

**THE BARE TRUST SYNDROME IN THE
PENINSULAR MALAYSIAN TORRENS SYSTEM –
A HARBINGER OF TOTAL COMMITMENT TO EQUITY? OR
THE MEANS OF A RETURN TO
TORRENS CONCEPTS?**

A owns Torrens land and contracts to sell it to B. B pays the purchase price in full and receives a transfer in registrable form, the issue document of title and possession of the land. Prior to registration, what interest does B have?

THE TORRENS VIEW

Under Torrens concepts B is said to have a registrable interest with an immediate right to register sufficient to support the entry of a caveat against A's title.¹ Lodgement of the transfer for registration is within the capacity of B and registration should follow automatically.² Most Torrens jurisdictions would say, in general law terms, B has an equitable interest in land³ or, in Torrens terms, a registrable interest for which "he has taken all the steps specified by the Statute to confer on him the ability to register."⁴

Under this executed contract A has no further relationship with B⁵ and whilst "it is the official act of registration and not the execution and delivery of the dealing or instrument, which creates or assigns the estate",⁶ A may have no *effective* power to deal with the land. If the basic Torrens concept of a conclusive Register and the role of the caveat (here in giving notice of claims against the registered title) in support of that conclusiveness is maintained, then until B caveats A can deal with the land and perhaps can pass title.⁷ If, however, general law priority rules are applied

¹ As to who may caveat in Peninsular Malaysia see decisions such as *Ong Cbat Pang & Anor v. Valliappa Chettiar* [1971] 1 M.L.J. 224; *Macon Engineers Sdn. Bhd. v. Gob Hooi Yin* [1976] 2 M.L.J. 53.

² Providing no questions of priority, form or substance occur.

³ See e.g. *Barry v. Heider* (1914) 19 C.L.R. 197.

⁴ D. Jackson: "Registration of Land Interests – The English Version" (1972) 88 L.Q.R. 93 at p. 101.

⁵ Save perhaps to answer any requisition from the Registrar of Titles – this duty would stem from the contractual relationship.

⁶ *Jasbir Kaur v. Tharumber Singh* [1974] 1 M.L.J. 224 per Azmi L.P. at p. 228.

⁷ See e.g. *Abigail v. Lapin* [1934] A.C. 491; *Osmanoski v. Rose* [1974] V.R. 523.

to this Torrens transaction then the retention of the issue document of title by B acts as constructive notice⁸ (making the entry of a caveat to give actual notice⁹ unnecessary) to any competing *bona fide* purchaser for value¹⁰ after settlement and prevents A dealing effectively with the land.

THE PENINSULAR MALAYSIAN VIEW

A. Until 1928

The Torrens system was introduced into Peninsular Malaysia in the last decades of the nineteenth century.¹¹ The system, a copy of that of South Australia,¹² was a strict exclusive scheme¹³ from which principles of equity were excluded. The interpretation of the statutory proscription that attempts to deal with land otherwise than in accordance with the enactment were to be "null and void and of no effect"¹⁴ prevented resort to modifying principles of equity. The benefits of the strict system were stressed by most members of the judiciary and most especially by Chief Justice Innes who supported the Courts' refusal "to engraft upon the plainly worded local law of registration . . . English equitable doctrines"¹⁵ for this would have inhibited the policy of the Legislature under which "registration is now general and consequently litigation over unregistered transactions has almost disappeared."¹⁶ Under this legislation B would

⁸See *Doshi v. Yeob Tiong Lay* [1975] 1 M.L.J. 85. See the Australian decision *J. & H. Just (Holdings) Pty. Ltd. v. Bank of New South Wales* (1971) 125 L.C.L.R. 546.

⁹See Woodman & Grimes "Baalman: *Torrens Title in New South Wales*" (2nd ed.) p. 203.

¹⁰As to volunteers see *King v. Smail* [1958] V.L.R. 273: As to purchasers who are not *bona fide* see *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 M.L.J. 224.

¹¹The four States which later, in 1896, became the Federated Malay States, initially had enacted Torrens-type rules which were replaced with enactments, e.g. the *Rules for Disposal of Lands in Selangor*, Notification No. 24 of 1877 which were later replaced by the *Registration of Titles Regulation No. IV* of 1891 dealing with registry office land.

¹²As provided for by the *Real Property Act 1857-1858*. The system in the Federated Malay States was based on those in force in Australia, New Zealand and Fiji.

¹³D.S.Y. Wong "Tenure and Land dealings in the Malay States" *espy*. ch. 9. See also decisions such as *Ramasamy Chetty v. Fan Seng Yew* (1918) 5 F.M.S.L.R. 354; *Ong Tin & Anor v. The Seremban Motor Garage* (1917) F.M.S.L.R. 308.

¹⁴Section 4 of the *Registration of Titles Regulation No. IV* of 1891 (Selangor), *Registration of Titles Enactment No. 29* of 1897 (Pahang); *Registration of Titles Enactment No. 18* of 1897 (Perak), Section 5 of the *Registration of Titles Enactment No. 13* of 1911 (F.M.S.).

¹⁵*Ramasamy Chetty v. Fan Seng Yew* (1918) 3 F.M.S.L.R. 354 at pp. 358-9.

¹⁶*Ibid.*

have been said to have a registrable interest — though it is doubtful if the Courts would have referred to it as an equitable interest.

B. 1928 to 1965

Later amendments¹⁷ relaxed the stringency of the early enactments to some extent. This was so in respect of the operation of section 55 which provided that transactions in land must conform to the provisions of the statute and of section 96 which provided that no instrument "shall be effectual to pass any land or any interest therein" until registered. The Courts in interpreting these sections recognized, in the absence of words to the effect of the earlier section 4 and section 5,¹⁸ that strict Torrens concepts could be modified, even negated. By 1951 it was said:

"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."¹⁹

Thus an unregistered interest in land of the type held by B could be classed as an equitable interest and dealt with in accordance with such equitable principles as were not inimical to Torrens.²⁰ At this stage B's interest would have been called registrable and this would have meant:

"... 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 ... on registration in accordance with the Land Code."²¹

This classification involved the use of general law rather than Torrens terminology and represented the growing reliance on general law principles.

C. From 1965.

The present enactment, the *National Land Code*²² by section 206(3)²³ may have given legislative justification and impetus to the uninhibited

¹⁷ *Land Code* No. 24 of 1926 (F.M.S.); *Land Code* No. 2 of 1928 now cited as Cap. 138 of the Revised Laws (1935) (F.M.S.).

¹⁸ See *Supra* p.2.

¹⁹ *Wilkins & Ors v. Kannammal & Anor* (1951) 17 M.L.J. 99 per Taylor J. at p. 100.

²⁰ Notice (and for Torrens this meant actual notice by way of caveat) may have been the only such principle properly adopted. See e.g. *Cowell v. Stacey* 1887 13 V.L.R. 8D. Recent decisions here and in other jurisdictions (esp. in Australia e.g. *J. & H. Just (Holdings) Pty. Ltd. v. Bank of New South Wales* (1971) 125 C.L.R. 546) have extended notice to include constructive notice in the terms of general law principles of priority.

²¹ *Bachan Singh v. Mahinder Kaur* [1956] M.L.J. 97 per Thomson J. (as he then was) at p. 98.

²² No 56 of 1965.

²³ Section 206(3) provides in part:

"Nothing . . . shall affect the contractual operation of any transaction relating to alienated land or any interest there."

importation of equitable principles throughout the system, especially in respect of general law rules of priority²⁴ and of the modern comprehension of the ambit of equity itself.²⁵ B's interest can still be called registrable but now this would be interpreted to mean that B is the equitable owner for whom "want of registration cannot affect [his] equitable rights".²⁶

However B's interest would now be classified in a different manner than under previous enactments. The interest will be viewed not as an interest within the statutory hierarchy but as an interest in land examinable by general law principles. For example it is obvious that the Peninsular Malaysian Courts will apply constructive notice in priority competitions between interests, either those traditionally definable as equitable interests or the new "equities" which are treated as equitable interests. Again this is illustrated in the current enhancement of the substantive content of the caveatable-thus-registrable interest *vis a vis* the caveat provisions²⁷ (particularly the stress²⁸ laid on the availability of the qualification of "claiming . . . any right to such title or interest"²⁹) where it seems our Courts are prepared to apply the full range of equitable and general law rules to the Peninsular Malaysian Torrens scheme.

