The History of Property Law. Tutorial on Old System Title. 2 June 2015.

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1. English land law was part of the law of England received in New South Wales in 1788 and again in 1828. There was great complexity after centuries of evolution. The English law of land ownership evolved out of the Feudal System, which over centuries decayed from a complex ordering of society into a system of land law. Incidents and Services which had once been valuable came to be worth little or nothing, except to the Crown, the ultimate Feudal Lord. In 1660 the remaining substantial entitlements were exchanged by Charles II for an excise on beer, bringing the Feudal System to a practical end. What remained and was received in New South Wales were some strange terminology and some strange forms of conveyancing which had evolved largely to avoid the feudal method of transferring land ownership, a ceremony called Livery of Seizin, which had to be enacted on the land itself by the parties before witnesses. These transactions were often recorded in a Charter of Feoffment, but the ceremony was essential and the Charter was merely evidential. Conveyancers evolved several techniques in which land title was conveyed without Livery of Seizin: Feoffment to Uses, Bargain and Sale and Lease and Release. The conveyancing documents in use when English law was received here employed all these mechanisms cumulatively in one document. “Freehold,” “Fee Simple” and a few other terms from the feudal system remain in use far from their original contexts.
2. In feudal terms, all freehold land in New South Wales is held of the Queen in the feudal tenure Free and Common Socage; it is difficult to see any practical implication which tenure now has. Fee Simple is the estate in which land is usually held: in its feudal origin this curious term signified an estate which the freeholder could dispose of, but if it was not disposed of, the land would pass for ever to the successive heirs of the purchaser, meaning the person who acquired the land by Crown Grant or for value and not by inheritance. As I will show, land no longer passes to the heir, and if not disposed of by will passes in the same way as personal property does on intestacy. There can be an estate for life, behind which there must be a reversionary fee simple owner. Formerly

there could be an estate tail, in which the current owner could not dispose of the land and it descended for ever to the chain of heirs provided for by the grantor who created the entail. Estates tail were never common here and were abolished for New South Wales in 1920, and it is enough to say that they were a complicated nuisance. Law of great strictness required exact formulas of words for creation of estates. The words to create a fee simple were “unto and to the use of (grantee) and his heirs:” any variation, such as “and his descendants” meant that there was no more than a life estate, and the worst blunder was to say “to (grantee) in fee simple” which created a life estate. This was reformed in 1920.

3. This tutorial will address a small part of the vast subject of the history of the law of real property in New South Wales. I am only incidentally concerned with the Torrens System, and I will speak of freehold title under the Old System or General Law, which is fading rapidly but has not disappeared. I will also give a brief account of what was done in a solicitors’ office when acting for the purchaser of land with Old System title. The English law of land ownership was simplified when received in New South Wales by the sheer simplicity of the economy and institutions which existed here, and by the nature of society where no-one was long-settled, hardly anyone had inherited land, and land did not represent social or family continuity but was a commodity and could be bought and sold with little sentiment. After the Torrens System began on 1 January 1863 all new Crown Grants came under it, but freehold title to large tracts of land in Sydney and older settled areas had already been granted by the Crown, and title and conveyancing continued under the general law or Old System, except where land was later brought under the Torrens System by a Primary Application. Primary Applications involved difficulty and expense, and clients found it difficult to understand the advantages of Torrens Title over Old System title.
4. Statute law in New South Wales has produced new systems and complexities which I will not examine. A notable and large system relates to disposal of Crown lands, usually by Conditional Purchases or Perpetual Leases. Dealings by the Crown and those acquiring land from the Crown were minutely regulated, and included a system of recording

transfers and inheritance. For well over a century these interests were outside the Torrens System, but they have now been brought under it.

