

BOOK REVIEWS

INTRODUCTION TO LAND LAW, P. Butt, B.A., LL.M. (Syd.), Senior Lecturer in Law, University of Sydney. (The Law Book Company Limited, Sydney, 1980), pp. i-xxxii, 1-395 with Table of Statutes, Table of Cases and Index. Paperback recommended retail price \$32.50 (ISBN: 0 455 20136 6).

THE MORTGAGEE'S POWER OF SALE, C. E. Croft, B.Ec., LL.M. (Monash), of the New South Wales and Victorian Bars, Barrister-at-Law, W. M. Tapp Research Student of Gonville and Caius College, Cambridge. (Butterworths Pty. Ltd., Sydney, 1980), pp. i-xxxii. 1-176 with Table of Statutes, Table of Cases and Index. Cloth recommended retail price \$19.00 (ISBN: 0 409 44850 8).

Although there is much that is common to English and Australian Property Law, there are also marked differences. The English Law of Property Act 1925 and the growth of the Torrens system of title by registration in Australia have both contributed to these differences, as has the reluctance of the Australian courts to follow some of the more radical innovations of the English courts, in particular of the Court of Appeal. Consequently, the standard English property law texts no longer meet the needs of Australian lawyers and students. Thus both the books here reviewed in some measure fill a real need.

Although Peter Butt's book will be welcomed in particular by students tackling the subject for the first time the author's hope, expressed in the preface, that it will also be of use to "legal practitioners seeking a concise statement of the leading principles of land law" should prove well founded. Though the book is conventional in both content and approach, the fact that it breaks no new ground should elicit neither surprise nor criticism. It is lucid and comprehensive and provides the overall view of the subject essential in an introductory work. The opening chapters trace the development of land law from feudal times to the present, while those following deal with contemporary law as it affects both general law and Torrens title land. Although in such a book considerations of space eventually prevail, it would have been useful to have had some discussion of the impact of modern zoning and town planning laws other than the brief reference on page 218. Similarly it can be argued that there is a place even in an introduction to land law, for a consideration of the nature of proprietary interests, particularly in the context of the Commonwealth Parliament's power to acquire property.¹

One particularly useful feature of the book is found in Appendix I, where the author provides some excellent illustrations of the interaction between the class-closing rules and the rule against perpetuities. These examples show not only how the class-closing rules may save a gift which would otherwise infringe the rule against perpetuities, but also how those rules may operate to exclude possible beneficiaries even where there is

1 S.51 (xxxii) Commonwealth of Australia Constitution Act 1900.

no perpetuity problem. Part B of Appendix I illustrates possible interpretations of section 16 (1) of the Conveyancing Act 1919 (N.S.W.) and suggests a preferred approach. Appendix II contains the New South Wales Law Reform Commission's draft legislation for reform of the law relating to perpetuities.²

Perhaps the outstanding attributes of this book are its clarity and conciseness, both achieved without sacrificing accuracy. There are no more important attributes in an introductory text. At a price of \$19.50 for the soft cover edition (\$29.50 for the hard cover), the book is good value.

Regrettably one must be less enthusiastic about Croft's work on the law relating to the mortgagee's exercise of his power of sale. The appearance of the work is timely since there has been a steady stream of litigation in this area in recent years. Perhaps this timeliness accentuates the work's deficiencies.

The book deals with the relevant problems in the order in which they are likely to arise during the course of an actual sale. There are introductory chapters on the nature of mortgages and the source of the power of sale with a useful appendix providing forms and precedents. Between these two the author deals with the conditions precedent to the exercise of the power of sale, the mortgagee's right to possession and its enforcement. There is quite a long section on the duties that are imposed on a mortgagee exercising his power and finally a consideration of the purchaser's rights and duties and the factors governing the distribution of the proceeds of sale.

The discussion is on the whole clear and concise and, as Mr. Justice Northrop suggests in the foreword, it is directed to the solicitor seeking a quick answer. At various points the author cuts through an area of uncertainty and provides sensible solutions to practical problems, as for instance in the discussion of the equitable mortgagee's right to possession (pages 44-48). Similarly the discussion of the standard of care required of a mortgagee exercising his power of sale concludes with a valiant attempt to clarify the judicial requirements in this controversial area. While some of the confusion might be dispersed by a more skeptical examination of what the courts do rather than of their verbal rationalisations, the author's technique in listing those propositions which may be asserted with confidence at least minimises the area of doubt.

Some of the limitations of this work arise no doubt from the compromise between comprehensive treatment and conciseness. At times the author attempts to extract a clarity and simplicity that are at odds with the complexity of the material. At times the text is so terse as to be more bibliographical than expository, as for instance in the distinction drawn between equitable mortgages and equitable charges (page 3). However, these are minor flaws. More disturbing are several substantial errors and omissions. For example, paragraph 69 (page 16) states that a mortgage of land under the Real Property Act 1900 (N.S.W.), "may dispense with the necessity for periods of notice and default, indeed with any notice at all . . .". This is clearly wrong: section 58A provides that notice of payment may not be dispensed with where it relates to "default in the payment on the due date of any principal, interest, annuity, rent-charge or other money". Indeed section 58A(2) states expressly that such an agreement would have "no force or effect". Again, in the discussion of the mortgagee's right to possession, the author cites authorities to the effect that Section 2A of the Landlord and Tenant Act 1899 (N.S.W.) does not restrict the right of a person to obtain possession without recourse to the courts (para. 87, page 61). He omits to refer to Section 2AA of that same Act, which abolishes the right of peaceable re-entry in relation to residential premises.

