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CHAPTER 21

REGISTERED LAND LAW

1 Prefatory

1.1 Land Registry staff often have difficulty in discovering the meaning and purpose of some of the legislation that they administer, particularly where parts of it have been taken uncritically from another country and introduced for some reason which perhaps is no longer apparent and is not easy to ascertain. Law and survey students, and even practitioners, have a similar difficulty, and there can be little doubt that an exposition of the law relating to registration of title will fill a real need, if it is kept relatively simple and brief, though it must contain sufficient comparative material and indication of sources to enable objective opinion to be formed. Such an exposition could also be of value to a legal draftsman designing an appropriate law, or amending an existing one.

1.2 Our purpose now, therefore, is to describe and explain certain features of registration of title which are of interest and importance to anybody operating or using, or even merely studying, the system. These features are generally covered by legislation. There is naturally some variation from jurisdiction to jurisdiction, and we consider that it will be easier to understand the law that is required if we set out a representative modem statute for the purpose of illustration, comparing it where necessary with other statutes. This will also be the most convenient way to examine those of Dowson and Sheppard's "salient features" which we have not already considered in Book 1.[1] Furthermore, it will afford a suitable opportunity to explain the basic philosophy underlying the legislation that we advocate; this is important because this legislation has various distinctive features of its own, particularly in its approach to substantive land law.

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[1] Dowson and Sheppard (D & S 99) gave the following list of salient features which they proposed to examine:

(i) The Registrar: (a) Qualifications of; (b) power conferred on.
(ii) Initial Registration.
(iii) Machinery of Record: (a) the cadastral plan; (b) the Register.
(iv) Faulty titles on first registration.
(v) Legal effect of registration.
(vi) Certificate of title.
(vii) Publicity of the register.
(viii) Sale and Transfer of registered land.
(ix) Conflict of prescriptive claims and registered rights.
(x) Protection of non-registrable rights.
(xi) Easements.
(xii) Joint tenants, tenants in common and merger.
(xiii) Mortgages: (a) Statutory; (b) equitable.
(xiv) Non-notation of Trusts.
(xv) The Assurance Fund.
(xvi) Execution against registered land.
(xvii) Professional Assistance in transactions.
(xviii) Central or Regionally Decentralised Service.

1.3 Perhaps here we should explain what we mean by 'substantive land law' in this context. We mean the sort of law for which provision was made in the English Conveyancing Act 1881 which has been repealed and replaced by the Law of Property Act 1925. "These Acts have simplified both practice and study in a multitude of ways. Obsolete and incongruous rules have been cleared away, new and beneficent principles have been invented. In a great many ways it is now unnecessary to go behind these Acts."[2] Part III of the Law of Property Act 1925 is a useful illustration. It is entitled 'Mortgages, Rentcharges, and Powers of Attorney'. Unless statutory provision is made for such matters, there is bound to be uncertainty and confusion; but we advocate that this provision should be made in the registration statute itself rather than in a separate Act. Thus, when it is specifically provided in the registration Act that a registered proprietor may charge his land to secure a loan, the respective rights and remedies of the borrower and lender should be clearly set out and it should be unnecessary to have to refer to another statute. This may necessitate a policy decision - for example, whether the lender should have power to sell the charged land if the borrower defaults in paying interest, or should first obtain a court judgment - but these decisions must be made, and they will be easier to make and to implement if the statutory framework is there for them to fit into. Such issues should not be evaded merely by ignoring them. The description and analysis of the law in the next chapter will make this point clear.

1.4 For illustrative purposes we require a statute which

(a) will be suitable whatever has been the previous system of land registration, remembering that some system is almost certain to exist already and perhaps, as in Kenya, more than one;

(b) itself provides the substantive law which landowners need for dealing in land, no matter whether their titles stem from customary tenure, or from grants from the State, or from any other source;

(c) takes into account various important new statutes enacted in this field since the Second World War; and

(d) has been in operation long enough to demonstrate its worth whilst revealing any weaknesses.

1.5 We have chosen the Kenya Registered Land Act 1963 for this purpose and, in the light of the above four requirements, we will now explain under the following headings our reasons for making this choice: (a) variety of land registration in Kenya, (b) origin and purpose of the Kenya Registered Land Act, (c) some important statutes considered in framing the Kenya Registered Land Act, and (d) use and spread of the Registered Land Act.

1.6 We shall then briefly mention two other important statutes which have been enacted in this field since the Kenya Act: the Malaysia National Land Code 1965 and the Israel Land Law 1969. In the next chapter we shall set out the Kenya Registered Land Act 1963 for the convenience of readers who wish to see the actual text. This will be followed by the Registered Land Rules and the land registry forms prescribed under the Act.

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[2] M & W 1

2 Variety of land registration in Kenya[3]

2.1 Kenya is indeed a fertile field for research into land registration. When the 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. We will now give particulars of these ordinances as they will interest anybody seeking comparison with legislation in his own country.

(1) THE REGISTRATION OF DOCUMENTS ORDINANCE 1901

2.2 This ordinance made provision for the deeds registration which became common form in most countries into which English land law was introduced, though in Kenya it had some special features. For example, it did not mention priority but required certain documents to be registered within two months of execution and enabled the Registrar to impose a 'fine' for non-registration. It provided, in the usual way, for a copy of the registered documents to be retained in the registry and for an index of names to be kept. Without plans and any effective means of indexing or even identifying parcels, the register of documents was only of very limited use. It was better than nothing, but not much better.

(2) THE LAND TITLES ORDINANCE 1908

2.3 When British administration began in East Africa towards the end of the nineteenth century, some of the coastal area was individually owned but the greater part of the land there appeared to be unoccupied and was claimed by Government as available for disposition under the Crown Lands Ordinance 1902. (This Ordinance had replaced the Lands Regulations of 1897 which, in their turn, had replaced Land Regulations that had been taken over from the Imperial East Africa Company and published in 1894) Without some specific legal process, however, it was impossible to separate with certainty the land claimed by private owners from land which was waste or unused. Furthermore, there was danger, particularly in the neighbourhood of towns, that squatters would acquire title unless Government took steps to safeguard its interests. In any case the uncertainty of title was such that investors were afraid of putting money into land, and so development was impeded. In fact, all the circumstances indicated a pressing need for adjudication.[4]

2.4 The Land Titles Ordinance was therefore enacted in 1908. It provided for the appointment of a Recorder of Titles (a name taken from the Torrens Act in Tasmania) and it established "a court of special jurisdiction subordinate to the Supreme Court to be styled 'the Land Registration Court' whereof the Recorder of

[3] The account in this section (originally compiled from official files in Kenya) is mainly taken from A Report on the Registration of Title to Land in Kenya (unpublished) prepared by a committee in 1961 (see para 3.2 below).

