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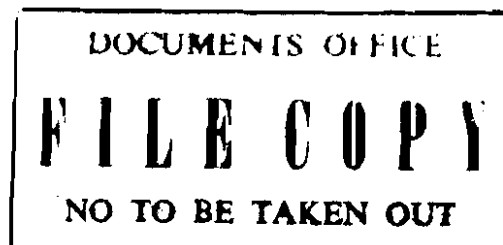
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OBJECTS AND PURPOSES OF LAND REGISTRATION

(Submitted by the Government of the United Kingdom)

OBJECTS AND PURPOSES OF LAND REGISTRATION

By

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INTRODUCTION

1. The importance of land

1.1 Land is our main source of life. From it we obtain everything we use or value, whether it be food, fuel, clothing, shelter, metal or precious stones. We live on the land and from the land, and to the land our bodies - or our ashes - are committed when we die. The distribution and use of land are of vital importance, and it is not surprising, therefore, that land records are a matter of great concern in most countries. The framing of land policy, and its execution, may in large measure depend on the effectiveness of land registration, as we can conveniently call the making and keeping of these records.

1.2 Land registration must, however, be kept in perspective. It is a device which may be essential to sound land administration; but it is merely part of the machinery of government. It is not some sort of magical specific which will automatically produce good land use and development. Nor is it a system of land holding, nor even a kind of land reform though it may be the administrative tool by which land reform can be effected. In short, land registration is only a means to an end. It is not an end in itself. Much time, money and effort can be wasted if that elementary truth is forgotten.

2. Two functions of land registration

2.1 Our study of land registration must clearly distinguish between its public and its private function; the former relates to the welfare of the State or community as a whole, the latter to the advantage of the individual citizen. The point of view of the State wishing to make an inventory of the national land resources for fiscal purposes or in order to ensure proper development is by no means the same as its point of view when it merely wishes to assure the rights of the owner or occupier of land and to enable him to conduct his land transactions safely, cheaply and quickly. Many of the land records in Europe were devised for the purpose of taxation and only incidentally have some to be used for the purpose of proving ownership and facilitating transfer. In England, however, and in many other countries which use English land law, registration has had nothing at all to do with land tax or a public inventory of ownership, but was introduced solely for the purpose of simplifying conveyancing (as the business of transferring interests in land is called). It is from the conveyancing angle that we shall first approach the subject and not until later shall we come to the

land record for tax purposes which is known as a 'cadastre', a French word meaning a public register of the quantity, value and ownership of the immovable property in a country compiled to serve as a basis for taxation. 1/

2.2 We consider Cadastre at length in Chapter 13. In this chapter we need only stress that it is quite a different subject from "the form of land registration more explicitly known to British readers as Registration of Title to Land". 2/ There is no 'cadastre' in the European sense in England or in countries which have followed English practice, though rating lists tend to serve the same purpose but are as distinct from the 'register of title' as in Europe the 'cadastre', the register for fiscal purposes, is distinct from the 'legal register' in which transactions are recorded for the purpose of title. 3/ Cadastre, the fiscal record, is immensely important in its own right and could well be the subject of a separate book; it greatly increases the scope of this one.

2.3 Some confusion is caused, however, by the fact that the expression 'cadastral survey' has long been widely, if imprecisely, used to denote a survey of the boundaries of the proprietary land units of a country whether or not it has any connexion with taxation. We also use it in this sense. The function of cadastral survey is to define the parcels 4/ of land which

1/ The derivation of the word 'cadastre' used to be ascribed, rather surprisingly, to the Latin word 'capitastrum' which was taken to be a contraction of 'capitum registrum', a register of capita, 'taxable land units', literally 'heads', but modern dictionaries derive cadastre from the Greek word 'katastikhon' (meaning literally 'line by line' and so a tax register), and the shorter O.E.D. now dismisses 'capitastrum' as a 'figment'.

2/ Dowson and Sheppard: Land Registration Preface, p.vi.

3/ The authorities in Sweden, when writing in English, call their cadastral record, the 'land register' to distinguish it from the 'legal register', but this is confusing because, in many countries where English is the language of legal statute, 'land register' is the name used to denote the register of title, and in England it is the Land Registration Act 1925 which governs registration of title. (See also the Singapore Land Titles Ordinance s16(1) and the Tanganyika Land Registration Ordinance s3(2). In each the register of title is called the Land Register).

4/ The word 'parcels' is a term of art in English conveyancing, the 'parcels clause' being that part of a conveyance which contains a description of the land dealt with. In the Kenya Registered Land Act 1963, however, and in similar acts the word 'parcel' is defined as 'an area of land separately delineated on the registry map'. The parcel in this sense may comprise several 'units of use', but generally, though not invariably, will not include more than one 'unit of operation'.

constitute the units of the record. It gives each such unit a distinctive number and so provides a peg upon which any information regarding it can be conveniently hung. 1/ In Chapter 6 we discuss the maps which support a register of title.