With this background of progressive modification by way of general law principles in mind, it is not unexpected (*albeit* it is unwelcome) to find our Courts now decreeing that, in the circumstances above, B has a beneficial estate³⁰ in the land which A holds as bare trustee for B. B of course does have a registrable interest and although this means he has an immediate right to register the instrument of transfer, this status is seemingly irrele-

²⁴ See e.g. *Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Bayas Tudjub* [1974] 1 M.L.J. 145; *Temenggong Securities Ltd. v. Registrar of Titles, Johore* [1974] M.L.J. 45; *Dosbi v. Yeob Tiong Lay* [1975] 1 M.L.J. 85.

²⁵ Lord Denning in the Court of Appeal has led the way in extending the mantle of equitable relief, with an enhancement in the concept of *in personam*, to the equity or personal interest to which formerly narrow *in personam* or *inter partes* relief only was granted. Relief is sometimes given through the guise of a constructive trust, sometimes by reference to estoppel, licences. See e.g. *Inwards v. Baker* [1965] 2 W.L.R. 212; *Hussey v. Palmer* [1972] 2 W.L.R. 1286; *Crabb v. Arun District Council* [1975] W.L.R. 847; *Cooke v. Head* [1972] 2 All E.R. 38; *Richards v. Dove* [1974] 1 All E.R. 888; *Binions v. Evans* [1972] Ch 359.

²⁶ *Karuppiah Chettiar v. Subramaniam* [1971] 2 M.L.J. 116, per Ong C.T. at p. 118.

²⁷ In respect of private caveats — see sections 322 to 324, National Land Code No. 56 of 1965.

²⁸ See e.g. *Vangdaseiam v. Mabadevan & Anor* [1976] 2 M.L.J. 161; *Macon Works & Trading Sdn. Bhd. v. Phang Hon Chin & Anor* [1976] 2 M.L.J. 177.

²⁹ Section 323(1) (a) National Land Code No. 56 of 1965.

³⁰ Despite the absence of the duality of estates concept from Torrens.

vant. Instead, the Courts prefer to define B's interest by stressing the constructive nature of A's interest and in so doing rely on an artificial concept which is both unnecessary and inappropriate. Does this mean B's interest is to be adjudicated according to substantive trust law? Or to the law of contract? Or in accordance with Torrens principles? Apart from the general practice of abandoning Torrens principles in favour of those of general law, it would seem the Courts have not decided on the exact classification of B's interest other than accepting that whatever classification is given would involve a complementary adoption of general law principles.

THE BARE TRUST ON THE SALE OF LAND

In the last few years in decisions on the 1928 Land Code,³¹ the Peninsular Malaysian Courts referred to B's interest as being a bare trust in lieu of a registrable interest.³² For this the Courts relied on the principle in *Lysaght v. Edwards*³³ to the effect that "the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser".³⁴ This is not an absolute rule however for if the Court would not decree specific performance of that contract, the trusteeship does not arise.³⁵ *Lysaght's* case did not involve a contract for the sale of property but concerned the construction of the deceased vendor's will to ascertain which of two personal representatives was to hold the property subject to the contract. In so doing the decision reflected the status of the deceased vendor *vis a vis* his executors rather than his relationship with the purchaser under the contract. This factor has largely been overlooked in most jurisdictions where *Lysaght's* case is periodically paraded as support for equitable intervention. This represents a titular (but not a substantive) prop to focus resort to equity.³⁶

Lysaght's case involved land held under the deeds system.³⁷ Perhaps to

³¹ Cap. 138 Revised Laws 1935 (F.M.S.)

³² See e.g. *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 M.L.J. 224 *Haji Osman Bin Abu Bakar v. Saiyed Nour Bin Saiyed Mobamed* (1952) 18 M.L.J. 37; *Munab v. Fatimah* [1968] 1 M.L.J. 54.

³³ (1875) 2 Ch.D. 499.

³⁴ Per Jessel M.R. at p. 506

³⁵ See *Warmington v. Miller* [1973] 1 Q.B. 877

³⁶ *Davjoyda Estates Pty. Ltd. v. National Insurance Co. of New Zealand Ltd.* [1965] N.S.W.R. 1257; Cf. *Rayner v. Preston* (1881) 18 Ch.D. 1.

³⁷ A different system to Torrens as the Privy Council and many of the judiciary have stressed since the introduction of Torrens last century. See e.g. *Haji Abdal Rahman v. Mobamed Hassan* (1912) 1 F.M.S.L.R. 290; *Bachan Singh; Mabinder Kaur* [1956] M.L.J. 97.

distinguish this different background or to accommodate (and thus justify its use) to the Peninsular Malaysian Torrens system the local Courts have rephrased the rule to provide that

“... the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done all that is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchaser.”³⁸

Whereas when a valid contract comes into existence the purchaser's interest is only “a right to the land or interest in land against the vendor personally ... which entitles the purchaser to bring an action for specific performance.”³⁹

Even though the local Courts have transposed the rule to the Torrens arena, no attempt has been made to analyse the interest thereby produced nor to explain the reason for its existence.

WHAT IS B'S INTEREST UNDER THE BARE TRUST?

Does B hold a beneficial interest cognizable for protection — or especial protection — under Torrens? It would seem not. True, certain provisions in the enactments confer limited protection to trusts over Torrens land⁴⁰ but this protection is afforded only to those beneficial interests created in accordance with substantive trust law⁴¹ — in other words to interests atypical as unregistered interests under the statutory scheme. Does the existence of the bare trust in these cases mean that the beneficial interest said to be vested in B must conform to substantive trust law? Surely not. If by the bare trust “no more is meant than that the purchaser is regarded by equity as the beneficial owner of the estate of which the vendor is the legal owner”⁴² with incidents of this relationship resting in the law of contract, then the use of the term ‘bare trust’ is but semantics designed to

³⁸ *Ong Cbat Pang & Anor v. Valliappa Chettiar* [1971] 1 M.L.J. 224 per Gill F.J. (as he then was) at p. 229.

³⁹ *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 M.L.J. 53 per Ali J. at p. 56.

⁴⁰ See the caveat sections and provisions for the lodging of the trust deed and the duty on the Registrar in such cases. Cf. *Ex parte Campbell* (1886) 9 A.L.T. 83; *Templeton v. Leviathan Pty. Ltd.* (1921) 30 C.L.R. 34. And see J.R. Innes “Registration of Title in the F.M.S.” (1911): *Dan Sin Wah v. Chan Hai Swee* (1951) 17 M.L.J. 189.

⁴¹ See *Midland Bank Executor & Trustee Co. Ltd. v. Rose* [1949] 1 Ch. 78. *Wan Naimab v. Wan Mohamed Nawawai* [1974] 1 M.L.J. 41. Cf. *Dan Sin Wah v. Chan Hai Swee* (1951) 17 M.L.J. 189; *Tob Puan Kamarja v. Tamba* (1918) 2 F.M.S.L.R. 190; *Boase v. Chuny Rubber Estates Ltd.* (1913) 2 F.M.S.L.R. 130.

⁴² *Chang v. Registrar of Titles* (1975) 8 A.L.R. 285 per Jacobs J. at p. 295.

hinder a proper exercise in taxonomy. But if the description of vendor as trustee and purchaser as beneficiary imports the law "governing the rights and duties of trustees"⁴³, then the registrable interest is transformed into an interest atypical to the statutory scheme and thus one which is in substance a trust interest. The erstwhile registrable interest then becomes bereft of the concrete protection able to be given by the caveat to an interest in the statutory hierarchy.

