

ABSTRACT:

***EQUITY AND UNREGISTERED LAND RIGHTS IN COMMONWEALTH
REGISTRATION SYSTEMS.***

This paper examines one specific problem in the relationship between property rules of common law and statutory systems for registration of property interests. It examines how registration schemes affect the status of unregistered rights which, at common law, would constitute property rights. Many countries' registration schemes cover this issue by an express 'sterility section'. The paper traces the interpretation of the sterility section from early English shipping statutes to its incorporation into land registration statutes of Australasia, former African colonies, and eventually Caribbean territories.

The history of the sterility section provides the opportunity to look at divergent judicial approaches taken in different jurisdictions during different times, each within a different statutory matrix. The cases considered here are of interest in reflecting different attitudes to the facility with which a statute should be interpreted as rendering equitable rights unenforceable, and the resilience of equity against statutory interference with settled doctrine.

EQUITY AND UNREGISTERED LAND RIGHTS IN COMMONWEALTH REGISTRATION SYSTEMS

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A INTRODUCTORY

Compulsory land registration is a global phenomenon. In those countries which subscribe to the common law, any statutory regime for registration has the problem of determining the relationship between the property rules of common law and the new system for registration of interests in land. This paper will look at one specific instance of this problem of the relationship of the old rules to the new system. The particular topic is how the registration scheme affects the status of unregistered rights which, at common law, would constitute property rights in land. The focus of the paper will be one section utilised in the 'Torrens' land registration statutes and incorporated in the statute in force in Kenya, and its derivatives in the British Overseas Territories in the Caribbean. The section has the benefit of judicial pronouncements on the effect of unregistered rights and an interesting legislative history which draws on earlier registration system precedents. Although the final destination is the Caribbean statute, the examination of its history provides the opportunity to look at the divergent judicial approaches taken in other jurisdictions from which the relevant parts of the statute originate. This paper will look at the judicial and academic interpretation of the provision for unregistered rights, examining the statutory context of the provisions in question, and will consider the extent to which the judicial construction has given effect to the views of those who promoted the land registration statute. The cases gathered here are of interest in reflecting different attitudes to the facility with which a statute should be interpreted as rendering equitable rights unenforceable, and the resilience of equity against statutory interference with its settled doctrine.

B EVOLUTION OF LAND REGISTRATION LAW IN THE COMMONWEALTH

Land registration systems throughout the Commonwealth are enacted for the purpose of simplifying and conferring certainty on land titles in order to achieve faster, cheaper and more reliable dealings in land. Land registration is perceived to require some discouragement against 'off register' dealings by which persons dispose of land rights without registration of the dealings, as this would have the adverse effect of leading to incompleteness of the register, with potential prejudice of a disponee who relies on a register which has become outdated. To disarm off register dealings, land registration statutes commonly contain a provision to the effect that off register dealings are ineffective or 'sterile'.

Commonwealth courts have been repeatedly tested by litigation concerning the priority of rights in registered land where one or more of the rights is unregistered. The judicial approach has not been consistent, and judgments reveal quite disparate understandings of the fundamentals of land registration. This paper will explain the circumstances in which the problem has come about and will work through the relevant parts of the statutes and demonstrate how the courts

have dealt with the obscure draftsmanship, apparently conflicting provisions and tensions between statutory objectives.

It is proposed to consider the hypothesis that, on the proper interpretation of the relevant statutes, rights concerning land have no proprietary quality unless registered, that such rights are not property rights and that they consequently fall outside the scheme of priorities contained within the registration statute. This will be termed the ‘sterility hypothesis’ following the so-called sterility section¹, which the hypothesis regards as rendering sterile or ineffective all unregistered rights.

As a basis for discussion, this paper will use the ‘sterility section’ found in s 38(1) of the Kenyan Registered Land Law 1963:

No land, lease or charge shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge.

The language of s 38 appears sufficiently broad to be applicable to every unregistered right. It operates wherever there is an attempt to dispose of the interest in land. This would certainly cover attempts by contract, gift, will or other consensual method and possibly also informal conduct which at common law gives rise to a constructive or resulting trust or proprietary estoppel claim. ‘Disposition’ in the Registered Land Act is defined as ‘any act by a proprietor whereby his rights in or over his land, lease or charge are affected, but does not include an agreement to transfer, lease or charge.’² This broad definition defines by reference to the consequences of the disposition rather than to the conduct which generates the right, so within its ambit must fall all mechanisms for the creation and transfer of interests in land, even those based on informal conduct such as estoppel.

This paper will now look at the legislative history of s 38. The story of this form of sterility provision begins with its embodiment as a traditional provision of shipping legislation, although there are even earlier statutes that had sought a similar effect by suspending the force of a dispositive instrument pending registration in the deeds registry.³

1 Interpretation of the English Shipping Acts

The sterility provision can be traced to its first manifestation in a Shipping Act of 1786.⁴ After a succession of intermediate statutes⁵ it became incorporated in the Shipping Act 1845 in two limbs. First, the Act provided that a sale of a ship was to be effected by written instrument reciting the certificate of registration, otherwise the transfer ‘shall not be valid or effectual for

¹ This nomenclature is taken from the leading Canadian land registration text, V Di Castri *Registration of Title to Land* (Carswell Toronto 1987 Looseleaf) para 748.

² Section 3 of the Registered Land Law 1963 (Kenya).

³ Eg Statute of Enrolments 1535 (England) 27 Hen 8, c 16; s 8 of the Bedford Levels Act 1663 (UK) 15 Car 2, c 17.

⁴ Section 17 of the Shipping Act 1786 (UK) 26 Geo 3, c 60.

⁵ 34 Geo 3, c 68; 6 Geo 4, c 110; 3 & 4 Will 4, c 55.

any purpose whatever, either in law or in equity.’⁶ This was supplemented by the second limb, a registration requirement, which declared that prior to registration, ‘no bill of sale or other instrument in writing shall be valid and effectual to pass the property in any ship or vessel, or in any share thereof, or for any other purpose.’⁷ The purpose was originally to prevent the acquisition of interests in British ships without registration, to serve the particular objective of preventing secret acquisition by aliens. The provision was clearly effective to inhibit the mischief at which it was aimed, for, in reversal of the settled principle of equity,⁸ the English courts⁹ construed the section as preventing the vesting in purchasers or mortgagees of any proprietary interest in the ship where the parties failed to comply with the formalities of the Act.

The earlier shipping laws explicitly declared that contracts to transfer would suffer the same fate as informal transfers, but the 1845 consolidation of the shipping statutes neglected to include this provision. Nevertheless, the courts held that the policy demanding notorious ownership remained alive, and the court read into the consolidating statute a continuing ban on enforcement of unregistered contracts, by construing the statutory word ‘sale’ as including executory contracts to sell.¹⁰ Accordingly specific performance would still be declined¹¹ and no action for damages at law for non-performance could be sustained.¹²

On further consolidation of the Shipping Acts, another omission occurred. The new 1854 Act dropped the former statutory words (‘shall not be valid or effectual’) indicating the effect of failure to comply with the formalities, while retaining the direction¹³ that ships be transferred by a formal and registered bill of sale. On the effect of the omission, the Lord Chancellor said, ‘No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience’¹⁴ but found that the peculiarity of the forms of transfer and their purpose in determining flag were indicative that the statutory provisions were obligatory, and failure to comply would render an instrument ineffective to pass any equitable interest to the purchaser. He concurred in all the reasoning of the judge, who had given a more substantial judgment. The Vice-Chancellor at first instance had initially considered whether the policy of the shipping statutes had been altered by the consolidating Act: this was answered in the negative, the court presuming that no policy change was intended, and finding no evidence to rebut that. Secondly, the lower court also made reference to the fact that ‘it would be an idle form to say that a

⁶ Section 34 of the Shipping Act 1845 (UK) 8 & 9 Vict, c 89.

⁷ Section 37 of the Shipping Act 1845 (UK) 8 & 9 Vict, c 89.

⁸ *Shaw v Foster* (1872) LR 5 HL 321 (HL), *Lysaght v Edwards* (1876) 2 ChD 499 (MR).

⁹ Eg *McCalmont v Rankin* (1852) 2 De G McN & G 403; 42 ER 928 (LC) (decided under the Shipping Act 1833 (UK) 3 & 4 Will 4, c 55; *Hughes v Morris* (1852) 2 De G McN & G 349; 42 ER 907 (CA) decided under the Shipping Act 1845 (UK) 8 & 9 Vict, c 89.

