TORRENS TITLE — A CASE FOR THE REGISTRATION OF TRUSTS IN NEW SOUTH WALES

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Introduction

Under the Torrens system of title by registration it is said to be one of its "principles", "aims" or "hopes" for successful operation that the Register of title purports to deal only with interests comparable with "legal" interests under the old system. This leaves many interests existing without affecting the Register.[1] The problem with this "principle" of title by registration is that it does not indicate how to deal with the large number of interests in property which is 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 interest recorded on the title, nor is he recorded as proprietor of an interest in land.

Indeed it is claimed that title by registration simplifies ownership by a reduction in complexity and bulk in documents precisely through the doctrine of the "curtain",[2] which is that equitable interests are not to be recorded on the Register otherwise than where the statutes specify. It is, as we shall see, quite contrary to Torren's original views; he believed that there should be registration of all interests including equitable interests.[3] A clear statement of just how the "curtain" operates in practice was made as follows:[4]

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[1] T. B. F. Ruoff, *Ruoff and Roper on the Law and Practice of Registered Conveyancing* (3rd ed. 1972) at 687. *Cf.* Land Registration Act, 1925 (U.K.) s. 69 (1) and *Capital and Counties Bank* v. *Rhodes* 51 W.R. 270.

[2] T. Key, "Registration of Title to Land" (1886) 2 *L.Q.R.* 324; D. Jackson, "Registration of Land Interests — The English Version" (1972) 88 *L.Q.R.* 93 at 122; T. B. F. Ruoff, "An Englishman looks at the Torrens System" (1952) 26 *A.L.J.* 118 at 162, 194, 228: 118; R. G. Patton, "Extension of the Torrens System into Hawaii, the Philippine Islands and 'Latin-American Jurisdictions'" (1952) 36 *Minn. L.R.* 213; I. L. Head, "The Torrens System in Alberta: A Dream in Operation" (1957) 35 *Can. Bar. Rev.* 1.

[3] U. 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) at 79-80.

[4] J.M.L., "The Curtain" (1943) 93 *L.J.* 395 at 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 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 shown on the Register. 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. But if these are included, it may be asked: why should not other interests in property be recored likewise? A restrictive covenant may be as involved and complex as any other matter, and as it was the complexity of such matters as equitable interests that was used as the justification for the exclusion from the Register, the question may be asked: why include the former and exclude the latter? The "curtain" has indeed been shown up as an inoperative end. This article will examine the present position of trusts in the Torrens system and how they might be recorded on the Register successfully so that it may more fully present a picture of the title. By way of comparison reference will be made to the approaches adopted to trusts and title by registration in Torrens jurisdictions, in Austria, in Germany, in England and Wales.

Torrens Title

General Observations

Historically, settlements of property have been made by employing one of two principal methods. The first is the trust which may be described as a device by which certain obligations are imposed upon a person (the trustee) for the benefit of some other person or persons in respect to a parcel of land. A classic example is the case of a parent who dies leaving property to be administered in favour of minors. English common law developed upon the principle that two types of interest exist in property: first, the legal, held by the trustee, and secondly, the equitable, held by the beneficiaries. These concurrent

interests were resolved by the rule that the trustee could not act contrary to the terms and conditions contained in the trust instrument, and that he had to act for the benefit of the holders of the equitable interest and not for his own personal advancement from the property he administered.

Certain beneficial interests of this kind were excluded from the operation of the Torrens Register because of the principle of the "curtain", as mentioned previously. This gave rise to the need for the caveat (both private and official) to protect the interests of the beneficiaries and other unregistered interests.

A second method was the strict settlement (at common law or through the intervention of "uses" to create executory limitations) with powers, remainders and interests as may be created under a trust. The device was similar to the trust without the creation of trustees but had certain legal difficulties which do not require examination here. What is relevant is the fact that the interests created arose at law and not in equity. In the Torrens system such interests could be registered. Hence arose the anomaly that a settlement by way of trust could not be registered on the title, while the same settlement at common law or via the Statute of Uses (which gave rise to the executory limitations), could be registered. Such a dichotomy in treatment has no justification.

The extent of strict settlements was reduced in New South Wales with the abolition of direct conveyancing by will, in 1890.[5] Settlements which could have been registered before 1890 were removed from the Torrens system by this enactment, as interests under wills were regarded initially as equitable and not legal, therefore, they were now caught by the curtain. This denial of registration arose from a mere question of nomenclature.[6]

At present certificates of title are issued to vested legal remainders in New South Wales.[7] However, now that the Statute of Uses has been repealed,[8] the only settlement interests which may be registered are those created by a conveyance. So it may be seen that the type of settlements which can be registered now has resulted from an unconscious reduction in the creation of interests at law while leaving trusts caught by the curtain.

The argument that trusts should not be recorded on the Register because they make it too complex has not been borne out by the situation which has existed, almost from the introduction of the Torrens

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[5] Probate Act, 1890 (N.S.W.).

[6] Sir Robert Torrens, *An Essay on the Transfer of Land by Registration Under the Duplicate Method Operative in British Colonies* (1882) at 25; Returns, 1872, (Imp.) H.C., "Registration of Title (Australian Colonies)" at 185-6; R. R. Torrens, *Hand Book on the Real Property Act of South Australia* (1862) at 50.

[7] Real Property Act, 1900 (N.S.W.) s. 99. *Vide* also *Baalman's The Torrens System in New South Wales* (2nd ed. by R. A. Woodman and P. J. Grimes, 1974) at 348.

[8] Imperial Acts Application Act, 1969 (N.S.W.) s. 8.

system, in respect to strict settlements. In addition it will be shown that the rule is itself not consistently applied. Indeed the theory of exclusion of trusts from the Register is untenable.

Torrens himself planned a far greater amendment to property law with his 1857 Act than has in fact taken place. Under his scheme all interests were to be transferred by registration with no preliminary contract for sale; indefeasibility of title was to exist except for fraud or error; and there was to be registration of trusts.[9] The concept of registration of trusts was said to have represented the theory of recording all interests in a parcel.[10] It was not one of the fundamental principles of the Torrens system that there be a "curtain". Section 56 of the original Act provided that:

> . . . the Registrar-General . . . shall enter the particulars of such bill of encumbrance or bill of trust in the register-book, and shall *endorse* upon the grant, certificate of title, lease, or other instrument . . . the date of the bill of encumbrance or bill of trust, *the amount of the encumbrance,* the contingencies, restrictions, reversions, and remainders, to which it is intended to be subject, if any, and the names and descriptions of the parties for whose benefit the same is created, or for whose use such land is vested in trust, together with the names and descriptions of the trustees, if any appointed. . . .[11]

Discharge of the trust was provided for in section 57.

That the registration of trusts would not have caused great difficulty to the system was brought out by Dr Hübbe, who participated in the introduction of the Torrens system in South Australia, when he said:

> We can of course, easily forsee that special provisions will be needed to meet the various contingencies arising out of trusts, settlements, encumbrances, &c., but these difficulties can easily be met, nor are they half so formidable as they are frequently represented to be by those who are directly and pecuniarily interested in magnifying small difficulties and inventing fresh ones where none existed before.[12]

The concept of the registration of the trust disappeared from the South Australian legislation in 1858.[13]

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[9] *Vide* ss. 3, 33, 40, 56 and 60.

[10] J. E. Hogg, *The Australian Torrens System* (1905) at 23-28; J. H. Fisher, *The Real Property Act, as Passed in the Parliament of South Australia, Session 1857-8, with Analytical and Critical Notes* (1858) s. 56.

[11] The forms are to be found in Schedules E and F to the Act.

[12] *Op. cit. supra* n. 3 at 62.

