single sentence, and it referred throughout to "the forty-year period",⁵⁷ plainly suggesting that the same period applied both to length of search and extinguishment of claims.⁵⁸

These arguments, particularly the latter one, lost a great deal of their force when the provisions of the Investigation of Titles Act were replaced in 1964 by similar provisions in Part III of the Registry Act.⁵⁹ In this new form, the length of search provision was placed in one section and the extinguishment of claims provision in another. In addition, the wording of the provisions suggested that there were indeed two different periods, the length of search period running back from the date of the current

⁵⁵ For the contrary view see Neave, *loc. cit.*, footnote 7, at pp. 541-542. For a suggestion of the argument presented in the text see Reiter, Risk and McLellan, *op. cit.*, footnote 4, p. 444.

⁵⁶ See Laskin, *loc. cit.*, footnote 49, at pp. 1030-1031.

⁵⁷ In *Re Headrick and Calabogie Mining Co.*, *supra*, footnote 3, the current legislation was the Investigation of Titles Act, R.S.O. 1950, c. 186, s. 2(1). In *Jackman Developments Ltd. v. Smith*, *supra*, footnote 53, the legislation apparently applied (see footnote 54, *supra*) was the Investigation of Titles Act, R.S.O. 1960, c. 193, s. 2(1). Both of these provisions refer to "the forty year period". The original provision—s. 3(1) of the Investigation of Titles Act, S.O. 1920, c. 41—referred to "the said forty year period" (see *supra*, p. 514) and thus made the point even more forcibly.

⁵⁸ See Laskin, *loc. cit.*, footnote 49, at p. 1031.

⁵⁹ The Investigation of Titles Act was repealed by the Investigation of Titles Repeal Act, S.O. 1964, c. 48. The original replacing provisions were contained in the Registry Amendment Act, S.O. 1964, c. 102, s. 34. These were themselves replaced by the provisions contained in the Registry Amendment Act, S.O. 1966, c. 136, s. 52. The points being made in this text apply to both versions. The provisions remained substantially in the form enacted in 1966 until the recent changes.

dealing and the extinguishment of claims period running forward from the registration of the claim in question.⁶⁰

IV. *Analysis of the New Provisions*⁶¹

A. *The Root of Title Requirement*

It is now plain that there is no implicit requirement that the chain of title commence with a good root of title at least forty years old. It will be convenient for ease of reference to set out at this point the text of the length of search provision—section 105. It is as follows:

(1) A person dealing with land shall not be required to show that he is lawfully entitled to the land as owner thereof through a good and sufficient chain of title during a period greater than the forty years immediately preceding the day of such dealing,⁶² except in respect of a claim referred to in subsection 106(5).⁶³

(2) Where there has been no conveyance, other than a mortgage, of the freehold estate registered within the title search period [defined⁶⁴ to mean the period of forty years described in section 105(1)], the chain of title commences with the conveyance of the freehold estate, other than a mortgage, most recently registered before the commencement of the title search period.

(3) A chain of title does not depend upon and is not affected by any instrument registered before the commencement of the title search period except,

- (a) an instrument that, under subsection (2), commences the chain of title;
- (b) an instrument in respect of a claim for which a valid and subsisting notice of claim was registered during the title search period; and
- (c) an instrument in relation to any claim referred to in subsection 106(5).

Although the wording in section 105(1) is the same as in the previous legislation and is not different in substance from the equivalent provision of the Investigation of Titles Act, subsections (2) and (3) show that the words now mean what they say. They have also taken away the justification in the previous legislation for implying the common law rule. That, it will be recalled,⁶⁵ was that the mere absence of competing claims does not prove the vendor's title; there must be some affirmative proof. Section 105(2) and (3) now deals with this expressly. Subsection (2) provides the one exceptional situation where the chain of title commences more

⁶⁰ See *Re Lakhani & Weinstein*, *supra*, footnote 53; D. Lamont, *Real Estate Conveyancing* (1976), p. 154.

⁶¹ Registry Amendment Act, *supra*, footnote 1.

⁶² It is unclear which is the day of "the dealing". Probably it should be interpreted to mean the date of the contract. That is a reasonable meaning of the day of "the dealing" and it is the date from which a vendor's abstract ran back under the common law practice: see *Armour*, *op. cit.*, footnote 20, p. 33.

⁶³ For quotation of these exceptions and some comment on them see text, *infra*, pp. 530-531.

⁶⁴ S. 104(1)(e).