¹⁰ Eg *McCalmont v Rankin* (1852) 2 De G McN & G 403, 419; 42 ER 928, 935 (Lord St. Leonards LC).

¹¹ *Hughes v Morris* (1852) 2 De G, McN & G 349; 42 ER 907 (CA).

¹² *Duncan v Tindall* (1853) 13 CB 258; 138 ER 1197 (CP).

¹³ Section 55 of the Merchant Shipping Act 1854 (UK) 17 & 18 Vict, c 104.

¹⁴ *Liverpool Borough Bank v Turner* (1861) 2 De G F & J 502, 507-8; 45 ER 715, 718 (Lord Campbell LC). The decision in was later reversed by statute to allow for the recognition and enforcement of interests arising under contract and other equitable interests: s 3 of the Merchant Shipping Act 1862 (UK) 25 & 26 Vict, c 63.

mortgage may be made in a particular way, when it might be made in any other way with the same effect.¹⁵ Thirdly, it was said that the references elsewhere in the Act to equitable interests did not point to a change of legislative policy in favour of recognising equitable interests by virtue of the equitable doctrine applicable to executory contracts, since those statutory references could be limited to the specific categories of equitable interest sanctioned by the Act, such as the rights of legatees under the trust binding their executor.

2 Interpretation of the South Australian sterility section

The sterility section of the shipping legislation was then adopted (alongside other important provisions finding their ancestry in the English law relating to registration of title to ships¹⁶) in respect of unregistered interests in land, as part of the reforms of land law initiated by Sir Robert Torrens in South Australia.

The Shipping Act provision was introduced into the Torrens land legislation in the following form¹⁷:

No instrument shall be effectual to pass any estate or interest in any land under the operation of this Act, or to render such land liable as security for the payment of money, but so soon as the Registrar-General shall have entered the particulars thereof in the book of registry, and made endorsement on such instrument as hereinafter directed to be made in each such case respectively, the estate or interest shall pass or, as the case may be, the land shall become liable to security in manner and subject to the conditions and contingencies set forth and specified in such instrument.¹⁸

The similarity between the provisions shows that Torrens intended his section to replicate the effect of the Merchant Shipping Act provision, namely, that the section was intended to cover unregistered property rights, and Torrens made it clear that he understood the functioning of the sterility section of the shipping legislation.¹⁹ An integral part of Torrens' initial reform platform

¹⁵ *Liverpool Borough Bank v Turner* (1860) De G F & J 159, 171; 45 ER 703, 708 (Sir William Page Wood V-C).

¹⁶ Various sections are adopted from the Merchant Shipping Acts 1845 and 1854 (UK) and the Rules Orders and Regulations for the High Court of Admiralty of England 1859 (Eng). See PM Fox 'The Story behind the Torrens System' (1950) 23 Australian Law Journal 489, 492.

¹⁷ The history of the drafting of the Real Property Act and amending Acts is recounted in D Pike 'Introduction of the Real Property Act in South Australia' (1961) 1 Adelaide Law Review 169; DJ Whalan 'The Origins of the Torrens System and its Introduction into New Zealand' in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths Wellington 1971); see also *Dobbie v Davidson* (1991) 23 NSWLR 625 (NSW CA).

¹⁸ S 31 of the Real Property Act 1858 (South Australia). Re-enacted with slight improvement as section 39 of the Real Property Act 1861 (South Australia), and later as s 67 of the Real Property Act 1886 (South Australia).

¹⁹ Torrens had seventeen years' experience in the working of 'the system of transfer and incumbrance of shipping property by registration' under the imperial Merchant Shipping Act, both in the Customs Department at London and as Collector of Customs in South Australia: RR

was to establish the register as the exclusive source of title. His guiding concept during the formative stages was to treat his new conveyancing as a version of the surrender and admittance familiar to legal historians in the context of English copyhold tenure. The method of transfer in this tenure was not by direct transfer, but by a surrender from the copyholder to the lord of the manor followed by the issue by the lord of a new title to the purchaser, the title being dependent on registration in the record of the Manor Court. Torrens declared²⁰ that his 1858 Act was, in principle, identical, with the purchaser taking a direct grant from the Crown rather than relying on the validity of the past chain of title.²¹

Torrens knew that the Merchant Shipping Acts prevented the generation of proprietary equitable interests from unregistered instruments. He disapproved²² of the law-equity duality of English law, and specifically wanted to eliminate the possibility of unregistered equitable interests prejudicing purchasers. In his original scheme for registered land titles there were provisions conferring the attribute of indefeasibility on titles²³, but there was no section designed to protect a purchaser from the doctrine of notice²⁴, and one may suggest that no such provision was necessary if equitable interests were not to be recognised. Bringing together these indicators, it is possible to infer that Torrens' idea was to prevent the proprietary effects of equitable interests vis-à-vis third parties (although without prejudice to the personal equitable relationship between the person creating the right and its recipient²⁵). This is reinforced by Torrens' unambiguous comment in the South Australia legislature that 'anything not registered should be treated as not having existence.'²⁶

In its new Australian land law setting, the sterility section received differing judicial interpretations. Initially – as demonstrated by *Lange v Rudwoldt*²⁷ – the courts recognised that the section both denied proprietary status to unregistered rights and prevented the personal right to enforcement of any unregistered contract to dispose of an interest in the land, whether by specific performance or damages for non-performance, in accordance with the interpretation of the English Shipping Acts. It is doubtful that this reflected Torrens's intended plan, for while he made the apparently categorical declaration that unregistered rights had no existence, he also in

Torrens *Speeches of Robert R. Torrens Esq* (Adelaide 1858) 12. Torrens had also been advised by Hübbe on the operation of the Hanseatic systems of title registration which denied recognition to unregistered interests: S Robinson *Transfer of Land in Victoria* (Law Book Co Ltd Sydney 1979) 11-25.

²⁰ RR Torrens *The South Australia System of Conveyancing by Registration of Title* (Adelaide 1859) 12.

²¹ RR Torrens (n 19) 34.

²² RR Torrens (n 19) 4, 35; RR Torrens *Speeches of Robert R. Torrens Esq* (Adelaide 1858) 7, 13.

²³ In particular, ss 31 and 33 of the Real Property Act 1858 (South Australia).

²⁴ Such a provision was included in subsequent Real Property Acts and became known as the 'notice section.' On the evolution of the indefeasibility provisions, see WN Harrison 'The Transformation of Torrens' System into the Torrens System' (1962) 4 University of Queensland Law Journal 125.

²⁵ There was, for example, explicit reference to trusts in the original statute: s 60 of the Real Property Act 1858 (South Australia).

²⁶ RR Torrens *Speeches of Robert R. Torrens Esq* (Adelaide 1858) 15.

²⁷ *Lange v Rudwoldt* (1872) 7 SALR 1 (SA SC).

the same speech stated that prior to registration, dispositions should be ineffective ‘except as personal contracts between the individuals.’²⁸ In the words of a Canadian commentator, Torrens’ scheme was designed so that ‘what would formerly have been an equitable estate or interest was to be relegated to a “right” assertable and enforceable against the registered owner in personam.’²⁹

This initial judicial approach was rapidly abandoned as *Lange v Rudwoldt* was overruled and the enforceability of personal contractual rights was acknowledged despite the sterility section. In *Cuthbertson v Swan*³⁰, the defendant pleaded that the Real Property Act 1861 prevented the enforcement of his contract to purchase land by way of an action for damages for non-performance. The court reviewed the Shipping Acts and the English cases showing that those Acts barred the enforcement of executory contracts for the acquisition of property rights in ships, but, despite the common interest of both shipping and land registration systems in suppressing the proprietary effect of unregistered interests, found the analogy of the Shipping Acts to be weak because the national interest promoting by disclosing ship ownership³¹ was not applicable to land ownership.³² Accordingly the court rejected the comparison with the Shipping Acts insofar as personal enforcement of contracts was concerned.

Despite recognising the contractual relationship between the vendor and purchaser, the Australian court did not regard this contract alone as justifying the enforcement of the contract in equity by a decree for specific performance; rather, it was said that the right to have an agreement specifically performed proceeded upon the doctrine that an agreement to sell land constituted the seller the trustee of the land for the purchaser.³³ After tying the availability of specific performance to the existence of a trust, the court embarked on a consideration of whether the Real Property Act allowed for the recognition of trusts. It found from the references to equitable interests elsewhere in the Act that trusts were consistent with the Act (albeit that they would often be unenforceable against purchasers by virtue of the indefeasibility provisions) and consequently equity was able to order specific performance. Up to this point, the judicial solution is consistent with the recognition of a trust insofar as the trust describes the *personal relationship* between trustee and beneficiary: however, the judgment in *Cuthbertson v Swan* indicated that the trust did not merely describe the rights and duties as between trustee and beneficiary, but entailed full proprietary consequences, setting up a proprietary beneficial interest in the beneficiary that would be enforceable against third parties. It appears that the court in *Cuthbertson* did not canvass the possibility that the trust relationship could be limited to

²⁸ RR Torrens *Speeches of Robert R. Torrens Esq* (Adelaide 1858) 15.