5. Freehold land granted by the Crown since 1 January 1863 under the Torrens System has had the certainty of title and relative ease of transactions which Torrens Title brings. Torrens title is legal title, and the equitable interests are elsewhere. In the Old System any document could contain anything, legal or equitable. You have to read through to find out what was there. A slight advantage of the Old System over Torrens is that the conveyance takes effect and passes title when it is delivered: when the vendor's solicitor hands it to the purchaser's solicitor at the settlement, not later when it is registered.
6. The pillar of the Torrens System is Indefeasibility of the title on the register. Nothing like Indefeasibility exists under the Old System. Amidst its complexities, two pillars of the Old System can be seen. One is that the purchaser's protection is in enquiries made by his solicitor to establish that the title he is a buying starts with a Good Root of Title, meaning in essence that it starts with a transaction in which the whole legal and equitable interest in the land was dealt with for value: in those circumstances it is highly probable that careful consideration was then given to whether there was a good title. Gifts are not good roots of title, nor are dispositions by trustees. A Good Root of Title shows that an adverse claim is highly unlikely, and does not completely demonstrate that there can be no adverse claim. Perfect protection is not attainable.
7. The second pillar is Priority on Registration: statute law gives the purchaser who registers his conveyance in the General Register of Deeds priority over interests legal or equitable under any earlier unregistered conveyance from his vendor or a predecessor in title of his vendor: priority is in accordance with dates of registration, and not the dates of the documents themselves.
8. The period of commencement of a Good Root of Title which a purchaser may require is thirty years before contract: Conveyancing Act s. 53(1) as amended in 1930. The period was sixty years until 1920, thirty years until 1930. The purchaser can search earlier than the Good Root of Title if he wants to, and if he finds a defect in title he is bound by notice of it, and could raise it against the vendor as an objection to title: but

Conveyancing Act section 53 protects him if he does not make the search. If a purchaser does search earlier he may raise the suspicion that he knew some ground for doing so.

9. Sometimes defects in title emerged before exchange of contracts when the vendor required Special Conditions limiting the title he had to show. If the purchaser decided to accept some limit he had made a judgement about the risk involved. If there was a Good Root of Title 25 years old and the purchaser intended to live in the house for long time he might decide to accept the risk, and in economic theory this is an element in the price. Some vendors such as the Australian Agricultural Company were in extremely strong positions and insisted that purchasers accept their Old System title without enquiry and without any covenant as to title. As their Crown Grant covered thousands of acres and was more than a century old, any search would have involved analysing the land descriptions in all their previous conveyances out of that grant, to make sure that the AA Co had not earlier conveyed this particular parcel: enquiry was practically impossible, the AA Co was honest anyway, and solicitors for purchasers accepted this.
10. There are inherent weaknesses in Old System title. Forgers and frauds will be with us always. In the Old System they have continued effects: a forged conveyance conveys nothing, no matter how long it has been registered. A legal interest better than the vendor's might exist and not be revealed by reasonable searches and enquiries. There could conceivably be an interest in the land created by documents much more than 30 years old**,** which outweighs a Good Root of Title more than 30 years old. For example there could be a legal interest in remainder which arose under some transaction long ago but will not vest in possession until the expiry of some life or lives which still continue. In concept it was possible that 70 or 80 years ago a life tenant under a settlement purportedly sold and conveyed an estate in fee simple, more than he had, and started the chain of title which you were investigating: yet there were interests in remainder which had not yet vested in possession. Another possible trap was that land had been brought under the Torrens System in the distant past but this had been ignored in later transactions purportedly under the Old System. Defects like

these were always extremely unlikely, and they have become more so as time passes, statutory limitations of actions have become shorter and particularly with provisions of the Limitation Act 1969 which go beyond limiting actions and actually extinguish rights. With changes in society and *mores*, the times when complex settlements of land were created have receded into the distant past. It is ninety-five years since estates tail were abolished, and not many complicated settlements were made in the Twentieth Century. This inherent weakness is almost a ghost, but it is still there.

11. The period of a Good Root of Title is affected by the current statute law of limitation of actions for recovery of land. Until 1769 no limitation period ran against the Crown. From 1769 the Crown was subject to a limitation period of 60 years: Crown Suits Act 1769, 9 Geo 3 c 16. From 1837 in New South Wales the limitation period for claimants other than the Crown was 20 years under the adopted Real Property Limitation Act 1833 (Imp) 3&4 Wm 4 c 28 s. 33, adopted by the Limitations Act 1837 8 Wm 4 No 3. Now by the Limitation Act 1969 s 27(1) the limitation period against the Crown is 30 years and against others 12 years. The 12 years may be extended if there is a disability. Under Part III s 51 titles are barred after 30 years, and under Part IV s 65 a barred title is extinguished. Time runs from the accrual date of the claim for possession, so until someone is in adverse possession time does not run. Application of these provisions depends on the accrual date and the possibility that the claimant was under a disability: this may not be simple.
12. A great weakness of title under the general law was that not only was the purchaser's title subject to prior equitable interests if he had notice of them, but also Chancery judges attributed constructive notice of prior equitable interests to him if the judges decided that he should have found out about them. The uncertainties of title under the general law meant that a person who on the surface was the unchallenged proprietor of land and had controlled its occupation for decades might actually hold subject to interests and contingent interests arising under a transaction and documents from many decades ago, belonging to persons who had not taken any action to assert their interests, and may

not have had occasion or been able to do so because there were no present advantages or because their interests were contingent on events which had not yet happened and might never happen.