⁶⁵ See text, *supra*, at pp. 509-511, 515-516.

than forty years from the current dealing and that is where "there has been no conveyance, other than a mortgage, of the freehold estate registered within the [forty year period]". In this case, it is necessary to go outside the forty year period to "the conveyance of the freehold estate, other than a mortgage, most recently registered before the commencement of the [forty year period]". The implication is clear that in other cases—where there is a conveyance, other than a mortgage, of the freehold estate registered within the forty year period—the chain of title commences at a point forty years immediately preceding the date of the current dealing. The point is not, moreover, left resting on any such implication: subsection (3) puts the matter beyond any doubt by providing, subject to the stated exceptions, that, "[a] chain of title does not depend upon. . . any instrument registered before the commencement of the [forty year period]".⁶⁶

The new Act also changes the requirement of what sort of instrument amounts to a good root of title. Since the old provisions did not deal explicitly with the good root of title requirement it was reasonable that the implied requirement should include the common law notion of what was a good root. Section 105(2) now makes it plain that what is required is a "conveyance, other than a mortgage, of the freehold estate". Consequently, it is now irrelevant that the instrument in question, such as an executor's deed of conveyance, may depend for its effectiveness on some other instrument. This also is confirmed by section 105(3) providing that, subject to the stated exceptions, "[a] chain of title does not depend upon and is not affected by any instrument registered before the commencement of the title search period. . .".⁶⁷

⁶⁶ This position is further confirmed by the new regulations made under the Registry Act, R.S.O. 1980, c. 445. Section 15 of the Act provides for the giving of an abstract of title by the Registrar. Until recently, the regulations provided support for the orthodox view that the chain of title must commence with a good root at least forty years old. The registrar's abstract was generally required to commence with the last conveyance registered next before the date forty years before the date of the request for the abstract. (R.R.O. 1980, Reg. 896, s. 5(4)(a)). Now the position is changed and conforms to the new investigations of title provisions. The Registrar's abstract now will generally commence with the *first* instrument registered *after* the date forty years before the date of the request (O. Reg. 578/84, s. 1(2)). Only when there is no such instrument will the abstract include a conveyance registered before the forty year period (O. Reg. 578/84, s. 1(3)).

⁶⁷ The view expressed in the text is also expressed in the *Polaris Bulletin* No. 07, para. 16 (October 15, 1981).

There is, however, a difficulty with the phrase "conveyance, other than a mortgage, of the freehold estate". What is *the* freehold estate? Ordinarily, the phrase "freehold estate" means an estate of indefinite duration (see, e.g., D. Mendes Da Costa & R.J. Balfour, *Property Law* (1982), p. 353). Two of such estates can currently be created in Ontario: a life estate or an estate in fee simple. (A third freehold estate, a fee tail, cannot, since May 27, 1956, be created in Ontario: *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 90, s. 4). It is, therefore, not apt to speak of *the* freehold estate. This

B. *The Relationship between Length of Search and Extinguishment of Claims Provisions*

It will be convenient at this point to set out the extinguishment of claims provision—section 106. It, with the exception of subsection (5) which is set out later,⁶⁸ provides as follows:

(1) A claim that is still in existence on the last day of the notice period expires at the end of that day unless a notice of claim has been registered.

(2) A person having a claim that is not barred by this Part, or a person on his behalf, may register a notice of claim in the prescribed form,

(a) at any time within the notice period; or

(b) at any time after the expiration of the notice period but before the registration of any conflicting claim.

(3) A notice of claim may be renewed from time to time by the registration of a notice of claim in accordance with subsection (2).

(4) Subject to subsection (7), when a notice of claim has been registered, the claim affects the land for the notice period of the notice of claim:

(6) Subsection (1) does not apply to a claim to a freehold estate in land or an equity of redemption in land by a person continuously shown by the abstract index for the land as being so entitled for more than forty years as long as the person is so shown.

(7) The registration of a notice of claim does not vaildate or extend a claim that is invalid or that has expired.

(8) For the purposes of subsection (1), an instrument by which a husband conveyed land before the 31st day of March, 1978 shall be deemed to be a notice of claim with respect to his wife's dower right.

(9) Subsection (8) is repealed on the 31st day of March, 1988.

The new Act makes it clear that the length of search period is different from the extinguishment of claims period. As in the previous provisions (unlike the original Investigation of Titles Act provisions⁶⁹) they are each contained in separate sections. Again, like the previous provisions (but again unlike the original Investigation of Titles Act provisions) the wording of section 105(1) provides for a period of forty years immediately preceding the day of the dealing and section 106(1) provides for extinguishment at the end of a period commencing with the day of registration of the instrument. It is also now clear (subject to one point I shall discuss below⁷⁰) that the extinguishment of claims provision works independently of the proof of title provision so that it is in principle irrelevant that, in carrying out a search pursuant to section 105, there

usage is particularly surprising in the context of these provisions since s. 104(1)(d) (which defines "owner" as "a person, other than a lessee or a mortgagee, entitled to a freehold or other estate or interest in land at law or in equity, in possession, in future or in expectancy") and s. 106(6) appropriately refer to a freehold estate.

⁶⁸ *Infra*, p. 530.

⁶⁹ See *supra*, pp. 516-519.

⁷⁰ *Infra*, pp. 522-524.

would be disclosed to the purchaser a claim subject to section 106(1). This point will not, in fact, commonly arise since sections 105 and 106(1) correspond in the sense that the chain of title will, pursuant to section 105(1) and (3), normally go back forty years (the title search period) and claims older than that will have expired, pursuant to section 106(1),⁷¹ unless a valid notice of claim has been registered, and such a notice would necessarily appear in the search during the title search period. The point will only arise where, pursuant to section 105(2), the search is required to go beyond the title search period. An example may help.