²⁹ V Di Castri *Registration of Title to Land* (Carswell Toronto 1987 Looseleaf) para 748, developing the statements of DJ Thom *The Canadian Torrens System* (Burroughs & Co Ltd Calgary 1912) 127.

³⁰ *Cuthbertson v Swan* (1877) 11 SALR 102 (SA SC).

³¹ See the comments of Sir William Page Wood V-C in *Liverpool Borough Bank v Turner* (1860) 1 J & H 159, 169; 70 ER 703, 708; upheld on appeal (1861) De G F & J 502; 45 ER 715 (LC).

³² *Cuthbertson v Swan* (1877) 11 SALR 102 (SA SC) 111 (Stow J).

³³ *Cuthbertson* 109 (Stow J). The leading English decisions in *Shaw v Foster* (1872) LR 5 HL 321 (HL) and *Lysaght v Edwards* (1876) 2 ChD 499 (MR) suggest that it is the enforceable contractual obligation which generates the trust, and not *vice versa* as indicated in *Cuthbertson*.

enforceability against the trustee alone³⁴ as a matter of equitable obligation instead of equitable property, and therefore contradicted the draftsman's own explanation of the Act.

This decision significantly derogated from the sterility section, which could no longer be regarded as enacting a comprehensive block on the recognition of unregistered proprietary rights. Since equitable proprietary rights were to be acknowledged, the sterility section could have application in respect of 'legal estates and interests only.'³⁵ Following the decision, the recognition of trusts and other varieties of equitable interests became deeply embedded in the case law of the Torrens system jurisdictions³⁶ and has coloured the interpretation of other sections of the registration statute.³⁷

The historical evidence of Torrens' intended scheme of 1857 suggests that its provisions dealing with security of titles were meant to apply to legal and equitable rights equally, and it would appear that the courts have persevered in a false step in allowing unregistered equitable interests to be recognised as proprietary burdens rather than mere personal obligations. However, the first Real Property Act was amended many times during the immediately following years, with some substantial repeals, additions and amendments, and it has been suggested that these rendered Torrens' writings and speeches of 1857 and 1858 out-dated and inaccurate to describe the scheme eventually settled.³⁸ In particular, these developments significantly detracted from the idea of a fresh grant by the state on the issue of each new registered title, causing Torrens' analogy with the surrender and admittance to copyhold title to be superceded. But whatever Torrens' initial plan in the 1850s, the weight of judicial authority has for many years made it now 'almost impossible'³⁹ to sustain any argument that equitable interests should not be recognised under the Torrens system, and in the Canadian Torrens systems it is even proposed to discard the sterility section entirely to reflect this judicial development.⁴⁰

³⁴ Plus perhaps against transmitters of the property who take in a representative capacity, such as the trustee in bankruptcy or personal representative.

³⁵ *Cuthbertson v Swan* (1877) 11 SALR 102 (SA SC) 113 (Stow J).

³⁶ In particular, Privy Council decisions in *Williams v Papworth* [1900] AC 563 (PC); *Great Western Permanent Loan Co Ltd v Friesen* [1925] AC 208 (PC); *Abigail v Lapin* [1934] AC 491 (PC) and High Court of Australia decisions in *Barry v Heider* (1914) 19 CLR 197 (HC Australia) and *Butler v Fairclough* (1917) 23 CLR 78 (HC Australia).

³⁷ In particular, the provisions known as the 'notice section' and the 'paramountcy section' (for a recent example, see *Gardener v Lewis* [1998] 1 WLR 1535 (PC) on appeal from Jamaica).

³⁸ WN Harrison 'The Transformation of Torrens' System into the Torrens System' (1962) 4 University of Queensland Law Journal 125. Torrens himself later admitted, 'I brought out my scheme in the form of a Bill – a very defective one, as I too timidly followed the language as well as the forms of my model, the Shipping Act.' RR Torrens *Transfer of Land by Registration of Title* (London 1872) 6. See also S Robinson *Transfer of Land in Victoria* (Law Book Co Ltd Sydney 1979) 11-25 and M Raff *Private Property and Environmental Responsibility - A Comparative Study of German Real Property Law* (Kluwer Law International forthcoming).

³⁹ DJ Whalan *The Torrens System in Australia* (Law Book Co Sydney 1982) 282. For the same reason the argument was regarded as 'unrealistic' in V Di Castri *Registration of Title to Land* (Carswell Toronto 1987 Looseleaf) para 748.

⁴⁰ Clause 4.4(1) of the Draft Land Recording and Registration Act in Alberta Law Reform Institute *Proposals for a Land Recording and Registration Act for Alberta* (Report No 69 Edmonton 1993); see also Alberta Law Reform Institute *Towards a New Alberta Land Titles Act*

3 The sterility section in African and Caribbean land statutes

From South Australia, the sterility section passed into the land titles legislation of the other Australian states, which were used as the basis for land title systems introduced elsewhere in Asia, Africa, Europe and North America. For our purposes the next stage in the history of the sterility section is its incorporation into certain African reforms. In 1957, the Colonial Office's Land Tenure Specialist, S. R. Simpson, proposed land law and land registration reforms for Lagos⁴¹, recommending the inclusion of provisions relating to indefeasibility of land titles based in part on the Kenyan⁴² and Sudanese⁴³ land registration laws which were themselves based on the schemes found in Torrens' eponymous Real Property Act 1858 of South Australia. The Simpson report was followed by a Lagos Working Party Report⁴⁴ which put forward the Lagos Registered Land Bill 1960. Although developments in Lagos were then postponed, an unofficial committee in Kenya proposed similar reforms for Kenya, drawing heavily on the Lagos Bill, and also considering the registration laws of Kenya, Singapore, Tanganyika and Sudan.⁴⁵ The Kenyan committee's 1961 Registered Land Bill was eventually enacted as the Kenyan Registered Land Act 1963. This statute has achieved some prominence in the Commonwealth because of its adoption in other countries⁴⁶ and through Simpson's popular textbook on land registration.⁴⁷

Even if there are doubts on whether Torrens intended equitable interests to lose their proprietary character, there is strong evidence that the draftsmen of the Kenyan legislation intended exactly that. Simpson's Lagos report, like Torrens, persistently attacked the duality of English law which recognised informal equitable interests as burdens on a legal title.⁴⁸ When the draft Lagos Bill 1960 was prepared, it made the purpose of the sterility section abundantly clear: any unregistered disposition was 'ineffectual to create, extinguish, transfer, vary or affect any

(Report No 8 Edmonton 1993) para 4(a). The proposal has been implemented in s 16(1)(a) of the Metis Settlements Land Registry Regulation (Alberta).

⁴¹ *A Report on the Registration of Title to Land in Lagos* (Lagos 1957).

⁴² Registration of Titles Ordinance 1919 (Kenya).

⁴³ Land Settlement and Registration Ordinance 1925 (Sudan).

⁴⁴ *Report of a Working Party on Registration of Ownership of Land in Lagos* (Lagos 1960). SR Simpson also sat on this committee.

⁴⁵ Registration of Titles Ordinance 1919 (Kenya), Land Titles Ordinance 1956 (Singapore), Land Registration Ordinance 1953 (Tanganyika), Land Settlement and Registration Ordinance 1925 (Sudan).

⁴⁶ Versions of the Kenya statute have been enacted in Nigeria, Malawi, Seychelles, Solomon Islands, Belize, and the six Caribbean territories mentioned below. In Kenya, as in other countries, the Act operates only on such land as has been brought under its provisions – only a small fraction of all land – leaving the remainder to be dealt with under the unregistered system or rival registration statutes.

⁴⁷ SR Simpson *Land Law and Registration* (Cambridge University Press Cambridge 1976).

