

EQUITY AND THE TORRENS SYSTEM STATUTORY AND OTHER INTERESTS

In the previous issue of this Review¹ the problem of a deserted wife's rights in the matrimonial home was examined. The question whether, if it be admitted that a deserted wife can or should have any rights other than personal ones against her husband, such rights can be recognised where there is a system of registration of title to land is part of the larger problem of the recognition of rights and/or interests apart from and perhaps even contradictory to the statute forming the basis of the registration system.

The introduction of a system of specified rights inevitably poses the questions of the indefeasibility and exclusiveness of those rights. The two overlap, for if the statutory rights can be defeated, then defeat may be by the recognition of other positive rights. In deciding the nature of possible rights within such a system, principles applicable where there is no such system do not easily fit for there is a fundamental duty on a person claiming a right to take the steps provided, and upon which its recognition depends. It would defeat the whole purpose of the statute to provide the procedure and at the same time for the Courts to allow it to be ignored. A system of registration of title, if it is to mean anything, must itself be the source of the rights it creates, and be distinguished from the type of registration (usually of deeds) where prior to, and apart from, the registration an interest exists. In that type of system, registration serves a notice of that interest to any third parties, but does not of itself establish the interest, whereas in the 'true' system of registration of title (as the Torrens system) the statutory rights are themselves established by registration.

Courts have been reluctant to take the further steps and say that there are *no rights* until registration, and after registration there are only those rights which are provided for by the statutes. The result is that systems of registration usually consist of statutory rights built on the system of rights existing prior to the statute. Even where a particular statute provides specifically that certain rights may be created only in a certain way, and further, that no rights may be created except in that way, the Courts have refused to recognise the inevitable. All too often they have construed the inevitable as the inequitable, and denied the system by artificial construction, or as the Privy Council said in *Haji Abdul Rahman v. Mohammed Hassan*,² "been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a

1. 1963 Malaya Law Review Vol. 5 No. 2, p. 213.

2. [1917] A.C. 209 at p. 216.

system of registration of title contained in a codifying enactment". It must always be borne in mind that the system places a premium on the claimants' acts. There is available to a claimant of a statutory interest a procedure which he can take to create (or protect) his interest. He should not be allowed to sit back and ignore the procedure and complain that because of his inactivity he has suffered.

STATUTORY TITLE AND INTEREST — NEW SOUTH WALES AND SINGAPORE

The pattern of the Torrens System is to declare a statutory title indefeasible with certain exceptions. The Real Property Act 1900-1956³ of New South Wales provides:

"Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same, subject to such encumbrances, liens, estates or interests as may be notified on the folium of the register-book constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever."

It excepts from the overall provisions a proprietor claiming the land under a prior certificate of title, the omission or misdescription of an easement, (where the proprietor is not a purchaser for value or deriving through such a purchaser), any portion of land included by wrong description, and a tenancy for not more than three years of which the registered proprietor had notice before he became such that he was not protected against it.⁴

The Land Titles Ordinance 1956⁵ of Singapore provides:

"Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Ordinance, any person who becomes the proprietor of registered land, whether or not he dealt with a proprietor, and notwithstanding any lack or good faith on the part of the person through whom he claims, shall hold that land free from all encumbrances, liens, estates, and interests whatsoever, except such as may be registered or notified in the land-register."

EXPRESS QUALIFICATION

It subjects the indefeasibility of title to subsisting exceptions reservations covenants and conditions contained or implied in the Crown grant or Crown lease of the land, any subsisting easement or right of way in existence when the land was brought under the Ordinance, the Registrar's statutory power to correct errors in the land register, and "the rights of any person in occupation of the land under a tenancy not exceeding three years" when the proprietor was registered as such. The Ordinance also specifies that the provision does not prejudice rights and remedies based on (i) fraud or forgery of the registered proprietor or

3. New South Wales Statutes 1984 - 1957 Vol. 9, p. 682.

4. Ibid. s. 42.

5. No. 21 of 1956.

in which he colluded, (ii) any contract to which the proprietor was a party, (iii) any trust, where the proprietor is a trustee, (iv) a legal disability of a person from whom the proprietor acquired the land with knowledge of the disability, (v) unlawful acquisition by the proprietor in purported exercise of a statutory power or authority. Finally it is provided that a person who is not a purchaser cannot rely on the provision to give him a better title than his immediate predecessor.⁶

(a) ESTATES AND INTERESTS

Equity may take a hand in limiting the nature of the title, in construing specified limitations or imposing limitations which are not specified by the statute. Under both the New South Wales Act⁷ and the Singapore Ordinance⁸ the proprietors title is said to be free of "encumbrances, liens, estates and interests". There is no accurate guidance in either the Act or the Ordinance as to the meaning of the phrase. It would be construed so widely as to include (in the terminology of the general law) any and every equitable right, or limited to interests which are interests in land as distinct from personal obligations. Courts have held that it is no part of the scheme to enable registered proprietors to avoid contractual obligations or defeat "personal equities".⁹ In other words, where a registered proprietor would, under the general law, be subject to a personal obligation, not an interest in land, the provision of indefeasibility is no help to him. Such a distinction, although a general law distinction, is also a natural limitation of a system concerned with rights over land. Where the line is drawn may not necessarily coincide with the general law; there would be no purpose or reason in drawing it differently unless the statute so required. Where the statute itself limits its operation and does not prohibit the recognition of equitable principles outside its boundaries, the very operation of these principles strengthens the force of the system.

(b) FRAUD

However, in construing the general exception of fraud (which is specified in both the Act and the Ordinance) the Courts, although declaring that this does not mean constructive fraud, have gone some way to attack the systems' basic principles.¹⁰

In *Merrie v. McKay*¹¹ the Supreme Court of New Zealand thought it fraud to obtain registration knowing of possession under a prior unregistered agreement, and that there had been an outlay of money under it, but in *Oertel v. Hordern*¹² the Supreme Court of New South Wales

6. Ibid. s. 28.

7. See supra note 3.

8. No. 21 of 1956.

9. See *Baker's Creek Consolidated Gold Mining Co. v. Hack*; (1894) 15 L.R. Eq. 207, 221 (N.S.W.); [1917] *Haji Abdul Rahman v. Mohammed Hassan* A.C. 209.

10. See *Assets Co. v. Mere Roihi* [1905] A.C. 176.

11. (1897) 16 N.Z.L.R. 124.

12. (1902) 2 S.R. (N.S.W.) Eq. 37. Cf. *Ong Tin v. Seremban Motor Garage* (1917) 1 F.M.S.L.R. 308.

held it to be no fraud simply to have notice of an unregistered lease. In the latter case the Court opined that a person who failed to register his interest had no ground for complaint.

In *Waimiha Sawmilling Co. v. Waione Timber Co.*¹³ Lord Buckmaster in delivering the advice of the Privy Council, the basic principle of which was that mere notice was not fraud, nevertheless said that it would be fraud "if the designed object of the transfer is to cheat a man of known existing right". The dictum presupposes that a person *can have* a right apart from the register, and implies that a person omitting to take the statutory steps is still entitled to protection. The use of the word "cheat" at the most conflicts with the ratio of the advice and at the least by its vagueness renders the dictum largely meaningless. The whole concept is also an attack on the basis of registration, which places a premium on the acts of a person who may create (or protect) his interest by taking certain steps. It is surely essential in considering the construction of exceptions to indefeasibility that the duties of the claimant to an interest be regarded, as they *are* under the system, as primary.

(c) EQUITIES

While the Land Titles Ordinance¹⁴ of Singapore specifies certain exceptions to the rule of indefeasibility which were merely implied under former complementary legislation, such as the New South Wales Act,¹⁵ it is like that Act in that it does not specifically state that a proprietor is subject to personal equities or obligations in general. There is no reference to any equitable obligation arising other than by contract or trust to which a proprietor is subject, and it is noticeable that the trust obligation is personal rather than proprietary.¹⁶ It is only where the proprietor is a trustee that the exception applies against him. Recognition of equitable interests in the general law sense apart from personal obligations or any statutory interest which could be so classified, by making the registered proprietors interest subject to a prior equitable interest, would be a denial of the Torrens System.

