

Paper delivered at the "Land and Freedom" Conference:

The 18th Annual Conference of the Australian and New Zealand Law and History Society

9-11 July 1999

**"The Peculiarities of Property in Colonial New South Wales"**

A.R. Buck

University of Newcastle

Note: not to be quoted or cited without permission of the author

How "Australian" is Australian land law? Most land law texts in New South Wales begin with a variation on the following brief historical prolegomena: English law was received into Australia on settlement in 1788. Questions of applicability of English law were settled by the New South Wales Constitution Act of 1828. Since 1828 the land law of New South Wales and England has diverged markedly, yet until the passage of the Australia Act 1986 the possibility of compulsion to follow English decisions remained. Only in the light of the 1986 legislation, therefore, can it be claimed that: "The law which governs Australia is now Australian law".<sup>1</sup> Indeed, most land law texts still implicitly accept the claim first made by G.W. Millard in 1894 that: "the law of real property in force in this colony is the English law of real property with certain omissions, additions and variations".<sup>2</sup> Is there justification for continuing to accept this claim?<sup>3</sup> This article questions whether the law which governs Australia is only now Australian law, or whether Australian law, designed for local circumstances, has played a much larger part in the development of land law in this country than has hitherto been recognised.

## Introduction

The dominant prevailing interpretation of contemporary Australian land law, is, in a quite fundamental way, an historical interpretation. To argue that the law which governs Australia is now Australian law is to presume a different prior state. Such an argument inevitably leads us back to the English origins of Australian law. This interpretation of contemporary law therefore presumes the importance of the sources of the law. "It is difficult to begin a study of any area of the law without some appreciation of its sources", it is claimed.<sup>4</sup> The sources of law in New South Wales were first elaborated by W.D. McIntyre in 1892.<sup>5</sup> The law of New South Wales, as McIntyre explained, sprang from three sources: such English law as was in existence before the Constitution Act of 1828, English statutes passed since the Constitution Act which apply specifically to New South Wales, and all statutes passed by the local legislature.<sup>6</sup> All texts on land law in New South Wales subsequent to McIntyre have continued to emphasise the importance of the Constitution Act.<sup>7</sup> As Hargreaves and Helmore stated:

The fixing by statute for a definite date for the introduction of English law has the great advantage that one is left in no doubt as to what English statute law was imported.<sup>8</sup>

The effect of this emphasis on the Constitution Act of 1828 has been to periodise the development of Australian law in such a way as to prioritise the importance of English law in the story of Australian law. "In the period since 1828", we are told, "a wide divergence has developed between the land law of New South Wales and that of England".<sup>9</sup> Mentally, the effect of the periodisation is not only to affirm in our minds the importance of English law to the development of Australian land law, but also to lead us to the period after 1828 to look for evidence of the "wide divergence" between Australian and English law.

The evidence of the differences between English land law and land law in Australia was

first outlined by G.W. Millard in 1894.<sup>10</sup> With respect to differences arising from legislation designed for Australian conditions enacted by the local legislature, Millard mentioned but two examples: the Crown land legislation and the introduction of the Torrens system of registration.<sup>11</sup> Not only have Millard's examples have been adopted by the writers of legal texts in New South Wales ever since but Millard's two examples have been reduced to the sole example of the Torrens system.<sup>12</sup> The effect of this has been to reinforce in the student's mind the importance of English law to the development of Australian land law. However, rather than accepting the priority imposed by an emphasis on the sources of law, if we focus our lens on the development of law itself in Australia, a different interpretation emerges. This paper will examine the development of land transfer law in colonial New South Wales.

A student of the law could be forgiven for assuming the introduction of registration of title was the only departure from the inherited English law of land transfer in the nineteenth century. But as this study will show, there was in fact a significant body of Australian law shaping the development of registration schemes introduced, judicially interpreted, fought over, reformed and adapted during that period. Such an examination will reveal, not only that the role of English law has been over-emphasised, but also that Australian law, designed for local exigencies, has played a far greater juridical role than has hitherto been acknowledged. This will necessitate a fundamental re-evaluation of the character of Australian land law.

### **Early Registration Schemes**

Early Australia was, in many respects, a frontier society where the societal assumptions incorporated into the inherited English common law were irrelevant.<sup>13</sup> Local problems required local solutions. In particular, it was apparent to contemporaries that unregistered contracts facilitated fraud. Accordingly, Governor King, by an Order of 13 November 1800, provided that

no claim of property was to be admitted by the Civil Court of the Judicature unless the parties entered into written agreements between each other, and entered them in books provided for the purpose and kept at the Judge Advocates. This was done "to prevent litigious disputes", as the Order noted.<sup>14</sup> Then on 26 February 1802, King ordered the registration of all assignments from 6 March, "to prevent such scandalous frauds", as the Order ran; those frauds involving the transfer of property by assignment to creditors.<sup>15</sup> The Order noted further that no assignment could be considered legal unless registered at the Judge Advocates Office in order to allow purchasers to see if the property had been transferred previously.

