

Indefeasibility of Title: Law Reform in Scotland and New Zealand

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The Law Commissions of both Scotland and New Zealand have in recent years been working on the subject of land registration. Each has produced a lengthy report on the subject, and in each case the report has resulted, fairly quickly, in legislation: respectively the Land Registration etc (Scotland) Act 2012 and the Land Transfer Act 2017 (NZ). The Scottish legislation came into force at the end of 2014; the New Zealand legislation is due to follow shortly.

Among the topics grappled with by both Law Commissions was the topic of indefeasibility of title. What happens if the instrument of transfer is defective, for example by reason of absence of title, incapacity, or forgery? Should registration still confer title on the would-be purchaser? Or should the law leave title where it began, with the 'true' owner, and seek to compensate the purchaser, in deserving cases, with compensation from the state?

To these questions there are no easy answers but rather a range of possible solutions. Viewed from the point of view of the purchaser, these are, broadly speaking (i) title always; (ii) title sometimes; (iii) title never. The first describes a system of immediate indefeasibility or, as it is sometimes called, of title by registration. The purchaser becomes owner; the 'true' owner submits to the expropriation and hopes for compensation. The last is a system of deferred indefeasibility. The purchaser receives nothing, but a future third party taking from the purchaser in good faith becomes owner at the expense of the 'true' owner. There is still indefeasibility, and expropriation, but deferred to as late as a system of registration of title can reasonably allow.

If, however, the choice between 'title always' and 'title never' seems unduly stark, as usually it does, then the attractions of 'title sometimes' become hard to resist. Yet this only increases the choices that have to be made. What is the default rule (immediate indefeasibility or deferred indefeasibility?) to which 'title sometimes' is to act by way of exceptions? Do the exceptions comprise fixed rules, or a judicial discretion, or both? Are they generous or restricted? And, assuming the default rule to be immediate indefeasibility (as is usually the case), are they true exceptions (so that there never was a vesting of title in the purchaser), or do they rather constitute a prospective unscrambling of a vesting, which should not have occurred in the first place?

Before the new legislation, in both Scotland and New Zealand, the rule was immediate indefeasibility plus exceptions, or in other words a version of 'title sometimes'. But the choices of the respective Law Commissions for reform have not been the same. In New Zealand the approach has been to expand the exceptions with the introduction of a broad judicial discretion; in Scotland it has been to abandon 'title sometimes' altogether in favour of deferred indefeasibility. The purpose of this paper is to examine, and evaluate, these very different approaches to indefeasibility.