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A CASE FOR THE APPLICATION OF THE THEORY OF DEFERRED INDEFEASIBILITY IN UGANDA AS AN INSTRUMENT TO PROMOTE INDEFEASIBILITY OF TITLE UNDER THE REGISTRATION OF TITLES ACT.

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A CASE FOR THE APPLICATION OF THE THEORY OF DEFERRED INDEFEASIBILITY IN UGANDA AS AN INSTRUMENT TO PROMOTE INDEFEASIBILITY OF TITLE UNDER THE REGISTRATION OF TITLES ACT.

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Abstract

The theory of deferred indefeasibility as opposed to immediate indefeasibility is presented as a means to improve security of title today. A comparison is made of the relative merits and demerits of the two theories of deferred and immediate indefeasibility. In so doing, the aim is to reconcile the out-dated theory of immediate indefeasibility with the modern legal regime and to preserve its relevance in the prevailing socio-economic situation. In a comparative analysis, other jurisdictions, especially Canada are studied to ascertain how they have evolved their interpretation of the same. Inevitably, indefeasibility, as a concept of real property is analysed considering human rights perspectives as relatively impacted by the two theories.

1.0 INTRODUCTION

The question of whether indefeasibility should be deferred or immediate has been, in other jurisdictions, a subject of debate for many years. (E, 1995)¹ The situation in Uganda is generally quieter; as in most Torrens jurisdictions, the agreed position is in favour of immediate indefeasibility. This was confirmed by the Privy Council decision in *Frazer v Walker*.² However, the rekindling of the debate in other jurisdictions points to recognition of the inherent

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¹ Toomey, E. 'FRAUD AND FORGERY IN THE 1990s CAN OUR ADHERENCE TO FRAZER v WALKER SURVIVE THE STRAIN?' (1994) 5 Canterbury Law Review pp. 424 <<http://hdl.handle.net/10092/3261>> [Accessed 20 January 2022]

² [1967] 1 All ER 649

weaknesses of the concept of immediate indefeasibility and the advantages accruing from taking up the concept of deferred indefeasibility.

First, it is important to understand the Torrens System and the principle of indefeasibility as envisaged by the Registration of Titles Act, Cap 230³ before the concepts introduced above are debated.

The Torrens system in Uganda is provided for under the Registration of Titles Act, Cap 230 (hereinafter referred to as the RTA). It has been held that under the Torrens System, security of title is based on the four principles of:

- i. Indefeasibility – which means that title cannot be impeached save by imputing fraud on a transferee;
- ii. Registration – which means title is secured by the fact of registration, and that only registered instruments are recognised as affecting interests on a Certificate of Title;
- iii. The curtain principle – which ideally speaking, means abolition of the common law doctrine of notice and exhaustive inquiry and
- iv. Assurance – which requires compensation upon detrimental reliance on the register.⁴

The aforementioned principles are substantially provided for in the RTA.⁵ The principles of the Torrens system are not mutually exclusive, but are complementary in their application. It follows that the principle of indefeasibility cannot be assessed in isolation of the other aforementioned principles, especially registration. The process of title moving is a legal process that is reflected by registration on the title deed and the registration is protected by sections 59 and 176.⁶

In this sense, registration is not a mere endorsement on paper. It is a reflection of the change in the legal status showing that the registered proprietor is given the rights under section 59,⁷ fundamental among which is

³ Hereafter referred to as The RTA

⁴ *Adrabo Stanley v Madira Jimmy* Civil Suit No. 0024 OF 2013

⁵ See sections 59 and 176, 54, 136 and 180, and 181 of the Act respectively.

⁶ *Andrew Babigumira v John Magezi* Miscellaneous Application No. 538 of 2013

⁷ *Ibid.*

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indefeasibility of title. Registration therefore acts as a root of title. It is established that once a title is recorded on the register, not only is the title created by the act of registration, but its validity and immunity from any attack are also guaranteed.⁸

1.1 What is Indefeasibility under the Torrens System and the RTA?

Put simply, it is a “convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys”.⁹ Section 176 entrenches the principle of indefeasibility by limiting actions of ejectment on land under the RTA.¹⁰ It has been held that the remedy of ejectment as provided for thereunder has been limited in the RTA by the principle of indefeasibility.¹¹ The section has been interpreted to mean that the production of a certificate of title shall be an absolute bar and estoppels any action of ejectment.¹²

Indefeasibility however does not mean that the registered proprietor is always guaranteed against other claims. There are exceptions to the principle as seen in the provisos under section 176. However; the general rule remains that a certificate of title issued under the RTA is conclusive proof that the person registered thereon is entitled to the estate.¹³ Any claims not registered on the encumbrance page or on the white page are not recognised by the act as a general rule.¹⁴

Indefeasibility, it follows, moves hand in hand with another core principle, registration. In *Lumu v Lindo Musoke*,¹⁵ the court interpreted the equivalent of sections 54 and 92(2) to hold that when read together, the sections are to the effect that no instrument is effectual until it is registered in the manner

⁸ *Adrabo Stanley v Madira Jimmy* Civil Suit No. 0024 OF 2013

⁹ *Frazer v Walker* [1967] 1 All ER 649 pp. 652

¹⁰ *Wasswa & Anor v Kyimba* Civil Suit No. 482 of 2011

¹¹ *Ibid.*

¹² *Ibid.* Indeed, in this case it was held that since the plaintiff did not fall under the provisos of section 176, the defendant, who was the registered proprietor, was protected from an action of ejectment.

¹³ *Adrabo Stanley v Madira Jimmy* Civil Suit No. 0024 OF 2013

¹⁴ Section 54 of the RTA

¹⁵ [1974] HCB 19

provided in the RTA. In this regard, indefeasibility cannot be differentiated from the principle of registration. In this case, although the plaintiff, the registered owner, had entered a sale agreement, the said agreement did not transfer any legal interest in the land. The defendant, who had assumed possession basing on the sale agreement, was thus held to be a trespasser.

Courts in other jurisdictions have been divided on the application of the principle of indefeasibility; the key dichotomy being whether indefeasibility under the Torrens system is deferred or immediate.

The purpose of this paper then is to import these debates, whilst making a case for the former as a tool to tame fraudulent transactions. Ironically, however, the case is also made for deferred indefeasibility as a mechanism to improve the very concept of indefeasibility of title of a registered proprietor, which is quintessential to the Torrens system.

2.0 IMMEDIATE AND DEFERRED INDEFEASIBILITY:

One of the more difficult decisions facing courts interpreting Torrens legislation has been the choice between the opposing theories of immediate and deferred indefeasibility of title. Proponents of immediate indefeasibility take the view that an innocent purchaser of land, who registers an instrument which is void through forgery or breach of some statutory or common law requirement, should attain an indefeasible title by registration.

It is argued that the policy of a system of title registration is to protect a person who registers without fraud. The fact that the instrument registered was void before registration is regarded as irrelevant. On the other hand, proponents of deferred indefeasibility argue that Torrens legislation was not intended to override the fundamental common law rules governing void instruments. The registration of a void instrument cannot cure its defect.

Nevertheless, even under deferred indefeasibility theory, Torrens system ensures that the void instrument, when registered, can form the root of a good title for a subsequent purchaser. A person who registers an instrument executed by the innocent registered proprietor attains indefeasibility on the

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registration of his own dealing. Thus, indefeasibility is 'deferred' to the second purchaser. (Neave, 1976)¹⁶

2.1 Deferred indefeasibility

Under deferred indefeasibility, the title of a transferee is not in any way secure if it is procured through fraud even though said transferee is bona fide.¹⁷ Deferred indefeasibility introduces the concepts of 'intermediate' and 'deferred owners.'¹⁸ Under the theory, the intermediate owner is the owner who obtained title from the fraudster, and the deferred owner is the owner who takes title from the intermediate owner.¹⁹

Only the deferred owner can rely on the doctrine of bona fide purchaser for value without notice to claim indefeasible title.²⁰ An intermediate owner on the other hand cannot and the rationale for this is that unlike the deferred owner, they had the opportunity to investigate the transaction and the vendor's title in order to avoid the fraud.²¹ Registration of a void instrument does not cure its defect, thus neither the instrument nor its registration gives good title.²²

The reasoning behind deferred indefeasibility was well articulated in *Gibbs v Messer*.²³ It was held that:

¹⁶ Professor Marcia Neave, 'Indefeasibility of Title in the Canadian Context' (1976) 26 U.T.L.J. 173 quoted in *Lawrence v Maple Trust Co Ltd* 2007 ONCA 74 (CanLII) at para. 43

¹⁷ *Gibbs v Messer* [1891] AC 248

¹⁸ 1168760 *Ontario Inc v 6706037 Canada Inc* 2019 ONSC 4702 para. 46 <https://canlii.ca/t/j2b89>

¹⁹ Ibid.