⁴⁸ *A Report on the Registration of Title to Land in Lagos* (Lagos 1957) paras 26, 33. It is apparent from this report that Simpson was familiar with Torrens' writings on the South Australian Real Property Act.

estate, right or interest *legal or equitable*⁴⁹ (emphasis added). In the light of this, there can be no doubt surviving that the Working Party's intention for the Lagos Bill was to eliminate all proprietary effect of unregistered interests. With the categorical statement that 'anything not on the Register and which is not an 'overriding interest' creates no right or interest in land,'⁵⁰ there was to be no scope for the possibility that unregistered rights could be found by the court to subsist as equitable proprietary interests.⁵¹ The same view of equitable interests was carried over into the Kenya reforms: by illustration, it was later said of the Kenyan system that the recognition of an equitable mortgage arising under a contract to create a mortgage supported by deposit of land certificate was inconsistent with the scheme of the Act.⁵² Nevertheless, it is plain that personal enforceability was intended to be retained, contrary to *Lange v Rudwolt*⁵³: this is seen in the saving for the enforceability of contracts in the sterility section, and the saving for the enforceability of trustee obligations as between trustee and beneficiary in the trustee dealing section.⁵⁴

One intriguing aspect of the Kenyan Bill was that while it had a clause holding unregistered dispositions ineffective, it did not contain the three emphasised words (referring specifically to legal and equitable interests) that were present in the Lagos Bill.⁵⁵ Can it be deduced from this omission that the Kenyan committee was intending to revert to the practice of the Australasian systems by rendering unregistered dispositions ineffective to affect any legal interest, but allowing equitable interests to be created and disposed *dehors* the registration system? Although the omission of the words must be presumed to be deliberate in the light of the extensive scrutiny of the Kenyan Bill and not an inadvertent oversight, it is submitted that the omission does not affect the comprehensive operation of the clause. I can locate no explanation of the draftsmen for dropping the three words, yet I tentatively suggest that the reason is, paradoxically, to reduce the opportunity for misinterpretation of the Bill by recognising equitable proprietary interests. One of the most important of the draftsmen's aims, as indicated by the Lagos reports and comments on the Kenyan Act noted above, was to abolish the strange duality of legal and equitable interests, to be replaced by a new scheme which made no reference to any such distinction; perhaps one may be permitted to surmise that the Kenyan committee felt an explicit reference to preventing legal and equitable interests could be used to infer that the new

⁴⁹ Clause 54(1) of the Land Registration Bill 1960 (Lagos).

⁵⁰ *Report of a Working Party on Registration of Ownership of Land in Lagos* (Lagos 1960) p 4 para 6(m). Simpson subsequently highlighted this comment in a discussion of the Kenyan Act: SR Simpson *Land Law and Registration* (Cambridge University Press Cambridge 1976) 448.

⁵¹ TW Mapp *Torrens Elusive Title* (Alberta Institute for Law Research and Reform Edmonton 1978) 145, apparently unfamiliar with the Simpson reports, suggested that this saving provision for contracts should be taken as implicitly permitting proprietary consequences of the trust arising from a specifically-performable contract for the sale of land.

⁵² *Report of the Mission on Land Consolidation and Registration in Kenya (1965-1966)* (Nairobi 1966) para 264. SR Simpson was a member of this Mission so one may assume his imprimatur in respect of this comment.

⁵³ *Lange v Rudwolt* (1872) 7 SALR 1 (SA SC).

⁵⁴ Respectively, cll 54(2) and 128(3) of the Lagos Land Registration Bill 1960, carried into the Kenyan reform as ss 38(2) and 126(3) of the Registered Land Act 1963.

⁵⁵ Clause 54(1) of the Land Registration Bill 1960 (Lagos). See the quotation in the text at footnote 46.

code maintained the common law's division of interests into legal and equitable rights, instead of accepting an era of rights to be classified solely as registered or unregistered. This is speculative, but it may be noted that the Kenyan legislation at no other point makes any reference to equitable interests in distinction to legal interests.

4 Interpretation of the sterility section in the Caribbean Territories

During the 1960s and 1970s, the British colonies in the Caribbean⁵⁶ participated in a regional scheme⁵⁷ for land administration, enacting virtually identical laws for the comprehensive surveying and compulsory registration of land⁵⁸, utilising a model statute taken almost verbatim from the Registered Land Act 1963 of Kenya. The materials which assist the interpretation of the Lagos and Kenyan reforms are therefore directly applicable to the interpretation of the Caribbean islands' land registration laws and there is naturally the strongest case for contending that the interpretation of the Kenyan Act explained above should be equally applicable; the result would be that the Caribbean sterility sections would be interpreted so as to prevent the recognition of both legal and equitable proprietary interests unless registered. In this paper I will concentrate on the interpretation given to the land registration statute of the Cayman Islands.

The Cayman cases on the sterility section can be divided into two streams. The first case on the interpretation of the sterility section was *Paradise Manor Ltd v Bank of Nova Scotia*⁵⁹, in which no cases were cited on the interpretation of the sterility section, and the Court of Appeal reached the conclusion that its effect was to prevent the recognition of proprietary rights that law and equity would otherwise hold to emanate from unregistered transactions: 'An unregistered instrument can have effect only as a contract. As a contract it may be enforced by applying to the court for specific performance compelling the other party to the contract to execute an instrument

⁵⁶ Anguilla, Antigua and Barbuda, British Virgin Islands, Cayman Islands, Montserrat, Turks and Caicos Islands. All but Antigua and Barbuda remain British Overseas Territories. Belize subsequently enacted a version of the Kenyan model land registration.

⁵⁷ The Regional Cadastral Survey and Registration Project (1972-1977) of the UK Ministry for Overseas Development and the British Development Division in the Caribbean. The project developed from the Commonwealth Development and Welfare Scheme for the Adjudication and Registration of Land in the Turks and Caicos Islands. The project led to new land administration systems in British Virgin Islands (1971), Cayman Islands (1972), Anguilla (1972), Antigua (1975). A similar scheme was implemented in Montserrat (1978) through the Development Division with assistance from the Department of Overseas Survey. See KC Dunlop 'The Implementation and Operation of the Cayman Islands Land Registry' (Commonwealth Survey Officers Conference Cambridge 1983); KC Dunlop 'Land Registration in the Cayman Islands' (1986, unpublished); LJ Howells 'The Cadastral Survey and Registration Project in the Caribbean' (1974) *Chartered Surveyor* (Quarterly Supplement 1) 51.

⁵⁸ Local laws embodying the Caribbean statute are: Registered Land Ordinance, 1974 (Anguilla); Registered Land Act 1975 (Antigua and Barbuda); Registered Land Ordinance 1970 (British Virgin Islands); Registered Land Law (1995 Revision) (Cayman Islands); Registered Land Ordinance 1978 (Montserrat); Registered Land Ordinance 1967 (Turks and Caicos Islands).

⁵⁹ *Paradise Manor Ltd v Bank of Nova Scotia* [1984-85] CILR 437 (Cayman Islands CA).

in the prescribed form and registering it.’⁶⁰ That decision was followed by the Court of Appeal in *Mums Incorporated v Cayman Capital Trust Co BV*⁶¹, and then both *Mums* and *Paradise* were approved in *H Ltd v B*.⁶² In neither of the later cases were any other authorities cited by the court.

The second stream of Cayman cases consists of *Myles v Prospect Properties Ltd*⁶³ in the Court of Appeal and various later cases in the Grand Court.⁶⁴ In none of these decisions were any of the cases from the first stream cited, but Privy Council cases⁶⁵ arising from Torrens jurisdictions were followed and it was accepted that the Registered Land Law did not preclude the recognition of proprietary status for unregistered rights: ‘the competing interests of the parties in the present case do not depend on legal title and must therefore be resolved outside the [Registered Land Law].’⁶⁶ The result of the two streams of Cayman cases is to leave the law with a conflict of authority at Court of Appeal level.

The validity of using the Australasian Torrens system cases in the Caribbean registration systems to supply authority in favour of recognising unregistered proprietary interests must be doubtful. The Australasian approach to the equivalent sterility section shows that it is not accepted as abolishing proprietary equitable interests, and the cases would therefore appear to go against the sterility hypothesis proposed for the Caribbean statutes. I have argued that these Australasian cases do not accord with Torrens’ original scheme, but I would also suggest that the cases do not assist in the interpretation of the Caribbean statutes because of the significant difference in wording between the Caribbean and Torrens sterility provisions. The difference lies in references to the effect of ‘instruments.’ The Torrens statutes declare:

No instrument shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render any such land liable as security for the payment of money, but, upon the registration of any instrument in manner hereinbefore described, the estate or interest specified in the instrument shall pass, or, as the case may be, the land shall become liable as security...⁶⁷

⁶⁰ *Paradise* 480 (Henry JA).

⁶¹ *Mums Incorporated v Cayman Capital Trust Co BV* (1990) [2000] CILR 131 (Cayman Islands CA).

