

## THE "PRINCIPLES, AIMS AND HOPES" OF TITLE BY REGISTRATION

### Introduction

The system of title by registration in operation in Australian jurisdictions is the Torrens system, conceived and introduced first into South Australia by Sir Robert Richard Torrens. From there it has spread to all of the States and Territories of Australia and to many other jurisdictions: for example, New Zealand; Western Canada; the Maritime Provinces of Canada; numerous states of the United States of America and much of Africa. Its success and suitability in these diverse lands with vastly differing cultures reveals its general suitability for adoption as a conveyancing procedure.

In this method title is guaranteed by recording the proprietorship upon a folium of a public Register (the effect of which is referred to later). Thenceforward the proprietorship is conferred by the Registration Act, subject to certain exceptions. Parties deprived of interests through the operation of the system may claim against an assurance fund for their losses.

Title by registration exists also in other jurisdictions (both in common law and civil law countries) as the sole or dominant conveyancing procedure, such as England, Wales, Israel, Germany and Austria. In Germany and Austria registers of title have been established since the thirteenth century.

In England and Wales the system is similar to Torrens title in many respects. However, it varies in one fundamental way, which is that the Register may be rectified more readily. It does not carry with it a definitive indefeasibility once registration is secured without fraud. If under general law rules it is wrong to accept the statement of interests recorded on the Register, it may be rectified to reflect the true legal title, leaving the deprived proprietor to the remedies provided by the assurance fund.

Under the Israeli system title is conferred in a similar way to Torrens title, except that there is no assurance fund and the extent of registrable interests is slightly different. In Germany and Austria title is conferred by registration as in the Torrens system except that there is no assurance fund and the extent of registrable interests is founded upon Roman law principles.

These methods of holding and dealing with title should be compared with the deeds system which depends upon the fact that the property has been granted by the Crown and transferred by a specific document on each occasion of transfer: the title deed. It ensures that a legal interest in land is acquired only if the transferor has the right and ability to transfer an interest. In the event of an invalid deed, the document which purports to make the transfer, the transfer is ineffective. The deed merely conveys the title if it exists in the transferor, and this depends

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upon the chain of valid deeds from the date of grant by the Crown to the last act of transfer. A single defect in the chain of title is fatal. In such an event a purchaser does not acquire any rights and the title remains where the defect has left it.

This simple account of the deeds system has omitted many complications, for example, when an owner acts in fraud, so that there may be two or more parties claiming an interest in the same parcel of land. Further, to be effective not all interests need to be represented by deeds: such as, the interest of a mortgagee where the mortgage has been created by deposit of title deeds. In these cases the rules of priority govern competing claims. An examination of them lies outside this article. Also, good claims may be barred by statutes of limitation, having the effect of making bad titles good. Then, deeds may be registered in the General Register of Deeds. It operates upon the principle that the first instrument to be registered takes priority over an inconsistent instrument provided that there is a priority dispute; that is to say, if the documents purport to deal with the same interests in the property. Registration here is largely a procedure to preserve priority or to grant priority over registered instruments: unless there is a competition between instruments, there is often no value in registration.<sup>1</sup>

It is the purpose of title by registration to avoid the difficulties evident in other methods of conveyancing: such as exist in deeds and deeds registration. The capacity to do this depends upon its successful operation and this rests, in turn, on the "principles" forming its basis. This article will examine the supposed original "principles" in an attempt to show the limited extent to which they are embodied now in the various legislative schemes mentioned and to show also the extent to which various "hopes" have been fulfilled.

### The "Principles" of Title by Registration

Historically, supporters of title by registration in the various forms in which it has been proposed have advanced various matters which they have labelled as "principles" of title by registration. Each of them (compared with their operation) will be discussed here as a concise statement and the result of the aims which supporters of reform sought to achieve set out. They will be sub-classified under the following areas: the Register and the "curtain"; matters beyond the "curtain"; the assurance fund; effect upon the substantive law of real property (which overlaps all of the previous areas, in varying degrees); boundaries; the status of the Register (public or private); and supposed "desires and hopes".

It must be conceded, at the outset, that rather than being "principles", in any consistent sense of the word, they are a collection of various descriptive statements, hopes, alleged facts, claims and so on. What are these "principles"? They are said to be: title is ascertained by its statement upon the Register and dealings are conducted in relation to the

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<sup>1</sup> Hogg, *The Australian Torrens System* (1905) 9-12. However, it must be remembered that otherwise registration may be required to make certain transactions operative. For example, the discharge of a mortgage without re-conveyance but this is a further use of registration and not its principal purpose.

