# COMMENTS

## A NEW APPROACH TO THE UNILATERAL ALTERATION OF INSTRUMENTS

With scant regard for established authority, the Full Court of the Supreme Court of South Australia ensured that justice was done[1] in *Armor Coatings (Marketing) Pty. Ltd.* v. *General Credits (Finance) Pty. Ltd.*[2] by relying on a sixteenth century decision[3] which had had very little support for almost four hundred years.[4] The court refused to declare void an instrument in which there had been a unilateral, unauthorised and apparently material alteration after execution where the alteration was made in good faith and was in the interests of the party seeking to avoid the document.

The whole area of unilateral alteration of instruments is a vexed one pervaded by ". . . primitive and arbitrary . . ." rules[5] which are much in need of change.[6] The Full Court recognised this need for change, and refusing to follow the general current of authorities favouring outmoded rules, set out a fairer and more sensible principle. The purpose of this comment is to analyse the way in which the court achieved this and to assess the significance of the decision. To estimate the importance of the case, several steps must be taken. First, it is intended to set out briefly the law as it stood before the case. Secondly, the judgement of Bright J. at first instance and the judgements of the Full Court must be examined in detail. Thirdly, the consequences of the decision for Australian courts in general must be considered. Fourthly, it is intended to consider the possible ramifications if the Full Court had held in favour of the plaintiff instead of the defendant: that is, to consider the effect of registration of a void instrument under the Torrens system. It should be noted that this comment is confined to the specific issues raised in the case. Issues such as alterations by strangers and vitiation of instruments alone or of whole obligations are examined fully elsewhere.[7]

### 1. *Earlier Cases*

The classic statement on unilateral alterations to instruments after execution is contained in *Pigot's* case.[8]

> ". . . when any deed is altered in a point material, by the plaintiff himself, or by any strangers, without the privity of the obligee, be it by interlineation, addition, razing, or by drawing of a pen through a line, or through the midst of any material word, that deed thereby becomes void . . . if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void . . ."[9]

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1. The Full Court gave the plaintiff leave to appeal to the Privy Council, so the matter may not be finally decided—see *infra* text to n.53. At the time of preparation of this comment no appeal had been lodged.
2. (1978) 17 S.A.S.R. 259.
3. *Lord Darcy and Sharpe's* case (1584) 1 Leon 282.
4. In fact, the only support given to the case was by the dissenting judgement of Latham C.J. in *Brunker v. Perpetual Trustee Co. Ltd.* (1937) 57 C.L.R. 555, 592.
5. *Armor Coatings Pty. Ltd.* v. *General Credits (Finance) Pty. Ltd.* (1978) 17 S.A.S.R. 259, 282 *per* Bray C.J.
6. Tarlo, "The Unilateral Alteration of Instruments", (1959) 2 M.U.L.R. 43.
7. *Ibid.*
8. (1614) 11 Co. Rep. 26b.
9. *Id.*, 27a.

*Pigot's* case itself only extended to alterations to deeds, but, since *Master* v.*Miller*,[10] the doctrine has been regarded as applicable to all written instruments. The doctrine does not extend to alterations made with the authority of the obligor.[11] Although the judges in *Pigot's* case considered that even non-material alterations by the obligee avoided the instrument it is now clear in the light of later decisions that the doctrine only applies to material alterations.[12]

Such was the scope of the principle and this was set out clearly in the judgement of Bright J. at first instance. The decision of the Full Court in *Armor Coatings (Marketing) Pty. Ltd.* v. *General Credits (Finance) Pty. Ltd.* can now be cited as authority for a proviso to this established doctrine to the effect that a party should not be ". . . entitled to avoid a written instrument because of an alteration made in good faith to that document by the other party wholly in the interests of the would-be avoider."[13]

Prior to the decision, the weight of authority and professional opinion was strongly against the existence of such a proviso, although text writers had tended to the view that the doctrine in *Pigot's* case had little merit in the modern day context.[14] The doctrine derived from a time when the ". . . deed was surrounded with a magic aura. Anything which violated its integrity destroyed its mana."[15]