[13] (1858) 22 Vict., No. 16, ss. 46 and 47 in particular; dealt with more fully in ss. 45-49 and 67.

As a general rule trusts are not registered now in the Torrens system[14] and this is true of almost all systems of title by registration.[15] This idea, in New South Wales and other jurisdictions, has been itself restricted by permitting the deposit of a trust instrument at the Registry. In New South Wales this procedure was commenced in 1871 and it defeats, partially, the rule enunciated in section 82 of the Real Property Act. This provides that the Registrar-General may not record in the Register any notice of trusts, whether express, implied or constructive, but it also lays down that a trust instrument may be lodged with the Registrar-General for safe custody and reference. The Registrar-General is under a duty to record his caveat preventing registration of any instrument not in accordance with the provisions of the trust. This position was explained by Baalman as follows:

> . . . the broad effect of sub-ss. (1) and (2) is not so much to prohibit the recording of trusts in the Register, but to prohibit their *indiscriminate* entry.[16]

Except for Queensland, a similar position exists in the other Australian States. In Queensland, whether this principle exists has caused argument. Section 79 of the Queensland Act apparently excludes the registration of trusts. However, it is possible to register the "Nomination of Trustees" under section 77: this document, as the name suggests, "nominates" the trustees of the settlement. In addition, there is provision for a schedule of trusts to be endorsed or annexed to the instrument of nomination and it may be entered on the Register, which is otherwise similar in content to the other States. On this basis the Registrar would seem to have to register the trust, while at the same time being enjoined from so doing. The Courts have resolved the dilemma by treating the Nomination as an "instrument" and by not treating the Schedule as an "instrument". Thus the Schedule is not technically part of the Register.[17] The possibility of registration of trusts, as is already the case in British Columbia, will be examined later.

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[14] *Vide,* for example, Real Property Act, 1900 (N.S.W.) s. 82 (1).

[15] *Vide,* for example, Land Registration Act, 1925 (U.K.) s. 74; F. R. Crane, "Equitable Interests in Registered Land" (1958) 22 *Con.* (*N.S.*) 14; "Report of the Committee on the Torrens System and Registration of Title to Land (including the Uniform Land Registration Act)" (1917) *Nat. Conf. of Comm. on U.S.L.* 228 at 253; s. 60 of the Act; S. R. Simpson, *Land Law and Registration* (1976) at 579 and 581; The Registered Land Act, 1964 (Kenya) s. 126 (1); R. R. 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 Lands Titles Office . . . To which is Added, the South Australian Real Property Act as amended in the Session of 1858, with a Copious Index by Henry Gawler, Esq.* (1859) at 23-24; Returns, *supra* n. 6 at 19.

[16] Woodman and Grimes, *op. cit. supra* n. 7 at 323.

[17] E. A. Francis, *The Law and Practice Relating to Torrens Title in Australasia,* Vol. II (1973); *cf. Re Bennett, Deceased. The Union Trustee Company of Australia Ltd.* v. *Bennett and Others* [1951] St. R. Qd. 202 at 211-212. *Cf.* J. E. Hogg, *Registration of Title Throughout the Empire* (1920) at 161.

Failure to register the trust, as already indicated, detracts from the theory of registration that the title should be ascertainable, together with encumbrances, from an examination of the Register. The importance of this was brought out as early as 1861, when the South Australian Property Law Commission, which inquired into the operation of the Real Property Act, in South Australia, said:

> It is however, essential to any such system, that it should provide for the creating and securing of derivative interests, not in the nature of contract, such as are ordinarily created by settlements or wills, or for trusts. . . .[18]

Trusts in the Torrens System in New South Wales

The basic procedure for dealing with trusts is for the trustees to be registered as proprietors, together with the lodgment of a caveat to protect the interests of the beneficiaries.[19] In New South Wales the trust may be lodged under the provisions of section 82, outlined previously, but the means provided are rarely used. In the event of the trust being lodged under the section the Registrar-General must record his caveat as provided. The duty is mandatory[20] and it may be argued that the procedure offers complete protection to the beneficiaries, because it prevents the trustees from dealing with the property of the trust contrary to the terms contained in the trust instrument.[21] In this case the Registrar-General's Department has shouldered much of the responsibility for inquiry into the existence of the trust interests and their protection. It has been said that this is not a proper departmental duty[22] because it casts a judicial function on the Registrar and his staff, but the procedure works successfully. Thus little lies in the way of the Registry handling all settlements and trusts on the Register, not only those which arise by way of common law settlement.[23]

If a settlement arises not by way of trust, as has been shown may happen, the protection of it would appear to lie in section 12 (1) (e), which permits the Registrar to lodge caveats to protect parties under any disability, where an error has been made by misdescription of the land or otherwise or for the prevention of fraud or improper dealing. Such a settlement is not caught by the terms of section 82. It is submitted that it may be registered and does not have to rely on a

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[18] Real Property Law Commission (S. A.). *Report, with Minutes of Evidence and Appendix* (1861) Paper No. 197, V.

[19] Returns, 1881, (Imp.) H.C., "Registration of Title (British Colonies)" 7.

[20] *Turner* v. *Noyes* (1904) 20 W.N. (N.S.W.) 266; Francis, *op. cit. supra* n. 17 at 17.

[21] Hogg, *op. cit. supra* n. 10 at 792-3; *supra* n. 19 at 99; J. Baalman and T. Le M. Wells, *The Practice of the Land Titles Office (New South Wales)* (3rd ed. 1952) (Together with 1st Supplement, 1952, 2nd Supplement, 1955 and 3rd Supplement by P. J. Grimes, 1969).

[22] G. A. Jessup, "The House that Torrens Built" (1945) 18 *A.L.J.* 302 at 304-5.

[23] *Cf.* the view of Ruoff who maintains that the procedure sanctioned by s. 83 is exercised in an unexacting manner: *supra* n. 2 at 230.

caveat under section 12 (1) (e), as in the case of a vested gift (which is registered already), together with a contingent remainder. This reveals the difference in treatment between settlements not by trust and the same provision by way of trust. The problems concerning non-trust settlements and trust settlements have arisen only because the terms of a trust may not be recorded on the Register. Would it not be simpler to record a settlement by way of trust as distinct from lodging a caveat under section 82 so that all settlements are treated alike?

If the trust is not lodged under section 82 and no caveat is recorded either under sections 12 (1) (e) or 72 (private caveats), the interests of the beneficiaries will be precarious. Any breach of trust is governed by the decisions in *Templeton, Harold Alfred* v. *The Leviathan Proprietary Limited*[24] and *In re the Transfer of Land Act 1890; Hoskin* v. *Danaher*.[25] In these cases the Registrar refused to register where he believed that dealings were in breach of trust. Sir Adrian Knox, C.J., in the *Leviathan* case, regarded it as the duty of the Registrar to refuse to register where a transaction was in breach of trust.[26] This question has been the subject of much debate in New South Wales. Baalman and Wells, eminent Torrens title writers, take the view that the existence of trusts off the Register is no concern of the Registrar-General, yet they recognize that if he is aware of trusts any dealing must be within the powers of the trustee.[27] This apparent confusion has its genesis in the celebrated case of *Wolfson* v. *Registrar-General*.[28] The Registrar-General had refused to register a transmission application without recording upon the certificate of title the existence of an equity resulting from a partnership agreement. In justification of the actions of the Registrar-General, Davidson, J. said:

> In my opinion, therefore, when it appears to the Registrar-General that the applicant for transmission, who based his claim on the agreement of partnership, had not the whole estate thereunder, but was or might be subject to the equitable estate or mortgage in the form of a vendor's lien, he was bound to notify on the certificate the relevant provisions of the agreement.[29]

This approach was rejected by Rich and Evatt, JJ. in the High Court of Australia, where they said:

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[24] (1921) 34 C.L.R. 34. *Vide,* also E. C. Adams, "Requisitions from the District Land Registrar" (1960) 36 *N.Z.L.J.* 343 at 344; "Torrens System—Mortgages in Breach of Trust" (1930) 4 *A.L.J.* 145 at 145.

