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## Implementation of Enacted Title by Registration Legislation in the Maritimes

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### I. *Introduction*

Since my first contribution to this Journal upon the topic of title by registration,<sup>1</sup> it is possible to report a further cascade of ink; the pilot project in Prince Edward Island, which was examined, has produced two statutes: (1) Land Titles Act, Nova Scotia;<sup>2</sup> (2) Land Titles Act, New Brunswick.<sup>3</sup> The Nova Scotia Act remains unproclaimed and makes no repeal of the first attempt at title by registration in 1903-4 which failed to obtain substantial converts even though proclaimed.<sup>4</sup> New Brunswick has taken the great leap into the unknown by proclaiming its statute on 1st January, 1984;<sup>5</sup> amending it twice thereafter<sup>6</sup> and repealing the failed initial enactment of 1914 which was never proclaimed.<sup>7</sup> The Prince Edward Island Act<sup>8</sup> remains unproclaimed. Given this background one can only fear for the prospect of a successful Torrens system in the Maritimes having regard also to the universal distaste with which it was greeted, at inception, by the legal profession and the inertia of that body. These observations are not wild charges: the books are filled with a legion of articles in proof and the citation of these is valueless.

The purpose of this article is to draw attention to a glaring defect in the statutes and one which may be played upon by the supporters of inaction or the minimum movement possible: the issue of two systems in operation at the one time. I contend that the evidence from the Australian jurisdictions (all of which have the Torrens System) England and Wales and Israel, representing diverse legal systems which have introduced title by registration, makes it imperative to have compulsion. Without compulsion the Statutes will remain just that: a proposal. I shall examine the application of the Statutes; look at the same question in New South

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1. Stein, R.T.J., *Some Aspects of Title by Registration in the Maritime Provinces of Canada* (1976), 2 Dal. L.J. 633.

2. S.N.S., 1978, c. 8.

3. S.N.B., 1981, C. L-1.1.

4. The Land Titles Act, S.N.S., 1903-04, c. 47.

5. S.N.B., 1981, c. L-1.1, pursuant to s. 86.

6. S.N.B., 1984, c. 48 and S.N.B., 1985, c. 4.

7. The Land Titles Act, S.N.B., 1914, c. 22.

8. Land Titles Act, R.S.P.E.I., 1974, c. 16.

Wales, England and Wales and Israel by way of comparison and; make recommendations on how the future might be mapped out in the Maritimes, having a successful system of title by registration as the goal. Compulsory registration is recommended to avoid the drawbacks of two separate systems of conveyancing operating side by side.

## II. *The Maritime Statutory Provisions*

### 1. *Nova Scotia*

Assuming proclamation, the Act may apply to any lands (including Crown lands) or documents as designated by the Lieutenant-Governor in Council.<sup>9</sup> Applications for registration may be made by proprietors with the requirement that the Registrar-General must notify interest holders in the parcel and abutting proprietors.<sup>10</sup> Parties not notified may make a claim of an interest<sup>11</sup> and Crown grants are registered automatically (limited compulsion).<sup>12</sup> The Registrar-General himself may require registrations.<sup>13</sup> The Act purports to grant indefeasibility of title<sup>14</sup> and regional registers are contemplated.<sup>15</sup> There is no statement of how the new system is to *replace* the old in an ordered sense; the framers may have reached their conclusions but, it is contended, past evidence requires this to be spelled out formally to some degree and then acted upon.

### 2. *New Brunswick*

The same general format described for Nova Scotia is repeated in this jurisdiction with similar limitations.<sup>16</sup> Both New Brunswick and Nova Scotia provide for voluntary first applications supported by the possible use of compulsion in circumstances other than where compulsion is required (the limited case of Crown grants).

### 3. *Prince Edward Island*

Assuming proclamation, the Statute suffers from the difficulty of being first in the field and does not have the advantage of considered analysis after enactment: the advantage availed of in Nova Scotia and New Brunswick. The general aims of the Act have been analysed previously<sup>17</sup>

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9. S. 3 (1).

10. S. 12.

11. S. 13 (11).

12. S. 24.

13. S. 15.

14. S. 17; subject to subsisting interests: s. 13(8)-(10).

15. Ss. 6 (2); 83 (1).

16. Ss. 2, 11, 12, 83, 14. Title may be registered subject to subsisting interests: s. 12 (8)-(10).

17. Stein, R.T.J., *supra*, note 1; the title depends upon the type of registration granted.

and to this I add that persons interested in land may make private applications<sup>18</sup> with notices being sent to interested parties, abutting proprietors (as in Nova Scotia and New Brunswick) and persons who have filed a “caution”.<sup>19</sup> Applications for registration are required on sale, mortgage or other transfer of the fee or an entail;<sup>20</sup> mortgagees may apply to have the mortgagor or proprietor of the equity of redemption recorded where the mortgagee holds a power of sale.<sup>21</sup> The Crown<sup>22</sup> and certain lessees may apply for registration of their leasehold interest.<sup>23</sup>

### III. *New South Wales*

The Torrens system has operated concurrently with the “old” system since title by registration was adopted in 1863. However, it has been accepted that all lands should be converted to title by registration.