Assume a sale being made in 1985 of an estate in fee simple in Blackacre by X Co. to Harry. In 1935, an easement over Blackacre was given by X Co. to Y Co., the owner of neighbouring land, and it was registered in the same year. In 1930, a conveyance of the estate in fee simple to X Co. was registered. In these circumstances, Y Co.'s claim to its easement would be extinguished by the effect of section 106(1), assuming that no notice of claim was registered under section 106(2) and that the exception in section 106(5)(a)(iv) (which I shall discuss below⁷²) did not apply. It is irrelevant to the continuation of Y Co.'s claim that section 105(2) required a search beyond the 1935 easement to the 1930 conveyance. This is apparent from the terms of section 106(1) itself, but section 105(3) confirms the position since it provides that, subject to the three exceptions—none of which applies in this case—a “chain of title does not depend upon and is not affected by any instrument registered before the commencement of the title search period . . .”.

There is one situation where the position is less clear. This is where the claim under consideration is contained in the same instrument that commences the chain of title. An adaptation of the example used in the previous paragraph may help explain the point. Assume the facts were the same except that the easement in favour of Y Co. was contained in the instrument conveying the estate in fee simple to X Co., which was registered in 1930. (The example would be a practical one if the conveyance were made by Y Co. and the easement was reserved in favour of Y Co.'s retained land). Again, (making the same assumptions as before) section 106(1) would plainly seem to extinguish Y Co.'s easement. In this case, however, section 105(3) does not provide obvious confirmation. Exception (a) would apply since the 1930 conveyance is an instrument that, under subsection (2), commenced the chain of title. In these circumstances, it can be argued that X Co.'s claim of title does depend on *and is affected by* the 1930 instrument; that, consequently, it is affected by adverse claims contained in that instrument; and that, therefore, the claim

⁷¹ The extinguishment of claims provision is not in fact dependent for its operation on there being a sale of the property; cf. Basye, *op. cit.*, footnote 4, p. 284.

⁷² *Infra*, pp. 530-531.

to the easement is not extinguished. This is a plausible argument;⁷³ but I think it is wrong.

There are two main arguments in favour of my position. The first is the practical argument that the continued validity of Y Co.'s claim should not depend on the fortuitous fact that it happened to be contained in the same instrument that commenced X Co.'s chain of title. This argument is admittedly not clear-cut. It might be countered by the points that, first, X Co. only ever had the property subject to Y Co.'s claim and that, second, the title searcher will be required to peruse the root of title instrument (in order to determine that it does support the vendor's title) and should, therefore, be bound by anything contained in it. On balance I do not think these counter arguments are compelling. The first point may be true but it does not raise any relevant difference from the situation where X Co.'s title was acquired free of the claim but later became encumbered by it. The second point can itself be countered by the argument that the search back to the instrument outside the forty year period is exceptional; it is required only to enable the searcher to establish the vendor's affirmative proof of title to convey; and the policy of the Act in general, and section 106(1) in particular, is that the searcher should not be required to investigate the effect and continued viability of antiquated claims.⁷⁴

My second argument is textual. The view that Y Co.'s easement is preserved creates disharmony between sections 105 and 106: section 106(1) (which is not stated to be subject to section 105) would plainly and explicitly extinguish the claim but for the argument that section 105(3)(a) preserves it. However, in my view, section 105(3)(a) can be given full effect without causing a clash with section 106(1). The main body of section 105(3) provides that a "chain of title does not depend upon and is not affected by any instrument registered before the commencement of the title search period" except in any of the three exceptional situations. Exception (a) is a case where the chain of title does "depend upon" the instrument in question because it is the root of title instrument that provides affirmative proof of the vendor's title. There is in this context no obvious application of the phrase "affected by", and the natural interpre-

⁷³ It is stated in the *Polaris Bulletin* No. 07 (October 15, 1981), para. 17: "Where there is no conveyance within the title search period, the chain of title begins with the first conveyance beyond the 40-year period back from the date of dealing [subsection 105(2)]. *Any interest set out in the root deed still affects the land (a right-of-way or easement, for example).* However, it is our opinion that instruments registered between the root deed and the beginning of the title period have expired, unless a notice is registered to preserve them [subsection 105(3)]. It is our view that they can thus be eliminated from a search." (Emphasis added).

⁷⁴ Cf. *Wichelman v. Messner*, 83 N.W. 2d 800 (Minn. S. Ct., 1957) where the Minnesota Marketable Title Act was held to extinguish a possibility of reverter or right of re-entry (it was not decided which was the correct characterization) that was created by the title root instrument.

tation is that the vendor's title is not affected by Y Co.'s claim since it is extinguished by section 106(1). Exceptions (b) and (c), on the other hand, explicitly refer to claims against the property. These are not (unlike (a)) cases where the vendor's claim of title "depends upon" the instruments in question but these are cases where the vendor's chain of title will be "affected by" an instrument in respect of or in relation to any of the claims referred to.

