EQUITABLE INTERESTS and THE MALAYSIAN TORRENS SYSTEM

(Presentation of a basic problem arising under the National Land Code)

I

The topic I am going to discuss will involve the question whether or not equitable interests in land are recognised by the Torrens system. This question may well be thrown aside by the practitioners in Australia as one devoid of any current interest to them. The Australian Courts have in the last fifty years repeatedly pronounced as the ABC of the Torrens system that the system does recognise equitable interests in land. The *de facto* operation side by side with equitable interests of the Australian Torrens system cannot be denied. However, in choosing my present topic, I have in mind a two-fold purpose: (i) to show that what has been judicially settled in Australia may still be a living issue for the Malaysian Courts and, (ii) to stress that there is no standardised answer to be provided by the decisions of the Australian Courts for our own problem.

It cannot be stated with certainty when the Australian Courts began to adhere consistently to their present view.[1] At the time the Real Property Act, 1900 of New South Wales[2] was passed, they were still divided on the question as to the relationship between equitable interests and the system. James Edward Hogg in his well-known book[3] published in 1905 still found it practical to state and strongly support a view which was later discarded by the Courts.

It is not proposed in this article to dig up the inconsistencies in the old Australian cases. For the limited purpose of this article a brief recapitulation of Hogg's view would suffice. This is that the Torrens system is "a return to a system of one estate". To him, one of the main reformative roles of the Torrens system is to do away with dual ownership of land which is "one of the causes of the evils in the [English]

1. For a brief account, see John Baalman's *Commentary on the Torrens System in N.S.W.,* (1951), p. 126.

2. This statute may fairly be regarded as a sufficient model of the Australian Torrens Systems.

3. I.e. *The Australian Torrens System.* See Chapter II "On the General Nature of Estate, Interest and Rights in land under the System".

4. "the existence of two kinds of ownership — legal and equitable — of the same land was, in 1830 in England, considered to be one of the causes of the evils in the existing system of conveyancing which could only be effectively remedied by enforced registration of title and the recognition of one estate in the land

system of conveyancing.[4] Under the Torrens system, an estate or interest in land can only be acquired by virtue of due conformity with the statutory procedure. The holder of a registered title or interest in land has that which corresponds to the legal estate or interest in land at common law. But his estate or interest partakes of the character of a statutory creation. As regards equitable interests in land, only some of them are expressly given a place in the system, but having undergone a statutory baptism, they no longer retain all their original characteristics. No other equitable interests in land can exist under the system. This, however, does not mean that personal rights between parties which affect the land are not protected; nor does it mean that such rights cannot in some circumstances bind a third party.[5] His point is that equitable interests which are not expressly sanctioned by the system revert to their original status of personal rights which they had prior to their elevation by the Court of Chancery to the status of proprietory interests in land.[6] He clearly sees the neccessity of giving sufficient protection to these personal rights or equitable rights in a system of "single estate".[7] Thus the return to a system of "single estate" is to be accompanied by an *analogous* return to "the protection of the equity Courts" of "collateral rights" affecting the land. It is only analogous, because the protection of the "collateral rights" need no longer be sought only in the Courts but is sufficiently provided for in the system itself, viz., through the statutory machinery of lodging caveats. A person claiming any such "collateral rights" may lodge with the Registrar a caveat the effect of which is to prohibit any further dealings with the land by the registered proprietor against whom the caveat has been lodged. Unless a dispute arises as regards the caveat, no court proceedings is necessary to procure protection.

Such a view on substantive law as urged by Hogg matches neatly with the purported procedural simplicity of dealings with land under the Torrens system. The Australian Courts, however, proceeded in the other direction. By 1916, Harvey J. was already in a position to state dogmatically that "[t]he whole course of judicial interpretation of the Real Property Act has recognised the old law and practice in land under the Act."[8]

The view which upholds the co-existence of equitable interests with the Torrens system obviously prefers to maintain a system of dual ownership of land. Under the system, a *legal* estate or interest in land is an

instead of two. These are the cardinal principles of the Torrens system . . . ." *Ibid.*, at p. 772.

5. *Ibid.*, at p. 775.

6. *Ibid.*, at p. 772.

7. "the view that the Torrens system is a return to a system of one estate with collateral *rights* under the protection of the equity Courts, is illustrated by the analogy between the importance of injunctions in the old procedure of the Court of Chancery, which at first simply created and enforced rights by means of its injunction and the importance of the "remedy by injunction" against registered proprietor at the present day." *Ibid.*, at p. 775.

8. *Tietyens* v. *Cox* (1916) 17 S.R. 48 at p. 54. See Baalman's *Commentary,* p. 126. See also *Barry* v. *Heider* (1914) 19 C.L.R. 197 and *Butler* v. *Fairclough* (1917) 23 C.L.R. 78.

estate or interest which is created or acquired by registration. But equitable interests in land may be created in certain transactions albeit short of registration. One clear instance is where a statutory form has been executed for valuable consideration but has not yet been registered.[9] The person in whose favour the statutory form has been executed has a right to have it registered. And "that right, according to accepted rules of equity, is an estate or interest in the land".[10] Where no statutory form has been executed, a contract for value between the parties may also create equitable interests in land, for here the "parties may have a right to have such a statutory instrument executed and registered".[11] However, a person having an equitable interest in the land under the system cannot merely rely on the equitable doctrine of notice, for the system has placed on him a duty to lodge a caveat of his claim in order to procure for his equitable interest a statutory protection. Should he neglect to do so, his equitable interest will be defeated by a subsequence registered proprietor whether or not the latter had notice of the equitable interest.

