

CONSTANCE MAILER

**The Frankenstein Mortgage: conceptual
inconsistency and the quest for legal
coherence in the Torrens system**

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Abstract:

The principles of “certainty” and “autonomy” are central to the Torrens system and contract law respectively. Courts seek to resolve conflict between these principles. Systemic incoherence is especially apparent when courts consider the all-obligations mortgage.

The mortgage document does not only place a charge on title. It secures personal obligations also. Registration may or may not extend to these obligations. According to the laws of contract, these personal obligations are established by the substance of the relationship between the parties, illustrated by a structure of legal forms via the contract. Registration then purports to “animate” the contract through the legal form of “title/interest by registration”. Hence the title of this paper: the “Frankenstein Mortgage”.

The Torrens system requires jurisdictions to engage in a perpetual search for coherence. An awareness of the ideological disunion underlying the law of real property enables judges to subduct concepts in a congruent manner and achieve a semblance of a unified legal form.

Rather than etiologating the Torrens principle of certainty through policy-based rationales, reforms require an examination of residuary common law principles and conceptual sources of law, combined with a consciousness of the illogical nature of lawmaking that must, to maximize practical efficacy, provide a compromise between the two systems.

Key words: Torrens, mortgage, immediate indefeasibility, deferred indefeasibility, jurisprudence.

I Introduction:

The human desire for property is rivalrous. The utility of possession of material goods, including real property, is therefore maximised where the law enables stability of ownership:¹

There are different species of goods, which we are possess'd of: the internal satisfaction of our minds, the external advantages of our body, and the enjoyment of such possessions as we have acquir'd by our industry and good fortune...as the improvement, therefore, of these goods is the chief advantage of society, so the instability of their possession, along with their scarcity, is the chief impediment.

The Torrens system conceptualises stability of ownership as "dynamic security": security of transaction, where the law upholds *bona fide* transferees' expectations of acquiring good title, unburdened by claims which they did not agree to.² The principle of "static security" prevents transfer of property other than by accordance with the law of contract – consensual transfer, whereby the transferee's set of rights devolves from the transferor's through the meeting of the minds. Current New Zealand personal property law and the pre-Torrens English deed system prioritise static security over dynamic security. Systems of immediate indefeasibility, such as the current New Zealand Torrens system, favour dynamic security over static security.

Immediate indefeasibility relies on a core statutory provision within the Torrens code which holds that the registered proprietor's title is paramount. Purposively, the approach views the core provision as a manifestation of the intentions behind the Torrens system: to provide certainty and a radical shift from the vexed rules of unregistered conveyancing.

Deferred indefeasibility does not construe the Torrens statute in terms of core and subsidiary provisions. The putative "core provision" is only

¹ Hume (1739), *A Treatise of Human Nature* (Oxford University Press, Oxford, 2000) at [3.2.2].

² R Demogue "Security" in A Fouille (ed) *Modern French Legal Philosophy* (Hardpress, Lenox, 2013) at 428.

a "general statement to be read subject to other provisions".³ Arguably, the deferred indefeasibility approach is purposive and principled on a more complex and engaged level. Registration should only be cancelled in order to protect those who deal on good faith and for value – in a manner which the register authorises. Thus, the register is a source of "authority" for title in a purposive manner, as titles which are registered *and* which are of themselves in accordance with the rules of the registration system are protected. According to immediate indefeasibility, the mere fact of registration creates title.

From a policy perspective, commentators have observed that neither deferred nor immediate indefeasibility fully gives effect to Torrens principles. One viewpoint shows that immediate indefeasibility gives purchasers better security when entering into the transaction, but it permits an ongoing risk of owners losing their land through forgery.⁴ Another argues that deferred indefeasibility imposes a burden of inquiry on all purchasers, and decreases ease of conveyancing as it threatens registered titles; title can be challenged at any time on the bases of defects in the transaction.⁵

In Part II, this article addresses core conceptual differences between the principles of common law, contract and the Torrens system. The author investigates sources of conceptual variations in different jurisprudential perspectives on the nature of property law and identifies judicial reasoning that merges these perspectives in the search for coherence. The author argues that it is not possible to formulate coherent law in this area without resorting to legal fictions. However, the utility of fictions is maximised when they are adopted with consciousness of their falsity and the fundamental incompatibility of their conceptual bases.

Parts III and IV assess why mortgages pose particular problems within the Torrens system. Part III analyses different approaches to

³ *Clements v Ellis* [1934] HCA 18, (1934) 51 CLR 217 at 239 per Dixon J.

⁴ P B Temm "Mr Bumble right again" (1967) NZLJ 129 at 129; W Taylor "Scotching *Frazer v Walker*" (1970) 44 Aust LJ 248 at 252-256.

⁵ R Sackville "The Torrens System: some thoughts on indefeasibility and priorities" (1973) 46 Aust LJ 526 at 531.

indefeasibility and mortgage law in New Zealand and Canada and addresses New Zealand law reform suggestions. Part IV focuses on the "incorporation question" and compares different Australian and New Zealand approaches to the interpretation of new forms of mortgage contracts according to immediate indefeasibility.

Part V summarises some of the ramifications of incoherence in the New Zealand Torrens system.

The author proposes that incoherence is most prevalent in immediate indefeasibility jurisdictions because there is a greater disjunction between Torrens and other rules.

II A New Ownership:

Under the New Zealand Torrens system, enforceable rights in real property are not rooted in the validity or invalidity of the transferor's title. The *nemo dat* doctrine is abolished.⁶ Therefore, the exchange of covalent rights and duties in a void mortgage contract is therefore uncertain, where some rights in the contract are protected by Torrens registration and others are not. Where the contract is void because of fraud, for example, a right is not transferred through the contract. The Torrens register acknowledges this common law rule through the fraud exception.⁷ However, the Torrens principle of "title by registration" creates a new type of set of rights, a new ownership, through the Torrens register. This "new ownership" is defined by the registration of the title that represents it. Title and ownership rights devolve from the register, not the transferor. The materialisation of this title and ownership through registration is the main formulaic concept on which the Torrens structure is based.⁸

Most title registration statutes create ambiguity because they aim to encapsulate incompatible propositions. The first is that only valid instruments are to be registered. The register therefore acts in a

⁶ *Breskvar v Wall* (1971) 126 CLR 376 (HCA) at 385-386 per Barwick CJ.

⁷ Land Transfer Act 1952, s 62.

