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AN OUTLINE OF A MODEL ORDINANCE FOR AFRICA

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AN OUTLINE OF A MODEL ORDINANCE FOR AFRICA

by

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1. I have chosen the Kenya Registered Land Act 1963 as an appropriate model for a land registration statute for two reasons:-

- (1) Kenya is a particularly fertile field for the study of land registration because it offers examples of almost every sort of land registration known to English law.
- (2) The Registered Land Act aims at providing the substantive law required for land dealing and is not confined merely to the machinery of land registration.

I will explain these two reasons in greater detail.

2. When the Kenya Registered Land Act was passed in 1963, it had to take into account and be reconciled with no fewer than five ordinances which already made provision for land registration in some form or other. In 1902 the Registration of Documents Ordinance had introduced registration of deeds in its simplest form, but in 1908 the Land Titles Ordinance (as amended in 1910) established a more sophisticated type of deeds registration which, supported by official survey plans, approached a system of registration of title, and this system was adopted for titles granted under the Crown Lands Ordinance 1915. In 1919, however, the Registration of Titles Ordinance introduced a version of the Torrens system of registration of title which, though severely criticized from the outset, was in full operation in 1959 when, on the recommendation of a working party appointed in 1957, the Native Lands Registration Ordinance (later renamed the Land Registration (Special Areas) Ordinance) was enacted for the purpose of regulating the titles which had emerged in the areas held under customary tenure.^{1/} This ordinance was derived principally from the Sudan Land Settlement and Registration Ordinance 1925 and the Tanganyika Land Registry Ordinance 1953. Under the Sudan Ordinance is operated an effective and simple system of registration of title derived in the main from English sources, and the Tanganyika Ordinance had, in the words of its draftsman, "borrowed freely from the English Land Registration Act 1925."

3. Thus the new system introduced into Kenya by the Native Land Registration Ordinance in 1959 was based on the English system. In its practical working it was wholly divorced from the existing registries which derived from Torrens, and so Kenya then had versions of the English and Torrens systems of

^{1/} Report of Working Party on African Land Tenure, 1957 - 1958 (Govt. of Kenya, 1958).

registration of title under the aegis of different ministries and each with its own ordinance. In addition there were also the systems of deeds registration set up under the Land Titles Ordinance and the Crown Lands Ordinance, as well as the Registration of Documents Ordinance which was still in force.

4. From every point of view this mixture was undesirable, and in 1961 another working party set about the task of co-ordinating and, so far as might be practicable, unifying the existing systems. The members of this working party had extensive practical experience of the operation of land registries in Kenya and elsewhere, and they produced the first draft of the bill which, after considerable discussion in Kenya and elsewhere, became the Registered Land Act 1963.

5. The second, and most important reason, for choosing the Kenya Registered Land Act as a model is that it was designed "to establish a complete code of property law which will provide, first, the machinery of registration and, secondly, all that is considered necessary for the practical needs of landowners in regard to the security and proof of title, and the creating and transfer of interests in land."^{2/} Unlike, for example, the English Land Registration Act 1925, it does not aim to be purely procedural, but seeks to provide the substantive law needed for land dealing. It makes no difference whether title stems from grants made under statutory law or from the recognition of ownership under customary law. The same law applies to each.

6. The Kenya Registered Land Act was based on a bill that had been prepared for the Federal Territory of Lagos by a working party which included two practising lawyers, a licensed surveyor, a crown counsel and a former assistant registrar of titles, all Nigerians, sitting under the chairmanship of the Chief Federal Land Officer (an expatriate) and so had a wide practical knowledge of West African conditions. In their report they described how one of the principal objects of their bill was to close the gap between customary tenure and tenure under English law and went on to say:

"We do this by making provision for the compilation and maintenance of a Land Register which will show the ownership, whether Crown or private, of every parcel of land. The ownership is not an 'estate in land' but is 'absolute ownership' and is the platform on which all other interests stand. It takes the place of the legal estate of the fee simple absolute in possession under the English Law of Property Act 1925. Out of this 'absolute ownership' can be created certain registrable rights in land. These are leases, charges, easements, profits and restrictive agreements, and they take the place of the legal estate of the term of years absolute and the various legal interests of the English Act. Anything not on the Register and which is not an 'overriding interest' creates no right or interest in land, although it can have effect as a contract. Thus there will no longer be 'legal and equitable owners'."

^{2/} Memorandum of Objects and Reasons. Kenya Gazette Supplement No. 32, 30 April 1963, p.277.

but, instead, there will be registered owners (i.e. 'proprietors') who by registration can create the interests provided for in the Bill."^{3/}

7. A version of that Bill was enacted in Lagos in 1964. The original bill had been revised by a New Zealand Craftsman who was instructed not to make any alterations in matters of substance. Nevertheless some anomalies crept in from the Torrens system or from New Zealand - such as 'limitation of parcels' which is meaningless in a context which uses English general boundaries - and though the Lagos Registered Land Act 1964 was repealed and re-enacted in 1965, the Kenya Act, is in any case, a better model to examine, because the Kenya working party made use of the Indian Transfer of Property Act 1882. This Indian Act had been applied to East Africa by order-in-council in 1897 as being "plain, simple and devoid of refinements". It is based mainly on the English law of real property but, in the words of the Law Commission in India who proposed it in their report of 1879, its function was "to strip the English law of all that was local and historical, and to mould the residue into a shape in which it would be suitable for an Indian population and could be easily administered by non-profession judges."

8. When it came to drafting the new law for Kenya, the Transfer of Property Act was invaluable because it provided a relatively simple reminder of the matters which must be covered if the new law were to make provision for the substantive law which is contained in acts like the English Conveyancing Act 1881, the prototype of this sort of law, and a long and complicated act replete with a vast amount of what was "local and historical".

9. The Registered Land Act is couched in simple and plain English. Land is held in 'absolute ownership', not in 'freehold' or 'fee simple' which are technical terms of English law and require historical knowledge to understand. They must bewilder, and even make suspicious, an owner under customary law who is seeking clarification of his title. Where technical terms are used (for instance 'lease', 'easement', 'profit') they are clearly defined. It is claimed that any well educated person can read and understand the whole act.

10. The Kenya Registered Land Act 1963 has been substantially used as a model for registration acts in Seychelles,^{4/} Malawi,^{5/} Turks and Caicos Islands,^{6/} and the British Solomon Islands,^{7/} not to mention the Lagos Registered Land Act 1965 (which is based on the original bill prepared by

^{3/} Report of a Working Party on Registration of Ownership of Land in Lagos. Federal Government Printer 1960, p.4.

^{4/} The Land Registration Ordinance 1965.

^{5/} The Registered Land Act 1967.

^{6/} The Registered Land Law 1968.

^{7/} The Land and Titles Ordinance 1969.

the Lagos working party but still contains certain anomalies). A particularly interesting version of it has been prepared for Ethiopia to fit in with the Civil Code.