⁶² *H Ltd v B* [1994-5] CILR 343 (Cayman Islands GC).

⁶³ *Myles v Prospect Properties Ltd* [1994-95] CILR 1 (Cayman Islands CA).

⁶⁴ *Jones v Registrar of Lands* [1998] CILR 71 (Cayman Islands GC); *Esso Standard Oil SA Ltd v Jose’s Ltd* [1999] CILR 51 (Cayman Islands GC) 103; *Bonotto v Boccaletti* [2001] CILR 120 (Cayman Islands GC) 131.

⁶⁵ *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC); *Frazer v Walker* [1967] 1 AC 569 (PC).

⁶⁶ *Jones v Registrar of Lands* [1998] CILR 71 (Cayman Islands GC) 88 (Smellie CJ).

⁶⁷ Section 41 of the Land Transfer Act 1952 (New Zealand). All of the Australian Torrens Acts similarly refer to the effect of ‘instruments’, except s 41 of the Real Property Act 1900 (New South Wales), which prescribes the same effect for any ‘dealing.’ S 181 of the Land Title Act 1994 (Queensland) prevents the unregistered instrument from transferring or creating an interest ‘at law.’

The application of this section is limited to any ‘instrument.’ Despite considerable authority to the contrary prior to the early 1900s⁶⁸, later Torrens system cases have consistently held⁶⁹ that a transaction (with or without a supervening ‘instrument’) is indeed capable of passing an interest in land. For example, where a contract for the sale of land is concluded and recorded in an instrument, the instrument itself is incapable of passing an equitable interest to the purchaser but the mere fact of the agreement enforceable between the parties will confer an equitable interest on the purchaser⁷⁰: ‘If the equitable interest is regarded as arising from the transaction behind the unregistered instrument, no violence is done to the wording of s 41(1) of the Land Transfer Act 1952 [the New Zealand sterility section].’⁷¹

The sterility section of the Kenyan and Caribbean statutes is broader than that found in the Australasian Torrens systems. The Kenyan provision applies to every ‘attempt to dispose’ rather than every instrument. The word ‘disposition’ is given the widest definition in s 2 of the Registered Land Act and one must assume⁷² that the same definition applies to the cognate verb ‘dispose’ found in the sterility section. There is, consequently, no opportunity to argue that, for example, the existence of an executory agreement to sell an interest in land is itself capable of setting up an equitable interest in the purchaser – there is a transaction underlying an ineffectual instrument, but that transaction is in itself an attempt to dispose of an interest in land within the extended definition of disposition, and therefore is ineffective to confer any proprietary rights. The cases interpreting the Australasian statutes are therefore of little value in the Kenyan and Caribbean systems, and one may even question whether the wording of the section was deliberately changed by the Kenyan draftsmen in order to escape the reasoning of the Australasian cases. I suggest that the Australasian cases are weak aids to interpreting the Kenyan and Caribbean legislation, and that greater assistance may be obtained from a reading of the commentaries left by the respective draftsmen.

C THE STERILITY HYPOTHESIS AND THE STATUTORY CONTEXT

⁶⁸ Eg *Registrar of Titles v Paterson* (1876) 2 App Cas 110 (PC); *National Bank of Australasia Ltd v United Hand in Hand and Band of Hope Co* (1879) 4 App Cas 391 (PC); *McEllister v Biggs* (1883) 8 App Cas 314 (PC). See JF Burrows ‘Unregistered Interests and the Land Transfer Act 1952’ (1971) 4 New Zealand Universities Law Review 290.

⁶⁹ From Australian Torrens systems: *Barry v Heider* (1914) 19 CLR 197 (HC Australia); *Butler v Fairclough* (1917) 23 CLR 78 (HC Australia); *Abigail v Lapin* [1934] AC 491 (PC); *Breskvar v Wall* (1971) 126 CLR 376. From the New Zealand Torrens system: *Farrier-Waimak Ltd v Bank of New Zealand* [1965] AC 377 (PC). From Canadian Torrens systems: *Great Western Permanent Loan Co Ltd v Friesen* [1925] AC 208 (PC).

⁷⁰ *Barry v Heider* (1914) 19 CLR 197 (HC Australia); *Brunker v Perpetual Trustee Co Ltd* (1937) 57 CLR 555 (HC Australia).

⁷¹ GW Hinde, DW McMorland and PBA Sim *Land Law in New Zealand* (Butterworths Wellington 1997) para 2.045. See also JF Burrows ‘Unregistered Interests and the Land Transfer Act 1952’ (1971) 4 New Zealand Universities Law Review 290.

⁷² Compelled, rather than assumed, in the Cayman Islands by virtue of s 12(3) of the Interpretation Law (1995 Revision).

So far I have considered a description of the applicability and consequences of the sterility section based on its legislative origin and case interpretations, but in isolation from the remainder of the land registration statute. It is now necessary to see if there is in the registration statute anything which is inconsistent with the interpretation of the sterility section put forward, or anything which qualifies or derogates from the interpretation of that section. Three relevant sections dealing with priority issues will be examined, the first of these being the notice section. The basis for discussion will once again be the Kenyan Registered Land Act 1963.

1 The notice section

After the first Real Property Act was passed in South Australia, diverse amendments were made, often to reverse the decisions or forestall suggestions of an occasionally antagonistic legal profession and judiciary.⁷³ One such provision⁷⁴ was another section on indefeasibility of title, often labelled the 'notice section', based on a provision found in the English Merchant Shipping Act 1854.⁷⁵ Whereas the Shipping Acts and Torrens statutes have the notice section in a single form, the Kenyan Act divided the section into two limbs⁷⁶:

No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned-

- (a) to enquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered;
- (b) to see to the application of any consideration or any part thereof...

Where the proprietor of land, a lease or a charge is a trustee, ... no person dealing with the land, a lease or a charge so registered shall be deemed to have notice of the trust...

These sections are entirely neutral on the sterility hypothesis, rendering no assistance in determining whether or not proprietary equitable interests may exist in the registration scheme. The notice section exists simply for avoidance of doubt and should have no effect other than to dispel the possibility of an argument (namely, that a purchaser is concerned to investigate equitable incumbrances or defects) which should be rejected anyway on the basis of other statutory provisions. The reasons for these statements lie in the history of the notice section. First, it has been argued above that one of Torrens' main motivations for reform was to protect purchasers from the doctrine of notice, that he perceived the very existence of equitable interests as pernicious, and that he intended his reforms to destroy the proprietary effect of these interests unless registered. Secondly, there is the fact that his Real Property Act of 1858 contained no equivalent of what is now the notice section. When one draws these together, it may be deduced that the notice section was not an integral and necessary part of the scheme to rid the law of the mischief of unregistered proprietary interests, and that the draftsman's understanding was that the

⁷³ See D Pike 'Introduction of the Real Property Act in South Australia' (1961) 1 Adelaide Law Review 169.

⁷⁴ Section 66 of the Real Property Act 1861 (South Australia).

⁷⁵ Section 43 of the Merchant Shipping Act 1854 (UK) 17 & 18 Vict, c 104.

⁷⁶ Ss 39(1) and 126(3) Registered Land Act 1963 (Kenya).

existing indefeasibility provisions of the original Act were capable of achieving that effect without further ado; or, as Whalan describes the argument, the notice section is merely ‘ancillary’ or ‘explanatory’ of the other indefeasibility provisions.⁷⁷

This is in stark contrast to the interpretation of the notice section within the Merchant Shipping Act 1854. That Act did indeed recognise the existence of unregistered equitable interests in certain cases⁷⁸, so the notice section in that context played a valuable role, not catered for by other sections, in protecting purchasers from the effects of the doctrine of notice. In contrast, the purpose of adding the notice section at a later date to the existing Real Property Act was not, it is submitted, to effectuate a significant change in the scheme, but rather to confirm that which was implicit in the other provisions, namely, the old equitable doctrine could no longer apply to land under the registration system.