II

The question whether or not equitable interests in land co-exist with the Torrens system always covertly forms the central issue of a broader question, *viz.,* whether the Torrens system is merely a new system of conveyancing or whether it revolutionises the existing law of real property. It would appear that the view adopted by the Australian Courts tends towards regarding the system merely as a conveyancing reform.[12] Hogg, on the other hand, takes the view that radical changes in substantive law necessarily result from the changes in the methods of dealing with land.[13] Methodologically, any inquiry along the line of this broader question is objectionable. Any direct answer to such a question would be an over-simplified statement of the actual position under the system. But it is not uncommon for the Australian judges to resort to broad statements describing the Land Transfer Acts as conveyancing statutes. Two reasons may be given. They may find it just a convenient form of expression which nevertheless enables them to state categorically that the system is not intended to destroy the fundamental doctrines of equity. The other reason probably lies in the attitude of the Courts in regarding their judicial activities as being confined to the interpretation of the statutes.[14] A judge may satisfy himself with the conclusion that the statutes mainly provide for procedural matters. But it may well be the

9. It is a nice question to consider the rights of a person in possession of a statutory form executed in his favour by way of a gift. This consideration may help to bear out the distinction between "statutory right to register" and "equitable interest".

10. *Per* Isaacs J. in *Barry* v. *Heider* (1914) 19 C.L.R. 197.

11. *Ibid.* See also Donald Kerr's *The Principles of the Australian Lands Titles (Torrens) System* (1927), pp. 127-130.

12. "They (the Land Transfers Acts) have long, and in every State, been regarded as in the main conveyancing enactments . . . .", per Isaacs J. in *Barry* v. *Heider.*

13. See Hogg's *The Australian Torrens System,* p. 771.

14. See Harvey J.'s statement quoted at p. 21, *ante.*

case that important changes in substantive law are being "secreted in the interstices of procedure".

Interpretation and the Inarticulate Premises

The nature of judicial interpretation is today a lively subject for discussion in jurisprudence. It is not intended here to plunge into the controversy. It may however be useful to note some of the truths which have been uncovered in the controversy and which are relevant to our present topic. The first truth is that what at first sight appears to be mere interpretation of words may in fact be conclusions drawn from concealed premises which have their tentacles in various fields. This clearly is the case where the Australian Courts professed to construe the wordings of their Torrens system statutes in favour of their conclusion that the system recognises equitable interests. Section 41(1) of the Land Transfer Act, 1900 of New South Wales reads as follows: [15]

> 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 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 in manner and subject to the covenants, conditions and contingencies set forth and specified in such instrument, or by this Act declared to be implied in instrument of a like nature.

Many would agree with what Baalman had to say, *viz.*:[16]

> On a literal construction, s. 41 appears to deny any efficacy whatever to unregistered instruments. The Courts, however, have consistently declined to give it a literal construction. They have recognised unregistered instrument as being capable of creating interests corresponding to the effect of the interests which those instruments would have created in land under the general law, but enforceable only in equity.

A query may be raised as to whether it is at all correct to assume that there is a fixed literal construction of the section. The words "estate or interest" in the section are free from qualifying adjectives. It could have been open to the Courts to say that equitable estates or interests were altogether outside the ambit of this particular statutory provision. The Australian Courts, however, conceded that the words "estate" and "interest" used throughout the Act include both *legal* and equitable estate and interests. Nevertheless, they declined to go further so as to give the provision the effect of prohibiting the creation or passing of any *legal* or equitable estate or interest unless by virtue of the registration of proper instrument.[17] By seizing upon the words "No instrument .... shall

15. There are counterparts of this section in the Torrens system statutes in the other States of Australia.

16. *Commentary on the Torrens System in N.S.W.,* p. 123.

17. Isaacs J. in *Barry* v. *Header* said: "Mr. Loston argued very strenously that sec. 41 of the Real Property Act was decisive in his favour .... His point was that the provision applied to both legal and equitable estates, interests and liability. I agree with him so far as to the meaning of that provision. "Estate" and "interest" as used in the Act include both legal and equitable estates and interest .... But what follows? Mr. Loston contended that the consequence

be effectual", the judges unreservedly declared that the application of the section must be limited to the effect of the instrument only and that "sec. 41 in denying effect to an instrument until registration does not touch whatever rights are behind it".[18] This conclusion would appear to have been reached simply as a result of the interpretation of words. But it does not require argument to point out that "the whole course of interpretation" [19] would have been in vain, had the Courts not proceeded from the premiss that *equitable interests in land are recognised by the Torrens system unless they are expressly ousted by the statute.* What is the justification for such a premiss? Why should there exist behind the ineffectual instruments the whole world of equity where equitable estates or interests in land can be as effectively created or transferred as they would have been under the general law? These questions still deserve to be answered. Or at least, they will show that the answer given by the Australian Courts to the question as to the relationship between equitable interests and the system does not lie in the mere interpretation of words.

On the other hand, Hogg must have proceeded from a different premiss, *viz.*, the premiss that *unless expressly recognised equitable interests in land cannot exist under the system.* And he therefore went all out to show that nothing in the statute warrants such express recognition.[20]

Some purported justifications

It is clear that of the two premises one presupposes the co-existence between equitable interests and the system and the other presupposes the exclusiveness of the system. Perhaps, we may try to see what justifications there could be for these premises. Obviously, a conceptualistic approach would not be fruitful. The "Torrens system" being a creation of the Legislature is not susceptible of categorical conception which will give birth to principles by logical necessity. Of course, a workable framework of concepts could be built up for a particular Torrens system. But any argument from such concepts to their contents will result in nothing but a tautology.

