THE HISTORY AND PLACE OF THE REGISTRY ACT IN NEW BRUNSWICK LAND LAW*

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A System of Conveyancing

The first point to observe about the New Brunswick Registry Act is that it is not simply a means of recording documents; it also provides for a system of conveyancing, in fact the *ordinary* means of conveyancing in the province. To fully understand the significance of this system of conveyancing it is necessary to examine alternative forms of conveyancing, beginning with those known in England from the earliest times. I make no apology for refreshing your memory about this because, as you will see, it is necessary to an understanding of some of the cases I will be discussing.

The oldest form of conveyance known to the common law is the feoffment with livery of seisin. It was, as the name implies, the delivery of seisin — the feudal counterpart of possession. The donor and donee would come on the land and the donor would formally deliver up possession of it, by giving the donee a tuft of earth, or by some other formality. Usually the occurence would be recorded in writing in a charter of feoffment, but the writing was not essential to the validity of the transfer. The New Brunswick case of *M'Lardy* v. *Flaherty*[1] (perhaps one of the few recorded cases relating to an actual feoffment on this continent)[2] provides a convenient example. There the donor was passing on the street in front of the lot in question. He said to Flaherty, "Here is your estate: it don't belong to me at all, I have deeded it back to you". Flaherty then took hold of one of the posts, the remains of an old building that had been standing on the lot, and said he thought he would repair the building and put some tenants in. Flaherty then apparently went into the house. "This, coupled with what he said", asserted Chipman C. J., "would . . . amount to an entry after Ray [the donor] had told him there was his estate."[3]

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1 (1847), 5 N.B.R. 455.

2 See *Berry* v. *Berry* (1882), 16 N.S.R. 66, at p. 79.

3 (1847), 5 N.B.R. 455, at p. 460.

The feoffment was not just *a way* of conveying land. It was for many years the ordinary way. It was impossible at common law to convey a fee simple or other freehold estate in possession by deed. As it was put technically, such estates, or as they were called, "corporeal hereditaments", lay in livery and not in grant.

The feoffment was inconvenient in several respects. It required actual entry on the land by both parties at the time it was made. It also required that it be open and public; otherwise it would be difficult to prove.

For this reason lawyers developed a new form of conveyance, the lease and release, which consisted in giving a lease of the land to be conveyed followed soon afterwards by a release. Here is how it operated. A lease did not convey seisin, so livery was not required. And a reversion, unlike an estate in possession, could be conveyed by a grant, *i.e.*, by deed, at common law because it was impossible to give livery of seisin (or possession) of an estate that arose in the future. The donor, therefore, gave a lease to the donee for, say, one year. The donee then entered the land and took possession. All that remained in the donor, then, was the reversion of the fee simple. This reversion he would then release (or give up) to the grantee in possession by deed of grant. The lease then merged with the reversion and the donee acquired the whole fee simple. This method of conveyance was an improvement over the feoffment, but it required that the donee should actually enter the land under the lease, for until entry the donee had only an *interesse termini* and the release would not operate. This was as far as conveyances had developed before the introduction of the use in the Chancellor's Court of Chancery, if one excepts such unusual types of conveyances as the fictitious actions of fine and recovery.

The use, you will remember, was the predecessor of the trust. Land was conveyed to a nominal owner by feoffment to the use of the person who it was intended should have the beneficial enjoyment (the *cestui que use*). The common law courts recognized the title of the nominal owner only, but the Court of Chancery in the exercise of its equitable jurisdiction would enforce the use. Equity would also hold that a use resulted under certain circumstances even though not express, a doctrine that gave rise to the system of conveyancing known as the "bargain and sale". This was a contract, oral or written, under which a man, A. agreed to convey land to another, B, B having paid valuable consideration therefor. As soon as this contract was made, equity would say that A held the land under a resulting use for B. In

other words the equitable title to the land passed to B, the *cestui que use*. The legal title, however, remained in A.