STATES OF MALAYA

The Land Code¹⁷ of the former Federated Malay States provides¹⁸ for indefeasibility of title apart from (i) 'fraud or misrepresentation' to which the proprietor is a party (ii) the title of a tenant in possession

13. [1926] A.C. 101 at p. 106 Cf. *Loke Yew v. Port Swettenham Rubber Co Ltd* [1913] A.C. 491. (See *infra* p. 167).
14. No. 21 of 1956.
15. See *supra* note 3.
16. See Land Titles Ordinance (No. 21 of 1956) s. 28(2) (c).
17. Cf. Land Enactments of Trengganu (c.56 of 1939 Laws) s. 40; Perlis (No. 11 of 1356) s. 72; Kedah (No. 56 of 1934 Laws) s. 43; Kelantan (No. 26 of 1938) s. 37. The Johore Land Enactment has no comparable section. Indefeasibility under the Kelantan Enactment is made subject to s. 95 of the Enactment which can be compared to s. 107 of the Land Code (as to which see *infra*). Cf. note 19 *infra*. The Torrens system as exemplified by the Land Code is extended to Penang and Malacca by the National Land Code (Penang and Malacca Titles) Act 1963 (No. 2 of 1963) which has not yet come into force.
18. F.M.S. Land Code (c. 138 of 1935 Laws) s. 42.

under an unregistered lease or agreement for a lease for a term not exceeding one year. Any registration obtained by forgery or by means of an insufficient or void instrument is void, and the title of any proprietor may be defeated "by operation of law".¹⁹

The appearance of misrepresentation as an additional ground for defeating the proprietors title does not appear to have been seized on by the Courts,²⁰ yet if it is to mean anything, it must be contrasted with fraud. The general exception that a title may be defeated by operation of law makes sense only when considered with the basic provision of the Code which, in contrast to the Singapore Land Titles Ordinance and the New South Wales Real Property Act, is definitive in its control of interests permitted to exist other than under the Code. Even so provided rights over land may exist other than under the Code, it may be argued that title of a registered proprietor may be defeated by such rights because of this provision referring to a criterion other than the Code, that the title can be defeated by them because of the general provision. Further if the Code itself defines interests created by it by reference to the general law, then the provision comes near to defeating the entire concept of the Code.²¹

TRANSFER FROM REGISTERED PROPRIETOR

In all these statutes a person taking a transfer from a registered proprietor is further protected. The Singapore Land Titles Ordinance,²² which is similar to that of the New South Wales Act²³ provides:²⁴

"Except in the case of fraud, no person dealing with a proprietor or with a person who is entitled to become a proprietor shall be required or in any

19. This phrase is also found in the Land Enactments of Trengganu (c. 56 of 1939) Laws s. 40) Perlis (No. 11 of 1356 s. 72) and Kedah (No. 56 of 1934 Laws s. 43). The Johore Land Enactment (No. 1 of 1935 Laws) has no provision akin to s. 42 of the F.M.S. Land Code, but s. 63 of the Enactment is comparable to s. 55 of the Code. Therefore all dealings in accordance with the Enactment, which forms the source of rights just as the Code. The effect of s. 65 (comparable to s. 96 of the Code) may thus be greater than that of the comparable section in the New South Wales Act. The Land Enactment of Kelantan on the other hand reads (s. 37 (vi)) — "Nothing in this section shall be construed so as to prevent the title of any proprietor being defeated *under the provisions of this Enactment*", which in referring to the Enactment itself and not to the general law, is an entirely sensible proviso, and is not open to any of the objections referred to in the text.
20. Cf. Kirpal Singh, "Indefeasibility under the Torrens System", 1961 M.L.J. at p. xxvii.
21. It can be argued that the subsection is limited to interests created by operation of law rather than dealings of the parties, (cf. s. 55), but each such interest directly or indirectly originates with a dealing, and the distinction though frequently made is subject. Even if it be accepted the subsection, it is submitted, is nonsense in a system which purports to exercise a strict control. The legislature persists in introducing such an escape route (see national Land Code (Penang and Malacca Titles) Act 163 s. 36). It is to be hoped that the National Land Code will avoid such terminology, and be guided rather by the Kelantan Land Enactment (see note 19 supra). As to s. 107 of the Code, which is similarly self destructive see note infra.
22. See supra note 5.
23. See supra note 3.
24. Land Titles Ordinance (No. 21 of 1956) s. 29(1).

manner concerned to inquire or ascertain the circumstances in or the consideration for which the current proprietor or any previous proprietor is or was registered, or to see to the application of the purchase money of any part thereof, or shall be affected by notice of any bankruptcy proceeding, trust, or other unregistered interest whatsoever, any rule of law or equity to the contrary notwithstanding; and the knowledge that any unregistered interest is in existence shall not of itself be imputed as fraud.”

The Land Code,²⁵ in effect exempts a purchaser who has taken bona fide for valuable consideration from a registered proprietor from the disqualification resulting from that proprietor's fraud or forgery. Such a purchaser remains liable to defeat by operation of law.

EFFECT OF STATUTES ON OTHER RIGHTS

A fundamental problem is to decide whether a particular statute is exclusive. Does it prohibit the existence of rights over land within its ambit which it provides? This must obviously depend on the wording of the statute. It involves a consideration both of unregistrable and unregistered rights, and necessitates an examination of the purposes and nature of the statutory procedure adopted for creation (or protection) of rights.

If the basic proposition that the statutory right has its source in the statute and is not a right created elsewhere and merely protected or enforced by the statute be accepted, then any other right over land within the statute must have its source elsewhere. If the statutory provisions refer only to the creation of rights under the Act, and nowhere forbid the existence of other rights, then there is nothing to support the view that the “register is all”. It is only if the basic provisions are couched in positive prohibitive terms that the issue arises.

Even if the terminology of the statute forbids the source of the rights to be anywhere other than the statute, the provisions themselves may infer the recognition of a right apart from the statute. The statutory definition may necessarily imply that the source of the right is outside the statute. Where the procedure for protection or creation is not carried out the question will arise whether there are, despite the omission, any rights, and if so what they are. Further, the statute may limit the *nature* of rights with which it is concerned. Any rights permitted expressly or impliedly by the statute, but not controlled by its provisions, are unregistrable rights, and the registration system should be irrelevant to their recognition. Any question of priority arising between such rights and registered or (if they exist) unregistered rights may be decided by the nature of the rights themselves or simply by the order of their creation. This will depend whether force is to be given to a right not only because it is registered but because it is registrable.

The system provides for the creation of a statutory right. It subjects that right to certain other interests, some of which are based on equitable principles, and in so doing it adopts those principles as part of the statutory scheme. It may reject other equitable principles

25. F.M.S. Land Code (c 138 of 1935 Laws) s. 42(3).

(e.g. constructive notice),²⁶ or by its very principles render them in-applicable. It may fundamentally affect the nature of general law interests and estates, for by the creation of statutory interests it may prohibit all other interests in land. However the omission of an all-embracing provision prohibiting all such interests must surely imply the existence of such interests dependent on the general law.

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As has been said the starting point of such an examination must be the statute. It may be that its provisions will refer to the general law thereby inevitably recognising that the statute is imposed on that law, and does not totally dispose of its provisions.²⁷ In *Barry v. Haider*²⁸ it was contended that a transfer of land within the ambit of the Real Property Act 1900²⁹ of New South Wales was inoperative for any purpose and that no rights at all could exist until registration, by virtue of the provisions of that Act.

The High Court of Australia rejected the contention, saying that equitable claims and interests in land were recognised by the Act and that the contention itself was —

“absolutely opposed to all hitherto accepted notions in Australia with regard to the Land Transfer Acts. They have long, and in every State, been regarded as in the main conveyancing enactments, and as giving greater certainty to titles of registered proprietors, but not in any way destroying the fundamental doctrines by which Courts of Equity have enforced, as against registered proprietors, conscientious obligations entered into by them”.³⁰

The pertinent section (s.41(1)) on which the contention was based reads—

“No instrument, until registered in manner hereinbefore prescribed, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed, the estate or interest specified in such instrument shall pass, or as the case may be the land shall become liable as security....”

Looking at the provision in isolation there would seem two arguments against the proposition that an unregistered instrument could create no right, (i) The section refers only to “estate or interest in land”. Therefore it does not affect any right which is not so classified.

26. As in all these statutes under discussion. See *Assets Co. v. Mere Roihi* [1905] A.C. 176.
27. Such a general provision as found in the F.M.S. Land Code s. 42 (vi), confuses or defeats the system introduced by the statute. Cf. text and note 20 supra. The statute could, by reference to the general law, make clear that it is built on such law rather than replacing it. See e.g. the U.K. Land Registration Act 1925.
28. (1914) 19 C.L.R. 197.
29. Act No. 25 of 1900.
30. *Barry v. Haider* (1914) 19 C.L.R. 197 at p. 213 per Isaacs J.; Cf. *Butler v. Fairclough* (1917) 23 C.L.R. 78 at p. 91.