[25] [1911] V.L.R. 214. *Cf.* the registration of strict settlements; *vide,* Baalman and Wells, *op. cit. supra* n. 21 at 132-133.

[26] (1921) 30 C.L.R. 34 at 52-53.

[27] Baalman and Wells, *op. cit. supra* n. 21 at 161-162.

[28] (1934) 51 C.L.R. 300; in the Supreme Court of New South Wales, before Davidson, J., *sub. nom. Re Wolfson* (1934) 51 W.N. (N.S.W.) (Eq.) 33.

[29] (1934) 51 W.N. (N.S.W.) (Eq.) 33 at 34. *Vide* "Torrens System — Transmission Application-Notification of Outstanding Equitable Estate" (1934) 7 *A.L.J.* 446.

> In our opinion, however, such an encumbrance has no place on the register. When the land is brought under the Act, and is then subject to equities, other considerations apply. But the declared policy of the system is to keep trusts off the register and it appears to us that the notification of such special and elaborate equities as those involved in the present case as encumbrances is within the very evil to which the Act was directed. The register was not to present a picture of legal ownership trammelled by all sorts of equitable rights in others, which those who dealt with the registered proprietor must take into account. Sec. 95(4) affords no justification for putting them upon the register. Such rights must be protected by caveat, not by notification.[30]

This approach did not deal adequately with the arguments put by Flannery, K.C. (with him Barwick) that equitable interests could be recorded upon the Register under the Real Property Act, 1900, section 14(2)(a), which provides that: "Subject to this section, a primary application may be made by a person claiming to be the person in whom is vested an estate in fee simple either at law or in equity in the land to which the application relates".[31] In addition, the apparent clarity of the decision was shattered by the introduction of section 12(1)(f), which provides that the Registrar-General may lodge a caveat ". . . for the protection of any person interested in land under the provisions of . . ." the Act. The aim of this was to permit the Registrar-General to do what the High Court of Australia had denied him the right to do in the *Wolfson* case,[32] namely to notify the world of an equitable interest by way of a Registrar-General's caveat, which will not lapse as does a caveat under section 72, rather than to register the interest. These sections reveal further the incompleteness of the "curtain" and the inadequacy of the general rule excluding trusts from the Torrens system.[33]

Where the Registrar merely "suspects" a dealing to be in breach of trust, he is not entitled to prevent the registration and this is supported by the judgment of Starke and Higgins, JJ. in the *Leviathan* case.[34] The other side of the line is evidenced in the *Hoskin* case where an executor purported to convey an interest to himself. The Registrar refused to register until proof was advanced that the next of kin had been given independent advice and that they understood the nature

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[30] *Supra* n. 28 at 308.

[31] Mentioned in *Ex parte Clissold and Another* (1884) 5 L.R. (N.S.W.) 175 and *Re Hutchinson* (1910) 27 W.N. (N.S.W.) 164. However, there is no elaboration of how the provision operates or is to be reconciled with section 82. *Vide* Baalman and Wells, *op. cit. supra* n. 21 at 61.

[32] Inserted by Conveyancing, Trustee and Probate (Amendment) Act, 1938 (N.S.W.), s. 8 (1) (a); E. A. Francis, *The Law and Practice Relating to Torrens Title in Australasia* Vol. I (1972).

[33] *Cf.* the English System which permits the registration of a debenture trust deed: Ruoff, *op. cit. supra* n. 1 at 233.

[34] (1921) 30 C.L.R. 34 at 62 and 72.

and effect of the transaction. Madden, C.J. was of the opinion that the ground for refusing to register the transfer was erroneous.[35] A'Beckett, J. expressed his opinion more forcefully:

> There is . . . no law against a beneficiary giving his interest in the trust property to his trustee. If he observes the legal essentials of a gift, as the next of kin have done in this case, the gift takes effect — the property passes — and the donee can keep it unless the Court afterwards takes it from him. There is no suggestion that any of the next of kin in this case were under age or insane, or that they have changed their minds. The donee submits that the Commissioner of Titles has no right to make their gift ineffectual by insisting upon his furnishing evidence of independent legal advice. I think the Commissioner is wrong in requiring evidence of matters which are immaterial unless the next of kin repent their action and seek to undo what they have done. He has no right to regard them as plaintiffs in an action against the donee, and to treat the donee as a defendant in an action, by refusing to register the transfer to him unless he proves what he would be unable to prove.[36]

In other words, if documents are all in order in the formal sense, the Registrar must accept them. If he *thinks* that there is a breach of trust he may not prevent registration, even though this may have the unfortunate result that he may have to sanction that which he suspects will be in breach of trust but cannot so prove. This shows how inadequate is the ordinary caveat if it seeks to protect the terms of a settlement or a declaration of trust in the case of contingencies. If the caveat lapses as a result of the lodgment of an inconsistent dealing for registration, the Registrar will have to record the dealing contrary to the interests claimed in the caveat.[37] For example, the trustee may have perpetrated the fraud and as the interests of the beneficiaries are not vested there may be no one else to prevent the transfer. Thus the value of the procedure set out in section 82 is revealed; the lodgment of a dealing for registration will give the Registrar-General the opportunity of seeing whether it is in conformity with the trust document or not, and hence whether he can refuse to allow registration of the dealing, as explained in the *Leviathan* decision.[38] It may be asked again whether it would not be simpler, in all instances, if the interests of the beneficiaries were protected by registration of the trust. This would allow a purchaser to know whether he was about to buy a law suit and it might result in security of the beneficial interest, which is not the case in all situations at present. It may be even that the purchaser

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[35] [1911] V.L.R. 214 at 225.
[36] *Id.* 227-228.
[37] Baalman and Wells, *op. cit. supra* n. 21 at 177.
[38] *Id.* 161 and 178; *In re Chafer and Randall's Contract* [1916] 2 Ch. 8 at 18.

will take subject to that interest if it amounts to a right *in personam*. In essence a court must decide whom of two "innocent" parties must suffer.

Life has become more complex and if the system of title by registration is to keep up with modern developments in the growth and complexity of society it must reveal interests and privileges which relate to property upon the Register. The pregnant question is: why receive a document under section 82 and then make it virtually useless? It is trite to observe that the beneficiary is in a far greater position of security under the "old" system than he is under the Torrens system, for there, at least, the trust document may be registered in the General Register and this gives him considerable protection against the actions of a dishonest trustee.[39]

Termination of Settlement

The caveat lodged as a result of section 82 in New South Wales, will be removed when the trust has come to an end by any means permitted under the general law. Until such time as this occurs, transactions may take place only if they are consistent with the terms of the trust. If they are consistent, the Registrar will have no right to inquire into them or to prevent them.[40]

At present, if the trust is lodged under section 82, the Registrar-General is, in a sense, a law unto himself, in that it is he who interprets the validity of the transactions under the trust instrument. These rights and privileges have, historically, lain in the hands of the Courts and not of Crown employees. Although the existence of this discretion has not been approved of by a Registrar-General of the State[41] it still exists. Regulation of settled interests could be made far simpler through their registration. A purchaser would find out the terms upon an examination of the Register and would not deal in breach of the contents of the Register. New Zealand offers support for these contentions[42] for although section 128 is in similar terms to section 82 in New South Wales,[43] Maori lands held in trust[44] are dealt with on the Register as a result of the Maori Lands Act, 1931.[45]

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[39] *Cf. Re Robertson* (1944) 44 S.R. (N.S.W.) 103; 61 W.N. (N.S.W.) 51 and the protection of trusts by inserting the words "no survivorship" (until 1970) which was done rarely. *Vide* Francis, *op. cit. supra* n. 17; (1944) 17 *A.L.J.* 354 E. C. Adams, "'No Survivorship' Titles. Procedure on Death of Registered Proprietor" (1941) 17 *N.Z.L.J.* 137.