2 New South Wales Law Reform Commission, *Report on Perpetuities and Accumulations* (1976) 90.

The discussion (para. 215ff) of the priority of successive equitable mortgagees of Torrens title land is interesting. As the author demonstrates (para. 230), difficult priority problems arise where the order in which caveats are lodged differs from the order in which the securities are created. It is however misleading to refer to these successive mortgages as "registrable" since it seems the delivery of the duplicate certificate of title is not hypothesised. Presumably it is assumed to be in the custody of the proprietor of the registered mortgage. It is of course possible for the Registrar to dispense with the production of the certificate of title³ but the problem discussed in paragraph 230 hypothesises three successive, registrable interests, a highly unlikely occurrence.

The confusion probably stems from reliance on the analogous English problems. The examples the author discusses are based on problems posed by Megarry and Wade.⁴ However, under the English system which they describe, it is possible to have successive registrable mortgages. In Australia there are difficulties in regarding the interest as registrable until the holder of that interest has either possession of, or access to, the duplicate certificate of title.⁵

The author suggests (para. 232) that because of the difficulty of resolving these priority problems "the correct interpretation of Real Property Act Section 58(3) and Transfer of Land Section 77(3) is that 'mortgagees . . .' etc., refers only to registered mortgages." He does not discuss the implication of such an interpretation. Is he suggesting that the mortgagor who has exercised his power of sale has no duty to pay money owing under unregistered mortgages? Is payment to be the responsibility of the mortgagor. The priority problems are not solved in this way. The better solution would be to adopt Professor Sackville's suggestion and base priority on the order in which caveats were lodged.⁶ This in effect provides a system of registration of equitable interests.

Of course, if any one of the parties concerned had obtained possession of the duplicate certificate of title, then the resolution of the problem would be quite different. That person could then claim to have priority over subsequent mortgages on the basis of *J. & H. Just (Holdings) Pty. Ltd. v Bank of New South Wales*.⁷ In N.S.W. section 43A would ensure that he also took priority over previous equitable mortgagees provided that his registrable dealing had been obtained without notice of those prior interests.⁸

There is at least one other area where a discussion of the Real Property Act 1900 (N.S.W.) section 43A would have been welcome to New South Wales readers. This is the discussion of the protection afforded to a purchaser from the mortgagee exercising his power of sale. The Real Property Act 1900 (N.S.W.) section 58(2) provides that such a purchaser shall not be concerned to inquire as to the fact of any default or notice having been made or given as aforesaid.

The author suggests (para. 191) that since section 58(2) is in substantially the same terms as section 112(3) of the Conveyancing Act 1919 (N.S.W.) then prior to registration the purchaser of land under the Real Property Act 1900 (N.S.W.) is given the same protection as that afforded to purchasers from general law mortgages. Whether this pro-

3 *Tolley and Co. Ltd. v Byrne* (1902) 28 V.L.R. 95.

4 *The Law of Real Property* (4th ed., 1975) 974.

5 See *I.A.C. (Finance) Pty. Ltd. v Courtenay* (1963) 110 C.L.R. 550; R.A. Woodman and P.J. Grimes, *Baalman, The Torrens System in New South Wales* (2nd ed., 1974) 214.

6 R. Sackville, "The Torrens System — Some Thoughts on Indefeasibility and Priorities" (1973) 47 *A.L.J.* 526, 542.

7 (1971) 125 C.L.R. 546.

8 *I.A.C. (Finance) Pty. Ltd. v Courtenay* (1963) 110 C.L.R. 550; *Meriton Apartments Pty. Ltd. v McLaurin & Tait (Developments) Pty. Ltd.* (1976) 133 C.L.R. 671.

tection is sufficient to exclude the full operation of the doctrine of constructive notice as suggested by the author (para. 184) or as doubted by Sykes,⁹ it would seem that consideration of Section 43A is required. A purchaser who receives both the duplicate certificate of title and a transfer executed by the mortgagee¹⁰ would have a "dealing registrable" within the meaning of Section 43A and thus be protected from both actual and constructive notice received subsequently.¹¹

There are a number of other issues that deserve discussion in such a book, for instance the doctrines of marshalling and tacking. Also, in view of the controversy surrounding the standard of care which courts require a mortgagee to observe in exercising his power of sale, a discussion of the likely effect of attempts to regulate this standard by contract between the mortgagor and mortgagee would have been useful. In this respect a consideration of the Contracts Review Act 1980 (N.S.W.) would be relevant.

Enough has been said to show that this potentially valuable book has serious deficiencies, most of which relate to the law in New South Wales. It is thus difficult to justify that part of the book's subtitle which refers to the law in New South Wales.

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9 *The Law of Securities* (3rd ed., 1978) 99-100.

10 See section 59 Real Property Act 1900 (N.S.W.)

11 Note 8 *supra*.

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