(ii) The leading clause referring to the prohibition that no instrument until registered should be effectual to pass any estate or interest, limits the application of the section to the effect of the instrument. It does not go to the right behind it. Therefore, unless another provision prohibits the existence of rights over land save in "instruments", it has no effect on the "right" itself.

The Court cited other provisions of the Act³¹ as showing that equitable interests were recognised therein emphasising those concerning caveats.³² Under the Act, any person claiming any estate and interest in land under the Act under any unregistered instrument may by caveat forbid the registration of any interest affecting such land, estate or interest.³³ This provision, said Griffith C.J., "recognised that an unregistered instrument could create a claim cognisable by a Court of Justice".³⁴

Isaacs J. differentiated between the instrument and the rights behind it.³⁵ But the learned judge seems to go further than (ii) above. He thought a proprietor would be bound to fulfil any contract he made by "ordinary principles and rules of law and equity" and that the right to have an instrument executed and registered, "according to the accepted rules of equity is an estate or interest in land". The fact that an instrument is not effective till registration "cannot cut down or merge the pre-existing right which led to its execution".³⁶

By this reasoning therefore, a right to register a transfer itself is an equitable estate or interest in land, a right recognised as existing in accordance with a system providing for statutory interests in land by registration. The Privy Council approved of the reasoning and applied it to the similarly worded Land Titles Act³⁷ of Saskatchewan in *Great West Permanent Loan Co. v. Friesen*.³⁸

The reasoning can be applied to the Singapore Land Titles Ordinance³⁹ which is also similarly worded. Unlike the New South Wales Act,⁴⁰ the Ordinance specifically enacts that a contract may be enforced against a proprietor whether or not contained in a registered instrument,⁴¹ but it is the step between the contractual right and the equitable interest or a proprietary right which depends on whether there is any provision forbidding the creation of estates or interests apart from registration.

31. See *Barry v. Heider* (1914) 19 C.L.R. 197 at pp. 206 - 207 (per Griffith C.J.).

32. See *ibid* ss. 72 - 74.

33. *Ibid.* s. 72.

34. *Barry v. Heider* (1914) 19 C.L.R. 197 at p. 207.

35. *Ibid* at p. 216.

36. *Ibid.*

37. R.S. Sask. 1920 c. 67.

38. [1925] A.C. 108. For the wording of the relevant section (s. 58(1)) see *ibid* p. 222 - 223.

39. No. 21 of 1956.

40. See *supra* note 3.

41. No. 21 of 1956 s. 28(2) (b).

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The Land Code⁴² appears to forbid any dealing in land except under the Code, and it would seem more difficult to apply the reasoning of *Barry v. Heider*⁴³ thereto. The Code provides (in s.55) —

“All land which is comprised in any grant, lease of State land, certificate of title or entry in the mukim register, whether registered prior or subsequently to the commencement of this Enactment, shall be subject to the provisions of this Enactment, and shall not be capable of being transferred, transmitted, charged or otherwise dealt with except in accordance with the provisions of this Enactment.”⁴⁴

Although there is a section (s.96)⁴⁵ complementary to s.42 of the New South Wales Act, in the face of s.55 it cannot be said that the Code takes no account of the interest behind the instrument. It specifically provides that land must be dealt with in accordance with the Code. The source of rights therefore is the Code, and only the Code.⁴⁶ Indeed it could well be argued that the wording of s. 55 affects contracts concerning land, but the Privy Council in *Haji Abdul Rahman v. Mohammed Hassan*⁴⁷ thought to the contrary.

“It does not profess to prohibit and strike at contracts in reference to land, provided that such contracts cannot be construed as attempting to transfer, transmit, mortgage, charge, or otherwise deal with the land itself. In other words, it is contracts or conveyances which, but for the section, might be held to create real rights in a party to the contract or conveyance which alone are struck at.”

42. C. 138 of 1935 Laws.
43. (1914) 19 C.L.R. 197.
44. Cf. Land Enactment of Perlis s. 39; Kelantan s. 46; Kedah s. 53 which are similar or identical with the Land Code. The Johore Land Enactment s. 63 retains the wording of the Selangor Registration of Titles Regulation s. 4 (upon which *Haji Abdul Rahman* was decided) providing that every attempt to deal with land other than in accordance with the Enactment shall be “null and void and of no effect”. The Trengganu Enactment has no such all embracing section, but merely lays down rules for the registration of land within the Enactment (see *ibid* s. 51). This contrasts with the prohibitory nature of the provisions of the Code and the other State Enactments. Although by s. 69 (as by s. 96 of the Code) no instrument may transfer etc. an interest in land until registered, the arguments advanced in the text do not apply where there is no prohibition on a dealing in land save as in the statute. The reasoning of the Australian courts would therefore apply to this Enactment. The Kelantan Enactment further provides (s. 87A) that agreements for the sale of land (except a registered *Jual Janji* transfer of land) are null and void unless duly registered within a specified period. During that period (3 years) they presumably have contractual force.
45. Cf. Land Enactment of Trengganu s. 69; Perlis, s. 69; Kelantan, s. 96; Kedah, s. 78; Johore, s. 65.
46. The Code may itself refer to the general law wither by definition (e.g. “interest in land”) or by express provisions (e.g. s. 42(vi) as to which see *supra* note 20.)
47. [1917] A.C. 209 at p. 214. The Board was considering Reg. 4 of the Selangor Registration of Titles Regulation 1891 which was identical in language to s. 55 of the F.M.S. Land Code, with the addition that it specifically provided that every attempt to deal with land otherwise than in accordance with the section, should be “null and void and of none effect”.

Admitting this, the contrast between the F.M.S. Land Code⁴⁸ and the Singapore Ordinance⁴⁹ is marked. Under the former there is no justification for using the validity of a contract contained in an unregistered instrument, as a springboard for the jump to the creation of an equitable interest, although under the latter the general law can be relied on in order to justify the transition.

Equitable estates and interests and personal obligations are therefore unaffected by the New South Wales statute and the Singapore Ordinance both for the reason that they are not prohibited by the section governing the effect of registration of instruments, and, as regards equitable interests, because other provisions recognise their existence.

A SECONDARY STATUTORY RIGHT

A statute may recognise, and provide for, rights other than registration, and it may be that only if these provisions themselves refer to the general law expressly or by implication that these further rights can be called equitable interests. On the other hand they may be only another species of statutory right created by the statute, as distinct from already existing rights, protected by the statute.

CAVEATABLE AND EQUITABLE INTERESTS

A feature of the Torrens system is the availability of the caveat, but as with the effect of registration, the effect of the caveat depends on the particular statute. The lodging of the caveat may not, in contradistinction to the registration of an instrument, create any right at all, but may only protect a right already existing. The content of that right, subject to statutory provision, will depend on the general law. Of the New South Wales Act⁵⁰ the Privy Council said in *Abigail v. Lapin*⁵¹—

“The statutory form of transfer gives a title in equity until registration, but when registered it has the effect of a deed and is effective to pass the legal title; upon the registration of a transfer, the estate or interest of the transferor as set forth in such instrument with all rights, powers and privileges thereto belonging or appertaining is to pass to the transferee. No notice of trusts may be entered in the register book, but it has long been held that equitable claims and interests in land are recognised under the Real Property Acts.”

and approved⁵² the words of Griffith C.J. in *Butler v. Fairclough*⁵³ —

“It must now be taken to be well settled that under the Australian system of registration of titles to land the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings.”

48. C. 138 of 1935 Laws.

49. No. 21 of 1956.

50. See supra note 3.

51. [1934] A.C. 491 at p. 500.

52. Ibid. at pp. 501 - 502.

53. (1917) 23 C.L.R. 78 at p. 91.

In both *Barry v. Heider*⁵⁴ and *Butler v. Fairclough*⁵⁵ therefore, the High Court cited the provisions relating to caveats as showing that equitable interests and/or estates are recognised in the Australian system. With respect this does not necessarily follow. It does not follow that because a claim to a statutory (registerable) interest is itself a statutory interest, the right to obtain either interest is recognised as an 'equitable interest', or that, prior to following the procedure laid down the statute a person has a right recognised by the statute. If it is said that the only interests in land are those which are registered, then a caveat merely protects a claim to such an interest. It creates an interest *per se*, in that it operates so as to protect the claim, and prevent the creation of a registerable interest which would defeat it. If however it be admitted that a registerable interest is not the only interest which can subsist, and that 'interest in land' is recognised as referring both to registerable and general law interests, a caveat will operate *so as* (inter alia) to protect those interests. The scope of the caveat depends on the construction of the interests permitted to operate according to the statute's provisions. Its nature may well be proprietary. But whatever its scope and nature its availability cannot be used as an argument for the existence of interests prior to and apart from its own. It does not of itself aid in deciding whether interests are permitted apart from registerable interests.