If this is the correct perception of the relationship between the notice section and other indefeasibility provisions, the notice section cannot be interpreted as changing the existing scheme of the statute and establishing a new statutory rule. It is proposed accordingly that the notice section, which confirms that a purchaser is not affected by equitable interests, is consistent with (but does not positively support) the sterility hypothesis that unregistered equitable interests have no proprietary characteristic. This interpretation of the notice section is bolstered by comments in the preparatory materials leading to the Kenyan Act.⁷⁹ First, the Lagos Working Party indicated that the section's only value was in making abundantly clear that which was already implicit in the scheme of the Bill, namely that the purchaser proposing to deal for value ‘is in no way required to go behind the register.’⁸⁰ Secondly, the unofficial Kenyan committee recognised that the section was obscure but included it nevertheless as the committee felt its presence in other Torrens statutes justified its inclusion.⁸¹ Additionally, there are the Kenyan draftsman's later comments⁸², after enactment in Kenya, that the section ‘clearly needs rethinking’ and is ‘unnecessary’ on account of other provisions within the Act.⁸³ One may also note that the draftsmen of a pair of contemporary proposals for title registration systems in

⁷⁷ DJ Whalan *The Torrens System in Australia* (Law Book Co Sydney 1982) 312, n 2. See also WN Harrison ‘Indefeasibility of Torrens Title’ [1954] 2 University of Queensland Law Journal 206, 227, 237-239, P Blanchard *Indefeasibility under the Torrens System in New Zealand* 3 in D Grinlinton *Taking Torrens into the Twenty-First Century* (Conference Papers, University of Auckland 2003) and *IAC (Finance) Pty Ltd v Courtenay* (1962) 110 CLR 550 (HC Australia).

⁷⁸ *Liverpool Borough Bank v Turner* (1860) 1 J & H 159, 175-177; 70 ER 703, 710-711 (Sir William Page Wood V-C); approved on appeal (1861) De G F & J 502, 509; 45 ER 715, 718 (Lord Campbell LC).

⁷⁹ The notice section is divided between ss 39 and 126 of the Land Registration Act 1963 (Kenya).

⁸⁰ *Report of a Working Party on Registration of Ownership of Land in Lagos* (Lagos 1960) 21. The notice section was divided between clauses 55 and 128(3) of the Registered Land Bill 1960 (Lagos).

⁸¹ *Report on the Registration of Title to Land in Kenya* (unpublished 1961) 26, 42. See also SR Simpson *Land Law and Registration* (Cambridge University Press Cambridge 1976) 510-580.

⁸² Simpson *Land Law* 580. Simpson himself sat on the Working Party on African Land Tenure, which recommended a land registration Bill without notice section.

⁸³ In particular, s 39(2) of the Registered Land Act 1963 (Kenya) (trustee deemed absolute proprietor).

Africa⁸⁴, with which Simpson was familiar, obviously regarded the section as unnecessary as they considered various statutes which contained a notice section⁸⁵ yet proceeded to draft a Bill without one.

The proposed interpretation of the notice section as merely ‘ancillary’ has traditionally not been taken in the Torrens jurisdictions. There, the notice section has been interpreted as establishing an independent rule for the protection of purchasers, and has moreover been interpreted as establishing the obverse rule that wherever a person is not a protected purchaser under the notice section, then he is indeed to be bound by proprietary equitable interests. This interpretation of the notice section as ‘dominant’, which prevails in Australia and New Zealand⁸⁶, would necessarily presuppose the recognition of proprietary equitable interests and would therefore demolish the sterility hypothesis. However, I suggest that this Australasian interpretation engages a fallacy in taking one rule, which imposes a particular consequence when certain conditions are met, and then automatically inferring a second rule that where those conditions are not met then the reverse consequence necessarily follows. I suggest that the notice section should not be interpreted as leading to the conclusion that transferees outside the section are necessarily bound by equitable interests.⁸⁷ To cut down the scope of the express terms of the indefeasibility sections by circuitous inference from the notice section represents an unsatisfactory interpretative technique.⁸⁸

There are indications of dissatisfaction with the traditional interpretation of the notice section in the Australasian Torrens countries. Cases have revealed disenchantment with the operation of the notice section⁸⁹ and commentaries⁹⁰ have acknowledged that the notice section

⁸⁴ Land Registration Bill (Tanganyika), enacted 1953, and the Native Lands Registration Bill 1958 (Kenya), enacted 1959, annexed to *Report of the Working Party on African Land Tenure 1957-1958* (Nairobi 1958).

⁸⁵ The Tanganyika Bill took account of the Transfer of Land Act 1928 (Victoria) (which contained the notice section as s 43), according to J. F. Spry ‘Notes on the Tanganyika Land Registration Bill’ para 14, included as Appendix II in *Report on the Registration of Title to Land in Kenya* (unpublished 1961). The Kenya Bill took account of the notice sections embodied in s 74 of the Land Settlement and Registration Ordinance 1925 (Sudan), ss 23 and 80 of the Registration of Titles Ordinance (Kenya), and s 29 of the Land Titles Ordinance 1956 (Singapore), according to the *Report of the Working Party on African Land Tenure 1957-1958* (Nairobi 1958) para 39.

⁸⁶ Although there are occasional suggestions otherwise, eg in *Jonray (Sydney) Pty Ltd v Partridge Bros Pty Ltd* [1969] 1 NSW 621, 627 (NSW CA) it was said that the notice section “may be regarded as a section of further assurance”; see also *Conlan v Registrar of Titles* [2001] WASC 201.

⁸⁷ A similar flaw affected the notorious decision in *Peffer v Rigg* [1977] 1 WLR 285 (HC) concerning s 59(6) of the Land Registration Act 1925 (Eng) 15 Geo V, c21, and was remarked by RJ Smith, ‘Registered Land: Purchasers with Actual Notice’ (1977) 93 Law Quarterly Review 341, 342.

⁸⁸ *Bogdanovic v Koteff* (1988) 12 NSWLR 472 (NSW CA).

⁸⁹ See, for example, the assembled cases in GW Hinde, DW McMorland and PBA Sim *Land Law in New Zealand* (Butterworths Wellington 1997) 125, n 26. Note the problems surrounding the interpretation of ‘dealing’ in the notice section of the Australian statutes and the time at which it bites: eg DJ Whalan ‘The Position of Purchasers Pending Registration’ in GW Hinde

as currently interpreted is not easily reconciled with the other indefeasibility sections which appear to confer an unincumbered title regardless of the circumstances attending the purchase (such as notice, valuable consideration, and the vendor's identity, which would all be relevant to protection under the notice section). Furthermore, the modern case law demonstrates divergent approaches to the various Torrens statutes⁹¹; and some states have introduced legislative amendments to deal with problems raised by the notice section.⁹² Collectively, these may be perceived as reinforcing the view that the notice section should be peripheral to the scheme of indefeasibility of title and is not to be taken by itself as establishing the dividing line between protected and unprotected transferees. Interpreted this way, the notice section does not necessarily presuppose equitable proprietary interests, but is merely a reminder that the equitable doctrine of notice is inapplicable to registered land. On this interpretation, the notice section can accordingly be regarded as neutral on the question of the existence of unregistered proprietary rights, and is consequently not inconsistent with the sterility hypothesis.

2 The overriding interests section and the volunteers section

Although it may be argued that the notice section is not determinative in the debate as to whether the Kenyan and Caribbean registration systems admit proprietary status for unregistered rights, the remaining two sets of provisions to be discussed do, however, have a direct impact on the validity of the sterility hypothesis. The first set is the provision for overriding interests. The relevant Kenyan sections are sections 28 and 30. Section 28 reads:

The rights of a proprietor... shall be held by the proprietor... subject-

(ed) *The New Zealand Torrens System Centennial Essays* (Wellington 1971) and R Sackville 'The Torrens System' (1973) 47 *Australian Law Journal* 526, 540-543. Also note the problems surrounding the failure properly to distinguish bad faith and fraud: eg P Butt 'Notice and Fraud in the Torrens System' (1977) 13 *Western Australia Law Review* 354.

⁹⁰ Eg DJ Whalan *The Torrens System in Australia* (Law Book Co Sydney 1982) chapter 23 and GW Hinde, DW McMorland and PBA Sim *Land Law in New Zealand* (Butterworths Wellington 1997) 123.

⁹¹ Especially on the issue of whether volunteers are protected: contrast lack of protection under *Rasmussen v Rasmussen* [1995] 1 VR 613 (Vic SC) and *Re Passburg Petroleums* (1984) 8 DLR (4th) 363 (Alta CA) with *Bogdanovic v Koteff* (1988) 12 NSWLR 472 (NSW CA) and *Conlan v Registrar of Titles* [2001] WASC 201. See R Carter 'Does Indefeasibility Protect the Title of a Volunteer?' (1985) 49 *Saskatchewan Law Review* 329; P Butt 'Volunteers and the Torrens System' (1989) 63 *Australian Law Journal* 45; P Butt 'A New Era in Torrens Title in Queensland' (1994) 68 *Australian Law Journal* 675, 678; P Radan 'Volunteers and Indefeasibility' (1999) 7 *Australian Property Law Journal* 197. The different judicial approaches may be attributed to differences in the drafting of each state's Torrens statute, and whether immediate or deferred indefeasibility prevails.