Register;<sup>2</sup> the doctrine of the "curtain";<sup>3</sup> indefeasibility of title;<sup>4</sup> avoidance of historic searching of title which exists in the "old" system and the associated problems flowing from such an examination;<sup>5</sup> that on the surrender of the certificate of title there is a grant of a new and indefeasible title to the purchaser subject to the indefeasibility exceptions;<sup>6</sup> that interests are transferred by being recorded upon the Register;<sup>7</sup> that unregistered and unregistrable interests may be protected

- 2 Ruoff, *Ruoff and Roper on the Law and Practice of Registered Conveyancing* (3rd edn 1972) 4; Fortescue-Brickdale, "Land Registration in Central Europe" (1897) 2 J Comp Leg 112, 136; PP, "Registered Titles" (1964) 108 SJ 650, 667; Hogg, *Registration of Title to Land Throughout the Empire* (1920) 1; Francis, *The Law and Practice Relating to Torrens Title in Australasia* vol I (1972) 15; Hudak, "Registration-of-Land-Titles Act: The Ontario Torrens Law" (1971) 20 Col St LR 617, 617; Harrison, "The Transformation of Torrens's System into the Torrens System" (1962) 4 UQLJ 125, 130; "Title to Land - Torrens Act - Reference to Recorded Plat as a Noting" (1953) 37 Minn LR 151, 151f; Patton, "Extension of the Torrens System into Hawaii, the Philippine Islands and 'Latin-American Jurisdictions'" (1952) 36 Minn LR 213, 223, 231; Torrens, *The South Australian System of Conveyancing by Registration of Title, with Instructions for the Guidance of Parties Dealing, Illustrated by Copies of the Books and Forms in Use in the Land Titles Office; to which is Added, the South Australian Real Property Act as Amended in the Session of 1858* (1859) 12; Ruoff, "An Englishman looks at the Torrens System" (1952) 26 ALJ 118, 162, 194, 228; *Registrar of Titles (Vic) v Paterson* (1876) 2 App Cas 110, 117, the Court said: "[T]he register book reflects all facts material to an owner's title to land. Nothing that is not actually registered appears in the picture but the information that is shown is deemed to be both complete and accurate ..."; Fortescue-Brickdale, "The Land Registry" (1906) 50 SJ 803, 819.
- 3 Key, "Registration of Title to Land" (1886) 2 LQR 324; Jackson, "Registration of Land Interests - The English Version" (1972) 88 LQR 93, 122; Ruoff, "An Englishman looks at the Torrens System" supra n 2; Patton, supra n 2 at 26; Head, "The Torrens System in Alberta: A Dream in Operation" (1957) 35 Can Bar Rev 1.
- 4 Patton, supra n 2; Atkinson, "The Australian Registry of Land Titles" (1891-1892) 43 C 586, 586; Carret, "Land Transfer - A Reply to Criticism of the Torrens System" (1894) 7 Harv LR 24, 27; WM, "Registration of Title in New South Wales" [1960] Scots LT 129, 130; Reeves, "Progress in Land Title Transfer; The New Registration Law of New York" (1908) 8 Cal LR 438, 444, 445; Hogg, supra n 1 at 29-30; Kerr, *The Principles of the Australian Land Titles (Torrens) System* (1929) 6; Niblack, *The Torrens System its Cost and Complexity* (1903) 164; Francis, supra n 2 at 3; Glasgow, "The Development of Registered Conveyancing" (1963) 2 SQR 193, 206; "Title to Land - Torrens Act - Reference to Recorded Plat as a Noting", supra n 2. Cf the position in Baden in 1853 where only the last entry was considered, "What Registration Means" (1853) 21 LT 225, 226 and also Taylor, "Scotching Frazer v Walker" (1970) 44 ALJ 248, 249.
- 5 Potter, "Some Difficulties of Conveyancing with Registered Titles" (1934) 19 Con 105, 105; "Registration of Title (British Colonies)"(Imp) HC, Returns (1881) 151; Francis, supra n 2 at 3 - where it is said that Lord Watson took the system to cut off retrospective investigation of title - *Gibbs v Messer* [1891] AC 248, 254; Adams, *The Land Transfer Act 1952* (1958) 8; Torrens, *An Essay on the Transfer of Land by Registration under the Duplicate Method Operative in British Colonies* (1882) 24; "South Australia - Registrar-General's Report" (1860) 1; Cushman, "Torrens Titles and Title Insurance" (1937) 85 U Pa LR 589, 589-590; Torrens, supra n 2 at 9; Webster, "Transfer of Lands by Registration of Title" (1863-1864) 16 LM & R (3d) 363, 371-372; White, "The Elements of a Torrens Title" (1972) 11 Alta LR 392, 395; Laugessen, "The Torrens Title System in Colorado" (1962) 39 D 40, 41-42; Hassam, "Land Transfer Reform - The Australian System" (1891) 4 Harv LR 271, 274; Atkinson, supra n 4 at 589; McDougal, "Title Registration and Land Law Reform: A Reply" (1940) 7 U Chic LJ 63, 75; Opie, *Correspondence on the Real Property Act* (1882) 13. Cf *CPR and Imperial Oil v Turta and Sereda, Montreal Trust Co and Turta* [1954] 3 DLR 1 (SC); Robinson, "The Assurance Fund in British Columbia" (1952) 30 Can Bar Rev 445, 446-447.
- 6 Implicit in Jones, "Land Title Registration in the United States" (1902) 36 ALR 321.
- 7 Patton, supra n 2; Hogg, supra n 1 at 29-30; Blyth, "Land Transfer and Land Registry" (1896) 12 LQR 354; "Equities under a Registration of Titles System" (1925) 20 WN (Syd) 21, 23; Simpson, "The Role of Maps and Boundaries in Land Registration" in *Conference of Commonwealth Survey Officers 1967*, vol I (1968) 292.