It has been contended above that the only interests in land permitted under the Land Code are those provided for in the Code. The provision for caveats would support the argument that equitable interests are permitted only if some interest in land other than that created by the statute may be protected or created thereby. A person "claiming title to a registerable interest in land" may prevent a caveat.⁵⁶ In so far as the claim is to 'a registerable interest' the reference is *ex hypothesi* to a claim to an interest under the Code, but it could be argued that a claim to "title to land" implies title not only within the Code, but without.⁵⁷

If the 'title' referred to is not only the title conferred by the Code then the registration of a caveat may create interests other than registerable interests or contracts. If the general law is to be the criterion in defining 'title', any interest coming within that term (e.g. equitable title), could be created by the registration of a caveat. But this still does not necessarily mean that such interests are created prior to registration, thereby implying the *existence* of that title prior to registration, so that

54. (1914) 19 C.L.R. 197.

55. (1917) 23 C.L.R. 78.

56. F.M.S. Land Code (c. 138 of 1935 Laws) s. 166(1). Cf. Perlis s. 128; Kedah s. 121; Under the Trengganu Enactment (s. 94) "any person claiming to be interested under any will, settlement trust deed or any instrument of transfer or transmission or any person claiming registrable interest in land held under registrable title" may present a caveat. Cf. Johore Land Enactment s. 71(1). The Kelantan Enactment (s. 150) provides that "any person claiming to be interested under any will or trust deed or any instrument of transfer or transmission or any lien or any registrable interest in land" may present a caveat.

57. "Title" is defined in the Code only as being "right, title and interest". (See c. 138 of 1935 Laws s. 2).

land could be 'dealt with' by creating such a title. What seems to be recognised at most is the claim to title represented by the caveat when registered i.e. the creation of an interest by registration of a caveat just as by registration of an instrument. In any event the word 'title' is used elsewhere in the Code exclusively to refer to the title of the registered proprietor i.e. the highest statutory interest.⁵⁸ It is not likely that an exception to the scheme of registered title would be introduced in a provision referring to that title, at the same time protecting a claim to that interest and creating an interest entirely apart from and to some extent inconsistent with the superiority of the registerable title. It would surely require specific terminology, a facet sadly lacking in the Code, before such an interpretation should be adopted.

SCOPE AND IMPLICATION OF A CAVEAT

As it is 'a claim' to title or registerable interest which may be protected the possible scope and force of caveats is considerable. Griffith C.J. in *Butler v. Fairclough*⁵⁹ put the narrowest interpretation on the phrase in construing 'claim' as a claim by legal proceedings. In *Chin Chen Hong v. Hameed*,⁶⁰ Buhagiar J. went to the other extreme. He thought that an agreement for sale which was in the form of a "non-statutory and non-registerable instrument" created —

"an equitable interest of a contractual nature under the instrument consisting of a right to be registered as the owner of the interest purported to be conferred by the instrument".

The learned judge referred to *Haji Abdul Rahman v. Mohammed Hassan*⁶¹ where the Privy Council held that an unregistered mortgage while having no effect as a transfer was good as a contract, and continued —

"This contractual right may be sufficient to give a person an 'interest' in the land for the purposes of protection by restrictive entry in the register; the *claim to an interest in land* arising out of the contract is sufficient to make it a caveatable interest and to support a caveat."

Such a conclusion can be based only on one of two hypotheses. Either the interest under such an agreement is a 'real interest' in itself as distinct from a personal obligation, in the sense of an equitable interest under the general law, and therefore within the scheme of the Code, or it is a personal obligation which is nevertheless encompassed by the Code. The learned judge said of such instruments as he was discussing, that they do not create an estate or interest, legal or equitable, in the land but create a contractual right, a personal right of action. He then concluded that this personal obligation could constitute an 'interest' in the land sufficient to support a caveat.

This reasoning destroys the distinction so carefully made in *Haji Abdul Rahman*.⁶² Although the obligation is personal, it is said to

58. See e.g. Part VI of the Code, dealing with registration.

59. (1917) 23 C.L.R. 78 at p. 91. See supra.

60. (1954) 20 M.L.J. 169 at p. 170.

61. [1917] A.C. 209.

62. Ibid.

create an interest in land which must be a dealing in land within s.55 of the Code. In the words of the Privy Council the type of transactions falling within the section are “contracts or conveyances which but for the section might be held to create real rights in a party to the contract or conveyance”.⁶³ The conclusion that a contractual right is a dealing in land, able to be protected by the Code the nature of the right is inconsistent with *Haji Abdul Rahman*.⁶⁴ It changes the category of the right from unregistrable to unregistered.

Hogg⁶⁵ was of the opinion that the right to obtain a caveat was to be treated “as an assignable right of property, thus placing such a right higher than a mere contract”. This approach is surely contrary to the basic principles of registration. It gives to the unregistered interest a force of its own simply because it may be registered, but the force should be dependent not on the ability to register but on the act of registration.

Throughout the efforts to give force to the unregistered interest there runs the proposition that it may be a proprietary right, and should be recognised as such. Buhagiar J. called it a personal obligation which gave rise to an interest in land. Hogg calls it an assignable right of property. Both views are directly opposed to the decision in *Haji Abdul Rahman*,⁶⁶ which necessarily implies that all rights outside the scheme have no proprietary flavour and are personal. The problem of priority between the latter cannot be solved by calling some of such rights ‘proprietary’.

It has been contended above that it cannot be said that the system of caveats per se implies the recognition of equitable interests and estates, or that the right to protect a claim to a registrable interest is anything other than a statutory right. To say that it is a property right is to say that the Code recognises that a claim to title to a registrable interest in land is a property right. It cannot be said that because such a claim can be protected that such a claim is itself a property right. Under the Australian system, it is possible to argue that the statutes have no effect on rights behind the instruments but under the Land Code land may only be dealt with according to the provisions of the Code.⁶⁷ Therefore while a claim may be protected, there is no reason to say that until it is protected it can be anything but of a nature recognised outside the Code, i.e. a contract or an equity. It must first be decided whether any property rights are recognised by the legislation before examining the provisions for caveats.

Under the New South Wales Act⁶⁸ a caveat may be lodged (inter alia) by a person claiming “any estate or interest in land” or “under

63. Ibid. at p. 214.

64. Ibid.

65. “Registration of Title to Land Throughout the Empire” p. 116, cited by Brown J. in *Alagappa Chety v. Ng Guan Yin* (1921) 5 F.M.S.L.R. 236 (as to which see infra).

66. [1917] A.C. 209.

67. See supra pp. 156 - 7.

68. Real Property Act 1900-1956 (N.S.W. Stats. 1824-1957 Vol. 9) s. 72.

an unregistered instrument”, thereby implying both that an interest in land may exist apart from a registered interest that it may be created under an unregistered instrument. Under the Land Code⁶⁹ a caveat may only be registered in respect of a claim to an interest registerable in itself. There is no recognition of any interest other than that created by the Code, or that any interest in the land may exist prior to the registration of the caveat.

NATURE OF THE ‘RIGHT TO REGISTER’

Even if it be accepted that a contractual right can be the subject of a caveat, it confuses the issue to term such a right an ‘equitable interest’ or a right of property. It is a statutory interest just as is the registerable interest upon which it is based. However wide the ‘claim’ to a registerable interest is said to be, the ability to register does not (or perhaps rather, should not) of itself give the claim any force.

The Malaysian Courts have been consistently inconsistent when considering the nature of rights over land and the effect of the Land Code on those rights. On the one hand they insist that an unregistered registerable interest can only have effect as a contractual right following *Abigail v. Lapin*⁷⁰ and *Haji Abdul Rahman v. Mohammed Hassan*.⁷¹ This view (which it is submitted is the better) was perhaps best expressed in 1956 by Thomson J.⁷² (as he then was) —

“Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration -in accordance with the Land Code.”