It may seem appropriate to inquire whether the recognition of equitable interest is at all compatible with the statutory machinery of registration of titles by the State. Hogg's view would appear to be that

> was that until registration no person can acquire any interest in land legal or equitable .... Such contention is absolutely Opposed to all hitherto accepted notions in Australia with regard to the Land Transfer Acts."

18. *Per* Isaacs J., *ibid.*

19. *Per* Harvey J., *ante,* at p. 21.

20. It is interesting to note that while the Australian Courts were happy to see those words like "equitable estates and interests" appear in the statutes, Hogg found it necessary to carry out semantic consideration of the meanings of such words, e.g. "estate", "interest", "law and equity" etc., as used in statutes and by courts. In his opinion, these words are ambiguous. The same word may have one meaning in another part; the words "equitable interests" under the system mean something different from those which have long been called by that name under the general law. See Hogg's *The Australian Torrens System,* at p. 785.

the provision for such a machinery is inseparable from the return to a "single estate" system. But this is merely an assertion. Although the statute only provides for the registration of *legal* estates or interests in land, it does not follow that unless the machinery is invoked no estate or interest whatsoever can be created or dealt with. It may, however, be noted that there are difficulties as regards the mechanics of the process by which an estate or interest passes upon the registration of proper instrument. One view is that a registered estate passes by virtue of the very act of registration carried out by the Registrar and not by virtue of the effect of a registered instrument. An instrument in statutory form is only meant to be a contract between parties. It may therefore be contended that to permit creation or dealing of equitable interests by virtue only of the contract is to go against the policy under-lying the machinery of registration, *viz*., that no estate or interest in land can pass without the Registrar having a hand in it. But an equally valid contention to the contrary may be made. It may be said that the policy of "state interference" does not extend beyond the dealings with land which are expressly governed by the statutes. Moreover, the act of registration is merely an administrative act when all statutory requirements have been complied with. Thus Isaacs and Rich JJ. who had been persistent in upholding the recognition of equitable interests under the Torrens system found it consistent for them to say: "It is not the parties who effectively transfer the land, but it is the State that does so, and in certain cases more fully than the parties could." [21] However, such a view is not satisfactory, for in recognising the creation of equitable interests without registration, the Courts must fall back to give full effect to the act of the parties themselves. It is therefore not without reason that the Privy Council should prefer a different view. In *Abigail* v. *Lapin* they said: [22]

> 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.

This view draws as close an analogy as possible between the different modes of conveyancing, i.e. under the system and under the general law. It certainly fortifies the principle of recognition of equitable interests in that it explains the creation of equitable interests under unregistered instrument by likening its effect to that of a purported instrument of conveyancing under the general law which is not in the form of a deed. But it is rather an "after-thought" explanation which follows from the concealed premiss adopted by the Australian Courts than a ground which goes to justify such a premiss.

Another of Hogg's methods of justifying his premiss is to look for corroboration in the statute introducing the system. According to him, the fact that the statute does contain express provisions for certain situations in which equitable interests would have arisen under the general law is indicative of the intention of the Legislature that the equitable doctrines relating to the creation of equitable interests are meant to be ousted.[23] But those holding the opposite view are equally capable of

21. *Commonwealth* v. *New South Wales* (1918) 25 C.L.R. 325 at p. 342.

22. (1934) A.C. 491. See also Baalman's *Commentary,* p. 124.

23. *The Australian Torrens System,* p. 785.

explaining the presence of such provisions in their favour. They regard such provisions as merely imposing a statutory duty on persons having equitable interest in land to protect their interests. Although their interests may be defeated as a consequence of their neglecting the duty, such provisions at the most only affect the defeasibility of equitable interests but not their very existence.

The Australian Courts have also resorted to corroboration. They regard the presence of a scheme of caveats under the system as implying the existence of equitable interests.[24] Again, this is not the only interpretation of a neutral fact. The scheme is one which provides statutory means of protection. By itself, however, nothing is said as to what are to be protected thereunder unless the wording of the relevant statutory provisions is clear and unambiguous. If one holds the view that equitable interests are recognised by the system, the caveats will operate to protect those equitable interests. If one agrees with Hogg, there is nothing inconsistent to say that the caveats are there to protect equitable or contractual rights and not interests in land.[25] One may even further contend that since a caveat is a protection by way of statutory prohibition, its analogy to an equitable injunction strengthens the view that only personal rights are permitted by the system.[26]

It would therefore appear that the Australian Courts in adopting their present view were simply making a choice between two alternatives. There may be certain social factors which made the Courts go one way and not the other. The fact that the Torrens system was not the only conveyancing system in Australia might also be relevant. But their choice clearly showed their hesitation to throw over something which had always been held so close to them.

III

The Torrens system was introduced into the Malay States in 1858. A new Act, the National Land Code, was passed by the Malaysian Legislature in 1965 and it has come into operation in the Malay States from the first day of 1966. Prior to this, there was in force in the Federated Malay States a unified Enactment commonly referred to as the Land Code,[27] but each of the other Malay States had its own Land Enactment.[28] The new Act was enacted to establish a uniform system of land tenure and dealing in all the Malay States as well as in the two

24. "This recognition (i.e. of equitable estates and rights) is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings." *per* Griffith C.J. in *Butler* v. *Fairclough* (1917) 23 C.L.R. 78. See also Baalman's *Commentary,* p. 276.