⁸ *Breskvar v Wall*, above n 6, at 385.

confirmatory capacity, in consistency with the rules of contract – registration only affirms rights and duties conferred according to the rules of contract. This proposition is congruent with the main policy goal of the Torrens system: certainty.⁹

The second proposition is that title devolves from registration, regardless of the invalidity of conveying instruments. In implementing this proposition, courts have created the concept of “immediate indefeasibility”, regarded by some jurisdictions as the logical conclusion of the certainty principle in practice. However, in practice, the second proposition creates ambiguity: primarily, because it conflicts with the first proposition; secondarily, because it is incompatible with other law: other statutes, the rules of contract and common law principles of ownership.

As this paper will illustrate, the latter proposition is adopted in NZ and Australian law, which, unlike Canadian law,¹⁰ does not retain and affirm common law and contractual principles to the extent to which they remain consistent with the Torrens scheme.

In Torrens systems, a conflict of legal forms ensues – on one side, the rules of contract and common law rights; on the other, Torrens legislation and principles. The Torrens system in practice does not afford the level of certainty in defining the parameters of rights to real property which it aims to effect. Certainty is key to the Torrens aims of “cheap and expeditious transfer and secure titles”¹¹. Registration statutes purport to operate as an exhaustive code. However, they cannot. The ordinary rules of contract are still valid as the basis of the transaction; these rules are modified and often excluded by the title registration statute. Issues arise where defective instruments become registered.

⁹ P O'Connor "Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems" (2009) 13 Edin L Rev 194 at 6.

¹⁰ *United Trust v Dominion Stores* [1977] 2 SCR 915.

¹¹ S Rowton Simpson “The Torrens System” in *Land, Law and Registration* (Cambridge University Press, Cambridge 1978) 68-90 at [5.5.2].

This conflict is symptomatic of “bijural ambiguity”.¹² The author suggests that ambiguity is sourced in two different jurisprudential conceptions of property: the Lockean and Hohfeldian perspectives. Locke views property rights as “rights that could be generated and sustained by individuals through their labour and exchange”: legal forms which reflect social facts.¹³ From Hohfeld's perspective, rights do not adhere to property or the owner. A property right is the state's legal sanction to perform or not perform certain acts.¹⁴ Thus the Torrens register provides a guideline as to whether or not rights exist, as the law will only recognise, as a right, that which is on the register. Theoretically, Hohfeld's conception of rights is consistent with the Torrens system: both approaches do not regard rights as legal forms dependent on economic or social facts, but only as legal forms, because they are on the register.

The use of a "paramourty provision" in immediate indefeasibility jurisdictions imposes one legal form, the "title by registration", on top of the matrix of covalent rights and duties (other legal forms) composing the contract. The author labels the Torrens title as a "xenomorphic" legal form, as it derives from a conceptual basis which is alien to the ordinary rules of contract.

Forms and fictions:

This article contests that the assumptions which result from the imposition of one "xenomorphic" legal form on other legal forms are similar to legal fictions, in that they involve the reconciliation of a desired legal result with some expressed or assumed premise. The creation of fictions is inevitable in seeking to meld two disparate and conceptually incompatible areas of law. When dealing with fundamentally incompatible premises, it is impossible to merge the premises, or to develop logical reasoning based on both of them in

¹² O'Connor, above n 9, at 6.

¹³ J Waldron “To Bestow Stability upon Possession” in J Penner and H Smith (eds) *Philosophical Foundations of Property Law* (OUP, Oxford, 2003) at 1-3.

¹⁴ J M Balkin *The Hohfeldian approach to Law and Semiotics* (1989) 44 UMLR 1119 at 1122.

conjunction. A consciousness of the fictitious nature of such lawmaking is required in order to maximise its utility.¹⁵

Two legal fictions arise in the judicial reasoning regarding the immediate indefeasibility of mortgages:

- 1) The majority's assumption in *Boyd v Mayor of Wellington (Boyd)* that the principle of "title by registration" entails that void transactions are no longer void once registered;¹⁶
- 2) The assumption in *Frazer v Walker (Frazer)* that immediate indefeasibility applies to mortgages as well as fee simple and freehold title.¹⁷

According to Fuller, a legal fiction arises where a step in the process of legal adaptation has taken place in an "ungraceful and inelegant manner...where Category A was rather roughly and violently stretched to cover the new situation":¹⁸

A fiction is...a false statement recognised as having utility...a fiction taken seriously, that is 'believed' becomes dangerous and loses its utility...a fiction becomes wholly safe only when it is used with complete awareness of its falsity.

The purpose of the legal fiction usually consists in making lighter the difficulties which are connected with the assimilation and elaboration of new, more or less revolutionary, legal principles.¹⁹ The author of a fiction may be "aware of its inadequacy".²⁰ To Fuller, subjectivity and the judicial attitude when creating a potential fiction are key. Fuller states that fictions are like scaffolding - as the law develops, they can be abandoned.²¹ Fictions are often judicial "glosses" which adapt a legal rule in a consciously fallacious way to fit an unforeseen situation.

¹⁵ L Fuller "Legal Fictions" (1930) 15 Ill Law Rev 363 at 368.

¹⁶ *Boyd v Mayor of Wellington* [1924] NZLR 1174 (CA).

¹⁷ *Frazer v Walker* [1967] 1 AC 569 (PC) at 1079.

¹⁸ Fuller, above n 15, at 525.

¹⁹ R von Jhering *Geist des Romischen Rechts* (Breitkopf und Hertel, Leipzig, 1866) at 306.

²⁰ Fuller, above n 15, at 368.

²¹ L Fuller *Legal Fictions* (Stanford University Press, Redwood City, 1967) at 70.

However, it is possible for much of an area of law to be fictitiously based – as in tax law, fictions in property law arise from a disjunction between socioeconomic reality and the legal forms used to express that reality.²²

The author suggests that Torrens “title by registration” introduces a new kind of ownership entirely – a “xenomorphic” form of ownership. The Torrens idea of title is not ownership itself (a bundle of rights and powers) but a legal form which signifies ownership. As this article shows, new types of mortgage are particularly expository of incompatibility between the principles of transfer of rights by contract, and the generation of rights by registration.

In addition to forming legal fictions, the application of immediate indefeasibility in New Zealand in fraud cases such as *Westpac v Clark* (*Westpac*) involves the creation of more literal fictions, as it “tells stories” of a factually non-existent relationship between a registered proprietor and a registered transferee/mortgagee.²³

Immediate Indefeasibility:

The Privy Council in *Gibbs v Messer* (*Gibbs*) initially adopted deferred indefeasibility.²⁴ The author notes that in the colonial period, the time in which the Torrens principles of certainty and title by registration were conceived and viewed as most necessary, deferred indefeasibility was viewed as consistent with these principles. “The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity”.²⁵ This end is achieved through the protection of *bona fide* purchasers.

In *Gibbs*, a fraudster forged an instrument of transfer and a mortgage document, registering a fictitious person as transferee and mortgagor. The Court held that as both the transfer and the mortgage were void

²² See in general J Prebble “Income Taxation: A Structure Built on Sand” (2002) 24 Sydney L Rev 301, at 305-306.