### 2. *The Facts*

The defendant company agreed to lend the plaintiff company a sum of money to be used by the plaintiff in constructing buildings on its land. It was agreed that the loan should be secured by a registered mortgage in favour of the defendant over the land. The mortgage was incomplete at the time it was executed: various matters relating to details of dates and amounts of payments had not been filled in. Subsequently these details were inserted by the defendant's solicitor and the mortgage was lodged for registration. Thus, before initial lodgement for registration various alterations were made to the mortgage document. Bright J. at first instance and the learned judges who heard the appeal were unanimous in holding these alterations to have been authorized and no further reference needs to be made to them.

At an earlier time the Highways Department had given notice of intention to acquire part of the plaintiff's land and had lodged a caveat to this effect. Both the plaintiff and the defendant were aware of this situation. Therefore the land subject to the mortgage was described in the mortgage as being the whole of the land described in the certificate of title except the land comprised in the caveat. As there was a caveat existing, the Registrar General could not register the mortgage without obtaining the consent of the

10. (1791) 4 T.R. 320.
11. See Tarlo, *loc. cit.* (*supra* n.6), 46. Further it is submitted that a party should be able to ratify subsequently an unauthorized alteration and thus make a document binding on himself: see Tarlo, *id.*, 52 and *Hudson* v. *Revett* (1829) 5 Bing. 368. (Note, however, that in *Hudson* v. *Revett*, the alteration could be viewed as being an authorized one.) The problem with the effectiveness of subsequent ratification is that in general terms it may not be possible to make valid a document which is already void due to an initially unauthorized, material alteration.
12. *Aldous* v. *Cornwell* (1868) L.R. Q.B. 573.
13. (1978) 17 S.A.S.R. 259, 280-281 *per* Bray C.J.
14. See *e.g. Salmond and Williams, On Contracts* (2nd ed., 1945), 573.
15. (1978) 17 S.A.S.R. 259, 275 *per* Bray C.J.

Highways Department. The Department refused consent and issued a notice of acquisition of the land comprised in the caveat. To allow prior registration of this notice of acquisition, the defendant's solicitor withdrew the mortgage. In order to gain registration of the mortgage then, two further alterations were made to the mortgage document by the defendant's solicitor.

First, he changed the reference to the caveat in the exclusion clause into a reference to the notice of acquisition. Since the excluded land remained exactly the same, this alteration was held to be clearly not material and nothing further needs to be said about it.

The second alteration was more problematical. The document had originally been dated 31 August, 1973. The Registrar General, however, had insisted that it must bear a date later than the Highways Department's notice of acquisition (17 December, 1973) and the defendant's solicitor had struck out the original date and substituted "18 December, 1973". The exact effect of this alteration upon the parties' obligations was not entirely clear, but it was at least arguable that it altered materially the operation of clause 24a of the mortgage document which read as follows:

> "The mortgagor shall as expeditiously as possible and in any event not later than the expiration of [twelve] months from the date hereof complete to the satisfaction of the Mortgagee in accordance with the Plans and Specifications previously submitted to the Mortgagee the building or other construction works (herein referred to as 'the Works') described therein."

*Prima facie*, it seemed that the alteration resulted in the plaintiff being given an additional three and one half months for the completion of the work, a change which seemed both material and exclusively to the benefit of the plaintiff.

After the alterations were made, the mortgage was registered. Subsequently, the plaintiff sought a declaration that the memorandum of mortgage was null and void together with certain consequential relief. The plaintiff's claim appeared to lack any merit. Money had been advanced to it by the defendant and the defendant had merely made such changes to the document as were necessary to obtain registration of a mortgage which both parties had agreed to. The changes made to the document in no way prejudiced the plaintiff: in fact, the plaintiff was attempting to take advantage of an archaic rule to try to escape its liabilities.