[40] Ruoff, *op. cit. supra* n. 1 at 369, Chapter XIX generally, 400.

[41] An Interview between the Registrar-General of New South Wales, Mr I Watson, and the Senior Deputy Registrar-General of New South Wales, Mr J. A Griffith, Associate Professor R. A. Woodman and Robert Stein, Tuesday, 1s June, 1976 at 18-19.

[42] *Cf.* the position in New South Wales under the Real Property Act, sectio 83, which permits the registration of trusts over lands granted to religious bodie or for charitable or public purposes such as show grounds and schools of arts The machinery exists in this respect for their registration. *Cf.* Baalman an Wells, *op. cit. supra* n. 21 at 93; Ruoff, *op. cit. supra* n. 1 at 190.

[43] E. C. Adams, *The Land Transfer Act 1952* (1958) at 286-287. *Vid*

Registry Duties and Breach of Trust

There is a related question to the duties of the Registrar in respect to trust property and activities in breach of trust and this concerns property acquired by the trustee in breach of the terms of the trust. The question is whether or not the Registrar-General should attempt to prevent the dealing as inconsistent with the terms of the trust. Baalman and Wells suggest that such an action would not be acceptable, for it would deny to the beneficiaries the discretionary right to decide whether they will or will not adopt the acquisition.[46]

In summary then it may be said that trusts may not be recorded on the Register yet there are procedures available which grant a large measure of protection to beneficiaries but which are rarely used. This has the effect of making beneficial interests relatively precarious in that they run the risk of being defeated by a person who acquires an inconsistent interest. This result may apply whether the person dealing does or does not register. In either case the beneficiaries or their trustees may be involved in litigation which might have been avoided had the terms of the trust been recorded on the Register.

Germany

Subject to the historical observation which will be made presently, Germany (and Austria) have not seen any equivalent to the growth of the principle of the "curtain", found in common law jurisdictions. In other words, there is no distinction drawn between "legal" and "equitable" interests because the BGB recognizes only one form of ownership which corresponds with "legal" ownership, at common law. "Beneficial" rights are contractual or are limited to claims for unjust enrichment. There are, however, two exceptions which approach the notion of a trust:

1. The *Verwaltungstreuhand* — by which a transferor transfers property to a person who agrees to administer it for the transferor. The transferee is bound by the terms of the agreement but he also obtains the ownership of the property. If he commits a breach of the agreement the transferor has a claim for compensation against him but he does not have any right of action against a third party who may have derived an interest as a result of the breach of agreement.

2. A transaction similar to a bill of sale to secure a loan over

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Footnote 43 (continued).

s. 129 which permits registration of public trusts; Francis, *op. cit. supra* n. 17 at 20.

[44] E. C. Adams, "Indefeasibility of Title. *Morrison* v. *Song Hing* Considered" (1949) 25 *N.Z.L.J.* 216 at 218; *Tataurangi Tairuakena* v. *Mua Carr* [1927] N.Z.L.R. 688.

[45] T. B. F. Ruoff, "Land Transfer Through English Eyes" (1953) 29 *N.Z.L.J.* 216 at 235 and 249.

[46] Baalman and Wells, *op. cit. supra* n. 21 at 162.

moveables (*Sicherungseigentum*). It is not relevant to a consideration of land law.[47]

The consequence which flows from the general approach of German (and Austrian) law to the question of trusts has the effect that property may not be settled on a trustee to hold it for the benefit of named beneficiaries. This is associated with a general dislike of any attempt to tie up the succession of proprietary interests. However, during the Imperial period property was permitted to be settled within certain family limits and was known as *Fideikommisse*. After the revolution in 1918 laws were passed which had the purpose of winding up such settlements because it was thought that they did not benefit the large tracts of land which they covered. Family foundations were established to overcome this reaction but the law has been altered to require the dissolution of even these.[48]

The present law does permit a testator to appoint successive heirs: the usual procedure makes the first heir legal owner (not tenant for life) until the occurrence of an event (usually his death) (he is called the *Vorerbe* or provisional heir) and on this event he is replaced by the second heir (*Nacherbe* or reversionary). For the protection of the interests of the reversionary the law requires the registration of the interest on every folio which forms part of the estate and any disposition adverse to the reversionary is void. If the entry has not been made, however, any person dealing with the *Vorerbe* may rely on the general principles of public faith in the *Grundbuch* (Register) and will take free of the interest of the *Nacherbe*. This principle is that anyone who relies on the existence or absence of entries on a folium of the Register takes subject to or free of interests not recorded. It is impossible for the testator to exempt the *Vorerbe* from the rules which require him not to deal with the property contrary to the interest of the *Nacherbe*. There is one further limitation on this procedure as an estate planning device and it is that the interest of the *Nacherbe* must vest, as a general rule, within thirty years of the death of the testator and if it does not it will become inoperative.[49]

Austria

The general principles have been introduced with the discussion of the position in Germany: there is no division of proprietary interest into "legal" and "equitable". It is possible to make a settlement of property and to have it protected by way of court prohibition for the benefit of the beneficiaries (as explained previously). The terms of the will are not recorded on the Register *in extenso*[50] but the existence

[47] E. J. Cohn, *Manual of German Law* (1968) at 175-176.
[48] *Id.* 270.
[49] *Id.* 271-272.
[50] Interview between Dr Günter Auer, Office of the Ministry of Justice Vienna, and Mr R. Stein (Wednesday, 29th January, 1975) at 3-4; Interview between *Dozent* Dr Hans Hoyer, Jurisdische Facultaet, University of Vienna and Mr R. Stein (Friday, 31st January, 1975) at 7.

of the settlement will be recorded in Part B (which details the proprietorship together with restrictions thereon) by reference to the "file of instruments"[51] (which is a record of all interests which cannot be entered concisely on a folium of the *Grundbuch*). This will bind the land according to the terms as stated in the instrument of settlement because instruments found in the "file of instruments" are part of the Register and come within the principle of "public faith".

The limitations upon the settlement of real property in Austria are similar to those stated for Germany, concerning the substitution of the *Nacherben* for the *Vorerben* (*fideikomissarische Substitution*)[52] and the property may be settled only among living people[53] upon a stipulation which is not contingent (the interest having to be vested).[54] The question of whether a substitution has taken place is not concluded by a death certificate for the *Vorerben*[55] and his deletion from the *Grundbuch* will be effective only upon the consent of the substitution department (*Substitutionsbehörde*).[56] Such a settlement takes priority over an inconsistent disposition contained in the settlor's will.[57]

England and Wales

As with the Torrens system in New South Wales, the Land Registration Act, 1925 makes general provisions for the exclusion of trusts from the Register. Section 74 provides:

> Subject to the provisions of this Act as to settled land, neither the registrar nor any person dealing with a registered estate or charge shall be affected with notice of a trust express, implied or constructed, and references to trusts shall, so far as possible, be excluded from the register.

The trustees will be registered as proprietors of land, under the provisions of the Land Registration Act,[58] in respect to a trust for sale, a bare trust, a charitable trust or some other trust which is not a trust for sale. However, if the trust does not refer to a trust document, the Chief Land Registrar will be unable to frame the appropriate restriction (which prevents transfer except according to its terms) and he may,

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[51] Interview between Dr Günter Auer, Office of the Ministry of Justice, Vienna, and Mr R. Stein, *supra* n. 50 at 2.