If the Registrar has no power to caveat on behalf of a beneficiary⁴⁴, then the Registrar⁴⁵ may have no duty or obligation to prevent him registering an instrument valid on its face but which is inimical to the beneficiary's (i.e. purchaser's) interest. Especially as, in this case, there is no trust deed in existence able to be lodged for information purposes which might also be treated as constructive notice to the Registrar in the existing climate of general law's intrusion into Torrens.

As purchaser B can caveat as the holder of a registrable interest pursuant to the statutory scheme. B could also caveat as the holder of a beneficial interest. What happens however if B caveated under section 323(1) (a) as the holder of a registrable interest which the Court then classes as the beneficial interest under a trust? Does this not alter the nature of the caveatable interest? Under section 323(2) the caveator must specify the nature of his claim to the land. Does B caveat as possibly claiming a registrable interest or possibly a beneficial interest? B cannot caveat twice over the same land at the same time claiming substantially the same interest.⁴⁶ Thus B would have to decide to caveat either under the bare trust or as the holder of a registrable interest. What is the effect if he chooses the former status and is unsuccessful in caveating and the Court applies actual notice to a priority contest between B and a third party? As the holder of a registrable interest B has a status recognised and able to be protected within the scheme. That should be sufficient. B should not have to toy with a dichotomy of interests, one of which is outside the statutory scheme.

B does not receive any benefit as beneficiary that he does not have as the holder of a registrable interest. On the contrary, with a registrable interest he has an enhanced position to that of the holder of a constructive

⁴³ *Ibid.*

⁴⁴ Section 320(1) (b) (ii) and (2) of the *National Land Code* albeit for a minor beneficiary. But by section 43 a minor may not hold land. Would this preclude his contracting during minority even where settlement is not effected during minority?

⁴⁵ Even if a trust deed can be lodged for information (Section 344) this will not prevent the Registrar registering an otherwise valid transfer. In the bare trust case the contract could hardly constitute a trust deed.

⁴⁶ *Damodaran v. Vasudeva* [1974] 1 M.L.J. 128.

interest about which substantial doubts exist as to its substantive content and effect.

JUSTIFICATION FOR THE BARE TRUST SYNDROME?

In general the effect of the bare trust on the sale of property has been glossed over. Once deciding the trust existed that was thought to be enough. No analysis of the effect and implication of the trust has been made.

It may be that the bare trust is pertinent only to the status of the vendor *vis a vis* his creditors, executors etc. The nomination of the bare trustee may be no more than a means of preserving property (over which the vendor has no disposing power for his own benefit) from third parties claiming against the vendor whilst he remains registered as owner of that property. For example in *Karuppiab Chettiar v. Subramaniam*⁴⁷ A, the vendor, sold land to B who paid all purchase money, received possession and a transfer in registrable form. However, B did not receive the issue document of title⁴⁸ for A had previously deposited it with C to effect a lien (although C had not entered a caveat to protect that lien⁴⁹). B however then caveated. A defaulted under the lien and executed another transfer in favour of C. C could not lodge the transfer because of B's caveat and so C applied for and was granted a Prohibitory Order. C registered the Prohibitory Order and sought to sell the land. B intervened asking that the order be set aside claiming that A merely held as trustee for B. The Court accepted that A held as bare trustee on the date of granting⁵⁰ the Prohibitory Order which must be set aside; for A

"... having sold his entire interest in the land and received payment in full undoubtedly holds the legal estate only as a bare trustee for ... [B] ..., who is the equitable owner. Want of registration⁵¹

⁴⁷[1971] 2 M.L.J. 116.

⁴⁸In the terms of *Ong Chai's* case (See *supra* p. 6) was this a bare trust if the issue document of title was outstanding?

⁴⁹See decisions such as *Mercantile Bank Ltd. v. The Official Assignee* [1969] 2 M.L.J. 196 which held that the retention of the issue document of title without the entry of a caveat gave the lien-holder a right in equity to a lien which would be treated (*Walsh v. Lonsdale* (1882) 21 Ch. D9) as a lien.

⁵⁰In light of decisions such as *Mercantile Bank* (see Note 49 *supra*) it is surprising that the Court did not consider the date of the contract (A and B) as important. See *Vallipuram Sivaguru v. Palaniappu Chetty* [1937] M.L.J. Rep. 59; *Osmanoski v. Rose* [1974] V.L.R. 523.

⁵¹*Cf.* It is "the official act of registration and not the execution and delivery of the dealing or instrument which creates or assigns the estate". *Jasbir Kaur v. Tharumber Singh* [1974] 1 M.L.J. 224. There is no duality of estates under Torrens concepts.

cannot affect his equitable rights"⁵² and as these equitable rights could be protected without registration⁵³, A's creditors could not attach the land.

If the bare trust is to be used merely to confirm that the vendor has no disposing power for his own benefit, the vendor's nomination as trustee should be unilateral so that it does not require a complementary naming of the purchaser as beneficiary. This ambivalence seemed to be influential in the case of *Munah v. Faimah*⁵⁴ which involved a purchaser who, on settlement, had not received a transfer. The vendors were selling as personal representatives of the deceased registered owner and had not obtained Letters of Administration. Nineteen years after settlement the purchaser, after many times requesting the transfer, took action to have the land transferred to her.⁵⁵ The Court granted this application for it said the purchaser was the beneficial owner and all she required was "to clothe the equitable estate with the legal title".⁵⁶ Although the purchaser was said to have a beneficial interest were the vendors bare trustees? In the terms set down later in *Ong Chat's*⁵⁷ case the bare trustee arose only when settlement had been effected completely i.e. the purchaser had received possession, the issue document of title and a transfer in registrable form. The Court avoided calling the vendors trustees and was able to make its decision on the contractual obligations of the vendors and the purchaser although by reference to equitable principles.

The status of the vendors was not referred to. Yet it seems the Court accepted that there was a division in ownership — between legal and equitable estates⁵⁸ — relative to traditional trust terminology; but that this division, represented here by the beneficial ownership of the purchaser, could exist unilaterally — i.e. without the complementary naming of the vendor as trustee. Does this mean that the bare trust should be ambivalent — when directed to the vendor he becomes bare trustee (but

⁵² Per Ong C.J. at p. 118.

⁵³ See e.g. *Barry v. Heider*

⁵⁴ [1968] 1 M.L.J. 54

⁵⁵ Cf. the remedy sought in *Haji Osman Bin Abu Bakar v. Saiyed Noor Bin Saiyed Mohamed* (1952) 18 M.L.J. 37.

⁵⁶ Per Raja Azlan Shah J. (as he then was) at p. 55

⁵⁷ *Ong Chat Pang v. Valliappa Chettiar* [1971] 2 M.L.J. 224.

⁵⁸ An unfortunate choice of words perhaps? Did Raja Azlan Shah mean "estate"? Under Torrens concepts there is no place for the duality of estates. See D. Kerr: "The Principles of the Australian Lands Titles (Torrens) System" p. 134. See also *Chick Binti Abdullah v. Itam Binti Saad* [1974] 1 M.L.J. 221.

without needing a beneficiary) and when directed to the purchaser he becomes beneficiary (but without needing a trustee)? Such a dichotomy of status would be possible if the Courts were to treat this type of bare trust not as a constructive trust - thus a substantive institution⁵⁹ - but as a remedial device.⁶⁰ This remedy would be limited to those cases needing it and not used as a general labelling of otherwise protectable interests.