### 3. *Decision of Bright J.*

Following the established authority of *Pigot's* case and *Aldous* v. *Cornwell*,[16] Bright J. took the view that if the mortgage document had been altered by the defendant in a material particular without the authority of the plaintiff while the document was in the custody of the defendant, then the plaintiff must succeed however unmeritorious its claim.[17] Thus, two issues were of importance. First, it had to be decided if any of the insertions or alterations were "material" and secondly, if any of the changes were material, then it was vital to establish if the defendant had been "authorized" by the plaintiff to make them. As indicated earlier,[18] the

16. (1868) L.R. 3 Q.B. 573.
17. (1978) 17 S.A.S.R. 259, 266.
18. See references, *supra* nn. 3-4.

alteration to the date of the mortgage after the initial lodgement for registration was the one which raised the greatest problem and for this reason, it is intended to concentrate the following analysis upon the judges' treatment of this particular alteration.

Bright J. examined briefly the maze of case law on materiality. As had been stated earlier ". . . it is hazardous to attempt to extract general principles from the multiplicity of inconsistent cases."[19] Nevertheless it is relatively clear that an alteration will be considered material if the actual contract between the parties may be affected by the alteration:[20] it is less clear whether this is the only type of material alteration. As the law stands at present, it appears that an alteration of the instrument itself, without alteration of contractual rights, may be considered material[21] and an alteration seeking to make admissible in the courts a document which is inadmissible as it stands could be material.[22]

Usually the alteration of a date on a document will be material for the rights and obligations often run from that date. Nevertheless, Bright J. was of the view that the change of date in this instance was not material for in light of the other provisions of the mortgage document, it did not affect the rights of the parties. On any reading of the mortgage, the term of the loan was not expected to commence until the first advance had been made from the defendant to the plaintiff. (This first advance would not be made until the plaintiff had paid the disbursement and the architects had issued the required certificate). Bright J. further held that even if he were wrong and the alteration to the date was material, the alteration was made with the implied authority of the plaintiff.[23]

Thus Bright J. upheld the validity of the mortgage and the plaintiff appealed to the Full Court.

### 4. *The Full Court*

All three judges of the Full Court dismissed the appeal. The decision of Bray C.J. deals with the law relating to alteration of instruments in the greatest detail and both Mitchell J. and Walters J. agreed with his reasons for judgement. After restating the law in *Pigot's* case[24] and the subsequent decisions of *Master* v. *Miller* and *Aldous* v. *Cornwell*, Bray C.J. commented that it was impossible to reconcile all the decisions in the area and that he intended to follow the cases which had interpreted the rule liberally. He said "There is . . . little reason for preserving, in a rational system of law, a rule which instead of adjusting the equities of the case to the circumstances and nature of the alteration visits the document with total nullity."[25]

Bray C.J. specifically discussed the issues of "authorization" and "materiality" and gave each of these terms a wide interpretation.

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19. Tarlo, *loc. cit.* (*supra* n.6), 47.
20. *Sims* v. *Anderson* [1908] V.L.R. 348; Halsbury, *Laws of England* (4th ed., 1975), xii, para. 1378.
21. *Suffell* v. *Bank of England* (1881) 7 Q.B.D. 270, 272; *Mollett* v. *Wackerbarth* (1849) 5 C.B. 181, 193.
22. *Vacuum Oil Co. Pty. Ltd.* v. *Longmuir* [1957] V.R. 456. *Cf.* the American position, *Rowe* v. *Bowman* 183 Mass. 484 (1903).
23. (1978) 17 S.A.S.R. 259, 269.
24. See *supra* n.2.
25. (1978) 17 S.A.S.R. 259, 276.

(a) *Authorization*

First, Bray C.J. drew a distinction, as had the trial judge, between two types of document. Where the obligation itself originates in a document, for example an airline ticket or a negotiable instrument, any alteration is likely to be material and it will be unusual to be able to imply an authority by the other party to change it.[26] On the other hand where the document purports to express in writing an arrangement already reached by the parties, there is more scope for the courts to imply an authority for alterations. For instance, the document may not express accurately the agreement between the parties, or blanks may have been left in the document and in these situations the courts would readily imply an authority by one party to the other to alter the document unilaterally.[27] Of course once authorization is proved, the document will not be declared void because of the alteration.