Both my arguments rest on a fundamental principle of the current statutory provisions. Although the terms and purposes of sections 105 and 106 are closely related, section 106(1) works independently of section 105. Indeed, it appears that the extinguishment of claims effected by section 106(1) does not only work in favour of a purchaser carrying out a search pursuant to the requirements of section 105, and it seems that section 106(1) even operates in the absence of a sale being carried out.⁷⁵

C. *The Operation of the Extinguishment Provision*

(1) *The Meaning of "claim".*

The word "claim" is specially defined for the purpose of Part III of the Registry Act and this meaning provides a general limitation on the effect of both sections 105 and 106. The relevant provision is section 104(1)(a). It is as follows:

"claim" means a right, title, interest, claim, or demand of any kind or nature whatsoever affecting land set forth in, based upon or arising out of a registered instrument, and, without limiting the generality of the foregoing, includes a mortgage, lien, easement, agreement, contract, option, charge, annuity, lease, dower right, and restriction as to the use of land or other encumbrance affecting land.

The natural interpretation of this is that a "claim" must always arise from a registered instrument and that the second part⁷⁶ of the definition simply enumerates examples of what falls within the first part.⁷⁷ There are difficulties with this interpretation. First, "dower right" is specifically included and that is a right which arose by operation of law and not out of an instrument at all.⁷⁸ Secondly, the interpretation suggested is inconsistent with the decision in *Zygocki v. Hillwood*.⁷⁹ In that case the extinguishment of claims provision was held to extinguish claims to mortgages

The Model Marketable Title Act, on the other hand, does not extinguish "interests and defects which are inherent in the muniments of which such chain of record title is found". See Simes and Taylor, *op. cit.*, footnote 41, pp. 5, 7, 11.

⁷⁵ Cf. Bayse, *op. cit.*, footnote 3, p. 284.

⁷⁶ I.e., from and including, the words "and, without limiting" to the end.

⁷⁷ I.e., from beginning to, and including, the words "registered instrument". This interpretation is taken by Neave, *loc. cit.*, footnote 7, at p. 539.

⁷⁸ See Neave, *ibid.*, at p. 539.

⁷⁹ (1975), 12 O.R. (2d) 103 (Ont. H.C.).

which were not registered under the Registry Act but which had been in existence for more than forty years and had been deposited in the office of the Secretary of State of Canada pursuant to section 77 of the Railway Act.⁸⁰ The usefulness of this case is, however, reduced by the fact that no consideration was apparently given to the definition of "claim". Thirdly, the position is further clouded by section 104(2). It provides that, "[a] claim referred to in clause 106(5)(a) or (b) is not confined to a claim under a registered instrument". This seems to suggest that ordinarily—where this provision does not apply—the application of sections 105 and 106 is confined to claims under registered instruments. But if this is right, section 104(2) does not make sense. It applies only to section 106(5)(a) and (b). As we shall see,⁸¹ this deals with certain exceptional situations where sections 105 and 106 do not apply to claims of the sorts mentioned. If "claim" ordinarily only means a claim under a registered instrument, sections 105 and 106 would in any event not apply to it. Section 104(2) seems, therefore, to be redundant. Whatever is the correct interpretation of section 104(1)(a), legislative qualification is, I suggest, imperative.

(2) *The effect of section 106(6).*

Section 106(6) prevents the extinguishment of a claim to a freehold estate in land or an equity of redemption in land by a person "continuously shown by the abstract index for the land as being so entitled for more than forty years as long as the person is so shown".⁸² The basic policy of this subsection is clear. It is that the person who in substance is

⁸⁰ R.S.C. 1970, c. R-2.

⁸¹ *Infra*, pp. 530-531.

⁸² There is a curiosity in the drafting of this provision. The reference to a claim to a freehold estate would clearly include a claim to a fee simple, which is the estate most obviously contemplated. It would also extend to a claim to a life estate. But it would seem clear that it would not extend to a leasehold interest. The reference to an "equity of redemption in land" would, on the other hand, seem to extend to any interest in land—freehold or leasehold—which is subject to a mortgage. It seems that there was a drafting error and that the provision should have read: "... a claim to a freehold estate in land or an equity of redemption therein."

The predecessor of this provision in the previous legislation was included as one of the situations to which this Part of the Registry Act did not apply (*cf.* the present section 106(5)) and it referred to "a claim to a freehold estate in land or an equity of redemption therein . . .". (Emphasis added): see Registry Act, R.S.O. 1970, c. 409, s. 112(2)(f). The equivalent provision, when it was in the Investigation of Titles Act, plainly did extend to leasehold estates. It referred to "the owner of a freehold or leasehold estate in land or of an equity of redemption therein . . .": see Investigation of Titles Act, R.S.O. 1960, c. 193, s. 2(3).