⁹² Eg s 60 of the Land Transfer Act 1925 (Australian Capital Territory) and s 43A of the Real Property Act 1900 (New South Wales), to protect a purchaser from the effect of acquiring notice between completion and registration of purchase: see P Butt *Land Law* (3rd edn Law Book Co Sydney 1996) 724-730. See also the comprehensive reforms to indefeasibility in the Land Title Act 1994 (Queensland).

(a) ...

(b) unless the contrary is expressed on the register, to such liabilities, rights and interests as affect the same and are declared by section 30 of this Act not to require noting on the register...

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register – ...

Section 30 then continues to list eight classes of overriding interest, including the troublesome class of rights in paragraph (g), which refers to ‘the rights of a person in actual occupation of land or in receipt of rents and profits thereof save where inquiry is made of such person and the rights are not disclosed...’

The nature of the ‘rights’ to which this paragraph applies is not explained anywhere in the statute but the meaning of the English equivalent⁹³ has been settled by the House of Lords: ‘To ascertain what rights come within this provision, one must look outside the Land Registration Act, 1925, and see what rights affect purchasers under the general law.... The whole frame of section 70, with the list that it gives of interests, or rights, which are overriding, shows that it is made against a background of interests or rights whose nature and whose transmissible character is known, or ascertainable, aliunde, i.e., under other statutes or the common law.’⁹⁴ By similarly rejecting the passing of the burden of personal rights under the Kenyan s 30(g), there would appear to be a conflict between the sterility section and the overriding interest provision. The sterility hypothesis proposes that proprietary quality is excised from unregistered proprietary rights, yet s 30(g) necessarily requires that some unregistered rights are clothed with proprietary characteristic or else they could never fall within the type of rights that are protected by s 30(g).

If the sterility hypothesis prevails, then the overriding interest provision affords no protection to them, and s 30(g) becomes devoid of effect, for there will never be any right which can be protected by its terms. Any interpretation recognising that the overriding interest provision of s 30(g) has some positive effect necessarily leads to the inevitable conclusion that the s 30(g) overriding interest provision is not compatible with the sterility hypothesis and there is no way of synthesising the opposing functions of the overriding interest section and the sterility section, the former enabling enforcement of rights against purchasers, the latter preventing it.

The same issues occur in relation to another provision, the ‘volunteer section’, which indicates that later registered proprietors who are donees take title subject to ‘any unregistered rights or interests subject to which the transferor held it.’⁹⁵ If the sterility hypothesis is applied so as to remove the proprietary character of all unregistered rights, it appears that the volunteer section performs no function, as the only rights which would have been capable of binding under its provisions have been eliminated. If the sterility hypothesis dominates in this way, it renders the entire volunteer section superfluous. It is inappropriate to argue that the volunteer section can be dismissed like this when the volunteer section is expressly mentioned in the statute as an

⁹³ Section 70(1)(g) of the Land Registration Act 1925 (Eng) 15 Geo V, c 21.

⁹⁴ *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (Lord Wilberforce) 1261; followed by the Grand Court of the Cayman Islands in *Millwood v Brown* [1998] CILR 344.

⁹⁵ Section 29 of the Registered Land Act (Kenya).

exception to indefeasible vesting⁹⁶, so this provides another example where the sterility hypothesis cannot easily be reconciled with the statutory provisions.

3 The caution section

The lodging of a caution to protect an unregistered right is permitted under the Kenyan Act, and the cautioning provisions of that Act integrate satisfactorily with the sterility hypothesis. The caution provision of the Registered Land Act reads⁹⁷:

Any person who-

(a) claims the right, whether contractual or otherwise, to obtain an interest in any land, a lease or a charge, that is to say, some defined interest capable of creation by an instrument registrable under this Act...

(b) ...

(c) ...

(d) ...

may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the same.

The statute recognises that the caution is not an alternative to substantive registration but a formal device to preserve the status quo until the cautioner formalises his entitlement by procuring a signed disposition which may then be substantively registered. The caution section appears to take great pains to avoid any phrase indicating that the subject matter of a caution might be a property right, substituting the rather unwieldy wording which explains that a caution can only ever protect the personal right to procure a registered interest. The form of drafting appears deliberately designed to achieve compatibility with the sterility hypothesis, avoiding any hint that the subject matter of the caution could be an 'interest in land.'

When the Kenyan model registration statute spread to the Caribbean, a few minor changes were made in the new version, one of the most significant of which was an alteration to the caution provision which has serious repercussions for the sterility hypothesis. The relevant section of the Cayman Islands Registered Land Law⁹⁸ reads:

Any person who-

(a) claims any unregistrable interest whatsoever in land, a lease or a charge...

(b) ...

(c) ...

(d) ...

may lodge a caution [etc].

⁹⁶ The vesting section of the Cayman statute, s 23 of the Registered Land Law, opens with the words, 'Subject to section 27...' Section 27 is the volunteer section.

⁹⁷ Section 131(1).

⁹⁸ Section 127(1).

The problem caused by the Caribbean amendment lies in defining the type of rights that will fall under the description, ‘unregistrable interest in land.’ If the sterility hypothesis is followed, it appears that the ‘unregistrable interest in land’ is an oxymoron, since any rights (leaving aside overriding interests) which are not substantively registered cannot be recognised as interests in land but operate only as personal rights. By presupposing the possibility of unregistered proprietary interests, the amended caution provision flatly contradicts the sterility hypothesis in the Caribbean statutes, yet the sterility section nevertheless continues to take its place in s 37(1) of the Law. Because of this change in the drafting of the caution section, there has become a stronger justification for interpreting the Caribbean land statutes so as to acknowledge the proprietary quality of unregistered rights.

D COMPREHENSIVE OR QUALIFIED STERILITY?

The difficulty lies in finding an interpretation of the Registered Land Law which produces a scheme which unites the sterility section with all the relevant provisions of the Registered Land Law in a coherent and consistent fashion, and which fulfils the design for the legislative scheme recorded by the draftsmen of the original Kenyan statute.

One weakness of the sterility hypothesis lies in the attempt to achieve compatibility with s 30(g) overriding interests and the volunteer section. This stems directly from the attempt of the Kenyan draftsmen to conjoin segments of the Torrens legislation⁹⁹ with segments of the English legislation¹⁰⁰ without appreciating the misalignment of ideas. Because of the opposing policies which these sections reflect, any attempt to reconcile their provisions will be problematic, and the sterility hypothesis is no exception.

The scheme predicated upon the sterility hypothesis is by no means the only possible interpretation. Major rival hypotheses are constituted by interpretations which qualify the ambit of sterility. These interpretations may construe the sterility section either (a) as preventing the recognition of proprietary characteristics of only those rights arising under a registrable but as yet unregistered disposition, or (b) as preventing the recognition of the proprietary characteristics of only common law proprietary rights. These interpretations, favoured in the Torrens jurisdictions, would leave all other unregistered rights unaffected by the sterility section, and would therefore be consistent with allowing equitable proprietary rights to be generated. An advantage of these alternative approaches is that they are easier to reconcile with many of the other elements of the land registration statute, such as overriding interests, the notice section and the volunteer section, which at first sight seem to imply that at least some unregistered rights enjoy proprietary status. Such an approach to the Cayman sterility section would promote greater consistency between the Registered Land Law and the Australasian Torrens legislation, introducing to the Cayman Islands a vast resource of judicial and academic explanation of the indefeasibility provisions.

Despite these advantages, I do not agree that the sterility hypothesis should be discarded so lightly. This is because of the doubt cast on the Australasian cases which interpret the Torrens system as allowing proprietary equitable interests in apparent defiance of the draftsman’s

⁹⁹ The sterility provision in s 31 of the Real Property Act 1858 (South Australia).

¹⁰⁰ The overriding interest provision in s 70(1)(g) of the Land Registration Act 1925 (Eng) 15 Geo V c 21 .

intended scheme as described in his contemporary writings. In particular, it has been suggested that the traditional Australasian interpretation of the notice section rests on a great misapprehension and that the Australasian interpretation of the sterility section is unduly restrictive, losing the purity encountered in the judicial interpretation of its predecessor in the English shipping laws. But whatever the interpretation of the Australasian provisions, the drafting of the Lagos and Kenyan Bills does represent a departure from the judicial construction of the Torrens statutes. While much of the structure of the Australasian Torrens legislation was appropriated to the Kenyan Act, subtle changes in wording did occur, and these changes, whose interpretation is indicated by the extensive reports which accompanied the proposals, indicate that the draftsman's purpose was to produce a scheme which implemented the sterility hypothesis with only limited derogations from it in the cases of occupiers' rights and acquisitions by volunteers. Any alternative interpretation of the sterility section which would limit its application to registrable but unregistered dispositions may be doubted as it would require a very serious gloss on the language of the section; although it must be acknowledged that the sterility hypothesis itself requires a careful, purposive approach to the interpretation of various parts of the land registration statute.