Secondly, where a document is intended to be registered under the Torrens system, and one party gives it to the other party knowing and intending that that document should be registered, an implied authority to make any alterations necessary to obtain registration and which do not depart from the bargain between the parties will be readily inferred.[28]

Thirdly, the courts will readily imply an authority from one party to the other to do whatever is necessary to make a document legally enforceable.[29] This conclusion meant that Bray C.J. had to disagree with the decision of Sholl J. in *Vacuum Oil Co. Pty. Ltd.* v. *Longmuir*[30] where the document was vitiated because one party affixed a stamp (such stamp being required for legal enforceability) to an executed document without the consent of the other party.

Thus, Bray C.J. gave a very broad meaning to authorization. Despite some cases to the contrary,[31] he stated that authority for the alteration from the party seeking to avoid would be inferred where the alteration did not require a departure from the intention of the parties.

Despite this wide interpretation of authorization Bray C.J. concluded that the change of the mortgage date could not be said to have been impliedly authorized by the plaintiff. When the defendant sent a copy of the mortgage with the initial alterations to the plaintiff, any authority to make alterations was "exhausted".[32] Bray C.J. stated:

> "I do not think that the appellant should be regarded as having conferred an authority to interfere with the document for an indefinite period in the future, except with regard to any formal corrections necessary to achieve registration. I think that, except to that limited extent [the defendant] after [it] had sent the copy of the

26. See *Outer Suburban Properties Ltd.* v. *Clarke* [1933] S.A.S.R. 221.
27. (1978) 17 S.A.S.R. 259, 267 *per* Bright J.: 277 *per* Bray C.J. See also *Adsetts* v. *Hives* (1863) 33 Beav. 52; *Keen* v. *Smallbone* (1855) 17 C.B. 179. But *cf. Keysen* v. *Gregg* (1932) 32 S.R. (N.S.W.) 288.
28. See *Barker* v. *Weld* (1884) 3 N.Z.L.R. 104 *Cf. Brunker* v. *Perpetual Trustee Co.* Ltd. (1937) C.L.R. 555. It should be noted that in *Brunker's* case, the addition did depart from the intention of the parties or at least the intention of the transferor.
29. (1978) 17 S.A.S.R. 259, 278-279.
30. [1957] V.R. 456.
31. *Brunker* v. *Perpetual Trustee Co. Ltd.* (1937) 57 C.L.R. 555; *Vacuum Oil Co. Pty. Ltd.* v. *Longmuir* [1957] V.R. 456.
32. (1978) 17 S.A.S.R. 259, 279.

> mortgage to the appellant was *functus officio* with regard to the implied authority conferred on him . . . by the appellant."[33]

Thus it became vital to determine whether the change of date had been a material alteration.

(b) *Materiality*

*Prima facie,* the rights and obligations of the parties did run for a time ascertained by the date of the document. The literal meaning of clause 24a appears to be that the plaintiff bound itself to complete construction within twelve months of the date set out. As the rights and obligations of the parties under the contract were affected by the alteration, the test of materiality appeared to have been satisfied according to the authorities.[34]

Nevertheless, the Full Court held that the document was valid. Bray C.J. set out two reasons for so holding. First, he felt justified in inferring from other provisions of the mortgage and from the terms of a preceding contract a manifest intention, overriding the contrary impression conveyed by Clause 24a, that the twelve months granted the plaintiff for the completion of construction were not to run from the date of the mortgage document, but from some other date (possibly from the date fixed for the first advance, 8 November, 1973). This construction, an apparent application of the rule that the manifest intent can override the literal meaning of particular clauses in written documents, made the obligation to complete independent of the date of execution and meant that the alteration of that date was not material. Secondly, and more importantly, he held that even if the date *did* materially alter the document the plaintiff was not entitled to "avoid a written instrument because of an alteration made in good faith to that document by the other party, wholly in the interests of the would-be avoider."[35] If Clause 24(a) were materially altered then this proviso could apply to save the document. Bray C.J. was of the opinion that the principle in *Pigot's* case should be subject to a proviso to the effect that an unauthorised material alteration should not vitiate a deed at the instance of a party not adversely affected by the alteration. It should be noted that Walters J., in a concurring judgement, adopted a view of the matter different in theory though not in practical effect from that put forward by the learned Chief Justice: his Honour agreed that the change of date was solely to the benefit and advantage of the plaintiff and concluded that it was thus not a material alteration. These considerations, so his Honour thought, made the rule in *Pigot's* case inapplicable. It seems that the scant authorities relied upon by Bray C.J.[36] are in fact more in tune with the approach adopted by Walters J. However, the distinction between the two views does not seem to go beyond mere semantics: both must lead to the same result in any given fact situation.