From its inception all lands thereafter alienated by the Crown have been placed under the Torrens system, and conversion procedures have also been provided to enable the registration of property alienated before 1863; the so-called “primary application”. Because conversions by primary application were made so slowly, Parliament introduced procedures to speed them up and these are found in the Real Property Act 1900, Parts IVA and IVB, giving rise to “qualified” and “limited” certificates of title.

“Qualified” certificates of title, the first procedure adopted to facilitate conversion, may be granted in four situations:

- (a) where primary application is refused;
- (b) upon registration of a plan of sub-division;
- (c) where a mortgage or conveyance for value is registered under the “old” system in the General Register of deeds and where there is a plan of survey not more than fifteen years old;
- (d) as required by the Registrar-General. In this case a notice is issued to the apparent holder of the “legal” estate, in the form of a questionnaire, requiring the addressee to state his interest in the land and the nature of any encumbrances (section 28E). This alternative is the most commonly used but, unfortunately, it has resulted in the award of title in only 30% of cases where they might have been granted. The effect of the issue of a qualified certificate is that the title is taken subject to the subsisting interests; cautions are lodged by the Registrar-General requiring that dealings are made subject to those subsisting interests. In effect title is defeasible to the extent of those

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18. Ss. 6-13, 19.

19. Ss. 14, 60.

20. S. 19 (4).

21. S. 19 (9).

22. S. 23.

23. S. 25.

interests. The caution lapses after six years where there has been a dealing for valuable consideration, without fraud.<sup>24</sup> The amendments of 1976 provide for the lapsing of the caveat after 12 years if it has not expired as a result of a dealing for value.<sup>25</sup> It needs to be observed that, after consideration of the statement furnished by the proprietor, the Registrar is given the discretion to issue an ordinary certificate of title instead of a qualified certificate.<sup>26</sup> This was also introduced in the 1976 amendments.

It seems to have been recognised that qualified certificates of title have not been completely successful in meeting the problem, because a further conversion procedure was introduced by the 1976 amendments, "limited" certificates of title. For the period of issue of qualified certificates of title to 31st May 1976, only 21,438 new titles had been issued and this had not kept pace with the division of titles (as a result of subdivisions) where title still remained under the "old" system.<sup>27</sup> The introduction of "limited" certificates of title<sup>28</sup> has introduced great complexity and detail into the Real Property Act which might have been left to be defined in delegated legislation. It also introduces the concept of "general boundaries" into the Torrens system.<sup>29</sup> The result of the whole procedure is that it empowers the Registrar to issue a limited certificate<sup>30</sup> where he could not have issued a qualified one. However, he must lodge a caveat which:

1. indicates the conditions which when complied with will allow the withdrawal of the caveat;
2. specifies any occupation line adopted;
3. forbids registration of a transfer for valuable consideration unless the conditions permitting the withdrawal of the caveat have been complied with or unless the transfer is accompanied with an exemption certificate.<sup>31</sup>

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24. Real Property Act 1900, new sections 28M (3) 28M (3A) inserted by the Real Property (Amendment) Act 1976, No. 96, 1976, s. 5, schedule 5, (6).

25. *Id.* (8), (9) and (10).

26. *Id.* section 28EA *Vide, generally, Woodman, R.A., and Grimes, P.J., Baalman's, The Torrens System in New South Wales*, (2nd ed. Sydney: Law Book Company, 1974) at 84-86, 87-88 and Simpson, S.R., *Land Law and Registration*, (Cambridge: Cambridge University Press, 1976) at 380-386.

27. An interview between the Registrar-General of New South Wales, Mr. J. Watson, and the Senior Deputy Registrar-General of New South Wales, Mr. J.A. Griffith, Associate Professor R.A. Woodman and Robert Stein, Tuesday, 1st June, 1976, and a histogram provided by Mr. Griffith, 1st June, 1976, which indicates that there was only 880 primary applications in 1973, as further evidence of the slow conversion to the Torrens system.

28. Introduced by the Real Property (Amendment) Act, *supra* note 24, Part IVB.

29. *Id.* s. 28S (1).

30. *Id.* s. 28U (2).

31. *Id.* s. 28T.

