**CHAPTER 6**

# DEEDS REGISTRATION

## 1 Prefatory

1.1 It has not been easy to decide where to place this chapter in the book. The idea of recording deeds in a public register for conveyancing purposes was conceived centuries before the idea of registration of title (unless indeed we can regard 'surrender and admittance' under the English copyhold system[1] as being registration of title), and chronologically therefore we ought to have considered registration of deeds first. But registration of deeds was almost a total failure in England (as we have recounted in Chapter 3) and the insertion of a dissertation on the deeds system would have broken the continuity of the English narrative, with which any treatment of registration of title in a common law context must necessarily begin.

1.2 If the chapter is difficult to place, it is even more difficult to write because, as soon as we look outside England, we find that there is virtually no other country where a system of deeds registration has not been established. In the rest of Europe there are examples dating back to the twelfth century.[2] At first, registration applied only to certain districts or towns, but it was gradually extended to whole countries.[3] Nowhere else does there appear to have been a failure comparable with that in England after the conveyancers had circumvented the Statute of Enrolments 1535[4] and enabled private conveyancing to be

[1] See 3.4.2

[2] We thought that we had discovered a very early example of deeds registration in the Old Testament where the account of the purchase by the prophet Jeremiah of his cousin Hamimeel's field (which we mentioned in 1.5.7) might appear to indicate a register of duds: "And I gave the evidence of the purchase unto Baruch the son of Neriah, the son of Maasciali, in the sight of Hanameel mine uncle's son, and in the presence of the witnesses that subscribed the book of the purchase, before all the Jews that sat in the court of the prison " (Jeremiah 32:12). But in the Revised Version, and in the New English Bible, 'book of the purchase' becomes 'deed of purchase' (recognizing that in this context the Hebrew sepher means 'document' not 'book'), and it is clear that Jeremiah did no more than hand over to Baruch in the presence of witnesses the signed and sealed deed, instructing him to place it in an earthenware jar so that it might be long preserved. Baruch was not a registrar or court officer but a friend or dependent of Jeremiah (he appears again in Chapters 36, 43 and 45). The deed itself was the so-called 'double document' in which the text is written twice (cf. indenture, 4.53), the upper part being signed by witnesses (on the back) and then folded and sealed, whilst the lower part is left open for reference. In litigation the inner deed would be opened in court. It is interesting that Jeremiah, in buying the field, was exercising a 'right of redemption' as next of kin, and also that it was the purchaser (not the vendor, as we might have expected) who signed and sealed the deed. The incident is of particular significance, however, because it took place more than 2,500 years ago, more than a thousand years before the Anglo-Saxons first came to Britain. It effectively disposes of the idea that land dealing is basically a 'western concept'.

[3] See D & S 46

[4] See 3.9.5

conducted without any sort of register of public ceremon. Indeed, despite this failure in England, all former British dependencies seem to have successfully introduced systems of deeds registration. At the end of the last chapter we described the spread of the 'recordation system' throughout the United States where, despite its deficiencies, it has been effective enough to enable the title insurance companies to set up and maintain their title plants and thus defeat attempts to introduce registration of title.[1] These companies could not operate without the public deeds registers.

1.3 It should be noted that the system of deeds registration we discuss in this chapter is a system created expressly for purposes related to conveyancing; its object is to provide a public register of transactions to land by placing on record the instruments of conveyance. Deeds are recorded by copying the whole document (transcription) or by 'memorial' of its basic particulars (inscription) in a register.[2] Registration under this system must be clearly distinguished from the recording of transactions in the cadastral record devised for fiscal purposes which we discuss in the next chapter. For example, the land records of rural India and Pakistan, which have come to confer 'presumptive title', are quite distinct from their system of deeds registration which has been in operation since 1839.

1.4 We have already described deeds registration in general terms[3] and the difficulty now is where to begin a more detailed account of particular features and individual systems. There is a huge field to select from. At one extreme is, say, the Middlesex Deeds Registry, which, as we have already recounted in Chapter 3, was not abolished until 1940 even though as long ago as 1870 a Royal Commission had agreed with expert evidence that it "causes a great increase of trouble and expense, affords no additional security or other special advantage and ought not to be continued".[4] At the other extreme is the South African system which appears to confer all the advantages of registration of title and, indeed, is really equivalent to it. The Scottish system used to be considered equally efficacious, but the decision has at last been taken to replace it by registration of title, a decision which clearly must be of the greatest interest and importance to all advocates of the latter system.