E CONCLUSORY REMARKS ON THE STATUS OF UNREGISTERED RIGHTS

Diverse judicial attitudes to the parliamentary attempt at abolishing equitable rights are seen in the cases on the Shipping Acts, the Australasian Torrens statutes, the Kenyan Act and the Caribbean Laws. Under the Shipping Acts, the English courts demonstrated a willingness to accept the loss of equitable interests and even personal rights to enforce the contract of sale. This approach was taken despite the absence of any express sanction for non-compliance with the statutory formalities and despite the presence of express references to equitable interests elsewhere in the statute; although in those cases there was admittedly the significant feature that the Act in question was consolidating earlier Acts which did contain express sanctions, and the court consequently presumed in the absence of contradictory evidence that the legislative policies underlying the statute remained unchanged. In conjunction with the policy argument, the court also adopted the argument of counsel: 'To provide particular modes of transfer for purposes of important public policy, and at the same time allow transfers to be effectually made in any other way which persons might choose to adopt, would be a most extraordinary course.'¹⁰¹

The land reformers Torrens and Simpson set out to achieve the same effect in their land registration schemes (and now the English Law Commission and Land Registry can be added to this list, having secured their own sterility provision¹⁰²). Initially, *Lange v Rudwoldt*¹⁰³ under the

¹⁰¹ Rolt QC in *Liverpool Borough Bank v Turner* (1860) 1 J & H 159, 162; 70 ER 703, 705 (VC).

¹⁰² Part of the reforms which will govern electronic conveyancing: s 93 of the Land Registration Act 2002 (Eng) 50 & 51 Eliz II c 9. Yet again, questions have been raised as to the possible judicial responses to this sterility provision; eg M Dixon *Principles of Land Law* (4th edn Cavendish London 2002) 7-8. During the debate leading to the Birkenhead legislation, the desirability of various sterility clauses had been raised: HW Elphinstone, 'Transfer of Land' (1886) 2 Law Quarterly Review 12, 22; T Key, 'Registration of Title to Land' (1887) 3 Law Quarterly Review 324, 340; C Sweet, 'Land Transfer Act' (1908) 24 Law Quarterly Review 26, 38; JR Innes, 'Notice and Fraud in Registration of Title to Land' (1915) 31 Law Quarterly Review 397, 402.

Torrens system showed an equal judicial willingness to oust equitable interests even where the statute was original and not consolidating an earlier, known legislative policy; although the statute of Torrens differed from the English shipping scheme in that it contained an apparently comprehensive sterility provision with an express, universal sanction of nullity for non-registration.

Despite the early signals, however, Torrens' radical conception of comprehensive sterility for land rights was whittled away by legislative amendments (particularly the insertion of the notice section) and judicial construction. The later decisions of the South Australian courts held that legal and equitable personal rights, and the equitable doctrine setting up proprietary rights from executory contracts, all remained unaffected by the legislative provisions. *Cuthbertson v Swan*¹⁰⁴ relied on the dictum that 'the system of trusts is so interwoven with the habits and business of the people, and the comfort and happiness of families is so dependent upon its continuance' to suggest that the legislature would not have abolished trusts without manifesting that intention in clear words; and that the court would proceed on the basis that it would not give so wide a construction to the general prohibitory words of the sterility section if it could be restricted in their meaning.¹⁰⁵ The court also pointed out during argument¹⁰⁶ that the Privy Council had recently held¹⁰⁷ that where there were no express words excluding the recognition of executory contracts and the intended legislative policy on the matter was not apparent from the statute, then executory contracts were to be recognised. The collective use of these reasons shows a significant reluctance to upset the settled property doctrine of equity, but the distinguishing of the Shipping Act cases may be justified, as the court in *Cuthbertson* hinted, on the ground that when weighing the loss of trusts against the advantages of registration, the advantage to individuals of simplified conveyancing was less compelling than the advantage to the national interest in knowing the true ownership of shipping.

The sterility sections of the Kenyan and Caribbean statutes have been subject to conflicting interpretations and, in some of the cases, considerable erosion of the draftsman's intended policy. Partly this is due to the drafting of the model Act itself, as certain statutory provisions, such as the overriding interests and volunteer section, seem to be irreconcilable with the plain words of the sterility section, perhaps an inevitable risk when a new registration code is concocted from disparate foreign elements in the way that Simpson combined Torrens sterility with English overriding interests.¹⁰⁸ In addition to this inherent problem of the Act, the sterility section has been influenced by legislative and judicial developments remarkably similar to those seen in the Torrens jurisdictions. First, the tinkering with the Kenyan model statute's caution provision on enactment in the Caribbean legislatures suggests that the caution section and

¹⁰³ *Lange v Rudwolt* (1872) 7 SALR 1 (SA SC).

¹⁰⁴ *Cuthbertson v Swan* (1877) 11 SALR 102 (SA SC).

¹⁰⁵ *Cuthbertson* at 110.

¹⁰⁶ *Cuthbertson* at 103.

¹⁰⁷ *Barton v Muir* (1874) LR 6 PC 134 (PC); *Blackwood v The London Chartered Bank of Australia* (1874) LR 5 PC 92 (PC).

¹⁰⁸ Esposito has similarly explained the problems concerning recognition of equitable interests in the common law system of South Australia by characterising Torrens' original Real Property Act as a foreign transplant from the civilian system of the Hanse Towns: AK Esposito *The History of the Torrens System of Land Registration with Special Reference to Its German Origins* (LLM thesis, University of Adelaide, 2000) ch 3.

sterility section are built on quite different conceptions of unregistered rights. Secondly, repeated judicial comments indicate that despite its apparently clear wording, the Caribbean sterility section cannot be taken at face value, and does not entail comprehensive sterility.

Nevertheless, the Caribbean courts could have adopted the reasoning of one of the Australian cases¹⁰⁹ which indicated that statutory references to unregistered interests should derogate from the sterility hypothesis only to the minimum extent necessary to give effect to them without altering the general principle of the hypothesis. The most recent decisions of the courts in the Cayman Islands¹¹⁰ have preserved proprietary equitable interests in reliance on Torrens precedents which themselves are based on the implicit recognition of trusts throughout the statute, thereby limiting that the ambit of the sterility section to legal interests. The earlier decisions¹¹¹, in contrast, display an acknowledgement (perhaps surprising in the light of the modern Australian land cases and the English shipping cases) that the Caribbean land registration enactment comprises a self-contained code capable of eliminating settled equitable property rights by general statutory words making no specific mention of equity's former intervention.

It appears that to oust completely the proprietary attribute of equitable rights, the desirable technique to fulfil the draftsman's hope of a 'judge-proof' rule¹¹² is a clear and specific statutory direction to that effect, with careful avoidance of any allied statutory provisions which may be taken to imply derogations from apparently broad words in the sterility provision. But there is also the draftsman's dilemma: to make a specific declaration that proprietary equitable interests do not arise from unregistered dispositions is desirable to indicate the sterility hypothesis, yet by doing so the draftsman necessarily imports a reference to equitable rights into the statute, the very matter which a reformer like Torrens or Simpson would wish to avoid in order to escape any link to the principles of the old system.

¹⁰⁹ *Cuthbertson v Swan* (1877) 11 SALR 102 (SA SC).

¹¹⁰ *Myles v Prospect Properties Ltd* [1994-95] CILR 1 (CICA); *Jones v Registrar of Lands* [1998] CILR 71 (CIGC); *Eso Standard Oil SA Ltd v Jose's Ltd* [1999] CILR 51 (CIGC) 103; *Bonotto v Boccaletti* [2001] CILR 120 (CIGC) 131.

¹¹¹ *Paradise Manor Ltd v Bank of Nova Scotia* [1984-85] CILR 437 (CICA); *Mums Incorporated v Cayman Capital Trust Co BV* (1990) [2000] CILR 131 (CICA); *H Ltd v B* [1994-5] CILR 343 (CIGC).

¹¹² Adopting the phrase of TBF Ruoff *An Englishman Looks at the Torrens System* (Law Book Co Sydney 1957) 15.