An exemption certificate permits the Registrar to certify in writing (upon application) that a transfer for valuable consideration may be registered, notwithstanding the existence of a limitation caveat, but he may not give the certificate unless to refuse to do so would work unreasonable hardship upon the applicant, in all the circumstances.<sup>32</sup> The certificate may be issued upon such conditions as the Registrar sees fit to impose<sup>33</sup> and any registration takes effect subject to the caveat until it is withdrawn under the ordinary provisions of the Part. The limited certificate operates as an ordinary certificate of title subject to its boundary delineation and where the certificate of title is a “qualified” certificate it is subject to the qualifications stated in Part IVA of the Act.<sup>34</sup> The boundary of the land the subject of registration includes any land coming within the provision where it is not properly within the area as defined by the general boundary.<sup>35</sup> Where any condition has been complied with the Registrar may cancel or withdraw the caveat<sup>36</sup> if all parties to the boundary agree, or settle the boundary line, and he may cancel the condition.<sup>37</sup> The provisions contain a power of dispensation in respect of the consent of adjoining owners.<sup>38</sup>

The vendor of land subject to a “limited” certificate of title must dispose of a limitation caveat at his own expense before he transfers the property, unless the contract states expressly that he will provide the purchaser with an appropriate exemption certificate,<sup>39</sup> and this provision applies notwithstanding any stipulation to the contrary.<sup>40</sup> In addition, no proceedings may be brought against the Registrar to implement any of the cancellation or withdrawal provisions under the Part.<sup>41</sup> What is more, in the event of any proposal to transfer land coming within these provisions, the Registrar may require the lodgment of a plan of survey<sup>42</sup> as a condition precedent to commencing the transfer of the property; or before cancelling a delimiting condition or permitting the withdrawal of a caveat.<sup>43</sup>

The complex procedures just outlined in respect of “limited” and “qualified” certificates of title are inconsistent with the demand for

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32. *Id.* s. 28W (1) and (2).

33. *Id.* s. 28W (3).

34. Real Property Act, s.28P (1) (d).

35. Real Property (Amendment) Act, *supra*, note 24, s. 28U (7).

36. *Id.* s. 28U (1).

37. *Id.* s. 28V (2).

38. *Id.* s. 28V (3).

39. *Id.* ss. 28X (1) and (2).

40. *Id.* s. 28X (3).

41. *Id.* s. 28Y.

42. *Vide*, Real Property Act 1900, s. 114.

43. Real Property (Amendment) Act, *supra* note 24, s. 28Z.

simplicity in title by registration; they add considerably to the difficulties in initial registration; and they do not facilitate the quieting of titles. The incidental result is to postpone for long periods the benefits which the Torrens system might ensure. A far simpler procedure could be adopted for the conversion of land from the "old" system to the Torrens system and this will be explored later.

#### IV. *England and Wales*

##### 1. *General Comments*

Unlike the Torrens system of title by registration in Australia, the English and Welsh system did not have the advantage of alienation of lands under its provisions from its inception (almost all land had been alienated from the Crown by 1862). So, in order that the new procedure of title by registration could be given a fair trial, compulsion was necessary. Until compulsion was introduced, the system hardly developed at all.

In 1870, 1873 and 1875 Lords Hatherly, Selbourne and Cairns tried to introduce compulsory provisions into the then systems of title by registration. However, this was not accepted by the Commons because of objections from the legal profession and when the Act of 1875<sup>44</sup> was introduced the compulsory provisions were abandoned. In the second reading speech The Earl of Selbourne objected to the omission but Lord Cairns justified it on the ground that it was better to initiate the system rather than to have it founder on the opposition of the legal profession.<sup>45</sup> On these and other grounds, he had come to the opinion that a voluntary Bill had the best chance of success. Lord Kimberley prophesied (correctly) that the abandonment of the principle would doom the Bill to failure. No-one would bother to transfer their property to another system when they could continue under the existing law. A further attempt was made, in 1887, to introduce compulsion but it was no more successful than in 1875. It was recognised by the supporters of title by registration that compulsion would have to come eventually.<sup>46</sup> Further attempts were not successful. The first United Kingdom enactment to introduce compulsion was the Irish Act of 1891.<sup>47</sup> Then Lord Halsbury succeeded

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44. (1875), 38 & 39 Vict., c.87.

45. *Royal Commission on the Land Transfer Acts; Second and Final Report of the Commissioners (presented to both Houses of Parliament by Command of His Majesty)*, His Majesty's Stationery Office, London, 1911, at 9.

46. Sargant, C.H., *The Land Transfer Bill II* (1887), 3 L.Q.R. 272 at 274; *Is Compulsion Really Necessary for the Establishment of Registration of Title* (1887), 31 S.J. 780 at 809.