on the Register by lodging a caveat;<sup>8</sup> an assurance fund;<sup>9</sup> that it does not alter the substantive law of real property and is a conveyancing procedure only;<sup>10</sup> that the Register eliminates the distinction between "legal" and "equitable" estates and that there is one form of estate only, though it might be "registered" or "unregistered";<sup>11</sup> that mortgages are raised by way of charge and not by way of transfer; title is guaranteed as to the boundaries stated upon the Register;<sup>12</sup> transfers are effected in a public office and not privately;<sup>13</sup> that it is so simple that a certificate of title can be understood by anyone and they can perform their own conveyancing; and, title is evidenced in one document.

Before commencing the analysis it needs to be said that there has been a general retreat (in the Torrens system) from the high ideals which Torrens sought to achieve upon the introduction of his revolutionary method of conveyancing.<sup>14</sup> This retreat is shown through a watering down of the subjects examined (each "principle", "claim" or "hope" being an original assertion at or shortly after the first enactment, in South Australia, in 1857). In other words, it may be thought by some to be a failure to implement the "principles", "aims" and "hopes" which has caused some of the difficulties to be revealed. In this respect, the limitations exposed may be viewed as part of the principles *as they exist now*. However, this is a simplistic view, for some limitations are never regarded as part of the system; for example, overriding interests (which may be either exceptions from indefeasibility and specified by the statutes or created by other statutes and take priority under the rules of statutory interpretation<sup>15</sup>). It may be argued that these limitations have to be accepted as a natural consequence of the existence of systems of title by registration. It is not the purpose of this article to open this mine-field

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- 8 Patton, *supra* n 2 at 26; Hogg, *supra* n 1 at 29-30; "Subordinate Rights in Registered Land" (1941) 75 Ir LT 83; "Land Registry; Liens on Land Certificates and the Rights of the Depositees" (1935) 69 Ir LT 11, 24; Cf Sabel, "Some Suggestions for Amending the Torrens Act" (1936) 13 NYULQR 244, 253; Fitch, "Registration of Land Titles" (1896) 5 Mich LJ 165, 168.
- 9 Torrens, *supra* n 2 at 9; Jones, *supra* n 6 at 338; Ruoff, *supra* n 3; Niblack, *supra* n 4 at 164; Hogg, *supra* n 1 at 29-30; Ruoff, *Ruoff and Roper on the Law and Practice of Registered Conveyancing* (3rd edn 1972) 830; Smith, "Registration of Title to Land" [1948] Scots LT 67, 87.
- 10 Kerr, *supra* n 4 at 21; Simpson, *Land Law and Registration* (1976) 53; Jackson, *supra* n 3 at 96; Torrens, *supra* n 5 at v. See *Lewis v Keene* (1936) 36 SR (NSW) 493, 500. Alterations to the previous law should be assimilated with the old as nearly as is possible — *Groongal Pastoral Co v Falkiner* (1924) 35 CLR 157. See also, Desenberg, "Torrens System of Title Registration" 12 LR 405, 438.
- 11 Patton, *supra* n 2; Hogg, *supra* n 1 at 766; Hogg, *supra* n 2 at 2; Fiel, *Monographien zum österreichischen Recht (Grundbuchsgesetz)*, Prugg verlag Eisenstadt (1969) 75 (trans).
- 12 Niblack, *supra* n 4 at 19. It is indicated that Sir Robert Torrens refused to register under Lord Cairns' Act on the ground that he would receive no guarantee as to boundaries. Torrens regarded boundaries as one of the major principles of title by registration. Time has shown that this is not so. The fixed boundary is not one of the fundamental principles. See also "A New View of Registration of Titles to Land" 126 WR 76, 89 and Head, *supra* n 3.
- 13 Hogg, *supra* n 1 at 2; *Interview between Judge Otto of the Hamburg District Court and Dr B von Hoffmann, of the one part, and Mr R Stein, of the other, Hamburg (Friday, 7 February 1975)* 2; von Metzler, *Das Anglo-Amerikanische Grundbuchwesen*, Cram, de Gruyter & Co, Hamburg (1966) 13 (trans).
- 14 This subject is examined in Stein, "Sir Robert Torrens and the Introduction of the Torrens System" (1981) 67 JRAHS 119.
- 15 See, for example only, cases such as *Travinto Nominees Pty Ltd v Vlattas and Anor* (1973) 129 CLR 1; *South-Eastern Drainage Board v Savings Bank of South Australia* (1940) 62 CLR 603 and *Praten v Warringah Shire Council* (1969) 90 WN (NSW) 34.