25. See Jackson, "Equity and the Torrens System: Statutory and other Interests", (1964) 6 *Malaya L.R.,* 146 at p. 156.

26. See note 7 at p. 21, *ante.*

27. F.M.S. Land Code, Revised Laws, 1935, cap. 138.

28. Johore: Land Enactment (Revised Laws, 1935, No. 1); Kedah: Land Enactment (Revised Laws, 1934 No. 56); Kelantan: Land Enactment, 1938, No. 26 (certain provisions therein are saved by the Twelfth Schedule of the National Land Code); Perlis: Land Enactment, 1356, No .11; Trengganu: Land Enactment, 1357, No. 3.

erst-while Straits Settlements, Penang and Malacca. In the latter two States which retain a system of private conveyancing modelled on the English law, the conversion to be effected under the new Act[29] will be a gradual process which may take a period of more than ten years.

Before we go on to consider the problems under the new Act, an understanding of the position under the previous Enactments will be helpful. I shall mainly deal with the F.M.S. Land Code because the previous separate Enactments were substantially the same and also because the Land Code was used as the basis of the new National Land Code.[30]

(A) UNDER THE PREVIOUS ENACTMENTS

Express prohibition by the Code

The Land Code contained a provision[31] similar to section 41(1) of the New South Wales Act. And the Malayan Courts adopted the Australian Courts' interpretation.[32] While the Australian judicial interpretation enabled the Australian Courts to reach their preconceived conclusion (if I may say so), the same interpretation could not serve the same technical purpose under the Code. There was in the Code another provision, i.e. section 55,[33] which clearly prohibited any dealing with land except in accordance with the statutory procedure under the Malayan Torrens system. Thus even if the Malayan Courts had proceeded from the same premiss as adopted by the Australian Courts, they could not escape from the conclusion that the Code did expressly oust the creation and dealing of equitable interests under the general doctrines of Equity.

In *Haji Abdul Rahman* v. *Mahomed Hassan*[34] a transfer was duly

29. "In nine States [i.e. the Malay States] its introduction will mean no break in continuity and in Penang and Malacca the way for its introduction has already been prepared by the National Land Code (Penang and Malacca Titles) Act, 1965, which when brought into force, will abolish the system [i.e. the system of private conveyancing]." para. 4 of the Expanatory Statement to the National Land Code Bill.

30. *Ibid*., at para. 5.

31. Section 96: "No instrument until registered in manner hereinbefore prescribed shall be effectual to pass any land or interest therein or render any land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed the land or interest specified shall pass or, as the case may be, the land shall become liable as security in manner and subject to the agreements, conditions and contingencies set forth and specified in such instrument or by this Enactment declared to be implied in instruments of a like nature".

32. Such interpretation was tacitly approved by the Privy Council in *Haji Abdul Rahman* v. *Mahomed Hassan* (1917) A.C. 209.

33. Section 55 reads: "All land which is comprised in any grant, lease of State, certificate of title or entry in the mukim register, whether 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."

34. [1917] A.C. 209.

registered under the Registration of Titles Regulation, 1891, in the State of Selangor, but there was a collateral agreement in writing between the parties that if the transferor should within six months from the date of the execution of the transfer repay the transferee his debt, the transferee should retransfer the land to him. The transferor sought to redeem the land after the lapse of a period of about 18 years. The Privy Council in reversing the decision of the F.M.S. Court of Appeal, held that all that the transferor had was a contractual right (then extinct) to enforce a retransfer of the land under the agreement. The contention urged upon the Board was that the transferor had an equity of redemption, the whole transaction being one of conveyance of land as a security only. The Board conceded as to the true nature of the transaction, but said that "the agreement .... was not in the form of Schedule E and therefore could not be and was not registered" and that "it conferred *no real right in the land*,[35] which remained after the transfer duly registered as the unburdened property" of the transferee.

The opinion of the Board was based on section 4 of the Enactment. The section provided that no land should be dealt with except in accordance with the provisions of the Enactment and that "every attempt" to otherwise deal with the land should be "null and void and of no effect".[36]

Contract and Registered Instrument

The board in the same case pointed out that although an unregisterable agreement could not create any "real right" in the land, it was nevertheless binding on the parties as a contract.[37] It is submitted that the Board in this case made two important distinctions. One was between a contract and a registered instrument, and the other was between a contract merely "in reference to land" and a contract attempting to deal with land. It was the former distinction which gave the case its place as a leading authority on the general question as to the relationship between equity and the Malayan Torrens system. The parties could, no doubt, enforce their contract in equity and were generally said to have a "personal equity" arising under the contract. But to elevate that "personal equity" to an "equitable interest in land" was, in the opinion of the Board, exactly what was prohibited by the section. In a number of cases,[38] the Malayan Courts apparently attributed to such "personal equity" a proprietory nature when they held that even a subsequent registered proprietor was bound by such "personal equity" through the doctrine of notice. To use Lord Dunedin's criticism, they were "too much

35. My own Italics.

36. This section was retained by section 63 of the Johore Land Enactment.

37. "It [i.e. sec. 4] 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 contracts or conveyancces which alone are struck at .... The agreement is valueless as a transfer or burdening instrument but it is good as a contract." *Per* Lord Dunedin in *Haji Abdul Rahman.*