13. Equity judges are wise in their own generation, they must think and speak in their own times and they sometimes make innovations outside the bounds of established precedential law. When they do this they are seeking to apply in their own times the deeply underlying base of equity which restrains reliance on common law rights in order to overcome fraud and unconscionability: a concept of no precision applied anew in each Age. This is what equity judges are doing, even if they do not know they are doing it, or are denying it. Equity judges do not all think alike; some are immobilised by precedent and some have high confidence in their own innovations and go too far, as on the clouded morning when Lord Denning invented the Deserted Wife's Equity. When they go too far there are statutory interventions. Early Victorian Chancery judges seem to have gone far too far in finding constructive notice. Their circumstances were not quite the same as those in New South Wales where elaborate settlements of land with contingent interests which would or might arise when and if contingencies were fulfilled in distant futures were little known, and where registration of deeds gave priority notwithstanding competing equitable interests earlier in time. Their nicety in protecting equitable interests the existence of which was far from obvious conflicted with the spirit of enterprise, innovation and rapid economic change abroad in the Victorian Age. Uncertainty of titles got in the road of business.
14. The Torrens System responds to uncertainty by enhancing certitude of titles and confidence in transactions, primarily by Indefeasibility. In the Torrens System the surface is the reality, and equitable interests are only as good as initiatives taken to protect them. Torrens title and Indefeasibility express values characteristic of the Victorian age: efficiency and certitude to support transactions in land, and protection for those who own interests below the surface only if they take the initiative and protect themselves by lodging a caveat: sturdy Victorian thinking. This involves accepting state intervention; less sturdy but beneficial in the context.

15. In England the statutory intervention was much milder and attempted to state and limit the circumstances in which a purchaser is affected by constructive notice. In England this was the Conveyancing Act 1882 (Imp) 45&46 Vic c 39 s3, a modified version of which was enacted as section 164 of the Conveyancing Act 1919, which states the circumstances in which a purchaser is to be prejudicially affected by constructive notice of an instrument fact or thing. Subsection 53(3) added in 1930 supplements s 164. Section 164 only limits constructive notice. It gives no protection against knowledge the purchaser actually has.
16. Section 164(1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless:
    (a) it is within the purchaser's own knowledge, or would have come to the purchaser's knowledge, if such searches as to instruments registered or deposited under any Act of Parliament, inquiries, and inspections had been made as ought reasonably to have been made by the purchaser, or
    (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of the purchaser's counsel as such, or of the purchaser's solicitor or other agent as such, or would have come to the knowledge of the purchaser's solicitor or other agent as such, if such searches , inquiries, and inspections had been made as ought reasonably to have been made by the solicitor or other agent.
17. The object of the searches, enquiries and general carefulness of the solicitor acting for the purchaser is to ensure that the client receives a good title to the land he has contracted to buy: to establish as far as possible that there is no conflicting interest. Whether or not a purchaser is prejudicially affected by notice is significant for equitable interests. If a legal interest exists it exists, whether or not you know about it. Section 164 is central to what the purchaser's solicitor does to achieve protection against competing equitable interests: it says nothing about competing legal interests.
18. Subsection 164(1) turns on tests of reasonableness, and their application depends on evidence and judicial notice about practice, and like all

reasonableness tests is debatable. This puts a boundary to judicial imagination and generosity when attributing constructive notice to a purchaser, but falls far short of indefeasibility.

19. Registration of deeds was not part of the English law received in 1828. There were statutory provisions for registration of deeds in a few English counties, and these were not uniform. Registration was first required by a proclamation of Governor King on 13 November 1800 and priority was provided for by a series of statutes in 1825, 1842, 1897 and now by section 184G of the Conveyancing Act 1919 to which the provisions of the Registration of Deeds Act 1897 were moved in 1984.
20. Section 184G (1) All instruments (wills excepted) affecting, or intended to affect, any lands within New South Wales which are executed or made bona fide, and for valuable consideration, and are duly registered under the provisions of this Division, the *Registration of Deeds Act 1897*, or any Act repealed by the *Registration of Deeds Act 1897*, shall have and take priority not according to their respective dates but according to the priority of the registration thereof only.