for discussion, but mention is made of it only to indicate the fact that another stand-point may be taken upon the subject examined. Nevertheless, that there is a reduction in the overall amount of work done through the adoption of title by registration, over that in the "old" system, which results in savings in time and money, may be seen as a benefit flowing from the "principles", "aims" or "hopes". However, as stated, the article seeks to examine the "principles" and whether they have been achieved, not *why* they have or have not been achieved.

## The Register and the Curtain

### 1 *Title based on the Register*

It is said that the Register is the title itself and that it is conclusive.<sup>16</sup> Therefore, an inspection of the Register takes the place of the former methods of investigation of title to land.<sup>17</sup>

Under the schemes operating in England and Wales and the Torrens system, the Register<sup>18</sup> of title purports to deal only with interests comparable with "legal" interests under the "old" system, and many interests may exist without affecting the Register.<sup>19</sup> The problem with this first principle of title by registration is that it does not provide for the large number of interests in property, especially equitable interests (see *The "Curtain"*, infra) which are not registered or which cannot be registered, even though some equitable interests may be recorded. For example, a person who has an equitable interest in property held in trust does not have that fact recorded on the title, nor is he recorded as proprietor of an interest in land.

### 2 *The "Curtain"*

Indeed it is claimed that title by registration simplifies ownership precisely through the doctrine of the "curtain",<sup>20</sup> which is that equitable interests are not to be recorded on the Register otherwise than where the statutes specify. This has often been regarded as a second "principle" of title by registration. It is contrary to Torrens's views; he believed that there should be registration of all interests, including equitable interests.<sup>21</sup> This was the case upon first enactment in South Australia. A clear statement of just how the "curtain" operates in practice was made as follows:<sup>22</sup>

16 Ruoff, supra n 9; *An interview between the Registrar-General of New South Wales, Mr J Watson, and the Senior Deputy Registrar-General of New South Wales, Mr J A Griffith, Associate Professor R A Woodman and Robert Stein, (Tuesday, 1 June 1976) 1-2; Head, supra n 3 at 3; Ruoff, "Land Transfer Through English Eyes" (1953) 29 NZLJ 216, 235, 249. See also Frazer v Walker [1967] 1 AC 569 and Breskvar v Wall (1971) 46 ALJR 68.*

17 Crane, "Conveyancing with Registered Land" (1937) 2 Conv (NS) 42, 106, 241, 324; (1940) 4 Conv (NS) 289.

18 For a similar definition of the principle, see Royal Commission on the Land Transfer Acts, *Second and Final Report of the Commissioners* (Presented to both Houses of Parliament by Command of His Majesty) (1911) 7.

19 Ruoff, supra n 9 at 687. Cf Land Registration Act 1925 (UK) s69(1) and *Capital and Counties Bank v Rhodes* 51 WR 270.

20 Key, supra n 3; Jackson, supra n 3 at 122; Ruoff, supra n 3 at 118; Patton, supra n 2; Head, supra n 3.

21 Hübbe, *The Voice of Reason and History Brought to Bear Against the Present Absurd and Expensive Method of Transferring and Encumbering Immoveable Property. With some Comments on the Reformatory Measures Proposed in the Opening Speech of the Governor-in-Chief, and the Bill Recently Introduced by the Hon. R. R. Torrens, Esq, into the House of Assembly*, (1857) 79-80.

22 JML, "The Curtain" (1943) 93 LJ 395, 395.

"I remember Mr Justice Chitty, in his judgment in some case — I think *Corritt v Real Person Advance Co.* (42 Ch. D. 263) describing the curtain as follows: 'You shut your eyes very tight and pretend you don't see.' I do not think this remark got into the printed report, but it very vividly described this game of pretence, or of deeming one thing to be another. Still this game of pretending that you can't see behind the curtain, or of deeming one thing to be another is quite effective and useful provided you don't play tricks with high explosives."

In such a system, the true title may not be in fact what is revealed by the Register, indeed a person may know that the state of title is different from that recorded. It is true that these interests may be protected by way of "caveat" — a device used to warn prospective parties dealing with the registered proprietor that unregistered or unregistrable interests may exist in the property. Also, the principle of the "curtain" is not applied with uniformity. In New South Wales, as in other jurisdictions, land-owners have required the development of procedures to ensure the protection of certain equitable interests which would not have been recorded on the Register because of the existence of the "curtain". For example, the recording of restrictive covenants on the Register has produced a major inroad into the full application of the "curtain".