²⁰ Ibid.

²¹ *Reviczky v. Meleknia et al* 2007 CanLII 56494 (ON SC) wherein it was held that, the deferred owner acquires good title because he or she had no opportunity of discovering the fraud and furthermore that this is the 'determinative factor within the lesser transactional proximity to the fraudster which is implicit in being a subsequent purchaser.' <https://canlii.ca/t/1v9bt>

²² *CIBC Mortgages Inc. v. Computershare Trust Company of Canada*, 2016 ONSC 7094 Para 37

²³ [1891] AC 248

“The protection which the statute gives to persons transacting on the faith of the register is by its terms limited to those who actually deal with and derive right from a proprietor whose name is upon the register. And so, those who deal, not with the registered proprietor, but with a forger...do not transact on the faith of the register...”

It was on that premise held that such a transaction being void could not confer title onto the purchaser.

The holding and the theory of deferred indefeasibility, in general, is in line with the common law principle, *nemo dat quod non habet*. At common law a person could not pass better title than he or she had. Accordingly, if title to an interest in land was obtained through fraud, that title could never form the root of a good and valid claim to the land.²⁴The development of the principle of deferred indefeasibility was largely checked by the Privy Council decision in *Frazer v Walker*.²⁵

In this case, the Privy Council differentiated *Gibbs v Messer*²⁶ on the facts since in the latter case the court was concerned with the position of a bona fide purchaser for value from a ‘fictitious person’. The decision was therefore founded on a distinction drawn between such a case and that of a bona fide purchaser from a real registered proprietor. Lord Wilberforce held that on the facts then before court, the decision was not relevant as regards adverse claims made against a registered proprietor. Nevertheless, *Frazer v Walker* has become famous/ infamous for its dictum on immediate indefeasibility that effectively overruled the holding in *Gibbs v Messer*.

In the case at hand, the Privy Council considered the case of *Assets Co Ltd v Mere Roh*,²⁷ where the holding was that registration was conclusive to confer on the appellants a title unimpeachable by the respondents. Lord Wilberforce pointed out the variance in deducting the actual ratio decidendi of the case, considering it was a consolidated appeal on varying facts. The dividing point was whether the decision had established that the title of a transferee who

²⁴ *Lawrence v Maple Trust Co.* 2007 ONCA 74 (CanLII)

²⁵ [1967] 1 All ER 649

²⁶ [1891] AC 248

²⁷ [1905] AC 176

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acquired his interest under a void instrument is indefeasible, or whether it is only a bona fide purchaser from such a proprietor whose title is indefeasible.

Without the nomenclature, the court was actually in fact considering whether the decision in the *Assets Co. Ltd* case decided in favour of immediate or deferred indefeasibility. The court relied on *Boyd v Wellington Corporation*,²⁸ a case decided by a majority of the same court which held that the *Assets Co. Ltd* case above was an authority in favour of immediate indefeasibility. It was therefore held that, “As regards all such (void) instruments it (Roih case) established that registration is effective to vest and to divest title and to protect the registered proprietor against adverse claims.”²⁹

As stated earlier, this holding effectively departed from the position in *Gibbs v Messer* and authoritatively ended the hitherto confusion on the matter of whether indefeasibility is to be immediate or deferred.

2.2 Immediate Indefeasibility

As a Privy Council precedent, the decision is of a high authoritative and persuasive value in most Torrens jurisdictions and Uganda is no exception in this regard. It follows that the position in Uganda is that “upon registration, a registered holder immediately acquires protection of registration,”³⁰ and the title of a registered proprietor cannot be impeached, unless he or she somehow engaged in fraud leading to the acquisition of the title.³¹ The fraud of the vendor or predecessor in title is irrelevant under immediate indefeasibility.

Under the immediate indefeasibility theory, the Torrens system creates a system of title by registration, not a system of registration of title.³² A system of title by registration is designed to protect the interests of innocent parties who rely on the register. Therefore, once an instrument is registered, it is

²⁸ [1924] NZLR 1174

²⁹ *Frazer v Walker* [1967] 1 All ER 649 at p. 654

³⁰ *Teddy Akot v Okwonga Bridget* Civil Appeal No. 035 of 2019

³¹ Ibid.

³² *CIBC Mortgages Inc. v. Computershare Trust Company of Canada*, 2016 ONSC 7094 para. 34

effective even if it is procured by fraud.³³ However, where the fraud is imputed on the transferee, then his/ her title is impeachable.³⁴

Otherwise, the transferee's title under immediate indefeasibility is secured immediately³⁵ and he or she stands immune to any action of ejection.³⁶ Indeed, the immediate indefeasibility theory as applied by Ugandan courts has legal basis in the RTA. The Act prima facie seems to support this position. For instance, section 59 is to the effect that inter alia, no certificate of title issued thereunder shall be impeached by reason of any informality or irregularity in the application of in the proceedings that led to the registration of the said certificate. The section has not caused much debate within our jurisdiction regarding present purposes hence in *Kampala Bottlers v Damanico (U) Ltd*,³⁷ it was held that as per section 59, production of a certificate of title in the names of the appellant was conclusive proof of ownership of the land reflected therein, unless the case fell within the ambit of section 176.

In addition, the RTA also expressly protects purchasers whose title is obtained from a fraudulent vendor under section 181. The discernible conclusion from the above sections is that Act envisages immediate indefeasibility.³⁸ Needless to say this legal position has led to absurdities and injustice in practice.

The absurdity accruing is illustrated by the case of *Lwanga v Registrar of titles*,³⁹ where Odoki, J held that a fraudulent seller could confer proper title to a bona fide purchaser for value. The facts of this case were that a one Gwalingo bought land from Mukasa in 1920, by a forged document dated 30th September 1952. Two years after Gwalingo's death, a one Katemba purported to have obtained the land from Gwalingo as a gift. On February 5th 1953,

³³ Ibid.

³⁴ *Kampala Bottlers v Damanico (U) Ltd* Civil Suit No. 22 of 1992

³⁵ As provided under section 176 of the RTA

³⁶ *Wasswa and Anor v Kiyimbwa* Civil Suit No. 482 of 2011

³⁷ Civil Suit No. 22 of 1992

³⁸ It is worth noting that this can be rebutted because sections 59, 92(1) & (2) only give the power to transfer title to the registered proprietor and this is difficult to reconcile with the position that the same law supports transactions that the proprietor is not aware of.

³⁹ [1980] HCB 23

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Katamba forged a transfer of the said land into his names and was duly registered as the proprietor thereof.

Katamba then transferred the land to a one Salongo by a transfer dated 8th February 1955 and the latter thereby became the registered proprietor thereof. The applicant, the son of Gwalingo, brought the application to compel the Registrar of Titles to register the land in the names of Gwalingo. It is important to note that Salongo in this case was innocent of Katamba's fraud. It was held that he (Salongo) had good title. He was 'immediately' immune to any claims by the original owner by virtue of his bona fide registration. It was irrelevant that he had acquired title from a fraudulent vendor.

The technical meaning of indefeasibility is indestructibility of title or inability to be made invalid.⁴⁰ The person who is registered as proprietor has a right to the land described in the title, good against the world.⁴¹ It is difficult to reconcile this postulation with the law as is. The law is that where a registered proprietor has his secure title transferred to a purchaser for value without his consent, his only recourse is a claim for compensation or damages,⁴² especially where said purchaser is bona fide.