3. The unit of record

3.1 The purpose for which land registration is required is of great importance, for it ought to determine the choice of the unit of record. If the purpose is fiscal, valuation will be the primary objective and the most suitable unit of record may be the unit of use; for example, in agricultural property, the units of use are the individual fields which vary in size and quality and so in value and which together make up the farm or unit of operation, an appropriate unit where development is concerned or the implementation of laws to regulate land use. Two or more units of operation - whether contiguous or not - may, however, be comprised in a unit of ownership, and this appears to be the obvious unit when the purpose of the record is to give particulars of ownership and not of value or use. 2/

3.2 Land parcels may vary in size from the several hundred square miles of an Australian ranch down to the square foot of "English freehold" now being sold to Americans for sentimental reasons, and in type from a ten by twelve minutes of latitude and longitude oil concessions in the North Sea out of sight of land to a parcel delimited on the ground by a wall like that of Pevensey Castle which has stood for 1,500 years. The problems of identifying and defining land parcels are correspondingly varied. We examine these problems in Chapter 6.

4. Two special characteristics of land as a marketable commodity

4.1 Land when regarded as a commodity capable of being bought and sold has two special characteristics which distinguish it from all other commodities known to commerce. First, and most obvious, it is immovable, and so it cannot be physically transferred from one person to another; nor can it be

1/ Dowson and Sheppard - Land Registration p.81. See also Journal of African Administration Vol. VI No.2 (April 1958) p.58: "A cadastral plan of an area shows how it is divided up into parcels of land subject to separate proprietary rights which are recorded on the register of title. It does not necessarily show any physical features unless they happen to be the boundaries of holdings and, of course, a boundary shown on the plan may not be indicated by any physical feature on the ground".

2/ Dowson and Sheppard point out that the Department of the Seine in France numbers parcels by 'unités foncières', whereas in the rest of France the 'ilôt de propriété' is the unit of record: e.g., two adjacent parcels being the property of one owner, but leased to two persons, form two 'unités foncières', but only one 'ilôt de propriété'. (Land Registration page 53).

possessed in the same way as something that can be actually handled. Secondly, it is everlasting. This may sound strange to persons who are accustomed to being told not to destroy their land by, for example, allowing it to be eroded, but in its original legal definition land is not regarded as comprising merely the surface; it is deemed to include everything which is fixed to it and the air which lies above it right up into the sky and whatever lies below it right down into the centre of the earth; 1/ it includes land covered with water and so, even the sea bed is land. Regarded in this way as a segment of the earth continued into outer space, land is as unchangeable in extent as the earth itself and it cannot be increased or decreased or destroyed as can all other forms of wealth. Thus the land included in the Domesday survey made in England nearly nine hundred years ago is still the same land today; the individual proprietary units into which it was divided may have changed completely but today's parcels are made up of the same land and the change is merely one of 'mutation' which is what we call the process of changing the boundaries of a parcel. 2/ This permanence not only makes land peculiarly capable of lasting record, but it also makes such record specially necessary. 3/

5. The nature of land ownership

5.1 Its immovable and everlasting qualities set land aside from other commodities and make its ownership a much more complicated matter than the ownership of goods. The very nature of the ownership appears to be different. The owner of goods can remove or destroy them. The owner of land can neither move it nor, in its legal sense, destroy it; his power is limited to the enjoyment or disposition of rights in or over the land. This is equally true whether the ownership is recognized in law as absolute (Roman, dominium; Continental and Scottish, allodium; Islamic, mülk) or whether the owner is called a 'tenant in fee simple', as he is in English law which in legal theory does not recognize

1/ Cujus est solum ejus est usque ad coelum et ad inferos - Whose is the soil his also is that which is above it as far as the sky and below it as far as the nether regions - is how the medieval lawyers expressed it.

2/ The dictionary definition of 'mutation' is 'change' and Binns defines 'mutation' as meaning "any change in the land, in the conditions under which land is held or in the holder which affects the entries in the registers". (Binns, Sir B.O., Cadastral Surveys and Records of Rights in Land, p.37). We have confined its use to boundary changes, which is what it has come to signify in the registries which use 'mutation forms'.

3/ It should be noted that horizontal subdivision does not fit in with this definition of land and the 'stratum' of a building does not have this permanence. Nevertheless the 'block of air' it occupies is capable of precise definition and could be redetermined, though it seems unlikely that this would serve any useful purpose. The question of strata titles will be examined in Chapter 11.

the ownership of land, but only the ownership of estates or interests in land, though in practice the fee simple is absolute ownership. ^{1/} We shall consider this theory of English land law in the next chapter, in so far as it affects our subject.