1.5 It is evident, therefore, that we should describe the Scottish system In some detail and set out the reasons for the decision to replace it by registration of title. We must also examine the South African claim that its deeds system is the equal of registration of title. Neither of these systems, however, operates against a background of English land law and, as the Keeper of the Registers of Scotland pointed out in a memorandum in 1958: "None of the complexities which have arisen in England from the distinction between legal and equitable estates has ever occurred in Scotland." Nor, of course, have these complexities occurred in South Africa with its allodial tenure under Roman-Dutch law. We must therefore give some consideration to a deeds system in the context of English land law and equity, and in particular to 'deeds recordation' in the United States as being a very

[1] See 5.11.1-4
[2] Sea D & S 46
[3] See 2.3
[4] See 3.17.6

large and important 'common law country' where, for the reasons explained in the last chapter, deeds registration is unfortunately of far greater significance than registration of title is now ever likely to be.[1] We conclude the chapter with a brief account of the deeds system in Hong Kong, as an example of a very good deeds register in a common law context.

1.6 But first we should say a little more of deeds registration in England, and we shall then briefly discuss two particular problems of English land law which it seemed that registration of deeds could resolve.

## 2 Deeds registration in England

2.1 As we have already mentioned, deeds registration was only of very limited application in England. It was established in the Bedford Level in Cambridgeshire in 1663,[2] in Yorkshire (West Riding 1703, East Riding and Kingston upon Hull 1707, and North Riding 1735), and in Middlesex in 1708. It was introduced into Ireland in 1707. The preambles to the Acts are important as they played no small part in their judicial interpretation.[3] They are also instructive; they paint a lurid picture of the dismal consequences that had overtaken many worthy landowners because of the uncertainty of their land titles.

2.2 In the West Riding of Yorkshire the principal consideration appears to have been the need for safe title as a basis for credit, as expressed in the preamble to the West Riding Act in 1703:

> "Whereas the West Riding of the County of York is the principal place in the North for the cloth manufacture, and most of the traders therein are freeholders, and have frequent occasions to borrow money upon their estates for managing their said trade, but for want of a register find it difficult to give security to the satisfaction of the money-lenders (although the security they offer be really good) by means whereof the said trade is very much obstructed and many families ruined: for the remedying whereof etc."

2.3 The preamble to the East Riding Act of 1707 elaborates the theme of ruin in even more harrowing terms:

> "Whereas the lands in the East Riding of the County of York and in the Town and County of the Town of Kingston-upon-Hull are generally freehold which may be so secretly transferred or conveyed from one person to another that such as are ill-disposed have it in their power to commit frauds and frequently

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[1] see 5.11

[2] It is surprising (and disconcerting) to find that Hags remarked in 1906: "The Statute of Inrolments of 1535, and the Bedford Level Act of 1663, both create systems of registration of title to land." But they clearly did not conform with his own definition (on the same page) or at least with that part of it which we have italicized: "A system of registration of title is a system of property law which provides for a register, entry upon which is essential to the passing of certant rights of property from one person ro another *in such a way that the latters rights in the subject-matter of the transaction become complete and good against the world*." (Hogg, Ownership and Encumbrance, 3).

[3] So, par, 3.4 below

> do so, by means whereof several persons (who through many years' industry in their trades and in their employments and by great frugality have been enabled to purchase lands or to lend moneys on land security) have been undone in their purchases and mortgages by prior and secret conveyances and fraudulent incumbrances, and not only themselves but their whole families thereby utterly ruined: for remedy whereof etc."

2.4 The Middlesex Act of 1708 had a similar preamble, and we cannot help wondering how the manufacturers of the Midlands, and the merchants of Bristol and Liverpool, not to mention York itself, managed to survive without registration of deeds which, as we shall presently see, all the United States of America and indeed most other countries adopted.

2.5 The preamble of the Irish Registry Act of 1707 contained some special local colour, for it declared that the Registry of Deeds was established with the object of "securing purchasers, preventing forgeries, and fraudulent gifts and conveyances of lands which have been frequently practised in this Kingdom, especially by papists to the great prejudice of the protestant interest therein". The provisions of this Act still control the effect and operation of the registrations made in the Registry; but the Registry staff has been reorganized by subsequent statutes, the most important of which was passed in 1832.