On the other hand, the courts have in some instances ignored the statute entirely, with the effect that a person registering with knowledge of another unregistered interest is postponed to that interest, either because the former interest was of itself superior as being a right to register or, despite the statutory definition of conscience, that it would be unconscionable in the circumstances for the latter to succeed. In giving to the right to register a proprietary flavour, they have simply followed the Australian approach that unregistered instruments can and do convey an estate or interest in land, with the result that (i) a registered interest may be subject to such an interest⁷³ and (ii) an unregistered interest is subject to such an interest.⁷⁴

69. F.M.S. Land Code (c. 138 of 1935 Laws) s. 166(1) Cf. *supra* p. 154.

70. [1934] A.C. 491.

71. [1917] A.C. 260.

72. See *Bachan Singh v. Mahinder Kaur* (1956) 22 M.L.J. 99. The learned judge repeated his remarks in the Court of Appeal in *Margaret Chua v. Ho Swee Kiew* (1961) 27 M.L.J. 173 at p. 176.

73. See cases cited *infra*.

74. See *Chin Cheng Hong v. Hameed* (1954) 20 M.L.J. 169 (*infra*).

In *Chin Cheng Hong v. Hameed* (1954)⁷⁵ there were four respondents who were partners. They had acquired a piece of land as partnership property which was registered in the name of the first respondent. On January 20, 1948, that respondent entered into an agreement for the sale of the land with the appellant. On May 27, 1948, a caveat was presented by the 2nd and 3rd respondents.⁷⁶ The appellant argued that he and the respondents had equitable estates in the property, that a search of the register in January did not reveal the respondents' interest, and therefore he was entitled to be regarded as bona fide purchaser for value without notice of the 'equity' claimed by the respondents.

The Court distinguished between the registerable interest of the respondents and the contractual right of the appellant, and held that the latter could not override the former. *Mathew C.J.* apparently thought that if the contractual right prevailed, this would be to apply equitable principles to a system of land registration. He did not think it relevant to consider whether the contractual right could be prohibited by a caveat.⁷⁷ *Buhagiar J.* thought that it could be so protected and *Wilson J.* agreed with both.⁷⁸

Although the Court purported to follow *Haji Abdul Rahman v. Mohamed Hassan*,⁷⁹ did it not deny the distinction there taken? It gave a force to an unregistered registrable interest that was greater than contract, by holding that there is inherent in the ability to register, an interest the strength of which prohibits the consideration of any rights subsequent to it, except, presumably, a registered or registerable right. But the essence of the validity of a transaction not registered is that it is a contract and only a contract, whereas the *force* of a registered interest is derived from the fact that it is registered not that it is registrable. More fundamentally perhaps, the decision completely ignores the duty of a holder of a registerable interest to register it. The result of non-registration is to represent to any person searching the register that there are no claims conflicting with the contract of the registered proprietor, but whether or not the appellant had searched the register, the omission of the respondents should, it is submitted, have the same effect.⁸⁰ The fundamental doctrine of a registration system is the duty case on he who can register to do so. The situation in the case was that parties with a 'contractual right' did not take the steps available to change that right to a statutory right. They took no steps to bring their interest to the notice of other parties and another party entered into contract in relation to the same land. The rights of all the parties would in effect depend on equitable principles

75. (1954) 20 M.L.J. 169.

76. This case was identical with an earlier case (1953 M.L.J. 135) except that in the earlier, the respondents had presented a caveat *before* the agreement for sale which would of course entitle them to priority over the appellant according to the statute.

77. (1954) 20 M.L.J. 169.

78. *Ibid* at p. 170.

79. [1917] A.C. 209.

80. *Cf. A bigail v. Lapin* 1934 A.C. 491.

in so far as they would be relying on specific performance of the agreements, but none of the parties had any other right. In content the rights were identical. The question was, where lay the equity?

The question whether a contractual right was caveatable was said by Mathew C.J. to be irrelevant.⁸¹ As the appellants claim depended on the respondents acts or omissions, this view, it is submitted, is correct but it was, however, surely illogical for the learned chief justice to hold it irrelevant *because* the respondents interest was registerable. Buhagiar J. concluded that the interest was caveatable,⁸² but, (apparently) on the ground that a caveat did not, in itself, make a claim either better or worse, agreed that "the appellants contractual right cannot have priority so as to override the registerable interest" of the respondents. This is to say that a right to a caveat can never take priority to a right to register. Yet a caveat has the effect of preventing registration of title. If we are to say that the Land Code gives force to a right to get on the register why should a right to present a caveat not have in relation to the right to register a force analagous to that which a caveat has, in preventing registration?

Whether or not a contractual right is caveatable, it is submitted that the Code is concerned with *registered* interests, and unregistered interests based on the parties agreement take effect only in so far as they cannot be considered a dealing in land i.e. as contracts. As a right to a caveat is confined to interests which are registerable, it may be that there are unregisterable rights. The view of Mathew C.J. would result in an unregisterable registerable interest always having priority to an unregisterable right. This inverts the principle of *Abigail v. Lapin*⁸³ and a basic concept of equity. A person who may take steps to create or protect his rights succeeds at the expense of one who can do more than he has done. Unless there is an express statutory provision leading to this conclusion it should not be adopted. There is no provision in the Code giving force to a *right* to register (an interest or a caveat). To create such an interest judicially is to subvert the basic principles of the Code.

In *Vallipuram Sivagaru v. Palaniappa Chetty*,⁸⁴ A, who was the registered proprietor of land, in 1931 deposited the issue document of title with B as security for a loan. In 1932 A sold and purported to transfer the same land to C who thereupon registered a caveat. A died. B then lodged a caveat which, although registered, had no force because of A's death, and afterwards sold and purported to transfer the land to D who lodged a caveat. The Court of Appeal held that B's interest had priority over D's, and that D could not obtain specific performance of the agreement of sale. The Court appeared to treat the right to present a caveat and thereby create a lien as an equitable right in itself. It stated that the issue was whether as between two equities B had lost his right to priority, and held that the failure to register caveat did not have this result.

81. (1954) 20 M.L.J. 169.

82. *Ibid* at p. 170.

83. [1934] A.C. 491.

84. (1937) 6 M.L.J. 59.

Terrell Ag. C.J. drew a distinction as to the effect of caveats under the Code holding that a caveat establishing a lien implements an equitable right (which in itself begs the question), but a caveat based on a claim to a registrable right affects only future dealings. The learned judge said that the caveats were “accordingly irrelevant on the question of priorities between the parties”. But surely that is just where they are relevant. Both purchasers lodged caveats thereby preventing the chargee from registering the charge except after inquiry. The failure of the chargee to lodge a caveat reduced his right from property (or more correctly, statute) to contract.

It is submitted that the real issue was submerged by treating the right to present a caveat as some sort of equitable right. The contest was between two persons having contractual rights. The loan transaction and the various agreements for sale were nothing more or less than contracts, and could be termed equitable rights only in so far as the parties would obtain equitable contractual remedies. Ultimately the decision depended on the question of how heinous is the omission to lodge a caveat? In this case, as the documents of title were not in the hands of the registered proprietor, and apparently there was no inquiry made, the omission was not such as to deprive the holder of his interest. But the issue had nothing to do with the relative contents of the two rights. They were both contractual, and the decision should surely have turned on the entitlement of either to specific performance.

A like case on the effect of a caveat is *Haroon bin Guriaman v. Nik Mak binte Mat and Anor*,⁸⁵ where both the plaintiff and defendant had agreed to purchase the same land from the registered proprietor. The proprietor had agreed first to sell it to the plaintiff and then to the defendant. The plaintiff lodged a caveat but not until shortly before the defendant began an action for specific performance against the proprietor. *Briggs J.* held that the plaintiff had been “guilty of grosse negligence” in not imposing a caveat to protect his interests, in not taking possession of the document of title and not taking physical possession of the land. The learned judge held that the lodging of the caveat did not affect the relative priorities of the parties which had been settled long before it was imposed.

What then is the effect of a caveat? Should the failure to lodge a caveat be considered as negligence when adding up the points of priority between two parties? *Briggs J.*, citing and approving *Hogg*,⁸⁶ summarised what he took to be the position —⁸⁷

“where competing equities arise, their relative priority *inter se* at the moment before a caveat is imposed to protect either will be determined by the ordinary rules of equity. If a caveat is then put on to protect that which has the lower priority according to such rules, it may be warned off by the person entitled to the higher priority”.

85. (1951) 17 M.L.J. 209.

86. See *supra* note 65.

87. (1951) 17 M.L.J. 209 at p. 211.