5.2 There are many rights that can exist in land but are not found in respect of goods. For example, because land is immovable its position cannot be changed, and if its owner is unable to get to it without having to cross somebody else's land, then he must have a right of way over that other land and, moreover, a right of way which must exist for as long as his land is surrounded by land in other ownership. Then again, because land cannot be carried off and fraudulently hidden or disposed of, it becomes a useful security for a loan or the performance of some obligation without the need to hand over its possession as is the case where movable property is pawned. And because a thief cannot steal and hide land, the real owner can always lay his hand on it, unlike a watch or house or motor car that may be stolen and never seen again. Because land never wears out it can be made the subject of future interests or even a series of future interests, and because it is everlasting mortal man has never ceased to exercise his ingenuity in inventing means to ensure that his land will forever be used in accordance with his wishes and so be a lasting memorial to him and a projection of his own personality long after his death. It is this capacity of land to carry future interests combined with man's desire for immortality which has led to many of the involutions of land law.

5.3 The collection of rights pertaining to any one land parcel may be likened to a bundle of sticks. From time to time the sticks may vary in number (representing the number of rights), in thickness (representing the size of 'quantum' of each right), and in length (representing the duration of each right). Sometimes the whole bundle may be held by one person or it may be held by a group of persons such as a company or a family or clan or tribe, but very often different sticks are held by separate persons. Sticks out of the bundle can be acquired in different ways and held for different periods, but the ownership of the land is not itself one of the sticks; it must be regarded as a vessel or container for the bundle.

5.4 This container may, at any particular time, hold all the sticks or only some of them or indeed none of them at all, for it is possible to visualize the position where virtually all the rights in a piece of land are held by persons other than the owner who is left only with what the Romans used to call 'proprietas nuda' or 'bare ownership' (i.e., ownership bare of all rights and powers); for example, a 999-year lease at a nominal rental and free of conditions will leave the 'owner' with no presently exercisable rights at all. Nevertheless should the leasehold fall in for any reason, the 'container' (i.e., the 'ownership') will still be there

^{1/} Megarry and Wade: The Law of Real Property, 2nd Edition, p.68.

to catch the rights which were attached to it. The transfer of the ownership is the transfer of the container itself and leaves the transferor with no interest at all either present or future. That is why some communities are reluctant to grant outright ownership of land when they have it at their disposition. They prefer to retain the container and merely to hand out some, or may be all, the sticks for a certain length of time.

5.5 Where movable property is borrowed or hired it is usually easy enough to determine who is the owner and who is the borrower or hirer. The relationship is generally short-term and gives rise to few problems, but in some jurisdictions the owner of land may lease it (i.e., grant the exclusive possession of it) for so long a period that the prospect of its return at the end of the lease is of no practical account. We shall discuss this more fully in Chapter 2, for the long lease is a peculiar feature of English land law.

5.6 In creating and maintaining land records it must, therefore, be kept clearly in mind that interests in and powers over land may be enjoyed or exercised by persons other than the owner to the diminution or even exclusion of the owner's rights. Thus the definition of the parcel and the description of its owner will not alone provide an adequate land record. The record must also show any limitation of the right of ownership and any interest which has been granted or otherwise obtained out of it. ^{1/} Furthermore if that interest confers the right to exclusive long-term possession which can itself be the subject of dealing in the same way as the original ownership, then a separate record must be kept of that interest, and so two or more records may be needed in respect of the same parcel.

5.7 There is also a general qualification of the right of land ownership which should be kept in mind, though it is unaffected by land registration. Even where a single person has the fullest possible ownership of a piece of land in which no other person has any right at all, we know of no country in the world today which will allow him to exercise the ordinary right of an owner of other kinds of property not merely to use but also to abuse or destroy what he owns. As population increases and pressure on land grows, the State takes more and more powers to ensure that land, whoever owns it, is properly used. Even the right to sell, which might be thought to be an essential attribute of ownership, is often withheld or restricted, for public policy demands that land shall not be allowed to fall into the wrong hands. It has, in fact, long been realized and accepted that there is really no such thing in modern society as absolute ownership of land; nobody can be allowed to do just exactly what he likes with land, completely regardless of the public interest. The State itself always asserts special authority over land, for this is its basic asset.

^{1/} Registration can serve the very useful purpose of clarifying and determining rights which are obscure or uncertain.

6. Security of tenure

6.1 But we must not think only in terms of land ownership, if we are to keep land registration in perspective. We must remember that proper development depends on 'security of tenure' rather than on recorded ownership which, as we have seen, can be 'empty' of the right to use the land, and even of the power to control that use. 'Security of tenure' is what a person has if he is secure or safe in his occupation of land, that is, if in those countries where individual property rights are recognized and the rule of law prevails - the Courts will support his occupation against anybody who challenges it. This security will not depend on whether the occupier can prove his right to be in occupation but on whether anybody else - and this includes the State or the Government - can prove a better right. In fact provided that nobody else can produce evidence to show a better right the Courts will not require any proof from the occupier, for there is much truth in the old saying that possession is nine points of the law.

6.2 Security of tenure, to be adequate to encourage, or even permit, development need not amount to ownership nor need it last for all time. A lessee has security for the term of his lease and for as long as he complies with its conditions the law will give him complete protection even against his landlord, the owner of the land. For the security to be adequate, it must, of course, last for a period long enough for the purpose for which the land is to be used. This period should be related to the life of the use. Thus, for example, the security of tenure which might have been adequate for annual crops will not be sufficient if long-term crops such as coffee or tea are to be planted.