The principle set out by Bray C.J. was clearly against the established authorities as had been noted by Bright J. at first instance:[37] the prevailing view was that the rule in *Pigot's* case should apply whether the alteration

33. *Ibid.*
34. See *supra* nn. 5-6.
35. (1978) 17 S.A.S.R. 259, 280-281.
36. *Lord Darcy and Sharpe's* case (1584) 1 Leon. 282; Halsbury, *op. cit.* (*supra* n.20), xii, para. 1378; *Brunker v. Perpetual Trustee Co Ltd.* (1937) 57 C.L.R. 555, 592 *per* Latham C.J.
37. (1978) 17 S.A.S.R. 259, 266.

was to the advantage of either party.[38] However, Bray C.J. stated that he did not think the view was well-founded and that there was not authority for it which was binding on him. He relied upon the 1584 decision of *Lord Darcy and Sharpe's* case [39] as support for the principle he propounded. In that case, one party had altered the date on a bond so as to give the other party a full extra year to perform his obligations. The court refused to declare void the bond ". . . for the razure is in a place not material, and also the razure trencheth to the advantage of the defendant himself who pleads it."[40] The import of the court's decision appears to be that an alteration wholly to the advantage of the party seeking to vitiate the document, should be regarded as immaterial. This case was relied upon by Latham C.J. in *Brunker* v. *Perpetual Trustee Co. Ltd.*[41] The transferee of land, in order to obtain registration, had altered the transfer by inserting notification of a mortgage. Contrary to the opinion of the other members of the High Court,[42] Latham C.J. held that such an alteration was not material. He further stated:

> "If, however, contrary to the view that I have expressed and to *Barker* v. *Weld,* the insertion of the reference to the mortgage did alter the legal effect of the document, the alteration was for the benefit of the transferor (or his estate). Such an alteration was held not to be a material alteration in *Darcy & Sharpe's* case decided in 1584, at a time when rules with respect to the effect of altering a document were very strict indeed."[43]

The majority of the High Court found it unnecessary to comment upon this point.

Bray C.J. found further authority for the principle in Halsbury:

> "A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, *or may otherwise prejudice the party bound by the deed as originally executed.*"[44]

Despite these statements, the weight of authority indicated no support for the principle. In *Gardner* v. *Walsh,*[45] another surety was added to a promissory note and this was held to be a material alteration which would avoid the note: the alteration would avoid the note whether or not the alteration was to the prejudice of the would-be avoider. Similarly the Supreme Court of Victoria and the Court of Appeal have rejected the concept that benefit to the would-be avoider or detriment to the other party, can be of any relevance in the question of voidability of the document.[46]

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38. See *e.g. Gardner* v. *Walsh* (1855) 5 E. & B. 83 and *Markham* v. *Gonaston* (1598) Cro. Eliz. 626.
39. (1584) 1 Leon. 282.
40. *Ibid.*
41. (1957) 57 C.L.R. 555.
42. *Supra* n.28.
43. (1937) 57 C.L.R. 555, 592.
44. Halsbury, *op. cit.* (*supra* n.20), xii, para. 1378.
45. (1855) 5 E. & B. 83.
46. *Colonial Bank of Australasia* v. *Moodie* (1880) 6 V.L.R. (L) 354; *Koch* v. *Dicks* [1933] 1 K.B. 307, 320 *per* Scrutton L.J., 324 *per* Greer L.J., 328 *per* Slesser L.J. Further, a similar view seems to be supported by the American cases—see Tarlo, *loc. cit.* (*supra* n.11), 56 n.77.