Restrictive covenants are interests recognised in equity and not at law. If they are created validly under the rules applicable to them and are then registered as required to be effective, they become interests protected by the principle of indefeasibility of title (which is examined next). Such a recording is not made *in extenso*, upon the Register, but is incorporated by reference to the dealing which creates it and, in this respect, the statement upon the Register is subject to the validity of the dealing, which may or may not have been interpreted correctly by the Registrar-General when making the recording.<sup>23</sup> If restrictive covenants are included why are other equitable interests omitted? <sup>24</sup> Restrictive covenants may be as involved as any other equitable interests and, in the latter case, it was their complexity which was used as the justification for their exclusion from the Register. The "curtain", therefore, is not a principle of title by registration.

### 3 *Indefeasibility of Title*

This has been adopted in all of the jurisdictions mentioned except for England and Wales. The basis for the idea is that once a particular person is registered as proprietor, title cannot be divested from him or her without statutory approval contained in either the Acts dealing with title by registration or some other overriding enactment.<sup>25</sup> However, that this is no necessary feature of a system of title by registration is shown by the fact that it is not a requirement for the successful operation of the system in England and Wales (this has been explained previously, concerning the power to rectify the Register). In fact, a large number of interests may exist and be enforced outside the operation of title by registration; such as, competing unregistrable interests, unprotected by

23 *Bursill Enterprises Pty Limited v Berger Bros Trading Co Pty Limited* (1971) 124 CLR 73.

24 Hunter, "Equity and the Torrens System" (1964) 2 Adel LR 208, 211-212.

25 Lake, "The Land Transfer Bill of 1893" (1893) 95 LT 513, 515; Salde, "Indefeasibility of Title a Comprehensive Survey and Analysis of the Situation" [1968] NZLJ 12, 31, 58, 77 at 12-13; *Frazer v Walker*, supra n 16.

caveat or other device, and overriding interests (those interests which are excepted expressly from the operation of the registration Acts).

#### 4 *Avoidance of Historic Searching of Title*

As it is necessary to examine only the current state of the Register this should be thought to be the linchpin of the system. It avoids the questions of voluminous documents (containing recitals, terms of deeds which are repetitive from deed to deed), loss of documents (which provides a gap in the chain of title), accumulations of documents (as a result of the chain of title growing) and defects within documents (such as invalid attestations, inoperative documents executed by corporate officers where the document is ultra vires the powers of the company or without the scope of authority of the officer). As Opie, a writer on the Torrens system in South Australia during the latter part of the nineteenth century, explained:<sup>26</sup>

“A certificate of title should always be held simply to mean what it says: that the person named in it is possessed of the estate described, and that to look further back would be useless as to look behind a land grant”.

Sir Robert Torrens regarded this assertion as the true foundation of his system. However, while this is recognised to be a major principle of title by registration it must be accepted that it causes problems, particularly in relation to overriding interests because it may be necessary to ascertain the previous state of the proprietorship to ensure that the property, on purchase, is free from financial charges and other orders created by a previous owner or a public, semi-public or private body and which still affect the parcel without this fact being recorded on the Register (mentioned previously). In addition, it must be emphasised that the validity of the statement upon the Register is dependent upon the correct recording being made by the Registrar-General (as stated under *The “Curtain”*, supra). The necessity to refer to a current dealing does not challenge this “principle” for the procedure requires examination and interpretation of extant matters and not those which have been cancelled under a previous title. These difficulties are present in all of the jurisdictions mentioned.

#### 5 *New Certificates have the Nature of Crown Grants*

Subject, again, to the correctness of the Registrar-General’s recording of the effect of a dealing (which always remains definitive), the thesis of the “principle” is that the title is not derivative in any sense.<sup>27</sup> This characteristic<sup>28</sup> was explained by von Metzler, a German writer on title by registration, as follows: <sup>29</sup>

“Surrender of the certificate is, dogmatically, a renunciation of the estate which reverts to the Crown. After the examination of the documents the registrar writes out a new certificate for the purchaser and notes the transfer of rights in the book. This typical feudal law construction of renunciation and regrant is what

26 Opie, supra n 5.

27 Harrison, supra n 2.

28 According to Hogg, allodial ownership (which offers a foundation for the idea) is the system suited best to title by registration: Hogg, supra n 1 at 3.

29 von Metzler, supra n 13 at 50.