6.3 But for our present purpose the significant point is that security of tenure is a question of fact - not of record - and, as a fact, it can exist whether there is documentary evidence to prove it or not. It does not necessarily rest on statutory title or on a system of written record as advocates of registration of title sometimes assert and thereby prejudice their whole case, for their opponents are quick to point out that there can be, and often is for all reasonable and practical purposes, complete security of tenure even under a system of customary law and without any formal record at all. That this must be so is apparent when we consider some of the development which has taken place in Africa. There has been much good development - development by individual farmers - in land held under customary law. We need only look at Chagga coffee in Tanganyika, cocoa and groundnuts in West Africa, or cloves in Zanzibar. Cotton in Uganda has come as much from unregistered land as it has from mailo land in Buganda where title has been registered for fifty years or more. Obviously in these areas there has been a security of tenure within the framework of customary law which has been quite adequate to enable extensive development to be effected.

6.4 In this situation the expense and effort of registering title may not only be unnecessary but dangerous. Nevertheless, when this idyllic state of affairs is subjected, inevitably, to social and economic pressures customary land law is shown to have neither the certainty nor the capacity which would enable it to adjust itself to meet the need. Consequently it becomes incapable

of safeguarding rights in land and ceases to command respect. - This uncertainty and inadequacy then impedes, or even inhibits development, and it is at this stage there becomes apparent the demand and necessity for a uniform and comprehensive land law in order to assure security of tenure. In Chapter 9 we shall examine the part land registration can play in this process.

6.5 We have said that security of tenure is a question of fact, not of evidence or record. Evidence does not alter fact, though witnesses sometimes seem to hope it will. The relationship of fact to evidence - in particular to documentary evidence - may be made clearer by the analogy of a passport. A boy is born in England on 1st January 1950 to parents named Smith and they call him John. These are facts which exist whether or not there is evidence to support them. The issue of a passport to John Smith will not alter these facts. The passport is merely a documentary record which, because it has been issued by a recognized authority, will be accepted as proving certain facts concerning John Smith. But John Smith still remains John Smith, a man born in England on 1st January 1950, whether he has a passport to prove it or not. So it is with security of tenure; this is a fact which does not depend on whether there is a document of title to prove it though it may well be convenient, and important, to have such a document. Indeed, to stretch the analogy of the passport further, if John Smith remains at home he will not require a passport; he will only need it when he starts to move about the world. Similarly a landowner will not require a document of title if he remains in occupation of his land and does not want to deal with it in any way. As soon, however, as he does want to deal with it, it will be very necessary for him to prove his title, and he will find a document of the evidentiary value of a passport very useful for this purpose. He will also require written evidence of ownership to take with him if he wants to leave the land but retain his ownership.

7. Importance of facilitating dealing in land

7.1 Dealing in land is a matter of great importance if we are truly to achieve that freedom and ease of transfer which according to the economists are absolutely vital to promoting the best use of land. ^{1/} Indeed English history supports the economists; for it has been found that development is inhibited by practices which restrict the power of transfer - such as the 'settling' of estates, as the process of tying up land in the family is called in England - and the legislature has had to interfere in order to restore mobility. The inalienability of 'waqf' land in Islamic countries similarly holds up development and progressive governments in such countries as Turkey and Egypt have intervened in order to bring such land back onto

^{1/} See, for example, Chapter 2 of the Report of the East African Royal Commission on Land and Population. H.M.S.O. Cmd. 9475, 1955.

the market. In Fiji, where land is owned by 'mataqali' (clans) which have not been permitted to sell it, Government has introduced legislation to enable long leases to be granted.

7.2 Indeed where improved land use is the objective, security of tenure is by no means all that matters. Optimum land use may be unlikely without it, but it will not by itself ensure that land is properly used. The land may be occupied by somebody who is unwilling or unable to make good use of it, while those who would work it well or who need it most cannot obtain it. In some developing countries a sense of tribal exclusiveness in land not only restricts freedom of transfer, but tends to confine tribes in their particular tribal areas. Given the ideal of absolute freedom of transfer, pressure on the land in some areas could be relieved and uncultivated or sparsely populated land in other areas brought into production by those best capable of farming it. If good development is to be assured it must be possible for rights in land to be adjusted or transferred cheaply, quickly and with certainty. We therefore now come to the consideration of the processes which are needed to facilitate dealings in land. It is in this connexion that evidence of title becomes so important and land registration has much a vital part to play.

8. Special processes needed for dealings in land

8.1 The immovability of land and its indestructibility - its two special characteristics which we have already described - not merely affect the nature of its ownership but also make the sale of land quite a different process from the sale of goods.