It was held by Justice Field on 30 June 1817 that a mortgage not registered in accordance with the proclamation of 1802 was void against a subsequent mortgage which had been registered. This decision brought into question a considerable number of interests in land at the time which had been effected in ignorance of the proclamation of 1802.<sup>16</sup> Accordingly, Governor Macquarie issued a proclamation on 19 July 1817 whereby no deed was deemed to be void simply through lack of conformity with the proclamation of 1802 because of ignorance, but that each case should be considered by the Court on its merits. Earlier that year, Macquarie also issued a proclamation relevant to the public registration of deeds and other instruments. The prevailing practice of registering deeds with the Judge Advocate caused them to be mixed indiscriminately with other papers relating to land, thus defeating the purpose of public accessibility. As a result, Macquarie issued a proclamation decreeing that all deeds executed after 25 March 1817 effecting real property at law and equity in New South Wales were void as against any subsequent purchaser or mortgagee for valuable consideration unless the deed was registered before the deed under which the subsequent purchaser or mortgagee claimed.<sup>17</sup> In other words, the notoriety of land transactions, which did not even begin to animate the legal profession in England, had already been implemented, litigated and judicially interpreted for almost two decades in Australia. The juridical

role of Australian law, designed for Australian contingencies, in the practise of land ownership was already noticeable.

After the establishment of a local legislature in 1824 the principles of Macquarie's proclamation were given legislative legitimacy by a Registration Act of 1825.<sup>18</sup> The Act authorised the registration of all deeds and conveyances (except leases for less than three years) relating to any land, tenements and hereditaments in New South Wales at the Supreme Court. The registration needed to be signed by at least one person involved in the transaction and verified on oath by some "competent person" before a judge or the Registrar of the Supreme Court. But, the production of the actual instrument was not required as it had been under Macquarie's proclamation.<sup>19</sup>

### **The Registration Act of 1825**

The Registration Act of 1825 was the first important piece of indigenous legislation concerning the registration of deeds and instruments and needs to be examined in some depth, as all subsequent legislation has been conditional on that Act. First, fines and recoveries did not exist in New South Wales. The want of fines was provided for by the Act of 1825 which substituted a simple deed, duly acknowledged and registered, which had the force of a fine.<sup>20</sup> This allowed for the barring of dower, which could be barred by a fine in England.<sup>21</sup> Neither did recoveries exist in the colony and the Act of 1825 provided for the want of them by means of a specific conveyance attended by certain particular forms as outlined by the Act. When a bargain and sale was employed, the whole legal estate in fee simple was transferred by means of the Statute of Uses, with the bargainer, or vendor becoming seised to the use of the bargainer (purchaser) and his heirs. Such a conveyance could not be made effective by enrolment pursuant to the Statute of Enrolments.<sup>22</sup> But the publicity offered by that Statute was provided for by the Act of 1825.

Second, crown grants in land in New South Wales were from earliest times recorded in full

length in books kept for the purpose, a practice which continued to be done in respect of all such alienation made prior to 1 January 1863 and not already so recorded.<sup>23</sup> Needless to say, this practice was considered cumbersome by contemporaries. In respect of private deeds and conveyances, the Act of 1825 required only the registration of a memorial containing certain particulars as specified by the Act.

Third, perhaps the most important part of the Act of 1825 was that which related to priority. The proclamation of 1817 made all deeds fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration unless registered before the registering of a subsequent deed. The Act of 1825 differed from this by giving priority according to the time of the registration, but only to such deeds as were made and executed bona fide for valuable consideration. The Act provided, moreover, that priority was to be given to any deed registered within one calendar month from its execution. The effect of this was to open the door for fraud. There was nothing to prevent a fraudulent owner from making more than one conveyance of the same property, and the one month priority ruling provided that if two such conveyances were made within the same month and the second purchaser registered the deed before the first, the conveyance of the first purchaser would be void.<sup>24</sup> It was in the light of these considerations that the legislation affecting registration was enquired into in 1841 by a committee of the council with the object of effecting a reform of the law.<sup>25</sup>

### **The Law Investigated**

In evidence to the Committee, William Carr, on 11 August 1841, specifically noted the possibility for fraud presented by the one month priority ruling.<sup>26</sup> The Act of 1825 had stated that its intentions were to defeat fraud, but as Carr pointed out, a deed could be registered on the first day of the month, and the vendor could re-convey the same land on the 15th of the same month, and

should the first deed not have been immediately registered, "the solicitor who prepared the second conveyance might use every precaution by searching the Register up to the day of completing the purchase made by such second conveyance, and have done all in his power to satisfy himself that there was no encumbrance on the property", yet if the first purchaser registered his deed after the 15th and before the 30th, he should have priority over the second purchaser, who would have no redress.<sup>27</sup>

Such frauds were possible because of the regular non-appearance of the original title deeds, for which many excuses were given; for example, "where the land contained in the grant had been divided into many allotments, the title to such allotments is generally shown by attested copies of the original deeds; also where grants have been lost or destroyed, the title is shown by the next best evidence, which is an attested copy from the records kept in the government offices", Carr noted.<sup>28</sup> With second mortgages, moreover, the mortgagee's solicitor was usually satisfied with copies of the original deeds. Consequently, a fraud was possible if the deed was not registered immediately. The priority period of one month only exacerbated the problem.