    (2) No instrument registered under the provisions of this Division or the *Registration of Deeds Act 1897* shall lose priority to which it would be entitled by virtue of registration thereunder by reason only of bad faith in the conveying party, if the party beneficially taking under the instrument acted bona fide, and there was valuable consideration given therefor.

    (3) …
21. A party who acts *bona fide* takes priority according to the dates of registration and not according to the dates of the competing deeds. Registration is not compulsory, but it would be folly not to register. Registration is not only for conveyances but also for any other documents affecting title such as mortgages, discharges of mortgage, settlements, and deeds creating easements: in fact, any document at all can be registered. Wills can be registered, but this is no longer useful, and they do not gain any priority.
22. The English law of inheritance and descent was part of the law received here. Land could be disposed of by a written will, executed with formalities. Widows had Dower rights, but these could be barred easily

and did not apply to marriages which took place after 1837. Land not disposed of by will descended to heirs, the eldest surviving son if there was one, the daughters jointly or the sole daughter if there was no son, and so on to grandsons, brothers, or others under rules of some complexity, the heir being sought being the heir of the original grantee, not necessarily of the last inheritor. By the Real Estate of Intestates Distribution Act 1862 26 Vic No 20 ss 1 and 2 known as Lang's Act, restated by the Probate Act 1890 s 32, land which was not disposed of by will passed to the administrator and was distributed under the rules for personalty, not to the heir. This ended the old law as to inheritance by heirs. A similar provision in the Probate Act 1890 54 Vic No 25 ss 15 and 19 vested all land in the executor who held it according to the dispositions of the will. The terms of wills themselves often devised the real estate to the executor, upon trusts which the executor was to carry out by further conveyance. If after administering the estate the appropriate outcome is for the land to pass to the devisee, it passes under an Acknowledgement executed by the executor, which must be registered: Probate and Administration Act 1898 section 83. Until 1890 the will itself was the document which conferred title to land on the devisee.

23. Under the Old System a mortgage operates in quite a different way to a mortgage under the Torrens System. In the Torrens System the mortgagor continues to be the registered proprietor, and the mortgagee's interest is noted in a memorial on the register folio and enforced by statutory powers conferred on the mortgagee. In an Old System mortgage, freehold legal title to the land is conveyed to the mortgagee, and when the mortgage is discharged title is reconveyed to the mortgagor. Nineteenth Century legislation enabled the re-conveyance to be greatly simplified: the mortgagee executed a discharge of mortgage in a statutory form endorsed on the mortgage; in terms it was little more than a receipt but it was given statutory effect as a re-conveyance when it was registered. This provision is now section 91 (3) of the Conveyancing Act 1919.
24. The interest of the mortgagor is an equitable interest, the equity of redemption, protected only by a court having jurisdiction in equity,

which protects the mortgagor by supervising compliance with the mortgage and will if necessary compel the mortgagee to execute a re-conveyance of the legal title. The words of a mortgage under the Old System usually reflect this. Of course it is possible to do less, to draft a mortgage so as to create only an equitable charge in favour of the mortgagee: but this is not what usually happens.

25. If a mortgagor and mortgagee joined to bring land under the Torrens System by a Primary Application the Certificate of Title would once show the Mortgagee as registered proprietor and notify the mortgagor's interest with a reference to the Old System mortgage. The practice may be different now. There were Old School solicitors who would not rely on a mortgage under the Torrens System, but insisted that the borrower execute an Old System mortgage which provided among other things for the transfer of Torrens title to the mortgagee until the mortgage was redeemed. I think this Old School has died out, as it should have.
26. Sometimes solicitors acting for purchasers, with inconvenient caution, registered the contract of purchase immediately after exchange. Later after settlement the conveyance was registered: in the meantime the purchaser's priority had been protected. After the conveyance was registered the terms of the contract mattered little, but any searcher had to look through the whole contract in case it put him on notice of something or other.
27. By the time New South Wales was settled a conventional conveyance adopted all mechanisms apparently available: according to its terms it was a conveyance to the Use of the purchaser, a Bargain and Sale and a Lease and Release. Livery of Seizin no longer ever took place. Naturally enough, in the first thirty years of settlement in New South Wales there were few lawyers, apart from transported convicts who could not be relied on, and the elegance and efficacy of these complexities escaped most vendors and purchasers: conveyancing was not well handled. After about 1825 the handful of lawyers here grew and by 1840 there was a recognisable profession with enough practitioners and skills to conduct conveyancing. By that time there were many irregular documents in chains of title.