But the Statute of Uses, 1535, provided that thenceforth the *cestui que use* should be deemed to have the seisin, that is the legal estate.[4] So it became possible by the bargain and sale to convey the legal title in land. This would have made possible the conveyance of land by a simple oral contract. But this result was perceived and steps were taken to prevent it. For the secret transfers that would have been possible by this means would have prevented the King from collecting the feudal dues to which he was entitled from landowners; to collect these it was necessary that the King know who the landowners were. So at the same session of Parliament that passed the Statute of Uses the Statute of Enrolments was also passed providing that a bargain and sale should be void unless in writing, indented, and sealed and enrolled within six months in His Majesty's Courts at Westminster.[5]

But conveyancers were finally successful in devising a secret method of land transfer, the bargain and sale of a lease and release. A would agree to sell B a lease. This would raise a use in the lease in favour of B, which by the Statute of Uses was converted into a legal title to the lease in B without entry; enrolment was unnecessary because the Statute of Enrolments did not apply to leaseholds. A then released his reversion to B and B had the whole fee simple.

These, then, were the major types of conveyances in effect in England at the time New Brunswick was settled, and since colonists carry with them such of the laws of England as are applicable to their situation and conditions, these modes of conveyancing became and are part of the law of New Brunswick. This is made clear in such cases *M'Lardy* v. *Flaherty, Doe d. Hannington* v. *M'Fadden*[6] and *Doe d. Wilt* v. *Jardine*[7]. But it is obvious that such forms of conveyances would be far too complicated for the needs of a frontier land like early New Brunswick. Accordingly, in the Registry Act, which was passed at the first session of the House of Assembly in 1786, section 10 was enacted to remedy the situation.[8] That provision now appears as section 39 of the existing Act, which reads as follows:

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4 27 Hen. 8, c. 10 (Imp.).

5 27 Hen. 8, c. 16 (Imp.).

6 (1836), 2 N.B.R. 153.

7 (1836), 2 N.B.R. 142.

8 26 Geo. III, c. 3, s. 10 (N.B.)

> Every conveyance, duly acknowledged or proved and registered according to the law in force at the time of the registration, shall be effectual for the transferring of the land therein described and the possession thereof, according to the intent of such conveyance without livery of seisin or any other act.[9]

The effect of this section was settled in *Doe d. Wilt* v. *Jardine*[10] in 1835. There A had given a registered deed to B that read in part that the grantor "do demise, release and quit claim" the land in question unto the grantee his "heirs and assigns forever". It was argued that the deed was not effectual to convey the land. It could not operate as a release (in which form it was) because it was not preceded by a lease. And it could not operate as a bargain and sale because it was not enrolled as required by the Statute of Enrolments. It was held, however, that the deed, being registered, was effectual to pass the fee simple, that being its obvious intent. To be good under the Registry Act it is not necessary, to use the language of Chipman C. J., for a conveyance to "tally with some technical form of conveyance known to the law of the mother country."[11] This, of course, does not mean that one can convey a fee simple without appropriate words of limitation as was argued in *Jack* v. *Lyons*;[12] the words "and his heirs" or nowadays "in fee simple"[13] must be used. It does mean, however, that a registered instrument need not conform with earlier technical forms of conveyancing or use particular words expressing the transfer, so long as the words denote that the land in question is being conveyed.

Because of its lack of technicality it is not surprising that conveyancing by registered instrument became the ordinary — indeed the almost exclusive — means of conveyancing in New Brunswick. But what of the ordinary deed that is not registered? Was this not sufficient in the absence of statute to pass title as between the parties? The point came up in *Doe d. Hannington* v. *M'Fadden*.[14] There it was sought to establish the validity of an unregistered deed of mortgage that was almost identical to that in use today. It could not possibly be a feoffment, or a lease and release, because the mortgagor had, of course, never given up possession. But it was strenuously argued that it was a valid bargain and sale which passed the legal title under the Statute of Uses, a

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9 R.S.N.B. 1952, c. 195, s. 39.