²³ *Westpac New Zealand Ltd v Clark* [2009] NZSC 73, [2010] 1 NZLR 82.

²⁴ *Gibbs v Messer* [1891] AC 248 (PC).

²⁵ At 254.

according to the rules of contract, the registrar should cancel and reissue the titles.²⁶ The judgment identifies the form-based nature of the mechanism by which a void contract may be validated: "Cresswell must be held to have been *de jure*, if not *de facto*, the proprietor, whose name was on the register, and that their mortgage...is therefore as valid as if Cresswell's own name had been on the register".²⁷ In *Westpac*, following *Frazer*, the legal form of the relationship and transfer between registered proprietor and mortgagee, provided by registration, was paramount over the fact and legal substance of the relationship and transfer, which were a nullity.²⁸

Australian and New Zealand courts have subsequently rejected the *Gibbs* approach, restricting its application to cases where forgery has involved a fictitious person.²⁹ In *Boyd*, the Court considered a registered transfer which had not been performed correctly according to the Public Works Act. The Court would not order the rectification of the register. Therefore, the positive system prevailed over the ordinary rules of contract and other statutes. The judgment of Barwick CJ in *Breskvar v Wall* indicates a purposive approach:³⁰

That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration.

This is both a statement and an expansion of the "title by registration" mechanism. The Court utilizes the idea that a transferee's title devolves

²⁶ The facts of *Gibbs* accentuate the immediate indefeasibility doctrine's inconsistency with the ordinary rules of contractual validity, which entail that no title passes when there is no consideration or agreement between the current and former registered parties: "Hugh Cameron was...a myth. His was the only name on the register, and having no existence, he could neither execute a transfer nor a mortgage" at 254.

²⁷ At 255.

²⁸ Above n 23 at [13].

²⁹ *Breskvar v Wall*, above n 6; *Boyd*, above n 16.

³⁰ *Breskvar v Wall*, above n 6, at 385-386.

from registration, and not from the title of the transferor, as a premise for the decision that a *prima facie* invalid transfer is validated by registration.

“Title by registration” has been adopted in Australia as the basis for the primacy of Torrens principles (as manifested in judicial extension of the statutory provisions) when in conflict with other law – for example, the registration of a mortgage that was void because of incapacity (the mortgagor was a minor),³¹ and transfers void for breaches of other statutes.³² However, New Zealand courts have been less ready to apply the “title by registration” mechanism with such latitude. In *Duncan v Macdonald (Duncan)*, Torrens legislation is read subject to the Illegal Contracts Act: section 6 states that the mortgage's power of sale is effective to convey legal title by way of security but that the power of sale is ineffective until the mortgagee applies to the court under s 7.³³ Section 7 enables the court to vary and validate the covenant to pay, setting the amount payable for release of the charge or out of the proceeds of realisation in the same manner as could be done equitably. The court's discretion effectively rearranges the register as it negates the power of sale.

It is arguable that the way in which this statute interacts with Torrens provisions is contrary to the principled Torrens approach – that the register is the only source of title and one only has to look at the register to ascertain title.

The issue of inconsistency between “title by registration” and the Illegal Contracts Act reflects the incompatibility of “title by registration” and contractual and common law principles of transfer, as the Act is premised on these principles.

³¹ *Horvath v Commonwealth Bank of Australia* (1999) 1 VR 643 (VSCA) at 158.

³² *Breskvar v Wall*, above n 6.

³³ *Duncan v McDonald* [1997] 3 NZLR 669 (CA).

In personam jurisdiction:

Australian and New Zealand courts permit the granting of *in personam* relief, sourced in the equitable jurisdiction. *In personam* relief relates to the conduct of parties after or during acquisition of registered title. The ultimate practical effect of the *in personam* exception is to undermine static security. Due to growing judicial concern about the inconsistency between the granting of personal equities and the terms and policy of the Torrens acts,³⁴ courts in the 1990s limited the *in personam* jurisdiction to cases where there was something unconscionable in the conduct of the registered owner, and there was a recognised cause of action.³⁵ The restriction aimed to maintain dynamic security and aligned the *in personam* system with the positive nature of the Torrens system.

Nevertheless, immediate indefeasibility still presents a bifurcated jurisdiction of two extremes: on one hand, the "title by registration" polar question of the Torrens system, and on the other, the equitable concerns of the *in personam* jurisdiction. The first is premised on certainty and is an external constructor that takes no account of the substance of the relationships between parties; the second depends much on the courts' discretion and focuses solely on parties' relationships with, and conduct to, each other.

Transactional Flaws and Derivative Title:

In *Boyd*, Salmond J dissented in support of deferred indefeasibility and the *Gibbs* approach. Salmond J stated that one of the main purposes of the Torrens system was to protect titles of transferees registered in good faith, notwithstanding defects in the transferor's title. This is the abolishment of the *nemo dat* rule – the idea that one's title derives from one's transferor's title: "all such prior interests are, in the absence of fraud or other specific exceptions, finally and conclusively destroyed by

³⁴ *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 (HCA) at 613, 638 and 653; *Vassos v State Bank of South Australia* (1993) 2 VR 316 (CA) at 329; *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472 (HCA) at [54].

³⁵ *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202 (NSWSC) at 217-218; *Duncan v McDonald*, above n 33, at 683-684 per Blanchard J.

the bringing of the land under the Act and the issue of an adverse title to some other person".³⁶

Salmond J viewed the dismissal of the "derivative" concept of title as a different issue to the validity of transactions *inter partes*:³⁷

The whole law as to the validity and invalidity of conveyances and their transactions *inter partes* would be set aside and rendered inoperative so soon as either party succeeded honestly, however negligently, in inducing the Registrar to register the transaction. I find nothing in either the Act or in the public policy which underlies it sufficient to justify so *remarkable an extension* of the doctrine of indefeasibility of title.

The Torrens principles act to protect purchasers against flaws in the source of their title, not defects in the transaction. Deferred indefeasibility is consistent with the abolishment of *nemo dat*, and with the current New Zealand legislation, which protects an innocent purchaser/mortgagee from challenges "on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor through fraud or error, or under any void or voidable instrument."³⁸ This section does not necessarily protect title from challenges based on the invalidity of the instrument of transfer. The second "may" phrase appears to apply to the transferor's author, not the transferee's.

III The Mortgage Problem:

"Title by registration" is difficult to apply to mortgages, which, as charges, interact with pre-existing fee simple or freehold title. The mortgage, by its registration, does not eliminate the previous title, even

³⁶ *Boyd*, above n 16, at 1204 per Salmond J.