Bray C.J. succinctly stated his reasons for disagreeing with ". . . the general current of authorities . . ."[47] when he stated:

> ". . . I do not think that any authority binding on me prevents me from following *Darcy & Sharpe's* case and the opinion of Sir John Latham, and it is highly desirable, in my view, that this primitive and arbitrary rule should be confined as closely as respect for the doctrine of precedent will admit. If the lender, in a mood of muddled benevolence, alters the document by substituting $500 for $1,000 as the amount of the loan, I really do not see why he should lose the whole of his debt. There is no reason in logic, justice or common sense why he should. The evil which the rule is designed to prevent is entirely lacking in such a case."[48]

Walters J. too was affected by the complete lack of merit in the plaintiff's claim. He set out the generally accepted rule. He then noted that, in his view, materiality depended on whether the alteration affected the legal relations between the parties so as ". . . to vary *injuriously* the rights against, and the duties, to the party making the alteration."[49] Therefore on the facts he found that the alteration to the date of mortgage after the initial lodgement for registration was not material for it did not adversely affect the plaintiff. Rather the alteration was of benefit to the plaintiff. Mitchell J. agreed with the reasons for judgement of Bray C.J. and Walters J.

The plaintiff's appeal was therefore dismissed and the Full Court held that the mortgage was valid. The Full Court's decision is a courageous one. Its liberal interpretation of authorization means that fewer documents will be capable of being rendered void by a unilateral alteration. Of particular importance are Bray C.J.'s comments about documents intended by both parties to be registered under the Torrens system. Often at the time of execution, blanks will be left. The party actually registering the document should be seen as having an implied authority from the other party to make such alterations, not departing from the bargain, as are necessary to obtain registration. The Full Court's observations on materiality are even more far-reaching. It does seem obvious that the courts should consider in determining materiality whether the would-be avoider is prejudiced by the alteration. However, there was much authority against this principle affecting materiality, albeit not binding, and the Full Court had little authority to rely upon to reach the decision it did. A decision in favour of the plaintiff could not in any sense have been viewed as a just one.

### 5. *The Significance of the Decision*

The area of unilateral alteration of instruments is of great importance to those who in the course of their business must execute documents frequently and of course to their legal practitioners. As Bray C.J. remarked:

> "It is a matter of everyday occurrence in South Australia, and I presume, elsewhere, for one party to execute a document containing blanks and to hand it to the other party for registration or stamping. If the filling in of the blanks, or the alteration of the document to comply with official requisitions, by the other party or his solicitor or other representatives avoids the document unless the express con-

47. (1978) 17 S.A.S.R. 259, 282.
48. *Ibid.*
49. (1978) 17 S.A.S.R. 259, 283 (author's emphasis).

currence of the first-named party is specifically obtained, commercial affairs and land transactions might be thrown into considerable confusion."[50]

In cases of non-material alterations, it is of little importance that this happens on an every day basis. But it may often be difficult to decide if an alteration is material or non-material. Cases such as *Vacuum Oil Co. Pty. Ltd.* v. *Longmuir* indicate that it would be dangerous in the extreme for any alterations to be made to an executed document without the express consent of the other party. Even if an alteration were wholly to the benefit of that other party, authorization to make it should still be obtained for there was a definite risk that the document would be declared void if authorization had not been obtained. *Armor Coatings* purported to change this situation.