28. Crown Grants, particularly in early years, contained conditions and reservations which could adversely affect a later owner. Reservations which enabled the Crown to take land for roads or other public purposes were usual. Reservations often related to minerals, resources such as timber, and to foreshore land. I once saw a condition which affected much land in the Eastern Suburbs, that no building was to be erected which would obstruct visibility of the Macquarie Light House. Some grants contained a condition that no timber suitable for naval purposes was to be cut down. Until about 1831 Crown Grants usually reserved Quit Rent, but there were practical and political difficulties in collecting it, and regulations in Government Gazette 9 October 1846 provided that Quit Rent would not be charged after that time but that the first 20 years remained due, and if some of that was unpaid the Crown continued to regard it as due. There were no active steps to collect it. Sometimes when land was resumed the Quit Rent was deducted from the Resumption Moneys. Requisitions on title always included: "Quit Rent must be paid or redeemed before settlement" to which the reply always was "This must first be shown to be due" and no further action was taken. Quit Rent was abolished in 1964 when an amendment inserted s 234A in the Crown Lands Consolidation Act 1913.
29. In the earliest years descriptions in Grants and conveyances could be inexact or obscurely expressed, and plans were unsatisfactory. Sometimes boundary lines were measured by an Engineer officer accompanied by a convict pushing a wheelbarrow and counting the number of times the wheel went round. This worked well enough if the convict understood $2\ \pi\ r$. From the time of Sir Thomas Mitchell as Surveyor General the quality of survey work and plans and descriptions was higher. The high quality of plans and Type equation here. the means of establishing the identity of the land referred to is one of the ornaments of the Torrens System, improving with time and advances in survey techniques and professionalism. In earlier times plans of subdivision were sometimes incorporated in Conveyances, even sometimes in Memoranda of Transfer. Plans of survey deposited in the registry are now universal for subdivisions and are a huge advantage to the public.

30. In Old System conveyances, it is good practice to describe the land conveyed by a Metes and Bounds description as well as by reference to the Deposited Plan. Description by Metes and Bounds explains itself, but such descriptions are technical and are drafted by the surveyor who prepared the plan. The description starts at a point established by reference to a monument, a fixed point such as a survey mark, and follows the plan around the boundaries, stating the compass bearing and the length of each line forming part of the boundary: not simple even in the case of a perfect rectangle, and quite complex if any of the bounds are curved, or follow a natural feature such as a river. These descriptions have to be meticulously checked when inspecting deeds, and the implications of any apparent discrepancy have to be considered.
31. After 1837 many reforms and alterations were enacted for England which the New South Wales legislature neglected to adopt. New South Wales statutes made a series of changes not found in England but special to conditions here. After the first enactment in 1825, the Deeds Registration Act 1842 5 Vic No 21 recast the provision for priority of deeds according to the priority of their registrations. This priority relates both to legal title and to equitable priorities. Section 21 validated what had clearly become the practice here, that the conveyance by Lease and Release recited that there had been a lease although there never had been one in fact, and released the reversion of this fictitious lease. This meant that there was no practical need for Livery of Seizin. Conveyancing by Lease and Release and by Bargain and Sale were simplified by sections 20 and 21 which made registration equivalent to a feoffment. Legislation rectified other small problems on the way, for example by validating grants issued by early Governors under their personal seals and not a Public Seal of the Colony.
32. The Titles to Land Act 1859 remedied a number of real or possible defects in land titles and conveyancing. Recitals in section 1 show that there had not always been appropriate use of words of limitation to create a fee simple – "unto and to the use of the purchaser and his heirs" – and remedied these for the past, while requiring the correct words of limitation for the future. Section 19 in effect dispensed with

Livery of Seizin for the past and future where the conveyance was registered.