³⁷ *Boyd*, above n 16, at 1203 per Salmond J.

³⁸ Land Transfer Act 1952, s 183.

though it confers the ability to do so (the power of sale) on the mortgagee.

The immediate indefeasibility of the mortgage did not arise because of conscious policy decisions, but because the *Frazer* decision did not differentiate between fee simple, and the mortgage in determining the effect of the paramountcy provision in the Torrens statute.

The narrow ambit of the fraud and *in personam* exceptions entails that mortgagees have little incentive to guard against fraud, where mortgagees, as institutional lenders, are well placed to take precautions by verifying the identity of lendees.³⁹ Furthermore, the Act compensates institutional lenders indirectly by remunerating the erstwhile registered proprietor while the mortgagee enjoys its power of sale.⁴⁰

NZ Reforms:

From an economic perspective, the cost of fraud can be minimized if the law imposes the liability on the party who can avoid the occurrence of fraud at least cost.⁴¹

Following similar statutory amendments in Queensland and NSW,⁴² New Zealand law reform recommendations seek to place an onus on mortgagees to "take reasonable steps" to verify mortgagors' titles, incentivising lenders to avoid fraud.⁴³ A mortgagee's title will be defeasible if the mortgagee fails to take reasonable steps to check the identity of the mortgagor.

Similarly, reform suggestions modify the current system of immediate indefeasibility by "introducing judicial discretion as a means of avoiding manifest injustice in limited cases".⁴⁴ This suggestion is intended as an extension of the *in personam* jurisdiction and an incorporation of it

³⁹ *Grgic*, above n 35; *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC).

⁴⁰ Land Transfer Act 1952, ss 172 and 172A.

⁴¹ O'Connor, above n 9, at 207.

⁴² Land Title Act 1994 (Qld), ss 185(1A), 11A and 11B; Real Property and Conveyancing Legislation Amendment Act 2009 (NSW), s 56C.

⁴³ New Zealand Law Commission *A New Land Transfer Act* (NZLC R116, 2010) at [2.19].

⁴⁴ At [2.16].

within the Torrens scheme,⁴⁵ while being conceptually inconsistent with that scheme: "the interests of justice substantially outweigh transactional certainty in the few cases where discretion would need to be exercised".⁴⁶

Canadian Approaches:

In Canada, Torrens statutes require clear and unambiguous language to displace common law principles.⁴⁷ Canadian courts read Torrens statutes in a manner which gives equal weight to Torrens principles and the common law.

Ontario:

Most Canadian provinces have adopted deferred indefeasibility.⁴⁸ However, in some provinces, there is ambiguity regarding its scope.

The interaction of the deferred and immediate indefeasibility rules in Ontario is very different to New Zealand. *Household Realty Corp v Liu (Liu)*, involving similar facts to *Frazer*, considered a conflict between two statutory rules: the positive system of title by registration and the rule of deferred indefeasibility.⁴⁹ The statute's statement of deferred indefeasibility is consistent with Salmond J's *Boyd* distinction between invalidity by authorial title and invalidity by instrument – s 155 states that a fraudulent "disposition" (act of transfer) is invalid. The Court in *Liu*, similarly to *Frazer*, held that s 78(4) (the "title by registration" section) was "paramount" over s 155. The determination differed from *Frazer* in two ways. The Court interpreted s 78(4) as "paramount", not on the basis of Torrens principles, but as a matter of statutory interpretation. The Act stated that s 155 was "subject to [the rest of] the Act". Also, the conflicting sections were not, as in *Frazer*, the "title by

⁴⁵At [2.14].

⁴⁶At [2.16].

⁴⁷ *Dominion Stores Ltd*, above n 10.

⁴⁸ Joint Land Titles Committee *Renovating the Foundation: Proposals for Model Land Recording and Registration Act for the Provinces and Territories of Canada* (ALRI, 1990).

⁴⁹ Land Title Act RSO 1990 c L-5, ss 78 (4) and 155.

registration section" and the "register amendment" section,⁵⁰ but the "title by registration" section and a "deferred indefeasibility" section.

In contrast with public responses to NZ law reforms,⁵¹ the Ontarian public, perhaps spurred on by concerns about mortgage fraud in the United States, viewed *Liu* as introducing "a serious mortgage fraud plague".⁵² Section 78(4) was amended, so that "title by registration" does not apply to registration of fraudulent instruments.⁵³ *Lawrence v Maple Trust Company* later overturned *Liu*, stating that the Act accommodated interpretations consistent with both deferred and immediate indefeasibility. However, common law principles only supported deferred indefeasibility.⁵⁴ Thus, common law principles informed the interpretation of the Torrens statute and clear statutory language would be needed to cancel the application of those principles.

British Columbia:

In 2006, British Columbia amended its Torrens statute to provide immediate indefeasibility for fee simple titleholders.⁵⁵ Before this change, courts relied on *Gibbs* to interpret conflicting sections according to deferred indefeasibility; ignoring the law change in *Frazer*.

In British Columbia, indefeasibility does not apply to mortgages. However, questions similar to the deferred/immediate indefeasibility problem arise in respect of registered fraudulent mortgages. In *Gill v Bucholtz*,⁵⁶ a fraudster, forged a transfer of the land to an accessory, who mortgaged the property to two innocent parties. The Court reasserted the

⁵⁰ Land Transfer Act 1952, ss 62, 80 and 81.

⁵¹ See in general New Zealand Law Commission, above n 43, at 11-12.

⁵² *Rabi v. Rosu* (2006) 277 DLR (4d) 544 (ONSC) at [2]; See in general: B Aaron "Mortgage fraud persists with cash-back schemes" *Toronto Star* (Toronto, 10 December 2006); A Coombes "Borrowers discover that home is where the mortgage fraud is" *Wall Street Journal* (New York, 11 April 2006); J Creswell, "Web help for getting mortgage the criminal way" *New York Times* (New York, 16 June 2007).

⁵³ Section 78 (4.1).

⁵⁴ *Lawrence v Maple Trust Company* (2007) 278 DLR (4d) 698 (ONCA) at [54].

⁵⁵ Land Title Act RSBC 1996 c 250, s 25.1.

⁵⁶ *Gill v Bucholtz* [2008] BCSC 758.

nemo dat principle for mere charges as these are lesser interests than the fee simple, and are dependent on the title of the registered proprietor.⁵⁷

The British Columbian and Ontarian perspectives exemplify the general Canadian view that, as a mortgage is dependent on the title of the mortgagor, indefeasibility principles must work differently. By asserting common law rules, Canada can therefore avoid most of the incorporation and contractual interpretation issues which vex immediate indefeasibility.