10 (1836), 2 N.B.R. 142.

11 *Ibid.*, at p. 146.

12 (1879), 19 N.B.R. 336.

13 Property Act, R.S.N.B. 1952, c. 177, s. 11(3).

14 (1836), 2 N.B.R. 153.

statute which, it was further argued, applied to New Brunswick. With this contention the court agreed, but it also went on to point out that the deed had not been enrolled in the court as required by the Statute of Enrolments. The deed was, therefore, held void.[15]

It was not until 1904 that the ordinary unregistered deed became effective to pass title to land in possession in New Brunswick.[16] The relevant section now appears as section 9(2) of the Property Act which reads as follows:

> All corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery.[17]

But surely, you may say, there must have been many deeds before 1904 that were never registered. And then it may occur to you that the Statute of Limitations might be of some help in validating the deed. However, the Statute of Limitations only applies when the person in possession holds adversely of the owner, and here, far from doing so, he holds with the consent of the owner. Only when the owner sells to a third person can it be argued that he holds adversely, but the third person is likely to acquire immediate possession so the limitation period has hardly time to start, let alone expire. The logic of this argument was upheld in two Supreme Court of New Brunswick cases, *Parson* v. *Good*[18] and *Carson* v. *McMahon*.[19]

The courts, however, found a solution in a much older principle that transcends the whole of the common law: that a right

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15 See also *Doe d. Burnham* v. *Watts* (1843), 4 N.B.R. 441. It is interesting to note that in an early Manitoba case (*Sinclair* v. *Mulligan* (1886), 3 Man. R. 481, aff'd (1888), 5 Man. R. 17) it was held that the Statute of Enrolments was not applicable though the Statute of Uses was. Though technical reasons are found for this the underlying reason for this difference probably is that bargains and sales were the only convenient modes of conveyance in the early years of that province. In Nova Scotia, in fact, voluntarly deeds have had, rather clumsily, to be upheld as being valid by a local variation in the common law; it appears doubtful whether either the Statute of Uses or the Statute of Enrolments is in force there (*see Berry* v. *Berry* (1882), 16 N.S.R. 66; see also *Shey* v. *Chisolm* (1853), 2 N.S.R. 52). In New Brunswick, on the other hand, a registered deed was a convenient mode of conveyancing and a holding that bargains and sales were valid would have interfered with that system somewhat by permitting valid conveyances outside it.

16 C.S.N.B. 1903, c. 152, s. 11.

17 R.S.N.B. 1952, c. 177, s. 9(2).

18 (1846), 5 N.B.R. 272.

19 (1940), 15 M.P.R. 109, citing *McVity* v. *Tranouth*, [1908] A.C. 60.

long enjoyed must have had a lawful origin. In this particular situation the courts presumed a feoffment after a long possession, say about 20 years:— "Livery of seisin, though the fact be not endorsed on the deed of feoffment, will be presumed where the deed has gone according to the feoffment for a great length of time". This reasoning has been adopted in at least two New Brunswick cases, *Cairns* v. *Horsman*[20] and *Carson* v. *McMahon*,[21] but the doctrine could not apply in cases like *Doe d. Hannington* v. *M'Fadden* because a mortgagee does not, of course, normally go into possession. I have little doubt, too, that where a deed was given for valuable consideration, the courts of equity would hold that the grantee had an equitable interest and the deed would satisfy the need of writing required by the Statute of Frauds. Of course, such an equitable title could be defeated by a person who *bona fide* purchased the legal estate for value without notice of the existing equitable estate even if he did not register, or by a subsequent purchaser of an equitable estate if his instrument was first registered.