Although *Armor Coatings* did purport to grant relief from the strict operation of the rule where the alteration was for the benefit of the would-be avoider, it did not (and could not have, in view of the facts) reform the whole of the law relating to unilateral alteration of instruments! A number of issues which can arise in this area are still governed by outmoded principles and surrounded in doubt. For instance, where a material alteration is made by a stranger to the transaction rather than by the party who has custody of the document, it appears that the document is nevertheless invalidated. It seems that this may even be the case where the alteration is made against the will of and as a fraud against the party with custody of the document.[51] Further, the question as to whether a material alteration vitiates the document alone or the document *and* the contract behind the document remains a vexed one.[51a]

However, within its scope, the decision of *Armor Coatings* went far to correct existing inadequacies. Clearly, the Full Court's decision is binding only in South Australia. The persuasive weight the decision would have in the State Supreme Courts and in the High Court should depend more upon its inherent quality than upon its formal status and it is hoped that if any State Supreme Court or the High Court were faced with similar facts to those existing in *Armor Coatings* the reasoning and decision of the Full Court of South Australia would be followed.

However, this is not to suggest that practitioners should relax in any way their diligence in either obtaining consent from the other party for alterations or actually requiring the other party to sign the alterations, when they find it necessary to change in any way an executed document. The law must still be regarded as uncertain, outside South Australia at least, and the Full Court's decision itself is subject to an appeal to the Privy Council. The Full Court granted the plaintiff leave to appeal to the Privy Council on the basis that the case involved a question of general and public importance: that is, the case involved a question of the status and, the limitations of the doctrine in *Pigot's* case.[52] To date final leave has not been sought from the Full Court and therefore no appeal has actually been lodged with the Privy Council.[53] In view of the Full Court's refusal to grant

50. (1978) 17 S.A.S.R. 259, 286.
51. Tarlo, *loc. cit. (supra* n.6), 58-59.
51a. See *Vacuum Oil Pty. Ltd.* v. *Longmuir* [1957] V.R. and Tarlo, *id., passim.*
52. However, the Full Court refused to grant the plaintiff an injunction to restrain the defendant from exercising its power of sale. The reasons for this are explained by Bray C.J. (1978) 17 S.A.S.R. 259, 287-290.
53. Letter from Mr. J. Pertl, solicitor for the plaintiff, dated 16/3/79.

the plaintiff an injunction to restrain the defendant from exercising its power of sale under the mortgage, it may be that no appeal will be lodged.

It may be that in relation to documents arising under the Torrens system, the issue resolved in *Armor Coatings* is not of such vital significance as it is in relation to other types of documents. If the Full Court had held the mortgage document to be void, would the registration of the mortgage have cured the defect anyway and allowed the mortgage to operate? The inference from the judgement of Walters J. was that a decision declaring the document void would have resulted in the plaintiff's liability under the mortgage being discharged by operation of law.[54] On the other hand, Bray C.J. commented that if the mortgage had been declared void, a further question would arise before it could be finally concluded that the defendant had lost its security. That question would have involved a discussion of the effect of registration of a void instrument under the Real Property Act 1886-1975 (S.A.). It is intended to discuss briefly the effect of registration of the mortgage if the Full Court had declared the mortgage void.

### 6. *Effect of Registration*

The Torrens system of land registration sets up a system of title by registration. One of the main ideas behind the system is to grant indefeasibility of title, subject to certain statutory exceptions including fraud in the registered proprietor. Thus in the absence of fraud, the person who becomes the registered proprietor should obtain an indefeasible title. However, despite this clear objective, there has been a dispute from early times as to the position of the person who becomes registered through a void instrument.[55] At first, it was decided both by the Privy Council in *Gibbs* v. *Messer*[56] and the High Court in *Clements* v. *Ellis*[57] that a person registering through a void instrument did not obtain an indefeasible title: the concept of "deferred indefeasibility" became entrenched. However, this theory has since been overturned and the principle of "immediate indefeasibility" has been embraced by the Privy Council[58] and the High Court.[59] If a person registers a void instrument and he has not been fraudulent, he will obtain an indefeasible title. However, in South Australia alone there is a specific but limited statutory exception to this principle. Certain types of void deeds provide an exception to indefeasibility. Under section 69 II of the Real Property Act, 1886-1975 (S.A.) a certificate or other instrument of title is void if obtained by forgery, by means of an insufficient power of attorney or from a person under a legal disability. So, for example, if the mortgage document in *Armor Coatings* had been void by reason of a forgery rather than by alteration of the document, registration of the document would not have given indefeasibility of title to the defendant. However, if the document had been declared void in *Armor Coatings* it would not have been by virtue of any of the matters set out in section 69 II. Therefore, it could be thought that the registration of the mortgage by General Credits (Finance) Pty. Ltd. would have ensured that it had a valid mortgage even if the mortgage document itself had been declared void.