It was not only the period for registration at the Supreme Court that was criticised, but the practice and organisation of the Deeds Registration branch of the Supreme Court itself. F.W. Unwin complained of the state of deeds searches whereby a careless search was often conducted by either the Clerk of the Office or, more frequently, the solicitor's own clerk to whom the indexes were handed over. The result was often a report to the solicitor of no encumbrances where they did in fact exist. Unwin described this situation where, "the solicitor is exposed to his own clerk pocketing five shillings and cheating him, and in the next place the carelessness of the clerk in the Registrar's offices, on whom no responsibility lies".<sup>29</sup>

By far the most persistent issue, in the eyes of the witnesses to the committee, however, was the question of whether judgments should act as a lien on lands. The law held that if a debtor

sold lands, of which he was the owner at the time when the judgment of the court was given against him for the recovery of the debt or damages, or which he acquired subsequently, the creditor might in either case, under the writ furnished by the Statute, take a moiety of the lands out of the hands of the purchaser. Hence it became important for all purchasers of land to ascertain whether there were judgments against their respective vendors, for these were encumbrances on the purchases. It was for this reason that F.W. Unwin complained so bitterly of the state of the Deeds Registration office in the Supreme Court.<sup>30</sup>

By the Imperial statute concerned with the payments of debts out of Real Estate in New South Wales of 1813, moreover, land was put, in terms of payment of debts, on the same footing as personal chattels. It was, in practice, subjected to the same mode of conversion as leasehold estates in England. James Norton, in evidence to the Committee on 9 August 1841, felt that the right given by the Statute of 1813 superseded the claim a plaintiff had in England to a moiety of the rents and profits of the lands, and that it was neither necessary nor desirable to allow plaintiffs, by the registration of judgments, to encumber the lands of defendants and prevent them from exercising the means of discharging such judgments by the sale of their lands, nor to prevent the plaintiff from availing himself of the right of selling land under their executions.<sup>31</sup>

R. Donnelly, moreover, in evidence to the Committee on 9 August 1841, felt that, as a consequence of the Act of 1813, the legal profession considered freehold property to be in the same position as leasehold with respect of judgments; that is, they were binding from the date of their execution. As a result, solicitors seldom searched for judgments. He felt if judgments were to bind lands in the Colony from the date of registration as opposed to the date of execution, they could not ensure a safe title.<sup>32</sup> The question of whether judgements should make a lien on lands was a continuing problem. As Charles Henry Chambers pointed out in evidence to the Committee, his opposition to such a provision was rooted in the difficulties it would cause in the way of

subsequent creditors obtaining payment of their debts, out of the property charged. He reaffirmed that the impression of the profession was in accordance with the construction of the Imperial Act of 1813 judgments did not operate as a lien on lands in the colony until executions were issued.<sup>33</sup>

It was the solicitor Robert Owen, however, who articulated the concerns of the witnesses with most force. He recognised the inapplicability of a rule such as judgments forming a lien on lands, with the exigencies of the colonial context. For, as he noted, "the Law of Judgment binding land was calculated for ancient times, when the exigencies of society and commerce required fewer changes of property".<sup>34</sup> It was this question of applicability to colonial conditions which marked the opposition to the role of judgments. The question was one of how a decision binding lands would interfere with viable commercial enterprise, in that "judgments binding lands", noted Robert Owen, "must have the effect of interfering with the free disposal of real property, which freedom I conceive to be very essential to the prosperity of these colonies".<sup>35</sup> It was for the same reason that F.W. Unwin decried the virtual secrecy of judgments.<sup>36</sup> He recommended their registration if they were to bind land, because these judgments are not known to the public, and that a party would be enabled to obtain credit if his property was unencumbered; and if it were intended to afford the plaintiff security on land, it might be better done by a Deed of Mortgage. If judgments are to form a lien on lands, this provision for their registration is in my opinion extremely advantageous and necessary, because at present a search must be made in the Records of the Supreme Court, term by term, at a great expense to the party, and loss of time to the Chief Clerk's Office.<sup>37</sup>

It is interesting to note that not all were in agreement with the recommendation. Robert Owen specifically opposed even a registration of judgments acting as a lien on lands because it materially interferes "with the change of property, as in the case of A.B. having large landed estates,

it must follow that the judgment affects those lands, all purchasers posterior by judgments would be placed in jeopardy, or the landholder might not be able to sell at all." Owen's specific focus of opposition was revealed when he concluded: "I think it opens a door to fraud".<sup>38</sup> Owen's warning was not heeded, however, as the legislature took the middle course advocated by Unwin when section 10 of the Deeds Registration Act of 1842 enacted that no judgment should bind lands unless the execution was lodged with the Sheriff.<sup>39</sup>

The other effect of the Registration Act of 1842 was on the conveyancing practice of lease and release. An English Statute of 1841 had abolished the lease for a year, thus simplifying the complex conveyance of two deeds in order to effect a land transfer. The Colonial Act of 1842 similarly made a lease alone sufficient for the transfer, by making a recital, or mention of a lease, conclusive evidence of its prior execution. This would seem to have been based on the English Act of 1841, although its wording was in no way similar.<sup>40</sup> As a consequence of these changes, the Act of 1842 went a long way towards simplifying a complex inherited system of conveyancing as well as materially increasing the security of titles in the transfer of landed property.