IV The Incorporation Question

Modern forms of mortgages are very different from those of the *Gibbs* era. Lenders use collections of documents to formalise secured loans. Among these are a simple instrument of mortgage which includes the provisions of a registered memorandum,⁵⁸ and the “all-obligations mortgage”, which identifies the mortgaged property and records that the mortgage secures all money which the mortgagor may owe to the mortgagee now, or in the future, for any reason. In the latter case, the terms of any loans appear in separate loan agreements, which are not registered. The all-obligations conundrum is a symptom of dissonance between the circumstances in which the Torrens principles were encapsulated, and innovations in contract formation which are adapted to complex lending systems.

Australian and New Zealand law states that the performance of a personal obligation must be “an integral part of the estate or interest of the registered proprietor” to be protected by registration.⁵⁹

The principles of “certainty” and “autonomy” are central to the Torrens system and contract law respectively.⁶⁰ Courts seek to resolve conflict

⁵⁷ At [26].

⁵⁸ Land Transfer Act 1952, s 155A.

⁵⁹ *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* [1984] NZLR 704 (HC) at 713-714; *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 (HCA) at 17; *Mercantile Credits Ltd v The Shell Company of Australia Ltd* (1976) 136 CLR 326 (HCA) at 343 per Gibbs J.

⁶⁰ M Harding "Property, Contract, and the Forged Registered Mortgage" (2010) 24(1) NZULR 21 at 23.

between these principles. In Queensland, registration confirms the promise to repay, as contingent on the title. The register protects the mortgagee's right to sue the mortgagor personally for the debt. A registered mortgage's indefeasibility extends to the covenant to repay the sum secured by the mortgage.⁶¹ This approach aims to maintain consistency with the core Torrens principle and concept: the principle of certainty and the concept of "title by registration", not from the combined legal form and substance, or exegesis, of the contract.

As Harding explains, the primacy of the register rejects the autonomy of contract law in two ways – in the case above, it gives the whole contract an elevated and protected status which may not be intended or expected by the contracting parties, and in the case of forged mortgages (such as *Westpac*), it binds the mortgagor to agreements which he/she did not intend to enter into.⁶² This conundrum is sourced in the nature of the mortgage.

In economic substance, a mortgage is more than a mere "interest". It is the right to sell. This is part of the right to derive income, which is labeled by some scholars as the core of ownership.⁶³ Therefore, a mortgage is a kind of semi-ownership.

A mortgage also depends on pre-existing fee simple title. It is conceptually strained to state that the existence of the mortgage depends on its registration, and does not originate from the author's title, according to the abolishment of *nemo dat*. This is because, by its nature, it does devolve from a mortgagor's title.

The mortgage document not only places a charge on title. It secures personal obligations also. Registration may or may not extend to these obligations. According to the laws of contract, these personal obligations are established by the "meeting of the minds" – the substance

⁶¹ *Hilton v Gray* [2007] QSC 401, (2008) Q Conv R 54,686 at [48]-[55]; *Parker v Mortgage Advance Securities Pty Ltd* [2003] QCA 275 at [6].

⁶² Harding, above n 60, at 26.

⁶³ K Holmes *The Concept of Income: a Multi-Disciplinary Analysis* (IBFD, Amsterdam, 2001) at 328.

of the relationship between the parties, illustrated by a structure of legal forms via the contract. Registration then purports to fully "animate" this contract through the xenomorphic legal form of "title/interest by registration", even though there is no substantive relationship between the parties involved. Hence the title of this paper: the "Frankenstein Mortgage".

Recent Approaches:

Property/contract compromise has given rise to inconsistency in courts' treatment of different types of mortgages. Some jurisdictions have adopted an "incorporation approach", which splits the mortgage contract into two categories: material pertinent to registration – usually the charge on land and power of sale; and ancillary materials, such as an all-obligations loan.⁶⁴ Registration does not secure ancillary loans, therefore the mortgage in economic substance secured nothing, even though in legal form it is an indefeasible charge.

In *Westpac*, a fraudster obtained an unregistered mortgage from Westpac, an innocent party, in the name of F, the registered proprietor. The document purported to secure a promise to repay "all money which...you may owe...now or in the future for any reason". It was unsure whether or not F would have owed Westpac any money under this contract, were it registered. The Court read the matrix of rights under this contract strictly. The contract addressed "you" –F, the named person on the document, not the fraudster who had actually signed. Westpac had not lent F anything. Therefore, registration would have animated the contract, but this clause of the contract was ineffectual *ex ante* against F. The Court held that terms of an unregistered loan contract can be protected by registration of the mortgage instrument "only if the mortgage...must be interpreted as so requiring".⁶⁵

⁶⁴ *Duncan v McDonald*, above 33, at 682; *Perpetual Trustees Victoria Ltd v English* [2010] NSWSC 32, (2009) 14 BPR 26,675 at [125]; *Perpetual Trustees Victoria Ltd v Xiao Hui Ying* [2015] VSC 21.

⁶⁵ At [44].

The Court saw “no obvious policy reason” for a strict differentiation between charge and loan,⁶⁶ even where such a delineation would be consistent with the principle of certainty.

The *Westpac* approach differs from that of *Provident Capital Limited v Printy*, a NSW case which states that registration did not protect the whole of an all obligations mortgage, and that, in the Torrens context, there was no requirement to read separate parts of a mortgage instrument together.⁶⁷ NSW indirectly disapproved a *Westpac*-style reliance on the terms of individual clauses:⁶⁸

It may seem odd that the fate of an innocent owner, entirely ignorant of a purported loan and mortgage in his/her name, can depend upon the fortuitous circumstance that the mortgagee has or has not included, with sufficient specificity in the mortgage documents, the debt the subject of the mortgage.

Under this analysis, the *Westpac* reliance on contractual terms is less desirable than just delineating between all-obligations and conventional mortgages, as it is less certain. *Provident*'s reasoning was based on legislation which required identification of a “default” “in the observance of any covenant...in the mortgage” or “in the payment, in accordance with the terms of the mortgage...of (money) the payment of which (was) secured by the mortgage”.⁶⁹ The Court held that there could be no relevant default as the part of the mortgage which was animated by registration did not itself contain terms specifying the requirements of payment, and also did not contain a term incorporating the deed of loan into the mortgage.⁷⁰ The approach is similar to that of Glazebrook J in the Court of Appeal judgment of *Westpac*, which was majorly based on Australian authorities.⁷¹ Glazebrook J concluded that the registration of a mortgage validates the terms and conditions in the instrument of

⁶⁶ At [88].

⁶⁷ *Provident Capital Ltd v Printy* [2008] NSWCA 131, (2008) 13 BPR 25,199 at [53].

⁶⁸ *Perpetual Trustees Victoria v English*, above n 62, at [126].