The suggestion made in the first paragraph of this footnote is supported by the fact that the definition of "owner" in the present Act (which directly only applies to section 105(1)) "means a person, other than a lessee or a mortgagee, entitled to a freehold or other estate or interest in land at law or in equity, in possession, in futurity or in expectancy"; see s. 104(1)(d).

the owner of the land should not have to register a notice of claim every forty years in order to prevent his interest being extinguished by section 106(1).⁸³ It will remain unaffected by section 106(1) so long as the registered owner is continuously shown as being entitled. He will so remain as long as no conflicting instrument is registered against the land. The point can be conveniently illustrated by the case of *Algoma Ore Properties Ltd. v. Smith*.⁸⁴ Although it was decided on the basis of the provisions of the Investigation of Titles Act, its reasoning and decision on this point are applicable also to the modern provision. It concerned a contract made in 1952 by Walter Smith to sell certain land to Algoma Ore Properties. The purchasers made a requisition with respect to an alleged outstanding claim to the mineral rights in the land. This claim (like the vendor's title) derived from a will, which was registered in 1886, devising the land (except the minerals) to a child of the testator called Zelia Braiden and devising the minerals to four other children of the testator. In 1900 there was registered a conveyance of the fee simple in the land by Zelia Braiden to John Arnott and no mention was made of the minerals. In 1917 there was a conveyance of the fee by John Arnott to Walter Smith; again no reference was made to the minerals. The Ontario Court of Appeal held that the claim to the mineral rights had been extinguished. The provision equivalent to section 106(6) did not apply since the 1900 and 1917 conveyances "were in the ordinary statutory form and would have been effective to convey the mineral rights if the respective grantors had, at the time of giving the deeds, owned them".⁸⁵ These were, therefore, conflicting instruments and they had the following result.⁸⁶

When the deeds from Braiden to Arnott in 1900 and from Arnott to Smith in 1917 were registered, the owners of the mineral rights under the will of Elias Holden were no longer shown "continuously" on the books as being the owners and unless

⁸³ Some provision of this sort is essential. Simes and Taylor, *op. cit.*, footnote 41, p. 352, made this point as follows: "One of the basic difficulties encountered in drafting a marketable title act is that of distinguishing between the interests made marketable and the interests extinguished. In a sense, we are validating one interest because the chain of title has an ancient root and invalidating another because it is of ancient origin. Thus under the Michigan act, if A has a record title having a root more than 40 years old, we may clear his title of interests antedating that root. If B claims a mortgage or flowage right based upon an instrument recorded prior to A's 40-year record title, we extinguish B's interest in favor of A. For convenience, let us call A the marketable title claimant,—or merely the claimant,—and let us call B the 'encumbrancer'. How do we word our statute so as to strike down B's interest without striking down A's? It should be noted that under the Michigan statute which makes marketable the title to 'any interest', A will be an 'encumbrancer' as to subsequent 40-year titles, and as such, may lose his interest. Thus, if the statute requires both A and B to record notices within the statutory period, both of them may cease to have marketable titles. Obviously this is a result we do not wish to reach."

⁸⁴ *Supra*, footnote 3.

⁸⁵ *Ibid.*, at pp. 349-350 (D.L.R.), 641 (O.R.).

⁸⁶ *Ibid.*, at pp. 350 (D.L.R.), 642 (O.R.).

they followed the procedure set out in the Act and filed a notice of their claim . . . they lost their rights and the deeds from Braiden to Arnott and from Arnott to Smith became effective to convey the mineral rights.

The words "as long as the person is so shown" are new. I suggest that they do not make any substantial change, but they emphasize that section 106(6) will cease to apply, and section 106(1) will consequently begin to apply, as soon as a subsequent conflicting instrument is registered.

(3) *The notice of claim procedure.*

The normal method of preventing the extinguishment of a claim by section 106(1) is the registration of a notice of claim under section 106(2).⁸⁷ Section 106(2)(a) provides that a notice of claim may be registered within the "notice period", which is defined⁸⁸ to include not only the period ending on the day forty years after the day of registration of the instrument but also the period ending on the day forty years after the registration of a notice of claim. Consequently, a claim can be indefinitely preserved from extinguishment by the registration from time to time, and within each period of forty years, of a notice of claim.⁸⁹ Section 106(2) also provides for the registration of a notice of claim outside the notice period. The effect of this is less clear and it will first be convenient to set out here the important words:

- (2) A person having a claim that is not barred by this Part, or a person on his behalf, may register a notice of claim . . . ,
- (b) at any time after the expiration of the notice period but before the registration of any conflicting claim.⁹⁰

The difficulty is that normally there will be no room for the operation of this provision since section 106(1) will ordinarily have barred a claim at the expiry of the notice period unless a notice of claim had already been registered. This position is further confirmed by section 106(7) which provides that, "[the] registration of a notice of claim does not validate or extend a claim that is invalid or that has expired".⁹¹ The

⁸⁷ Until the coming into force of the new Act, a claim would also be kept alive if it was "acknowledged or specifically referred to or contained in an instrument . . . registered against the land within the forty-year period". See Registry Act, R.S.O. 1970, c. 409, s. 112(1). For comment on the change see *infra*, pp. 532-533.