11. The arrangement of the Kenya Registered Land Act 1963 follows the Lagos Registered Land Bill, except that in Kenya provision for 'adjudication' is now made under a separate ordinance, and so Lagos Part II which was entitled 'Adjudication' has been omitted.^{8/} Lagos Bill Part IX 'Judgments and Writs' and Part X 'Cautions and Restrictions' have been combined in Kenya under one Part entitled 'Restraints on Disposition'.

12. The Kenya working party wrote a detailed commentary on every clause of their draft bill but unfortunately it was not printed, and it is not easy to get a copy. I can of course, do no more here than broadly describe the Act and mention a few salient points that I think will be of general interest. The Act is divided into twelve Parts and I will describe each Part in turn.

PART I - PRELIMINARY

Section 1 gives the Act its short title. We chose 'Registered Land Act' to indicate that the Act is a Land Act as well as a Registration Act.

Section 3 is the interpretation section. It provides a comparatively large number of definitions and many of these will be found to be interesting. For instance "proprietor" means a person who is named in the Register as the owner of land or a lease, and so it is no longer necessary to keep on referring to the "registered proprietor"; it is in fact the magic wand of registration which changes an owner whose rights are vague and undefined into a proprietor whose rights are clearly set out in the Act.

Several other points have been cleared up; for example, nobody can now argue that rent is essential to a lease, for the definition makes it clear that a peppercorn rent is no longer required, and so gets rid of this curious legal anachronism.

Section 4 protects land registered under this Act from any other law, procedure and practice which is inconsistent with it. A provision on these lines is common to all the Torrens statutes and seems very necessary, but it has no equivalent in the English Act.

^{8/} Adjudication is a big subject and is dealt with in a separate paper, entitled 'Compilation of the Register'. The process used in Kenya to effect consolidation as well as adjudication has been described in a paper given by Mr. Lawrance.

PART II - ORGANIZATION AND ADMINISTRATION

Part 2 sets up the Registry and deals with its organization. It seems more logical to provide for these matters at this stage rather than towards the end, as in the English Land Registration Act. A point of drafting interest is that Part II is divided into three divisions on the Australian model. This is neater and more methodical than the unnumbered heading inserted in the English Act. Unfortunately, these unnumbered headings have now crept back into the Lagos Act, as this is the way it is done in New Zealand.

Part II contains many details which, some may argue, it would be better to provide for in rules, on the grounds that it is simpler to change a rule than it is to change the act. But the process set out in the Kenya Act has been well tried in practice in other places and there is no reason why it should be easily changed. Also the intention was to keep the rules down to a minimum. The English Act, for example, with 148 long sections and 325 rules is very confusing. It is necessary to keep on turning from Act to Rules and from Rules to Act, and it would be much easier to understand if the Act alone gave the complete picture, as the Kenya Act aims to do in 165 relatively brief and simple sections.

Division 1 - Land Registries and Officers - makes provision for the setting up of land registries and the appointment of the necessary officers. Section 6 provides that in the registry shall be kept a register, the registry map, parcel files, a presentation book, an alphabetical index of proprietors, and a register and file of powers of attorney. These are the working components of a land registry, and this is a useful sort of check list.

The parcel files should be specially mentioned as they are a good feature of the English system. Every parcel has its own file - an envelope is enough - in which are kept, under the same number as the parcel, all instruments supporting existing entries in the register. This will be found far more convenient than the Torrens practice of filing instruments consecutively in the order in which they are presented. In some registries they are bound up, in others they are loose, but in either case it would be impossible to reconstitute the register from them. This is possible under the parcel file system, which also makes it very much easier to arrange for the destruction of documents which no longer have any force and which become such a real problem in old registries.

The presentation book is a record of all applications numbered consecutively in the order in which they are presented at the registry. This is known as the "day list" or "business list" in some registries and is a very necessary record to keep a check on what is happening. There is considerable scope for ingenuity and business efficiency in organizing it.

Section 8 sets out the general powers of the Registrar and enables him to compel the production of documents, summons witnesses, and administer oaths.

Division 2 is entitled The Land Register. The "Land Register" means the sum total of all titles in any registration section and so is differentiated from a "register" which is the register relating to a particular parcel, usually called in the Torrens system a "folio" or "folium" - though there would seem to be no real reason for suddenly breaking into Latin.

It should be noted that there is a separate register for every parcel of land, and also for any lease which is required by the Act to be registered. A separate register is required for a leasehold interest because it can be transferred or charged or otherwise encumbered in the same way as can the absolute ownership. The numbering system enables the register of the lease to be kept immediately following the register of proprietorship - and this is very convenient.

Section 10 expressly provides that each register shall be divided into three sections, which is the way in which registers are divided in England, and this is also the layout now being adopted by some of the Australian Registries. Section A is called the Property Section and contains a brief description of the land or lease, together with particulars of its appurtenances and a reference to the Registry map and filed plan, if any; Section B is the Proprietorship Section and contains the name and, where possible, the address of the proprietor and a note of any inhibition, caution or restriction affecting his right of disposition; and Section C is the Incumbrances Section and contains a note of every incumbrance or other right adversely affecting the land or the lease.

The next two sections of Division 2 provide for the compilation of the land register and are key sections which, of course, vary from administration to administration to suit the existing position. It is essential to provide not only how new titles shall be brought on to the register, but how previous registers shall be taken over.^{9/} The Kenya Act is particularly instructive in this regard because of the wide variety of existing registers.

Three short sections then provide for the manner of registration, new editions of the register and cancellation of obsolete entries. It is astonishing to find that even to this day, in some Australian registries, for example Adelaide, expired entries are not cancelled, and there is no provision for making new editions of a register. The Kenya procedure aims to provide merely a living record of subsisting entries, and all dead matter is purged from the register.

Division 3 is entitled Maps, Parcels and Boundaries, and covers the survey side of the Registry.

There is no aspect of registration of title which causes more misunderstanding than matters connected with survey and maps. In Kenya, this understanding was almost inevitable as the Native Land Registration Ordinance

^{9/} This is all explained in the separate papers entitled "Compilation of the Register".

followed the English system, whereas the Registration of Titles Ordinance was on Torrens lines, and this is one of the features in which the two systems materially differ. I shall therefore first try to explain the differences and then describe how they were reconciled.

We can summarize the differences between the English and the Torrens systems in respect of boundaries and maps by saying that to an Englishman a boundary is a physical feature, such as a wall or fence or ditch, which delimits his land, and the English register is illustrated by a General Map, which is a topographical map on which individual parcels are indicated by colouring their boundaries. These boundaries are visible physical features and so necessarily have breadth as well as length; whereas under the Torrens system a boundary is an imaginary line, the length without breadth of the geometry books, which is indicated on the ground by marking the turning points with special marks (often concealed) and the precise position of these marks is shown on a plan specially drawn for each parcel by a professional surveyor, who is not on the Registry staff. This imaginary line may not be coincident with the actual boundary which the neighbouring owners are using in complete amity and which may have stood for generations.