33. The Conveyancing Act 1919 caught up with and enacted many reforms which had been enacted for England earlier. Livery of Seizin and conveyancing devices to avoid it were put to rest, as interests in land can be conveyed by deed: see Conveyancing Act s.14 and subs.50(1). Sometimes the result of the reform had been achieved in other ways, so the reforms of 1919 sometimes trod on each other's toes, and brought about the same result two or three times. Further amendments to the Conveyancing Act in 1930 completed this process. However in the mean time extensive reforms in 1925 had taken the English law in some different directions which have not been followed here.
34. In 1962, when I last acted for a purchaser, Examiners of Title knew more about Old System Title than anyone else. Examiners of Title were lawyers who spent their careers in the Registrar General's Department and reported on Primary Applications. They had a large resource of shared experience and information about things which could be wrong with Old System titles, were terrified of exposing the Assurance Fund to any risk of a possible claim and hardly ever did, and behaved as if they felt that an Examiner of Titles who actually granted a Primary Application was diminished as a person.
35. There are no longer Examiners of Titles, and there can be few if any Primary Applications. Whenever an Old System conveyance is registered the Registrar General accepts the title without examination and brings the land under the Torrens System by issuing a Qualified Folio endorsed with a caution under Part 4A of the Real Property Act 1900, added in 1984. It seems to be routine to do this: Old System Title is melting away under the glare of Part 4A. A Qualified Folio may be issued after a Primary Application is made: that is, although there has not been a recent conveyance. A caution warns that the land is subject to any subsisting interest whether recorded or not. The caution ordinarily lapses after six years. If there were an adverse claim within that time registration under the Torrens System would produce no advantage. Anyone whose title has been barred by this process can claim compensation: but there can have been few such claims. Old System

Title is like Fairy Gold: if you touch it, it vanishes, and re-emerges as a Qualified Folio. Or the better analogy could be with kissing a frog which changes into a prince. Almost any new transaction will take the land into the Torrens System.

36. Under Part 4B the Registrar General may create a Limited Folio where the boundaries are not sufficiently defined. The limitation may be removed after survey and investigation and notice to persons possibly affected. In this respect, definition of boundaries is not as close to perfect as it formerly was.
37. Before there were Qualified Folios, the Registrar General was required to cause the title in a Primary Application to be examined for such period as he considered sufficient, and asked Examiners of Title to report. Their opinions were practically conclusive, as the Registrar General acted on them. In the earliest years from 1863 the first Examiners of Title understood that risk and insurance were principles of the Torrens System, but their successors were extremely difficult to convince, and a Royal Commission of 1879 reported that they had faults of extreme and meticulous technicality and timidity. They were terrified that they might accept a title and later be confronted with a claim against the Assurance Fund. Their concerns were inappropriately high: that was what the Assurance Fund was for, and accepting risks and paying claims were not disasters but were parts of the scheme of the Torrens System. The Assurance Fund continued to be collected until 1941, by which time £700,000 had been collected and £21,000 paid out. This was not a success story. The one really large claim had not arisen from misjudgement of a risk, but from the Examiner simply overlooking one of the documents which had been put before him. Until 1921 Examiners always investigated title back to the Crown Grant: this was excessive, and the Registrar General told them this was not required. However they remained extremely exacting, and were equipped with arcane experience and accumulated shared knowledge, not available to anyone else, about things like the mode of execution of deeds in the constitutions of long-dissolved building societies, and special requirements in the Private Acts creating long-defunct private companies.

38. I turn to the impact of Old System Title on handling an ordinary purchase in a solicitors' office. After exchange the vendor's solicitor had to supply an abstract of title. This expression explains itself: an abstract of the documents and events by which the vendor claimed to show a Good Root of Title. The abstract showed the nature of each document, its date, its parties, the description of the land with which it dealt, and particulars of its registration. Some matters in the abstract were not title documents: events such as dates of death, and particulars of grants of probate and of wills. In good practice the abstract showed the Crown Grant, but this was not always done. It was prudent for the purchaser's solicitor to search the Crown Grant to see whether it contained any unusual provisions.
39. It was important to prepare the abstract with care and not to go back further than was necessary, because the purchaser was on notice of the full terms of any document referred to in the abstract and might raise some objection to title if he were told too much. Using an old abstract from an earlier sale might disclose more than was necessary and make needless trouble. There were conventions about the language used in abstracts, the layout of their contents and the size of the paper – brief size - on which they were typed. It was clear that many solicitors with whom one dealt had no idea what they were doing with Old System title, and on the other hand some old practitioners lived and breathed it, so that it took the place of culture and music in their lives. In suburbs and towns where there were many Old System titles there were usually one or two old solicitors who knew the history of many old titles, had clearly in their minds chains of title and the personalities who had owned large estates and subdivided them, who in town had been sharp or careless practisers fifty or eighty years before and whose work was reliable, where all the weak titles were buried and what was wrong with them. They knew things like whether there had ever been a Primary Application for adjacent land with some common thread in the chain of title, and whether the Examiners of Title had found any defect in it.
40. The purchaser's solicitor perused the abstract with care and considered whether it truly demonstrated a Good Root of Title and effective subsequent transactions down to the vendor. Then the purchaser's