38. A clear example is *Yap Tai Cheong* v. *Wong Kam* (1921) 2 F.M.S.L.R. 244.

swayed by the doctrine of English equity".[39] But on the whole, the Malayan Courts in cases subsequent to *Haji Abdul Rahman* were fully aware of the point made by the Privy Council which marked an essential difference between the Malayan Torrens system and the Australian Torrens system. Thomson J. in *Bachan Singh* v. *Mahinder Kaur*[40] further elaborated the point by resorting to a contrast between "right in *ad rem"* or "personal right" and "right *in rem"* or "real right".[41] In *Alagappa Chetty* v. *Ng Chuan* Yin,[42] Brown J. in following *Haji Abdul Rahman* expressly referred to Hogg's view. And in many cases, the Courts unreluctantly granted specific performance to enforce registration in pursuance of the agreements between the parties.[43]

Unregistered Registrable Instrument

Although the Board in *Haji Abdul Rahman was* concerned with an unregistrable contract, the effect they gave to section 4 should mean that no unregistered instrument, whether registrable or not, could confer any "real right in land". In other words, a right under an unregistered registrable instrument was also of the nature of a personal right though enforceable in equity.

However, the decisions of the Malayan Courts were unfortunately in a state of confusion in cases where consideration of the effect of an unregistered registrable instrument was directly or indirectly involved. Two types of such cases need to be considered.

(i) *The right to caveat*

One of them related to the question as to what right a person must claim in order to lodge a caveat. In New South Wales, a caveator must claim an estate or interest in land.[44] Such a prerequisite had meaning only under a Torrens system which permits creation of equitable estates or interests under the general law. But under the Malayan Torrens system where equitable estates or interests were not recognised, the machinery of caveats could as well operate to protect certain types of personal rights which might arise either under unregistered registrable instruments or under unregistrable instruments. All the previous Enactments expressly allowed a person having a claim under an unregistered registrable instrument to caveat. But as regards unregistrable instruments, there was uncertainty. The Land Code was ambiguous or rather silent as to whether a person claiming under an unregistrable instrument could also caveat.[45] The Malayan Courts were thus more concerned with

39. In *Haji Abdul Rahman's* case.

40. (1956) M.L.J. 173.

41. See also Hogg's *The Australian Torrens System,* p. 775.

42. (1921) 5 F.M.S.L.R. 236.

43. E.g. *Ayaduri* v. *Lim Hye* (1959) M.L.J. 143; *Ponnusamy* v. *Nathu Ram* (1959) M.L.J. 86; *Bachan Singh* v. *Mahinder Kaur* (1956) M.L.J. 173.

44. See Baalman's *Commentary,* p. 276.

45. Section 166 provided that "any person claiming title to or registrable interest in

a search for a general principle on which a right to caveat could be founded. In *Chin Cheng Hong* v. *Hameed & Ors.,* Buhagiar J. said:[46]

> As Lord Dunedin stated in *Haji Abdul Rahman* v. *Mahomed Hassan* 'The agreement is valueless as a transfer or burdening instrument but it is good as a contract'. This contractual right may be sufficient to give a person an 'interest' in the land for the purpose of protection by restrictive entry in 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.

The judge seemed to have based his statement on a premiss that for a contractual right to support a caveat, it must be one with a proprietory flavour.[47] If by an " 'interest' in land" he meant a proprietory right, he was clearly departing from *Haji Abdul Rahman.* On the other hand, probably proceeding from the same premiss, some other judges in other cases have held that a person claiming under a contract of sale had no right to lodge a caveat,[48] for a contractual right could not be raised in the face of *Haji Abdul Rahman* to any status higher than that of a personal right. That premiss was clearly wrong. It is submitted that under the Malayan Torrens system, the correct principle should be that a personal right could by itself give rise to a right to caveat unless the relevant statutory provision provided otherwise. Thus any attempt to give such personal right a proprietory flavour would not only be misleading but was altogether unnecessary. However, Buhagiar J.'s *dictum* may be given a useful meaning. Since not all personal rights could be protected by caveats, it would therefore be necessary to have a criterion whereby a personal right which would support a caveat could be discerned. When the Judge talked of " 'interest' in the land for the purpose of protection by restrictive entry in the register", he might be making an attempt to state such a criterion without at all intending to clothe a contractual right in a proprietory garment.[49] It would appear that the criterion conceived by the Judge was that to acquire a right to caveat, a person must claim a personal right which under the general law would have been elevated into an equitable interest in land. If this criterion was good, then the equitable doctrine relating to the creation of equitable estates or interests in land was not altogether irrelevant to

land may present a caveat". On the ambiguity of the word "title", see Jackson, "Equity and the Torrens System; Statutory and other Interests", (1964) 6 *Malaya L.R.* 146 at pp. 156-7. On the hand, section 71 (i) of the Johore Land Enactment, for example, was wide enough to allow lodgement of caveat to protect a right under an unregistrable instrument.

46. (1954) 20 M.L.J. 169 at p. 170.

47. See Jackson, "Equity and the Torrens System; Statutory and other Interests", (1964) *Malaya L.R.* at pp. 159-163.

48. See cases cited in *Tee Chin Yong* v. *Ernest Jeff* [1963] M.L.J. 118.

49. This might be the reason for his use of the word "interest" within inverted commas. The ambiguity of this word has caused much difficulties in the exposition of law. It was also loosely used in the Land Enactments. In the light of *Haji Abdul Rahman,* the phrase "registrable interest in land" could only mean a personal right under a registrable instrument. Another phrase "caveatable interest" is commonly used in Australia. Under the Australian Torrens system, it has the meaning of an interest in land which will support a caveat. But the same phrase, if used under the Malayan Torrens System, could only mean a personal right which would support a caveat.

the operation of the Malayan Torrens system.