### **The Law Reformed**

In 1843 the previous legislation respecting the registration of deeds, in particular that of 1825 and 1843 was repealed, substantially re-enacted and consolidated.<sup>41</sup> On the question of the conveyancing procedure of lease and release, the provisions of 1842 making a lease alone sufficient was repealed and re-enacted. This provided, in a relatively final form, that every deed or instrument of release executed after the passing of the Act was to be effected as if the releasing parties who had executed the same had also executed a lease, or bargain and sale for a year, giving effect to the release, although no such lease or bargain and sale had in fact been executed. The recital or mention of a lease or bargain and sale in a release executed before 1 January 1844 was to

be conclusive evidence of the execution of such lease or bargain and sale.<sup>42</sup>

On the question of conveyancing, the Registration Act of 1843 repealed and re-enacted the provisions of the Act of 1825. It supplied the want of common recoveries by providing that any deed in due form of law was to be valid to pass all the estate and claims of the respective parties to the deed, as if a common recovery had been suffered by such lands.<sup>43</sup> On the all-important question of priority, the Act of 1843 re-enacted the previous law, which provided that all instruments (except a will) affecting any lands or hereditaments or any other property in New South Wales which were executed or made bona fide or for valuable consideration and were duly registered under the provisions of the Act, should have and take priority not according to their respective dates, but according to the priority of registration only. Finally, on the question of the administration of deeds registration, the Act of 1843 provided for the appointment of a Registrar General for the registration of assurances affecting real property. The previously registered records in the Supreme Court were transferred and re-registered.<sup>44</sup>

The legislation of 1843 left two questions of vital importance to land transfer in New South Wales unresolved. These were, first, the construction of the priority clause, and second, the question of the period of limitations. According to the Act of 1843, the priority clause had re-affirmed the previous principle of according priority to the date of registration and not the date of execution. However, the wording of the Act was such that this principle was to affect property executed or made bona fide or for valuable consideration. This differed from the Act of 1825 which had mentioned property made bona fide and for valuable considerations, and from the Act of 1842 which had made no mention of bona fides or valuable consideration, and thus implied the wording of the Act of 1825. This would not seem to be a major difference, but, the confusion it caused in the courts was considerable.<sup>45</sup> In order to rectify this confusion, Robert Lowe drafted a Bill in 1849 to "simplify the Law of Real Property".<sup>46</sup>

### **The Law Debated**

The Bill was subsequently referred to a Select Committee.<sup>47</sup> The basic opinion of those giving evidence was that a deed should have priority according to the date of registration whether bona fide or not. As the witnesses noted, however, the Bill was very artlessly drafted. The committee voiced a similar opinion in its report, and the Bill was not continued with. Indeed, the unhappy form of the Bill prompted Alfred Stephen to draft a Bill of his own wherein there was a clause to ensure that the priority of a registered deed should not be lost by the fraud of the conveying party, a clause which ultimately found expression in the Titles to Land Act of 1858.<sup>48</sup>

The second major issue of concern dealt with by the Select Committee on the Real Property Law Bill in 1849 was the question of the proper period for limitations of actions to be effective. In 1837 the New South Wales legislature had adopted the Imperial Limitations of Actions Act of 1833. As a consequence, when a mortgagee had obtained possession of any mortgaged land, the mortgagor could not bring a suit to redeem the mortgage, but could within 20 years after the time at which the mortgagee had possession, or had signed or written acknowledgment of the title or right of redemption of the mortgagor, or had received payment of any part of the principal money or interest secured by the mortgage. When a mortgagor's right of redemption was barred, moreover, his title was extinguished and his land became irredeemable. Conditions in New South Wales varied greatly from conditions in England for which the Act had been drafted. "The greatest difficulty", noted W.W. Billyard on 27 July 1849, "in this for conveyancers is with regard to the identity of property. . . . [I]n England property is easily identified, being described as bounded on the north by such a person's land; on the south by another person's, and so on; and you can get declarations to show the identity; in this Colony nearly all the old grants are void from the uncertainty of description".<sup>49</sup> As a result of these local conditions and

with due reference to the faulty state of the registration of deeds in the sense of their retrievability, it was universally held by the witnesses that local conditions dictated the shortcoming of the period of limitations. As Robert Johnson pointed out on 24 July 1849: "Property changes owners here more frequently than at Home. Such changes would not occur in England in a hundred years as occur here in twenty".<sup>50</sup> For this reason Johnson recommended the shortening of the period of limitations to account for "the rapidity with which property changes hands here".<sup>51</sup> Such a view was reaffirmed by Billyard on 27 July 1849 when he argued, "in England, even as the law stands now, you have to deduce the title for sixty years, and, I think, it would increase the value of real property in this Colony, if you make the period shorter".<sup>52</sup> Similarly, G.K. Holden argued for shortening the period of limitations because: "the general advantage gained in security, simplicity and economy, in all transactions in land, far outweighs the occasional hardship of a claim prematurely barred. The sacrifice made for equivalent considerations in limiting actions affecting money and chattels is far greater".<sup>53</sup>

It was the question of "occasional hardship", against the "general advantage gained in security, simplicity and economy in all transactions in land", that provoked some disagreement among the witnesses. As the law stood there was, despite the general twenty years limitations rule, provision for extending the period of limitations with respect to persons under the disability of lunacy, infancy, coverture and absence beyond the seas. Robert Johnson noted with some dismay that there was, however, no such provision in Robert Lowe's Bill under examination. Not only did he think such provisions were necessary and expedient, but he argued, "perhaps they are more necessary here than in England, because there is more property here belonging to absent owners than in England, and many persons die here leaving an heir at Home".<sup>54</sup> Johnson argued alone on this point, however, as all the other witnesses argued strongly against any such special provision. The reasons for their beliefs provide a singular insight into not only the legal but the colonial

commercial mentality.