The form of a notice of claim is prescribed by O. Reg. 512/81, s. 41(1) (form 31).

⁸⁸ By s. 104(1)(c).

⁸⁹ This is the combined effect of section 106(2), (3) and (4).

⁹⁰ It should be noted that a notice of claim may be registered by "a person on behalf" of the claimant. A claim may belong to an incapacitated, unascertained or unborn person. It is important that such a claim be capable of being kept alive by the registration of a notice of claim by a person on behalf of the claimant. See Basye, *op. cit.*, footnote 4, p. 285; Payne, In Search of Title (Part II) (1962), 14 Alabama L. Rev. 278, at pp. 304-305.

⁹¹ Emphasis added.

clue to the difficulty, I suggest, is that there is one situation where section 106(1) does not apply, and consequently a claim does not expire at the end of the notice period, and that is where the claim falls within section 106(6). Notice of such a claim, but only such a claim, can be registered "at any time after the expiration of the notice period but before the registration of any conflicting claim". This interpretation is, it will be noticed, consistent with the interpretation given to the requirement in section 106(6) that a person be continuously shown to be entitled to the interests referred to in the subsection.

The effect of this, I should emphasize, is that claims that do not fall within section 106(6) will automatically expire at the end of the period of forty years unless a notice of claim is registered within that period.

D. Fraudulent Interlopers

The problem of fraudulent interlopers can best be considered by use of a hypothetical example.⁹² Assume the following facts. In 1930 a conveyance of the fee simple in land from Albert to Bill was made and registered. In 1935, Albert made a purported conveyance to Albert and Co. Ltd., a company controlled by Albert, which conveyance was, through some subterfuge, registered in the same year. In 1946, a registered conveyance was made from Albert and Co. Ltd. to Albert and Co. (No. 2) Ltd. (another company controlled by Albert). In 1985 Albert and Co. (No. 2) Ltd. made a conveyance to XYZ Ltd., a company unconnected with Albert or Albert and Co. Ltd. This conveyance was made for value and XYZ Ltd. had no knowledge of any claim to the property by Bill or his successors in title. No notice of claim was ever registered by Bill.

The apparent effect of the relevant provisions can conveniently be outlined first. Section 105 establishes the title search period as 1985 to 1945, that is, the period of forty years back from 1985. Since there is a conveyance, other than a mortgage, of the freehold estate during that period, the chain of title "does not depend and is not affected by any instrument registered before the commencement of the title search period". Consequently, XYZ Ltd. would search back only to 1945 and would not have reason to discover the 1930 conveyance to Bill. In addition, it would seem that Bill's claim was extinguished by section 106(1) since no notice of claim was registered during the notice period and none could be registered afterwards since there was a conflicting claim. That conflicting claim would also prevent the operation of section 106(6).

The conclusion suggested by this analysis may seem unpalatable to some. I shall consider whether there is any escape from it. First, it might be suggested that the conveyance from Albert to Albert and Co. Ltd. was

⁹² Cf. the problem posed in Reiter, Risk and McLennan, *op. cit.*, footnote 4, pp. 448-449.

a nullity and that consequently no title could be derived from it. The argument, which would be a valid one under the common law,⁹³ would be that since Albert had conveyed all his interest in the land he had nothing left to convey to Albert and Co. Ltd. Nevertheless, it seems to me that the statutory provisions under consideration alter the effect of the common law and both give validity to an otherwise ineffective instrument and extinguish an otherwise valid claim.⁹⁴

A second argument depends on the facts of the particular case. Assume in our example that Bill remained in possession of the land from 1930 until the present. It could be persuasively argued that, although the claim of Bill which derived from the 1930 conveyance expired in 1970, he gained a new claim by virtue of his possession of the land and the effect of the Limitations Act. This claim is not one within the definition of "claim" for this part of the Registry Act⁹⁵ and, therefore, was unaffected by sections 105 and 106. On these facts, this argument seems to be compelling and produces a reasonable result. But consider the position if the first conflicting instrument was registered less than ten years ago. Until the conflicting instrument was registered, Bill was in possession by virtue of his subsisting claim arising from the 1930 conveyance and, therefore, his possession was not adverse to anyone else. The period of his adverse possession would, therefore, be insufficient to protect his position. This is unsatisfactory since there is no reason why Bill should be worse off in this situation than in the previous one, where the conflicting instrument was registered in 1935.⁹⁶

A third argument is based on the equitable principle that a statute shall not be used as an instrument of fraud.⁹⁷ This principle has already been applied to provisions of the Registry Act dealing with priority of claims and the effect of non-registration.⁹⁸ Fraud, in the context of this

⁹³ See, e.g., *Armour, op. cit.*, footnote 20, p. 93. Cf. *Jemco Holdings Ltd. v. Medlee Ltd.* (1975), 78 D.L.R. (3d) 604 (N.S. App. Div.).