(ii) *Priorities between unregistered instruments*

The other types of cases was concerned with the question of priorities between unregistered instruments. In *Chin Cheng Hong* v. *Hameed*,[50] a partnership land was registered in the name of one of the partners. The registered proprietor executed a contract of sale of the land in favour of a purchaser who later claimed priority over the other partners. The Court of Appeal unanimously held for the other partners on the ground that the contractual right of the purchaser could not override the registrable interest of the partners. The decision might be good, but the Court's reasoning is objectionable. The judges seemed to have regarded a registrable interest as of a nature qualitatively superior to that of a contractual right. If by this they meant that a registrable interest was a real right in land, they plainly did not do justice to *Haji Abdul Rahman* which they had purported to follow. On the other hand, if by a "registrable interest" the judges had meant a statutory right to register as distinct from a personal right under an unregistered registrable instrument, it might then be good policy for the Court to attribute a higher status to such a statutory right. The rule would be that a person who had a right to register was in a better position than a person who had no such right or who had only a right to caveat.[51] However, this approach is not free from theoretical difficulties. A right to register under the Torrens system connotes a duty to register in order to acquire a registered interest in land.[52] If a person having a right to register ignored his duty to register, he should be made responsible for the "objective" consequence of his negligence.[53] The "objective" consequence was that a person who subsequently acquired a "caveatable interest" [54] in the same land was in a position to say that he had no actual or constructive notive of the prior conflicting "interest" and that he was therefore "induced" into having a subsequent transaction with the registered proprietor. Thus to give a statutory right to register a higher status would eventually mean that as between two types of equity under the system, *viz*., the personal equities arising under a registrable instrument and under an unregistrable instrument respectively, the rule governing priority between equities had no application. The effect was to give the former equity a superior quality in an indirect way.

Contract attempting to deal with land

We mentioned another distinction made by the Privy Council in *Haji Abdul Rahman.* That is, the distinction between a contract merely "in reference to land" and a contract attempting to deal with land. Its parti-

50. (1954) 20 M.L.J. 169.

51. Bahagiar J. took the view that the purchaser had a caveatable interest.

52. This point was discussed by Jackson in his article, "Equity and the Torrens System; Statutory and other Interests", (1964) 6 *Malaya L.R.* 146 at pp. 160-1.

53. Consider *Abigail* v. *Lapin* (1934) A.C. 491.

54. See note 49 at p. 30, *ante.*

cular significance in what may be called "mortgage" cases was not fully realised by the Malayan Courts. An agreement for sale and resale of land which would have given the vendor an equity of redemption under the general law was only valid as a contract under the Malayan Torrens system. In consequence, the vendor only had a personal equity in the sense that he could ask for specific performance of the resale according to the terms of the contract. But he could not ask for the interference of Equity to extend the stipulated period for contractual redemption. For the grant of an equitable right to redeem after the expiration of the contractual period must necessarily mean that the Court had given the agreement the effect of making the land a security for loan. The agreement would then be not just a contract having "land" as its subject matter, but one which affected the nature of the particular land dealing. This latter effect was exactly what the Privy Council denied to such an agreement, but unfortunately it was also exactly what the Malayan Court of Appeal approved in *Yacob bin Lebai Jusoh* v. *Hamisah binti Saad*.[55] In this case, the plaintiff sold a land to the defendant for $2,000. The defendant later entered into a written agreement with the plaintiff to resell the land to him for the same amount of money, but the agreement was to become null and void if the plaintiff failed to repurchase at the end of three years. Jubling J. (concurred by others) said:[56]

> in *Haji Abdul Rahman, the* Privy Council laid down that where an agreement is in the nature of a mortgage the right to redeem remains irrespective of whether or not the period within which it is specified the loan shall be repaid has expired. The stipulation that the land shall be repurchased within three years does not therefore affect the plaintiff's right to redeem.

In a subsequent case,[57] where the plaintiff sought for a re-transfer of land after the time stipulated in the contract for the retransfer had expired, the Court of Appeal refused to follow its own previous decision in *Yacob Lebai Jusoh.* Buhagiar J. expressedly discredited that case as one "decided against the authority of the decision of the Privy Council in *Haji Abdul Rahman".* On the nature of the contract, he said: [58]

> The option given to the Respondent to repurchase the land did not confer on the Respondent any interest in the land; she only acquired a contractual right .... The Respondent's right is governed by *the law relating to contracts*[59] and the parties have chosen to make time of essence of the contract, a term not prohibited by law. After the 31st December 1950 the Respondent's right became extinct.

The second part of his observation might be misunderstood and the decision might then be taken to have turned on the question whether the parties had chosen to make time of essence of the contract. True, even under the Torrens system, the Court would in proper circumstances mitigate the rigidity of the effect of contractual stipulation as to time.

55. (1950) 16 M.L.J. 255.

56. *Ibid*., at p. 257.

57. *Wong See Leng* v. *Sarawathy Ammal* (1954) 20 M.L.J. 141.

58. *Ibid*., at p. 143.

59. My own italics.

For instance, in *Ayaduri* v. *Lim Hye,*[60] a time stipulated in a contract of sale of land was held not to be deemed as of essence of the contract. But an equitable right to redeem is based not merely on contracts but rather on security transaction in land in which case it may fairly be said that time could never be made essential in equity. Thus Buhagiar J. could not have meant that the effect of a contract as constituting a security transaction in land could be attended to by the Court when considering whether time was of essence of the contract. He was only referring to the general law of contract.[61]

To sum up, the Malayan Torrens system did not recognise within its ambit the existence of equitable estates or interests in land.[62] On the other hand, the system did not do away with personal rights or equities arising under registrable instruments or unregistrable instruments in reference to land. These personal rights which could have been elevated to equitable interests in land under the general law could be protected under the system by way of lodging caveats. This, however, did not result in a reversion *in toto* to the position prior to the conversion of personal equities into equitable interests in land. There were certain personal equities such as an equitable right to redeem which were ousted by the system, these personal equities being based on actual dealings with land.