8.2 In the case of movable property, generally speaking, it can be safely assumed that the person who has the right to move it and who offers it for sale in proper circumstances is the owner and has the right to sell it. Moreover, the mere fact of moving it defines what is being sold. But it is not safe to assume that the person in occupation of land is its owner, for frequently he is not; he may be a lessee, or merely a squatter, or even a trespasser. In any case, as has already been explained, the ownership of land is itself peculiar because very often it is not a simple straightforward matter of a single individual person having complete ownership. In fact, so many and so varied are the interests in land - so many different sorts of stick are there in the bundle - that there can be, without any intention to defraud, quite genuine misunderstanding or ignorance of what the true position is. Family land in West Africa is sometimes a case in point; it is by no means always certain who can deal with it and to what extent. 1/ Similarly the question of who could deal with settled land in England used to be obscure before the position was cleared up by statute. 2/ Clearly some proof of ownership other than mere possession is an essential preliminary to the sale of land.

1/ In customary tenures various groups ranging from the family through the clan to the tribe have a tangle of overlapping and interlocking rights and the unravelling of these rights can be a very difficult problem.

2/ The Settled Land Act, 1882 gave the tenant for life, under the settlement, power to deal with the land as if he were the owner in fee simple, and in the case of a sale shifted the settlement from the land to the purchase money, which had to be paid into court or to trustees.

8.3 The permanence of land, the fact that it lasts forever, also makes it specially liable to become the subject of derivative or subordinate interests, such as leases or mortgages or easements. These are, so to speak, carved out of or fastened onto the ownership and the important point about them is that they give persons other than the owner rights over the land after it has been transferred, even though the person to whom it has been transferred had no knowledge of them at the time of the transfer. It is imperative that such rights be fully ascertained before a transfer is completed.

8.4 It is evident, therefore, that the sale of land requires a different process from the sale of goods and demands special safeguards to ensure, first, that the land being sold is unambiguously defined, for a parcel of land, unlike a parcel of goods, is not self-defining; secondly, that the seller owns the land he is offering for sale and has the right to sell it; and thirdly, that the purchaser has knowledge of all the derivative and subordinate interests which may detract from the value of the land or restrict its use, and which "run with the land", as the expression is, when it is transferred. 1/

9. Private conveyancing

9.1 In the days when communities were small and close-knit, people knew all about their neighbours' affairs. The handing over of a turf or twig or some such symbolic act performed in the presence of witnesses upon the land itself was sufficient evidence of the transfer of the property in the land and was adequate to safeguard not only the purchaser but also any third party who might claim an interest in the land. Therefore many early systems of law, including customary law in developing countries, have regarded publicity alone as a sufficiently effective guarantee of the sale of land.

9.2 But as society becomes more complex writing takes the place of public ceremony and mere oral enquiry in the neighbourhood of the land is no longer adequate to prove ownership, nor will third parties know when there is a dealing. The person who appears to be the owner may in fact be the owner, but if he has bought the land, he will have obtained ownership not by a public ceremony but by virtue of a written document which has been negotiated privately and seen only by the parties to it (and their legal advisers, for the preparation of such a document soon requires specialized legal knowledge). If he has kept this document safely he will be able to produce it, but it will merely show that he acquired the land from somebody who in his turn by production of the relevant document showed that he acquired it from somebody who similarly proved his acquisition and so on as far back as is required either by law or by custom. And, of course, if the owner or a predecessor in title came into ownership not by a transfer but, for example, by succession, then that fact must also be satisfactorily proved. Moreover there is always the possibility that other interests, such as a lease or a charge to secure a loan, may have been created by some document which may not be revealed though it affects the title. Even the definition of the land itself is much more open to dispute when written description of the boundary is substituted for public perambulation.

1/ The model register is divided into three parts to cover these three points.

9.3 Thus the proof of ownership (or proof of title as it is commonly called) which is needed for safe dealing becomes a difficult technical process involving skilled investigation by practitioners learned in this special branch of the law. We shall describe in the next chapter how an elaborate system of conveyancing was developed in England, and has set the pattern for many countries which use English land law or have been influenced by English procedure.

9.4 This system of private conveyancing has many shortcomings. It is slow and costly, and above all it is not conclusive. Every time there is a dealing and a different practitioner is involved, he must repeat the investigation to satisfy himself that the title is sound. The efficacy of the investigation, and so the very ownership itself, will depend on the skill and integrity of the lawyers conducting it, who naturally demand and indeed deserve a substantial fee, for their learning is expensive to acquire and also they bear the responsibility for ensuring that the transaction is legally sound. In particular there is the danger that, because dealing has been secret, something which affects the title will not be discovered. Some substitute is required for the protection previously afforded by publicity.

9.5 The Real Property Commissioners, appointed in 1829 to enquire into English land law, expressed the problem clearly and suggested a solution:

"In all civilized countries the title to land depends in a great measure on written documents, and the purchaser looks and is empowered by the law to look for proof of the seller's right beyond the fact of his possession. It is obvious that a documentary title cannot be complete unless the party to whom it is produced can be assured that no document which may defeat or alter the effect of those which are shown to him is kept out of sight. It follows that means should be afforded by the law for the manifestation of all the documents necessary to complete the title or for the protection of purchasers against the effect of any documents which, for want of the use of such means, have not been brought to their knowledge; in other words, that there should be a General Register." 1/

10. Registration of deeds

10.1 The maintenance of a public register in which documents affecting interests in land are copied or abstracted is generally known as 'registration of deeds' 2/, and its basic feature in its simplest form

1/ Second Report of the Real Property Commissioners 1830, page 3.