"There can be no just reason", argued G.K. Holden to the Committee, "why an antipodean heir, whose existence is likely to be unknown and even undiscoverable here, should have a double time allotted him for raking up the ashes of his genealogy, to the prejudice of parties who have bought and improved the land".<sup>55</sup> Holden argued that it was a totally different case from the absence contemplated by the English law where owners were more easily traceable and less likely to be absent. "As the law now stands in this Colony", he argued, "the purchase of land from the apparent eldest son of a settler married in the Colony owns the risk of rejection by an unknown heir, born, it may be, of some former unknown English marriage, and the very distance that baffles all enquiry is made a ground for extending for forty years a claim which would otherwise die out in twenty".<sup>56</sup> As Holden went on to argue, "infinite mischief might ensue" if the heir of any grantee of land could prove the grant without producing the original grant, then by proving his own relationship to the grantee, put the present occupier to strict proof of his title which he (i.e. the occupier) derived from the grantee. In the course of forty years, he pointed out, during which the right of action was retained by the heir, in virtue of the provision for his disability, the evidence required to support the most honest titles could become lost or inaccessible. Property, as Holden noted, "improved to a hundred fold its original value, may excite the cupidity of an heir whose connection with the forgotten owner would never have been otherwise thought of, and who gains his first intelligence of the prize from an advertising attorney speculating on his share of the spoil".<sup>57</sup>

Yet it was not just by denigrating the claims of absent owners that men like Holden argued their case. There were also commercial considerations. It was indeed possible that frauds could occur as against the interests of bona fide owners who happened to be absent, as the Committee pointed out. But the question was one of balance for men like W.W. Billyard. "I should consider"

he argued, "whether the clause, passed in this way, would increase the value of the property, and facilitate its transfer, and if so, whether this advantage would more than counterbalance the disadvantage? No doubt frauds of the kind to which you have referred might occur".<sup>58</sup> Holden concurred with this view, and argued that the Court could always provide for the eventuality of fraud.<sup>59</sup> It was left to Alfred Stephen to point out the inapplicability of the English law to the colonial conditions. He argued that was where the root of the tension lay.

"In England", he noted, "the absence of the parties entitled is the exception; here it is the rule".<sup>60</sup> While he was not totally opposed to the principle of providing for disabilities, such as absence overseas, he stressed the tension between the colonial exigencies and the state of the existing law. "But what I would draw attention to", he argued, "is the absolute dissimilarity between the state of things existing here as to land, and that which exists in England".<sup>61</sup> Stephen made the point that land in New South Wales was without value unless improved. "It has been what canvas is to the painter", he noted somewhat lyrically, "the skill and labour of its first owner, or someone purchasing from him, have given it value; and now that the picture is completed at great cost, some absentee taking advantage of some flaw in the terms of the transfer is tempted to come here and claim the fruits of another man's toil and money".<sup>62</sup> Stephen was focussing on the relationship between improvement and the right to tenure. Because the law favoured absentee owners rather than possessors, there was less incentive on the part of the owner to improve his property. The adopted English law stood in the way of giving security to the title, not of the absentee (and strictly legal) owner, but of the colonial occupier who possessed and improved the property. It is this question of whom the law should operate for which stood at the heart of the tension between English property law and the exigencies of colonial New South Wales. Stephen's argument about transfer was that the moral right of the colonial occupier should stand superior to the legal right of English ownership.

Perhaps unwittingly, Robert Johnson's evidence highlights the irony and even illogicality of Stephen's position because, as Johnson noted, "proof of possessions . . . with respect to real property is much more difficult here than . . . in England, from the circumstances of many tracts of land being scarcely ever in actual occupation of the owners for any length of time, whereas in England property is always in the possession of some actual person".<sup>63</sup> It is this paradox that lies at the heart of the tension between colonial exigencies and the state of English property law.

Colonial exigencies, Stephen asserted, determined that "almost every man in the earlier times was a proprietor of the land; and it has largely been trafficked in, and passed from hand to hand, almost as chattels are--with little formality or knowledge of what were the necessary formalities on such transfers". And yet the law favoured not the colonial occupier, nor the colonial exigencies of land transfer, but the absentee: "a person never in the colony, nor ever intending to come here, but for such a cause. I confess I have not the same respect for such cases of disability as conveyancers seem to have".<sup>64</sup> Consequently, Stephen submitted his own Bill, which he felt was more attuned to colonial conditions on the central issue of mortgagability.

"A very large portion of the lands of the colony", Stephen noted, "as we all know, either is or has been under mortgage. Many mortgages have at different times been paid off and again mortgaged".<sup>65</sup> In colonial conditions, he argued, the party who had received the mortgage money and interest may have been an agent only, having a perfectly valid power to that extent, but no sufficient power to re-convey. Besides such cases, every additional (subsequent) mortgage involved considerable expense in conveyancing, in both abstracts and recitals. Stephen felt that when a mortgage was paid off it should be (save to past transactions) as if it had never existed; that the mortgage should thenceforward form no part of the title, but that the mortgagor should be as of his first estate. Accordingly, his Bill made a provision that would have effect as if the mortgage had been originally drawn to be made void on payment of the money at a given day, and payment had

in fact been made on that day. The provision allowed the mortgagor to register his receipt, or not, at his discretion, thus preventing the difficulties which could arise from an enactment that the payment ipso facto should operate as an extinction.