[4] See 11.6

titles shall be the presiding judge".[5] All persons who claimed land within the areas to which the Ordinance was applied were required to come forward and prove their titles within a specified time. The Land Registration Court granted a certificate of title to those who were successful; unclaimed land, and land in respect of which claims were rejected, was deemed to be Crown land and so available for alienation. The process laid down was derived from a Ceylon Act (No. 3 of 1907) which, in fact, was not proclaimed and so was never used in Ceylon, where a previous Act for the registration of title had been passed as early as 1877, but had been found too expensive and laborious to operate. This may help to explain why adjudication in Kenya under the Land Titles Ordinance 1908 was suspended in 1922.[6] It was resumed in 1957 for political reasons: it is scarcely a process to be commended.

2.5 The 1908 Land Titles Ordinance only made provision for the adjudication of claims, and though the Recorder was required to keep a register book in which duplicate certificates were bound[7] (in the usual Torrens manner), no procedure was laid down for maintaining the register. It was clearly essential to remedy this omission, but the adoption of a full-dress Torrens system of registration was rejected on the grounds of expense. It was considered that the cost of forming an insurance fund and employing officers of sufficient legal knowledge to make it safe for Government to guarantee title would be beyond the income which could be expected from transactions. "A mode of registration which would prevent the titles cleared under the Ordinance from again getting into the present state of confusion and uncertainty, without putting the Government to additional expense or placing on the native community the burden of paying fees which at the present time they could not afford to pay" was therefore devised and introduced in 1910 by an amendment to the Land Titles Ordinance.

2.6 The effect of this amendment was to set up a deeds registry which was indexed by parcels that were defined by official survey plans, but which fell short of registration of title in two particulars: first, the register was not declared to be indefeasible, and so it was necessary to trace title back to the original certificate whenever there was a transaction; and secondly, there was no indemnity.

(3) THE CROWN LANDS ORDINANCE 1915

2.7 The 1910 addition to the Land Titles Ordinance 1908 was of particular importance because it was the model on which Part XII of the Crown Lands Ordinance 1915 was based. This part provided for the registration of titles granted under the Ordinance, thus establishing in Kenya an advanced system of deeds registration supported by close survey and using certified deed plans but necessitating investigation of title whenever there was a transaction; it was still only a system of deeds registration, though of the sort which in Hong Kong, for

[5] s.6
[6] SeeLlawrance Mission Report (1966) 36 para 119
[7] s26

example, has been considered satisfactory enough to make the introduction of registration of title unnecessary.[8]

(4) THE REGISTRATION OF TITLES ORDINANCE 1919

2.8 However, in 1919, the Kenya Government saw fit to enact the Registration of Titles Ordinance "to introduce a form of title by registration commonly known as the Torrens system". The framers of this Ordinance were Australian and the models they used were the Federated Malay States Registration of Titles Enactment 1897 and the Victoria Transfer of Land Act 1890. The usual advantages of registration of title were claimed for the Bill and were summarized in the statement of Objects and Reasons in a way scarcely likely to commend the system to a legal profession which had already established the English system of conveyancing in Kenya, for it was emphasized that registration of title did away with the necessity for investigation into a title, "thus saving large sums in time and lawyers' fees", and since simple forms which can be used and understood by laymen were provided, "lawyers can be largely dispensed with".

2.9 Unfortunately the procedure for initial compilation was inadequate. A Select Committee which had reported on the Bill did not consider the question of bringing the old titles under the new system to be as urgent as getting registered under it any new titles that were issued. The committee contemplated "an interval of say a few months for the new registers to be established and during that interval any further representations made in connection particularly with what is the most difficult problem in the Bill, the bringing in of old titles, should be carefully considered." Over forty years later these titles still had not been brought in, and their position, both in law and practice, was anomalous. Here then was a prime example of the worst feature of the original Torrens system: the failure to make adequate provision to bring under the Act the titles already existing when it was enacted.

2.10 The Registration of Titles Ordinance was itself unsatisfactory and it was very severely criticized from the outset. By 1925 two separate committees, one for the Colony and one for the Protectorate, had recommended a completely new ordinance. A bill was drafted but it was rejected both by the Law Society of Kenya and the Mombasa Law Society, and it was abandoned.

2.11 Another committee, appointed in 1927 under the chairmanship of the Solicitor-General, circularized a memorandum stating that its members were unanimously of the opinion that the Registration of Titles Ordinance was unsuitable and should be repealed, but proposals for its replacement finally disappeared in the wider context of a suggestion that a system common to Uganda, Kenya, and Tanganyika should be considered by the Inter-Territorial Law Officers Conference. Unfortunately nothing came of that suggestion either, and the Registration of Titles Ordinance came to be generally accepted despite its evident shortcomings. It is a typical example of the indifferent or bad statute under which many systems of land registration have had to operate because

[8] See 6.7.3

would-be reformers have been unable to overcome legislative inertia, not to mention professional opposition to change.

(5) THE NATIVE LANDS REGISTRATION ORDINANCE 1959 subsequently renamed the LAND REGISTRATION (SPECIAL AREAS) ORDINANCE

2.12 Even before the Second World War started in 1939 there had been a movement towards the recognition of individual title in the extensive areas occupied by Africans under customary tenure. This movement was halted by the war, but after that ended in 1945 there was much practical experiment in the field by administrative and agricultural officers who were anxious to overcome the obstacles to good development presented by customary tenure. In 1957 a working party was set up to consider the legislation and organization required in connection with the individualization of tenure which was already proceeding apace in many areas of Kenya, notably in the Central Province. Titles were emerging there without any arrangements for subsequent dealing or for the controls needed when landowners are quite unaccustomed to registered title. It was imperative to make provision for these titles, and further delay might have resulted in great confusion and wasted the valuable work which had already been done.

2.13 The existing system of registration under the Registration of Titles Ordinance 1919 was unsuitable for the new titles but there was clearly no time to review this or the other processes of registration, and a fifth ordinance was therefore devised. The working party drafted a bill to govern the process of systematic adjudication (combined with consolidation) which was already in effective use in the Central Province, and for the operation of a system of registration thereafter. This draft owed much to the Sudan Land Settlement and Registration Ordinance 1925 which not only enshrined the process of systematic adjudication which had been used in the Sudan for over twenty-five years,[9] but also provided for the operation of a simple system of registration of title derived, in the main, from English sources. The adjudication part of the Sudan Ordinance required substantial modification to fit the Kenya process[10] but the registration part was followed fairly closely in the Kenya bill, though several additions were made to cover such matters as survey, partition, and prescription and limitation. These additions, also, were mainly drawn from Sudan sources, in particular the Civil Justice Ordinance, the Survey Ordinance and the Prescription and Limitation Ordinance. This bill became the Native Lands Registration Ordinance 1959, which, shortly afterwards, was renamed the Land Registration (Special Areas) Ordinance.