It could be said that the existence of the bare trust is directed at preserving the purchaser's contractual rights against the vendor or his executors somewhat in the fashion of implied covenants for title, especially a Torrens equivalent to the covenant for further Assurance. One initial proviso to this view however must be made. Might not these covenants be implied by virtue of the contract so that non-observance by the vendor would enable the purchaser to take action for specific performance? This was clearly so in the case of *Haji Osman Bin Abu Bakar v. Saiyed Noor Bin Saiyed Mobamed*⁶¹, where the vendor has performed all his contractual obligations but notwithstanding the laches of the purchaser the vendor's executors were directed to execute a new transfer. In this case B as purchaser delayed for six years after settlement in lodging the transfer for registration. A, the vendor, then died and by section 85(ii)⁶² of the legislation⁶³ then in force the transfer became ineffective. B attempted to lodge the transfer but registration was refused. B then sued A's personal representatives seeking specific performance.⁶⁴ This relief was denied at first instance but allowed on appeal for the Court said the personal representatives held as bare trustees for B. The purpose of section 85(ii) was to protect the "estate of a deceased person against fraud rather than against fulfilling the lawful and binding obligations of the deceased".⁶⁵

Covenants for title are no longer provided for in the Peninsular Malaysia

⁵⁹The English view. See D.W.M. Waters: "The Constructive Trust"

⁶⁰The American view. See R. Pound "The Progress of the Law" (1911) 33 Harv. L.R. 420.

⁶¹(1952) 18 M.L.J. 37.

⁶²Section 85(ii) provided "The death of any person prior to the presentation of any instrument executed by him shall prevail so as to prohibit the registration of such instrument, and such instrument if registered shall be void".

⁶³Land Code Cap. 138 of 1935 (Revised Laws) (F.M.S.)

⁶⁴Surely A had performed his obligations under the contract so that specific performance should have been unnecessary. Cf. *Ng Yew v. Perumal Mudaly* (1924) 5 F.M.S.L.R. 21 where delay defeated equity. Cf. the remedy sought in *Bacban Singh v. Mahinder Kaur* (1956) 22 M.L.J. 97. (*supra*. p. 271).

⁶⁵Per Thomson J. (as he then was) at p. 39.

Scheme.⁶⁶ It is difficult to justify the presence of the bare trust syndrome only to ensure that on settlements such covenants will be implied to
“... establish a fresh contractual privity which enables the purchaser to bring an action for damages, or in the case of a covenant for further assurance, a suit for specific performance.”⁶⁷

Not only is the contract (at the stage the bare trust arises) an executed one for which specific performance is no longer necessary nor appropriate as all obligations of both parties have been performed,⁶⁸ but more effective is the fact that the purchase money is not released to the Peninsular Malaysian vendor unless the transfer is registered. Any requisition from the Registrar directed to the vendor would be speedily answered. Conveyancing practice in such a case is more effective than any judicial sanction imposed on a pseudo-trustee for the pseudo beneficiary!

“Equity looks on that as done which ought to be done”⁶⁹ is one of the most frequently applied maxims of equity. It is applied in several guises — as a constructive trust in *Lysaght's* case — as treating a contract to do a thing as if the thing were already done as in *Walsh v. Lonsdale*⁷⁰ — and in other ways in other cases. But the concept behind the maxim does not rationalize the use of the bare trust on the sale of land. For even under the *Lysaght* formula⁷¹ both parties must still perform their contract — i.e. the vendor to execute the conveyance and give possession and the purchaser to pay all purchase money — to effect the legal estate and there is no question but that they intend to do so. It is even more inappropriate at Torrens where the bare trust arises only on completion of these obligations. The unsuitability of basing the bare trust on this maxim was illustrated in the decision of at least one member of the judiciary in the *Inter-Continental Mining* case.⁷² The case involved lessor, lessee and sub-lessee

⁶⁶ Under earlier legislation e.g. Section 93 of the *Land Code* Cap. 138 of the Revised Laws (1935) (F.M.S.) an agreement was implied requiring the vendor to “do such acts and execute such instruments” as necessary to give effect to his obligations under the contract. It should be noted that the early bare trust cases were concerned with this *Land Code* e.g. *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 2 M.L.J. 224.

⁶⁷ Baalman *op. cit.* p. 318.

⁶⁸ Presumably the giving of a defective transfer would not constitute the relationship of the bare trust and consequently any implied covenant would not arise.

⁶⁹ *Banks v. Sutton* (1732) 24 E.R. 922 at 927

⁷⁰ (1882) 21 Ch.D 9

⁷¹ Cf the Peninsular Malaysian restatement of the rule. See *supra* 274.

⁷² *Inter-Continental Mining Co. Sdn Bhd v. Societe Des Etains De Bayas Tudjub* [1974] 1 M.L.J. 145.

and a contest between lessor and lessee.⁷³ The lessor and lessee had not, as the enactment⁷⁴ required, executed and registered a lease. These two parties agreed to arrange a sub-lease to another. A dispute arose and the lessee caveated.

The Court upheld his right to caveat, for as Gill F.J. (as he then was) observed the transaction represented a contractual licence, an agreement to execute a deed granting the lessee a lease, and because the lessee had gone into occupation and spent money a trusteeship of the lessor. The formula of estoppel or licence together with the expenditure of money to create a relationship protected by equity is now well established.⁷⁵ Where the party expending the money seeks possession of the land it is more usual to classify his interest as an equity. Where possession is not sought then it is usual to pronounce a constructive (not necessarily a bare) trust. In most "equities" cases the relationship is not founded on an agreement supported by traditional consideration but some Courts have been prepared to view the transaction in light of contract law.⁷⁶ But this indulgence is inappropriate here where the claimant had not done that which he should but could easily have done — here to execute and register a lease. Further it would seem inequitable to benefit him in equity for does he not come without "clean hands"? After all equitable relief is discretionary and where the maxim should apply

"... that which is agreed to be and ought to be done is treated as having been done and carrying with it in equity the attendant rights.

But the ... equitable rights do not in general arise when that which is agreed to be done would not be ordered to be done."⁷⁷

nor where that which ought to be done is not done due to the negligence or recklessness of the claimant.

Apart from the unsuitability of basing support for the bare trust syndrome on this maxim, there is a dagger in allowing it to be used to

⁷³ Mining land is not alienated but leased by the State Authority. Though the parties are described as lessor, lessee, sub-lessee their true titles are head lessor, sub-lessor and sub-lessee.

⁷⁴ Mining Enactment Cap. 147 Revised Laws 1935 (F.M.S.).

⁷⁵ See *Inwards v. Baker* [1965] 2 W.L.R. 212; *Crabb v. Arun District Council* [1975] 3 W.L.R. 847, *Ismail v. Haji Taib* [1972] 1 M.L.J. 259 where "an equity" was said to exist: Cf *Hussey v. Palmer* [1972] 3 W.L.R. 1286 where the relationship produced a constructive trust.

⁷⁶ See e.g. *Ismail v. Haji Taib* [1972] 1 M.L.J. 259; *Quare Latec Investments Ltd. v. Hotel Terrigal Pty. Ltd.* (1965) 113 C.L.R. 265. See comments of A.J. (later Lord) Denning in "Recent Developments in the Doctrine of Consideration" (1952) Mod. L.R. 1.

⁷⁷ *Warmington v. Miller* [1973] 1 Q.B. 877

validate a bare trust in situations which *Lysaght v Edwards* would not have considered within the sphere of the rule. Such cases are those where an interest rather than an estate (or in Torrens terms, the statutory estate) is concerned. *Lysaght's* case, and that of *Ong Chat*, concerned the transfer of the estate; the *Inter-Continental* case concerned the creation of an interest in land — where the estate was not involved. There is only tenuous justification for the syndrome to be applied to Torrens land and its extension in the situations dealing with interests (rather than with the statutory estate) should be discouraged.⁷⁸

If the use of the bare trust is designed to eliminate any possible priority battle (between B who has paid all money due and a competitor who may or may not have paid all money due) the bare trust may not add anything nor assist the purchaser where the competing interest is created prior to his contract⁷⁹ or settlement⁸⁰ — for that battle the status of purchaser under the contract is fully, if not more, effective. If prior to B's contract and the competitor does not hold the issue document of title or caveat then B should have priority.⁸¹ If after settlement A, as vendor, is presumed to have no disposing power for his own benefit and any contract made by him on his own behalf is ineffective to pass title.⁸² This would be so despite the absence of the trust for the Courts now apply constructive notice to Torrens transactions⁸³ so that the retention of the title by B would act as constructive notice to any subsequent competing *bona fide* purchaser thereby disentiing the latter to claim the land. Local conveyancing practice also intrudes into the priority contest for it is usual for the purchaser to search the issue document of title (i.e. the copy in the vendor's possession) as well as the register document of title thereby eliminating certain possible priority battles.