Therefore, in the event of a conveyance under the Torrens system the prudent purchaser must get expert survey confirmation that the boundaries which he sees on the ground in fact conform with the plan, for the plan, or rather the marks, usually buried, which mark on the ground the points shown on the plan are the dominant factor, and they may be out of line with the visible physical boundary. The relocation of these points will cost something of the order of the original survey, for it will require professional survey skill of the same sort. Under the English system this position does not arise, for the purchaser (or his lawyer) will be able to identify without difficulty the physical features which demarcate the boundary in law as well as in fact.

The distinction between the Torrens and English systems springs, in the first instance, from the different manner in which the respective registers have been compiled. This is absolutely fundamental and flavours the whole approach of every person who is accustomed to only one or other of the systems.

In the Torrens system the register itself consists of Crown Grants or subdivisions of Crown grants. When settlement began in Australia there were huge tracts of undeveloped land; the requisite parcels, usually with straight sides and often too large to be wholly fenced, were cut from this vacant land and were demarcated on the ground by driving in survey pegs at the corners or digging shallow trenches. These pegs or trenches show exactly what the grantee actually received and, so long as they can be found, there is no possibility of any contention as to what was granted. A qualified surveyor prepared a plan showing these points and providing sufficient information to enable any other qualified surveyor to relocate them should they be lost. A copy of this plan was drawn on the grant which itself became the register and subsequent dealings were recorded on this grant and on the duplicate in possession of the grantee.

In England, quite a different operation was involved when the register was started. It was, in the first place, a problem of adjudication, that is, of ascertaining the facts from any evidence which was available. The title could not, of course, be traced back to a Crown grant and there was no accurate record of pieces of land which had been precisely cut off from the Crown estate. Quite probably there was no map of any sort. No corner pegs or similar marks existed to pinpoint the exact line of the boundaries, which in practically all cases consisted of physical features on the ground, such as a fence and ditch or wall. It was a question of finding out what the boundaries of parcels which had existed for generations actually were. It was not always known on which side of the fence or wall the boundary actually lay or whether it lay down the middle; nor, in most cases, does this matter, for the only significant point is who should maintain the fence or wall, and this does not necessarily go by ownership. It is a matter of agreement or custom.

The English Act of 1862, however, required boundaries to be precisely determined, and this was one of the main reasons for its failure according to the Royal Commission which was appointed to enquire into it. The following extract from their Report is illuminating:-

"Everyone who has had experience in conveyancing knows that although the difficulties of identifying the parcels seem to be serious and numerous, yet in point of fact they hardly ever arise. If there is any borderland over which the precise boundary line is obscure, it is usually something of a very trifling value, and the purchaser is content to take the property as his vendor had it, and to let all questions of boundary lie dormant. But the Act of 1862 prevents a transfer on these terms. People who are quite content with an undefined boundary are compelled to have it defined. And this leads to two immediate consequences, both mischievous. First, notices have to be served on adjoining owners and occupiers which may and sometimes do amount to an enormous number, and the service of which may involve great trouble and expense. This is the first mischief. The second is that people served with notices immediately begin to consider whether some injury is not about to be inflicted on them. In all cases of undefined boundary they find that such is the case, and a dispute is thus forced upon neighbours who only desire to remain at peace."

It was the publication of this Report in 1870, which led to the adoption of what in the English Act are called "general boundaries". These are regarded with some scorn by adherents of the Torrens system, and indeed are castigated by Dowson and Sheppard who, in their book on Land Registration, call them "a euphemism for uncertain boundaries". This, unhappily, conveys quite the wrong impression. The English system makes it quite clear where the parcel is situated, and on the ground there will be no uncertainty at all as to what the boundaries are, for they are clearly visible and unmistakable physical features. These features show the general line of the boundary but do not

indicate the exact location of the line within the breadth which such physical features necessarily possess. That is what is meant by "general boundaries". What to the purist may appear slovenly imprecision is in fact a monument of common sense.

A striking example of the practical value of the general boundaries rule is afforded by the cellars under the pavement which are a common feature of London houses. Without the rule a special survey would be required in each such case and would cause great expense and inconvenience to no useful purpose.

Nevertheless, if an owner wishes to have the exact line of his boundary ascertained within the general line, provision is made to enable him to apply to have his boundary "fixed". When this has been done and recorded by means of a plan, the plan will be deemed to be conclusive evidence of the position of the boundary. Such a plan will indeed have more weight in law than the plan accompanying the Torrens certificate. However, this process serves so little purpose in practice, and is so expensive, that it is only done once in about every two years though new titles are coming into Her Majesty's Land Registry at the rate of over 180,000 a year.

The topographical map which supports the English Register is, in fact, a copy of the Ordnance Survey Map. This only depicts physical features and the Land Registry marks by coloured lines those particular features which actually constitute the boundaries of a parcel. No dimensions are shown on this map and, as the thickness of a line on it represents at least a foot on the ground, it could not be used for precisely re-establishing a boundary which had wholly disappeared. From it, however, every layman can easily identify for himself the physical features which delimit his property; the map merely operates as a signpost to them and they will be readily recognized when they are seen. This is all that is needed, for these physical features are the boundaries in law as well as in fact. There is no question of discovering buried boundary marks or pinpoints in the tops of pegs.

The Torrens maps are quite different; they show every relevant dimension. For example, dimensions on deed plans in Auckland in New Zealand are shown to 1/100th part of a link. A link is not quite 8 inches and so 1/100th part of it is less than 1/10th of an inch. Such a plan is very convenient for any landowner who wants to know the exact dimensions of his plot, and it is surprising how many do. In fact, if any landowner is asked if he would like to have this information, he will say at once that he does want to have it. It is also possible to use the map to re-establish a boundary mark with a very high degree of accuracy, and this is another apparent advantage which any landowner will say he wants to have if he is asked.

To Torrens type of precise individual plans was introduced into Kenya under the Land Titles Ordinance in 1908, and the Torrens type of plan was, of course, also naturally adopted for the Crown grant system under the Crown Lands Ordinance 1915, for this was precisely the sort of system from which it originally came, and for which it is entirely appropriate.