3 Origin and purpose of the Kenya Registered Land Act

3.1 Thus, after the enactment of the Native Lands Registration Ordinance in 1959, Kenya had versions of the English and the Torrens systems of registration of title operating in separate registries, each with its own ordinance and under the

[9] See 11.8.4
[10] See 15.9.1

aegis of different ministries, since 'native lands' came under 'African Affairs' whilst 'Crown land' was the responsibility of the Minister for Health, Lands, and Local Government. In addition there were still in use the systems of deeds registration set up under the Land Titles Ordinance 1908 and the Crown Lands Ordinance 1915, as well as the original Registration of Documents Ordinance 1901. It is in fact difficult to think of a system of land registration which was not represented in Kenya in some form or other, and a measure of unification appeared to be essential. A single system of land registration was needed, which, with a minimum of dislocation, would replace all these systems and would be as appropriate to titles stemming from customary tenure as to 'estates in fee simple' created by Crown grant.

3.2 In 1961 an unofficial committee, whose three members had extensive experience of the practical operation of land registers in Kenya and elsewhere, drafted a bill which they believed would provide "for the practical needs of the landowners of Kenya with respect (a) to security and proof of title and (b) to facility for creating and transferring interests in land". The Bill was accompanied by a detailed commentary, showing not only the origin of each clause but its purpose and (if relevant) how it met the criticism directed against the Registration of Titles Ordinance 1919 and the system operated under that ordinance.

3.3 This commentary and the draft Bill itself were to a considerable extent based on the *Report of a Working Party on Registration of Ownership of Land in Lagos,* published in 1960 and containing a draft Bill for an Act called the Registered Land Act, which appeared to be directed to the very purpose the Kenya Committee had in mind. This Lagos Bill had been drafted to implement a report published in 1957 and the idea was to begin, so to speak, from the other end, from the bottom rather than from the top. "Let us pretend, for a change, that 'the customer is right' and, instead of plunging into yet more abortive explorations of what the law is, let us consider what the 'owner' of a piece of land wants to know and what, from his point of view, he requires the law to cover."[11] The essence of the proposals was that the Ordinance should itself provide "a clear and firm platform on which all ownership of land shall rest, be the owner the individual, the family, the White Cap chief, or the State. On this platform can be erected, by machinery and processes provided in the Ordinance (and by no other means), such structures as are required and approved by the people of Lagos, but no provision will be made for oddities or refinements which seem to have no place there. All the requirements of the landowner (as indicated by a study of the transactions. of more than 90 years which are already known to us)[12] will be catered for, and if something is overlooked the omission can easily be repaired by amendment of the Ordinance after due consideration by the legislature."[13]

3.4 The Lagos draft Bill accordingly made "provision for the ownership, whether Crown or private, of every parcel of land. This ownership is not an ‘estate in land' but is 'absolute ownership'. 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

[11] Report on Registration of Title to Land in Lagos (1957) 17 para 34
[12] A reference to the well-kept deeds register in Lagos
[13] Ibid 18 para 38

this 'absolute ownership' can be created certain registrable rights in land. These are leases, charges, 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, though it can have effect as a contract. Thus there will no longer be 'legal and equitable owners' but, instead, there will be registered owners (i.e. 'proprietors')[14] who by registration can create the interests provided for in the Bill."[15]

3.5 The Lagos Bill derived many of its provisions from the Kenya Native Lands Registration Ordinance 1959[16] (for the Bill drafted by the 1957-1958 Working Party on African Land Tenure in Kenya had been passed into law under that name), but it was meant to provide more substantive law than that Ordinance and it included provisions derived from the draft of a Land Code prepared by J. F. Spry with a view to following up his Land Registration Ordinance in Tanganyika.[17] Thus the Lagos Bill went far beyond anything contemplated in the Registration Acts in England, where there had never been any doubt that if registration of title were to be introduced it must be kept purely procedural. This was necessary not least for tactical reasons, as Stewart-Wallace pointed out: "The [1857] Commissioners called on to make practical recommendations for the introduction of land registration into England had to consider *what was financially feasible and what would produce least opposition on introduction.* They decided, and the wisdom of their decision has never been challenged, that the Act introducing registration of title should be confined to making changes in the machinery of conveyancing merely. The alternative of introducing substantive changes applicable to registered land only, so that the substantive law affecting registered land would differ from that affecting unregistered land, was rejected."[18]

3.6 Torrens, on the other hand, had no such limited intention in Australia. His avowed objective was to do away with the complexities and absurdities of the English land law and legal system, but unfortunately he was not successful, and even his sensible definition of 'fee simple' as meaning absolute ownership was almost immediately removed from his statute, thus conserving the feudal concept of tenure. Also, like England, the Australian States have their Conveyancing Acts separate from the Act providing for registration of title. Perhaps this is inevitable so long as registered and unregistered land are indiscriminately intermixed. Yet even in New Zealand, where registration of title has been completed and all conveyancing is registered conveyancing, two separate Acts, the Land Transfer Act and the Property Law Act, were retained when the relevant laws were re-enacted in 1952. This is illogical for they both deal with precisely the same subject, and is inconvenient to say the least of it. The Lagos Bill (and the Kenya Bill following it) avoided this anomaly by making provision in a single statute for all such matters as are provided for in the Property Law Act and the Land

[14] In the Bill 'proprietor' is defined to mean "the person or body of persons registered under this Act as the owner of land or a lease or a charge".
[15] Report of a Working Party on Registration of Ownership Land in Lagos (Lagos 1960) 4
[16] See para 2.12 above
[17] See para 4.5 below
[18] Stewart-Wallace Land Registration 33 (our italics)

Transfer Act of New Zealand, but eliminating the unnecessary complexities of English land law.

3.7 English land law, however, is not the only stumbling-block when considering registration. In many countries into which English land law has been introduced it only applies to relatively small parts; vast areas are still held in customary tenure under customary law. There are thus two completely different systems with inevitable confusion where they overlap. The imported English land law is itself generally out of date and obscure as well as being full of technicalities; it is ill adapted to local circumstances. The following, written o some urban areas of Nigeria, is very much to the point: "In places the situation has been little short of chaotic, with quite small tracts of land being weighed down by a remarkable quantity of hard fought litigation. This has already resulted in a few statutes which attempt to clarify the position with regard to particularly confused places, but in the long run a much more drastic approach is needed. The present confusion of English and customary rules must be eradicated completely, and replaced by a simpler scheme applying universally throughout large areas, and eventually, perhaps, throughout the whole country."[19] The Lagos Registered Land Bill was drafted in 1960 with this end in view, and it seemed to be just what was needed in Kenya.

3.8 The Kenya Committee, however, was able to take the process further because of a special local advantage. The Indian Transfer of Property Act 1882 had been applied to East Africa by Order in Council in 1897 as being “plain, simple and devoid of refinements". This Indian Act was based mainly on the English law of real property but, in the words of the Law Commissioners in India who had 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-professional judges". When it came to drafting the new law for Kenya, the Transfer of Property Act was invaluable as a relatively simple reminder of the substantive law which must be included if the new statute were to cover all that was contained in Acts like the English Conveyancing Act 1881, which was the prototype of this sort of law but replete with a vast amount of what was "local and historical".