Sections 59 and 92 of the Act give the right to transact in land to the registered proprietor. It therefore seems against both law and logic for the same law to countenance a transaction in a parcel for which the registered proprietor is oblivious. In this sense, the concept of deferred indefeasibility is relatively more in line with earlier definition of 'indefeasibility' in as far as it prioritises the title of the original proprietor as against bona fide purchasers for value without notice.

3.0 FRAUD IN UGANDA UNDER THE REGISTRATION OF TITLES ACT

Section 77 of the RTA provides that any certificate of title, entry, removal of encumbrance, or cancellation in the Register Book that is procured or made by fraud shall be void as against all parties or privies to the fraud. In line with

⁴⁰ *Adrabo Stanley v Madira Jimmy* Civil Suit No. 0024 OF 2013

⁴¹ *Ibid.*

⁴² Section 178 of the RTA

the section, and as stated earlier, fraud is the only allowance the Act provides to defeat indefeasibility of title.⁴³ A good starting point is to recognise that fraud is ‘infinite in variety with the ever dynamic operations of mankind.’⁴⁴

It follows that it is in futility to have an all-encompassing dichotomy by which ‘fraud’ can be defined, and in general, courts have avoided hampering themselves with one specific definition.⁴⁵ However, the Supreme Court in *F Zaabwe v Orient Bank & Ors*⁴⁶ has given the now generally accepted definition of what amounts to a fraudulent act. The Supreme Court held to act fraudulently means, *inter alia*;

“to act wilfully, and with the specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself”.

The RTA is concerned with actual fraud⁴⁷ and not the common law doctrine of notice, which at common law could defeat title. However, whereas notice of unregistered interests cannot ideally affect title under Torrens system,⁴⁸ courts have used the concept of notice to impute fraud and defeat fraudulently acquired titles.⁴⁹ This is despite the express provision in section 136 that a purchaser will not be affected by notice.⁵⁰ In *Senkungu & 4 Ors v Mukasa*,⁵¹

⁴³ There are a limited number of exceptions to this principle of indefeasibility and these are listed in sections 64, 77, 136 and 176 of The registration of Titles Act; which essentially relate to fraud or illegality committed in procuring the registration.’ *Adrabo Stanley v Madira Jimmy* Civil Suit No. 0024 OF 2013

⁴⁴ *Senkungu v Yakobo* Supreme Court Civil Appeal No. 35 of 2006

⁴⁵ *Senkungu & 4 Ors v Mukasa* CIVIL APPEAL NO. 17 OF 2014

⁴⁶ Civil Appeal No.4 of 2006

⁴⁷ *Kampala Bottlers v Damanico (U) Ltd* Civil Suit No. 22 of 1992

⁴⁸ “It has been said that the main principle of a Torrens title registration system is the absolute authority of the register, save and except for fraud. The effect of this principle is that so long as encumbrances do not appear on the register, actual notice, no matter how clearly proved, does not affect the clear title of a purchaser for value.” *CIBC Mortgages Inc. v. Computershare Trust Company of Canada*, 2016 ONSC 7094 para. 21

⁴⁹ So for instance in *Edward Gasinzi & Anor v Lwanga Steven* Civil Suit No. 690 of 2014, it was held that the plaintiff’s physical presence on the land should have put the Defendant on Notice and that failure to make further inquiries of the person he found in occupation formed part of the particulars of fraud proved against him.

⁵⁰ In *David Ssejaka Nalima v Rebecca Musoke* Civil Appeal No. 12 of 1985, it was held that the section could not be called in aid in cases of fraud because the court doubted whether the framers of the Act intended to encourage dishonest dealings in land. Therefore, it was held that whereas mere knowledge of facts may not impute fraud, where such knowledge is shown to be accompanied by intention to defeat the interests of another, fraud may be imputed.

⁵¹ Civil Appeal No. 17 Of 2014

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it was held that the meaning of 'actual fraud' can be extended to include fraudulent conveyance schemes that can be affected without there necessarily being a false representation.

It was further held that such fraudulent conveyances typically involve a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession or grossly inadequate consideration. In regards to indefeasibility, the point to note is that the fraud alleged to impeach title must be imputed on the transferee.⁵² Otherwise, as seen in *Lwanga's case* above, fraud 'per se' will not impeach title.⁵³

3.1 Fraud as Facilitated by the RTA and the Concept of Immediate Indefeasibility:

Section 136 of the Act is to the effect that when dealing with registered land, the level of due diligence required of a purchaser is relatively lower than that expected of a purchaser of land not registered under the RTA. In *Ibaga Taratizio v Tarakpe Faustina*,⁵⁴ the court held that when it comes to registered land, one is not expected to perform the lengthy and burdensome inquiries expected when it comes to unregistered land.⁵⁵

It is clear in this regard the Act is treating the title as conclusive proof of ownership in line with section 59.⁵⁶ Section 136 is to be read along with not only section 59, but also section 181, which protects purchasers from actions of ejection and any claim that may defeat his/her interest *inter alia*:

"On the ground that the proprietor through or under whom he or she claims was registered as proprietor through fraud or error or has

⁵² So for instance in *Nassanga Margaret & Ors v Leo Kibahiganira & Ors* Civil Suit No. 94 of 2008, although it that the sale had been premised on fraudulently acquired Letters of administration as a matter of fact, it was held that this per se could not affect the titles of the Defendants who were not shown to be part of the fraud.

⁵³ *David Ssejaka Nalima v Rebecca Musoke* Civil Appeal No. 12 of 1985

⁵⁴ CIVIL APPEAL No. 0004 of 2017

⁵⁵ However, in practice, the courts have insisted that lands are not 'vegetables' and that a purchaser is expected to make a search of the actual land and there is also need to make thorough investigations not only of the land but also of the sellers before purchase.' *Sir John Mageire v Ausi Matovu* CACA No.07 of 1996

⁵⁶ However, in practice courts have recognised the injustice that would be perpetrated by such a strict application of the law and so courts now require parties to make investigations of the vendors. *Nafula v Kayanja & Anor* Civil Suit No. 136 of 2011. This is a step in the right direction as regards to defeating fraud.

derived from or through a person registered as proprietor through fraud or error.”

This is in line with the decision in *Lwanga v Registrar of Titles*,⁵⁷ where it was held that a person who was registered through fraud could pass a good title to a bona fide purchaser for value if the latter was not privy to the fraud. As seen above, this argument is supported in law and by judicial precedent. The only protection therefore that the law as is offers to the original proprietor, whose title has been fraudulently transferred, is the heavy burden on the same to impute the fraud on the transferee himself, which must be strictly proved.⁵⁸

Otherwise, fraud by the persons from whom a transferee claims title does not affect the transferee's title in any way unless, as stated above, such fraud can be imputed on him.⁵⁹ Where the original proprietor meets this burden and effectively imputes the fraud on the transferee, then his/her title is protected.⁶⁰ However, failure to do so would mean the former's title, and any indefeasibility he might have had thereunder, is effectively extinguished by the fraud of another in favour of the bona fide purchaser for value.⁶¹

Evidently, the law seems contradictory in application. It is inconceivable that the original proprietor who, with a certificate of title itself 'indefeasible' under the RTA, then has the heavy burden of proving the fraud against a subsequent bona fide purchaser for value. In this sense, it is difficult to see how it can be said that his title is/ was indefeasible under section 59 and the rest of the provisions under the RTA that are to that effect.

Put simply, the immediate indefeasibility theory as envisaged by the RTA encourages fraud by putting an end to inquiry regarding root of title. This is

⁵⁷ [1980] HCB 23

⁵⁸ *Kampala Bottlers v Damanico (U) Ltd* Civil Suit No. 22 of 1992

⁵⁹ *David Ssejaka Nalima v Rebecca Musoke* Civil Appeal No. 12 of 1985

⁶⁰ Consider for instance *Sinba (K) Ltd & 4Ors v UBC* Civil Appeal NO. 03 of 2014 where the Supreme Court imputed fraud on the 5th appellant due to her failure to carry out the necessary due diligence. Court resultantly found that she was not a bona fide purchaser for value and the fraud was imputed on her, her title was therefore within the provisos of section 176.