It was, however, neither desirable nor, without great delay and expense, was it possible to use this system of pegging and meticulous survey when it came to the conversion of native customary tenure to a recognizable form of recorded tenure. In any case use and occupation were to be the key, and the precision marking of individual corners would have none of the practical advantage of the visible continuous boundaries which are so much more useful to landowners. Such boundaries, indeed, were themselves an integral part of the whole scheme, for enclosure - that is the putting in of proper fences - was as essential to improve agriculture as it was to mark boundaries. There was not, of course, any difficulty in determining the exact line of the boundary, as the boundaries, on consolidation, were laid out just as in the case of a Crown grant, and so the English difficulty of ascertaining the precise line of the boundaries did not arise, nor in fact was there any difficulty in ascertaining the areas of the original fragments, for these were actually measured on the ground within the boundaries pointed out by the owners, with remarkably little dispute. It was, however, absolutely essential to stress the importance of putting in and maintaining the new boundaries and, as these would be physical features clearly demarcating their whole length, it was considered desirable to make them the boundaries in law as well as in fact on English lines. Aerial photography would, it was hoped, later make it possible to produce pictures clearly showing these features.

It was therefore necessary to reconcile the Registry Map system of the Native Land Registration Ordinance with the Certificate Plan system of the Registration of Titles Ordinance. This was easy enough. All that was needed was to make provision for parcels to be identified by reference to the Registry Map, as was done in Tanganyika where a precisely similar change-over was successfully effected as a result of their new Ordinance in 1953. This gave them the benefit of an index map which is lacking under the Torrens system.

In Kenya, however, they were not prepared to go as far as they did in Tanganyika, and they wanted to conserve the status of the Certificate Plans which already existed. This was done simply by providing that where parcels had been illustrated by such plans the boundaries should be deemed to have been "fixed", and such plans then became conclusive evidence of the boundary, as in the fixed boundaries of the English system though, as we have seen, practically nobody in England bothers to have it done.

We can now consider some of the principal provisions of the Maps and Boundaries Division in Part II of the Kenya Act.

First of all it is provided that the Director of Surveys shall prepare and maintain the Registry map. Survey is an expert function and it is waste of time and effort for registries to run their own survey branch, though it must be made crystal clear that the Registrar must have final control of the map and that it can only be altered on his instructions. Provision is therefore made for a special form called a "mutation form" which ensures that the register and map keep in line.

If a boundary is changed, in effect a new parcel is created and this is always given a new number. This system of unique numbering is a safeguard against the possibility of confusion.

It should be specially noted that a parcel is described by reference to the registry map, and there are no special title numbers. The name of the registration section, block number (if any) and parcel number as used on the map serve also as title numbers. This means that the registers of all parcels in the same area are kept together, and this has obvious administrative advantages. It also saves the cross-indexing of title numbers. It makes it very much easier to divide up a registry, should this be necessary, as it often is because registries grow and get too big, or there are political changes - Sydney and Canberra, and Lagos and Ibadan are two cases in point where it would have been invaluable, for as it was, every register had to be examined in order to see whether it must be transferred or not. Yet it is astonishing how few registries have adopted this simple device, despite the fact that it is recommended by Dowson and Sheppard who, I think may have first seen it in use in the Sudan, though it is, of course, the natural way of indexing a deeds registry when this is done by parcels and not merely by parties. Unfortunately it was not even adopted in Singapore when a new register of title was started some six years ago.

The Kenya Act makes special provision for what are called "filed plans" (i.e. an ad hoc plan filed in respect of a particular parcel). The filed plan is intended to be used merely for augmenting or amplifying the information available on the registry map. It can illustrate any special detail on any scale which may be appropriate, or it may even be merely a diagram showing particular dimensions. It must be remembered that it is the relationship of a parcel to its immediate neighbours which matters to its owner; so far as he is concerned its precise position on the world's surface is immaterial.

In Kenya the expression 'approximate boundary' was adopted as more clearly indicating what 'general boundary' really means in the English system. Special provision was made for the Registrar to point out a boundary where a proprietor asks to have this done, as not infrequently happens because there is some genuine doubt or uncertainty as to the boundary and the owners, as a rule, are quite content to let the Registry settle it. This sort of application is not an application to "fix" boundaries in the English sense and, though survey evidence may be the best evidence, there may well be other evidence which will show where the boundary should be, and so it is provided that the Registrar may take this into account if he wishes. I think that it is only in Kenya, and Acts based on the Kenya Act, that formal provision has been made for this very useful service.

Nevertheless provision is also made for boundaries to be "fixed" in the English sense if this is required, and in such case the map becomes conclusive evidence, though it will not prevail against adverse possession for twelve years, because in Kenya they have had the good sense to allow prescription

to operate even in the case of a registered title. This is covered in Part IX of the Act, and we will discuss it when we come to it. In my view it is a very important provision.

Another special feature of the Kenya boundary provisions is the requirement that boundary features, such as fences, hedges and walls, must be properly maintained, and the Registrar may determine which of adjoining proprietors shall be responsible for doing it. As a rule this sort of provision is confined merely to boundary stones or pegs.

Finally, before I leave maps and boundaries, there is one important point which I should mention here, though it is dealt with later in the Act - in Part X where provision is made for Rectification and Indemnity. No areas or dimensions are shown in the English register - or on the supporting plan - but they are in the Torrens system, and this is convenient to landowners and, of course, administrators when, for example, there are rules as to minimum holdings or some planning or building regulation is involved. There is, however, no warranty of their accuracy - not even in the Torrens system. There is, however, widespread misunderstanding of this simple point, and it seems only sensible that the law should clear it up once and for all.

It is therefore provided that, as between the government and the proprietor, no claim to compensation can be made on account of any surplus or deficiency in the area or measurement of any land disclosed by a survey showing an area differing from the area or measurement shown in the register. As between the proprietor and any other person six months is allowed for a claim, because a price may have been fixed at, say, so much an acre or per square yard as shown on the register, and it may be fair that the price should be adjusted if the register was wrong. A simple provision on these lines will save much abortive litigation.

PART III - EFFECT OF REGISTRATION

This is nearly the shortest Part in the Act - only five sections - but it contains what is really the heart of the whole system, for this is where those key provisions are made which enable the register to prove ownership. This is the special quality - known in Torrens circles as "indefeasibility of title" - which makes registration of title superior to registration of deeds. Incidentally it is a very solid piece of substantive law, and it can scarcely be passed off as being purely 'procedural' or 'adjectival', though it is often said that registration does not alter the law but merely simplifies procedure.

This Part is indeed tremendously important, but it should not worry the ordinary man very much - nor indeed the expert or anybody else - provided we get it right, and we ought to be able to get it right. For a hundred years or so various precedents have been tried out all round the world, and there really is not very much excuse for any mistake - or even for some new experiment which may raise doubt and so invite challenge in the Courts.

In fact if this Part of the Act succeeds in doing what it is intended to do, it should be like the foundation of a building designed and built by competent engineers; nobody need worry about it, or even look at it again. This part therefore begins with the categorical declaration that the registration of a person as the proprietor of land vests in him its absolute ownership. This declaration is obviously immensely important where, as in England or under customary law, title is not derived from and traceable back to some statutory grant, as it is under the Torrens system. Indeed, where customary tenure is being converted to recorded title, this section is the final and most important step in the process. Whatever the previous right amounted to under customary law it now becomes absolute ownership, just like absolute ownership stemming from any other source; indeed, once registration has waved its magic wand, the source no longer matters.