3.9 The draft Bill produced by the Kenya Committee in 1961 was closely examined in Nairobi where there was a well-established legal profession, and comments were also received from various experts outside Kenya. The Bill was couched in simple plain language, and it was fairly claimed that any educated person could read and understand it. Named the Registered Land Act 1963, it was enacted during the six months of internal self-government before Kenya became an independent state in December 1963.

[19] Park *The Sources of Nigerian Law* 138

4 Some important statutes considered in framing the Kenya Registered Land Act

4.1 In the last section we described how the Kenya draft Bill of 1961 was based largely on the Lagos draft of 1960 which, in its turn, had drawn heavily on the Kenya Native Lands Registration Ordinance 1959, itself derived mainly from Sudan legislation and in particular the Registration Part of the Sudan Land Settlement and Registration Ordinance 1925.[20] That Part can be said to have followed English ideas (the Registrar-General of the Sudan who developed the system came from HM Land Registry in London) though very little of the wording of the English Act appears in it.

4.2 The Kenya Committee set out the sources of their Bill in an appendix to their report which began:

> "We have extensively studied the English Land Registration Act 1925, but it comprises 148 long and sometimes complicated sections and 325 rules have been made under it. It was originally devised to compete with an extremely complicated system of private conveyancing with a background of very complex land laws, and so is not always an appropriate model for simpler conditions. The legislation has been considerably simplified in systems which, like the one we propose, are based on the English system and do not substantially depart from its general principles.
>
> "We have also studied the original Torrens Act and in particular the New South Wales Real Property Act 1900 and Baalman's commentary on it. It was his aim in this commentary 'to discuss the practical machinery of the Torrens system against the background of its administrative philosophy by concentrating on a single statute'. He chose the New South Wales Statute, but from our point of view the Victoria Statute of 1954 cast in modern form, and Baalman's own Singapore Ordinance of 1956, are more useful models."

4.3 The Committee went on to point out that there had been a great deal of new legislation which had enormously simplified and clarified the whole approach to the subject. The following are brief details of four statutes which are of particular interest and importance.

(1) THE TANGANYIKA LAND REGISTRATION ORDINANCE 1953

4.4 This was drafted by J. F. Spry, when Registrar of Titles in Tanganyika. (He later became a Judge of the East African Court of Appeal.) Qualified as an English solicitor, he also had extensive land registry experience in Uganda and Palestine. Spry described his Bill as being "essentially a procedural Bill, designed to improve the machinery of land registration in Tanganyika". He said that it had borrowed freely from the English Land Registration Act 1925 and that there was no fundamental difference between the two systems.

4.5 Spry's Land Registration Ordinance replaced the Tanganyika Land Registry Ordinance 1923, the author of which had claimed that it reproduced the Torrens system of registration in a condensed form, and that he had evolved it after

[20] See 23.3

rejecting the Kenya Registration of Titles Ordinance 1919 as being an unsatisfactory model "consisting merely of a selection of sections from the Victoria Act". He had similarly rejected the Uganda Ordinance (which was in draft at the time and reproduced most of the Victoria Act of 1915) on the grounds that it was too elaborate. Spry's new Ordinance in 1953 was therefore of particular interest, for it substituted the English for the Torrens system of registration in Tanganyika.

4.6 Spry also began to draft a 'Land Code' to make provision for the substantive land law required to go with his 'procedural ordinance'. This draft did not get beyond the preliminary stage, but was very useful as it was appropriate to the East African context and to a bill of the comprehensive nature which the Kenya Committee contemplated. It had also been used in the drafting of the Lagos Bill, as we have already mentioned.[21]

(2) THE VICTORIA TRANSFER OF LAND ACT 1954

4.7 This was - and still is - the latest of the Australian Torrens statutes. It is a vast improvement on the Act it replaced. It comprises 121 sections in simple and plain language as Compared with 284 sections in the old Act. The Kenya Committee commented that they wished that the English Land Registration Act of 1925 could be "modernized" in the same way.

4.8 In May 1957, P. Moerlin Fox published a commentary in which his aim was "to note the changes in the 1954 Transfer of Land Act as compared with earlier legislation, to comment on the object and effect of the various sections, and to refer the reader to selected authorities"[22]. This commentary was valuable, as it explained the changes that the new Act had made.

4.9 The drastic recasting of the Victoria Act was of special interest to the Kenya Committee, because it was excerpts from the Victoria Act of 1890 which had largely made up the Registration of Titles Ordinance in 1919. Also the Uganda Registration of Titles Ordinance 1922 is, practically word for word, a copy of the 1915 version of the Victoria Transfer of Land Act, which is very similar to that of 1890. This shows how much out of date is the style as well as the content, of the Uganda Act.

(3) THE SINGAPORE LAND TITLES ORDINANCE 1956

4.10 This was drafted by John Baalman, a leading authority on the Torrens system whose commentary on the New South Wales version of it has already been mentioned.[23] Baalman claimed that in the Singapore Ordinance he had produced the best possible model for the Torrens system, and indeed that it could be used as a model for any country which uses English land law as part of its basic general law. Baalman wrote a detailed commentary on his Singapore Ordinance, but this commentary was not available to the Kenya Committee at the time they were

[21] See para 3.5 above
[22] Fox *The Transfer of Land Act* 1954 v
[23] See para 4.2 above

working on the Kenya Bill. We have referred to it extensively in our commentary below.

(4) THE BRITISH GUIANA LAND REGISTRY ORDINANCE 1959 now the GUYANA LAND REGISTRY ACT 1959

4.11 This was another valuable precedent as it represented the efforts of a committee comprising several lawyers under the chairmanship of a solicitor with a big local practice who had devoted much time and energy to studying the subject and in particular had taken into account the various laws cited above. A detailed report on the Bill was published.[24] The committee was advised by G. D. N. Clarke, a former Sudan official who had a wide knowledge of the Sudan system and spent two or three years in Guyana advising the Government. The Land Registry Bill was accompanied by an Immovable Property Bill[25] which unfortunately was not passed into law, and so illustrates the danger of separating the registry or procedural law from the conveyancing or substantive law, for it set up the registry without the supporting law needed to make the new system really effective.

5 Use and spread of the Registered Land Act

5.1 The Kenya Registered Land Act was enacted in 1963, and it should now be possible to estimate how successful it has been. We should also indicate the extent of its spread elsewhere, and we propose to take in chronological sequence the various countries that, at one time or another, have adopted or have proposed to adopt legislation based on the Act, more or less in the form it took in Kenya.

5.2 Before we consider Kenya, we should perhaps first briefly remind our readers that the system introduced into the 'Special Areas' of Kenya by the Native Lands Registration Ordinance 1959 had to all intents and purposes been in use in the Sudan for more than fifty years, and that this is the system which the Registered Land Act 1963 was designed to make universal throughout Kenya. It is to the Sudan, therefore, that one should look for a well-tried example of this type of registration, particularly in large towns like Khartoum and Omdurman (where it is difficult to imagine how ordered administration could proceed without it).