⁷⁸It might be added that *Walsh v. Lonsdale* (1882) 21 Ch. D. 9 has long been applied to leasing situations in Peninsular Malaysia (The rule provides that an agreement for a lease is as good as a lease). See *Woo Yok Lam v. Loo Pek Chee* [1975] 1 M.L.J. 156; *Margaret Chua v. Hoo Swee Kiew* (1961) 27 M.L.J. 173 and was beneficially applied to the claimant in this case without needing to resort to the bare trust.

⁷⁹See e.g. *J & H Just (Holdings) Pty. Ltd. v. Bank of New South Wales* (1971) 125 C.L.R. 546; *Osmanoski v. Rose* [1974] V.L.R. 523; *Chick binti Abdullah v. Ham binti Saad* [1974] 1 M.L.J. 221.

⁸⁰See e.g. *Doshi v. Yeop Tiang Lay* [1974] 1 M.L.J. 85.

⁸¹See *Taddeo v. Catalano* (1975) 11 S.A.S.R. 492; *United Malayan Banking Corp. Bhd v. Gab Tuan Laye & Ors* [1976] 1 M.L.J. But cf *Karruppiab Cheltiar v. Subramaniam* [1971] 2 M.L.J. 116; *Mercantile Bank Ltd. v. The Official Assignee* [1969] 2 M.L.J. 196.

⁸²See *Boase v. Cluny Rubber Estate Co. Ltd.* (1913) 1 F.M.S.L.R. 130 *Chin Cheng Heng v. Hameed & Ors* (1954) 20 M.L.J. 169.

⁸³See e.g. *Doshi v. Yeop Tiang Lay* [1975] 1 M.L.J. 85. See also *Taddeo v. Catalano* (1975) 11 S.A.S.R. 492.

Historically, a more respectable reference to the bare trust could be made by treating it as a substitute for the formula of "bargain and sale". But this too would not satisfy the rationale for the applicability of the syndrome. Under this old procedure (which was well established by the early sixteenth century as a means of secret conveyancing) there was an agreement for sale, the purchaser paid the purchase money but there was no livery of seisin. Equity treated the vendor as being seized to the use of the purchaser, in the terms of a constructive trustee so that the purchaser had an equitable estate. Then the *Statute of Uses*⁸⁴ executed the use and the purchaser was vested with the legal estate. Formal livery of seisin is no longer pertinent to general law conveyancing and it has no relevance to Torrens where registration alone vests legal title and where actual possession is but an incident of the sale.

Is the bare trust situation designed to protect the purchaser from a negligent vendor who, in effect, commits waste? Any contract of fire insurance taken out by the vendor enables only the vendor to receive proceeds of that contract in the case of fire.⁸⁵ But the purchaser can take out his own insurance cover on the signing of the contract. The vendor is liable for damage caused to the property by his negligence or wilful action. But in Peninsular Malaysia the retention of the purchase money until registration must act as a sanction to a difficult vendor.

The Peninsular Malaysian Courts have not rationalised, explained or justified their use of the bare trust on any of these suggested or indeed it would seem any other grounds. Whether the bare trust is seen as a substantive institution or a remedial device, it is clear that, in either role, it has no place in the Torrens system where trusts are not within the cognizance of the scheme and where adequate remedy is given within the scheme itself (i.e. by the caveat procedure).

The whole problem of the bare trust syndrome as applied to contracts for the sale of land in Peninsular Malaysia could have been settled (and hopefully the syndrome declared inappropriate) by the Privy Council in the *Temenggong*⁸⁶ case. Unfortunately this question was not raised before the Board. The *Temenggong* case involved the entry of a Registrar's caveat⁸⁷ against the vendor's title after the date of settlement of a

⁸⁴ 27 Hen. VIII C. 10

⁸⁵ *Rayner v. Preston* (1881) 18 Ch. D. 1; *Cumberland v. Ireland*.

⁸⁶ *Temenggong Securities Ltd. v. Registrar of Titles, Johore* [1974] 2 M.L.J. 45; On appeal *Registrar Titles, Johore v. Temenggong Securities Ltd. & Anor.* [1976] 2 W.L.R. 951.

⁸⁷ Section 320, *National Land Code No. 56 of 1965*.

contract of sale and after the purchaser had lodged the transfer for registration.⁸⁸ The purchaser applied for an order to direct the Registrar to remove the caveat and register the transfer. The High Court dismissed this application and the purchaser appealed.⁸⁹ On appeal the Federal Court held that the vendor had no interest in the land at the time the caveat was entered for he was holding as bare trustee for the purchaser.

"The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the [purchaser] are bare trustees . . . and it must consequently follow, as night must day, that the vendors have no *interest* in the lands which can be the subject matter of a caveat."⁹⁰

On appeal to the Privy Council the bare trust was not referred to. But the decision of the Federal Court in interpreting the bare trust to mean no more than that the vendor no longer had any disposing power for his own benefit may be acceptable⁹¹ if the term "bare trustee" was able to be distinguished from its connotation as a constructive trust and if the limits of the concept were such as implied in that case — limiting it to reflect the potential caveatability of a third party's interest against the vendor.⁹² In other words the 'bare trust' occurs in circumstances in which it is clear that the Registrar would reject any caveat entered against the vendor.

The obvious difficulty with such an approach at Torrens is that registration alone vests and divests title and any person with a caveatable interest⁹³ against the registered proprietor can seek to caveat. Whether his claim against the vendor's title would succeed is another matter. For the purpose of a caveat is "to preserve the status quo pending the taking of timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in the Courts"⁹⁴ Was Ong (HS)F.J. implying that the

⁸⁸Section 319(2) provides in part: "The prohibition imposed by a Registrar's caveat shall apply to any . . . instrument notwithstanding that it was presented for registration before the caveat was entered . . ."

⁸⁹The caveat had been entered at the instance of Internal Revenue for a tax debt (which may or may not have been in existence at the date of entry of the caveat — the Report is unclear).

⁹⁰Ong H.S. (F.J.) (reading the judgment of the Court) at p. 47.

⁹¹See e.g. *Haji Osman Bin Abu Bakar v. Saiyed Noor Bin Saiyed Mohamed* (1952) 18 M.L.J. 37 (See *supra* p. 9)

⁹²This may raise a question of can a registered owner caveat his own land? Yes say the Australian Courts: See *Barry v. Heider* (1914) 19 C.L.R. 197. No say the New Zealand Courts: *Re an application by Hanpini Courts Ltd. (No. 2)* [1961] N.Z.L.R. 353. The New Zealand view is preferable.

⁹³See e.g. *Mahadevan & Anor v. Pavel* [1975] 2 M.L.J. 207.

⁹⁴*Registrar of Titles v. Temenggong* [1976] 2 W.L.R. 951 at p. 955.

bare trust prescribed not only the right of a third party to caveat but also the right to succeed in an action taken to uphold the caveated claim? On definition of the function of a caveat and on the essential Torrens principle of a conclusive register that implication goes too far. But it points to the dilemmas facing the Court – what is a bare trust, what is its effect and how does it apply to Torrens land?

THE FUTURE OF THE BARE TRUST ON THE SALE OF LAND IN PENINSULAR MALAYSIA

Equity is increasingly pervasive in the Peninsular Malaysian scheme. If the Courts are going to do damage to Torrens concepts by an overlay of equity, is it not in the interests of the community that such equity be applied only in conformity with strict, traditional requirements so that its effect will be minimised? Any 'ad hocery' in land dealings, even if designed to "satisfy the equity" should be restrained. Added to this is the factor of the present English and perhaps Australian trend towards producing, not a new equitable interest, but an equity or equitable interest available by reference only to conscience. If equity is to be satisfied, must new guidelines be drawn up to make it more accessible? What then of the maxims, and the principles underlying these maxims, on which equity as formerly understood existed?