⁶⁹ Real Property Act 1900 (NSW), s 57 (2).

⁷⁰ At [52].

⁷¹ *Westpac Banking Corporation v Clark* [2008] NZCA 346, [2009] 1 NZLR 201.

mortgage which delimit or qualify the estate or interest of the mortgagee in the land,⁷² and that terms and conditions of other agreements may be incorporated by reference into a registered mortgage of interest, but that the personal covenant to pay of a forged or otherwise void mortgage cannot be enforced against the registered proprietor personally.⁷³

Pre-Westpac Approaches:

Writing prior to *Westpac*, Scott (unlike Blanchard J) states that there is insufficient connection between a registered charge and a secured debt for the debt to be protected by registration.⁷⁴ The charge of a forged registered mortgage may exist in the absence of the debt, and a registered unforged mortgage may not be discharged even though the secured sum has actually been repaid.⁷⁵

Scott considers the legal and economic substance of the mortgage document and what is actually secured. He dismisses, as a fallacy (or fiction), the idea that Torrens registration provides complete protection. Although he does not illustrate the correlation in terms of a preference for reflection of substance and form in rights conferred by contract, rather than the register and its principles, Harding identifies a similarity in reasoning between the British Columbian perspective and Scott's viewpoint - where a forged mortgage cannot become indefeasible through registration, "the mortgage, if it were a valid instrument...would secure nothing, as the mortgagors has received nothing thereunder and, hence, would owe nothing to the mortgagee"⁷⁶. In a British Columbian context, according to Scott's view, the mortgage is a nullity both in legal substance and in legal form. Under New Zealand law the mortgage is indefeasible in legal form, as originating in the

⁷² At [30]-[31], [70] and [90].

⁷³ At [90].

⁷⁴ Struan Scott "Indefeasibility and the Forged Mortgage" [1998] NZLR 531 at 533.

⁷⁵ At 533-534.

⁷⁶ *Credit Foncier Franco-Canadien v Bennett* (1963) 43 WWR 545 (BCCA); *Homewood Mortgage Investments Ltd v Lee* 2008 BCSC 512 at [10].

register, but, in legal substance, it only secures the right of sale, not the entirety of the charge.

Duncan reiterates reasoning in NSW cases: registration “validates only those provisions that delimit or qualify the registered interest or that are otherwise necessary to assure that interest to the registered proprietor”.⁷⁷ This statement resonates with an earlier New Zealand case, which draws a line between “covenants affecting the estate or interest...or rights pertaining to a registered property”, which are “upheld, notwithstanding invalidity”, and “rights...which are not an integral part of the estate or interest of the registered proprietor”.⁷⁸ The New Zealand approach, however, assumes that the mortgage contract is prima facie invalid, and that certain parts of it, which are pertinent to the land, are validated by their contingency to the registered title. Their limitation on the title is activated *because it is pertinent to* the title of the mortgagor. *Duncan* states that the “primary transaction” involved in a mortgage is not “dealing in property”. It is the loan. The part of the contract which affects the registered proprietor’s title, and is animated by that title, is the only part of the legal charge and contract which is protected. Moreover, the “interest” given to the mortgagee is “for, and only for, a particular purpose” – so that the mortgagee may have right of recourse. Therefore, there is a twofold limitation on the contract’s validity. Primarily, only the part of the contract affecting the land is validated. Secondly, the part of the contract affecting the land is delineated with regard to the loan – the other, non-validated part of the void contract. So, it is not true that only the part of the mortgage affecting the land is validated, where one must look to the rest of the document to ascertain live limits on that charge.

Blanchard J begins his analysis with a statement which defines the mortgage in terms of economic fact: the point of the Torrens mortgage

⁷⁷ *Duncan*, above n 33, at 681; P Butt *Land Law* (3rd ed, Law Book Co of Australasia, Sydney, 1996) at [2019]; *PT Ltd v Maradona Pty Ltd* [1992] 24 NSWLR 643 (HCA) at 679; *Travinto Nominees Pty Ltd*, above n 59, at 48.

⁷⁸ *Congregational Christian Church*, above n 59, at 713-714 per Boarker J.

is to give the mortgagee the power of sale and a right to the proceeds if the mortgagor defaults.⁷⁹ The secured title only extends to the “right of recourse to the security for such value as the land may have”, not to the right to the performance of the promise to repay.⁸⁰ Therefore, in the case of a void instrument, the promise to repay is void. Part of the mortgage contract is valid, part is not. The mortgagor’s set of rights are those of “xenomorphic” legal form only, conjured into existence by the register – they do not reflect any actual agreement between the parties. This is an “irrebuttable (legal) fiction”.⁸¹ Harding views the fiction as constructed through statutory interpretation, in a compromise between the Torrens concept and the principles of contract law.⁸²

The property/contract/common law compromise also operates regarding leases. Section 118 provides that a registered memorandum of lease may include "a right for or covenant by the lessee to purchase the land".⁸³ *Fels v Knowles* establishes that the option to purchase is protected by registration, where the transfer and instrument is *prima facie* void as being *ultra vires* - the lessors did *not have the power* to grant the option.⁸⁴ The *Fels* decision can be contained within the delineation proposition, that only parts of agreements which are "an integral part of the estate of interest of the registered proprietor" can be validated by registration.⁸⁵

According to *Duncan*, “registration [only] protects the charge”.⁸⁶ The charge, as security for the debt, is indefeasible; but only through and to the extent of rights in the land. The rest of the charge, as a personal covenant, is not enforceable. Thus the mortgage is split in two. As Scott identifies, a mortgage is more than just a charge on land. It is a set of

⁷⁹ *Duncan v McDonald*, above n 33, at 682.

⁸⁰ At 682-683.

⁸¹ *Perpetual Trustees Victoria Ltd v English*, above n 65, at [125].

⁸² Harding, above n 60, at 31. Harding does not identify the *Perpetual Trustees dictum* with Fuller’s fictions.

⁸³ Land Transfer Act, s 118.

⁸⁴ *Fels v Knowles* (1906) 26 NZLR 604 (CA); *Rotorua and Bay of Plenty Hunt Club (Inc) v Baker* [1941] NZLR 669 (SC).

⁸⁵ *Congregational Christian Church*, above n 59, at 714.

⁸⁶ At 682.

covenants and powers. The charge on land relates closely to the personal covenant to repay; the purpose of the charge is to secure repayment.⁸⁷

In *Duncan*, the mortgagee can, without court order, simply exercise the power of sale, but cannot enforce or obtain judgment on the personal obligations in the contract. The mortgage is “a nullity” apart from registration. The principle of title by registration takes precedence over the principles of contract;⁸⁸ where the otherwise void instrument becomes registered, it is effective so far only as is necessary to uphold and protect the title but no further.⁸⁹ These *dicta* encapsulate the fiction that “charge by registration” equals “contract by registration”, insofar as the contract confers the charge. The Torrens principle is vexed because nature of a mortgage is very different to that of fee simple title. A mortgage does not secure title; it provides a charge over the title as security, and, of its nature, devolves from the rights of the registered proprietor.