Although one would agree with such a summary, the strict division of rights under the Land Code should again be emphasised, those outside being contractual in so far as they arise from dealings by the parties, or equities arising by operation of law, and those within the Code being statutory. In addition it is, unlike Australia,⁸⁸ only by the provisions of the Code that rights outside it can be recognised. Further, the fact that by available procedure, a right outside the Code can be altered to a right within it, will itself affect the strength of the right outside it.

NATURE OF RIGHT WHICH REGISTRATION 'VOID'

The confusion between statutory rights and rights existing outside the Code but by virtue of its provisions, persists in the decision of Gill J. in 1963 in *Kwan Teck Meng v. Liew Sam Lee*.⁸⁹ The learned judge there held that purchasers whose registration was 'void' due to death of the vendor prior to the presentation of the transfer for registration nevertheless had the right to sue and were liable to be sued in respect of any claim relating to the land. He relied on the Court of Appeal decision of *Haji Osman bin Abu Bakar v. Saiyed Noor bin Saiyed Mohamad*⁹⁰ where the Court held that, despite the provision avoiding registration, the contract of sale remained unimpaired. But in that case the Court was concerned with the issue whether specific performance could be ordered of the contract. Gill J. was concerned with the question whether a purchaser, having such a right against the vendor, had a right to bring an action for recovery of possession of the premises from a tenant. It is difficult to appreciate how a person with only a contractual right could possibly have a proprietary right so as to have locus standi not only against a tenant, but even indeed against a trespasser. The argument that if specific performance would be granted of the agreement the vendor has an equitable interest will not hold, due to the prohibition of 'dealings in land' by the Land Code. The basic proposition is that *all* rights concerning land not provided for in the Code or protected according to its provisions are contractual and not proprietary rights.

AGREEMENTS IN NATURE OF A MORTGAGE

The confusion between proprietary (statutory) and contractual rights was again apparent when judges purporting to follow *Haji Abdul Rahman v. Mohammed Hassan*⁹¹ reached contrary conclusions on the nature of agreements for sale and resale, if certain money was paid within a certain time. The issue in *Haji Abdul Rahman*⁹² was whether where there was no registered transfer but an unregistered agreement whereby the land was to be resold if certain moneys were paid, there was a 'mortgage' within the Limitation Enactment of Selangor.⁹³ The Privy

88. I.e. following the decisions of *Barry v. Heider* (1914) 19 C.L.R. 197 and *Butler v. Fairclough* (1917) 23 C.L.R. 78. See supra pp. 152, 155.

89. (1963) 29 M.L.J. 333.

90. (1952) 18 M.L.J. 37.

91. [1917] A.C. 209

92. Ibid.

93. No. V of 1896. Cf. supra note 47.

Council held that it was a contract only, and that only a charge duly registered could create the relationship of mortgager/mortgagee under the Code. In *Yaacob bin Lebai Jusoh v. Hamesah binte Saad*⁹⁴ the Court of Appeal held, following *Haji Abdul Rahman*⁹⁵ that such an agreement was in the nature of a mortgage, and therefore although the time stated in the agreement for repurchase had passed, the agreement remained in force. Both decisions were followed in 1953 by Thomson J. in *Nawab Din v. Mohamed Shariff*.⁹⁶ In that case A had obtained judgment against B for the transfer of land provided he paid B a certain sum of money. He borrowed this sum from C and agreed (inter alia) to sell the land to C, with A remaining the registered proprietor. Within a certain time A had the right to repurchase the land, but if he did not exercise this option he agreed at C's request to execute a registerable transfer of the land to C. C claimed specific performance of this agreement. The learned judge held (i) that the agreement was in the nature of a mortgage and therefore the time limit on the provision for repurchase did not apply; (ii) that it was irrelevant that A did not become the registered proprietor until after the agreement.

In 1954 in *Wong See Leng v. Saraswathy Animal*⁹⁷ the Court of Appeal, again following *Haji Abdul Rahman*,⁹⁸ held that when land were transferred with an option to repurchase within a certain time the latter was merely a contractual right, and that as the parties had decided in the contract that time was of the essence the Court had no power to substitute any other term. Buhagiar J. thought the decision in *Yaacob bin Lehai Jusoh*⁹⁹ was decided against the authority of *Haji Abdul Rahman*.¹

In 1963 in a somewhat strange case, *Zubaidah v. Zulkather*,² Adams J. appeared to hold (i) that A who was a registered proprietor was holding 1/3 undivided share of the land on trust for B; (ii) that A took over B's liability to a bank in promise of repayment and on condition that if there was no repayment within three years then B should forfeit all his rights to land. The learned judge held that this arrangement "was as it were a pledging", and that in the face of the use of B's "equitable interest" in the land as security for the loan it "would clearly be unreasonable to permit A to obtain the possession of B's share merely because the condition of the contract as to the time of repayment had been broken", and therefore all that A was entitled to was, not as she asked a declaration that she was absolute owner of the land but judgment for the capital and interest thereon.

94. (1950) 16 M.L.J. 255.

95. [1917] A.C. 209.

96. (1953) 19 M.L.J. 12.

97. (1954) 20 M.L.J. 141.

98. [1917] A.C. 209.

99. (1950) 16 M.L.J. 255.

1. [1917] A.C. 209.

2. (1963) 29 M.L.J. 63.

All these cases are concerned, in essence, with transactions where a loan is made, and a further transaction entered into to give the lender security for repayment. In both *Nawab Din*³ and *Zubaidah*⁴ the person taking the loan had no property right which could serve as security. At the most he had a contractual right, which was said in the latter case to be that of cestui que trust. In the former case the person taking the loan acquired a property (statutory) right after the loan was made. Indeed the loan was made to enable him to acquire it. Thomson J. thought that fact was irrelevant and did not distinguish the case from that of *Yaacob bin Lebai Jusoh*⁵ where the person taking the loan was the registered proprietor, apparently because in the learned judge's view the interest of a vendor under an agreement for sale was a property interest. It is respectfully submitted that the fact was irrelevant but for precisely the opposite reason — both cases the interest of the borrower was contractual only, for in *Yaacob*⁶ there was a registered transfer, the borrower then relying on the agreement for purchase. In *Nawab Din*⁷ the borrower became the registered proprietor, and in contract to *Yaacob*⁸ remained the registered proprietor and it was the lender who was asking for specific performance of the agreement to transfer, should the loan not be repaid.

As the Court of Appeal said in *Wong See Leng*⁹ the rights in such situations are contractual, but in that case the parties had deprived the Court of the discretion to exercise its equitable jurisdiction by making time the essence of the contract. However if time is not made the essence by the parties surely the Court could recognise the equitable principles behind the 'mortgage' transaction without recognising that the rights are anything but contractual. There is no reason why a borrower transferring his land as security subject to repurchase cannot ask Malaysian courts to recognise the basic principles acted on by English courts prior to the time when the contractual right became an equitable interest. In *Nawab Din*¹⁰ it was the protection of the borrower by equity which prevented the lender from obtaining specific performance of the agreement to sell if the loan was not repaid.

EXPRESS TRUSTS

It is argued by S.K. Das¹¹ that the recognition of trusts by the Land Code, together with the provisions relating to caveats, "is a complete refutation of the contention that equitable interests in land are not capable of existing side by side with the scheme of the Torrens Act". It is respectfully submitted that this conclusion is untenable.

3. (1953) 19 M.L.J. 12.
4. (1963) 29 M.L.J. 63.
5. (1950) 16 M.L.J. 255.
6. *Ibid.*
7. (1953) 19 M.L.J. 12.
8. (1950) 16 M.L.J. 255.
9. (1954) 20 M.L.J. 141.
10. (1953) 19 M.L.J. 12.
11. S.K. Das, "The Torrens System in Malaya", (Singapore) 1963 p. 219.

According to the Code the words "as trustee" may be inserted in a memorandum of transfer,¹² but neither is the provision directory nor its effect at all clear.¹³ No instrument may be registered which declares trusts relating to land but any such instrument "may be deposited... for safe custody and reference but in the absence of caveat the proprietor shall for the purpose of transfer charge or lease be taken and deemed to be the absolute proprietor of such land freed from the said trusts".¹⁴ A trustee or a beneficiary may present a caveat.¹⁵ These provisions give to the caveat the force of creating an interest i.e. the statutory interest to which a transferee's interest is subject. The pertinent question is therefore whether it also prohibits, when taken together with the other provisions of the Code, any interest save the statutory interest. In the absence of a caveat, as a proprietor is deemed to be an absolute proprietor, it is difficult to see how any 'trust' interest can be enforced save against the trustee as a personal obligation. Even if the transferee knew of the trust interest unless such knowledge amounted to fraud or misrepresentation within s. 42, there is no ground of "conscience" on which the beneficiaries could rely, for conscience under the Land Code is a statutory concept to be found within that section.