2/ 'Deed' is used here in its ordinary colloquial sense of a 'legal document'. The expression 'Registration of assurances' is used instead of 'Registration of deeds' by some English writers, an 'assurance' being the legal evidence of the transfer of property, but only English lawyers are likely to be familiar with this use of the word.

is that registered deeds take priority over unregistered deeds. In this form it does not affect the legal operation of any deed, whether registered or not; it merely determines the date of a deed by reference to the date of its registration and not to the date of its execution. Registration may, however, be made a condition of the validity of the deed, by providing in the law that unregistered deeds may not be received as evidence of title. Documents which are not registered can then be safely ignored, for they can have no effect; and so a search of the deeds register enables a conveyancer to make sure that he has not overlooked any material factor. This would appear to afford a substantial measure of protection, at least against the dangers inherent in concealed dealing.

10.2 Unfortunately, however, there is a fundamental defect in a system of conveyancing by deeds which does not stem from lack of publicity but rather from the very nature of the deed. A deed does not in itself prove title. It is merely a record of an isolated transaction; if properly drawn, it shows that that particular transaction took place, but it does not prove that the parties were legally entitled to carry out the transaction and consequently it does not prove the transaction valid. It may not be consistent with a previously registered transaction or even with actual fact. It is evident that the mere copying of a deed without any critical examination does nothing to remedy any deficiency it may have. It follows therefore that investigation of its validity and effect will still be necessary before any transaction can be safely conducted on the strength of it. The services of a conveyancer, of somebody skilled in this sort of investigation, will be required. This investigation will be facilitated by a register of deeds to a greater or lesser extent depending on the manner in which it is kept, and particularly on the way in which it is indexed. But however well it is indexed a deeds register will not show matters which affect a title but are not the subject of a deed.

10.3 Registration of deeds is a device which is extensively used throughout the world with widely varying degrees of effectiveness depending on how the register is kept. In Chapter 5 we consider some of the variants of the 'deeds system'.

11. Registration of Title

11.1 There is, however, another system which remedies the defects of registration of deeds and which is commonly called 'registration of title'. This is an authoritative record, kept in a public office, of the rights to clearly defined units of land as vested for the time being in some particular person or body and of the limitations, if any, to which these rights are subject. With certain unavoidable exceptions known in the English system as 'overriding interests', all the material particulars affecting

the title to the land are fully revealed to any interested person merely by a perusal of the register which is maintained and warranted by the State. The register is at all times the final authority and the State accepts responsibility for the validity of transactions which are effected by making an entry in the register, and only by this means. A simple procedure with simple forms is provided for the purpose. Dealing in land becomes, in theory at least, as quick, cheap and certain as dealing in goods. In fact registration of title offers a system of conveyancing which is complete in itself and in so far as it dispenses with the need for investigation of title so it dispenses with the need for the skilled conveyancer.

11.2 As defined by the Judicial Committee of the Privy Council the objective of registration of title "is to save persons dealing with registered land 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. That end is accomplished by providing that anyone who purchases bona fide and for value from the registered proprietor and enters his deed of transfer or mortgage on the register shall thereby acquire an indefeasible right notwithstanding the infirmity of his author's title". 1/ Registration of title "gives finality. It does away with the repeated, imperfect and costly examination of past title. It removes the possibility of bona fide mistakes as to the past title or the existing burdens affecting the land. It removes the ever-present possibility of fraud by duplication or suppression of deeds. It gives State-guaranteed safety and that positive security against adverse claims which the system of conveyancing by deeds can never give." 2/

11.3 We can therefore now envisage what must be recorded and kept up to date in the register of title if it is to achieve this objective. It can be divided into three parts containing:

- (1) The unambiguous definition of the parcel of land affected (and any right over other land which is enjoyed in virtue of its ownership).
- (2) The name and address of the owner, individual or corporate.
- (3) The particulars of any interest affecting the parcel which is enjoyed by someone other than the owner. (If the interest confers the right to exclusive long-term possession, then a separate record of that interest must also be kept, as we have already noted in para 5.6).

1/ Gibbs v. Messer (1891) A.C.248.

2/ H. M. Land Registry: Registration of Title to Land (HMSO).