Torrens adopted from the Middle Ages English Charter Rolls and Copyhold book system. Additionally it is believed that the Deed Books of the Hanse towns of Hamburg, Lübeck and Bremen contributed part of the model.”<sup>30</sup>

Although the basis for the idea would appear to be unfounded (at least as regards the application of the Charter Rolls and Copyhold system), it has been asserted that this “principle” was abandoned in the 1860s,<sup>31</sup> because the doctrine of indefeasibility implies an existing title which is free from defects except to the extent granted upon each transfer of the title.<sup>32</sup>

### 6 *Transfers are Effected by Recording them on the Register*

It has been indicated already that not all interests are transferred upon the Register nor are they all represented upon it. Therefore, this alleged “principle” cannot be said to hold as it would be the case only if all interests were transferred by the act of recording.

## Matters Beyond the Curtain

### 7 *Caveats or Like Procedures*

The assertion that unregistered and unregistrable interests may be protected on the Register by caveat or other means cannot be a principle of title by registration. Such an assertion is inconsistent with the first claim unless it is limited by the rule that certain interests only may be registered.

## The Assurance Fund

### 8 *The Assurance Fund*

It is said that the assurance fund warrants or guarantees the title against losses which may flow from the operation of the system of title by registration. In such cases we have a paradox: the principle of “indefeasibility” is replaced by that of “guarantee”<sup>33</sup> — the one gives security against deprivation, while the other assumes the possibility of such deprivation and grants financial assistance if it occurs. The existence of this principle is a further limitation upon the case advanced for the claim of “indefeasibility”. In addition, difficulty of access to the assurance fund in most jurisdictions belies the claim that it is a “principle” of title by registration that loss should be met from such a fund. Large accumulations of moneys in the many funds (in Australia, England and Wales, for example) support this contention. Many titles have been held to be bad upon the basis of the indefeasibility of someone else’s title, but few claims have ever succeeded against the assurance fund to make good the losses. Then, there are jurisdictions where no fund exists, yet there is registration of title: Germany, Austria and Israel. This supposed “principle” is exploded.

30 Cf *ibid*. This reveals the true foundation for the system. Therefore, it may be said conclusively that a decision like *King v Smail* [1958] VR 273 is incorrect. As the regrant is issued without limitation it is a fee simple unconditional grant. The Crown has not reserved the rights of volunteers and thus their title is as good as that of a bona fide purchaser for value. The result is expressed by von Metzler, *supra* n 13 at 51 in the form that “only the grant by the State possesses constitutive force”.

31 White, *supra* n 5 at 401; Harrison, *supra* n 2.

32 Cf *Fels v Knowles* (1906) 26 NZLR 604, per Edwards J.

33 Dumas, “English System of Registration” (1900) 9 Yale LJ 341, 342.



## The Substantive Law of Real Property

### 9 *Title by Registration does not Alter the Substantive Law of Real Property*

The assertion is that the procedure is one of bookkeeping only,<sup>34</sup> which does not attempt to alter the substantive law of real property but only the method of dealing with the transfer of title. In fact, it is impossible to effect such a major “procedural” change as title by registration without also changing property law in other respects. It has been argued that the provisions create one estate and interest in land: that of the “registered or unregistered” estate, in lieu of “legal” and “equitable” estates.<sup>35</sup> As a rule substantive changes in the law, of this kind, are made deliberately rather than casually, upon the introduction of a different procedure for the transfer of title to land.<sup>36</sup> As early as 1905 Hogg said:<sup>37</sup>

“It may be conceded that the intentions of the framers of the original Torrens Statutes were merely to facilitate conveyancing transactions, but in order to do this to the extent desired changes had to be made in the method of transferring and encumbering land which certainly might well be called drastic, if not revolutionary. The desired simplification of procedure necessarily involved — perhaps not changes in substantive rights of property — but certainly changes in the methods of securing and enforcing those rights; some of those changes are of such a nature that the Statute introducing them cannot be regarded ‘as a conveyancing Act only, and as a mere expedient for registering dealings.’”

One need only call to mind the unsatisfactory way in which the Torrens system secures some interests, for example, interests effected by fraud on the operation of the concept of indefeasibility in this regard, equitable interests and the legal interests in a profit, to accept the truth of Hogg’s remarks.

### 10 *Abolition of “Legal” and “Equitable” Estates*

This assertion is not supported by the evidence. It is still necessary to retain the concept of “legal” estate under a system of title by registration, at least in the common law jurisdictions. As Hogg recognised,<sup>38</sup> the legal estate might remain in: (1) the first registered proprietor, or (2) an outstanding proprietorship, despite the existence of the “registered estate”. As has been seen, this general assessment is inadequate because some “equitable” interests may be registered; for example, restrictive covenants. Kitto J, on the other hand, has said that the “registered” estate is a procedure for dealing with the “legal” estate.<sup>39</sup>

The legal estate cannot remain *in nubibus*. For example, according to the Wills Probate and Administration Act 1898 (New South Wales), the executor obtains a “legal” estate in registered property; again, a

34 Fairchild and Springer, “A Criticism of Professor Richard R. Powell’s Book Entitled Registration of Title to Land in the State of New York” (1939) 29 *Corn LQ* 557, 557.