47. Local Registration of Title (Ireland) Act 1891 (1891), 54 & 55 Vict., c. 66; Madden, Rt. Hon. D.H., Attorney-General for Ireland, *Land Transfer and Registration of Title in Ireland* (1892), 93 L.T. 51.

in securing compulsion for England and Wales in the Land Transfer Act 1897, with respect to “possessory” titles (see below).<sup>48</sup> As will be seen, the system was one of selective compulsion, initially applied to the County and then the City of London. After the findings of the Royal Commission of 1911,<sup>49</sup> no further extensions were made until the consolidation of the amendments to the Land Registration Act in 1925, and then only after a further ten year trial period for the system upon the application of the County Councils of Eastbourne and Hastings.<sup>50</sup> With the expiration of the trial period came further extensions to Middlesex (with the closure of the Middlesex Deeds Registry)<sup>51</sup> and the Borough of Croydon, in 1939. It was proposed also to extend to the County of Surrey, from 1940,<sup>52</sup> but the Second World War intervened and the next application was a voluntary one from the Borough of Oxford, in 1951. Compulsion was introduced into Surrey in 1952, after a further inquiry into the advisability of the system of title by registration, conducted by J.N. Gray.<sup>53</sup> From then on expansions took place when the current areas had been converted largely to the Register (the procedure will be examined hereafter) however, a growing number of voluntary registrations, which were also permitted, curbed the systematic expansion by compulsion.<sup>54</sup> From the time of the Gray inquiry the program came to expand the compulsory system to built up areas and urban districts, with a population in excess of 10,000 people. This expansion was rapid and after eighty years of compulsion, well over 3 1/2 million separate titles had been registered.<sup>55</sup>

48. Lake, B.G., *The Land Transfer Act, 1897* (1897-98), 23 L.M. & R. (4d) 179 at 183; Land Transfer Act 1897, s. 20.

49. *Supra*, note 45.

50. *Vide*, generally, Magee, F.A., *Land Registration in England* (1930), 8 Can. Bar Rev. 420; Stewart-Wallace, Sir J.S., *Land Registration in England in Relation to Mapping and Surveying* (1931-37), 17 Con. 45 at 47; J.M.L., *Registration and the Legal Estate* (1935), 79 L.J. 267, 267. *Vide*, also Land Registration Act 1925, s. 121 and s. 122 and T.S., *Land Registration, Past and Future* (1930), 16 Con. 4 at 5.

51. *Report of the Land Transfer Committee*, Chairman — Lord Tomlin (1935), 179 L.T. 48, 48; *Land Registration: Some Common Fallacies* (1937), 83 L.J. 282 at 282; Land Registration Act 1935, 26 Geo. V. & Edw. VIII, c. 26, s. 2 (2); J.M.L., *The Passing of the Middlesex Registry* (1936), 81 L.J. 377; *Compulsory Land Registration* (1936), 12 N.Z.L.J. 202; *The Future of Compulsory Registration* (1937), 183 L.T. 62; *Land Registration: Middlesex* (1936), 80 S.J. 479 at 480. The speed of first registrations and dealings at that time was almost immediate. *Vide*, also *Report of H.M. Land Registry, 1936-37* (1937), 183 L.T. 413.

52. Gray, J.N., *Land Registration Act, 1925. Report on the Advisability of Extending Compulsory Registration of Title on Sale to the County of Surrey*, (The Lord Chancellor's Office) London, H.M.S.O. 1951, 2; *The Land Registry Annual Report* (1939), 83 S.J. 488; *Land Registration: Compulsory Areas* (1938), 82 S.J. 671 at 672.

53. J.J.W., *Compulsory Land Registration* (1952), 96 S.J. 159; *The Law Society's Memorandum on Extension of Compulsory Registration of Title to Land*, November, 1954, 11.

54. *Report of the Chief Land Registrar* (1928), 72 S.J. 496 at 496.

55. Ruoff, T.B.F., *Ruoff and Roper on the Law and Practice of Registered Conveyancing*, ((3d)



The success of title by registration, secured by selective compulsion, may be measured against the necessity to prevent voluntary first registrations, which occurred when a considerable demand for title by registration developed as a result of its benefits becoming generally obvious. Compulsory conversion in specified areas, could not proceed efficiently alongside patchy voluntary registration all over England and Wales.

The procedure by which compulsion operates is by the selection of an area for conversion to title by registration.<sup>56</sup> Once the area is decided upon<sup>57</sup> any sale for value, or creation or transfer by sale of a lease exceeding forty years, must be registered. The application for first registration (discussed below) must be made within two months of the date of the grant of the interest in the assurance. If this is not done, the title of the proprietor becomes virtually unmarketable because the "legal" estate is re-vested in the vendor.<sup>58</sup> The effect is that the vendor may sell again and this purchaser, if he registers, will obtain the benefits of registration; the likelihood of his title being rectified is remote, in the light of the failure of the first purchaser to register and the general grounds upon which rectification will be granted (this is a separate issue and is not examined in the article).