solicitor called for and inspected the documents produced by the vendor in support of the abstract. Usually these were held at the vendor's solicitor's office, and had to be inspected there. Sometimes the documents or some of them were held by the solicitor who had acted for an earlier subdivider, who had obligations to produce these deeds to all those to whom he conveyed parts of his land and had to retain the deeds and produce them when called for: a steady stream of small production fees extending until the client parted with the last of the land: then the deeds had to be deposited: Conveyancing Act subs. 53(2)(e). The obligation to produce documents can be discharged by lodging them in the Registry, where they will be produced for inspection to anyone who pays a small fee.

41. On inspection each document had to be considered to see whether it conformed with what the abstract said about it. This involved checking the names of the parties, the date, the registration particulars, the executions, the description of the land conveyed and whether the conveyances had covenants for title appropriate for a sale for value. If there were variances in the names, these needed to be explained and resolved. A conveyance might open with a list of parties but through error close with executions by a smaller number. Sometimes there were small disasters such as a registration date earlier than the date of the deed. Each document had to be perused to see whether it contained provisions which were relevant but had not been disclosed in the abstract. The metes and bounds description as well as the reference to survey plan had to be meticulously checked against the descriptions in the contract. The duty stamp had to be examined to confirm that duty had been paid and in the appropriate amount. The formal requirements for a conveyance executed before 1920 were greater than those for a conveyance after 1 July 1920.
42. Some events in the abstract were not evidenced by title documents; there might be a need for searches in the Probate Office to confirm what the abstract said about grants of representation and the terms of wills. Sometimes the vendor's solicitor produced old and yellowing Statutory Declarations by persons long dead explaining apparent anomalies. The purchaser was entitled to rely on recitals in deeds twenty or more years

old: section 53(2) of the Conveyancing Act. If the purchaser's solicitor came to know that the conveying party in an earlier conveyance had been a trustee, he should consider whether the disposal of the land was within the trustee's powers, which might appear from the terms of a will or settlement, or in some statutory provision.

43. It was also necessary to search the General Register of Deeds. If the abstract relied on, say, a conveyance from John Smith to William Brown registered on 1 January 1910, and then on a conveyance by William Brown to Thomas Atkins registered on 1 January 1925 the purchaser's solicitor needed to look through the register of the names of vendors to make sure that William Brown had not disposed of the same land in some other transaction earlier than 1 January 1925. This involved looking through many pages of alphabetically indexed lists of names of parties to conveyances, year by year, from 1 January 1910 to 1 January 1925 to find a reference to any conveyance by William Brown, and if there was to see whether it was a conveyance of the land under consideration, which might require reference to the registration copy. If there were joint purchasers, search each name: if seven, seven. So too for each document in the abstract which was said to convey title. The process might be baffling. A conveyance might have been registered many years after its date, or never registered at all. William Brown might have been a developer who sold 2000 parcels of land in that period. There might be many William Browns who conveyed land in the search period. There are several ways of spelling Brown, Browne, Broun. There were said to be 50 ways of spelling Hughes, Hughs, Hews, Hewes, Huse, Hues and so on. Few solicitors made these searches themselves: they almost invariably engaged title searchers who spent their days and their lives running their eyes down index pages looking for names. The process called out for computerisation, but that did not exist until 1992. Searches cost money and time. Any anomalies they revealed had to be the subject of requisitions on title, or perhaps objection to title and refusal to complete. For transactions since 1992 searches are far easier and may be conducted on-line. An Official Search by the Registrar General's Department can be obtained for a fee, and I would leave searching to the experts and their computers.