11.4 Sir Charles Fortescue-Brickdale, who played a leading part in establishing registration of title in England, listed six qualities which should be combined in a system of registration of title: (1) security, (2) simplicity, (3) accuracy, (4) expedition, (5) cheapness, and (6) suitability to its circumstances, ^{1/} and to these Dowson and Sheppard added a seventh, (7) completeness of the record. ^{2/}

- (1) Security is the quintessence of the system. The owner of the land, the man who lends him money on the security of his land, the neighbouring landowner who has a right to pass over his land or run a drain through it, each and all must be secure. Their rights, once registered, must be beyond challenge.
- (2) Simplicity is essential not merely to the effective operation of the system, but to its initial acceptance. Landowners, no less than anyone else, suspect what they do not understand. The law must be capable of translation into the language which the people speak. Simple forms must be used and the procedure must be plain and straightforward.
- (3) Accuracy and (4) Expedition are obvious operational necessities in any system if it is to be effective. We need say no more about accuracy, for plainly an inaccurate register would be worse than useless, but expedition, or rather its converse delay, is not always recognized as being as important as it is. Only too often the complaint that registration takes too long is well justified, and brings the system into disrepute.
- (5) Cheapness, so far as operation is concerned, should not offer much difficulty. It is undeniable that there can be no cheaper way of safely conveying land than by an effective system of registration of title, because no other system dispenses with the necessity for retrospective examination of title. But the cost of introduction is a different matter altogether and is often the crucial factor in determining whether the system shall be adopted. It must be recognized that initial compilation, in areas where unregistered rights in land are already established, is bound to require a substantial expenditure, and we can only point out that it will cost no less (and in the aggregate may cost much more) if it is spread over an unreasonably long period.

^{1/} Fortescue Brickdale: Methods of Land Transfer.

^{2/} Dowson and Sheppard Land Registration, p.71.

- (6) Suitability to its circumstances may appear to be "a glimpse of the obvious" (as Mr. Punch would have called it), but it does not often seem to be appreciated how incongruous it is, for example, to substitute 'a tenancy in fee simple' for a right of absolute ownership under some indigenous customary law. The customary law will probably be well understood locally but a 'tenancy in fee simple' is an expression which is incomprehensible without some knowledge of English land law. It is unlikely to commend itself as a clarification or simplification.
- (7) Completeness of the record can be construed in two ways. The record of the individual parcel must itself be complete, but this is really to say no more than that it must be accurate. The record should, however, be complete in respect of all land, because until it is complete, unregistered parcels will continue to exist alongside registered parcels with different laws applying to each, and so important benefits which should accrue from registration of title will not be realized.

12. Registration of title and registration of deeds compared

12.1 Obviously the title to a piece of land cannot be investigated, let alone guaranteed, unless the land itself can be adequately identified. We have explained how the everlasting nature of land makes the proprietary units (i.e., parcels) into which it is divided capable of precise definition and permanent record. The first requirement of a register of title is that it should be based on these parcels, not on the persons who own them. Dowson and Sheppard expressed this in resounding terms. "The first essential working feature of registration of title" they said "is the transference of primary attention from the mobile, mortal, mistakable persons temporarily possessing or claiming rights over patches of the earth's surface, to the immovable, durable, precisely definable units of land affected and the adoption of these as the basis of record instead". 1/

12.2 But the use of land units as the basis of record is not necessarily confined to systems of registration of title. As we shall presently see in Chapter 5, the operation of many registers of deeds has been substantially improved by being based on parcels rather than proprietors, but so long as the registers remain in essence registers of deeds, not of title, the title will have to be deduced from scrutiny of the relevant deeds instead of resting on the register. Investigation is still required and the deeds register, no matter how well kept, is merely an adjunct of this investigation.

1/ Dowson and Sheppard: Land Registration, p.76, also p.71.

12.3 A registered title, however, requires no such investigation. This is the factor which really differentiates registration of title from registration of deeds. It can be said that the essential distinctive ingredient of registration of title is that title to land and to interests in land depends on what the register shows, and not on documentary instruments. Such instruments are still required to evidence to the Registrar the intention of an owner to create, transfer or extinguish rights in his land, but, though the instrument may establish a contractual right, it cannot in itself affect or pass any interest in land, because the law which sets up registration of title expressly provides that only the appropriate entry in the register can affect rights in land. The Registrar is responsible for making sure that the entry is reconcilable with previously registered entries and conforms both with the law and with fact.

12.4 However in an advanced deeds system the Registrar may likewise be required to satisfy himself that a deed is fully in order before he accepts it for registration, but even then the deed must be retained, for the title rests on it, whereas in a system of registration of title, once the appropriate entry has been made in the register the instrument which led to it is, in theory at least, no longer required. In practice, however, since no human undertaking is infallible, the instrument is invariably kept for as long as that entry subsists so as to be available to support it should it be questioned. As soon as the entry it supports has been superseded, the instrument can be destroyed, but here again in practice it is generally kept for a further period in suitable archives. Indeed, few registries of title have taken advantage of the fact that it is simple to make an ordered arrangement for the disposal and eventual destruction of spent instruments, so that the registry need no longer be a 'mausoleum of parchment' which is what Maitland called a deeds registry.