In addition to conferring absolute ownership the first section of this Part also provides that the registration of a person as the proprietor of a lease vests in him the leasehold interest described in the lease, and so it sets up two interests in land - absolute ownership and a leasehold interest, each of which is capable of independent registration. It might be thought that these could be equated with 'the fee simple absolute in possession' and 'the term of years absolute', the only two 'estates' capable of subsisting under English law after the reforms of 1925. Like them they are the two interests in land which give their proprietor the right to the exclusive occupation of land - unless he has disposed of this right by granting a lease or sub-lease. But - I quote - "it has been one object of the drafting to avoid in certain contexts the use of terms or phrases which might have overtones of English law and thus by implication bring the ideas of the English real property legal system into the Protectorate at points at which they would not be welcomed".

That quotation, however, is not from Kenya but from the British Solomon Islands Protectorate where their Land and Titles Ordinance 1957 created two 'estates' in land - called a 'perpetual estate' and a 'fixed term estate'. They were not the same as the two English estates - indeed there was a leasehold interest in addition to them - but the mere use of the term 'estate' led to inevitable confusion, for of all legal terms estate is one of the most precious and most peculiar to English land law. So also is the English doctrine of estates which Professor Cheshire explains by saying that "the English lawyer first detaches the ownership from the land itself and then attaches it to an imaginary thing called as estate". But I am not sure that this really helps us very much, and in Kenya it was firmly resolved to keep clear of estates.

The choice of wording, however, was still not easy. The Native Lands Registration Ordinance had already established the fee simple as the interest conferred by registration when customary titles were first put on the register. The fee simple had been chosen in 1959 as being the highest form of tenure known to the law, but even this was debatable because in the Registration of Titles Ordinance of 1919 it was actually declared that the person named in the

register as the proprietor of land as the absolute and indefeasible owner thereof. However, a form set out in the schedule to that Ordinance used the phrase "for an estate in fee", and so here was good material for another of those learned arguments which, however enjoyable, really serve no useful practical purpose whatever. They merely produce the sort of learning which caricatures wisdom.

Anyway when it came to choosing the terminology of the new Kenya Ordinance it was agreed that the words 'fee simple' had no more intrinsic value than 'socage' or any other feudal survival which requires a law lexicon instead of an ordinary dictionary to discover its meaning. 'Absolute ownership', on the other hand, is relatively plain English and has a meaning readily intelligible to and indeed understood by the ordinary man. One of the first things a child seems to find out is what 'mine' means, though he may be a bit slower when it comes to the meaning of 'thine' or 'yours'.

Thus by far the simplest solution was to adopt the Lagos precedent and provide for 'absolute ownership'. In the Lagos commentary, it will be remembered this was described as being the platform on which all other interests stand, and the first section of Part III (section 27) provided that registration vests in the proprietor absolute ownership or a leasehold interest, as the case may be. The next section then declares that his rights shall not be liable to be defeated except as provided in the Act and that they shall be free from all interests and claims other than those shown in the register or which are 'overriding interests'. A proviso makes it clear that nothing in the section shall be taken to relieve the proprietor from any duty or obligation to which he is subject as a trustee - and I shall say more about trustees later.

'Overriding interests' are certain rights and liabilities which it is not practicable to register but which, though not registered, must nevertheless retain their validity. It is obvious, for example, that it is not feasible to alter the register every time, say, a monthly tenancy is changed, and so it must be provided that short-term tenancies are valid though not registered. Again, public health and building regulations may impose restrictions which affect all land in a certain area, and it would be a waste of time to have to repeat them on the register of each parcel. These overriding interests are listed in detail in section 30, but in the Torrens statutes they are usually included as 'exceptions' in the 'paramountcy' section itself. Where they are put is merely a drafting point, but what should be included among them naturally raises a number of interesting points which unfortunately we have no time to discuss now.

The only other section I need mention in this Part is the provision that the proprietor who has acquired land or a lease or charge without valuable consideration holds it subject to any unregistered rights and interests subject to which the transferor hold it. This is the usual position of the 'volunteer' which made quite clear under the English system.

PART IV - CERTIFICATES AND SEARCHES

Part IV of the Act now brings us back to practical matters after our excursion into legal theory in Part III. The register was set up in Part II and Part III declared that its effect was to confer an unimpeachable title. The next logical step was to make provision for the issue of certificates to evidence that title, and as searches often lead to certificates, it seemed convenient to include them in the same Part. Part IV therefore deals with Certificates and Searches.

I do not share the view, which is widely held by registrars, administrators and others, that a land certificate or certificate of title is either a necessary, or even a variable, adjunct to land registration. If it is used to establish identity - and some people claim that this is its great advantage - it can be a real danger, for it may be stolen, and so make personation or forgery easier if too much reliance be placed on it.

The idea that the land certificate is a substitute for the old title deeds, which is a claim made by Her Majesty's Land Registry, is misleading and illogical, for it is the entry in the register which is the true substitute for the title deeds and not the certificate at all. In a case in 1926 on the New Zealand Torrens statute the Privy Council said "the cardinal principle of the Statute is that the register is everything" - and, if the register is everything, then the land certificate must be nothing. It is, in fact, out of date at the moment it is issued and it must be brought up to date (i.e. compared with the register) every time it is used.

A certified copy of the register, or of any registered document or of land can be obtained at any time for a small sum, and a certified copy of the register is just as useful as a certificate of title, for it can be used in evidence to prove what is shown in the register which as we have seen, is what really matters.

In fact, in the Sudan, land certificates on the English model were issued some time about 1914, but thirty years later it was extremely difficult to find one. Landowners were accustomed to obtain a certificate of search if they wished to prove title, and they found that their original certificate, which became more and more out of date as time went on, was less useful than the up to date search certificate.

The equivalent of mortgage by deposit of title deeds - which may be useful to secure an overdraft at the bank - can be effected by the lodging of a caution, for which express arrangements were made in the Sudan procedure, but in Kenya they finally decided that they would have no such thing as an equitable mortgage or lien.

PART V - DISPOSITIONS

It is in the field of dealing that registration of title confers the greatest benefit and has its greatest scope. The landowner wants to know how he can deal with his land and what the effect of that dealing will be. This

Part makes provision for the various dispositions which can be effected by a proprietor.

A disposition must be very clearly distinguished from a transmission a disposition is an act performed intervivos whereby the rights of a person in or over land or a lease or charge are affected. It requires an instrument executed by the registered proprietor (or his agent) to evidence it but, until it is registered, this will, in the words of the Act, be ineffectual to create, extinguish, transfer, vary or affect (misspelt 'effect' in section 38) any interest in the land. Registration is needed to complete it.