## 3 English land law and deeds registration

3.1 The two particular problems of English land law which it seemed that registration of deeds could resolve are 'priority' and 'notice'. What Maitland called "the complicated labyrinth of cases about 'priorities'"[1] could be bypassed by the simple statutory provision that priority depended on registration. Thus, the Yorkshire Registries Act 1884 (which replaced the three Yorkshire Acts of the early eighteenth century) provided that, except in case of actual fraud, "all assurances entitled to be registered under this Act shall have priority according to the date of registration thereof, and not according to the date of such assurances or of the execution thereof ".[2]

3.2 This seems to be a relatively straightforward and simple provision which effectively deals with priority, but the question of notice is much more difficult, and the 'doctrine of notice' requires an explanation. We have seen how the common law refused to recognize what came to be known, so confusingly, as equitable ownership, and how equity stepped in to treat the legal owner as a trustee for the equitable owner. But equity always stopped short of enforcing a trust against the person who had bought land from a legal owner in genuine ignorance of the existence of a trust,[3] that is 'without notice' of it. Notice, however, did not necessarily have to be actual or express; it could be 'constructive'. A purchaser has constructive notice if he has deliberately abstained from making an enquiry, or even if he has carelessly failed to make the enquiry

[1] Maitland *Equity* 130
[2] s14
[3] See M & W 120

which a purchaser acting on skilled advice would make obviously a disputable matter.

3.3 The Yorkshire Registries Act 1884 endeavoured to clear up any doubt on this point by providing that "the registration of any instrument under this Act shall be deemed to constitute actual notice of such instrument, and of the fact of such registration to all persons and for all purposes whatsoever, as from the date of registration".[1] But we are told that "as a result of this provision some inconvenience soon became apparent and considerable opposition was raised to the section, chiefly because it was contrary to the policy of other registration Acts".[2] We are left to guess who felt the inconvenience and who raised the opposition, but anyway the section was repealed in 1885.[3] Forty years later, however, the Law of Property Act 1925 provided that registration in a local deeds registry shall be deemed to constitute actual notice.[4] We have already mentioned how, under the Land Charges Act 1925, it can happen that persons have notice of registration which they we unable to discover, an obvious example of just the sort of harsh provision that the Court of Chancery sought to relieve.[5]

3.4 Equity has, indeed, always made serious inroads on statute law with a view to softening the rigour of its provisions and preventing hardships. The Registration Acts have been no exception. For instance, the Middlesex Registry Act 1708 declared that deeds affecting lands in the county of Middlesex shall be "adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration" unless a memorial of such deeds be "registered as by this Act directed, before the registering of the memorial of the deed of conveyance under which such subsequent purchaser or mortgagee shall claim". This is the 'race to the records' provision mentioned in the next section, and it could scarce be clearer or more explicit; yet in 1747 it was held that a purchaser who had notice of an unregistered disposition was bound by it on the grounds that, since the intention of the Act, as apparent from its preamble,[6] was to protect purchasers and mortgagees against prior secret conveyances and fraudulent incumbrances, no protection was required against a prior conveyance if notice was given of it; for then, not being secret, it was outside the ambit of the Act.[7] No statute enacted to prevent fraud should be allowed to facilitate fraud, which is what could happen on a literal construction of the wording of the Act. We specially mention this because we believe that the Registered Land Act (discussed in Book 2) has effectively resolved this awkward question by providing that any attempt to dispose of land, or a lease or charge, shall be ineffectual unless the disposition is registered, *but that it may operate as a contract*;[8] it is not 'null and void'. Courts can then order registration if there has been no intervening entry which would preclude it, or award damages for breach of contract.

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[1] s15
[2] Flynn *Registration in Yorkshire*, 3
[3] Yorkshire Registries Amendment Act 1885 s5
[4] s197 (referring to "memorials registered in Middlesex and Yorkshire")
[5] See 3.17.4
[6] See pare 2.4 above
[7] *Le Neve* v. *Le Neve* (1747) Amb. 436
[8] See Kenya Registered Land Act 1963 s38

## 4 'Deeds recordation' in the United States of America[1]

4.1 "For avoiding all fraudulent conveyances and that every man may know what estate or interest other men may have in any houses, lands or other hereditaments they are to deal in" are the opening words of the first recording Act enacted in America in 1640. They express the purpose of the recording system now universal, but by no means uniform, throughout the United States.