⁶¹ See for instance *Semwanga v Kwizera* Civil Suit No. 61 of 2005, where the bona fide purchaser acquired title indefeasible under forged transfer and consent forms.

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because title is secured immediately by the fact of registration and upon such registration. The fact that the vendor was registered through fraud is irrelevant.⁶² Such a position is unjust to the original proprietor in light of the notorious creativity of fraudsters.

Consider for instance *Ipolito Semwanga v Kwizera Buchana & Ors*.⁶³ Here, the court held that the plaintiff, the original proprietor, was not party to the sale agreement and he did not sign the transfer and consent forms. The first defendant was nonetheless awarded vacant possession, because he was a bona fide purchaser for value without notice. This was so even though as stated earlier, the Act gives the power to transact in land only to the registered proprietor.⁶⁴

Similarly, consider the case of *C R Patel v Commissioner Land Registration & Ors*.⁶⁵ This case was concerned with a Special Certificate of Title that was allegedly fraudulently acquired. It was held that the plaintiff was not party to the errors committed in the office of the first defendant. Therefore, to condemn the plaintiff on account of errors he was never privy to would be to abolish the indefeasibility of title principle which is protected in Sections 59, 64, 77, 176 (C) and 181 of the RTA.

In this sense therefore, the plaintiff's title was indefeasible immediately regardless of the fraud since, as was held, the original proprietor had not met the burden of imputing the alleged fraud on the plaintiff. The allegations of fraud included, *inter alia*, that counsel had submitted a fraudulent statutory declaration in support of an application for a special certificate as is required under section 70 of the RTA.

Intrinsic to the legal reasoning, is that the fact that the plaintiff was registered on title drops an axe on any other interests. The burden thereby shifted to the original proprietor, whose title itself previously acclaimed to be indefeasible,

⁶² Sections 59, 136 and 181 of the Act. See also *Nassanga Margaret & Ors v Leo Kibahiganira & Ors* Civil Suit No. 94 of 2008

⁶³ Civil Suit No. 61 of 2005

⁶⁴ Sections 59 and 92

⁶⁵ Civil Suit No. 87 of 2009

was now evidently defeasible. It was incumbent on the original proprietor to then impeach the title of the bona fide purchaser for value without notice.

As stated earlier, fraud has many shapes and incidents. Therefore, it may take the shape of, *inter alia*, fraudulent Grants of Letters of Administration.⁶⁶ It has also been recognised in forged powers of attorney under section 146 of the RTA⁶⁷ and double titling on the same parcel of land.⁶⁸ In all these instances, which are by no means exhaustive, the fact of registration means there is no further inquiry into root of title if the fraud in question cannot be imputed on the immediate transferee.

All other considerations are by virtue of said registration irrelevant for courts' consideration on who should have the title. Evidently, this is unjust to the original proprietor. The courts in Uganda have reiterated that fraud is such a 'grotesque monster that the courts should hound it wherever it rears its head and wherever it seeks to cover behind any legislation.'⁶⁹ The position that has been emphasized is that fraud, like all illegalities, unravels everything and vitiates the transaction.⁷⁰

A fortiori; practice has shown that insisting on imputing the fraud on the transferee as provided for under section 77 and as emphasized by the courts leads to manifest injustice, and in a sense makes the title of the original proprietor defeasible.⁷¹ The argument made in this article is that deferred indefeasibility offers a practical way to 'hound' fraud and in effect secure or at least strengthen the indefeasibility that Torrens system guarantees the original proprietor registered thereunder.

4.0 DEFERRED INDEFEASIBILITY AS A SOLUTION.

When the Torrens system was first introduced, the incidence of forgeries was extremely low. A system instigated more than a century ago must be made

⁶⁶ See *Nassanga Margaret & Ors v Leo Kibahiganira & Ors* Civil Suit No. 94 of 2008

⁶⁷ See *Fredrick Zaabwe v Orient Bank & Ors* Civil Appeal No.4 of 2006

⁶⁸ See *St. Mark Educational Centre Ltd v Makerere University* Civil Appeal No. 40 of 1997

⁶⁹ *Fam International Ltd & Anor v Mohamed El Faith* [1994] KALR 307

⁷⁰ *Ibid.*

⁷¹ See *Nassanga Margaret & Ors v Leo Kibahiganira & Ors* Civil Suit No. 0094 of 2008

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flexible enough to accommodate changes in our society. Moreover, it is essential to recognise that the area of law in question deals with one of the most important assets of individuals in the community - land ownership.

Today no one can realistically expect individuals to accept hopelessly inadequate compensation as an alternative to being ejected from their property or, as is more likely, to their acceptance of a mortgage commitment. The inflexibility of an absolute immediate indefeasibility principle has surfaced, and it would be foolish not to accept that a practical solution must be found. (E, 1995)⁷²

It has been argued that the Uganda land administration as a whole has been evolved to encourage the marketability of land. (Mugambwa, 2007)⁷³ This may in part explain why a bona fide purchaser's interest is given priority over that of the original proprietor, since this encourages potential investors to purchase land due to certainty that their title will not be impeached upon registration.

As suggested above, the incidents and species of fraud have multiplied malignantly since the ideal that is the Torrens system was conceived and imported. Indeed, to this end, it would be foolish to maintain its idealistic principles such as immediate indefeasibility in an inflexible manner without practical adjustments. The concept of deferred indefeasibility offers one such practical adjustment.

Consider for instance the Canadian case of *Lawrence v Maple Trust Co. et al.*⁷⁴ In this case Lawrence, a homeowner, had a mortgage on the suit property. An imposter pretending to be Lawrence, fraudulently sold the property to a one

⁷² Toomey, E. 'FRAUD AND FORGERY IN THE 1990s CAN OUR ADHERENCE TO FRAZER v WALKER SURVIVE THE STRAIN?' (1994) 5 Canterbury Law Review pp. 424-437 <<http://hdl.handle.net/10092/326> > [Accessed 20 January 2022]

⁷³ For instance, the apparent campaign against customary tenure which is unregistered has been traced all the way back to the East African Royal Commission (EARC) Report in 1955 which was largely concerned with improving the economic benefits attached to land.

J.T. Mugambwa, 'A COMPARATIVE ANALYSIS OF LAND TENURE LAW REFORM IN UGANDA AND PAPUA NEW GUINEA', Journal of South Pacific Law (2007) 11(1), available at: <<https://www.google.com/url/>> [Accessed 21 January 2022]

⁷⁴ 2007 ONCA 74 (CanLII)

Mr Thomas Wright, who it later turns out, was also fraudulent. Wright, upon registering the property in his name took out a mortgage as mortgagor on the property from Maple Trust Co.

On their part Maple Trust even checked the registry as part of the necessary due diligence. Lawrence upon realising the various transactions sued Thomas Wright and sought to have the mortgage declared void. The mortgage was upheld as valid. Ms Lawrence therefore appealed from the dismissal of her application to set aside the Maple Trust mortgage.

The court on appeal was largely concerned with the validity of the charge lodged by Maple Trust Co, the mortgagee. The argument made for the mortgagee was in line with immediate indefeasibility, to the effect that once Mr Thomas Wright was registered, the transfer was deemed to be effective. Further, as a bona fide purchaser/ (encumbrancer), who gave value for the charge and acted without notice of the fraud, it was entitled to rely on Wright's title and its charge was therefore valid.

The argument raised was that the fraud committed by Mr Wright was irrelevant, in so far as the validity of the charge was concerned. Maple Trust Co. was categorical in this position despite acknowledging that such a construction of the Act would lead to innocent parties losing legitimate interests in land basing on the fact that the Act provided for an assurance fund to compensate such victims.