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54. (1978) 17 S.A.S.R. 259, 283.
55. See Sackville, "The Torrens System—Some Thoughts on Indefeasibility and Priorities", (1973) 47 *A.L.J.* 526, 528.
56. [1891] A.C. 248.
57. (1934) 51 C.L.R. 217.
58. *Frazer* v. *Walker* [1967] 1 A.C. 269.
59. *Breskvar* v. *Wall* (1971) 46 A.L.J.R. 68.

However, the High Court decision of *Travinto Nominees Pty. Ltd.* v. *Vlattas*[60] did deviate from the general current of authority in favour of immediate indefeasibility.

The respondent gave the appellants an option to purchase certain Torrens system land. The option stated that the sale was subject to two existing tenancies, one of which was registered. The clerk of the appellant's solicitor, who searched the register, failed to discover two covenants on the registered lease: the first covenant required that the premises be used only for the business of hairdressing and tobacco and the second stated that the tenant had an option to renew for a further five years. The appellants exercised the option to purchase. On discovering the covenants, they claimed compensation from the respondent under a clause of the contract of sale which allowed for compensation to the purchaser for any misdescription of the property sold. *Inter alia*, the respondent argued that the appellants were not bound by the option to renew and therefore were not entitled to compensation. This argument was based upon a provision of the Industrial Arbitration Act, 1940 (Cth.), 88B, which provided that all leases of hairdressing premises were void if entered into without the consent of the Industrial Commission. Consent had not been obtained for the lease in question. The respondent argued that the lease and the covenant to renew were void, notwithstanding the registration of the lease. Thus the issue which had to be decided was whether registration of the void lease made the lease and all the covenants in it, valid.

The High Court held in favour of the respondent. Gibbs J. concluded the matter by resolving the conflict between the two conflicting statutes, the Industrial Arbitration Act, 1940 (Cth) and the Real Property Act, 1900 (N.S.W.), in favour of the former. However, Barwick C.J. did consider the consequences of registration of a void lease. He stated that indefeasibility renders secure title to and possession of the land in question. However, where the registered interest is a lease, it is only those covenants which mark out the term of the lease, the extent of the lease, that are protected by registration. For example, a tenant's covenant to repair has nothing to do with marking out the extent of the estate and therefore does not secure indefeasibility through registration. On the facts, Barwick C.J. held that the covenant to renew was not specifically enforceable because of the illegality and so did not mark out the term of the lease.[61] It is submitted that the reasoning of Barwick C.J. in holding the option to renew to be a covenant not marking out the extent of the estate is difficult to follow, but the general principle is clear. The registration of an interest in land does not confer validity on every clause in the document. However, where ". . . the covenant covers something which is part and parcel of the interest conferred . . ." it will be protected by registration even though the document itself may have been void.[62]

It is submitted that in *Armor Coatings* the registration of the mortgage document, if void, would have conferred validity on covenants in the mortgage of importance to the mortgagee. For instance, clauses as to the term and amount of the loan under the mortgage clearly mark out the

60. (1973) 129 C.L.R. 1.
61. *Cf. Mercantile Credits Ltd.* v. *Shell Co. of Australia Ltd.* (1976) 50 A.L.J.R. 487 where the right to renewal was regarded as an integral part of the lease.
62. Sykes, *The Law of Securities* (3rd ed., 1978), 394.

extent of the interest. Thus it is suggested that even if the mortgage document had been void, registration of the instrument would have ensured that the defendant's interest under the mortgage survived and that its security was safe.

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