Therefore the interest is no more an equitable interest in land than any other equitable right which exists alongside the statutory interests under the Code, but is as are other such rights a purely personal right. The nature of the right was brought out by the words of the Privy Council in *Loke Yew v. Port Swettenham Rubber Co. Ltd.*¹⁶ —

"So long as the rights of third parties are not implicated a wrong-doer cannot shelter himself under the registration as against the man who has suffered the wrong. Indeed the duty of the Court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of the registration if the register be not rectified. Take for example the simple case of an agent who has purchased land on behalf of his principal but has taken the conveyance in his own name, and in virtue thereof claims to be the owner of the land whereas in truth he is a bare trustee for his principal. The Court can order him to do his duty just as much in a country where registration is compulsory as in any other country...."

However in *Wilkins v. Kannammal*¹⁷ the Court of Appeal, in a unanimous judgment delivered by Taylor J., enforced a trust against a

12. F.M.S. Land Code (c. 137 of 1935 Laws) s. 160.

13. In *Murugappa Chetty v. Seenivasagam*, Thomas C.J. said that as regards trusts, if the words "as trustee" were omitted from a memorandum of transfer "the positions of the immediate parties are not affected thereby, provided that no rights of third parties intervene". Cf. Johore Land Enactment s. 72. provision is mandatory. The other State Land Enactments have complementary, (though not so detailed), provisions to the Land Code.

14. F.M.S. Land Code (c. 138 of 1935 Laws) s. 161.

15. *Ibid* s. 166(i). In *Liew Siew Yin v. Lee Pak Yin* (1940) 9 M.L.J. 135. Murray Ainsley J. held that such persons need not claim "a title or registrable interest in land" to lodge a caveat. If this be correct the scope of the Land Code is far greater than its title infers, and it brings within it rights wholly unconnected with land. Cf. Das. op. cit. p. 339 et seq. The questions raised in this article are not affected by such an interpretation except that they would apply to a wider sphere.

16. [1913] A.C. 491 at pp. 504-5.

17. (1951) 17 M.L.J. 99.

registered proprietor to whom the land subject to the trust had been transferred by a proprietor who was a trustee. No caveat had been entered in respect of the original trust but the Court, rejecting an argument that therefore the trust was unenforceable, said¹⁸ —

“This doctrine does not apply to a case such as the present one where the whole transaction was between members of the same family and household so that everyone concerned is necessarily taken to know the material facts. The Torrens law is a system of conveyancing; it does not abrogate the principles of equity; it alters the application of particular rules of equity but only so far as is necessary to achieve its own special objects. Wilkins was a trustee, as Kannammal knew. He alone could not alter the trust. He had no disposing power except over his own quarter share. The transfer to Kannammal therefore constituted her a trustee in his place.”

But with respect it is the Court's doctrine that abrogates the principles of the Torrens system as found in the Land Code. Either the transfer was void for fraud under s. 42 or it was free from the equitable (i.e. personal) rights of the beneficiaries.

In the *Port Swettenham* case¹⁹ the Board, referring to the Specific Relief Enactment 1903, held that a person purchasing land knowing that another had contracted to buy it was a trustee for that other. Taken in isolation this principle is in direct conflict with the Code and with the principle that notice of an unregistered agreement is not fraud, and therefore such a purchaser has an undefeasible title. Although the Board found fraud the decision was based on the principle of the wrong and dishonest act.

While it would be possible to rationalise the finding of ‘trusteeship’ and fraud, the wider concept of trusteeship without fraud in effect destroys the limitations imposed by s. 42.²⁰ That section lays down the content and nature of the statutory conscience. Whatever rights exist outside it are personal rights, and are binding as such. A person may be a ‘trustee’ of a right in personam, although had the right been altered to a statutory right he would have had an indefeasible title save for personal obligations, for where the right is statutory there are no grounds for interference with the exception of either those provided by the statute or those outside the ambit of the statute.²¹

18. Ibid at p. 100.

19. [1913] A.C. 491.

20. In *Ong Tin v. The Seremban Motor Garage* (1917) 1 F.M.S.L.R. 308 the Court of Appeal equated the Board's finding of fraud with their finding of trusteeship, but in *Yap Tai Cheong v. Weng Kam* (1921) 2 F.M.S.L.R. 244, the Court relied on the Board's finding of trusteeship apart from fraud.

21. Das. op. cit. at p. 294 says that s. 107 of the Code was intended to give relief to a cestui que trust as against his trustee. By this section any person claiming the right to be registered in the mukim register as proprietor or having an interest therein, otherwise than by succession or agreement of sale, may apply to the Collector or Commissioner of Lands to be registered. The section does not define ‘the right to be registered’ or attempt to do more than give a jurisdiction over already accepted ‘rights’. It does not affect the argument advanced in the text, for it does not purport to give property rights to cestui que trustent or indeed at all. Whether it includes personal obligations and equities depends on whether ‘the right’ infers to rights created by the Code, or recognised thereunder. For wider interpretation see *Straits Plantations Ltd. v. C.L.R. Sitiawan* (1939) 8 M.L.J. 15. Contra *Itam Jamaludin v. Sapiah* (1936) M.L.J. 276.

With respect, the unnecessary comments, the use of the non-legal and debatable terms of 'dishonest' and 'wrong' (in themselves question begging) and the implication of a general power to rectify the register have been the source of nothing but confusion, and cannot be set alongside the Code itself with any consistency. Surely the Board would have earned the rebuke of a later Board that they had "been too much swayed by the doctrine of English equity".²²

CONSTRUCTIVE OR RESULTING TRUSTS

An example of where the Courts are prepared to recognise an equitable right based either an agreement or conscience is that of a resulting or constructive trust. In *Dharmaratna, v. Dharmaratna*²³ the Court of Appeal applied the principle that there is a rebuttable presumption that a resulting trust in favour of A arises, where A pays the purchase money but B takes the transfer. In *Haji Abdullah bin Mohamed v. Abdul Majid bin Ibrahim*²⁴ Cullow J., referring to the *Dharmaratna* case²⁵ as showing the difficulty a person faced when alleging a resulting trust under the Code, seems to have held that such a trust could not be recognised save according to the provisions of s. 42. The issue was complicated for the reason that the plaintiff alleged that land purchased by him was registered in his brother's name, as the plaintiff was in Government service and was therefore forbidden by the terms of his employment to own land. The learned judge held that the plaintiff had not proved that the land was purchased in circumstances raising a resulting trust, and that even if he had he could not have avoided s. 42. Callow J. added that he could not grant the Court's aid to a plaintiff and by so doing defeat the requirements of regulations concerning the employment of Government servants. It is not at all clear whether if there had been no such consideration the learned judge would have held that a resulting trust could not be declared because of s.42, although the taint of impropriety attaching to the alleged agreement was entirely separate from the operation of s.42.

Although the defendants were apparently the successors in title to the plaintiff's brother who had entered into the agreement with the plaintiff the issue was not one of a property right as distinct from contract, as in the *Dharmaratna* case,²⁶ by reason of a specific provision of the Code. By s.165 land held in trust transmitted under the Code remains subject to all trusts to which it was subject at the death of the proprietor. There was therefore no question whether the plaintiff's claim was a right superior to that of the defendants, but the issue was akin to that in the earlier case, one of agreement in personal obligation.²⁷

22. See text and supra note.

23. (1939) 8 M.L.J. 310.

24. (1949) 15 M.L.J. 12.

25. (1939) 8 M.L.J. 310.

26. Ibid.

27. In *Chin Shak Len v. Lin Fah* (1962) 28 M.L.J. 418, Gill J. enforced a resulting trust in favour of a wife against her husband, the registered proprietor of an undivided interest in land, as the wife had supplied part of the purchase money therefor. There was no discussion of the effect, if any, of s. 42 of the Code and neither of the authorities referred to in the text was cited. The case however did not involve third parties.

RIGHTS TO WHICH JUDGMENT CREDITOR IS SUBJECT

There are a number of authorities establishing that a judgment creditor who attaches the land of his debtor does so subject to all 'equities'.²⁸ The use of the term 'equities' in a sense which includes every obligation contractual as well as proprietary blurs the distinction which is the very basis of the Code. It is not inconsistent with the Code to declare that an attachment is subject to equities but the reason is not the force of interest held, but the whole circumstances call for a recognition of the right *called* an equity. The classification of a rights as equities therefore, is to give to that category a proprietary flavour by an extension of the personal obligation. But the right remains in personam. Once the right becomes in rem then the Code operates.