The relevant law applicable to the facts was the Land Titles Act of Ontario, Canada. Section 78(4) thereunder recognises that it is reasonable to rely on the registry. The same Act however expressly states in section 155 thereunder, that subject to the provisions of the Act, registration does not validate an otherwise fraudulent and void disposition of an interest in land.

It was held that the position of the law in Ontario is in favour of deferred indefeasibility, and that the concept was consistent with section 155 of the Land Titles Act. It was held that on the facts, Ms Lawrence was the original owner. The mortgagee was the intermediate owner, since it had dealt with Mr

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Thomas Wright, the fraudster and further that there was no deferred owner. It was held that the charge was invalid in favour of the original owner.

The court was emboldened in this position due to policy considerations. It was argued that Ms Lawrence as the homeowner had no opportunity to discover the fraud, whereas the intermediate encumbrancer Maple Trust Co, which advanced the money had a better chance to discover the fraud. It was held that:

“By interpreting the Act in accordance with the theory of deferred indefeasibility, the law encourages lenders to be vigilant when making mortgages and places the burden of the fraud on the party that has the opportunity to avoid it, rather than the innocent homeowner who played no role in the perpetration of the fraud.”

Imperative to note, however, is that the court recognised that had the law been inclined towards immediate indefeasibility, as is the case in Uganda, the fact that the transfer to Wright was void by virtue of having been obtained by fraud would have been irrelevant.

Admittedly, deferred indefeasibility cannot solve all issues of fraud or protect a registered proprietor’s indefeasibility from all matters of fraud. However, deferred indefeasibility offers a better option. Consider *Ipolito Semwanga v Kwizera Buchana & Ors*⁷⁵ analysed earlier, the defendant testified that it was not the plaintiff (original proprietor) who sold to him the suit land and signed the consent and transfer forms.

Nonetheless, in line with the concept of immediate indefeasibility, it was held that the defendant, who was a bona fide purchaser for value, was entitled to vacant possession. By contrast, if Ugandan jurisprudence had been inclined towards deferred indefeasibility, the plaintiff’s title would have remained ‘indefeasible’. This is so especially since, on the facts, the defendant acquired his title from the fraudster and so he was not the deferred owner. On the facts, the defendant would have been an intermediate owner and the original owner would be able to recover the land.

⁷⁵ Civil suit No. 61 of 2005

Similarly, consider *Nassanga Margaret & Ors v Leo Kibahiganira & Ors*.⁷⁶ In this case, the defendants who successfully pleaded the defence of bona fide purchaser for value had acquired land from a fraudster with unlawfully obtained letters of administration. The plaintiffs brought this suit to recover the land from the defendants. It was held, in line with immediate indefeasibility, that annulment of the fraudulently obtained Letters of Administration alone could not automatically invalidate the title of a bona fide purchaser for value who was not privy to the fraud.

The point made in this article is that had similar facts been decided in a jurisdiction where the law was inclined towards deferred indefeasibility, the outcome would have been different. The plaintiffs, who were the legal administrators of the deceased's estate, would have been able to recover the land especially since on the facts there is no deferred owner.

It should always be kept in mind that the object of the Torrens System is not to enable persons who have doubtful titles to get indefeasible certificates of title, but to enable those who have good titles to have their rights declared and established as against the world. (Carret, 'A Reply to Criticisms of the Torrens System', 1893)⁷⁷ The injustice propagated by a strict reliance on immediate indefeasibility however seems to suggest that the Torrens system is instead concerned with perfecting void transactions;⁷⁸ a position which if adhered to will continue to manifest injustice.

4.1 WHOM SHOULD THE LAW PROTECT?

What is discernible from the above discussion is that the confusion, if any, emanates from the question, 'Who should the law protect?' The parties concerned in this case are the original proprietor, the bona fide purchaser

⁷⁶ Civil Suit No. 94 of 2008

⁷⁷ James R. Carret, 'A Reply to Criticisms of the Torrens System' [1893] Vol 7 No. 1 Harvard Law Review 24 at pp. 27 <<http://www.jstor.org/stable/1321988>> [Accessed on 25 January 2022]

⁷⁸ "...the immediate indefeasibility theory provides that registration will immediately validate a transfer, even if it is forged or otherwise void or voidable." Toomey, E. 'FRAUD AND FORGERY IN THE 1990s CAN OUR ADHERENCE TO FRAZER v WALKER SURVIVE THE STRAIN?' (1994) 5 Canterbury Law Review pp. 424 at pp. 424 <<http://hdl.handle.net/10092/326>> [Accessed 20 January 2022]

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from the fraudulent vendor and the subsequent bona fide purchaser in the case of deferred indefeasibility.

It has been commented that the Maple Trust case above, represents the typically challenging case where two relatively innocent parties are left to sort out the legal implications from the actions of a fraudster who is nowhere to be found.⁷⁹ The unavoidable injustice is that one innocent party must lose out regardless of whether one is inclined towards immediate or deferred indefeasibility. (Edwards, 1995)⁸⁰ It is clear that the law is torn between protecting the bona fide purchaser and the original proprietor.

The Ugandan position is clearly settled, as can be discerned from the precedents analysed herein; the former has the advantage at the cost of the latter. Sections 59, 92(2) and 181 of the RTA as interpreted by the courts guarantee the estate of such immediate bona fide transferee. As analysed above, this is regardless of whether the vendor was actually the registered proprietor as envisaged by Act.

It has been opined that the 'indefeasibility' rule in general achieves certainty for transferees, and hence eliminates the problems associated with making decisions under uncertainty.⁸¹ In the economic sense, immediate indefeasibility appears ideal, since a transferee can be sure that the title he is purchasing will be secure the moment he is registered thereon.

However, arguments on economic considerations cut both ways; whereas immediate indefeasibility secures the title of the transferee, deferred indefeasibility on the other hand reduces the risk of current property owners

⁷⁹ Davidson v. Canada (Attorney General), 2011 ONSC 4822 para. 32 <https://canlii.ca/t/fmlw0>

⁸⁰ Edwards, RR & O'reilly, J (1999) 'The Duel Between Immediate and Deferred Indefeasibility' Singapore Journal of Legal Studies, pp. 82-112 <<https://www.jstor.org/stable/24867780>> [Accessed 20 January 2022]

⁸¹ Edwards, RR & O'reilly, J (1999) 'The Duel Between Immediate and Deferred Indefeasibility' Singapore Journal of Legal Studies, 82-112 <<https://www.jstor.org/stable/24867780>> [Accessed 20 January 2022]

losing their interests on the basis of transactions they are unaware of.⁸² The downside with deferred indefeasibility is that:

“Society would lose the benefits of indefeasibility associated with certainty as any prospective transferee would bear the risk that their transaction may involve some fraud and hence would not gain indefeasibility upon registration.”⁸³

The economic consideration here is that potential investors would therefore be discouraged from buying land due to the lack of certainty that their titles will not be impeached. However, to consider land issues from the economic perspective only is to lose sight of the bigger picture. Rose Nakayi has criticised Uganda’s land laws and policy for advancing capitalistic land acquisitions instead of questioning them. (Nakayi, 2014)⁸⁴

The Uganda National Land Policy recognises the unique nature of land as ‘a key factor in shaping individual and collective identity through its history, the cultural expressions and idioms with which it is associated. The policy recognises that land “influences spirituality and aesthetic values of all human societies.”⁸⁵ It should also be kept in mind that it has been judicially recognised that real property is not fungible.⁸⁶

A particular parcel stands unique and cannot easily be substituted in terms of emotional, cultural, strategic and economic value. It follows that it is not enough to point to compensation, since it does not necessarily account for non-pecuniary matters. The case may be made that it is more equitable and fair to protect the original proprietor, who might have his aesthetic connections to his parcel. Prioritizing the original proprietor is also in line

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Rose Nakayi, ‘Can Land Policy serve capitalist, pro-poor agendas?’ *The Observer* (September 10, 2014) <<https://www.observer.ug/component/content/article/>> (Accessed 25 January 2022)

⁸⁵ National Land Policy, February 2013, pp. 1 available at <<https://www.google.com/ur/>> (Accessed 25 January 2022)

⁸⁶ *Lawrence v Maple Trust Company et al* 2007 ONCA 74 (CanLII): In this case, the case held in favour of deferred indefeasibility because as a policy consideration, it would not fair to compensate a homeowner from a mortgagee’s action of possession through compensation because real property is not ‘fungible.’