The essential feature of a 'transmission', however, is that it takes place automatically on the occurrence of an event, whether the register is altered or not. The event itself divests the registered proprietor of his interest, and thus the register becomes out of line with fact until a 'transmission' has been recorded. For example, death terminates ownership, and so when a registered proprietor dies, it is obvious that his property must (unless it is to be ownerless) be vested in somebody who is not actually shown on the register. We will consider transmissions when we come to Part IX.

A generic term is needed to include both 'disposition' and 'transmission', and in Kenya the word 'dealing' was chosen, though this is rather artificial when a 'dealing' is occasioned by death. Unhappily in Lagos 'disposition' has now been defined to include any acquisition by operation of law and so is muddled with 'transmission'.

Part V of the Kenya Act is divided into seven divisions; the first covers general matters, the next five provide for five categories of dealing, and the last refers to testamentary disposition merely to make it clear that this Act does not interfere with testamentary disposition. Each sort of disposition might have been given a separate part, as was done in the Singapore Ordinance and in British Guiana, but I think it is logical to keep all dispositions together in a Part of their own, and they can be distinguished merely by this useful Australian device of 'divisions'.

Division 1 - General - covers matters common to all dispositions. Its first section is aimed at ensuring that registered land can only be dealt with in accordance with the Act and 'on the register'. It is a codification and clarification of provisions which are common, in one form or another, to all registration enactments. It is basic to the system. But however much a statute provides that an unregistered instrument is void and of no effect, no court is likely to permit a person to avoid his commitments merely because of non-registration, provided that fulfilment is still possible, and therefore it is expressly provided that the court may treat an unregistered instrument as a contract. The section then goes on to provide that any agreement relating to registered land must be in writing (following English law in this regard), and it also includes a codification of the law of past performance. This section is indeed a good example of the way in which the Act endeavours to cover all the necessary substantive law.

I need not comment here on the other general provisions in this Division, but I should mention that there is at the end of it, in section 44, a short and simple commonsense provision in regard to merger which resolves the problem that merger otherwise presents. This is typical of the way in which the Act covers such matters.

Division 2 - Leases - has been brought forward in front of transfer (which normally precedes it in other enactments) because it is clearly a more orderly arrangement to provide for the creation of leases, and also charges, before arranging for their transfer.

So far as occupation leases are concerned (that is those leases where the proprietor of the lease is in possession of the leased premises) it makes little difference whether the lease is registered or not, for the interest of the occupier is an overriding interest and in any case the lease will operate as a contract. However it very frequently happens that a lessee may have sub-let the property, and so not be in possession. Indeed he may deal with the property, in so far as the lease allows him to do so, in much the same way as if he were the owner of it. It is for this reason that a separate register is provided for the leasehold interest, and I have already explained how it should be kept contiguous to the register of the proprietorship of the land.

I cannot, in this paper, review all the twenty sections of this division, but in general it may be said that a proprietor can safely let his property by filling in on the standard form only the name of the lessee, the term of the lease, and the amount of the rent. The Act will then take care of the rest, following principles which are common form. The usual agreements on the part of the lessor and lessee will be implied unless they are expressly varied. The procedure on surrender or determination is set out in sections 63 and 64, and this is a great convenience to registrars who are not sure what entries, if any, should be made when a lease appears to have expired. Several other points which often cause difficulty have been cleared up; for example, the meaning of "in repair" and "holding over". Also provision is made for relief against forfeiture on the lines of section 146 of the English Law of Property Act 1925 which reproduced section 14 (1) of the Conveyancing Act 1881.

Naturally it cannot be claimed that the whole subject of landlord and tenant has been completely disposed of in twenty sections, but it is surprising how much has been covered. In the main this Division follows English law, but of course it can be adapted to any law, including customary law if special provision is needed.

Division 3 - Charges - is, perhaps, the best example of the virtues of the Act in tidying up obscurities and difficulties in the substantive law. "No one by the light of nature ever understood an English mortgage of real estate" said Lord Macnaghten in 1904, and mortgages have a long and involved history in English law. The English mortgage was an outright conveyance of the mortgagor's estate, protected by the proviso for redemption which, after the redemption date had passed, became a mere equity of redemption, and the lawyer

used to have the embarrassing problem of explaining to his mortgagor client that the fact that he was assigning his entire interest did not mean that he was parting with the property otherwise than by way of security, and also that the fixed date for redemption did not mean that the money had to be repaid on that date; the layman could justifiably begin to think that, if those two vital parts of the deed did not mean what they said, then neither did anything else in it.

The Kenya Act however, in creating the power to charge land or a lease to secure a debt or the fulfilment of a condition, makes it quite clear what its effect will be. For example, a real date is set for redemption instead of the completely artificial date of the English formula, and provision is also made for subsequent redemption should this date be passed.

How the various remedies of the chargee are to be exercised are clearly specified, and here again the opportunity has been taken of simplifying English law. Under English law, the chargee has four main remedies, in addition to the right to sue for the debt. The first two of these remedies - foreclosure and sale - are basically designed to recover capital, and they put an end to the entire transaction, while the other two - taking possession and appointing a receiver - are for recovery of interest, and so keep the transaction alive. In the Kenya Act the chargee has been given the right to buy in at any auction held in exercise of the power of sale, and so can acquire the property more simply and expeditiously than by foreclosure which, in any case, could only be effected by the court after a lengthy and expensive process. There is therefore no point in perpetuating foreclosure, and it has been abolished.

Similarly the chargee's powers of taking possession has also been abolished. This power is so fettered and puts the chargee in such a difficult position that it is seldom, if ever, exercised in England. The normal means of intercepting the income of charged property is to appoint a receiver, and therefore in Kenya this has now been made the only means.

Two sections deal with tacking and consolidation and follow the principles of the Law of Property Act 1925 in England. Tacking and consolidation are, in fact, typical of the complexity which case law and practice can produce, but which can be very easily rationalized by statutory provision.

Division 4 - Transfer - makes provision for transfer of the land or transfer of a lease or of a charge. All that need be noted is the provision that no part of the land comprised in a register shall be transferred unless the proprietor has first sub-divided the land and new registers have been opened in respect of each sub-division. This is worthy of special mention because, on a visit to Sydney four years ago, it was explained to me how procedure which had been introduced on these lines had enormously simplified the keeping of their registers. The English procedure of transfer of part - which was followed in Lagos - is not to be recommended.

Division 5 makes provision for Easements, Restrictive Agreements, Profits and Licences.

The expression 'restrictive agreement' was deliberately used instead of the expression 'restrictive covenants' because the word covenant has a particular connotation in English law and means an agreement under seal. No provision is made in Kenya for sealing by individuals because it seems quite wrong that any less force or weight should be given to an undertaking merely because it has been signed instead of being sealed.