It was this Bill affecting Real Property that was put under the scrutiny of a Select Committee in 1850.<sup>66</sup> On the central clause relating to mortgages, not all were in agreement with Stephen. As James Norton testified on 5 September 1850, there were difficulties present in the reconveyance of mortgaged lands which made it difficult to dispense with the production of the original mortgage or release, as part of the title. Norton outlined those difficulties as: (1) that the payment may be part only of the mortgage money on which part only of the mortgaged land may be released; (2) the releasee may be an assignee or representative of the mortgagee; (3) the mortgage may be to a party who had by purchase or otherwise acquired the equity of redemption, and in whose title a disclosure of the mortgage must have been made; (4) the releasee may be the Attorney of the mortgagee who must establish his power and make that power a link of the title.<sup>67</sup>

Norton was unaware, moreover, of any means by which the instruments could be safely dropped out of the title, the precise effect and operation of the deeds always being a question in which the owner of the land was interested. With respect to a power of attorney, it was quite possible that it may be a power to invest on mortgage and not to receive mortgage money. The real grievance, Norton maintained, was the unnecessary length and complexity of mortgages and that reconveyances were too commonly unnecessarily prepared by separate deeds containing long recitals instead of being effected by a short endorsement on the original mortgage.<sup>68</sup>

What then was the position of mortgages? In the early nineteenth century a mortgage consisted of an absolute conveyance to the mortgagee, and a separate deed called a defiance by which the right of redemption was intended to be secured to the mortgagee. That practice which led to gross frauds, was followed by a form of mortgage prevailing in the mid-nineteenth century,

and which had by degrees, taken away all security from the mortgagor. Under the latter system, the mortgagee could at any time, without notice, by private contract sell to any party at any price he thought proper; in other words, he could cheat the mortgagor and sell to his own friend. What remedy did the mortgagor have? Only a suit which would, in all probability, not decide in his favour. Or so, at least, was the opinion of Norton. For him, such a situation was just as bad as the conveyance and defiance because the conditions of the contemporary mortgage offered no security for the future. He proposed that a mortgage could be effected by a deed which concisely stated the amount of the loan, the period for which it was made, the rate of interest, and a description of the property. He also proposed that the legislature regulate the mode of obtaining satisfaction by sale, a notice of which should convey to the public and the parties interested all the information which ought for their security to be made public. As he observed it, by the rules and practice of Chancery, very inexpensive modes of foreclosure and redemption were provided, and he felt it would be safer to compel parties to apply to a Court of Equity, so the court could have the power of regulating the sale of mortgage property in such a way as to prevent frauds.<sup>69</sup> Stephen's Bill of 1850 did not find its way onto the Statute Books.

### **The Titles to Land Act of 1858**

The only other change to the law concerning land transfer before the substantive reform of 1862 which saw the introduction of the Torrens system of registration was the Titles to Land Act of 1858.<sup>70</sup> The Act consolidated the preceding legislation regarding registration of deeds, and in some respects it took up the grievances of the Select Committees of 1849 and 1850. But in all respects it reflected the tension between the state of English law and the nature of colonial conditions. One of the major contributions of the Act of 1858 was on the question of the payment of debts out of real estate. A creditor who had in his debtor's lifetime taken legal proceedings

against him for the recovery of debts and obtained a judgement in a Court of Law in his own favour, had a great advantage. Under English law, by a writ of feri facias the creditor could have delivered to him by the Sheriff, all the chattels and a moiety of the lands of the deceased debtor, until the debt was levied at a reasonable price. In New South Wales, however, the imperial statute 54 Geo. III c. 15, enabled the creditors to take all the lands of the debtor, and to sell those lands, neither of which could be done in England.<sup>71</sup>

That was the law regarding private debts. Debts which were due or might have become due to the Crown were by imperial statute made binding on the estate in fee simple when sold as well as when devised by will or descended through inheritance. For the protection of purchasers and mortgagees, however, the Act of 1858 provided that the Auditor General could at any time take and pass the accounts of any such debtor or accountant, and upon satisfaction thereof, could certify the same. Thereupon the Governor could, by writing, countersigned by the Colonial Secretary and the Colonial Treasurer, release all or any of the land of the debtor in respect of all claims of the Crown against him up to the date of the release. Every such release had the effect of an absolute discharge of all the lands of the debtor, or of the particular lands specified, as the case may be, in the hands of any bona fide purchaser or mortgagee in respect of the above claims.<sup>72</sup>

With reference to conveyancing, the Titles to Land Act of 1858 stipulated that it was unnecessary to give effect to any feoffment executed before 3 January 1842, but that any such feoffment to have taken place was taken to have been livery of seisin in its most valid form. There was always the possibility when delivering the seisin or feudal possession by feoffment that a person could make a feoffment of an estate to which he was not entitled; such a feoffment would have operated by wrong (i.e. a tortuous conveyance). For example, if a tenant for life made a feoffment for lands of an estate in fee simple, the feoffee would have acquired both estate for life, and the fee simple, by wrong. Accordingly, such a feoffment was regarded as a cause for forfeiture

to the person entitled in reversion; in other words, such a feoffment was a conveyance of his reversion, without his consent. Therefore, the Titles to Land Act of 1858 provided that nothing in the Act should make any such feoffment operate as a tortuous conveyance.<sup>73</sup>