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with the right to property⁸⁷ provided for under the Constitution⁸⁸ as will be seen later.

In addition to the above considerations, the question of who the law should protect is answered by the ‘opportunity to investigate’⁸⁹ argument. In *Home Trust Company and JRJ Developments Limited v Dusanka Zivic*,⁹⁰ it was held that the policy rationale for maintaining deferred indefeasibility is that it makes it harder for original owners to lose their properties. More importantly, it forces prospective buyers to be more vigilant and perform more due diligence.

The court emphasized that while protecting immediate owners against the consequences of fraud is an appropriate objective, to do so whilst stripping ‘more innocent’ original owners, who possess prior original rights, does not seem entirely intuitive. The use of the phrase ‘more innocent’ as opposed to ‘less guilty’ by the court points to a recognition that there are two innocent parties, one of whom must lose out.

In this sense, the court in *Dusanka Zivic* held that the original owner is more innocent, since purchasers or encumbrancers like mortgagees have more control over the ‘risks’ assumed. They can ameliorate such risk largely by increased due diligence. In contrast, existing original owners have absolutely no way of defending against post-acquisition title fraud.

However, the ‘opportunity to investigate argument’, whereas it decides in favour of the original owner when it comes to the intermediate owner,⁹¹ it does not protect the former against a deferred bona fide purchaser. This is because, as was held in *Lawrence v Maple Trust Co. Ltd*,⁹² like the original owner, he or she lacks the opportunity to investigate. Nonetheless, the earlier stated

⁸⁷ Article 26

⁸⁸ The Constitution of the Republic of Uganda 1995

⁸⁹ *Reviczky v. Meleknia et al* 2007 CanLII 56494 (ON SC)

⁹⁰ 2006 CanLII 38359 (ON SC) para 22

⁹¹ I.e., The one who acquires title through the fraud of another.

⁹² 2007 ONCA 74 (CanLII)

considerations on the non-fungible nature of land and its uses and connections to an individual still weigh in favour of the original owner.

The holding in *Dusanka Zivic* is to a larger extent in keeping with the position of the law in Uganda. It has been reiterated by courts that lands are not vegetables and that there is a requirement to carry out due diligence by a prospective purchaser, part of which is investigating the title of the prospective vendor.⁹³ Indeed courts have in fact imputed fraud on purchasers who do not conduct the necessary due diligence.⁹⁴

However, due to the concept of indefeasibility as interpreted, the courts in some instances have been light on the due diligence required by a purchaser.⁹⁵ However, as argued above this position is unfair to the original proprietor.⁹⁶ It seems fair and just to place such burden on the subsequent purchaser other than stripping an owner of a prior legal right which, arguably, is in contravention of Article 26 of The 1995 Constitution of The Republic of Uganda. This provision substantially provides for the right to own property as will be seen later.

In addition to maintaining the integrity of the land titles system,⁹⁷ deferred indefeasibility is more just, equitable and fair since it protects the interests of the original owner at the cost of the purchaser, who acquired his title through fraud however bona fide since the latter had a better chance of discovering the fraud upon carrying out due diligence.

⁹³ Look at *Nafula v Brig Gen Kayanja & Anor* Civil Suit No. 136 of 2011 where it was held that the first defendant was not a bona fide purchaser since he had not performed due diligence and court ordered cancellation of title in favour of the Plaintiff, the original owner.

⁹⁴ See *Sinba (K) Ltd & 4Ors v UBC* Civil Appeal NO. 03 of 2014

⁹⁵ See for instance; *Nassanga Margaret & Ors v Leo Kibahiganira & Ors* Civil Suit No. 94 of 2008, Where court was concerned with a void grant of letters of administration and it was held that the purchaser was not required to look into whether the grant was legally obtained because to do so would place a large burden on the purchaser and defeat the principle of indefeasibility.

⁹⁶ Indeed, in *Nassanga Margaret & Ors v Leo Kibahiganira & Ors* Civil Suit No. 94 of 2008 the parties who were legally entitled to the Letters of Administration lost out on their rights in favour of the bona fide purchaser who was not required to perform the 'exorbitant' burden of investigating the Grant of Letters of Administration.

⁹⁷ *Home Trust Company and JRJ Developments Limited v Dusanka Zivic* 2006 CanLII 38359 (ON SC) Para 25

4.2 THE SUBSEQUENT BONAFIDE PURCHASER FOR VALUE UNDER DEFERRED INDEFEASIBILITY; A MATTER OF SAME DIFFERENCE?

In *Gibbs v Messer*, the courts, whilst deciding in favour of deferred indefeasibility for a transferee from a void instrument, held that a subsequent purchaser from such impugned transfer would be granted good title as against the original proprietor. In the Canadian case of *CIBC Mortgages Inc. v. Computershare Trust Company of Canada*,⁹⁸ it was held that the deferred owner acquires an interest in the property that is good against the rest of the world.

Similarly in *Lawrence v Maple Trust Co. et al.*,⁹⁹ the court acknowledged that any deferred owner who acquired an interest basing on Maples bona fide registration would have had indefeasible title.¹⁰⁰ The injustice to the original owner is self-evident. For instance, on the facts of the *Maple Trust's case*, Ms Lawrence the oblivious home owner would still have lost her land to the hypothetical deferred owner, had there been any.

The law is that the original proprietor has the burden of proving fraud on such a bona fide purchaser; which burden, as stated earlier, is relatively high.¹⁰¹ In *Hannington Njuki v George William Musisi*¹⁰², it was held that once a party establishes itself as a bona fide purchaser for value without notice of any fraud, the burden then shifts onto the plaintiff to strictly prove beyond a mere balance of probabilities that the defendant is guilty of some fraudulent act.

Aside from the unfair burden on the original owner, as has been aptly stated, human creativity is infinite. The facts in *C R Patel v Commissioner of Land Registration*¹⁰³ show a textbook scenario of how the system has been exploited

⁹⁸ 2016 ONSC 7094

⁹⁹ 2007 ONCA 74 (CanLII)

¹⁰⁰ This is because, like the original owner, a deferred owner is taken as being too remote to the fraud to have had an opportunity to investigate and uncover it. It follows that the metric for determining whether one is an intermediate or deferred owner is the opportunity to investigate or the lack thereof. *Reviczky v. Meleknia et al* 2007 CanLII 56494 (ON SC)

¹⁰¹ *Kampala Bottlers v Damanico (U) Ltd* Civil Suit No. 22 of 1992

¹⁰² [1999] KALR 794.

¹⁰³ Civil Suit No. 87 of 2009

to perpetuate fraud as per the bona fide purchaser for value. Therefore, in this case, upon the issuance of the allegedly fraudulently acquired Special Certificate of Title, the land in question was transferred through three transferees until it reached the plaintiff, who then claimed successfully as a bona fide purchaser for value.

On these facts, although deferred indefeasibility might have provided a viable solution to the first transfer, it could not protect the original registered proprietor against the subsequent deferred owners, where they were all bona fide. This is because the indefeasibility, which was deferred, would step in to protect their interests.¹⁰⁴ In view of the deferred bona fide purchaser for value, it follows that once again a strict application of deferred indefeasibility as earlier postulated may not achieve the desired end.

4.3 THE WAY FORWARD

It follows therefore, that it may not be advisable to import this concept as packaged in Australia and New Zealand. Unlike how the general system of land registration was imported, the concept of deferred indefeasibility should be imported with necessary modifications. Other jurisdictions have taken such an approach. In Canada's context, it has been held that whereas the Land Titles Act provides for deferred indefeasibility, the Act is specific that this only applies with respect to 'fraudulent instruments.' The Land Titles Act then defines what a 'fraudulent instrument' is for present purposes.¹⁰⁵ The point the author makes here is that it is possible to import an idea with necessary modifications as deemed necessary to target local issues and situations.