The above compromises cannot fully satisfy the Torrens principle of certainty. To do so, registration would have to animate the entire void mortgage agreement.

Scott opines that the logical dissonance of the *Duncan* approach entails that either registration has no effect on the underlying debt, or that registration regenerates the debt from the void contract and the mortgagor must find recourse through the *in personam* jurisdiction to prevent the mortgagee from enforcing the debt.⁹⁰ If the first option, Scott's preference, is in effect, then in practice the court will not allow the mortgagee to sue for the secured sum.⁹¹ In economic substance, the mortgage is a nullity, as the mortgagor has not personal liability to repay, and the charge does not secure repayment. Scott prefers the first option.

⁸⁷ At 533.

⁸⁸ *Breskvar v Wall*, above n 6, at 385.

⁸⁹ *Duncan*, above n 33, at 681.

⁹⁰ Scott, above n 74, at 533.

⁹¹ *CN and NA Davies Ltd v Laughton* [1997] 3 NZLR 705 (CA) per Thomas J.

Frazer v Walker and Incorporation:

Frazer affirmed (in *obiter*) the immediate nature of indefeasible title under s 62 and s 183, following *Boyd*, and extended the immediate indefeasibility doctrine to charges. If the covenant to pay is viewed as an integral part of the mortgagee's interest, then it is also validated by registration.⁹² Also, there must be a valid payable debt, on which the validated power of sale and covenant to pay can operate. These assumptions, of course, are the "complete validation" approach. New Zealand law is indecisive regarding this approach. In the first instance of *Laughton*, Blanchard J, citing *Frazer*, stated that registration of a mortgage removes mortgagor defences for not repaying a loan "directly advanced" to the mortgagor under the mortgage.⁹³ Blanchard J's proposition is difficult to apply to a *Westpac* type situation where the loan was not advanced to the owner. The facts of *Frazer* are perhaps unfortunate in that they produce an ambiguous precedent – in *Frazer* the fraudster (Mrs Frazer) was also a registered proprietor.

Blanchard J dissected the mortgage according to "primary obligations" (where the sum is "directly advanced" to the registered proprietor) and "secondary obligations":⁹⁴

Where the mortgagor's obligation to pay is in truth a collateral obligation of guarantee...ordinary principles of the law relating to guarantees apply regardless of registration of the security for the guarantor's obligation. The security created by the mortgage remains, for it is indefeasible, but it is arguable...that no underlying obligation remains in respect of which the security can operate.

Therefore, where the sum is not "directly advanced", despite the power of sale, the mortgage *in its capacity as security, not just charge*, is not

⁹² As is the NSW perspective, illustrated in *PT Ltd v Maradona Pty*, above n 77, at 677-681.

⁹³ *Laughton v CN & NA Davies Ltd & Anor* (1996) 3 NZ ConvC 192,356 (HC) at 192,361; Land Transfer Act 1952 ss 62 and 63; See in general S Scott "Extension to a Mortgagor's Covenant to Pay and Power of Sale – Guarantees" (1996) 7 BCB 188.

⁹⁴ At 192,361-192,362.

indefeasible – in economic substance it secures nothing, and Torrens indefeasibility is subject to a separate set of legal principles relating to guarantees. The Court instead approached the case on an *in personam* basis.⁹⁵ The effect of the *in personam* claim was as if the mortgagor discharged the debt or the mortgagee forgave the debt.

Underlying this conclusion, there is an assumption that registration validates unenforceable covenants to pay, and that covenants to pay are not severable from the power of sale – in fact, a covenant to pay gives rise to the power of sale to recover the debt.⁹⁶ The complete validation assumption "overlooks the distinction between the conferral of a power of sale and the exercise of that power".⁹⁷

*Solak v Bank of Western Australia Ltd (Solak)*⁹⁸

In a judgment which has now been overruled in accordance with the NSW approach,⁹⁹ Victoria approached a contract very similar to that addressed in *Westpac* on the basis that the right to repayment is covered and protected by registration. References, as in *Westpac*, to "you" in the all obligations mortgage, were found to apply to the registered proprietor, not to the fraudster who signed the document.¹⁰⁰

The Court initially reasoned that the "loan contract is intended to...be incorporated into the mortgage",¹⁰¹ and then came to a conclusion regarding the "you" of the contract that was the reverse of *Westpac*. The reasoning in *Solak* is based on an assumption that the parties intended for the terms of the loan contract to be incorporated into the mortgage instrument. The author argues that this is not necessarily so – in the case of a forged mortgage, the parties bound by registration have no mutual intentions whatsoever. There is no reason to believe that the Court in *Solak* is prioritising contractual terms, legal forms which evidence the

⁹⁵ *CN and NA Davies Ltd v Laughton*, above n 91.

⁹⁶ Scott, above n 73, at 540.

⁹⁷ At 540.

⁹⁸ *Solak v Bank of Western Australia Ltd* [2009] VSC 82.

⁹⁹ *Perpetual Trustees Victoria Ltd v Xiao Hui Ying*, above n 64.

¹⁰⁰ At [15].

¹⁰¹ At [13].

substance of the meeting of the minds, over the principle of certainty and clear delineation of what is protected under the Register and what is not.¹⁰²

It is inherent in any forgery that the victim of the forgery has not assumed contractual obligations upon which he or she can be sued personally. It is therefore, not an answer to the consequences of indefeasibility that there may be no personal obligations assumed by the true owner of the land where the covenant to pay is identified by the mortgage.

Thus the right to the performance of the promise to repay, if expressed in a mortgage instrument, falls within the mortgagee's title upon registration. The Court distinguished *Printy* on the grounds that in that case the collateral agreements were not incorporated within the mortgage document.¹⁰³ *Solak* takes the view that the propositions in *Printy* do not provide a basis for reading down terms in the incorporated and registered mortgage document in view of statutory protections; according to *Solak*, it is immaterial that mortgages as securities can exist without covenants to pay, or that covenants to pay may be collateral to a debt in a separate loan agreement.¹⁰⁴ The court seems to be stating that the covenant is valid (immediately indefeasible) just because it is part of the registered mortgage document, not because of the nature of its subject matter.

Westpac does not accord with *Solak*, and did not mention the case, despite the factual similarity. *Westpac* and *Ying*, more so than *Solak*, focus on the rules of contract and seem ready to restrict the validation of a mortgage as much as is possible, whilst retaining the immediate indefeasibility doctrine: "the court will certainly not strain to find that a reference in a registered document is apt to encompass an unregistered

¹⁰²At [16].