[52] GBG, paragraph 9; E. Fiel, *Monographien zum österreichischen Recht Grundbuchsgesetz*), Prugg Verlag Eisenstadt (trans.) at 19.

[53] Interview between *Dozent* Dr Hans Hoyer and Mr R. Stein, *supra* n. 50 at 8-9. *Cf.* "South Australia — Title by Registration in Hanse Towns", U. Hübbe, 1861, L.C., Paper No. 212 at 5, for a consideration of the position in Hamburg where settlements could be recorded. The few interests which might not be recorded in Austria are considered also in the Interview between Dr Günter Auer, Office of the Ministry of Justice, Vienna and Mr R. Stein, *supra* n. 50 at 24. *Cf.* the position in Germany where every right under the *Reichssiedlungsgesetz* may be recorded: *op. cit. supra* n. 47 at 209.

[54] Fiel, *op. cit. supra* n. 52 at 18; GBG, paragraph 9.

[55] Fiel, *op. cit. supra n.* 52 at 318.

[56] *Id.* 311; GBG, paragraphs 131 and 136.

[57] Fiel, *op. cit. supra* n. 52 at 19.

[58] Ruoff, *op. cit. supra* n. 1 at 403.

therefore, strike out reference to the trust and demand re-execution of documents by the parties whose interests are affected thereby. He may also require the deposit of a trust document so that he can frame the requisite restrictions.[59]

In the case of settled land it must always be registered in the name of the tenant for life (or, if appropriate, of the statutory owners). The successive or other interests created by or arising under the settlement, except for any legal estate which cannot be overridden under the powers conferred in the Settled Land Act, 1925, or any other statute, take effect as "minor interests" only and it is the duty of the registered proprietor to give effect to these interests by applying for the proper restriction.[60] A "minor interest" may be regarded as any estate or interest which is not a registered estate or an overriding interest (one which takes effect despite the principles of registration)[61] and it may be overridden by a transaction on the Register unless it has been protected under the provisions of the Act.[62] In a case where there is a life tenant without a statutory owner, all dispositions are prevented until trustees are appointed. Where there is no life tenant the appropriate restriction entered is that relating to the registration of the statutory owner (the trustees of the settlement or those who hold the powers of a life tenant).[63] It is possible for holders of minor interests to lodge a caution or to apply for an inhibition.[64] Cautions[65] make sure that the proprietor of the interest claimed therein is given notice that an inconsistent dealing by the registered proprietor is to be lodged. A caution casts upon him the duty to take action to protect the interests he claims. In essence, the caution is similar to the caveat in the Torrens system which operates as a complete "stop", for its duration.[66] An inhibition has the effect of preventing dealings with the land, according to its terms. The High Court may issue limited or general inhibitions, restricting dealing with registered land or charges until a further order is made; the Chief Land Registrar also may inhibit.[67] It is recognized that the complexity of this whole procedure may result in failure, as a fiduciary owner may yet be registered as if

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[59] *Id.* 405, 422, 426, 434-435; *supra* n. 15 at 25.

[60] Ruoff, *op. cit. supra* n. 1 at 169, 382-383, 390; Royal Commission on the Land Transfer Acts (U.K.). *Second and Final Report of the Commissioners* (1911) at 37.

[61] F. W. Taylor, "Minor Interests" (1960) 110 *L.J.* 456; Ruoff, *op. cit. supra* n. 1 at 126; "Land Registration (Second Paper)", The Law Commission, Published Working Paper No. 37, 26th July, 1971 at 2.

[62] Ruoff, *op. cit. supra* n. 1 at 126-127.

[63] *Id.* 807-808.

[64] *Id.* 383-384; T. B. F. Ruoff, "Rights of Third Parties in Registered Property" (1953) 17 *Con.* (*N.S.*) 105 at 109.

[65] T. B. F. Ruoff, "Rights of Third Parties in Registered Property" (1953) 17 *Con.* (*N.S.*) 105 at 107; J.M.L., "Registration of Title" (1935) 79 *L.J.* 283, 324, 341, 357, 375, 393, 410 at 393.

[66] Simpson, *op. cit. supra* n. 15 at 487; "The Land Transfer Rules, 1903" (1904) 48 *S.J.* 256.

[67] Ruoff, *supra* n. 65 at 117.

he was beneficially entitled but, as Ruoff, a leading English authority on land registration, remarked, this will in no way vary his fiduciary duties.[68] Unfortunately this result is little help to the person who suffers as a result of the breach of a fiduciary duty and/or where there has been a registration of some bona fide purchaser. Unless rectification of the Register is permitted, the beneficiary will lose his interest in the ultimate enjoyment of the property.

Registration of an original proprietor, who is a trustee, requires that he hold his interest for the benefit of the beneficiaries whose interests may be protected as indicated previously. In the event of there being a failure to protect the interests of the beneficiaries those who acquire interests later in time take free of any equities subsisting immediately prior to the issue of the land certificate.[69]

The existence of a settlement may raise important questions of title and powers to deal with registered land which is the subject of the settlement may be granted additional to those found in the Settled Land Act, 1925. Such powers will be conferred upon the tenant for life or upon the trustees of the settlement and set out in the vesting instrument. Any person authorized to inspect the Register will have the right to inspect the latest vesting instrument but the Chief Land Registrar must refuse to register any disposition which, on the face of it, is prohibited directly by the Settled Land Act and is not within the enlarged powers conferred by the deed of settlement.[70]

A settlement may be filed at the Land Registry under section 88 of the Land Registration Act, which provides:

> (1) The settlement, or an abstract or copy thereof, may be filed in the registry for reference in the prescribed manner, but such filing shall not affect a purchaser from the proprietor with notice of its provisions, or entitle him to call for production of the settlement, or for any information or evidence of its contents.
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> (2) In this section "settlement" includes any deed stating who are the trustees of the settlement, and the vesting instrument, and any transfer or assent in the prescribed form taking place, in the case of registered land, of a vesting instrument, as well as the trust instrument and any other instruments creating the settlement.

The settlement is filed under the number of the registered title to which it relates but separate therefrom. Ruoff, argues that the purpose of the filing is of no value once the relevant restrictions have been recorded and that the purpose is for safe custody of the settlement. The initial observation that the filing is of no value is difficult to support; not only

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[68] T. B. F. Ruoff, *Curtis and Ruoff on the Law and Practice of Registered Conveyancing* (1965) at 83-84.

[69] F. L. Stow, "Torrens Titles, Original and Derivative" (1932) 6 *A.L.J.* 53 at 54.

[70] Ruoff, *op. cit. supra* n. 1 at 385.

does it ensure safe custody, but it permits the person with the right to inspect the Register, also to inspect the last vesting instrument.[71] It is the duty of the Registrar to ensure that the trustees do not act as though they are beneficially entitled by securing the entry of the correct restriction upon the Register.[72]

It may be asked: if a settlement is filed then why not record it as part of the Register as the machinery is established for lodgment of settlements?

Termination of Settlement

The procedures relevant to the removal or termination of restrictions protecting settlements do not occur through being invoked, nor need they be removed when a purchaser is registered; it will be cancelled automatically, when its terms have been complied with, for example, on the death of the life tenant under a settlement. In all other cases it will terminate when the trustees of the settlement declare by deed that they are discharged from the trusts affecting the land.[73]

Registry Duties and Breach of Trust

This subject has been introduced with the examination of the Torrens system. Those comments may be developed by saying that a beneficiary is not responsible for a breach of trust, whether with or without notice of a breach, except in the case of his own fraud. However, in the case of a failure on the part of the Registry to comply with the terms of a restriction, the beneficiary will be able to recover any loss he has suffered from the indemnity fund[74] (which covers losses arising through the operation of title by registration).