⁹⁴ Cf. *Marshall v. Hollywood, Inc.*, 224 So. 2d 743 (Florida D.C.A., 1969), noted by R.H. Powell, *Marketable Record Title Act: Wild, Forged, And Void Deeds As Roots of Title* (1969-70), 22 U. Fla. L. Rev. 669.

⁹⁵ Section 104(1)(a). For discussion about the provision see *supra*, pp. 524-525.

⁹⁶ The Michigan statute dealt with this problem by providing that the benefit of the Act could not be taken by a person who had acquired an interest in land "if the land in which such interest exists is in the hostile possession of another": see: *Basye, op. cit.*, footnote 4, p. 281; *Simes and Taylor, op. cit.*, footnote 41, pp. 343-344; *Aigler, loc. cit.*, footnote 46, at p. 45. The Model Marketable Title Act contained a provision protecting the interests of persons in continuous possession for forty years: see *Payne, loc. cit.*, footnote 93, at p. 303; *Simes and Taylor, op. cit.*, footnote 41, p. 353.

⁹⁷ For a general discussion of the operation of this principle in the context of statutory provisions dealing with trusts see my article, *Formalities for Trusts of Land, and the Doctrine in Rochefoucauld v. Boustead* (1984), 43 Camb. L.J. 306, at pp. 322-336.

⁹⁸ The principle had the effect that, even in the absence of a statutory provision dealing with actual notice, the holder of a subsequent registered instrument was not

principle, has a potentially wide meaning going well beyond fraud in its ordinary sense. However far it may extend, it is strongly arguable, I suggest, that it should apply in the present context with the result that any property obtained by the fraud should be held on a constructive trust, and any person deriving title through the wrongdoer should take subject to that constructive trust unless he can take advantage of the defence of *bona fide* purchaser for value without notice. If this principle was applied to our problem, Albert and Co. Ltd. would have taken title to the land on a constructive trust for Bill; Albert and Co. (No. 2) Ltd. would have taken the property subject to that trust; and XYZ Ltd. would only have taken a title free of the constructive trust if it could successfully assert the *bona fide* purchaser defence. Even if it could, Bill would be able to assert a claim against the proceeds of the sale paid to Albert and Co. (No. 2) Ltd. as long as they could be identified in accordance with the law relating to tracing property.

E. *Statutory Exceptions to the Effect of the Provisions*

Section 106(5) lists various exceptional claims to which the provisions under consideration do not apply. It provides as follows:

This Part does not apply to:

- (a) a claim,
 - (i) of the Crown reserved by letters patent,
 - (ii) 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 letters patent, or in land that has otherwise reverted to the Crown,
 - (iii) of the Crown or a municipality in a public highway or lane,
 - (iv) of a person to an unregistered right of way or other easement or right that the person is openly enjoying and using;
- (b) a claim arising under any Act; or
- (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.

I shall comment now on one of these claims: that "of a person to an unregistered right of way or other easement or right that the person is openly enjoying and using". This exception is possibly capable of wide application but its effect is unclear for two main reasons. First, there is

allowed to take priority over an earlier unregistered instrument if he took with notice of the earlier unregistered instrument, despite the statutory provision that an unregistered instrument was void as against a registered one. The doctrine of actual notice is now expressly included in ss. 69(1) and 70 of the Registry Act. However, it continues to be read into the statute in the context of section 71: see *Rose v. Peterkin* (1887), 13 S.C.R. 677. In a recent English case it was held that the Land Registration Act, 1925 should not be allowed to be used as an instrument of fraud: *Lyus v. Prowsa Developments Ltd.*, [1981] 1 W.L.R. 1044; [1982] 2 All E.R. 953 (Ch. D.).

syntactical difficulty in determining the operation of both the adjective "unregistered" and the clause "that the person is openly enjoying and using". Although it is not completely clear, it seems to me that both of them apply to all three nouns to which reference is made so that the exception comprises rights of way, other easements, and rights—all of which are both unregistered and that the person is openly enjoying and using. The second difficulty is to determine why the exception should be restricted to unregistered rights. There are two aspects to this. First, if the definition of "claim" for the purpose of this Part of the Registry Act restricts the claims to which it applies to those arising out of registered instruments, then this exception is redundant since the provisions would not apply to it even if there was not the exception under consideration. The second point is to question why, in any event, a person with a right that is registered should be worse off (because the exception could not protect it) than one that is unregistered (to which the exception might apply).⁹⁹ The justification for an exception in favour of easements, and other rights covered by the provision, is that claims of this sort are ones that typically can be usefully enjoyed for more than forty years. The requirement that they be openly enjoyed and used both ensures that the only ones protected are those that in fact are being used and has the effect that their existence can usually be detected by normal physical inspection of the servient premises: consequently, the exception does not seriously hamper the policy of discouraging unduly lengthy searches of title. However, none of these justifications explain why the exception should extend only to unregistered rights and, in my opinion, it should not be so limited.

VI. Conclusion

I have two general comments. The first is concerned with the reduced importance of section 105; the second is concerned with the apparently harsh effect of section 106(1).