#### First Registration

First registration in a compulsory area may be effected with:

1. absolute title (subject only to the limitations contained in the Land Registration Act 1925);
2. qualified title (similar to absolute title but subject to some qualification stated on the Register), or
3. possessory title (which is dependent on possession and not proof of title).

The award of each of these various titles springs from the historical position on the introduction of compulsory title by registration. "Possessory" title was the means by which compulsion was introduced into England and Wales: it was granted without investigation, simply upon the production of the conveyance to the applicant or a statutory

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London: Stevens and Sons, 1972) preface p. vi, 1108-1111; H.M. Stationery Office, London, 1971, *H.M. Land Registry (Land Registration Acts, 1925 to 1966). Registration of Title to Land*, 5; H.M. Stationery Office, London, *Areas Served by the District Registries of H.M. Land Registry as on 1 November 1974*, Explanatory Leaflet No. 9.

56. *The Report of the Land Transfer Committee* (1943), 196 L.T. 111 at 112; Greene, W.A., *In Search of Cheaper Conveyancing* (1974), 118 S.J. 90 at 92.

57. *Royal Commission on the Land Transfer Acts; Second and Final Report of the Commissioners (Presented to both Houses of Parliament by command of His Majesty)*, *supra*, note 45 at 21; Strachan, W. *The Land Transfer Question*, (1904) 20 L.Q.R. 427 at 433-434.

58. Ruoff, T.B.F., *supra*, note 55 at 191; Lake, B.G., *supra*, note 48 at 182.

declaration by him, accompanied by the last document of title (if any). The advantage of this procedure was said to be:<sup>59</sup>

. . . as though a filter was placed athwart a muddy stream; the water above it remains muddy, but below it is clear, and, when you get so far down the stream as never to have occasion to ascend above the filter, it is the same thing as though the stream was clear from its source.

The assumption upon which this metaphor operates is that time may cure a defect in title, however, in theory a “possessory” title may never become absolute if the first proprietor did not acquire any title from his vendor. This objection may be overcome by the application of a statute of limitation. The advantages derived from the award of a “possessory” title (now granted in very few cases) are clearness and definitiveness of description of the property together with simplicity in the form and appearance of the instruments used in sale and mortgage, even though title might not be “absolute”.<sup>60</sup> The defects in such a grant of title were that:

1. they provided limited benefits: the major one being that title had to be investigated before it could be transferred and this placed registered titles to land at a disadvantage over “old” system titles as compulsion related only to “possessory” title and the cost of conveyancing, therefore, was increased by the fees of registration;<sup>61</sup>
2. “possessory” titles “might” lead to fraudulent claims to title;<sup>62</sup>
3. people will do only the minimum that is required of them and given a halfway house, they will not seek to advance the most effective system of title by registration where title is registered as “absolute”. Thus, such an approach tends to bring the new system into conflict with the ultimate aims which it seeks to achieve.<sup>63</sup>

These defects resulted in the Registry commencing a program to elevate “possessory” titles into “absolute” titles. This program revealed a further drawback in “possessory” titles. Once having obtained such a title there was a cost disadvantage in its elevation because of the fee structure

59. *Is Compulsion Really Necessary for the Establishment of Registration of Title*, *supra*, note 46 at 794. The origin of the quotation is to be found in the Royal Commission Report of 1870, paragraph 75, page xxviii.

60. *Registered Land* (1933), 77 S.J. 580, 580; Bordwell, P., *Registration of Title to Land* (1927), 12 Io. L.R. 114 at 125; Lake, B.G., *supra*, note 48 at 184; Fortescue-Brickdale, C., *The Land Registry* (1906), 50 S.J. 803 at 819: 819.

61. Simpson, S.R., *supra*, note 26 at 216-218; Bordwell, P., *supra*, note 60 at 125; Lake, B.G., *supra*, note 48 at 183.

62. *Report of the Commissioners Appointed to consider the Subject of the Registration of Title with Reference to the Sale and Transfer of Land* (1857), 1 S.J. 285 at 357; *Marshall v. Robertson* (1905), 50 S.J. 75 at 76, per Warrington J. (as he then was).

63. *Land Registry. Land Transfer Acts, 1875 and 1897. The Registrar's Memorandum on the Law Society's Recent Publications Land Registry Claims' (January, 1907) ad 'Compulsory Land Registration', (November, 1907), 3; Land Registration (Solicitors' Managing Clerk's Association meeting 24th Oct., 1913), (1913), 136 L.T. 20.*

(payments had to be made to secure a better title); this was another incentive to keep the *status quo*.