4.2 As would be expected, the recording statutes in the United States are classified according to the way in which they deal with priority and notice, and they are divided into three categories: (1) race statutes, (2) notice statutes, and (3) race-notice statutes. In *race statutes* (which, of course, have nothing to do with ethnic origin) priority depends on the order in which instruments we registered, the winner of the 'race' to the registry getting priority even if he know of a prior unregistered conveyance. Thus the statute could be used for fraudulent purposes and we have seen how the court in England refused to allow this.[2] The courts in America followed the same line and legislatures then produced the 'notice statute' to conform to the judge-made law. *Notice statutes* place no premium on the race to the registry; the bone fide purchaser for value without notice (actual or constructive) of other competing claims is safe, and the important question here is whether a purchaser in fact had notice of a prior grantee's interest; a 'notice statute' enables the grantee to safeguard himself, for it provides that registration constitutes general notice, but the registration must be effected before the later purchase occurs and not merely before it is registered. Thus a subsequent purchaser can rely on the register without having to record his own title document for, as against a prior purchaser who did not record, the subsequent purchaser without notice will always win. The *race-notice* statute is the next logical stop. It is a hybrid composed of elements of the other two. In order that a subsequent purchaser may prevail against a prior purchaser he must (1) purchase without actual or constructive notice of the earlier claim and (2) register first. It appears that twenty-five US jurisdictions have a notice type of statute, and twenty five a raw-notice type (with Indiana appearing in each list). Only two (Louisiana and North Carolina) have a pure race statute,[3] though the British colonial types were usually of this form.

4.3 It is possible to add a further category to recording statutes. "If conveyees are allowed a specified period of time within which to record - a feature which may be added to any of the above types of Acts...the statute is also categorized as a 'period of grace' Act."[4] A long period of grace in Liberia - fixed in 1861 when roads were few and transport difficult - has led to confusion and litigation, but such matters as these and other questions of policy and construction have been grist to the legal mill for centuries, and "many gallons of printer's ink have been

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[1] We are greatly indebted to Mr John Behrens of the US bureau of the Census who gave a paper entitled 'Land Registration in the United States' to a seminar on cadastre conducted by the Economic Commission for Africa in Addis Abate in 1970, and very kindly provided us with a copy of his extensive documentation.

[2] See para 3.4 above

[3] See Moses and Fisher *Land Parcel Identifiers for Inforicafion Systems* 17

[4] C W Johnson, *'Purpose and Scope of Recording Statutes'* 47 *Iowa Law Review* (1962) 231

used by judges and other writers in dealing with how the acts operate in settling disputes between contesting competitors".[1] In this book, however, we are primarily concerned with registration of title (which we believe can resolve most of these problems) and little useful purpose can be served by pursuing this line of investigation further, interesting and important though it may be in the context of deeds registration.

4.4 We cannot resist repeating, however, the formidable list of items set out in an article, vigorously championing registration of title against Professor Powell's devastating analysis (which had such decisive influence in the United Stores).[2] This article criticized "the wild disorder and the incompleteness of the public records" and listed the following as the most frequently recurring items in which the record is defective: "adverse possession and prescriptions; forgeries and other frauds; matters of heirship, marriage and divorce; copyists' and recorders' errors; infancy, insanity, and other disabilities; authority of corporate officers; invalidity of acknowledgments; identity of persons; invalidity of mortgage foreclosures and of judgments and decrees; want of legal delivery of instruments; violations of the usury laws; unprobated wills, praettermitted heirs, and posthumous children; falsity of affidavits; revocation of powers of attorney by death or insanity; parol partitions and dedications; inchoate mechanics' liens; extent of restrictive covenants; non-recordation of prior government patent; and facts about boundaries".[3] It would be interesting (and doubtless disturbing) to work through this list to see how much protection registration of title can offer in respect of some of these items.

4.5 Of more significance to our research than such legal niceties are the actual processes of recordation and, in particular, the improvements made by those States which have seriously attempted to tackle the problem created by "the accelerating fecundity of the records". These records were indexed at first merely by names of grantors and grantees. The grantor-grantee index is still in use in every State, but some States have introduced 'tract' indexes (i.e., indexing by land parcels in addition to the names of the parties), and this is perhaps the most decisive step forward in the process. On the mechanical side, photocopying and microfilining have ensured accuracy of transcription (previously a constant source of error) and now there is a move towards the establishment of 'land data banks' or even 'a comprehensive unified land data system' (CULDATA) for the whole country.[4] Such a system is of course in no way incompatible with registration of title, which, indeed, it would greatly facilitate.