5.3 The Sudan system, however, to a large extent rested on practice. English land law, as such, had never been formally introduced. The 'fee simple' was unknown. Those whose rights were considered to amount to full ownership were, on ‘settlement' (i.e. adjudication), registered as absolute owners, and the complexities of English land law, with its difficult terminology and its confusing legal and equitable ownership, were avoided. A simple but very effective system of registration had long been in operation when the Land Settlement and Registration Ordinance was enacted in 1925 and officially turned it into registration of title.[26] As we have seen, the registration part of that Ordinance made a useful base for the registration parts of the Kenya Native Lands

[24] Second Report ofLand Registration Committee (Georgetown 24 April 1958)
[25] Third Report ofLand Registration Committee (Georgetown 4 Nov 1958)
[26] See 11.10.14

Registration Ordinance 1959, but had to be augmented by various features from other Sudan legislation and elsewhere to make it adequate for the *introduction* of the new system (as distinct from merely supporting an existing system). Then again, the Kenya Registered Land Act 1963 itself represents a very substantial legislative advance on the Ordinance of 1959. Thus, while the Sudan offers by far the most convincing example of the working operation of the system, it is to the Kenya Registered Land Act 1963 that we can look for a comprehensive statute specifically designed to establish that system elsewhere.

A. Kenya

5.4 By the time of the Lawrance Mission (1965-66) there were some 275,000 titles on the register in the former Special Areas[27] (as a result of processes which by then had been in operation for some ten years). The Mission visited all the land registries with a view to ascertaining how the Registered Land Act worked in practice, and reported that the general impression was very favourable - "the Kiambu Registry, for example, appeared to be a model of what this sort of registry should be, for it was thronged with people who clearly appreciate and use the service it provides for them. The procedure appeared to be simple and effective."[28] Lest any critic concerned more with policy than with procedure should suggest that this could only be a superficial and subjective impression, we should repeat once again that the purpose of the Registered Land Act (as of registration of title anywhere) was to provide effective machinery for securing title and facilitating dealing; it regularized processes which, particularly in the Central Province, had been developing apace under customary tenure. The Mission was there not to investigate the economic and social consequences of land policy as such, but merely the operation of the system provided for the administration of that policy. Of the efficacy of the system the Mission had no doubt, and it was well qualified to judge.

5.5 J. T. Fleming, who went to Kenya as Land Tenure Adviser shortly after the Lawrance Mission had reported and remained there until 1972, has confirmed that the general impression recorded by the Mission was justified, and that, six years later, increasing demands for land and rising land values had made the public in the areas affected by these conditions even more appreciative of the value of registered title. In 1973 the number of titles on the register had increased to 630,000 in twenty-two registries. The Kenya Government clearly has confidence in the system - because it is pressing forward with a view to completing registration throughout all the areas held in customary tenure.

5.6 It must not be inferred, however, that there have been no setbacks. Kenya, like all rapidly developing countries, had great difficulty in finding staff adequate for all its offices, not least the land registries. This naturally tended to exacerbate the teething troubles which inevitably beset a new scheme, particularly when it is introduced on so vast a scale. Nevertheless, at the end of his tour, Fleming was able to report that the compilation of the registers, the recording of simple

[27] Lawrance Mission Report (1966) 27 para 90
[28] Ibid 76 para 276

transactions, and the collection of fees were proceeding reasonably effectively. Moreover, the creation of a Registry Inspectorate for the purpose of keeping an essential check on the routine functions of the Registries has provided an opportunity to give the all important 'in-service' training and advice needed by the Assistant Registrars.[29] It has also had the effect of bringing them into closer and more regular contact with the Chief Land Registrar's office in Nairobi.

5.7 It is sad to record, however, that the unsatisfactory position that occurred after the Registration of Titles Ordinance 1919 and which we criticized in paragraph 2.9 above seems to have repeated itself, and "the question of bringing the old titles under the new system" has not been considered to be as urgent as "getting registered under it any new titles". The Registered Land Act was enacted in 1963, as one 'of the first measure's of an independent legislature, with the avowed intention of bringing all titles - old and new - under it as quickly as possible, especially those about to be granted under the 'million acre' resettlement scheme in land already registered under the Registration of Titles Ordinance 1919. The idea was to put an end to the dichotomy between titles granted by the State and those stemming from customary tenure. Ten years later this desirable result had by no means been achieved - whether because of lack of staff, apathy, or just prejudice we will not presume to say, but we do not believe that it is because the Act itself is either unpopular with *landowners* or deficient, since, within a year or two of the passing of the Act, the registers in Mombasa were converted with no opposition at all and but little difficulty, though unhappily a number of mistakes were made, which provided some ammunition for 'non-supporters' of the Act.

B. Lagos

5.9 The Working Party on Registration of Ownership of Land in Lagos presented its report early in 1960. It was printed and published, but no action could be taken on it in view of the imminence of independence, which Nigeria achieved on 1 October 1960. Indeed, it was not until three years later that a legal draftsman from New Zealand, attached to the Attorney-General's Office, was instructed to get the Bill prepared by the Working Party into shape for enactment but to make no material alteration in it. This revised draft was printed as a bill in February 1964 and was duly passed into law as the Registered Land Act 1964 "to come into operation on a date to be fixed by the Minister by order in the Gazette".

5.10 Unfortunately, however, neither the Kenya Bill first drafted in 1961 nor the Kenya Registered Land Act 1963 (enacted in August) appears to have come to the notice of the Lagos authorities, and so the various improvements to the original Lagos draft which had been made in Kenya were not taken into account. Worse still, the draftsman introduced a large number of alterations, which appeared to owe their origin to the New Zealand version of the Torrens system, with demonstrably unsatisfactory results, and when it was proposed to implement the Act so many amendments were necessary that it was decided that it would be simpler to repeal it and replace it by a new draft.

[29] See 16.5.1

5.11 Accordingly a revised Registered Land Act was passed in 1965, but though this removed many of the worst anomalies of the 1964 Act it was still based on that Act instead of on the Kenya version of the original Lagos draft, which had so much to offer. Nevertheless preparations were made to put the new Act into force; but these were brought to an abrupt halt when on 15 January 1966 the Prime Minister of the Federation and the Premiers of the Northern and Western Regions were murdered, and a unitary state was established instead of the Federation. A second *coup d'etat* in July re-established the Federation, but in May 1967 the Regions were abolished and twelve States were created in their place, Lagos (including the old Colony Province which had become part of the Western Region) being one of them. The Military Governor of Eastern Nigeria then declared the former Eastern Region an independent sovereign republic under the name of Biafra, and the ensuing civil war did not end until January 1970.