The following comments seek to illustrate the result of resort to all-embracing equity and to present a solution, to the problem occasioned thereby, designed to restore Torrens concepts to our land system.

a. *The bare trust as it should be*

Did *Lysaght v. Edwards* set out to establish a rule that the existence of a valid contract of sale converted contractual rights into rights and duties determinable according to trust law? It is submitted that all *Lysaght v. Edwards* intended was to settle a query,⁹⁵ arising under a will, of personal representatives of a deceased vendor where a conveyance had yet to be executed and where there was no question of a dispute between vendor and purchaser. There was no intention to turn the vendor's contractual obligations into those examinable by trust principles. Indeed as Brett L.J. in *Rayner v. Preston*⁹⁵ later observed:

"... I doubt whether it is a true description of the relation between the parties to say that from the time of making of the contract, or at any time, one is even trustee for the other. They are only parties to contract of sale and purchase of which a Court of Equity will under certain circumstances decree a specific performance."

⁹⁵(1881) 18 Ch.D. 1 at p. 11.

There was merely a nomination of one class of personal representatives to whom the purchaser could apply for a conveyance or, if necessary, from whom he could seek observance of covenants for title. To that extent alone was the purchaser involved.

Unfortunately *Lysaght v. Edwards* is one of the most inappropriately applied decisions. Even though

"... the description of the vendor as trustee tends to conceal the essentially contractual relationship which, rather than relationship of trustee and beneficiary, governs the rights and duties of the respective parties."⁹⁶;

most Courts apply it in respect of contracts of Torrens land where the principles for the passing of property are quite distinct from those under the deeds system. As between the vendor and the purchaser the contractual obligations should prevail. As between vendor and his creditors, etc. the bare trust should only operate as notice of his contractual obligations without in any way altering the contractual obligation or relationship of vendor and purchaser. Would it not, in these circumstances, be preferable for Courts interpreting Torrens status to ignore the terminology of *Lysaght v. Edwards* and instead to use the formula "no disposing power for his own benefit"⁹⁷ in respect of the rights of the vendor? This would avoid the trust with its unfortunate connotations and represent more factually the status of the vendor under his contract especially in light of the modern view of enforcing constructive notice against competing claimants so that claimants against the vendor would be affected by the purchaser's retention of the issue document of title. In addition it would not alter the priority battle if the claim against the vendor was prior to settlement. For that the purchaser as purchaser stands much the same chance as he would as beneficiary under the bare trust.

b. *Equity generally*

It must be accepted that the Peninsular Malaysian Courts are in a dilemma. They accept and apply *Lysaght v. Edwards* to produce a bare trust yet in some cases they attempt to restrict its application.⁹⁸ At the same time the Courts are not unaffected by current trends to expand and enhance circumstances in which equitable relief is applied.⁹⁹

The Courts will have to decide if this view of equity (once

⁹⁶ *Chang v. Registrar of Titles* (1976) 8 A.L.R. 285 per Jacobs J. at p. 295.

⁹⁷ *Boase v. Cluny Rubber Estates* (1913) 1 F.M.S.L.R. 130.

⁹⁸ See e.g. *Karuppiab Chettiar v. Subramaniam* [1971] 2 M.L.J. 116.

⁹⁹ See *supra* cases noted in Note 90. See also *Richards v. Dove* [1974] 1 All E.R. 888; *Cooke v. Head* [1972] 1 W.L.R. 518.

accepted¹⁰⁰) requires the complementary total acceptance of the bare trust¹⁰¹ as a substantive institution. Should personal relationships and family arrangements¹⁰² give rise, as against a *bona fide* purchaser for value, to equitable interests which affect him

a. in terms of general law notice, because the estoppel etc. commences or comes into being before the *bona fide* purchaser's interest? This poses the further question — notice of what? An Equity?¹⁰³ A personal claim?¹⁰⁴ An equity to which the Courts grant specific performance to perfect the "double equity"?¹⁰⁵

or

b. because the equity (created before the purchaser contracts with or without notice of what he thinks is only a personal obligation) is later held to be a constructive trust? What obligation or liability does the purchaser then have to the beneficiary of such a trust?

Thus even after settlement the *bona fide* purchaser may find his registrable interest (or beneficial interest under the bare trust) able to be attacked by a person claiming against the vendor on the merest ephemeral interest for "any act done on the faith of a promise should be regarded as sufficient consideration to make it binding"¹⁰⁶ Such an attack may only relate to the proceeds of sale, but the claimant may caveat causing expense and trouble to the purchaser in circumstances where Torrens would not ordinarily recognise an interest in land (thus traditionally caveatable) exists. But there will be cases in which money or damages are not a substitute for the land claimed.

These factors compound the problem, of how much or what type or which parts of equity to apply. In the future if these trends prevail, the *bona fide* purchaser for value will be obliged to investigate (and be required to be bound by) claims to interests made by

a. those claiming equitable interests who have not caveated but who hold

¹⁰⁰ See e.g. development of the equity from *Inwards v. Baker* [1965] 2 W.L.R. 212 to that in *Crabb v. Arun District Council* [1975] 3 W.L.R. 847. The local Courts will have to decide if they will adopt this trend totally or partially. The former seems more likely.

¹⁰¹ e.g. as in the *Inter-Continental Mining Co., Sdn Bhd. v. Societe Des Stains De Bayas Tudjub* [1974] 1 M.L.J. 145.

¹⁰² See *Jones v. Padavatton* [1969] 1 W.L.R. 328.

¹⁰³ *Inwards v. Baker* [1965] 2 W.L.R. 212: (Lord Denning's judgment).

¹⁰⁴ *Ibid.* (The majority of the Court of Appeal).

¹⁰⁵ *Latec Investments Ltd. v. Hotel Terrigal Pty. Ltd.* (1965) 113 C.L.R. 265.

¹⁰⁶ A.J. (later Lord) Denning "Recent Developments in the Doctrine of Consideration" (1952) Mod.L.R. 1 at pp. 9-10.

- the issue document of title¹⁰⁷ or have possession of the land and claim the benefit of constructive notice;
- b. those whose interests rest on a personal obligation for which "consideration", as traditionally defined,¹⁰⁸ was not given but which are treated by the Courts as producing an interest in land; i.e. the 'equity' cases;
- c. those whose interests are similar to the non-existent¹⁰⁹ "deserted wife's equity" but who claim under an ex-nuptial situation. In these cases the Courts in England¹¹⁰ and Australia¹¹¹ may be still formulating principles but it is probable this "interest" too will be given the status of an equitable interest.
- d. those whose interests are based on personal law i.e. *harta sapencarian*. There are no decisions where an unregistered spouse, during marriage, has caveated against the title of the registered spouse. The future may be different for as *harta sapencarian* itself evolved¹¹² so too may its incidents become more sophisticated and more referable to the statutory system. So too may it become incumbent on a purchaser to query the marital status and happiness of his vendor. Does this amount to an invasion of privacy?

In respect of these sorts of claims, the local practice (which may not be universal) of searching both the issue document of title and the Register document of title may not add to the security occasioned thereby. Most of the new "interests" are not caveated or caveatable (at least until a Court determines their existence and effect) no change in possession of the issue document title is occasioned and it is doubtful if a vendor would answer correctly (or indeed be able to)¹¹³ requisitions concerning claims to his

¹⁰⁷ *Doshi v. Yeob Tiang Lay* [1975] 1 M.L.J. 85; *J. & H Just (Holdings) Pty. Ltd. v. Bank of New South Wales* (1971) 125 C.L.R. 546.

¹⁰⁸ E.g. value given for value received.