(B) UNDER THE NATIONAL LAND CODE

The absence of express prohibition

The National Land Code which repealed the F.M.S. Land Code and all other State Land Enactments[63] surprisingly does not contain any provision similarly worded as section 55 of the F.M.S. Land Code or section 63 of the Johore Land Enactment (which latter section retained the wording of section 4 of the Registration of Titles Regulation, 1891). The only provision in the National Land Code which bears some similarity to section 55 of the F.M.S. Land Code is section 205(1). This subsection reads:

> The dealings capable of being effected under this Act with respect to alienated lands and interest therein shall be those specified in Parts Fourteen to Seventeen, and no others.

The word "dealing" is defined in section 5 as follows:

> "dealing" means any transaction with respect to alienated land effected under

60. (1959) M.L.J. 143.

61. Professor Jackson took a different view. In his article, he wrote: "However if time is not made the essence of 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 the English Courts prior to the time when the contractual right became an equitable interest." *op. cit.*, p. 165.

62. Whether equitable interests in land can exist outside the system and be altogether irrelevant to it is another question. However, it would appear that in the Malay States this question is of no practical importance.

63. See note 29 at p. 27, *ante.*

> the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order.

Thus the subsection only deals with "dealings" *under the Act* in respect of estates or interests in land of which the Act has express cognisance. It says nothing about any dealing with land outside the Act. Nor does it expressly prohibit any dealing with land except in accordance with the provisions of the Act. Thus the stringent statutory provision on which the rule in *Haji Abdul Rahman* was based has disappeared.

On the other hand, section 96 of the F.M.S. Land Code is practically retained by section 206(1) of the new Code. It reads:

> Subject to the following provisions of this section —
>
> (a) every dealing under this Act shall be effected by an instrument complying with the requirements of section 207 to 212; and
>
> (b) *no instrument*[64] effecting any such dealing *shall operate*[64] to transfer the title to any alienated land, or, as the case may be, to create, transfer *or otherwise affect any interest therein*,[64] until it has been registered under Part Eighteen.

Thus a question may arise as to whether the Malaysian Courts should also confine the application of this subsection to the effect of instruments only. As was discussed before, the interpretation given by the Australian Courts to section 41(1) of the N.S.W. Land Transfer Act was but a technical device to attain their preconceived conclusion. It should therefore be open to the Malaysian Courts to give section 206(1) a wider interpretation. The wording of paragraph (b) of the subsection is wide enough to warrant a literal interpretation, *viz.*, that no dealings with land, whether under or outside the Act, can be effected if the statutory requirements as to procedure have not been complied with. The fact that the Courts have under the previous Land Enactments adopted the "Australian" interpretation may pose a technical difficulty. But section 206(1) does not follow the exact wording of section 96 of the F.M.S. Land Code. The words "or otherwise affect any interest therein" are ambiguous. They may be construed as extending the scope of section 206(1) beyond that of section 96. That is to say, the presence of these words in the new provision may be taken to mean that the new provision not only declares an unregistered instrument to be of no effect but goes further to prohibit the creation of equitable interests in land behind the ineffectual instrument. If this interpretation is acceptable, then section 206(1) may be regarded as a substitute for both sections 55 and 96 of the F.M.S. Land Code.

A living issue

If, however, the Courts should also restrict the ambit of section 206(1) to the effect of instruments only, the position which was clear in the light of *Haji Abdul Rahman* under the previous Land Enactments may then be open to challenge under the new Code. The question as to whether equitable interests in land co-exist with the Torrens system

64. My own italics.

will once again become a living issue in Malaysia.

As was noted before,[65] it was immaterial under the previous Land Enactments that the Malayan Courts simply adopted the inarticulate premiss of the Australian Courts. But if the Malaysian Courts should likewise approach the question under the new Code and at the same time take the view that no express statutory prohibition is found in the Code, they might come to eliminate the essential difference which existed between the Australian Torrens system and the Malayan Torrens system. Thus an inquiry into the justification of such a premiss is not merely of academic interest as it would otherwise appear to be. If it is true that the only reason which prompted the Australian Courts to presuppose the co-existence between equitable interests and their Torrens system was their hesitation to revolutionise the substantive law in the absence of unambiguous legislative intention, then even this reason is rendered insignificant by the fact that the previous Land Enactments had already discarded equitable interests in land. Furthermore, the Malaysian Courts may take the view that the position under the previous Enactments should not be altered merely by an inference from the absence in the new Act of a provision similar to section 55 of the F.M.S. Land Code. This view may be fortified by the fact that prior to the passing of the new Act, the previous Malayan Torrens system was the only system of land dealing in the Malay States which was exclusive of all forms of conveyancing under the general law.