From 1903, it was possible for a registered proprietor to make application for an “absolute” title after six years with a “possessory” title and modifications to the examination procedure to show title could be made as the Registrar permitted, where the first proprietor had acquired the land by purchase on sale,<sup>64</sup> but, as Sir Charles Fortescue-Brickdale (the then Registrar) indicated, in 1905, this offered little inducement as the profession would not suggest conversions to its clients.<sup>65</sup>

Conversions to “absolute” titles needed some impetus, given in 1908 by the Rules and Fee Order, which made it possible for the Registrar to offer “absolute” title. Such an offer was made normally upon an ordinary search by a solicitor<sup>66</sup> but applications could still be made for “possessory” title on first registration, if it was so desired.<sup>67</sup> At that time, it was suggested that the only justification for the issue of such a title would have been where the title to be registered was so defective that a better title could not be granted.<sup>68</sup> The basis upon which the Register offered a better title was if he thought it would not be upset by the Courts (a “good holding title”).<sup>69</sup>

From the time of the amendments to the system of title by registration, introduced by the Law of Property Act 1922 (consolidated in 1925) the Registrar was empowered to offer “absolute” title upon application for first registration even if an application was made for “possessory” title. A statutory basis for conversions to “absolute” or “good leasehold titles” (not examined here because it does not relate to the central issue of the article) from “possessory” title, without consent of the proprietor, was introduced in the same year upon the basis of:

1. freehold proprietorship, in excess of fifteen years, and
2. leasehold proprietorship, for a period in excess of ten years.<sup>70</sup>

64. Ruoff, T.B.F., *supra*, note 55 at 278; *The Land Transfer Rules, 1903* (1904), 48 S.J. 256 at 293, rule 36, 367. The history of the rule is set out in *The New Scheme for Registration with an Absolute Title* (1903), 47 S.J. 684 at 684-685.

65. Fortescue-Brickdale, C., *supra*, note 60 at 821.

66. *Land Registration* (Solicitors’ Managing Clerk’s Association meeting, 24th Oct., 1913) *supra*, note 63 at 20.

67. *The Draft Transfer Rules* (1908), 52 S.J. 723 at 724.

68. Hill, J.W., *Registration of Title*, (Law Society) (1914), 58 S.J. 438 at 439; Hogg, J.E., *The Registry. A Criticism of the Law Society’s ‘Observations’* (1907), 42 L.J. 281 at 282.

69. Strachan, W., *supra*, note 57 at 428; *Land Registry. Land Transfer Acts, 1875 and 1897. The Registrar’s Memorandum on the Law Society’s Recent Publications Land Registry Claims’ etc.*, *supra*, note 63 at 3.

70. Stewart-Wallace, J.S., *Land Registration Under the Law of Property Act, 1922* (1924), 9 Con. 92 at 93; *Royal Commission on the Land Transfer Acts; Second and Final Report of the Commissioners (presented to both Houses of Parliament by Command of His Majesty)* *supra*, note 45 at 43-44.

The Chief Land Registrar would grant “absolute” titles, even though the title presented was defective, if he thought that it would not be challenged.<sup>71</sup> The reason for the adoption of this approach was the extreme rarity of any real defect in title which might upset a sale: the burden of precarious titles was, thus, borne by the State.

The expansion of the “absolute” title over “possessory” title, following the Law of Property Act 1922, is shown in figures for the decade commencing 1920: in 1920, 44% of all titles were “absolute”; 1926, 96%, and 1929, 99%.<sup>72</sup> By 1954 fewer than 1% of titles were granted as “possessory”.<sup>73</sup> In other words, more than 99% of all titles were granted as “absolute”, “qualified” or “good leasehold”.<sup>74</sup>

The existence of both “possessory” and “absolute” titles does not mean that they are the only two alternatives available to the Registry upon the grant of first registration, as may be seen from previous remarks. It is possible for the Registry to grant a “qualified” title. Originally such grants could be applied for where title was good against all the world except the persons entitled under the qualification.<sup>75</sup> The grant of such a title flows from a failure to procure an “absolute” title: it assumes that there is some defect which forbids the grant of an “absolute” title.<sup>76</sup> Now, however, a “qualified” title may not be applied for, it is merely a “consolation prize”, given by the Registrar, if he is not prepared to grant an “absolute” title.<sup>77</sup>

It was asserted, in 1935, that the object of title by registration is that all titles should be registered as “absolute”.<sup>78</sup> Nothing has occurred since to change this observation.

The advantages of conveyancing with “absolute” title have been considered to some degree in discussing the practical necessity for the elevation of “possessory” titles into “absolute”. The grant of an “absolute” title after full investigation (as explained previously) means that practitioners are saved the labour and difficulty of correctly interpreting deeds and in operating the “old” system, whether with or without deeds registration, with an incidental reduction in the costs of dealing with real property.<sup>79</sup> With such advantages as these it is no

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71. Roper, R.B., *Registration of Title* (1967), 116 New L.J. 995 at 1025, 1053, 1078, 1107, 1137; 117 New L.J. 64: 995.