¹⁰⁹ *Chin Shak Len v. Lin Fab* (1962) 28 M.L.J. 418.

¹¹⁰ *Richards v Dove* [1974] 1 All E.R. 888; *Cooke v. Head* [1972] 1 W.L.R. 518.

¹¹¹ *Taddeo v. Catalano* (1975) 11 S.A.S.R. 492.

¹¹² *Teh Rasim v. Neman* 15 (1937) J.M.B.R.A.S. 18. In early *harta sapencarian* cases the unregistered spouse (in the majority of cases the wife) could only claim, on dissolution, a share of property jointly acquired during coverture if she had in fact worked side by side with the husband in the fields in gaining the property. Now *Roberts v. Ummi Kalthom* [1966] 1 M.L.J. 163 *harta sapencarian* is shared almost as if it is "community property" for which the requirement of actual work is not necessary.

¹¹³ If the Court must decide the existence and extent of these "interests" how can A (who allows B, his son, to "stay as long as you like and build a house on my land") know B has an interest equivalent to an equitable interest. E.g. in Peninsular Malaysia this may well be answered by saying B has no interest for this house is personalty and removable by B. *Kiah binte Hanapiab v. Som binte Hanapiab* [1953] M.L.J. 82.

title based on these equities.

Adding to this whole dilemma are the terms of section 206(3) of the *National Land Code*¹¹⁴ which seems designed to justify a total commitment to equity. Either the Courts must state that the contractual rights protected under section 206(3) are only those to which traditionally specific performance could and would be granted to effect an interest in land or alternatively that the extent of the "contractual operation" thereby preserved will be limited to that which merely produces an interest less than an interest in land and so does not affect alienated land.¹¹⁵ To ensure the arrest of the progressively modifying interpretation of the Peninsular Malaysian system the proper view of section 206(3) seems to be that the Courts must restrict the operation of the sub-section to those transactions properly founded in the traditional contract formula for which specific performance could (as a discretionary remedy) and would produce an interest in land. But although this is the preferable view it seems that the Court in consequent further modification to Torrens principles will use section 206(3) as an 'open sesame' to equity.

A characteristic of the Torrens scheme has always been that its "... registration ... [affords] to the public the means of knowing to whom the ownership of land ... belongs, what are the interests carved out of it, and what are the charges upon and the encumbrances affecting it, so that these owners may discharge the liabilities ownership entails, that those who deal with them may be protected, and ... the transfer to others of their proprietary rights may be easily and expeditiously affected."¹¹⁶

The over-abundance of equity puts the certainty of Torrens at risk¹¹⁷ Firstly in disabling those who search the Register from being able to rely on a conclusive Register, secondly by using the caveat provisions for capricious and unfounded claims and thirdly in general producing a system very like the deeds system which Torrens sought to avoid. The basic choice for our Courts must lie between certainty (achieved by the rejection of equity) and thereby justice for the community versus uncertainty

¹¹⁴ Act No. 56 of 1965. See *supra*, note 22.

¹¹⁵ Much in the way relief at law or in equity is to be given to *in personam* claims following *Frazer v. Walker* [1967] A.C. 569.

¹¹⁶ *Munro v. Didcott* [1911] A.C. 140. Lord Atkinson (delivering the judgment of the Committee) at p. 149.

¹¹⁷ Might it not also justify introduction of an Assurance Fund in Peninsular Malaysia where hitherto such a fund has not been provided? If a *bona fide* purchaser cannot rely on the Register and cannot obtain registration should not the Registrar be called to account?

(achieved by *ad hoc* 'conscionable' decisions) but justice for individual cases at the expense of the community.

If further modification to the principles of the statute is permitted it will be impossible to rely on a conclusive register. In addition those who observe the requirements of the statute in entering into transactions will be, in effect, penalised¹¹⁸ whereas failure to do so will be protected.¹¹⁹ This may represent some sort of personal justice because a statute.

"... designed for general application, allows little room for variation in individual cases, and relief from hardship [must] emanate from an authority external to the law itself."¹²⁰

But observance of the terms of the Code is not onerous nor does it inflict individual hardship. Our Courts must reject the view that

"... equity is, in the law of property, at the present day almost all-pervading, or, rather, that in the statutory pool into which both equity and common law have flung their counters, the counters flung by equity are the more numerous Property is no longer a static, but a dynamic force, which requires every other consideration to give way to the grand consideration of freedom and ease of transfer".¹²¹

Freedom and ease of transfer under Torrens come only from observance -- by all -- of the statute and the procedures therein detailed. Thence to justice for all. As Jessel M.R. observed in *Iysaght's*¹²² case

"This case is an illustration, if another illustration were wanting, of the great difficulties which arise from deciding cases for the purpose of convenience, instead of allowing the Legislature to intervene for the purpose of correcting any defect in the law."

The statute gives sufficient protection to those who deal with land as it directs, section 206(3) even given a limited interpretation should be all the equity necessary. If this is not sufficient for community (*not* personal) justice then relief should come from legislative amendment not from decisions relying on equity.

¹¹⁸See a much earlier decision under different and stricter legislation where Innes A.C.J.C. (as he then was) observed that "If English doctrines of equity are to be invoked 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". *Ramasamy Chetty v. Fan Seng Yew* (1913) 1 F.M.S.L.R. 354 at p. 356.

¹¹⁹See e.g. the *Inter-Continental* case.

¹²⁰Newman: "Law & Equity: A Comparative Study" p 12.

¹²¹H.G. Hanbury "The Field of Modern Equity" (1929) L.Q.R. 196 at pp. 196-7.

¹²²(1876) 2 Ch. D. 499.

c. *The future of the Peninsular Malaysian Torrens*

If the Courts accept and apply these expanded equitable principles, it will be of no benefit to use the bare trust (as presently applied) as a stop-gap to the wholesale importation of equity. Equity (and the trust is but a device of equity) is founded in the spirit of individual justice and conscience and so is inappropriate for and alien to Torrens. Instead, it is submitted, the Courts, if they are to use it at all, should use the bare trust sparingly only as a means to reassert Torrens (*albeit* within the liberal terms of the *National Land Code*¹²³) by

- setting out the conditions precedent for the adoption of the bare trust i.e. only where the Court is required to state in respect of the vendor and a party other than the purchaser that a registered owner due to his contractual obligations has no disposing power in the land for his own benefit.
- explaining its limitations i.e. the bare trust formula is a unilateral device of declaration of a status, which has no accompanying effect, of the vendor *vis a vis* parties other than the purchaser; and
- negating suggestions that it is a formula to cover a wide variety of circumstances where centuries before Chancery may have granted *inter partes*, individual relief.

It will little avail justice if case-to-case modification of the statute is encouraged. Thus

- a. if the semantics (unfortunately connotation of substantive content accompany such semantics) associated with "trusts", "beneficial interests" are replaced by the formula of "disposing power" and
- b. if the Courts vigorously refuse to allow interests not created in accordance with the statutory hierarchy (i.e. equities) to interfere with or prevail against those interests created in accordance with that hierarchy (i.e. the registrable interest); and
- c. if the Courts reject the application of general law doctrines e.g. of priority, of notice;

then, and only then, can the Peninsular Malaysian scheme achieve justice and certainty for all as a Torrens system. The resurgence of Torrens depends on the Courts for

"... it being clear that the Legislature has striven to compel compliance with the directions of the law as to the registration of title and as to the prescribed procedure accompanying it, it should be the first concern of these Courts to pass no judgment or order which may militate against this policy."¹²⁴

If the community requires the presence of the full-scale bare trust and

¹²³No. 56 of 1956.

¹²⁴*Ong Tin & Anor v. The Seremban Garage* (1917) 1 F.M.S.L.R. 308 (per Innes J. as he then was) at p. 316.

equity in the system, then satisfaction of this inclination is within the purview of the Legislature. Section 206(3) of the 1965 Code, as the inevitable progression from section 4 and section 5 of the pre-1926 enactments¹²⁵ and of section 55 and section 96 of the Cap. 138 enactment,¹²⁶ should offer as much modification to the system as necessary to relieve against hardship in individual cases; any further latitude would produce the mishmash of the general law system with its uncertainties, inequalities and injustice.