4.6 We cannot repeat too often, however, that under a deeds system what is registered is not the title but only the evidence of title, namely instruments purporting to transfer or deal with various interests. A would-be purchaser has to decide, by examining these instruments, and by inspection of the property, whether or not the vendor is the owner and has the right to sell. "This type of

[1] R W Aigler 'Symposium ~ Notice and Recording (Foreword)' 47 *lowa Law Review* (1962) 223
[2] See 5.11.9
[3] M S McDougal and J W Brabner~Smith 'Land Title Transfer: A Regression' 48 *The Yale Law Journa1* 7 (May 1939) 1126-8
[4] See 7.1.3

examination has to be repeated upon each successive transfer. The reliability of title examination procedures can be greatly increased with the aid of appropriate indices, bloc-maps and the imposition of various requirements by law in regard to the proper survey of the lands being dealt with and so on. *But it must be emphasized that these various requirements only operate to bring the reliability of deeds registration closer to the position attainable under a system of title registration*."[1] The goal is registration of title or a deeds system which, so far as is possible, approximates to it. We need make no further comment.

## 5 The Scottish system

### (1) THE REGISTER OF SASINES: HISTORY AND OBJECTIVES

5.1 In early times in Scotland, as elsewhere, a public ceremony whereby the seller of land gave the purchaser 'sasine' (the Scottish equivalent of 'seisin' or possession) was sufficient to make the sale secure and also to safeguard the interests of any third parties who might be affected; but in due course a written document, called an 'instrument of sasine', replaced the public ceremony. Like the English, the Scots adopted the idea that a general register open to the public would restore the necessary publicity, but were much more successful than the English in setting it up, and the Register of Sasines, established by an Act[2] of the Scottish Parliament in 1617, was for long considered to be virtually as effective as registration of title.

5.2 The main objectives of the Register of Sasines are publicity, security, and accessibility. Publicity is secured by the statutory requirement that in order to obtain an effective right in or over land in Scotland the full text of the constituent writ (as the Scots call a deed) must be registered in the Register of Sasines, which is open for inspection by any member of the public, in striking contrast to the secrecy of the English register of title. Security stems from the statutory provision that if there are competing claims preference depends on priority of registration. Accessibility is assured by the provision of adequate facilities for obtaining information from the Register.[3]

5.3 Although registration is not compulsory by statute, it has become all but universal in practice, because a right in land cannot be obtained except through registration. The registration of a writ gives no assurance that it is valid, and therefore any interested party must, to satisfy himself that there is a good title, examine each writ 'in a prescriptive progress of titles', which is the set of title deeds covering the prescriptive period of ten years (reduced from twenty years in

[1] K Bentsi~Enchill and G H Zarr 'The Assurance of Land Titles and Transactions in Liberia' 2 Liberia Law Journal (December 1966) 105 (our italics)

[2] The preamble to the Act (in translation) reads as follows: "Our Sovereign Lord, considering the great hurt sustained by his Majesties, Lieges by the fraudulent dealing of parties who have alienated their lands, and received great sums of money therefor, yet by their unjust concealing of some private right formerly made by them render the subsequent alienation, done for great sums of money, altogether unprofitable; which cannot be avoided unless the said private rights be made public and patent to His Highness's Lieges…"

[3] See *Reid Report* (1963) 3 para 11

1970)[1] that establishes title to land in Scotland. He must also examine any writ which imposes a restriction or burden on the property. Apart from checking that sufficient stamp duty has been paid, the Keeper of the Registers and his staff have no statutory responsibility for checking the validity of a writ presented for registration, though in practice each one is thoroughly examined in the Registry. But the Register of Sasines does not guarantee title; it is still only a register of deeds.

(2) THE REGISTER OF SASINES: PROCESS OF REGISTRATION

5.4 Registration consists of copying (generally by photography) all deeds presented for registration and binding them in what is called the Record Volume which thus contains copies of the actual documents in chronological order of presentation. There are four stages in the process involving four sets of records:

A. *Presentment Book*. The Presentment Book records the information that a particular writ has been presented for registration. The entry consists of a serial number, the date and hour of presentment and sufficient other information to identify the writ. There is provision for dealing with presentment by post. The writ at this stage is still subject to rejection or withdrawal, but if it is accepted the date and time of presentment are settled at this point. This kind of record (elsewhere known as the Presentation Book or Application Book or Day List or Journal) is also a common, indeed essential, feature of registration of title and is described in detail in Chapter 17.[2] It corresponds to the 'Daily Sheet' in the United States.