72. *Land Registration in the Past Year* (1929), 15 Con. 21 at 21.

73. Ruoff, T.B.F., *Registered Land — the State Guarantee* (1954), 18 Con. (N.S.) 130 at 131.

74. J.J.W. *Compulsory Registration: The Practice Outlined* (1957), 101 S.J. 241 at 241.

75. Lake, B.G., *supra*, note 48 at 183-184.

76. *The Land Transfer Rules, 1903 supra*, note 64 at 256. The provision is to be found in the Land Transfer Act 1875, s. 9.

77. Smith, T.B., *Registration of Title to Land*, [1948] Scots L.T. 67 at 68.

78. J.M.L., *Registration of Title* (1935), 79 L.J. 283 at 324, 341, 357, 375, 393, 410: 342.

79. Lake, B.G., *supra*, note 48 at 183; *Land Registration*, (Solicitors’ Managing Clerk’s Association meeting, 24th Oct., 1913), *supra*, note 63 at 20; Wontner, J.J., *Registration of*

wonder that, in 1934, it was recognised that the success of title by registration was “all over, bar the shouting”.<sup>80</sup>

### V. *Israel*

Now, most land in Israel is encompassed under the Torrens system. The conversions commenced in 1928 upon the passage of the Land (Settlements of Title) Ordinance with the final conversions being completed this decade.<sup>81</sup> The 1928 Ordinance was updated in 1969 but there were no substantial alterations to the theory behind settlement of title. Under the Act the Minister of Justice has power to determine an area which is to be settled and when he so determines the settlement process begins. Notice is given in the Gazette at least thirty days before the commencement of settlement. A settlement officer is appointed by the Minister for each district in which settlement takes place and he is assisted by a committee (made up of property owners in the district and representatives of the district who are appointed by the District Governor). The purpose of the Committee is to bring to his notice such things as incapacity or the absence of parties who may be interested in the settlement process. In addition, the committee has the function of representing such possible claimants.

At least thirty days before the settlement process commences, the officer must publish a notice which calls for the filing of claims and upon the publishing of the notice in the settlement area claimants may present their claims to the officer. If the officer should learn of claims independent of a formal application for consideration he may treat the claim as if a formal application has been filed. The claimants are required to delimit the boundaries and to explain their claim fully at the time it is filed. The officer may order claimants to appear before him and he can order surveys and mapping where boundaries cannot be established. He also has the power to establish the boundary line if it is incapable of designation from other sources. He is at liberty to order compensation to be paid as a result of any changes made to enjoyment flowing from his determinations.

An appeal from the deliberations of the officer lies to the District Court. Upon receipt of the claims the officer must prepare a schedule of

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*Title* (1930), 70 L.J. 119 at 131: 120; *Royal Commission on the Land Transfer Acts; Second and Final Report of the Commissioners (Presented to both Houses of Parliament by Command of His Majesty) supra*, note 45; Withers, A.H., *Dealings with Registered Land* (1934), 19 Con. 129 at 133.

80. Withers, A.H., *supra*, note 79.

81. Haskel, I., M. Jur., *Land Registration and Conveyancing in Israel* (Paper prepared for Madrid Conference), 8.

claims for exhibition in his office and upon exhibition no transfers of title are permitted. It is also possible for the officer to issue an order preventing the registration of any claims during the settlement process. During the period of exhibition the officer may add new claims to the schedule. Fifteen days after the date upon the schedule the officer may commence public hearings to determine the claims and he must refer matters in dispute to the courts. In determining claims to interests in land the court is instructed to have regard to all interests.<sup>82</sup> Parties may, in lieu of suit, agree to arbitration of their claims and once the arbitration order is issued it will be enforced by the courts. Upon the settlement of the area the schedule of claims is presented orally before the local settlement committee and before the claimants. The schedule, if accepted, must be exhibited for a further thirty days within which the community may appeal to the court against the determinations and it may, upon giving notice to the interested parties, change the officer's determination. Then a book of settled lands is opened in the community and the Registrar of the regional Land Registration Office enters the claims into the books. Transactions entered in it are ineffectual until the completion of registration in the local book of settled lands and the Registrar is bound to enter prohibitions against transactions where a claim is being argued before the courts. Upon solution of all disputes transactions take place in the new books as explained previously.<sup>83</sup>

It is possible to register unsettled land as well but such registrations are operative under the deeds system which was introduced by the British in 1920. In respect of such registration the Land Law provides, in s. 125(b), that it is only *prima facie* evidence of the transaction and validity must depend upon the principles of deeds transfer.<sup>84</sup> However, because of the fact that any land remaining is largely in rural areas, the importance of deeds titles are marginal only in the overall scheme of title to land in Israel.