Of course, a broader issue may be raised. It may be contended that the exclusion of equitable interests by the Torrens system would be to return to the rigidity which beset the common law prior to the advent of equity, and that every legal system needs at least some equitable safety-valve so that the entitlements and claims to some extent can be judged according to the conduct of the parties. But we have pointed out that the Malayan Torrens system did not do away with personal equities as between the immediate parties. Nay, it provided for the protection of those personal equities against subsequent claimants by way of caveat unless it may be objected that the statutory duty to lodge a caveat is opposed to the notion of equity. But even the Privy Council has in an Australian case[66] held that failure to caveat by a prior incumbrancer will under the general rules of equity postpone his priority to a subsequent incumbrancer who has no notice of the prior interest. How could it be an unreasonable policy to demand that a person who has a claim should take precaution to protect his own right? It is safe to say that a Torrens system which allows only personal rights or equities is not both in theory and in practice a defective or inferior system. However, as a matter of fact, the sway to the English doctrine of equity may continue in the Malaysian Courts. This together with the *de facto* successful operation of the Australian system side by side with equitable interests may be strong factors which may make the Malaysian Courts go the Australian way.

65. *Ante,* at p. 27.

66. *Abigail* v. *Lapin* [1934] A.C. 491.

Other relevant provisions

In the absence of a stringent provision expressly prohibiting the creation of equitable interests, some other provisions in the new Act may have significant bearing on the question. Section 323(1) (a) which deals with caveats retains the ambiguous words, *viz*., "claiming title to or any registrable interest in land", of section 166 of the F.M.S. Land Code. These words might under the authority of *Haji Abdul Rahman,* be explained off as improper use of words. But should *Haji Abdul Rahman* be no longer a good law, the words "title to land" and "interest in land" may literally be taken to mean some real rights in land, and be taken to indicate the creation and existence of proprietory interests in land under the general law before complying with the statutory procedure to effect dealings under the Act.[67]

Similarly, it is also pertinent to consider section 340 of the new Act which relates to indefeasibility of title. After setting out the specific grounds on which a registered title can be defeated, subsection 4(b) of this section provides that "Nothing in this section shall prejudice or prevent .... (b) the determination of any title or interest *by operation of law"*.[68] The difficulty and therefore the "importance" of this subsection lies in the ambiguity of the phrase "by operation of law". This subsection is taken from section 42 (vi) of the F.M.S. Land Code. But under the previous Code, the presence of section 55 as well as of the Privy Council's decision in *Haji Abdul Rahman* prevented any useful reference to section 42 (vi) in the discussion as to the recognition of equitable interests. Now that the door is open for free speculation again, much can be read into this ambiguous phrase, e.g. to say that this phrase saves or brings in the operation of the English equitable doctrines.

In addition, an important policy question may arise from some social facts which have long been obtaining in the Malay communities of the rural areas. In these areas, customary transactions which are akin to "mortgage" transactions in land are not uncommon. Originally, these transactions were effected by way of simple contract. After the introduction of the Torrens system, these transactions could be and, in fact, should be registered as charges or, in some case, as leases.[69] But the fact may be that many of these transactions have not been registered. There are reasons to believe that similar transactions may still be done today without registration or sometimes even merely by oral agreement. Thus a question of fact may be asked as to whether the rural people have become register-minded. If they as a whole have become sufficiently aware of the statutory requirements under the previous legislation, then apparently, some individual cases of hardship would not justify a radical change in the land law. If their customary practice has as a matter of fact been carried on with only a minority among them caring for registration and statutory protection, then there is a strong sociological ground to advocate in favour of the Australian judicial view under the new Code. The unregistered customary transactions would be placed in a much better

67. See note 45 at p. 29, *ante.*

68. My own italics.

69. E.g. in the case of *gadai makan hasil.*

position, if the law should regard them as capable of creating equitable interests in land. On the other hand, the introduction of the Torrens system into the Malay States must have stemmed from the idea that the English law of realty and system of private conveyancing were unnecessarily entangled for the Malay peasants who have just a simple conception of land ownership. This could be the reason why the previous Enactments expressly prohibited the creation and existence of equitable interests outside their ambit.[70] Hence it is of vital importance to review the experience of the previous Enactments with the rural people. The answer to our basic problem may ultimately lie in the conclusion drawn from this experience.

In conclusion it may be stated that the Malaysian Courts are now faced with the task of choosing between two alternatives. The choice is not an easy one to make. But it is clear that taking the Australian way does not simply mean clarifying the judicial confusion which existed under the old statutes. Its effect will be that of making radical changes or, more accurately, of introducing more English elements into the land law in the Malay States. The Australians have been reluctant to revolutionise the land law they had transplanted from England. The English themselves have found it too late to modernise their feudal inheritance.[71] The Malaysians, however, have been fortunate not to have had a wholesale importation of the English land law into the Malay States, though they did have an English Judiciary constantly swaying to the original source of their legal knowledge. Must the "sway" be checked, or must we allow it to be reinforced by the revival of the issue as to the recognition of equitable interests by the Malaysian Torrens system.

WONG SIONG YONG*

70. See p. 27, *ante*.

71. Much achievements have been made under the Law of Property Act, 1925. But the Land Registration Act, 1925, only provides a somewhat simplified method of conveyancing. To quote Megarry and Wade: "The *complexity of rights in land* (my own italics) is such as to render it impossible to make the transfer of registered land as simple as the transfer of shares registered in the books of a company, but the present system of registration of title may be said to go almost as far on that road as is practicable." *The Law of Real Property,* (2nd ed.), pp. 998-999.

* B.Sc. (Biology); LL.B., Assistant Lecturer in Law, University of Singapore. This article is in substance the text of a paper delivered at the Conference on the Law of Singapore and Malaysia under the auspices of the British Institute of International and Comparative Law held at Cumberland Lodge, Windsor, England, in April/May, 1966.