Section 105(1) states that it is concerned with what the vendor is required to show the purchaser. In one sense, this is confusing. The phraseology would be apt if it was in a jurisdiction (like England, under the common law system) where there was no public register of documents affecting title to land. Under the registry system in Ontario, the purchaser does not generally require the vendor to show him anything; he searches for himself at the registry.¹⁰⁰ For this reason, the provision is commonly

⁹⁹ The legislative history of this provision is of some interest but not of obvious help. When the provisions were in the Investigation of Titles Act the definition of "claim" for the purpose of the Act was more expansive than the present definition in that it included various matters that are now listed in the exceptions in section 106(5). The last clause of the definition was as follows: "... but does not include a highway, public lane, unregistered right of way or other easement or right that a person is openly enjoying and using or any claim imposed by any statutory enactment": see, Investigation of Titles Act, R.S.O. 1960, c. 193, s. 1(a).

¹⁰⁰ Cf. Payne, *loc. cit.*, footnote 8, at pp. 41-42.

(and, in substance, more aptly) described as a length of search provision. The provision does, however, carry out its original function of setting a limit on the vendor's affirmative obligation to prove his title. But even here its importance should not be exaggerated. Compliance with the requirements of section 105 does not determine that a vendor has a good title: it is primarily¹⁰¹ concerned with the length of the affirmative proof of the vendor's title rather than with the quality of his title.

The extinguishment of claims provision in section 106 has much greater substantive effect. This may seem paradoxical since the extinguishment of claims provision in the original legislation was, I have asserted, intended to be ancillary to the length of search provision.¹⁰² The crucial change was that which separated the two provisions so that the extinguishment of claims provision now operates independently of the length of search provision. No longer is it true, as the Ontario Court of Appeal held in *Re Headrick and Calabogie Mining Co. Ltd.*,¹⁰³ that the extinguishment of claims provision only extinguishes rights or interests in land "in favour of a person who acquires title from one who is shown to be the owner through a good and sufficient chain of title during the 40-year period referred to".

Section 106 might be thought to have an unduly harsh effect. A claim will generally be automatically extinguished by the expiry of forty years, unless a notice of claim is registered within the period. Even a claim to a freehold estate or an equity of redemption will be thus extinguished, in the absence of a timely notice of claim, where a conflicting instrument has been registered. The old provisions partially ameliorated the harshness since a claim was kept alive where it was "acknowledged or specifically referred to or contained in an instrument . . . registered against the land within the forty-year period". The general policy represented by section 106 is, I suggest, justified. The appropriate rule has to be arrived at after a balancing of interests. On the one hand, there is the interest of the person whose claim might be extinguished. However, effective claims outstanding after forty years are rare (since generally they will have expired either according to their terms or because of the effect of the Limitation Act¹⁰⁴); a procedure for preserving old claims is

¹⁰¹ In some circumstances, s. 105 may have a substantive effect: it may confer a title on a person which he would not have had at common law. For example, in *Algoma Ore Properties Ltd. v. Smith*, *supra*, footnote 3, not only did the extinguishment of claims provision have the result of extinguishing the four children's title to the minerals, but also the length of search provision had the result of creating a title to those minerals in Walter Smith and his predecessors in title, and this was a title they would not have had at common law.

¹⁰² *Supra*, pp. 514-515.

¹⁰³ *Supra*, footnote 3, at pp. 57-58 (D.L.R.), 762 (O.W.N.).

¹⁰⁴ For discussions about the relationship between the appropriate length of title search and extinguishment of claims periods and the age of potentially valid claims see:

provided; and, as I have argued, the courts would not be powerless to prevent a fraudulent person, or a person claiming through him, from taking advantage of the Act. On the other hand, there is the general interest in saving costs and reducing delay in land transactions and in preventing persons using a shadow of a claim strategically.¹⁰⁵ The abrogation of the provision dealing with claims "acknowledged or specifically referred to or contained" in later registered instruments is, I suggest, justified also. The difficulty with that provision was that the mere mention of a possible claim meant that that claim would have to be investigated in order to determine whether in fact it had any continuing force, thus obviating the convenience that would be otherwise gained by the clearing from the title of stale claims.

If there is concern that section 106 may operate too harshly, the correct response, I suggest, is not to preserve claims that would otherwise be extinguished; rather, compensation should be paid to the person whose claim has been inappropriately extinguished. In this way, the individual is protected without damaging the general interest in the removal of old claims. The principle of providing compensation within the Registry system was recognized in the 1981 reforms since section 108 provides for compensation out of the Land Titles assurance fund in certain circumstances.¹⁰⁶ These are, however, narrowly defined and they deal only with losses arising from an error of the Registrar.

Simes & Taylor, *op. cit.*, footnote 41, pp. 4-5, 355; Proceedings of Ontario Standing Committee on Administration of Justice, November 20, 1981 (1981, Hansard-J.), p. 400.

¹⁰⁵ See *Introduction, supra*, p. 508. See also Aigler, *loc. cit.*, footnote 46, at p. 50.

¹⁰⁶ Registry Amendment Act, *supra*, footnote 1.