5.12 Thus there has been virtually no chance of implementing the 1965 Act in Lagos, or of introducing it anywhere else in Nigeria. There can, however, be little doubt that the system of registration of title on the lines advocated in this book would be of great value throughout Nigeria. In fact, immediately before the military take-over in 1966, the responsible Minister in Eastern Nigeria had welcomed the recommendation of a committee that such a system should be introduced and had ordered the publication of its report. Registration of title has been contemplated in the former Western Region (and its successor states) ever since a committee there had recommended it in 1962.[30] It would similarly be valuable in the States of the former Northern Region, where it could be easily adapted to their system of land tenure.

5.13 We have, therefore, thought it necessary to tell the story of the Lagos Act in some detail because it is to be hoped that any legislation for land registration would be based on the Registered Land Act set out in the next chapter rather than the Lagos version enacted in 1965, which is still defective in various particulars but which space prevents us from criticizing in any detail.

C. Seychelles

5.14 "An Ordinance to provide for the registration of title of land, and of dealings in land so registered, and for purposes connected therewith", enacted by the Legislature of the Colony of the Seychelles was assented to by the Governor on 27 August 1965. Its short title is the Land Registration Ordinance 1965, but it is largely based on the Kenya Registered Land Act 1963, though there are some notable differences.

5.15 The most important of these differences is the provision for qualified titles. A qualified title is "subject to any adverse claim subsisting at the time of first registration so far as it is capable of being enforced at law", and it is provided that every title is so qualified on first registration. Since the register is prepared by the Registrar merely from the records in the Mortgage and Registration Office (i.e. the deeds registry), it is not unreasonable that the resultant title should be no better than it was before, at least not until either more formal adjudication or lapse

[30] Western Region Sessional Paper No 2 of 1962

of time has confirmed it. Provision is in fact made for a proprietor to apply to the Supreme Court for an order directing registration with an absolute title or, after ten years, he may apply to the Registrar for conversion to absolute title. This provision has not proved popular so perhaps a shorter period is indicated for the title to mature, or alternatively there should be a more conclusive investigation by the Registrar in the first instance (which would be substantially cheaper than an application to the court). Better still would be a process of systematic adjudication under special legislation designed for the purpose, following the model outlined in Chapter 23.2.

5.16 However, much more questionable than a qualified title on first registration is the extraordinary provision that on registration of a transmission on death an absolute title will be converted into a qualified title when the heirs are registered. The reason given for this (in the Objects and Reasons dated 9 April 1965 which supported the Bill) is that it is necessary in the interest of any heirs inadvertently overlooked, or whose existence was not disclosed following the death of the landowner". Admittedly, as has been found in many countries, not least in Kenya, inheritance can be a major problem, particularly where titles were previously held under customary tenure (which is not the case in the Seychelles), but surely the solution must be sought in improving the procedure for the distribution of estates; it cannot be found in substituting a qualified for an absolute title. This clan only bring the whole system of land registration - and indeed of land administration - into disrepute.

5.17 The Ordinance comprises only 104 sections and Part V - Dispositions -consists of 29 sections instead of the 70 sections of the Kenya Act. In fact it was claimed (also in the Objects and Reasons) that the Ordinance did not make any substantial changes in the law relating to land. "All the interests in land capable of being created at present are provided for in the Ordinance with procedural changes only." It therefore had a much more limited objective than the Kenya Act, and though the sections which have been kept follow in the main the Kenya wording, a detailed analysis can serve no useful purpose so far as our study is concerned.

D. Sarawak

5.18 Bills that have been prepared but have failed to be enacted should not, perhaps, be mentioned under the heading 'Use of the Registered Land Act', but a 'near-miss' in Sarawak is of more than mild historical interest in that the Kenya legislation was very closely studied by the local draftsman and the Attorney-General in preparing three bills entitled (1) Land Adjudication, (2) Land (Native Dealings), and (3) State Lands and Registration which were Published in the Sarawak Government Gazette in February and March 1964 "for general information and comment" with a view to replacing the Land Code 1956 which had proved unsatisfactory.

5.19 The first two of these bills were based on the legislation for adjudication and for the control of land dealing which will be discussed in Chapters 23 and 24. The third, State Lands and Registration, was intended to replace the provisions of the Land Code 1956 relating to administration, survey, and registration, and the

new provisions for survey and registration drew much from the Kenya Registered Land Act.

5.20 These bills, as revised in the light of comment and criticism received, were reprinted in January and February 1965 "for introduction into the Council Negri", and only a political decision at the last moment led to their withdrawal because of Dayak fears that they would dangerously facilitate the transfer of land to Chinese (though, in fact, the Land Control Act could wholly have prevented it). They are, however, of some significance from our point of view because they meant that the provisions of the Kenya legislation were carefully worked over and generally accepted by legal and survey technical advisers in a wholly different country. This was convincing proof of the technical merit of these provisions, and it contributed substantially to their speedy adoption in Malawi and the Caribbean, for obviously it was unnecessary to go over yet again technical details that had so recently been expertly settled.

E. Malawi

5.21 Nyasaland, in colonial days, unlike Kenya, Uganda, and Tanganyika in East Africa, and its two neighbours Northern and Southern Rhodesia in Central Africa, had no registration of title but only a system of registration of deeds. This deeds system was reasonably effective because each registration was referenced back to the preceding registration affecting the same property, and so a chain of title could be established. Dealing, however, was confined mainly to the towns and to titles going back to a 'certificate of claim' which was a document issued at the turn of the century to authenticate, after investigation, purchases of land by Europeans from the indigenous peoples. Dealing was conducted on English lines (by English solicitors) and naturally there was anything but a demand for registration of title.

5.22 Nyasaland, renamed Malawi, became independent on 6 July 1964 with Dr Banda as Prime Minister, and two years later he became President when Malawi became a republic though he still continued to exercise the functions of Prime Minister. In April 1967 he put through Parliament four bills which he said "when passed as Acts of Parliament, enforced and carried out, will revolutionize our agriculture and transform our country from a poor one into a rich one" - a significant, if overoptimistic, claim. The four bills were:

1) *The Customary Land (Development) Bill* - an adjudication Act, which will be discussed in Chapter 23;
2) *The Registered Land Bill* - based on the Kenya Registered Land Act;
3) *The Local Land Boards Bill* - an interesting Act for controlling land dealing, which will be discussed in Chapter 24;
4) *The Land Amendment Bill* (comprising only eight sections) - introduced to enable customary land to become private land, and also to vest customary land in the Head of State.

5.23 Dr Banda had no illusions about customary tenure. In seconding the Bills he said, "Under our present system of land holding and land cultivation, no one either as an institution or as an individual, will lend us money for developing our

land because our present methods of land holding and land cultivation are uneconomical and wasteful. They put responsibility on no one. No one is responsible here and now for uneconomic and wasted use of land because no one holds land as an individual. Land is held in common. They say, 'everybody's baby is nobody's baby at all'. We have to put a stop to this, even if only gradually, otherwise there will not be and there never will be any development in this country in the real sense of the word."[31]

5.24 Unfortunately the Registered Land Act was to apply only to land previously held under customary tenure, though it was intended that as soon as possible arrangements should be made to bring under it land whose titles had been registered in the Deeds Registry. An Act on these lines had long been needed to apply to these titles - quite apart from any question of converting customary tenure - but this, as elsewhere, was a field which had proved difficult to penetrate in the teeth of the established practice of private conveyancing, and it was not until August 1971 that "an Act to provide for the adjudication of rights and interests in land, other than customary land" came onto the statute book. This Act is called the Adjudication of Title Act 1971 and we briefly discuss it in Chapter 23.