Trust estates were liable, like estates at law, to involuntary alienation for the payment of the owner's debts. As to judgement debts, the Advancement of Justice Act of 1841 had provided that it was lawful for the Sheriff to whom any writ of feri facias had been issued out of the Supreme Court, to take and sell any equity of redemption or other equitable interest belonging to the defendant, and that this would pass all the defendant's right and title to, and interest in, such equity or equitable interests. But a proviso was added that where the equity or equitable interest related to real estate, a deed of bargain and sale should be executed by the Sheriff to the purchaser. Under the Advancement of Justice Act, moreover, this bargain and sale needed to be registered within one month of the sale--non-registration would leave the purchaser's title defective. To obviate any difficulties, the Titles to Lands Act of 1858 stipulated that no such deed before or after 30 June 1858 should be deemed invalid by reason only of non-registration. But it did not decide whether this meant doing away with the necessity to register at all or only to register within one month.<sup>74</sup>

Concerning this question of the priority of registration, the previous law had provided that all instruments excepting wills affecting any lands or hereditaments or any other property in New South Wales which were executed and made bona fide and for valuable consideration and were duly registered under the provisions of the Act, should have and take priority, not according to their respective dates of execution, but according to the priority of registration. A deed was not held to be bona fide when, at the time of making it, there was knowledge or notice of some prior dealing. Before 1858 it was held that the bona fides, moreover, must be in the conveying party. But the Titles to Land Act of 1858 stated that no deed would lose priority by reason of bad faith only in the conveying party, if the receiver acted bona fide and there was valuable consideration

given for the same.<sup>75</sup> After 1858, therefore, no fraud by the conveying party could affect the efficiency and operation of a registered deed, if the taker was himself innocent and gave value for the property.<sup>76</sup>

Many contemporaries recognised the importance of security of title to the commercial viability of land transfer; many also recognised the imperfection of prevailing laws and administration regarding registration. Christopher Rolleston, the Registrar General, admitted to the Select Committee on the Registration of Deeds affecting Real Property on 27 January 1859 that the classification of lands in his own department was "very unsatisfactory", and that searches were consequently onerous and laborious. This was due, he admitted, "partly to defects in the indices for about ten years--from 1838 to 1848--and partly to defects in the system of registration". And the most damning criticism of all, he freely admitted, was there were no provisions to meet a case of forgery.<sup>77</sup>

When asked what solution to this problem he favoured, Rolleston spoke of Robert Richard Torrens' South Australian system of registration of title which, "by making the title surer and more easily traceable" would cheapen the cost of land transfer, make land more saleable, and enhance its value.<sup>78</sup> Rolleston was quite specific as to the ultimate benefits of such a system when he asserted that it would "direct a much larger capital to landed investment than is at present employed in that way".<sup>79</sup> In his criticisms and recommendations, Rolleston was re-affirming what Alfred Stephen had pointed out ten years before: "that the circumstances of this colony, in the past years, have been peculiar to it; and that the English law of real property is not fairly applicable to such a state of things".<sup>80</sup> The intervening decade had only reinforced his opinion that the substantive principles of English property law needed reform to meet the exigencies of local conditions.<sup>81</sup>

## **Conclusion**

During debate over the Titles to Land Bill in September 1857 Sir William Burton argued that "there was nothing in the circumstances of this colony so different from England as to justify this measure."<sup>82</sup> Indeed, for Burton New South Wales was, in a very real sense:

England in miniature, a portion of England, and what difference was there in the population that such an alteration should be made in the law? He looked around him with pleasure, and he would ask, were they not all English, heart and soul, and why should this proposed difference be made?<sup>83</sup>

But unlike Burton, other lawyers and legislators were aware that Australia was a very different place indeed. As Sir Alfred Stephen pointed out in debate on the Bill: "Land here is not like land in England, there it remained in the same family for years and years, here it passed rapidly from hand to hand; was as much an article of trade as a bale of commerce."<sup>84</sup> Moreover, as Robert Isaacs pointed out in further debate on the Bill: "land in this colony was regarded more in the light of personal property than in England".<sup>85</sup> Indeed, the meaning of property had begun to change in Australia as a consequence of legislative initiatives designed to address local conditions.<sup>86</sup>

At the beginning of this paper it was asked: How "Australian" is Australian land law? In the light of this study of the development of land transfer law in New South Wales it is suggested that the juridical role of Australian law needs to be significantly re-assessed. In particular, our understanding of the character of land law requires a different "history" to the one first articulated in the 1890s and repeated with little variation ever since. As this article has shown, if we shift our attention from the sources of law and the periodisation such a focus imposes to a detailed investigation of specific areas of the law we find abundant evidence of Australian law developing in response to Australian conditions. Through the application of the methodology presented here we may even discover, hidden beneath our traditional understanding of the law in Australia, the outlines of a distinctively Australian jurisprudence.<sup>87</sup>