¹⁰³*Provident Capital v Printy*, above n 67.

¹⁰⁴At [17].

forged instrument... (where) no obligation was ever accepted by the registered proprietor”.¹⁰⁵

Queensland:

Queensland courts have taken a different view to *Westpac*. In *Queensland Premier Mines Pty Ltd v French (French)*,¹⁰⁶ Kiefel J distinguished between “rights arising from the instrument which creates the interest in land” and “the right to recovery of a debt merely collaterally secured by the mortgage” – the subject matter of an unregistered collateral loan contract.¹⁰⁷ This case dealt with legislation which states that the transferee of a registered mortgage acquires the right to “recover a debt or enforce a liability under the mortgage”.¹⁰⁸ Notwithstanding the latitude of this phrasing, Keifel J held that the payment of collaterally secured debt is not covered by registration, as “it is no part of the purpose and function of a statute such as the Land Title Act to rewrite the bargain between transferor and transferee”.¹⁰⁹ Therefore, the transferee did not acquire rights to the payment of the debt by registration of the transfer. This reasoning centers on the primacy of contract, the variety of tangential loan agreements in practice, and a reluctance to rescribe contractual agreements.

Kirby J identifies aspects of Torrens principles which correlate with current public policy objectives:¹¹⁰

There is to be a register open to the public which will record...the nature of a specified interest which, in this case, is the mortgage. An inspection of the register should reveal all about the title. What parties did or thought “on the side” should not be relevant. Fulfilling that public purpose suggests that, without very clear statutory language, courts should resist

¹⁰⁵ *Westpac*, above n 23, at [51] per Blanchard J.

¹⁰⁶ *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81 (HCA).

¹⁰⁷ At [55].

¹⁰⁸ Land Title Act 1994 (Qld), s 62.

¹⁰⁹ At [56].

¹¹⁰ *Queensland Premier Mines Pty Ltd v French*, above n 106, at [15].

importing into the Act consequences that are *interstitial or implied* from the description of the rights that are subject to registration. Because the personal obligations that derive from the loan agreement are *legally separate and distinct* from the obligations arising, as such, “under the mortgage”, they are not automatically transferred with the mortgage that is registerable. Unless included in the mortgage instrument itself, to be transferred they require separate and specific agreement by those who are parties to the loan agreement.

French did not concern a forged document. The document was a valid collateral loan contract which was unassigned to the new mortgagee when a Torrens mortgage was transferred to, and registered by, a new mortgagee. *Westpac* differs from *French* - the former focuses on the “you” terminology in the contract being inapplicable to the registered proprietor, because it addressed the fraudster. Blanchard J remarked that “a different conclusion might have been reached” if the registered proprietor were “expressly made liable...but that would have to have been done very explicitly”.¹¹¹ However, these statements are qualified by the context of fraud; they refer to the liability of the registered proprietor as opposed to the fraudster, not the extension of protection afforded by registration to collateral loans:¹¹²

A court will certainly not strain to find that a reference in a registered document is apt to encompass an unregistered forged document, and so provide the mortgagee with a security for a covenant to pay moneys for which no obligation was ever accepted by the registered proprietor.

French assumes that, as expressed in contract, and affirmed by the primacy of contract, parties intend against incorporation, and that mortgage instruments should be read narrowly. Harding interprets both *French* and *Westpac* as showing “a clear preference for mortgagor autonomy over mortgagee certainty when answering the incorporation

¹¹¹ *Westpac*, above n 23, at [51].

¹¹² At [51].

question”.¹¹³ However, *Westpac* does not address incorporation as directly as *French*. *Westpac* is about a forged unregistered document. The factual background affects constructions of contractual interpretation and intention. The New Zealand position on incorporation is therefore less clear.

Harding interprets the approach of *Westpac* as a “preference of contract over property” only regarding incorporation. Harding views incorporation as a “distinctly contractual question” and that it is inappropriate to apply Torrens principles to the process of contractual interpretation and therefore “intrude into the core of the law of contract”.¹¹⁴ Following Harding's assessment, the author comments that *Westpac* may indicate a slight discomfort with the *Frazer* approach, which (in *obiter*) regarded s 183 as extending “to the case of a mortgagee who is the “proprietor” of the mortgage and who has the power of sale over the fee simple”.¹¹⁵ Elias CJ comments that although “noncompliance with the requirements of registration does not affect the validity of registration ...the policy which attaches on registration does not relate back to overcome the need for compliance with the statutory provision”.¹¹⁶ This statement identifies the logical dissonance between the propositions which the author identifies on page 3.

Conclusion:

Incorporation issues originate primarily in a lack of guidelines in the Torrens statutes regarding which aspects of a mortgage are immediately defeasible and which parts of a faulty registered instrument can be corrected, and secondarily in an discrepancy between modern forms of mortgages and the principles on which the Torrens system were based. The protection of the charge through registration may be a “Phyrric victory” for the mortgagee as the main substance of the charge may be

¹¹³ Harding, above n 59, at 39.

¹¹⁴ Harding, above n 59, at 40.

¹¹⁵ *Frazer v Walker*, above n 17, at 1079; See *Westpac*, above n 21, at [13] per Elias CJ.

¹¹⁶ At [13].

unenforceable.¹¹⁷ Contract law states that there is no debt, and therefore no basis for recourse to the land, even if the money advanced is not repaid.

V Conclusion:

The Torrens system requires jurisdictions to engage in a perpetual search for coherence. An awareness of the ideological disunion underlying the law of real property enables judges to utilise legal fictions to subduct concepts in a congruent manner and achieve a semblance of a unified legal form. As O'Connor comments, incoherence is most prevalent in immediate indefeasibility jurisdictions because there is a greater disjunction between positive and ordinary rules.¹¹⁸ Furthermore, the operation of the *in personam* jurisdiction produces a polarity of form-based positive law on one hand and relational substance-based equity on the other.

Recent New Zealand reform ideas are a "coalface" attempt to ameliorate the practical consequences of immediate indefeasibility. However, they do not rectify the incomprehensibility of registration's operation, which results from basic conceptual incompatibilities. Proposed reforms do not address the incorporation question. The author suggests that, rather than etiologating the Torrens principle of certainty through policy-based rationales – effectively reconstructing the immediate indefeasibility doctrine – reforms require an examination of residuary common law principles and conceptual sources of law, combined with a consciousness of the fictitious and illogical nature of lawmaking that must, to maximize practical efficacy, provide a compromise between the two systems.

¹¹⁷ Harding, above n 59, at 22.

¹¹⁸ O'Connor, above n 9, at 31.

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