5.25 Buying and selling of land in customary areas had not begun to develop in Malawi, as it had in the Central Province of Kenya and in some parts of West Africa. Not only has adjudication under the Customary Land (Development) Act been exceedingly slow but also land has been registered only in the names of families which naturally means but little dealing. Progress under the Adjudication of Title Act 1971 has been equally slow. Thus the Malawi Registered Land Act has not had much of a trial; but, as has already been remarked, it followed the Kenya Act very closely, and we need only refer to it again where it actually differs.

F. Turks and Caicos Islands and the Caribbean

5.26 In 1967 the Kenya Registered Land Act also went to the Turks and Caicos Islands in the West Indies, a small country. Indeed, comprising in all only about 166 square miles with a population of under 6,000. Nevertheless a sound land title was recognized as being a *sine qua non* of any form of land development, and it was decided that this could only be established by a process of systematic adjudication which, of course, must be accompanied by a suitable Act for conducting transactions after the tides have been adjudicated and registered. The Kenya Registered Land Act and a process of systematic adjudication (based on the original Sudan procedure as distinct from the consolidation procedure of Kenya) seemed tailor-made for the purpose. And so it turned out, for the Registered Land Law 1967 and the Land Adjudication Law 1967 proved successful enough to be adopted in the Cayman Islands and the Virgin Islands, and 'model Acts' have now been based on them, ready for adoption by other Caribbean countries which can benefit from them.

[31] Malawi Hansard 4 April 1967

5.27 It was possible to adopt the Turks and Caicos legislation with greater assurance because, before it was enacted, it had received expert scrutiny in the Bahamas, and it is of considerable interest and importance, though again of the 'near-miss' variety, that it was used there as the basis for a "Bill for an Act to introduce a System of Registration of Land in the Colony to provide for the Transfer of Registered Land and for purposes connected therewith" which was printed and published as Bill 28 in 1967 "to be introduced into the House of Assembly by the Minister for Internal Affairs". Though this and the accompanying Land Adjudication Bill (29 of 1967) and the Land Surveyors Bill (30 of 1967) were not proceeded with, they are particularly significant because they were prepared, in the context of the highly sophisticated land dealing prevalent in the Bahamas, by an Attorney-General and Solicitor-General of wide experience. These draft bills were therefore a very useful check on the legislation of the Turks and Caicos where little legal and survey expertise was available locally.

G. Ethiopia

5.28 A particularly interesting adaptation of the Registered Land Act was prepared in Ethiopia in 1968 to fit in with the Civil Code (based on the Swiss version of the Napoleonic Code) which is in force there. But however much it may be stressed that such a measure is essential to ordered administration - a necessary instrument for the implementation of any land policy, whatever that policy may be - in Ethiopia it is inevitably associated with land reform, politically an explosive subject, and so the introduction of registration of title waits upon the determination of much bigger and far more contentious issues.

H. British Solomon Islands Protectorate

5.29 In 1912 the Chief Judicial Commissioner of the British Solomon Islands Protectorate drafted a Land Registration Regulation for the purpose of introducing the Torrens system into the Protectorate remarking that "to delay the introduction of this model of simplicity, brevity and facility in the matter of dealing with land will certainly entail complexity, difficulty and expense in later years when it is superimposed upon a long series of conveyancing acts under the ancient law of England". Nevertheless, the Colonial Office rejected the proposal for registration of title and the Land Registration Regulation 1918 merely made Provision for registration of deeds.

5.30 It must be remembered that in England registration of title was at that time still regarded as a very dubious proposition, and it was not until nearly half a century after registration of title had been first proposed for the Protectorate that the Land and Titles Ordinance 1959 made provision for a scheme based on Torrens models. Even then, owing to the difficulty of recruiting a Registrar of Titles, the introduction of registration was delayed until 1963. Moreover, its introduction proved to be no easy matter under the 1959 legislation, one of the main problems being the time and effort consumed in the investigation of documentary titles even when there were no adverse claims. At the same time, the

processes provided for the adjudication, registration, and conversion of tenure of customary land proved impracticable; also the provisions enacted for the purpose of bringing vacant land under public control were so objectionable to Solomon Islanders as to be incapable of operation.

5.31 Extensive amendments to the Land and Titles Ordinance 1959 were therefore made by the Land and Titles (Amendment) Ordinance 1964 and the Land and Titles (Amendment) Ordinance 1965, but although these 'amendments produced a reasonably workable statute for the time being, the resultant mixture of legislation was an unwieldy hybrid, still having numerous defects. Complete revision and consolidation were clearly advisable.

5.32 A draft bill was prepared in 1967 by I. E. Morgan (who had been Principal Registrar of Titles in Kenya when the Registered Land Act 1963 was enacted, and had played a leading part in its preparation). This draft bill was referred to a Select Committee of the Legislative Council, and then passed into law as the Land and Titles Ordinance 1968; it was brought into effect on 1 January 1969. It provides in Part III (ss9-29) for the Settlement of Unregistered Documentary Titles, and in Part IV (ss30-58) for Systematic Settlement (which we deal with in Chapter 23). The remainder of the Ordinance (ss85-240) provides for the organization and operation of a registry of title following very closely the Kenya Registered Land Act 1963 except that Part IX (ss122-32) provides for Estates (an anomalous feature of the 1959 Ordinance which was retained) and Part XXIII (s219-21) for Customary Land. The Ordinance may therefore be said to offer not only a working example of the provisions of the Registered Land Act but also of systematic adjudication.

5.33 So far as compilation of the register is concerned, however, the emphasis during the first five years has been more on the settlement of documentary titles than on the conversion of titles from customary tenure. By 1974 titles covering approximately 71,500 hectares were in process of being registered, and only some 28,300 hectares were still held in unregistered documentary title for which no application to register had been submitted. The settlement of interests in customary land has been slow, and by 1974 only 159 such titles had been registered, with a further 412 nearing completion.

5.34 In all about 600 Solomon Islanders were holding registered title by June 1974 when the Acting Commissioner of Lands sent the following comment on the working of the Land and Titles Ordinance:

> "Taken as a whole, the Ordinance works reasonably well. No real problems arise when dealing with relatively sophisticated landowners, whether fairly well-educated Solomon Islander landowners, expatriate owners, or people in the town areas. However, the Ordinance and the concepts behind it go completely over the heads of the rural masses and this leads to suspicion and distrust of government and its intentions. Melanesians have long memories and many rural people automatically connect any government interference in customary land ownership with the sort of land alienation that took place early in the century. This suspicion makes the work of the Department in implementing the Ordinance extremely difficult at times. For instance, increased awareness of the economic value of land brought about by the

relatively rapid development now taking place in BSIP**,** now means that almost without exception applications for first registration of documentary title under Part III of the Ordinance are challenged. Even as recently as two years ago this was not so. The fact that the Registrar of Titles calls for objections or claims against applications seems to suggest to unsophisticated minds that he must therefore think that the title is defective. Claims are therefore submitted often on a 'let's-have a-go' basis.