Nevertheless, you may now be beginning to see why I lay stress on our registered deeds as constituting a mode of conveyancing. The implications of this fact did not end with the statute of 1904 making unregistered deeds valid. The Registry Act still continues to govern the forms of our deeds and our conveyancing practice. The acknowledgment before a justice, notary or judge, or indeed any witness, is only required for the purpose of registration. A deed is certainly valid without these formalities. The only requirements of form to effect a conveyance under section 9(2) of the Property Act is that it be in writing and be signed, sealed and delivered as required in part by the common law and in part by the Statute of Frauds; it need not even be witnessed.[22] The New Brunswick deed, whether registered or not, could be immensely simplified and be equally valid. As was said of a similar document in a Nova Scotia case, our usual deed uses the language of almost every species of conveyance known to English law and a few extra words as well, yet it does not necessarily conform with the requirements of any of these conveyances (as we saw in *Doe d. Hannington* v. *M'Fadden*), and any one word such as "convey" would be sufficient.[23]

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20 (1901), 35 N.B.R. 436.

21 (1946), 15 M.P.R. 109.

22 *Doe d. Sherlock* v. *Powers* (1865), 11 N.B.R. 232.

23 *Berry* v. *Berry* (1882), 16 N.S.R. 66.

Priorities

The second point to observe about the Registry Act is that it established a new system of priorities among conveyances. At common law, the rule was simple: first in time, first in right. If I conveyed Blackacre to A today and tomorrow conveyed it to B, A's conveyance prevailed. As to equitable estates, equity generally followed the law except that where a subsequent purchaser for value without notice acquired the legal estate, his interest would prevail over a preceding equitable estate.

Section 27(1) of the Registry Act has altered this. It reads:

> All instruments may be registered in the counties where the lands lie, and if not so registered, shall . . . be deemed fraudulent and void against subsequent purchasers for valuable consideration whose conveyances are previously registered.[24]

To gain priority over an earlier instrument, the section requires two things: prior registration and valuable consideration. Now what is valuable consideration? This is interpreted in *Carson* v. *McMahon*[25] as meaning any consideration that would support an ordinary contract. The consideration need not, therefore, be a money consideration;[26] nor need it be adequate,[27] or have been fully paid at the time action is brought.[28] But both *Carson* v. *McMahon*[29] and *Payson* v. *Good*[30] make it clear that the consideration must be *bona fide*. I suggest, therefore, that a nominal consideration might not be enough, for the disproportion between the price and the value of a thing may be so great as to be evidence of fraud. The conclusion that nominal consideration is not valuable consideration is supported to some extent by the Upper Canada case of *Wilkinson* v. *Conklin*.[31]

In any case, proof that valuable consideration has been paid must be given by the subsequent purchaser who seeks the benefit of the priority given by the Registry Act.[32] Further, the fact that the registered deed relates that consideration (valuable or nom-

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24 R.S.N.B. 1952, c. 195, s. 27(1).

25 (1946), 15 M.P.R. 109; see also *Payson* v. *Good* (1846), 5 N.B.R. 272.

26 See *Fraser* v. *Sutherland* (1851), 2 Gr. 442; *Patulo* v. *Boyington* (1854), 4 U.C.C.P. 125; *Johnston* v. *Reid* (1881), 29 Gr. 293.

27 See *Payson* v. *Good* (1846), 5 N.B.R. 272.

28 See *Carson* v. *McMahon* (1946), 15 M.P.R. 109.

29 *Ibid.*

30 (1846), 5 N.B.R. 272.

31 (1860), 10 U.C.C.P. 211.

32 See *Payson* v. *Good* (1846), 5 N.B.R. 272; *Doe d. Cronk & Skae* v. *Smith* (1850), 7 U.C.Q.B. 376; *Grant* v. *Gillingham*, [1942] 1 D.L.R. 421; *Marriott* v. *Feener*, [1950] 1 D.L.R. 837.

inal) was given is no evidence against a person claiming under an earlier unregistered deed (unless, of course, he puts the registered deed in evidence himself).[33] Such a recital can only be evidence against a party to the deed.[34] From this you can see that it may become very difficult to prove consideration where the deed was made a long time ago.