B. *Minute Book*. After the entry is made in the Presentment Book, a Minute is drafted and checked. The Minute states the date and hour of presentment, the nature of the transaction and the names and designations of the parties; it contains a concise abridged description of the property; and it discloses whether any exceptions, burdens, servitudes etc. are mentioned or referred to in the writ. On the accuracy, completeness and clarity of the Minute depends the whole system of registration. Its preparation is therefore the most important step in the process, and the officers engaged on it must exercise care, skill and constant vigilance. They must also have considerable experience and a competent knowledge of the system of land tenure and conveyancing and of course of legal business, for they examine the writ to see:

(a) that it is correctly framed according to the statutory and common law requirements of the Scottish system of conveyancing;

(b) that it is correctly stamped;

(c) that the grantors have a title to the property, either recorded or by virtue of competent links in title;

(d) that there are no conflicting titles or charges on the Register;

[1] Conveyancing and Feudal Reform (Scotland) Act 1970
[2] See 17.5

(e) that the property is sufficiently identified and correctly described and that the plan (if any) is consistent with the description in the writ; and

(f) that it is properly executed.

If an error is found in the writ it is brought to the attention of the solicitor presenting it, and, if he considers the defect material, he can withdraw the writ at any time before it has been entered in the Minute Book. Despite its lack of statutory backing this arrangement works very well in practice, and thus there is an expert check on the work of the solicitors which is similar to the examination of a title for first registration under the English system. The need for it of course disappears if the title (as distinct from the deed) is registered.

C. *Search Sheets*. The introduction in 1871 of what is called the Search Sheet was undoubtedly a most valuable contribution to the smooth working of the Register. In the Search Sheet, a ledger account, so to speak, is opened for every separate property to which the deeds refer, and under an abridged version of the title deed description (which may or may not include the postal address) are entered short notes in chronological order of the successive deeds which affect that property. Consequently the Search Sheets disclose the present proprietor of every parcel which has been dealt with or affected by any writ recorded since 1871 and give an abstract of all deeds affecting its ownership, There were by 1972 approximately 900,000 separate Search Sheets. There is no statutory authority for the existence of the Search Sheet which was introduced 'administratively' merely to facilitate searching. It is an outstanding example of how useful and effective good administrative machinery can be, even without the formal support of law.

D. *Record Volume*. As already stated, this contains copies of the actual writs bound together in order of presentation.

5.5 The Record Volumes, as well as the Minute Books, are sent to the Scottish Record Office, where they are available for inspection by the public. Thus a vast amount of paper is permanently retained. In a system of registration of title, deeds (which, as a rule, are very brief) need be kept only so long as they support a subsisting entry.

5.6 After the writ has been stamped with a Certificate of Registration, each page is impressed with the official seal, and the writ, along with a note of the appropriate fees, is returned to the 'ingiver', to be kept with the other relevant deeds. (Registration of title, of course, dispenses with the need for the owner to keep such deeds.)

5.7 An American expert, having examined the Scottish system, commented that it had "certain features which had been proved in practice and which could be utilized to great advantage in the United States. Foremost amongst these are (1) the Search Book, (2) the Keeper's checking of instruments presented for registration to ascertain correctness of form and execution, and (3) the Keeper's determination that there are no competing interests in the record. The first two have been recommended previously as rather obvious improvements in American recording acts. The third has been rejected as impracticable, but for reasons that

do not appear convincing. The Scots have proved that all three are feasible in practice in a situation where both conveyancing practices and statutory recording acts are similar to their American counterparts."[1]

## (3) THE INTRODUCTION OF REGISTRATION OF TITLE

5.8 In September 1959 a Committee under the chairmanship of Lord Reid was appointed "to consider the case for introducing registration of title to land in Scotland, and, if necessary, the method by which such registration might be effected".[2] The Committee reported in July 1963.

5.9 In analysing the merits and defects of the Scottish system of registration of deeds the Reid Committee wrote:

> "In the evidence presented to us we were impressed with the large volume of support given to the present Scottish system, and in our view it has great merits. It has evolved over a long period of time to a high degree of perfection and adapted itself to the needs of the country and the special characteristics of the feudal system of tenure. It affords security without losing flexibility. It is public. It has facilities for remedying defects without undue trouble and nearly all disputable questions are now settled by authority. It keeps bureaucratic control to a minimum and allows maximum freedom of contract. In short, it is a practical system which works well."[3]

5.10 The Committee formulated four conditions which in their view must be fulfilled by any system of registration of title in Scotland if it were to be preferable to the existing system of registration of deeds:[4]

(1) "It must retain the merits of the present system as regards security, flexibility and publicity." (This is not quite so obvious and conclusive as might be thought; the English system, in replacing the deeds registries of Middlesex and Yorkshire, has put an end to the former publicity; nor, as soon as land is registered, can information concerning it, which was previously available to anybody on the payment of a small fee to the Land Charges Department, any longer be obtained without the written consent of the registered proprietor.)