It is interesting to note that in the British Solomon Islands they recently reintroduced the power to create profits à prendre which had been abolished by their Land and Titles Regulation in 1959. Their new position is based on the Kenya legislation.

Licences are a thorny problem in so far as they may create interests in land. The English law on this subject is full of conflicting decisions and Megarry and Wade, in their book on The Law of Real Property, state that "it is impossible to say what the outcome of the conflicting views and decisions will be". This indicates how obscure the English is on this point. Kenya has resolved the problem by prohibiting the registration of licences as such, but empowering the holder of a licence to protect his interest by lodging a caution, thereby ensuring that any potential purchaser has notice of his interest.

Division 6 is entitled Co-proprietorship and Partition. Partition is, of course, a disposition and so must be dealt with in this Part, and as it arises out of co-proprietorship, it is appropriate to deal with co-proprietorship at the same time. The special characteristics of joint proprietorship and of proprietorship in common are therefore clearly set out in sections 102 and 103. Co-proprietorship is a matter of the utmost importance in a country such as Kenya. Different religious or racial rules of inheritance which provide a share for each dependant can produce, in two or three generations, so many owners with shares expressed with such huge denominators that registration becomes farcical. In addition, fragmentation on the ground, if not on the register, may reach such proportions that economic use of land becomes impossible. Special provision must therefore be made to prevent this state of affairs from arising.

Provision is made for partition if it is required, but if the land is incapable of partition - for instance because partition would result in fragmentation below the economic level - the Registrar may order sale by public auction. Any co-proprietor may bid at the sale, or buy by private treaty before the auction, and this procedure establishes a convenient means whereby one co-proprietor can buy out the others. The procedure is also laid down for land which can be partitioned but not into such small parcels as would be necessary to satisfy all the co-proprietors. Those who receive more land than they are entitled to must pay compensation to those who receive

less or no land at all, and the sum so payable may be secured by a charge. The procedure laid down in sections 105 and 106 is worth study, but it is unlikely to be effective on the ground if alternative land or employment is not available.

Division 7 is entitled Testamentary Disposition. It is a contradiction in terms, because the definition of "disposition" in Section 3 confines it to acts performed inter vivos, - or would have confined it to such acts as if the original draft had not been altered - but in any event it would be in-appropriate to deal with testamentary dispositions in this Act, which relates to land only. Provision for testamentary disposition must cover movables as well.

PART VI - INSTRUMENTS AND AGENTS

Provision having been made for all the dispositions which a proprietor may make, this Part now deals with the instruments required to make them, and it seemed quite logical to group provisions as to how instruments should be executed with provisions concerning who can execute them.

First, it is provided that every disposition must be effected by an instrument in the prescribed form. The Registrar has discretion to accept a variation in any particular case, but it is intended that printed forms should be used as much as possible.

The instrument must be executed by all the parties thereto but the Registrar may dispense with the signature of any particular party which he considers unnecessary - except that he is not allowed to dispense with execution by the donee of a gift.

Section 110 makes provision for proving the signature. This is essentially a practical matter - and a very important one too. The signature of an unknown witness does not help and indeed, even in England, signing by a witness is not legally necessary for the validity of a deed, though it is an invariable practice. Instead of requiring a witness's signature Kenya has adopted the realistic formula of requiring a positive endorsement by the Registrar that he knows the grantor or has had him identified by a credible witness. Other officials or persons can be authorized to give this certificate, or, if there is some special reasons or if the Registrar is satisfied that the instrument has been properly executed, he may dispense with verification, but if he does he must record his reasons. This insistence on identification is much safer than reliance merely on a certificate of title which can be stolen (or even forged) and so itself may make fraud easier.

Section 112 makes provision for the retention of instruments in the Registry for so long as they support a subsisting entry, and for their destruction six years after they have ceased to be effective. It was felt inadvisable to authorize their immediate destruction in case any question should arise on them.

In Section 113 it is made clear that minors may be registered as proprietors, although such registration will not empower them to make any disposition (which could be made by a properly constituted guardian).

It is provided that, except where a person is under disability, nobody can sign on his behalf otherwise than under the authority of a properly executed power of attorney, and the law with regard to powers of attorney is succinctly and very effectively set out in detail in sections 116 and 117.

PART VII - TRANSMISSIONS AND TRUSTS

It will be remembered that a transmission is where an interest in land passes by operation of law - an event as distinct from an instrument - and the procedure for transmission on the death of a joint proprietor, and of a sole proprietor, or a proprietor in common, are set out in sections 118 and 119. Transmission on death intestate of a proprietor subject to African customary law is dealt with at length in sections 120 and 121. There has been no interference with customary succession, though a proper procedure has been laid down for getting the register altered to give effect to it.

Bankruptcy and liquidation are dealt with in sections 123 and 124. Bankruptcy is a sort of civil death and vests the bankrupt's property in the trustee in bankruptcy or the official receiver. It seemed logical also to include 'expropriation' in this Part, because a proprietor, once his land is declared for compulsory acquisition, cannot deal with it or retain its ownership. As in the case of transmission on death or bankruptcy, all that is then required is effective machinery for recording the change of proprietor which, in fact, takes place whether the register is altered or not.

Trusts were included in this Part because personal representatives - in whom the land vests on transmission on death - are by far the commonest trustees. But though in section 126 it is provided, as it must be, that no person dealing for valuable consideration with the trustee shall be deemed to have notice of the trust, provision is made later (in section 136) to enable, or even require, the Registrar to keep a watchful eye on what trustees do.

I cannot go into this point in any detail now, but the extent to which the registry should police trusts is one of the things they argue about at length at the Australian Registrars' conferences - which, as I have already mentioned, they have held every two years since the Torrens centenary in Adelaide in 1958. A nice balance must be struck between, on the one hand, keeping anything concerning trusts out of the Registry altogether, so that for the purpose of dealing no difference whatever is made in registry practice between a dealing by an ordinary proprietor and one by a trustee and, on the other hand, requiring the registry to make certain that a dealing confirms with a trust before registration is allowed. The point of balance will vary according to circumstances in each country.

The Kenya legislation permits a trust instrument to be deposited with the Registrar, but for purpose of safe custody only - it is not registered in the technical sense. This is allowed in Australian Registries and is a desirable service which prejudices nobody.

The Kenya legislation also provides (in section 127) that the Registrar shall enter a restriction where, to his knowledge, a surviving trustee cannot alone exercise the trustees' powers. This is in line with the English practice, where on the registration of trustees it is standard procedure for a restriction to be entered in the proprietorship part of the register to the effect that there shall be no disposition by the last survivor without an order of the court or of the Registrar.