Section 27(1), therefore, requires that to gain priority the subsequent purchaser must affirmatively prove that valuable consideration has been paid for the registered conveyance. That is all the section requires. What, however, happens if the subsequent purchaser knows, or has knowledge of facts which should have put him on his notice of an earlier conveyance? Well the rule at common law was, it seems, that if the purchaser came within the section, he had priority and his knowledge of an earlier unregistered deed made no difference.[35] But this was more than the courts of equity could stomach. Courts of equity held that a registered conveyance for valuable consideration would be defeated if the grantee had *actual* notice of an earlier unregistered transaction.[36] Now actual notice means just that. For example, possession by the person who holds the registered deed has been held not enough to give notice to others. An excellent definition appears in *Ferguson* v. *Zinn*[37] where Kingstone J. said:

> The distinction between constructive and actual notice is of course well defined. Actual notice is knowledge not presumed as in the case of constructive notice but shown to be actually brought home to the party to be charged with it . . . .
>
> Constructive notice is defined as notice of such facts as should have put one on his guard.[38]

Consequently, while the two things that must be proved to give priority over a previous instrument, registry and valuable consideration, may be there, the registered document may still be defeated if the previous purchaser can establish actual knowledge by the grantee under the registered deed.

Though possession does not defeat a registered title by being treated as notice, it may constitute evidence of notice. Moreover,

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33 *Bondy* v. *Fox* (1869), 29 U.C.Q.B. 64.

34 See *Payson* v. *Good* (1846), 5 N.B.R. 272; *Barber* v. *McKay* (1890), 19 O.R. 46; *Mariott* v. *Feener*, [1950] 1 D.L.R. 837.

35 See *Parks* v. *Ingraham* (1879), 19 N.B.R. 195.

36 *Ross* v. *Hunter* (1882), 7 S.C.R. 289; *New Brunswick Railway Co.* v. *Kelly* (1896), 26 S.C.R. 341.

37 [1933] 1 D.L.R. 300.

38 *Ibid.*, at p. 308.

as already pointed out, courts will treat long possession as having originated in a feoffment with livery of seisin. Will the courts permit such a presumed feoffment to override the claims of a subsequent purchaser under a registered deed? The point came up in *Carson* v. *McMahon*[39] in 1940, of which a simplified version of the facts is as follows. In 1894, the defendant received a deed to the lot in question from one Wesley Nesbitt and took possession of the property. The deed was never recorded. Wesley Nesbitt (the grantor) died and his children did not know he had sold the lot to the defendant, so they conveyed it to their aunt in 1916 who, two years later, granted it to one Doore. Both deeds were registered, but there was no evidence of any consideration (hardly surprising when one considers how long before the dispute the matter came up). Doore died in 1931 leaving the land to his daughter by a will which was also registered. The daughter then sold to the plaintiff for valuable consideration, and the plaintiff registered his deed. The plaintiff had no knowledge of the defendant's unregistered conveyance and sued for recovery of the land. On the face of it, the plaintiff seemed to have a good case. The defendant's deed was invalid, having been made before 1904 and not having been registered. Further, a Privy Council case, *McVity* v. *Tranouth*,[40] had decided that the Statute of Limitations could not assist the defendant because the first registered deed proved to be for valuable consideration was in 1931, and it was only from that period that the defendant could be said to have held adversely of the plaintiff. But the court nonetheless held for the defendant. He had, they pointed out, been in possession since 1894; after such a long possession a feoffment would be presumed. The Registry Act would defeat a written instrument such as a deed, but a feoffment was not a written instrument.

It is possible that this situation could arise in the case of an unrecorded deed made since 1904. It is true that since that time a feoffment must, by section 10(1) of the Property Act, be evidenced by deed, but it certainly can be argued that though the deed may be void under section 27(1) of the Registry Act as an instrument conveying title it does not prevent it from evidencing a valid feoffment.