(2) "It must in the long run result in a substantial saving in time occupied in legal work and in cost to the public."

(3) "Its character must be such as to prevent dislocation or substantial practical difficulties during the transitional period while it is being introduced: it must therefore be in the nature of an evolution or development of the present system." (A corollary of this requirement is that the transitional period should be as brief as possible.)

(4) "The first registration of title of any subjects must not be unduly expensive. In particular we would not favour any system which required intimation to neighbouring proprietors as a preliminary to such registration,

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[1] Ted J Fifis 'Security and Economy in Land Transactions: Some Suggestions from Scotland and England 20 *The Hastings Law Journal* (November 1968) 192

[2] *Reid Committee Report* (1963) vi

[3] Ibid 15 para 57

[4] Ibid 17 para 64 (our comments in brackets)

because that would inevitably stir up disputes and involve expenses in many cases in settling or litigating questions which are at present dormant. So the existing rights of neighbouring proprietors must be adequately safeguarded without their having to intervene." (The obvious solution is to determine the existing rights of neighbours at one and the same time.)

5.11 A majority of the Committee finally decided in favour of registration of title for two reasons – first, because conveyancing fees are a third higher than fees for registered conveyancing in England (i.e. they are the same as for unregistered conveyancing in England) and, secondly, because despite a big increase in the number of writs (97,000 in 1960 as compared with 46,000 in 1935), there has in fact been not only a decrease in the number of solicitors, but the unqualified conveyancing clerk, who formerly relieved the solicitor of much of the burden of conveyancing work, has virtually disappeared. Measures to relieve the existing, and ever growing, pressure appeared to be essential. Once more we quote: "Since the reform of most esoteric subjects is left to their initiates, it comes as no surprise that the Scots failed to adopt title registration until the current shortage of solicitors compelled the profession to seek to alleviate its excess workload."[1]

## (4) LAND TENURE AND TENURIAL REFORM

5.12 It can be argued that the feudal system of land tenure in Scotland will have to be abolished or modified drastically if registration of title is to be successfully introduced. We have complained of the intricacies of English land law, which Oliver Cromwell is said to have called 'a tortuous and ungodly jumble'[2] but English land law appears almost 'divine inspiration' when compared with that of Scotland where subinfeudation was never abolished.[3] The Reid Report gives an example:

> "Smith feus a piece of land to Jones; Jones, in turn, sub-feus part of his new property to Brown; Brown disposes a part of what he has received to Green, who lets a plot of ground by long lease to Robinson. We have, in effect, four tiers of holdings, including at least one example each of an over-superiority, a superiority, a dommium utile, and a lease. Moreover, each of the individual parties can burden his interests, create separate interests of liferent and fee, or import a destination into his title governing the succession. Servitudes, burdens and restrictions can be constituted, transferred or extinguished at all stages."[4]

The Report goes on to point out – one feels almost with the pride of the fakir who enjoys lying on nails – that this is a comparatively simple example: "In practice the permutations of title may be much more involved, and the separate identities of superiorities and mid-superiorities can be lost in the process."[5]

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[1] Fiflis, 'Security and Economy in Land Transactions' 192
[2] M&W 1
[3] Scotland, a separate kingdom in 1290, did not have the benefit of the Statute Quia Emplar, which Abolished subinfeudation in England and Wales. See 3.8.2
[4] *Reid Committee Report* (1963) 6 para 26
[5] Ibid 6 Para 27

5.13 Nevertheless (despite the English experience between 1862 and 1925) the Rent Committee did not think that the feudal system (and so, by inference, the Scottish land law) "is incompatible with registration of title, although it would undoubtedly give rise to some difficulties in practice"[1] and they recommended the setting up of a small expert committee to examine "the whole question of the amendment of our conveyancing legislation".[2] Accordingly a committee was appointed under the chairmanship of Professor Halliday; it reported in 1966 and made sweeping recommendations, of which some could be readily implemented but others would require drastic alterations to the existing system of tenure. The Cominittee pointed out "that a multiplicity of different forms of long-term tenure is inimical to simplification and economy in conveyancing and registration practice" and suggested that "(1) the number of existing variants in tenure should be reduced, and (2) when any new land policy is being initiated an endeavour should be made to effect its objects by incorporating them within the framework of an existing tenure rather than by introducing a new form of holding".[3] It was on this principle that they considered that "the abolition of feudal tenure and its replacement by a different system would involve more work and expense than are justifiable" and suggested that "subject to the abolition or modification of its objectionable features...and clarification of the complex structure of existing holdings,…the system of feuing should be retained".[4] (This appears to be a curious inversion of Shakespeare's "a rose by any other name would smell as sweet" - the name is to be retained but the smell removed.) However the Government has now published a Green Paper on feudal reform indicating its intention to abolish the feudal system, thus ending all existing feu duties as such and prohibiting any further fleuing.