"None the less, a steady increase in demands from rural people for security of tenure is occurring throughout the BSIP. This appears to be coming about through the quite rapid collapse of traditional patterns of tenure in many areas under the impact of agricultural development. Most of the people calling or writing to ask for 'registration' of their customary land have no idea what, in fact, registration means except that they have grasped the idea that it is some sort of safeguard to a person's ownership of land."

6 The Malaysia National Land Code 1965

6.1 In the Preface[32] we called the Malayan system of land registration a 'classic example' of the system that we advocate, and the enactment of the Malaysia National Land Code in 1965 was a major event which we must not appear to have overlooked though, rather absurdly, we only mention it to show why we can do no more than merely mention it and are unable to examine it in any detail in this book.

6.2 The National Land Code was enacted for the purpose of establishing a uniform land system in the eleven States of Malaya where two quite different systems of land tenure and conveyancing existed side by side, since the States of Penang and Malacca retained the system peculiar to the Straits Settlements, whereby privately executed deeds were the basis of title to land, and conveyancing practice followed English lines;[33] and the nine Malay States employed a system based on registration of title, but while the four States of Negri Sembilan, Pahang, Perak, and Selangor shared the Federated Malay States Land Code, each of the five other States had its own separate Land Enactment. All six land laws derived from the 1911 legislation of the Federated Malay States, but were of unequal merit and showed considerable differences in detail; much of the value of their general similarity was therefore lost.[34]

6.3 There are 447 sections in the new Code as compared with 259 in the FMS Code (and 164 in the Kenya Registered Land Act 1963), and it was explained that "a large part of the increase is due to the fact that the opportunity has been taken to re-write and supplement existing provisions in order to remove ambiguities to remedy omissions, or to express in statutory form what was previously only implicit or supplied by subsidiary legislation of varying structure in different States".[35]

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[32] See Preface 13
[33] See 11.10.6
[34] See Federal Government Gazette 1965 at 953
[35] Federal Gazette 1965 at 954

6.4 The National Land Code is divided into six Divisions, which are divided into Parts, numbered consecutively from the beginning of the Act, there being 35 Parts in all. Some of the Parts are divided into Chapters, which are numbered consecutively within each Part, and at the end there are 13 Schedules. The Code is extremely detailed and in places reads rather like a manual for land officers as it covers minutiae of office procedure. Much of it, however, is irrelevant to our theme since it deals with the administration and disposition of State land (elsewhere generally the subject of separate State or Government Land Acts). It is not until Part Ten (s158) that we come to 'Preparation and Maintenance of Registers of Final Title', and the Act begins to cover the same field as the legislation that we are discussing in this chapter. Of particular interest is Division IV (Parts Thirteen to Nineteen), which is entitled 'Alienated Lands: Dealings' and comprises 135 sections, but any close comparison with our suggested legislation is impracticable. For example it is not until section 340 (Division V - Alienated Lands: Supplemental) that registration confers an "indefeasible title or interest except in certain circumstances". Two points of particular interest (already mentioned in previous chapters) are that there is still no provision for indemnity, and, despite English and Australian experience, adverse possession "for any length of time whatsoever" does not extinguish any registered title or interest.[36]

7 The Israel Land Law 1969

7.1 The Israel Land Law 1969 also requires special mention because of its historical background and the field it covers. It is one of the most basic and extensive statutes enacted in the realm of private law in Israel since that country became independent in 1948 after thirty years of British rule.[37] During the British Mandate of Palestine two important laws had been enacted concerning land registration: the Land Transfer Ordinance 1920, which required every transaction in land to be registered, and the Settlement of Title Ordinance 1928, "which provided for a procedure of examination of titles throughout the country for the purpose of establishing a new and accurate land registry, instead of the old registry which was in a chaotic state."[38] The new system of registration, however, was only registration of deeds. Also the land laws of the Ottoman Empire which had applied for about four hundred years still remained in force.

7.2 Here then was a particularly challenging situation for the new administration, and in 1949 the Minister of Justice appointed a committee to prepare a new land law. The committee completed its work in 1959, and its report served as the main basis for the Land Law enacted in 1969. This statute comprises 164 sections divided into ten Chapters (instead of Parts) and some of the Chapters are subdivided into Articles (instead of Divisions). It repealed the Ottoman Land Code of A.H. 1274 (A.D. 1858) and all other Ottoman legislation relating to immovable property,[39] but its special interest from our point of view is that "in matters of immovable property" it abrogated Article 46 of the Palestine Order in

[36] s341
[37] See J Weisman 'The Land Law 1969: A Critical Analysis 5 Israel Law Review (1970) 292
[38] J Weisman (in a paper read at the Cumberland Lodge Conference in April 1972); see also 11.8.6
[39] s158

Council 1922-1947,[40] which provides that whenever the solution to a question of law is not to be found in the local law, reference must be made to the rules of the common law and the principles of equity prevailing in England, as a complementary source. Thus it abolished all the old land laws and replaced them by a single enactment "the provisions of which are systematically arranged and worded concisely and clearly".[41] (We might describe the Kenya Registered Land Act in the same words.)

7.3 One of the salient purposes to be achieved by the Land Law was "the introduction of a general binding system of registration applicable to all land and all rights therein, which should be public and comprehensive in nature".[42] Where land has been 'settled' (i.e. adjudicated) and registered, anyone who purchases for value in bona fide reliance on the register acquires a valid right, even if the entry on which he relied was incorrect.[43] Here then is an instance of the legislative conversion of a deeds register into a register of title[44] (though without any provision for indemnity). Incidentally, settlement (i.e. adjudication) has been very slow - and very expensive. It started in 1928 under the Land (Settlement of Title) Ordinance; yet a third of the area of this small country was still awaiting settlement in 1972, in striking contrast to Kenya where the ratio of 'sophisticated' manpower to land area cannot be nearly so advantageous as it is in Israel. Moreover in Israel, until all land is settled and registered, the new Law cannot be properly effective: "the application of a number of important provisions of the Law is dependent on the land undergoing settlement or proper parcellation. In respect of those extensive areas of the State which have not yet undergone these two processes, the new Land Law is, to a great extent, a matter for the future."[45]

[40] s160
[41] J Weisman 'The Land Law' 455
[42] Minister of Justice, on first introducing the Land Bill in the Knesset (the Israeli parliament)
[43] s10
[44] See 11.10.14-15
[45] J Weisman 'The Land Law' 456