The Form of and Grounds in Favour of the Registration of Trusts

The exclusion of trusts or their equivalent from a system of title by registration is not a necessary feature of the various systems examined.[75] They are either recorded in civil law jurisdictions (the case in Germany and Austria) or may be recorded in the common law jurisdictions (British Columbia), or some means is provided to protect them where they exist;[76] in the Torrens system the alternative to registration of the trust is the caveat.

The principal defects of a system which fails to register trusts are the possibility of fraudulent discharges by trustees which will deprive the beneficiaries of their interests, where the purchaser takes bona fide and for value without notice; or, an incomplete statement of interests

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[71] *Id.* 239-240, 384, 388-389.
[72] *Id.* 163.
[73] *Id.* 809; Ruoff, *supra* n. 65 at 117.
[74] *Op. cit. supra* n. 68 at 480; *cf.* Real Property Act, 1900, s. 127.
[75] D. Kerr, *The Principles of the Australian Lands Titles (Torrens) System* (1927) at 11.
[76] Key, *supra* n. 2 at 332; "Registration of Title" (1926) 70 *Ir.L.T.* 1, 11, 17, 23, 29, 35, 41 at 12.

which may lead to the registration of inconsistent claims because the Registrar is unaware of competing claims (here the trustees may not have committed fraud); or, that it may make compliance with suit requirements difficult, as in the case of notice to litigate on a caveat: to whom does the notice go so that the interests of minors or unborn beneficiaries can be protected in substance? To answer that it is to be sent to the caveator is no answer to the problem because on the facts it may be that the caveator has joined a scheme which has the purpose of depriving the "beneficiaries" of their interest or he may be dead.

Various alternatives are possible to protect beneficial interests. The first is to retain the present state of affairs. However, the disadvantages of this have been indicated already.

Secondly, there could be separate treatment of settled estates. As long ago as 1861 it was suggested to the South Australian Property Commission that there should be two registers:

> one for ordinary certificates of title, and one for settled estates and that when land is settled it should be transferred to the second register, and be operated upon by deeds under the old method of conveyancing.[77]

Such a procedure would operate until the settlement came to an end. The Commissioners answered this suggestion by saying that they saw no reason why the Torrens proposals, permitting registration of vested estates and remainders and caveats together with the words "without survivorship", would not offer adequate protection to the beneficiaries. This last procedure was abolished in New South Wales from 1970 as it proved to be used rarely and its supposed benefit was exploded by *Re Robertson*[78] when it was explained that survivorship was one of the principal advantages attached to a trust. A system of separate register would put the person dealing with the property on notice that there was a trust estate. However, it would open the possibilities of fraud by parties dealing with trust property by inducing them to seek the return of the trust property to the principal Register thus enabling transfers free of settlement to take place. A purchaser would be able to rely on the indefeasibility secured by his registration unless he had committed fraud. Without adequate protection to the beneficiaries, this system would be worse than the "old" system: it would be a backward step, giving no protection to beneficial interests at all.[79]

Thirdly, it would be possible to remove trusts from the Register, as proposed above, but to close the Register in respect to that title.

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[77] *Supra* n. 18 X.
[78] *Supra* n. 39.
[79] The lengths to which parties will go to commit fraud which may be excused under the New South Wales system of title by registration are brought out in cases like *Munro, James A.* v. *Stuart* (1924) 41 S.R. (N.S.W.) 203 (n) and *Oertel* v. *Hordern* (1902) 2 S.R. (N.S.W.) 37.

Such a procedure was proposed by some of the parties giving evidence to the 1873 South Australian Commission, another inquiry into the operation of the Torrens system, but it rejected the suggestion. It argued that such an approach would involve the closure of the Register to all property held upon trust and that this could not be permitted.[80] They were willing to suggest that the words "trust estate" could be inserted upon the Register but this would in no way detract from the powers of the trustees to deal with the property.[81] It may be asked: why adopt such a system if it is to have no apparent value against purchasers? The answer is that there are other advantages to be derived:[82]

(a) to fix the trustee with his fraud if he conveys in breach of trust — he would not be able to plead ignorance of dealing with the trust property;

(b) to prevent an apparent beneficial owner, who is in fact a trustee, from gaining credit on the security of the trust property;

(c) to permit the executors of the trustee to know what is beneficially the property of the trustee;

(d) to protect the beneficiaries in the case of a trustee's involuntary disposition, for example, bankruptcy.

It seems that it would only be in relation to point (d) that any additional security over the present position would be granted to the beneficiary.

A fourth possibility is to register the trust.[83] The simplicity of this procedure, especially with a loose-leaf Register and incorporation by reference (as is the case in Austria) makes it an obvious candidate for consideration. Inserting the trust document into the loose-leaf file and making it part of the title would remove the burdens imposed upon the Registrar under section 82 and, also overcome the limitations of the caveat protection, while giving the courts the right to determine the construction of the settlement if a question ever arose for such examination. Given the paucity of settled estates at any particular time, this procedure would involve the Registry in very little extra work, as is evidenced by the present position in British Columbia, Germany and Austria. This is the alternative that should be adopted, and it should apply to actual trusts and settlements as distinct from those which arise for technical purposes, such as on the death of a testator, under the Wills, Probate and Administration Act, 1898. The situation in British Columbia demonstrates that this may be done without causing

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[80] *Supra* n. 18 VIII.

[81] The proposal was not adopted; *vide* Real Property Act Amendment Act, 1878 (No. 128 of 1878), and Real Property Act, 1886 (No. 380 of 1886), Part XV.

[82] *Supra* n. 18 IX.

[83] Ruoff, *supra* n. 2 at 165.

any complexity or difficulty in operating the system of title by registration (as to which, see later).

Fifthly, one might require a complete change in the law of property by the abolition of equitable interests in land, leaving only legal interests. This question was examined by Sir Arthur Underhill who said in 1914:

> Now to eliminate equitable fees and terms would obviously be an immense advance in point of simplicity, and consequently a desirable thing in itself. Let us consider whether the difficulty of doing so is insuperable.[84]

It was this question of the existence of equitable interests and the desire to avoid chancery suits which motivates Sir Robert Torrens to introduce his system.[85] However, it raises the question of whether a reversion to the common law principles of legal interests is possible[86] without an associated dislocation of proprietary interests. A successful result has been achieved, to some degree, in England and Wales by the provisions consolidated in the Law of Property Act, 1925 and the Settled Land Act, 1925; but they have not reduced equitable interests to contractual, as is the case in Roman law systems: the result has been to place equitable interests behind the "curtain". Nor have they been abolished in the Torrens system.[87] However, this alternative has been adopted in Israel (as provided in the Land Law 1969, section 161) and it has not proved to have been incompatible with property law as administered there.[88]

The problem with this solution is that it involves a fundamental change in property law. The merits of such a change are beyond the scope of this article, but it seems unnecessary to achieve the object stated, and might raise other problems because of the many purposes for which trusts may be used and for which they are of great value.

From the early nineteenth century it was recognized that the protection of equitable interests was an important issue. One major factor supporting title by registration was the alarming number of

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[84] H. Underhill, "Lord Haldane's Real Property and Conveyancing Bills" (1914) 30 *L.Q.R.* 35 at 43.

[85] *Cf.* H. R. Raney, "Alberta Land Titles Act — Minerals Mistakenly Included by Registrar in Transferee's Title — Subsequent Voluntary Transfer — Right of Registrar to Correct Mistake — Statute of Limitations — State Indemnity for Loss of Title — A Recent Alberta Case, *Kaup and Kaup* v. *Imperial Oil Ltd et al*" (1961) 39 *Can. Bar Rev.* 275 at 280.

[86] *Supra* n. 84 at 43-44.