Consider for instance literature that suggests 'discretionary indefeasibility.' To overcome the harshness of the *Frazer v Walker* position, the *Canada: Joint Titles Committee Renovating the Foundation: Proposals for a Model Recording and Registration Act for the Provinces and Territories of Canada, July 1990*

¹⁰⁴ *Lawrence v Maple Trust Co Ltd* 2007 ONCA 74 (CanLII) at Para 43

¹⁰⁵ *CIBC Mortgages Inc. v. Computershare Trust Company of Canada*, 2016 ONSC 7094

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report introduced the term. (E, 1995)¹⁰⁶ The report acknowledged a general rule that a displaced registered owner maintains ownership and the new registered owner receives the compensation.¹⁰⁷

However, the Committee recognised that unlike its predecessor such a rule should not be 'inflexible' because in some cases, it may be fairer and cheaper to leave the land with the new registered proprietor and compensate the one who has been displaced.¹⁰⁸ To achieve this, the report suggested giving the court the necessary discretion. This includes taking into consideration aspects like the nature of the ownership, the use of the property by either of the parties or the circumstances of the invalid transaction.

It also includes considering the special characteristics of the property and their appeal to the parties, as well as the willingness of one or both of the parties to receive compensation.¹⁰⁹ And so to this end it has been posited that this position *prima facie* assuages the hitherto debate since it achieves the purpose of securing title and maintaining the facility of transfer so that a purchaser can become a registered owner just as quick and safely.¹¹⁰

The leaf to borrow here is that there is a need for a contextual approach to the law. The cut and paste option may not be the most desirable. The 'infinite creativity of the human mind' should not be left as a monopoly of the fraudsters. The concept of discretionary indefeasibility taken ideally offers the chance for courts to decide on the facts and in the interests of justice and fairness on which side indefeasibility should fall.

As asserted above, courts will be called upon to take into account more factors than mere registration and the law in general will have to take cognisance of the fact that land is not an exclusively economic concept. It follows that issues

¹⁰⁶ Toomey, E. 'FRAUD AND FORGERY IN THE 1990s CAN OUR ADHERENCE TO FRAZER v WALKER SURVIVE THE STRAIN?' (1994) 5 Canterbury Law Review p. 424 at p. 435 <<http://hdl.handle.net/10092/326> > [Accessed 20 January 2022]

¹⁰⁷ This is in line with deferred indefeasibility since the transferee doesn't get the legal title which remains with the original proprietor.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

of increasing certainty of prospective purchasers will have to come secondary especially in view of the original proprietor's right to property.

A case by case approach no doubt will increase the time taken in making judicial decisions, but at all times, the quintessential consideration should be fairness and justice.

5.0 HUMAN RIGHTS CONSIDERATIONS AND THE RIGHT TO PROPERTY.

"If we continue to take [property] in the modern narrow sense, the property right contradicts democratic human rights. If we take it in the broader sense, it does not contradict a democratic concept of human rights..." CB Macpherson, 'Human Rights as Property Rights' (1977) 24 Dissent 72. (Lynden, 2008)¹¹¹

The highest authority in Uganda on land matters is the Constitution that is the supreme law of the land, and all other laws inconsistent with it are to that extent null and void.¹¹² Article 26(1) thereunder protects the right to property. The Supreme Court has defined the scope of the meaning of the word 'property' in Article 26 in *Philip Karugaba v AG*,¹¹³ to the effect that the property envisaged by that Article is that which is capable of being owned and is capable of being given a compensable value.

It was further held that intrinsic to 'property' was the right to enjoy, possess and dispose which is in fact in chorus with sections 59 and 92 of the Act, which give similar rights to a registered owner. Like all other rights, the right to property can only be derogated as provided for by law.¹¹⁴ The right to property has also been recognised internationally, for instance in the

¹¹¹ Griggs, Lynden, 'Possession, Indefeasibility and Human Rights' [2008] Queensland University of Technology Law and Justice Journal 286 <<http://classic.austlii.edu.au/au/journals/OUTLawJJI/2008/16.pdf>> (Accessed 22 January 2022)

¹¹² Article 2(2)

¹¹³ Constitutional Appeal No. 1 Of 2004

¹¹⁴ See Article 26 (2)

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Universal Declaration of Human Rights¹¹⁵ and The African Charter on Human and People's Rights.¹¹⁶

The practice of the courts in Uganda has always been to interpret constitutional provisions containing fundamental human rights broadly. This is because these are permanent provisions intended to cater for all times to come. The practice therefore, is to give them an interpretation that realizes the full benefit of the guaranteed right.¹¹⁷ It is in this light that deprivation without compensation should be considered.

It has been opined that a right lost through failure to register may well be seen as expropriation of a proprietary interest without compensation. (Lynden, 2008)¹¹⁸ Such reasoning is no doubt in line with the modern and liberal interpretations given to statutes when it comes to matters of fundamental human rights. The aforementioned provisions of the RTA as interpreted by the courts should be considered in this light.

A cogent argument has been made that although initially lawyers may have thought that human rights jurisprudence would have no impact on established land doctrines, this has proved to be misguided. (Lynden, 2008)¹¹⁹ It has been argued on this premise that land lawyers need to take a more reformist attitude. This is because "a failure to do this may quickly see

¹¹⁵ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 17 (1) <<https://www.refworld.org/docid/3ae6b3712c.html>> [Accessed 28 January 2022]

¹¹⁶ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 14 <<https://www.refworld.org/docid/3ae6b3630.html>> [Accessed 28 January 2022]

¹¹⁷ Foundation for Human Rights Initiatives v Attorney General Constitutional Appeal No. 03 of 2009

¹¹⁸ Griggs, Lynden, 'Possession, Indefeasibility and Human Rights' [2008] Queensland University of Technology Law and Justice Journal 286 <<http://classic.austlii.edu.au/au/journals/OUTLawJJI/2008/16.pdf>> (Accessed 22 January 2022)

¹¹⁹ Griggs, Lynden, 'Possession, Indefeasibility and Human Rights' [2008] Queensland University of Technology Law and Justice Journal 286 <<http://classic.austlii.edu.au/au/journals/OUTLawJJI/2008/16.pdf>> [Accessed 22 January 2022]

established property doctrines evaporate in the arguably muddy, amorphous and presumably just waters of human rights.”¹²⁰

Such doctrines include doctrines such as adverse possession, prescriptive easements and the subject of this paper; indefeasibility as envisaged by the RTA.¹²¹ In other jurisdictions, the nexus between ‘established land doctrines’ and human rights is being debated. For instance, in *JA Pye (Oxford) Ltd & Ors v Graham & Ors*,¹²² the European Court of Human Rights was concerned with the legality of the doctrine of adverse possession in view of article 1 of Protocol No 1 of the European Convention on Human Rights.

This Article provides for the right to peaceful enjoyment of one’s possessions.¹²³ It was held in the dissenting judgement that the effect of the doctrine was both to deprive the applicants of their substantive property rights and to preclude them from lawfully repossessing the land, since they would have lost the beneficial title to it.¹²⁴ The minority argued:

*“While we can accept that, where land is abandoned, it may be in the general interest that it should be acquired by someone who would put it to effective use, we are unable to accept that the general interest would extend to depriving a registered landowner of his beneficial title to the land, except by a proper process of compulsory acquisition for fair compensation.”*¹²⁵

In recognising the doctrine of adverse possession as depriving an owner without compensation, the dissenting judgement shows that indeed what has hitherto been taken as ‘established land doctrines’ may have to be made

¹²⁰ Griggs, Lynden, ‘Possession, Indefeasibility and Human Rights’ [2008] Queensland University of Technology Law and Justice Journal 286 <<http://classic.austlii.edu.au/au/journals/QUTLawJJI/2008/16.pdf>> [Accessed 22 January 2022]

¹²¹ Griggs, Lynden, ‘Possession, Indefeasibility and Human Rights’ [2008] Queensland University of Technology Law and Justice Journal 286 <<http://classic.austlii.edu.au/au/journals/QUTLawJJI/2008/16.pdf>> [Accessed 22 January 2022]

¹²² Application no. 44302/02 (ECtHR, 30 August 2007)

¹²³ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS5, <<https://www.refworld.org/docid/3ae6b3b04.html>> [Accessed 1 February 2022]

¹²⁴ Para 3

¹²⁵ *Pye v Graham* Application no. 44302/02 (ECtHR, 30 August 2007) Para 12

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flexible in order to reconcile them with the ever expanding human rights jurisprudence.