An attaching creditor may be subject to equities because of the nature of his interest which depends not on the Land Code²⁹ or Enactment³⁰ but on the appropriate Civil Procedure Code.³¹ It can be argued that if any interest falls within s.42 (vi) it is that of the creditor, that he therefore obtains no indefeasible title by registration under s.42, and that the Code by its own provision recognises the right (whatever it is) but does not define it. Therefore those authorities holding that an attaching creditor takes subject to all the obligations of the debtor are not inconsistent with the Code, nor are they concerned with rights under it. On the other hand neither can they be used to support the view that equitable interests are recognised by the Code or like enactments. If it is required by the appropriate Civil Procedure Code that a person to rank before an execution creditor must have an interest in land then the Code will surely prevent it.

In *Ng Yew v. Personal Mudaly*³² it was held that an unregistered transferee of land had no rights against a subsequent attaching creditor. In a Johore case, *Alagappa Chetty v. Ng Guan Yin*,³³ Brown J. held that an unregistrable agreement for sale had no force against a subsequent attaching creditor. In *Sockalungham Mudaliar v. Ramasany Chettiar*,³⁴ Aitken J. said that the decision in *Ng Yew*³⁵ had been overruled by an unreported case in the Court of Appeal,³⁶ and disapproved of *Alagappa Chetty*,³⁷ in holding that a chargee who had lodged a caveat had an interest enforceable against a subsequent attaching creditor.

28. See the cases cited infra.

29. C. 138 of 1935 Laws.

30. For State Enactments see supra note 19 p.

31. Singapore R.S.C., 1934, Order 41 r. 1; Federation of Malaya R.S.C. 1957, Order 43 rr. 1 & 2.

32. (1924) 5 F.M.S.L.R. 21.

33. (1921) 5 F.M.S.L.R. 236.

34. (1938) 7 M.L.J. 237.

35. (1924) 5 F.M.S.L.R. 21.

36. I.e. *Pillay v. Official Assignee* (1928) C.A. (Perak). But, according to Aitken J., in that case there was a caveat lodged by the prior transferee, which there was not in *Ng Yew v. Personal Mudaly* (supra).

37. (1921) 5 F.M.S.L.R. 236.

The learned judge virtually ignored the effect of lodging a caveat, enforcing what he called the 'equitable interest' of the unregistered chargee. It is submitted that it was as unnecessary as curious to equate the interest of an unregistered chargee to a property right. The questions for inquiry are surely the nature of the rights (i) to which an execution creditor is subject (which involves inevitably an analysis of the nature of his right), and (ii) possessed by any claimant against him. The question of the caveat is relevant in so far as the creditor would be subject to equities, so that the failure to lodge a caveat may deprive a person of any rights against a creditor. On the other hand it could be argued that a creditor is subject to all the obligations of the registered proprietor and therefore a caveat is irrelevant, and the issue does not in effect involve third parties.³⁸

The insistence on changing the nature of personal to real rights is again apparent in two Kedah cases. In *Karuppan Chetty v. Muthia Chetty*,³⁹ Terrell J. held that a holder of an unregistered charge in Kedah had an equitable interest, apparently because the chargor could have been restrained by an injunction from selling the land not subject to the charge. This shows again the refusal to retain the distinction of contractual and proprietary remedies. It is a non sequitur to hold that simply because an injunction would issue, an equitable interest exists. At the most it is an equity, and even this conclusion depends on *all* the circumstances of the case. It is submitted that if an execution creditor is subject to prior equities it is because the creditors right is itself defined outside the Land Code and recognized by it. To discover its nature the source of the right must be looked at. If the creditor takes subject only to interests in land by others then he should succeed. If he takes subject to rights of a wider nature he should fail.

In *Arunsalam Chetty v. Teah Ah Poh*⁴⁰ the Court of Appeal, relying in part on *Karuppan Chetty v. Muthia Chetty*,⁴¹ granted the plaintiff a declaration that he had acquired an equitable interest in land comprised in a Surat Kechil which had been deposited with him as security for a loan he had made to the registered proprietor. Whiteley Ag. C.J. (S.S.) said that, as in Australia, the Courts in Kedah "recognise equitable estates and rights except so far as they are precluded from doing so by the statutes". Applying the general principles of equity the learned judge held that by the deposit of the Surat Kechil an equitable mortgage was created. Terrell Ag. C.J., coming to the same conclusion

38. The Court of Appeal in effect to this conclusion in *Boase v. Cluny Rubber Estates Ltd.* (1913) 2 F.M.S.L.R. 130 in holding that an attaching creditor could not attach an interest in land which had been assigned. In other words the creditor took subject to all contractual obligations of the proprietor.
39. (1931) 7 M.L.J. 221. The learned judge followed *Palaniappa Chetty v. Dupire Bros.* (1919) 1 F.M.S.L.R. 370, where the prior interest holder had registered a caveat. However there was no provision in the Kedah Land Enactment for the protection of a lien by a caveat. This does not affect the main question of whether an unregistered or unregistrable right can be anything other than personal.
40. (1936) 6 M.L.J. 17.
41. (1931) M.L.J. 221.

and citing *Haji Abdul Rahman v. Mohammed Hassan*,⁴² thought that the deposit "should be treated as a contract...to give the respondent the land as security for his debt. It is not a registerable security and as such is outside the provisions of the Land Code". With respect this again confuses the distinction between an 'interest in land' and right in personam. While a mortgage may be a contract, it is also in the general law very much more. But under the Land Enactment without registration it is no more. The Court at no time dealt with the basic provisions of the Land Enactment prohibiting dealings in land except under the Enactment,⁴³ but went on to declare that, the declaration having been granted, it followed naturally that the chargee was entitled to an order for sale. This illustrates the essential confusion. The 'chargee' had nothing more than a contract, and presumably could have enforced his right by asking for specific performance of his agreement. The case was in effect analagous to *Zubaidah v. Zulkathan*.⁴⁴ where Adams J. refused to declare a 'chargee' the absolute owner of the land because in the circumstances it would have been inequitable so to do. Surely the only action available to the plaintiffs in the former as in the latter case was specific performance. To grant an order of sale was analogous to allowing an action for completion of title, which as the Court of Appeal itself said in *Mesenor v. Che Teh*⁴⁵ does not exist. The action is for performance of an agreement, for there is no title to complete save by registration.

CONCLUSION

What then is the conclusion? The Courts, while paying lip service to the Code and its principles, do not seem to admit the limitations imposed by the language of the Code. It is of no purpose to cite decisions under the Australian system when that system differs in essential part from the Code. By reason of the Code's particular provisions it is submitted that there are statutory rights of registration and protection by caveat, and there are rights outside the statute. The latter however are neither statutory nor property rights, for such rights concerning land are prohibited by the Code itself. They are rights based on contract or conscience. While a contractual right itself may be said to be based on conscience there are some rights which do not have their source (at least directly) in agreement. These include what may have become property rights under the general law and certainly include such 'equities' as that of the deserted wife. They are personal rights and obligations with which the Code is not concerned. Whether they are called trusts, contracts, equities or equitable interests they are *rights in personam*. Under the Code equitable interests are not distinct from equities and trusts are only distinct from contracts in so far as the circumstances would enable the cestui que trust to enforce a right against a third party as an equity.

42. [1917] A.C. 209. The decision was directly contrary to *Haji Abdul Rahman*, for the issue in both cases was whether a debt in the nature of a mortgage was a simple contract debt caught by a Limitation Enactment. The Privy Council decided that it was, but the Court of Appeal relying on that advice decided that it was not.

43. As to which see *supra* notes 44, 45, p. 154.

44. (1963) 29 M.L.J. 63 (see *supra*).

45. (1952) 2 M.C. 208.

The extent of each right depends on the particular case but if they are given the status of a property right and therefore equated with the statutory right the Privy Council's oft repeated comment in *Haji Abdul Rahman v. Mohamed Hassan*⁴⁶ is justified and in the words of Innes A.C.J.C. "If English doctrines of equity are to be involved for the purpose of putting persons who have not complied with the law in the same position as those who have done so it seems to me that the clear intention of the Legislature will be nullified."⁴⁷

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46. [1917] A.C. 209 at 216. See supra p. 190.

47. *S.A.S.P.K. Ramasamy Chetty v. Fan Seng Yew* 1 F.M.S.L.R 356.