## ENDNOTES

1. Peter Butt Land Law (3rd ed, 1996) 7.
2. G.W. Millard An Appendix to Williams' "Law of Real Property" for the use of students in New South Wales (1894) 9.
3. For a critical analysis of this claim, see A.R. Buck "Torrens Title, Intestate Estates and the Origins of Australian Property Law" Australian Property Law Journal 4 (1996): 89.
4. Butt, above note 1, 1.
5. William D. McIntyre Manual of the Law of Real Property in force in New South Wales (1892).
6. Ibid, i-ii.
7. In addition to the works cited subsequently, see Alex C. Castles An Australian Legal History (1982) 397-99; V. Windeyer "A Birthright and Inheritance: The Establishment of the Rule of Law in Australia" (1961) 1 Tasmania University Law Review 667-69.
8. A.D. Hargreaves and B.A. Helmore An Introduction to the Principles of Land Law (New South Wales) (1963) 1.
9. Butt, above note 1, 5.
10. Millard, above note 2, 5-9.
11. Ibid, 7.
12. See, for example, B.A. Helmore Millard's The Law of Real Property in New South Wales (6th ed, 1948) 5; Hargreaves and Helmore, above note 8, 3; Butt, above note 1, 6.
13. See Bruce Kercher, "Homer in the Australian Alps: Attitudes to Law since 1788" (1995) 1 Australian Journal of Legal History 1.
14. C.H. Currey "Chapters on the Legal History of New South Wales, 1788-1863" (LLD thesis, University of Sydney, 1929) 357.
15. Ibid.
16. Ibid.
17. Sydney Gazette 25 January 1817.
18. 6 Geo. IV., No. 22.
19. Currey, above note 14, 357.

20. R.E. Kemp Principles of the Law of Real Property in New South Wales (1904) 279.
21. Millard, above note 2, 29. See also A.R. Buck "A Blot on the Certificate: Dower and Women's Property Rights in Colonial New South Wales" (1987) 4 Australian Journal of Law and Society 87.
22. Kemp, above note 20, 225.
23. Ibid, 519.
24. Ibid, 521.
25. "Select Committee on the Registration Act Amendment Bill", Votes and Proceedings of the New South Wales Legislative Council, 1841, Vol I.
26. Ibid, in evidence 11 August 1841.
27. Ibid.
28. Ibid.
29. Ibid, 13 August 1841.
30. Ibid.
31. Ibid, 9 August 1841.
32. Ibid.
33. Ibid, 12 August 1841.
34. Ibid, 13 August 1841.
35. Ibid.
36. Ibid.
37. Ibid.
38. Ibid, 13 August 1841.
39. 5 Vic., No. 21, s. 10.
40. Kemp, above note 20, 214.
41. 7 Vic., No. 16.
42. By section 26. The Deeds Registration Act took effect on 1 January 1844.

43. By section 16.
44. Kemp, above note 20, 520-21.
45. Millard, above note 2, 134-42; Kemp, above note 20, 521-22.
46. The Bill was read a second time on 10 July 1849 and referred to a Select Committee.
47. "Select Committee on the Real Property Law Bill", Votes and Proceedings of the New South Wales Legislative Council, 1849, Vol. II.
48. 22 Vic., No. 1.
49. "Select Committee on the Real Property Law Bill", in evidence 27 July 1849.
50. Ibid, 24 July 1849.
51. Ibid.
52. Ibid, 27 July 1849.
53. Ibid, 16 August 1849.
54. Ibid, 24 July 1849.
55. Ibid, 16 August 1849.
56. Ibid.
57. Ibid.
58. Ibid, 27 July 1849.
59. Ibid, 16 August 1849.
60. Ibid, 6 August 1849.
61. Ibid.
62. Ibid.
63. Ibid, 24 July 1849.
64. Ibid, 6 August 1849.
65. Ibid.
66. "Select Committee on the Laws of Real Property and Dower Bills", Votes and Proceedings of the New South Wales Legislative Council, 1850, Vol. I.

67. Ibid, in evidence 5 September 1850.
68. Ibid.
69. Ibid.
70. 22 Vic., No. 1.
71. Kemp, above note 20, 92-98.
72. Ibid, p. 98.
73. Ibid, p. 169.
74. Ibid, p. 198.
75. By section 18.
76. Millard, above note 2, 141-42.
77. "Select Committee on Registration of Deeds affecting Real Property", Journal of the New South Wales Legislative Council, 1858-59, in evidence 27 January 1859.
78. Ibid, 3 February 1859.
79. Ibid.
80. "Select Committee on the Real Property Law Bill", in evidence 6 August 1849.
81. Such reform would be implemented by the Real Property Act of 1862, which lies beyond the ambit of this paper. However, for a discussion of the social context of that legislation, see A.R. Buck, "The Logic of Egalitarianism: Law, Property and society in mid-nineteenth century New South Wales" (1987) 5 Law in Context 18.
82. Ibid.
83. Ibid.
84. Sydney Morning Herald 28 August 1857.
85. Sydney Morning Herald 3 September 1857.
86. This point is explored further in A.R. Buck "Attorney General v Brown and the Development of Property Law in Australia" (1994) 2 Australian Property Law Journal, 128.
87. See also A.R. Buck "Property Law and the Origins of Australian Egalitarianism" (1995) 1 Australian Journal of Legal History 145.