44. The purchaser's solicitor also searched the Register of Causes Writs and Orders to find whether the land was affected by any Court Orders, sequestrations or pending litigation. The purchaser was also concerned to ascertain who was in actual occupation and find out what interest they claimed to have. If some rival has been in adverse possession for twelve months, a conveyance of a documentary title, even a title good on its face, may be void: see Conveyancing Act subs.50(2). The purchaser's solicitor also had to make enquiries of public authorities such as the Water Board and the Municipal Council, which were entitled to statutory charges over land for unpaid rates.
45. After making requisitions on title and assessing the replies, the purchaser might be entitled to resist completion, but would not do so without assessing whether the apparent risk of some defect outweighed the advantages of taking whatever title was available.
46. The purchaser's solicitor prepared a conveyance. The conveyance almost always followed the short form in Schedule II to the Conveyancing Act 1919, an abbreviated form which, by a number of statutory implications, did all the work which had earlier been done by Livery of Seizin, Conveyance to Uses, Bargain and Sale, Lease and Release, compressed into a few words. Using the word "convey" was sufficient: section 46. Stating that the consideration had been received effectively established that fact: ss 39 and 40. Describing the purchaser as beneficial owner implied covenants for title, quiet enjoyment and further assurance, some protections against any later discovery of a defect in the conveyance: section 78. Saying that the conveyance to the purchaser was in fee simple was a sufficient limitation of the estate: section 47. Provisions creating easements and restrictive covenants were aided by extended meanings given by sections 88 and 88A, if technical requirements in those sections were observed. The operation of the conveyance was also assisted by sections 67 and 68 which gave extended meanings to general words. The short form contemplated that the conveyance would identify the land by describing it by metes and bounds: "describing particularly the situation, boundaries, and measurements, and if comprised in a registered plan quoting the lot and section number and number of plan." The conveyance was expressed to

be a deed, and was taken to be sealed if attested by one witness who was not a party: section 38. Alterations in a conveyance were a potential source of its avoidance or of great difficulty, and were avoided if in any way possible. Even filling in the date had hazards in theory.

47. Soon after exchange the purchaser's solicitor produced the contract at the Stamp Duties office, had duty assessed and paid, and later had the conveyance executed by the purchaser, and marked by the Stamp office to show that duty had been paid on the contract. Another duty was paid on the conveyance itself: in 1962 it was £1/10/-. He also prepared a registration copy of the conveyance, signed in one corner by a party and ready to be completed with all details such as the date and to be examined and verified by an affidavit by a solicitor or clerk.
48. Eventually the date of settlement arrived. If all hazards had been successfully negotiated, the solicitors for vendor and purchaser met, usually at the vendor's solicitor's office, the conveyance was checked for due execution and the date was inserted, the balance of purchase money was paid over by bank cheque or occasionally in cash, and the vendor's solicitor delivered the conveyance executed by the vendors. There were Notices of Attornment to tell the tenants to whom to pay the rent, and a direction to the stakeholder holding the deposit to account for it and pay over the balance. The meeting might be more complex and be attended by representatives of the vendor's mortgagee, who was to be paid out and to deliver the deeds and the discharge of mortgage, and also by the purchaser's mortgagee who produces the bank cheque and received all the documents, in registrable order, and then protected his client by attending to registration.
49. The new mortgagee's solicitor would require to take all registrable documents away with him in registrable form. There could be other complexities if there were several mortgagees to be paid out, or several new ones to provide finance to the purchaser; the room could be crowded.
50. At the Registrar General's Department there was a queue to see the clerk receiving registrations, he checked the Discharge of Mortgage, Conveyance and Mortgage and their registration copies for good order, assigned registration numbers to the copies and entered the numbers

on the backs of the originals. Small fees were payable at most stages, always in cash, generating a trail of receipt slips in the file, each receipt laboriously written out by hand. Your conveyance had been registered. What competing document had been registered earlier that morning? It was hardly possible to know.

51. The Department's practices for Registration of Deeds now, with the assistance of word processing, photocopying and computer searching, are far simpler than they were in 1962 when I grappled with them. They are described in Old System Information and Search Guide, March 2013, available on line from NSW Government Land & Property Information. If you are actually engaged in an Old System transaction you should look through this for the practicalities. For a fee the Department will prepare the Registration Copy, relieving you of the arcana of paper sizes and so on. You can give yourself the agony of searching earlier and truly investigating the title, or you can take the chance that things are as they seem and accept the risk that an adverse claim may turn up during the next six years. I think most people take the chance, unless they know some reason to be unusually careful. Do what you think best, and watch your insurance.
52. I suggest that you include thanks for Robert Richard Torrens and his system in your evening prayers.
53. For further reading, consult a current Conveyancing Service. The usual reference in 1962 was to works by Dr Basil Helmore, a profoundly learned Newcastle solicitor. He published several works on Property Law, notably the concise An Introduction to the Principles of Land Law, co-author with A.D.Hargreaves, Law Book Co 1963. He also published The Law of Real Property in New South Wales, Law Book Co 1961. Much of the law as it was in those days can be understood from the Conveyancing Acts and Regulations by G.D.Stuckey Q.C. and G.D.Needham Law Book Co 1953 and its second edition 1970.