[87] E. A. D. Opie, *Correspondence on the Real Property Act*, (1882) at 45-46; *Lange* v. *Ruwoldt* (1872) 6 S.A.L.R. 75, 7 S.A.L.R. 1; *Cuthbertson* v. *Swan* (1877) 11 S.A.L.R. 102; *cf.* J. R. Innes, "Registration of Title in the Federated Malay States" (1914) *J.Soc.Comp.Leg.* (*N.S.*) 386 at 389.

[88] J. Wiseman, "The Land Law, 1969: Critical Analysis" (1970) 5 *Is.L.R.* 379 at 383-388; Interview between Mr Israel Haskel, M.Jur., Director, Department of Land Registration and Land Settlement, Ministry of Justice, P.O. Box 189, Jerusalem, Israel (Wednesday, 22nd January, 1975) and Mr R. Stein at 6-7 (*vide*, marginal note); A. Rumsey, "The Postponed Land Transfer Bill" (1886-87) 12 *L.M. & R.* (*4d*) 361 at 362.

titles which had been upset because of settlements and fraudulent transfers in breach of settlement. Even in 1857, when it was suggested that all interests should not be recorded in a system of title by registration, it was realized that some procedure would have to be devised to prevent attempts to defeat equitable interests. It was suggested by the English Royal Commission of that year that documents of trust should be "lodged" with the Registrar and it is from this basis that the concept of lodgment of trust documents may be said to have developed.[89]

That the present state of affairs requires a remedy was recognized by the South Australian Commission of 1873 when it said:

> We feel it necessary here to point out, that in our judgment, and, we might add, experience, the social *status* of the persons who are very frequently appointed trustees in this Province requires that more protection should be extended to the trusts than that which the mere joint consent of two persons for the alienation of trust property affords [the ineffective nature of the words "no survivorship" was then commented on and that it was an embarrassment to the system for the proprietors may deal with the property without the sanction of the Court].[90]
>
> The consideration of the most complete way of protecting beneficiaries has engaged our earnest and protracted attention.

This problem has continued to the present time, as the authorities demonstrate.[91] The complete securing of trusts and of interests of the beneficiaries is possible only if the trust itself is recorded on the Register of Title. In the Returns for 1872 it was said that:

> the Torrens system is not . . . in any special way inapplicable to settlements, trusts or entails. If it only be once admitted that the system can adequately provide for the exigencies resulting from the ordinary legal succession of property, or the ordinary exercise of the powers involved in everyday mortgages or incumbrances, this must involve a virtual admission of its equal adequacy for all the purposes of settlements and trusts. These only differ from the others as words of many syllables differ from words of few syllables. They are resolvable into the same elements, and only require to be separated to present the same degree of simplicity.[92]

F. L. Stow, a leading property lawyer of this century, accepted this general assertion but in the case of express trusts only; he maintained,

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[89] Article VII Observations made on "Suggestions Sent to the Commissioners Appointed to Inquire into the Laws of Real Property, with Minutes of Evidence before them" (1830) 83 *Q.R.* 170 at 171-173; "Report of the Commissioners Appointed to Consider the Subject of the Registration of Title with Reference to the Sale and Transfer of Land" (1857) 1 *S.J.* 349 at 364, n. (j).

[90] *Supra* n. 18 VIII.

[91] The Law Commission, *supra* n. 61 at 6.

[92] Returns, 1872, *supra* n. 6 at 53. *Cf.* W. C. Niblack, *The Torrens System, its Cost and Complexity* (1903) at 39-40, where the learned author indicates that some form of protection is necessary for the beneficiaries.

without explanation, that registration of other beneficial interests would be impractical.[93] McDougal and Brabner-Smith, leading United States authorities on the subject of title by registration, observed in 1938 that:

> The mechanics of registration offer no insuperable obstacle to the handling of complicated future interests. Registration can be made in the name of the tenant or owner of the possessory estate and memorials entered upon the register and certificate indicating that the land is held subject to certain future interests which an intending purchaser can ascertain by looking at the filed documents creating such interests. It is true that such land may not be completely alienable. But why should we not secure such limited alienability as is possible? Non-liquidity because of outstanding future interests must seek its own justification; non-liquidity because of the disorder in which the public books are kept has no justification, unless to afford opportunity for the imposition of a private toll.[94]

This emphasises that all current burdens are encumbrances and none should be selected for preference over the other. It is true that some experts are still opposed to the recording of trusts, arguing that it would move against simplicity of title and would lead to a return to the problems which existed before title by registration.[95] But, as was explained by McDougal and Brabner-Smith, the question of the complexity of property law is an issue separate from that of registration of current proprietary interests. Simplification of property law does not involve a consideration of the Register, which has the sole purpose of implementing the interests and privileges secured by the existing law. Registration of trusts was advocated by the Attorney-General of South Australia in 1872, when he said:

> By the Act, Declarations of Trust, though received, by the Registrar General, are taken no notice of, and I do not see why they should not be recognized.[96]

As an alternative at this time it was proposed that "restraints" should be recorded on the Register to prevent dealings inconsistent with any trust terms: the 1873 Inquiry recognized the possible value of such a procedure, but it was not adopted and the device of adding the words "no survivorship" continued.[97] The proposal was to allow the restraint to be recorded by the settlor, beneficiaries or the Lands Titles Commissioners on behalf of beneficiaries, under an order of the Supreme Court.[98] It was, in essence, identical with the English "restriction",

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[93] *Supra* n. 69 at 122.
[94] M. S. McDougal and J. W. Brabner-Smith, "Land Title Transfer: A Regression" (1938) 48 *Yale L.J.* 1125 at 1138.
[95] Interview between Mrs A. B. McFarlane of Her Majesty's Land Registry, Lincoln's Inn Fields and Mr R. Stein, (11th February, 1975) at 17.
[96] Returns, 1872, *supra* n. 6 at 153-154.
[97] *Supra* n. 18 IX.
[98] *Ibid.*

having its origin in the Hanseatic law brought to the notice of the Inquiry by Dr Hübbe,[99] who had been educated in the Hanseatic system of title by registration. Had the procedure gone ahead both the English and South Australian systems would have contained identical procedures for recording "restrictions", as in those German states of the day with title by registration, and as is at present the case in Austria and Germany. The proposal was not adopted.

"Complexity" is not incompatible with a system of title by registration;[100] this is borne out by the procedures for dealing with trusts in British Columbia, where equitable interests have become charges within the system.[101] The effect of the procedure has been to abolish the principle of no trusts on the Register[102] and lawyers in the Province have recognized this change as a major improvement. As has been said:

> In point of fact, it is this departure which leads to the oft-repeated statement that in British Columbia we operate under a "modified" Torrens system. The adjective is unfortunate and I suggest that a more appropriate term would be the word "improved" rather than "modified" because all lawyers who have had practical experience with both the British Columbia system and the system in what may be termed the true Torrens jurisdictions, for example, the Prairie Provinces, seem to be agreed that the British Columbia system is an improvement over the other, with its endless substitute registrations by caveat and other weaknesses, as we in British Columbia view them.[103]

The existence of the trust is recorded on the Register under section 179 (formerly section 149) of the Act but it is not recorded *in extenso*. The instrument is filed just as are other instruments here where they are not recorded in full but by way of reference to the filed documents. Other equitable estates may be registered as charges.

The powers conferred by the trust instrument are of no direct importance at the point of registration; however, trust instruments, wills, settlements and documents may be lengthy and this will necessitate the relevant examiner keeping an up-to-date notebook of the trust concerned which will avoid re-examination of documents and breaches of trust. In a sense this may be regarded as a juridical function but disputes over the documents are settled in the Courts.[104]

Trusts may be registered also in the Torrens system in operation in Colorado, Ohio and Illinois. In Colorado the trust is registered by

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[99] *Id.* X. The proposal was not adopted: *cf.* Real Property Act Amendment Act, 1878 and Real Property Act, 1886.