35 Francis, *supra* n 2 at 222; Niblack, “Pivotal Points in the Torrens System” (1915) 24 *Yale LJ* 274, 275; Stow, “Torrens Titles, Original and Derivative” (1932) 6 *ALJ* 53, 55; Jackson, *supra* n 3 at 137.

36 Smith, *supra* n 9 at 71.

37 Hogg, *supra* n 1 at 771.

38 Hogg, *supra* n 4 at 770 and 901.

39 Woodman and Grimes (eds), *Baalman’s The Torrens System in New South Wales* (2nd edn 1974) 6.

purchaser, within the terms of the Real Property Act 1900 (New South Wales), s43A(1) itself, obtains a “legal” estate. In neither case are the estates registered when they are acquired. Dr Potter indicated, in 1934,<sup>40</sup> that such a “principle” gave rise to problems.<sup>41</sup> The Courts of England rejected the notion that the legal and registered estates could be married<sup>42</sup> without defining the registered estate in terms of the “legal” estate.<sup>43</sup> They took the view that a transfer by the registered proprietor was effective only because the statute enabled him to transfer and not because he held any estate in the registered property. The only change title by registration provided in the means of transferring titles was that the legal estate might be overridden by a registered transfer upon the statutory basis mentioned.<sup>44</sup> The continued existence<sup>45</sup> of equitable interests in registered land also shows that the claim cannot be accepted as a “principle” of title by registration.

### 11 *Mortgages are Charges*

Another advantage claimed for title by registration is that mortgages are created by way of charge and not by way of transfer (as at common law), and that this represents more truly the nature of the transaction. Under the deeds system a legal mortgage is effected by a conveyance of the property to the mortgagee, but this does not represent what the transaction is intended to achieve – security. Title by registration recognises the nature of the transaction by leaving the owner as registered proprietor thus giving him all the rights of proprietorship guaranteed by the “old” system while charging the land with the debt without conveyance of the property. This is a valid feature of title by registration.<sup>46</sup>

## Boundaries

### 12 *Guaranteed Boundaries*

This principle is still to be found in New South Wales<sup>47</sup> in part but it has been discarded in most jurisdictions and even in New South Wales the amendments found in Part IVB of the Real Property Act 1900 seek to reject it.<sup>48</sup> The other extreme is found in Austria where the boundaries are guaranteed down to two centimetres.

## The Status of the Register (Public or Private)

### 13 *Public Transfers*

It is said that transfers take place in a public register office and not privately and that they are performed by officials and not by private parties.<sup>49</sup> This assertion is a true “principle” of title by registration, provided the word “public” is restricted to a “publicly operated” Register;

40 Potter, *supra* n 5 at 108-109.

41 Cf Land Registration Act 1925 (UK) s69. See Ruoff, *supra* n 9 at 337.

42 Potter, *supra* n 40.

43 *Capital and Counties Bank v Rhodges* 51 WR 270; [1903] 1 Ch 631; “The Land Transfer Rules, 1903” (1904) 48 SJ 256, 325.

44 “The Land Transfer Rules, 1903”, *ibid*.

45 *Lange v Ruwolt* (1872) 6 SALR 65 reversed in *Cuthbertson v Swan* (1877) 11 SALR 102. See also *Guest v Cochlin* (1929) 34 Ont LR 365; JML, “Dispositions of Registered Land” (1938) 85 LJ 135, 136 and *Barry v Heider* (1914) 19 CLR 197.

46 Hogg, *supra* n 1 at 29-30.

47 Real Property Act 1900 (NSW) s45.

48 Hogg, *supra* n 1 at 85-86.

49 *Ibid* 2; *Interview*, *supra* n 13 at 2; von Metzler, *supra* n 13 at 13.

in some jurisdictions the public does not have access to the Register as of right or upon the payment of a set fee; for example, England and Wales. The principle is represented in all the jurisdictions considered and is indicative of an attempt to avoid those practices which led to defects in title arising from fraudulent or deceptive transactions in the "old" system. However, the "principle" must be limited to those interests capable of registration.

### Desires and Hopes

#### 14 *Conveyancing without Professional Aid*

The harsh reality is that such a system, could it be achieved, would be highly inflexible and would lead to a collapse in present concepts of interests in property.<sup>50</sup> Interests would have to be reduced to the comprehension of the ordinary person so that he or she could deal with the matter. This aim of title by registration has not been and cannot be achieved while property law remains in its present state of complexity.<sup>51</sup> Only the foolish would attempt to convey property without professional assistance and this fact is recognised in all of the jurisdictions mentioned with few only of all conveyances conducted privately.