12.5 In describing the Singapore Land Titles Bill which he drafted in 1955 Baalman ^{1/} made the following "broad distinction" between the existing system of registration of deeds and the system of registration of title proposed in his bill: "The Registration of Deeds Ordinance says, in effect, if you do not register your conveyance of land it will be bad. The Ordinance protects purchasers from the effect of concealed encumbrances, but its operation is entirely negative. A defective conveyance will continue to be defective even after it has been registered, and a purchaser of land must always be prepared to accept the risk of paying money for a bad title. The Land Titles Bill says, in effect, if you do register your conveyance, it will be good. The Bill will extract the impurities from titles registered under it so that at any given time a purchaser, without having to investigate the history of the title,

^{1/} John Baalman, author of a Commentary on the Torrens System in New South Wales, was a leading authority on the Australian system of registration of title.

or to consider the possibility of defective conveyances, but merely by inspecting the land register, can be satisfied that the proprietor named therein is the owner. He will see, by glancing at the land register, all the minor encumbrances affecting the title, and can rest secure in the knowledge that unregistered interests can be ignored." 1/

12.6 Indeed some writers do not use terminology of 'registration of deeds' and 'registration of title', but distinguish between negative and positive systems of registration. Norman thus describes them:

"One system, the negative, simply records all transactions which involve a parcel and there is, at least in theory, a continuous record of the rights held and any changes that may occur in them. This record of transactions does not, in the legal sense, provide a title to the property and can only act as a witness in the case of disputes. In contrast, the positive system establishes a title to the parcel, and its rights, which is guaranteed by the government." 2/

12.7 However Norman goes on to say that, notwithstanding the theoretical distinction between the two systems, they are quite similar in their practical application. For example, the registrar is a key figure in the positive system "as the entire system depends on his integrity and judgment. In theory this does not apply to the negative system, but is often found in practice ... Common acceptance of the legality of the negative system also serves to decrease the practical difference between the positive and negative systems". The difficulty inherent in classification is well illustrated by the fact that Norman lists the English system as being negative, whereas, it accords in full measure with Ruoff's fundamental principles of registration of title which we set out at the end of this chapter. It may indeed fairly claim to be a shining example of the positive system.

12.8 In fact the distinction between registration of deeds and registration of title is not always as clear-cut as perhaps we have made it appear. Hogg remarks that they shade off into each other "and it is a matter of some difficulty to distinguish with complete accuracy between registration of title and registration of deeds. Any dividing line between the two must be to some extent arbitrary and each division will contain systems closely resembling systems on the other side of the line". 3/ The South African system, for example, is in form a deeds system but for long has claimed to

1/ Colony of Singapore Government Gazette Supplement No.56, 15 July 1955, Bill No.4, p.1134.

2/ Norman, P.E. - Photogrammetry and the Cadastral Survey 1965, Series A, No.33, published by International Training Centre, Delft. (p.8).

3/ Hogg: Registration of Title to Land throughout the Empire, 1920.

have all the advantages of registration of title, and the same claim used to be made for the Scottish system though that, at last, has capitulated to registration of title. (We examine these two systems and some other representative deeds systems in Chapter 5). On the other hand, the emphasis on certificates of title and land certificates in the English and Torrens' systems gives those documents an importance out of keeping with the main principle of registration of title that only the register matters.

12.9 We might even be misled by the proposition that deeds registration will not dispense with the services of a conveyancer, whereas registration of title itself provides a system of conveyancing which can stand on its own. In England, for example, no one would contemplate buying land without professional legal assistance even when the title is registered, and in Fiji, where the Torrens system operates, practically all dealings in registered land are conducted by legal practitioners though the original intention was to dispense with the need for them. Indeed the layman in England will seldom know whether his title is registered or not and he would not appreciate the distinction if he did. On the other hand in India conveyancing is successfully conducted under a deeds system largely without professional assistance in much the same way as it is, for example, under the system of registration of title in the Sudan or Malaysia where transactions are prepared in the Registry by registry staff who have no professional qualifications.

12.10 There can in fact be little use in trying to lay down any hard and fast criteria. Each system must be judged on its merits and Ruoff ^{1/} suggests that registration of title succeeds or fails according to the degree with which the local law and local administration accord with three fundamental principles:

- (i) The mirror principle which involves the proposition that the register of title is a mirror which reflects accurately and completely and beyond all argument the current facts that are material to title. With certain inevitable exceptions the title is free from all adverse burdens, rights and qualifications unless they are mentioned in the register.
- (ii) The curtain principle which provides that the register is the sole source of information for proposing purchasers who need not and, indeed, must not concern themselves with trusts and equities which lie behind the curtain. (Some knowledge of English land law is needed for a proper understanding of this principle, and we must not, of course, forget that inspection of the land is always necessary).

^{1/} Ruoff T.B.F.: An Englishman looks at the Torrens System, pp. 8, 11 and 13.

- (iii) The insurance principle which is that, if through human frailty, the mirror fails to give an absolutely correct reflection of the title and a flaw appears, anyone who thereby suffers loss must be put in the same position, so far as money can do it, as if the reflection were a true one.

12.11 In the final analysis, however, the actual form of a system, and even the law which governs it, will matter less than the practical wisdom with which it has been adapted to local needs and the competence with which it is administered.

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