[100] Ruoff, *op. cit. supra* n. 1 at 29.

[101] H. L. Robinson, "The Assurance Fund in British Columbia" (1952) 30 *Can. Bar Rev.* 445 at 446, n. 5.

[102] S.B.C., 1913, c. 36, s. 17.

[103] *Supra* n. 101 at 446.

[104] Letter from Dean A. J. McClean, 23rd April, 1976 at 4-5.

being deemed a mortgage and it is entered on the Register in the form of a memorial; such a procedure might be used here. In the case of Ohio, the trust is dealt with in exactly the same way as trusts of unregistered property; where the trustee proposes to deal with registered lands the proposed transaction must be referred to the Court for construction and authority to deal.[105] An adaptation of the Illinois procedure, which is a variation of the Ohio and Colorado systems,[106] might offer an equally adequate means of recording trusts here (on the Memorandum of Encumbrances).

It is true that Torrens came to the conclusion that registration of trusts would involve manifest inconvenience to families by the exposure of their arrangements to the public view, and this led to their removal from the system. He also maintained that failure to record them would not appreciably impede dealings with land and that these considerations could, therefore, be set-off against any inconvenience resulting from proprietors being deprived of the power to register trusts.[107] This fear of exposure of trusts was dismissed as long ago as 1830, when it was argued that even if

> a marriage settlement ought to be carefully secluded from the public gaze — as an Asiatic bride; there is, in fact, no reason why a register should violate any of these privacies. It may be perfectly effectual for all the proper purposes of a register, without making any disclosure of the objects of the instrument registered; or if it be thought fit to register deeds at length, means may be

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[105] J. C. Maher, "Registered Land Revisited" (1957) 8 *W.R.L.R.* 16; R. W. Laugessen, "The Torrens System in Colorado" (1962) 39 *D.* 40 at 48.

[106] *Vide* Niblack, *op. cit. supra* n. 92 at 181-182, where the Illinois Act, ss. 68 and 69, is considered as a means of protection, as follows:

> TRUSTS, CONDITIONS AND LIMITATIONS. Section 68: Wherever a deed or other instrument is filed in the registrar's office for the purpose of effecting a transfer of a charge upon registered lands, or any estate or interest in the same, and it shall appear that the transfer or charge is to be upon trust, condition or limitation expressed in such deed or instrument, the registrar shall, unless such deed or instrument expressly directs to the contrary, note in the certificate, and the duplicate thereof, or memorial, the words "in trust", or "upon condition", or "with limitations", as the case may be, and no transfer of or charge upon, or dealing with the land estate or interest shall thereafter be registered, unless pursuant to the order of some court, or upon the written opinion of two examiners that such transfer, charge or dealing is in accordance with the true intent and meaning of the trust, condition or limitation.
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> ORDER OF COURT OR OPINION OF TWO EXAMINERS — WHEN REGISTRATION CONCLUSIVE EVIDENCE. Section 69: Upon the filing with the registrar of an order of court or opinion of two examiners, as provided in the last section, and in the latter event upon the registrar also being satisfied that the proposed transfer, charge or other dealing is in accordance with the true intent and meaning of the trust, condition or limitation, he shall proceed to register the same, and such registration shall be conclusive evidence in favour of the person taking such transfer, charge, or other right, and those claiming under him, in good faith and for valuable consideration, that such transfer, charge or other dealing is in accordance with the true intent and meaning of the trust, condition or limitation.

[107] Torrens, *op. cit. supra* n. 15 at 40-41.

> devised for preventing an inspection of the record, except by persons who have a legitimate purpose.[108]

A further reason which weighed heavily with Sir Robert Torrens is to be found in the Royal Commission report of 1857 and in the observations of Cookson and Field contained therein. Their objection was based on the rare occurrence of fraud among trustees. Torrens argued that as land is patent and beneficiaries are easily made aware of dealings with settled land, frauds in this matter would be very rare indeed.[109] However, the rarity of the occurrence of an event does not preclude making provision for its possibility, and in fact there exists many suits on the subject. Nor does the Torrens argument make provision for the case of future interests where a beneficiary may not be born. If, on the other hand, a trust were registered, a purchaser would have notice of its terms, being bound by the public faith of the Register, and he would be able to decide whether they had been breached with regard to the transaction in which he was concerned. In such a case he would be a party to the fraud and would be bound by the terms of the settlement, rather than, as at present, to take free of it, leaving the beneficiaries bereft of the settled estate.

It may be argued that registration of the trust will not prevent fraud by a person other than the trustee. However, the fraudulent person would have to forge all necessary releases because, depending on its terms, the failure to obtain such releases would be apparent to any purchaser. The latter would be aware of the classes of beneficiaries from the provisions of the document and would have the information required to ensure that the vendor had power to deal as he proposed. This would prevent the purchaser from acquiring a good title, on the faith of the Register, in breach of trust. An example would be a trust settling property on grandchildren of a living person — here a transfer of property would require the consent of the Court (unless there was power to dispense with this) before future interests could be destroyed. If this consent was missing, no purchaser would deal with the vendor.

It was also argued that the registration of trusts would make the Register unnecessarily bulky because of the length of trust documents. Doctor Hübbe said:

> If all the deeds connected with these arrangements were brought on the register, it is clear that in many cases registered titles would be most voluminous and embarrassing.[110]

In British Columbia, where the existence of trusts are recorded, this has not occurred. Rather the bulk occurs in the filed documents and not on the face of the Register. In response to the writer's request a sample of the register was taken in relation to 250 titles; a total of

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[108] *Supra* n. 89 at 172.
[109] Torrens, *op. cit. supra* n. 15 at 40.
[110] *Op. cit, supra* n. 3 at 93-94.

nineteen trusts was revealed held by personal representatives and/or trustees, as to the fee simple (seven) and mortgages (twelve). In the memorandum from the Regional Registrar to A. J. McClean, Dean of the Faculty of Law, University of British Columbia, in February 1976, it was said:

> With respect, your conclusions are correct as to the practice results, e.g. no bulky titles, materials in one place etc. to which one merely adds that the 1913-14 division of fee simple into legal and equitable estates placing charges on the register, or trusts for that matter, escape bulkiness by the provisions of sections 42 and 149 (current section numbers).
>
> The nett result I think is that in the case of a trust there is simply a notation on the certificate of title that the property is held on trust, with the document creating the interest being on file in the Registry Office, and dealings with the title being subject to the interest created by the trust.[111]

Conclusion

It is recommended that the British Columbia system for recording the existence of trusts be adopted here. It may be said that the registration of trusts would in fact be a return to the very early Torrens principles, later eroded. Rather than revolutionary, it could be regarded only as reactionary.[112]

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[111] *Supra* n. 104 at 1-2. There is, from the procedure adopted in British Columbia, no reason why transmissions could not be dealt with on the Register. Such an idea is not wholly new as transmission applications were the subject of a Registrar-General's caveat, in New South Wales, to prevent dealings inconsistent with the terms of the will. This procedure has been discontinued in recent years on the basis that it is not a concern of the Lands Titles Office to inquire into testamentary questions. As testamentary interests are equitable, pursuant to the provisions of the Wills, Probate and Administration Act, 1898, if property is settled the relevant provisions in the Will should be recorded on the Register to secure the interests of the beneficiaries.

[112] D. J. Whalan, "Partial Restoration of the Integrity of the Torrens System Register: Notation of Trusts and Land Use Planning and Control" (1970) 4 *N.Z.U.L.R.* 1 at 17.