The most effective argument against the bare trust must be that to nominate the vendor as trustee does nothing to enhance the purchaser's interest under Torrens. If the bare trust can be examined and its effect analysed and some remedial structure produced thereby, then there may be some reason for the bare trust on the sale of land. But only if this remedial structure fits within the Torrens scheme. The chances at this stage of analysis of the bare trust and fabrication of its remedial effects suitable to Torrens are too remote.

Whatever else the Peninsular Malaysian Torrens system may be, it clearly is a system designed for local requirements¹²⁷ thus

"... a great deal of the difficulty and confusion which sometimes attend actions relating to land in this country arise from the no doubt well-intentioned efforts of counsel to force our local law into conformity with conceptions of the English law which really have very little relevance."¹²⁸

Any need for "discretion, dispensation and mitigation"¹²⁹ must be realized through the Legislature or through the Courts (in extreme cases only) applying perhaps personal law. The importation of a bare trust — unexplained as to nature and effect — leads only to produce circumstances in which "discretion, dispensation and mitigation" are applied individually. This, of course, wrecks the whole fabric of the Torrens system.

Judith Sihombing*

¹²⁵ See *supra* Note 14 p. 2.

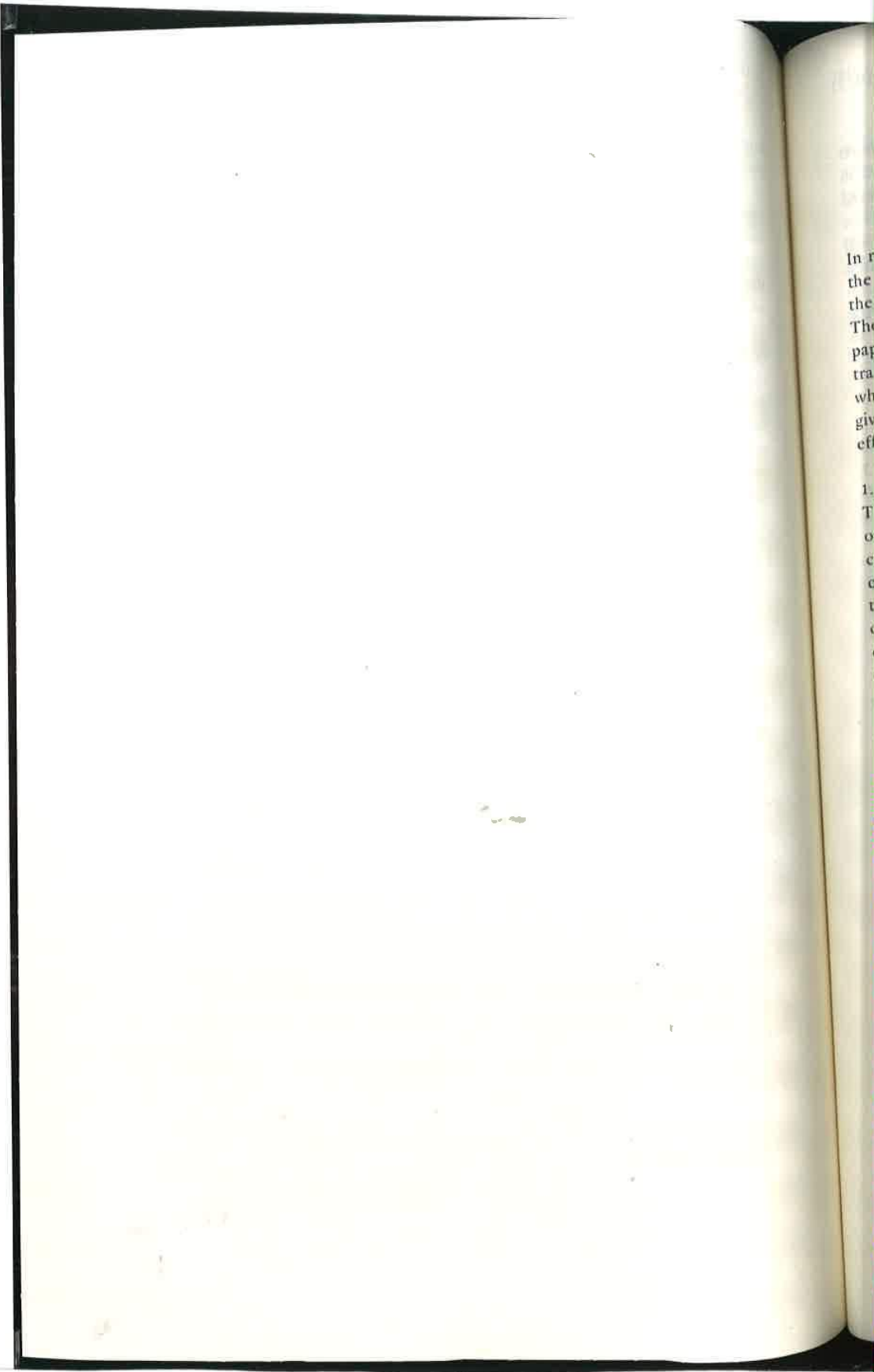
¹²⁶ See *supra* Note 17 p. 3.

¹²⁷ See e.g. *Haji Abdul Rahman v. Mohamed Hassan* (1913) 1 F.M.S.L.R. 290; See *Ong Chai Pang & Anor v. Valliappa Chettiar* (1971) 1 M.L.J. 224 *espy*, p. 228.

¹²⁸ *Bachan Singh v. Mabinder Kaur & Ors* [1956] M.L.J. 97 per Thomson J. (as he then was) at p. 97.

¹²⁹ Roscoe Pound: in the foreward to J. Newman: "Law and Equity: A Comparative Study", p. 12.

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MUSLIM FAMILY LAW REFORM IN PAKISTAN

In response to continued pressures for a more Islamic form of government, the former Prime Minister of Pakistan, Zulfikar Ali Bhutto has stated that the scope of Islamic law will be broadened and strengthened in Pakistan. Therefore, a study of Islamic law in Pakistan seems especially timely. This paper will focus on the history of Muslim family law reform in Pakistan, traditionally the heart of the Shari'ah and the major area of Islamic law which remains in force throughout the Muslim world. Emphasis will be given to both substantive legal changes and the methodologies utilized to effect them.

1. ANGLO-MUHAMMADAN LAW

The practice of traditional Muslim law in India-Pakistan in the early stages of British rule was unimpaired by foreign intervention. Although many changes came about in other areas, the judicial attitude of the British was characterized by non-interference with the prevailing legal system. Thus, traditional Hanafi law, which had been authoritative under the Mughal dynasty, remained in force. Gradually, however, mere British presence changed to an assertion of British power, especially at the end of the eighteenth century when the British East India Company became more involved in the political and legal life of the country in order to protect its own interests. Initial interference came in 1772 with Warren Hastings' reorganization of the court system by which British law was applied in the Presidencies while Muslims and Hindus continued to be governed by their respective religious laws in all matters. As *Regulation II of 1772* said:

... in all suits regarding inheritance, succession, marriage and caste and other usages or institutions, the laws of the Koran with respect to Mahomedans, and those of the Shaster with respect to the Gentoos (Hindus), shall be invariably adhered to.¹

This situation remained until the latter half of the nineteenth century when the application of Muslim law was narrowed even further by the enactment in 1862 of the *Indian Penal Code* and the *Code of Criminal Procedure*. Moreover, portions of the civil code were also codified. As a result of such measures, Islamic law in the Indian sub-continent came to be restricted to the domain of family law.

Even more important than earlier pieces of legislation for an under-

¹A.A. Fyzee, *Outlines of Muhammadan Law*, 3rd ed., (New York: Oxford University Press, 1965), p. 47.