However that may be, and despite the broad definition given to the word instrument by section 1(a) of the Registry Act, the Act only arranges priority as between persons claiming priority under written instruments. Thus it has been held that a prior

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39 (1946), 15 M.P.R. 109.

40 [1908] A.C. 60.

equitable mortgage created by a transfer of the title deeds took priority over a registered conveyance for valuable consideration even when the arrangement for the surrender of the title deeds was reduced to writing and not registered.[41] Similarly, other rights taking effect by operation of law rather than under written instruments have been known to take priority over subsequent registered deeds, given for valuable consideration.[42] In some provinces this has been remedied by a section such as the following:

> No equitable lien, charge or interest affecting land is valid as against a registered instrument executed by the same person, his heirs and assigns . . . .[43]

But there is no such section in the New Brunswick Act.

Public Notice of Conveyance

Finally, the Registry Act provides a public means of giving notice of conveyances. Section 68 provides that registration constitutes notice to persons acquiring an interest in the land subsequent to registration. While the section appears clear, it raises considerable difficulty. I will not go into the whole matter, but will limit myself to stating that it is not notice for all purposes,[44] and to examining briefly the two New Brunswick cases on the section. The first is *Carroll* v. *Rogers*.[45] There one Elizabeth McLaughlin acquired a piece of land from one Loggie by registered deed in 1893. In 1894 she sold a portion of it to the plaintiff who did not register his deed. Two years later Mrs. McLaughlin mortgaged the remaining land to one Sproule. The description in this mortgage followed the original description of the whole lot, but "excepted the portion sold and conveyed by" Mrs. McLaughlin to the plaintiff by the unregistered deed. The defendant, who had no knowledge of the plaintiff's claim, registered his title. At the trial he argued that he thereby had a claim to the whole lot. The plaintiff, for his part, maintained that since the mortgage to Sproule, which was registered, excepted the conveyance to the plaintiff, the defendant should be deemed to have notice of the plaintiff's claim by virtue of section 68 of the Registry

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41 *Harrison* v. *Armour* (1865), 11 Gr. 303.

42 See *Israel* v. *Leith* (1890), 20 O.R. 361.

43 See R.S.O. 1960, c. 348, s. 78; see *Toronto* v. *Jarvis* (1895), 25 S.C.R. 237. This section applies only to equitable estates, not legal rights created, for example, by feoffment or easements arising by operation of law.

44 See *Pierce* v. *Canada Permanent Loan and Savings Co.* (1894), 25 O.R. 671, aff'd (1896), 23 O.A.R. 516 (further advances under a mortgage).

45 (1900), 2 N.B. Eq. 159.

Act. The court accepted this, giving the plaintiff's earlier unregistered deed priority over the defendant's registered conveyance simply because the plaintiff's conveyance was referred to in a registered instrument.

The application of this decision was explained in *Carson* v. *McMahon*.[46] There, it will be remembered, the defendant claimed title under an old unregistered deed whereas the plaintiff claimed under a recent registered deed. The argument from long possession (which succeeded) was not the sole ground advanced by the plaintiff. He had, after he had obtained the land under his unregistered deed, sold the land to a pulp company which subsequently reconveyed to him. The deeds to and from the pulp company were registered before the defendant obtained his deed. The plaintiff therefore argued that the defendant should be deemed to have notice of his title by virtue of section 68 of the Registry Act. But the court held otherwise, because in searching title in the normal way, the defendant could not have found these deeds. To use the words of Baxter C. J.:

> The Registry Act provides for the keeping of indexes and I think if a person searching a title uses all the means provided by the Act it would be an unreasonable construction of the section relating to notice to hold that if there were any adventitious entry on the registry he must be held to have notice of it. All that was intended by the section was that if a document was on the registry, which he might have seen in the course of a proper search, he would be fixed with notice of it, whether he actually looked at it or not.[47]

It should perhaps be observed that the registered document was subsequent to the plaintiff's root of title.

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[46] (1946), 15 M.P.R. 109.

[47] *Ibid.*, at p. 118.