## VI. *Alternatives for the Maritimes*

The first possibility available which is not a real alternative is to have compulsory registration only as envisaged expressly in the provisions: upon Crown grant. That this will never lead to a successful replacement of the "old" system is proven by the English and Welsh systems. All the energy will have gone in making the hook and, as every fisherman knows, the bait is what is important. The bait must be something which cannot be ignored and this means compulsory conversion. It might be

82. Land Law 1969.

83. Haskel, I, M. Jur., *supra*, note 81 at 3-8.

84. Weisman, J., *The Land Law 1969: A Critical Analysis* (1970), 5 Is. L.R. 381 at 453.

thought that the merits of title by registration will draw primary or voluntary conversions. Such an idea, in the light of the facts in every jurisdiction, especially England and Wales and New South Wales, only has to be stated to be rejected. Incomes of the legal profession are maximised under the present system, they will not urge conversions to a system which guarantees a collapse in revenue assured by a monopoly position and a conversion which has to be paid for by the applicant.

It was to avoid a long period of dual operation of the "old" system and Torrens title conveyancing that "qualified" and "limited" certificates of title were introduced into New South Wales. The alternative types of compulsion which may be adopted here are:

- (1) the procedures in operation in New South Wales. The defects in these are serious. The full benefits of title by registration are not granted on first registration, and there is no systematic procedure which will ensure that the changeover can be completed in a reasonable time.
- (2) selective compulsion, as operates in England. If manpower problems exist, this procedure would be ideal. A variation thereon, to accommodate work-load difficulties, might be to require registration, first, of all mortgages; secondly, of conveyances and then a "mop up" of remaining titles. This approach could be combined with primary application to be made at any time. If selective compulsion is adopted, it could continue in all areas including those not subject to a compulsory registration order. In such a case the Registrar might be given a discretion to register land after the completion of an ordinary search. The advantage of this would be that title would be verified through the search; however, it is subject to the drawback that it is unsystematic, inefficient and costly. The examination of title, conducted by the solicitor, would be a guarantee against any defect in title but if one materialised after first registration the Province would have to meet the loss. In the event of Parliament considering this to be too generous an approach, which might expose the Crown to a large payment, it might be implemented in the case of titles to properties up to a set value only; for example, \$300,000. This would provide protection to the Fund against large claims without an investigation into title being conducted by the Registry; such claims would be likely to be rare as everyone knows that almost all titles are "good holding titles" under the "old" system. The English and Welsh method should be adopted in the Maritimes.
- (3) registration upon the grant of probate achieved by monetary incentives, with a sliding scale of fees to induce registrations. The drawback of such a procedure is again that it is not systematic and does not obviate the difficulties of *ad hoc* method of conversions. The advantage of it is, however, that it would eventually encompass all titles, because even though selective compulsion on sale would not incorporate those properties which are not sold (those which remain in families and pass by succession only, particularly in rural areas) a proprietor is bound to die and the property would be brought on to the Register by that event.

- (4) a systematic search of all titles still remaining unregistered, with a grant of “absolute” title to such proprietors as made out a “good holding title”. “Qualified” title (in the English sense) would be granted to those which are defective and cannot justify the grant of “absolute” title. Unfortunately, such a procedure would be a gigantic and costly undertaking and it might also impair the interests of third parties who were not aware of the procedure, no matter how good the advertising of the change; leaving them only with a claim against the Assurance Fund for their loss.
- (5) a settlement of title procedure similar to that in operation in Israel. The large bureaucracy involved in this method might be thought to be a drawback.

Having proposed the English system of compulsion (or a variation thereof) as that which should be adopted for the conversion of the present system to Torrens title, it must be recognised that there is a drawback in that some properties, particularly rural ones, may not be sold. This will call for a “mop up” procedure to ensure the eventual recording of all titles on the Register. The advantage of conversion on succession might be implemented to solve this problem (see 3 above). Support for this suggestion may be seen from the position in England where, as Simpson observed, after 100 years of title by registration and almost 80 years of selective compulsion, there is no single district in which all titles are recorded on the Register.<sup>85</sup>

Once a title is required to be registered, the registration should be made on the same basis as in England: the Registrar is empowered to award “absolute”, “qualified” or “possessory” titles; any dispute as to the type of title to be awarded would fall to be determined by the Court. Extensions of compulsory areas and the final clearing of the “old” system, through the requirement of conversion on succession, would be implemented by Rules under the Act, at the request of the Government or Registrar-General. This would ensure that undue delaying tactics could not be used by any self-interested body to prevent the ultimate conversion of all alienated lands to the Torrens system.

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85. Simpson, S.R., *supra*, note 26 at 52.