PART VIII - RESTRAINTS ON DISPOSITION

In other statutes, judgments, writs, caveats, cautions, inhibitions, restrictions, and prohibitory orders have been dealt with in a variety of ways, and they have often been widely separated in the same enactment. It seems better to group them together, for the essential purpose common to them all is to provide effective means whereby the power of a proprietor to dispose of his interests can be stopped or delayed. Accordingly in Kenya these 'restraints' were grouped together in this Part which is divided into three Divisions and the English nomenclature has been followed. Division 1 provides for 'Inhibitions' which are imposed by the Court, Division 2 provides for 'Cautions' which may be lodged by a person who claims some right or interest in the property, and Division 3 provides for 'Restrictions' to enable the Registrar to restrict dealing where it seems necessary in the proprietor's own interest, for example, where he is a minor. Thus a restriction is a friendly or protective act, whereas a caution is hostile. Under the Torrens system cautions and restrictions are called 'caveats', and the place of the restriction is taken by a caveat lodged by the Registrar. This sort of caveat is known in New South Wales as a 'Registrar-Generals caveat' and in Victoria as a 'Queen's caveat'.

In this paper I can only mention Division 2 which relates to cautions and sets out how and why a caution may be lodged to stop the proprietor from dealing. There is a clear cut distinction between two rival schools of thought on what the effect of this should be: the Australian provisions relating to caveats operate as complete 'stoppers', while the English rely on cautions which merely entitle the cautioner to have notice of any dealing and give him sufficient time to take action if necessary. In Kenya they chose the former though they adopted the English terms 'caution', whereas in Lagos where they have been using the term caution for 25 years they have now adopted the term 'caveat'.

But more important than its name is the ground on which a caution should be allowed. I am by no means sure that Kenya has got the right answer, though a lot of attention was given to the point. But at least they have provided that the Registrar may reject a caution if he considers it unnecessary

or that its purpose can be effected by the registration of an instrument. This should prevent the caution from being used merely to protect unnecessary delay in the registration of a dealing - or worse still enabling dealing to take place off the register without risk to the purchaser. The following quotation from Baalman's comments on his Singapore Bill is significant:

"In actual practice" he said "caveats against dealing have come to be regarded not so much as statutory injunctions but as provisional registrations. In the vast majority of cases the claim of the caveator is not in dispute, and neither he nor the caveatee contemplates litigation. The caveat simply reserves the status quo until the caveator is able to lodge the formal instrument executed by the proprietor, which will transform his equitable interest into a registered estate".

In other words the process is being abused and screens practices which add to the cost and difficulty of conveyancing, and which are unnecessary where title is registered. The occasions on which a caution is really needed should be few and far between.

A special form of caution can be provided to enable monetary advances to be protected by a process analogous to the security which was afforded by the deposit of title deeds. This is very useful to secure an overdraft, but as I have already mentioned, Kenya did not adopt this idea - I think they may miss it.

PART IX - PRESCRIPTION

Part 9 used to make provision for prescription but only in respect of easements and profits, and the land itself was dealt with in a separate act based on the English Limitation Act 1939. Part IX has now been repealed in Kenya and for a complete and suitable version of the law of prescription it is necessary to go to Part VIII of the original Native Lands Registration Ordinance in Kenya or to Part IX of the Malawi Registered Land Act 1967. However, it does not much matter where the law is to be found provided that it makes it clear that prescription should operate to confer title, or limitation to extinguish it - whichever way it is put. All developed nations have found this necessary - it was the *usucapio* of Roman Law - and it is quite wrong to suppose that registration can supersede it, but under the Torrens system, the ordinary common law provisions as to adverse possession were suspended in respect of registered land, though later Victoria was compelled to re-introduce them, and has been followed by some other Australian States and very recently by New Zealand.

England also at first made the mistake of suspending the ordinary law of prescription and limitation in respect of registered titles. It was restored in 1925, and it will be found that it resolves, very fairly, a great number of difficulties, not least boundary questions. As soon as the prescriptive period has passed, the physical boundary delimiting on the ground the area actually occupied becomes the de jure as well as the de facto boundary.

It is a great pity that prescription should have become tied up with such appellations as 'squatters titles' and 'land stealing' for they are quite misleading. It is comparatively rare that large slices of land are acquired by adverse possession, but genuine error frequently leads to small changes in boundary which no one wishes to dispute unless incited to do so by meticulous measurement and talk of guarantee. The complete dependence on survey marks and imaginary lines in Australia and New Zealand has given rise to some quite extraordinary results, and there is no doubt that, unless satisfactory provision is made for prescription, great hardship can result.

It was therefore very depressing to find that in Lagos, though Part VIII of their Act follows in the main what had been proposed in regard to Prescription, a section has been inserted at the end to provide that this Part will not apply to registered land.

PART X - RECTIFICATION AND INDEMNITY

The Registrar is permitted to correct the register if the correction does not affect the interest of the persons concerned, but even if it does he can still make the correction provided he gets their agreement.

The Court can rectify where it is satisfied that a registration has been obtained, made or omitted by fraud or mistake except where a bona fide purchaser for value is in possession, in which case the land would not be returned though, of course, compensation would be payable. It should be specially noted how the importance of possession is stressed throughout the Act. It should never be supposed that registration can do away with the need to look after and occupy one's land - though some people seem to think that it can. "You can go away" they say "and leave your land for as long as you like. The register and the plan will make sure that your title is still good when you come back." This idea can be fatal to good land use, and should be resisted.

The other section of Part X deals with the question of indemnity, and in the main follows the English principles. The right to indemnity is always advanced as one of the most important features of the system, but oddly enough the Sudan Ordinance categorically provided that no indemnity should be payable, and this did not seem to affect the faith of the public in the system or make any difference to the way in which it was operated, though it did relieve the registry from attention, registries seem to suffer from when haunted by the spectre of indemnity.

PART XI - DECISIONS OF THE REGISTRAR AND APPEALS

The Registrar may state a case for the opinion of the Supreme Court on any question arising out of the Act, and so get a binding decision.

Provision is also made for anybody, including the Minister, who is aggrieved by a decision of the Registrar to appeal to the Supreme Court within thirty days, and the procedure for doing so is clearly set out in section 150.

PART III - MISCELLANEOUS

This Part covers such matters as service of notices, offences and fees. There are a number of interesting points of detail, but it would be inappropriate to discuss them here.

CONCLUSION

I have rushed through the Act at great speed, and I fear that I may have fallen between two stools. On the one hand, I have not given enough detail on a number of very important points to be adequate for anybody particularly interested in them; while, on the other hand, I have mentioned so much that those who are not closely concerned with the practical operation of a registry may get the impression that the subject is much more difficult and involved than it really is.

As I endeavoured to make clear in my first paper, the truth is that the creation and transfer of interests in land is necessarily a difficult and complicated matter unless title is registered, and I hope that this account of the Kenya Registered Land Act 1963 will suffice to show not merely how valuable such legislation is but also that it is practicable.

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