On the other hand, the majority held that the fair balance between the rights of an individual and the general society was not upset by the principle of adverse possession.¹²⁶ The ‘fair balance’ argument is also applicable in Uganda; provided for under Article 43 of the constitution. The Article provides that no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest in the enjoyment of their own rights.

The Article further provides that ‘public interest’ shall not permit limitation of constitutionally guaranteed rights beyond what is “acceptable and demonstrably justified in a free and democratic society.”¹²⁷ The theory of immediate indefeasibility as inflexibly applied by the courts should be re-evaluated in view of this Article since the argument is being made that it unfairly prejudices the rights of the original proprietor.

The question then becomes whether the concept of immediate indefeasibility is demonstrably justifiable in a free and democratic society? In considering this, it is important to take into consideration not only the intended purpose of the law, but also its effects.¹²⁸ It follows, therefore, that even though one was to keep in mind the economic benefit of certainty affiliated to immediate indefeasibility, the practical implications of the theory would still affect its constitutionality.

It is impossible to reconcile the holding in *Ipolito Semwanga v Kwizera Buchana & Ors*¹²⁹ or *Lwanga v Registrar of Titles*¹³⁰ with the position that one

¹²⁶ *Pye v Graham* Application no. 44302/02 (ECtHR, 30 August 2007) Para 85

¹²⁷ See Judgement of Mulenga JSC in *Charles Onyango Obbo & Anor v Attorney General* Constitutional Appeal No. 02 of 2002

¹²⁸ This is in line with the ‘purpose and effect’ principle. ‘Under this principle, court would consider both the purpose and effect of an impugned statute to determine its Constitutionality. If the purpose of the statute infringes a right guaranteed by the Constitution, that statute is declared unconstitutional. Where the purpose of the statute is purportedly within the constitution, court would go further to examine its effects. If the effects violate a right guaranteed by the constitution, that statute is also declared unconstitutional.’ *Salvatori Abuki & Another v Attorney General* Constitutional Case No. 02 of 1997 As per Okello, JA

¹²⁹ Civil Suit No. 61 of 2005

¹³⁰ [1980] HCB 23

who owns property has the right to possess and dispose of it.¹³¹ Seen from the perspective of immediate indefeasibility, indefeasibility has the practical effect of violating the registered owner's right to property in favour of a bona fide purchaser for value. This is contrary to articles 26(1) and 43 of the Constitution. To uphold the right of the transferee at the expense of one who had a prior legal right amounts to the former enjoying his/ her rights in a manner that prejudices the same rights of the latter contrary to Article 43(1). On the other hand, indefeasibility when interpreted in line with the theory of deferred indefeasibility is closer to the substantive right to property since the interests of the original owner are prioritized.

With deferred indefeasibility, the original owner to a degree maintains his right to own, possess and dispose of his own property since his right cannot be impeached by a void transaction save by a deferred transferee. However, even considering such subsequent deferred buyer deferred indefeasibility can also be adopted with further modifications such as 'discretionary indefeasibility' as analysed above.

This will go a step further not only in achieving the necessary fairness, but also in protecting the Constitutional right to property of the registered owner. Deferred indefeasibility, with modification, offers the least intrusive derogation of the right to property whilst maintaining the benefits of security of title and facility of quick transfer of title offered by the Torrens system. Indeed, in the *Pye v Graham* case concerned with adverse possession above, in one of the dissenting judgements it was held as follows:

The argument was put forward that another possible legitimate aim of such an institution (adverse possession) would be to encourage landowners to exploit, improve, or make use of their land. I cannot find this acceptable, first because such encouragement may be achieved by other less onerous means such as taxation, or the creation of incentives. Secondly, I cannot accept that the general interest connected with that aim can reasonably extend to depriving

¹³¹ When a person possesses property in full 'ownership', they have the right of *inter alia*, possession; and the right to sell, lease, mortgage or otherwise transfer the property, management and exclusion rights, see: *Atunya Valiryano v Okeny Delphino*, Civil Appeal No. 0051 Of 2017

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*a registered landowner of his beneficial title to the land except by a proper process of compulsory acquisition for fair compensation.*¹³²

The above dictum, albeit only persuasive, shows that it is quintessential in the era of ever-growing human rights jurisprudence that the least intrusive means be given priority as the law seeks to limit enjoyments of rights in the guise of achieving ends. Such ends, for emphasis, include the ‘certainty’ offered by immediate indefeasibility.

What remains clear is that the position of the law on indefeasibility is irreconcilable with the modern perceptions of human rights and a good starting point is to recognise this problem. It is also clear that hitherto established land doctrines, including the subject of this paper, indefeasibility, need to be re-evaluated in consideration of the legal and societal context. A practical solution to bridge the apparent inconsistency is deferred indefeasibility which is more in sync with today’s legal developments in the area of human rights as earlier analysed.

6.0 CONCLUSION AND RECOMMENDATIONS

The author takes cognisance of the particularly delicate nature of land disputes that has even been recognised by the courts.¹³³ And whereas introducing more considerations into land disputes will no doubt lengthen the judicial process, the author postulates that that is only one side of the debate. The submissions above show the other side, to the effect that these new considerations are more reconcilable with societal development and international jurisprudence.

Even though it would be comforting to believe that a principle cemented in *Frazer v Walker* can withstand the ‘tides of time immemorial’ that, in itself, denies an acceptance of changing trends and ideas. (E, 1995)¹³⁴ Society has

¹³² See the Dissenting Opinion of Judge Loucaides Joined By Judge Kovler, Application no. 44302/02 (ECtHR, 30 August 2007) pp. 33

¹³³ See for instance the Judgement of Hon. Lady Justice Monica K. Mugenyi in *Jacob Mutabazi v The Seventh Day Adventist Church & Anor* Civil Suit No. 54 Of 2009

¹³⁴ Toomey, E. ‘FRAUD AND FORGERY IN THE 1990s CAN OUR ADHERENCE TO FRAZER v WALKER SURVIVE THE STRAIN?’ (1994) 5 *Canterbury Law Review* pp. 424 at 424 <<http://hdl.handle.net/10092/326>> [accessed 20 January 2022]

evolved considerably since the RTA was enacted in 1924, more so since the Torrens system of land administration was first conceived in 1859. Somehow, the law remains the same regarding the concept of indefeasibility.

The law should embrace progressive ideas like deferred indefeasibility, which are more in sync with modern concepts and international standards. That said, it is evident that the concept of deferred indefeasibility is irreconcilable with section 181 as interpreted in *Lwanga v Registrar of Titles*,¹³⁵ in as far as the section expressly protects purchasers who obtain title from fraudulent ‘vendors’.

The section is the legal basis for the earlier criticized ‘inflexibility’ of immediate indefeasibility.¹³⁶ It follows that in as far as deferred indefeasibility is advanced as a means to protect the original proprietor at the expense of the purchaser; it is irreconcilable with section 181. This entire paper may therefore be taken as a case for reform on this particular provision in order to operationalize the concept of deferred indefeasibility. The concept is prima facie better armed for the fight against fraudulent transactions.

In the alternative, a similar provision to section 155 of Land Titles Act of Ontario, Canada, as expressed above should be contemplated; an express provision that ‘registration does not validate an otherwise fraudulent and void disposition of an interest in land.’

¹³⁵ [1980] HCB 23
¹³⁶ n. 72

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