#### 15 *Title Expressed in One Document*

Subject to the necessity to refer to relevant dealings (to ensure the correctness of a recording by the Registrar-General), the thesis is that title is found expressed in one document and, even if detailed, it is readily understood by most people. It contains a simple statement of the location, proprietorship and area together with a clear expression of encumbrances (in this respect there may be a need to incorporate complex transactions by reference to the instrument which creates them, for example, registered easements, rent charges and profits). This would give a plain statement of the title, leaving the complexity to be found in the dealings themselves.<sup>52</sup> In the Torrens system, as enacted, this principle, developed from the Hamburg ledgers,<sup>53</sup> is realised partly, at least to the extent in which it provides for a Register recording interests that, under the "old" system, are substantially "legal" in character. The early Royal Commissions in jurisdictions which adopted title by registration seem to have been thinking in these terms.<sup>54</sup> However, the legislation adopted eventually excluded some "legal" interests and in any case there are a large number of other interests, mentioned already, arising outside the framework of the system.<sup>55</sup> In fact, the simplicity sought by the idea has not been achieved. Minogue J said:<sup>56</sup>

50 Whalan, "Automation and its Effects on Australasian Conveyancing in the 1980s" (1975) 49 ALJ 359, 370-372.

51 Gray, *Land Registration Act, 1925. Report on the Advisability of Extending Compulsory Registration of Title on Sale to the County of Surrey* (1951) 5.

52 Francis, *supra* n 2 at 20; Niblack, *supra* n 4 at 8; South Australia, Real Property Law Commission *Report with Minutes of Evidence and Appendix* (1861) PP 192, IX; Woodman, "The Torrens System in New South Wales: One Hundred Years of Indefeasibility of Title" (1970) 44 ALJ 96, 96; Maguire, "Land Transfer and Registration of Title" (1895) 29 Ir LT 113, 144; Mirth, "Torrens Land System - Caveats - Transfer of Lessor's Interest - *Hughes v Gidosh*" (1972) 10 Alta LR 126, 128; Kerr, *supra* n 4; (Imp) HC, Returns, *supra* n 5; Ruoff, *supra* n 9 at 13; "Transfer of Land Registered Under the Local Registration of Title (Ireland) Act, 1891" (1929) 63 Ir LT 163, 164; Cohn, *Manual of German Law* (1968) 92-93.

53 Hübbe, "South Australia - Title by Registration in the Hanse Towns" (1861) LC Paper 212, 4.

54 South Australia, Real Property Law Commission, *supra* n 52 at v.

55 Crane, *supra* n 17 at 45.

56 Francis, *supra* n 2 at v.

"The Australian and New Zealand law reports show that neither the bringing of land under the Torrens system nor the simple system of dealing with it after a certificate of title has issued which the system aims to provide, have succeeded in creating a problem-free area or in completely achieving the desired simplicity."

This fact is represented in the civil law jurisdictions mentioned with regard to certain interests which may not be recorded, and overriding interests in general.

To these "principles" may be added such procedures as the employment of maps and statutory forms, duplicate documents,<sup>57</sup> removal of past and the prevention of future accumulation of documents<sup>58</sup> (through the operation of cancellation procedures which mean that once an interest is removed from the Register the title is cleared of the existence of that interest) and, when the land is registered, prevention of its removal from the system.<sup>59</sup>

### Conclusion

The above discussion shows that it is difficult to decide whether the claims made for title by registration are its "principles". Whether they are now the bases<sup>60</sup> is often contradicted by the facts. We have seen that each of them, together with the idea of title by registration itself, has influenced the nature and working of this form of conveyancing. The "principles" may operate together to present a cohesive whole without being necessary to it. Title by registration can work successfully without one of them or some of them but without most of them at any one time it may be doubtful whether it could work at all.

As a final remark, it must be conceded also that machinery provisions are critical to the implementation of the supposed "principles", "aims" or "hopes" but it was thought (at the commencement of the Torrens system) that the machinery introduced would ensure the resultant implementation. Modifications were made to the procedures in the hope that the desired ends might be achieved when failures occurred, but the consequence of this was to add to the stated reduced operation of the original ideals (mentioned at the start). The hopes have remained the same but the interpretation of and modifications to the enactments have, as we have seen, produced quite different results.

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57 Hogg, *supra* n 1 at 29-30.

58 Torrens, *Hand Book on the Real Property Act of South Australia* (1862) 6.

59 Lake, "The Land Transfer Act, 1897" (1897-1898) 23 LM & R (4d) 179, 183; "Report of the Committee on the Torrens System etc." (1917) *Nat Conf of Comm on USL* 228, 260.

60 JL, "Registration of Title in England" [1955] Scots LT 182, 182-183; Ruoff, *supra* n 9 at 198; Innes, "Registration of Title in the Federated Malay States" (1914) 14 J Soc Comp Leg (NS) 386, 387.