5.14 It will be interesting, and doubtless instructive, to watch the effect of this kind of tenurial reform (or the lack of it) on the progress of registration of title.

## (5) METHOD OF COMPILING THE REGISTER OF TITLE

5.15 The Reid Committee pointed out that "the position in Scotland is in no way comparable with that in England where, before the introduction of registration of title in the latter part of the nineteenth century there was no system of registration covering the whole country; whereas in Scotland there has been an effective system of registration of deeds covering the whole country since 1617".[5]

5.16 It is therefore surprising that the Committee did not seek guidance from the experience of other countries. They remarked that though they had received some evidence about the South African system, "conditions there are so different that we have not thought it necessary to consider that system in detail. For the same reason we have not investigated the Torrens system or any of the systems in use in Europe."[6]

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[1] Ibid 36 para 128
[2] lbid 18 para 67
[3] *Halliday Committee Report* (1966) 77 para 212
[4] Ibid 77 para 215
[5] *Reid Committee Report* (1963) 15 para 58
[6] lbid 17 para 66

5.17 It is true that the South African system was unlikely to offer anything to assist the changeover in Scotland, for, as we shall see in the next section, there is no intention at all to change the South African system (which is already registration of title in all but name); but in Germany the existence of effective deeds registers enabled registration of title to be quickly introduced throughout the whole country, and so far as the Torrens system is concerned, the use made of the deeds registers in Penang and Malacca to create a register of title must be of significance to any country contemplating the substitution of registration of title for a good deeds system.[1]

5. 18 Scotland has indeed a very good deeds system. As long ago as 1910 it was remarked that "the 'search sheet' system in Scotland brings the Scottish deed registration very close to registration of title with regard to facility of search"[2] and that evidence showed that the Register of Sasines could be converted into a register of guaranteed title without the smallest risk and at a small expense".[3] According to the Reid Committee, "There are now approximately 700,000 separate Search Sheets. That is to say, for about 700,000 properties in Scotland, it is possible in a very short time, to obtain information as to the state of the title, the last registered proprietor, the heritable securities affecting the subjects, the writs referred to for burdens and the parts of the original subject which may have been sold."[4] Yet the Committee recommended that the best method to introduce registration of title "would be to make registration of the title compulsory on the first transfer for onerous consideration of any property within a designated Division. . ."[5] This is, of course, the method used in England where there is no Register of Sasines, still less any Search Sheets, and it is a method which in more than seventy years has not yet completed registration in a single county, or even in quite small towns like Hastings and Eastbourne which have practised it for nearly fifty years.

5.19 Nevertheless, it is very significant that those who will have to set up the register of title in Scotland firmly believe that the English system, taking full advantage, as it does, of the solicitor's investigation of title on purchase, is preferable to a systematic process which would require more staff than could readily be found and which might excite professional opposition. A principal difficulty is that the Search Sheet does not always include a description of the parcel which identifies it, and the proprietor (or his solicitor) must supply a description sufficient to locate the property on the Ordnance Survey map. Thus on first registration the cooperation of the proprietor (or his solicitor) will frequently be required. Moreover, since properties in Scotland are changing hands on average once in seven years, this method will probably be just as quick. Only time will show.

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[1] See 11.10.9-13
[2] Hogg *Empire* 3 (citing the *Dunedin Report* (1910))
[3] D & S 149
[4] Reid Committee Report (1963) 5 para 20
[5] Ibid 22 para 91

## 6 The South African system

6.1 Land in the Republic of South Africa is owned allodially, and is governed by Roman-Dutch, not English, land law; tenurial problems have therefore been comparatively simple, particularly in the field of conveyancing. Land registration dates from the first European settlement of 1652 and was derived from the system used in Holland, where 'from time immemorial' no alienation or pledge of land was good unless it had been effected in the presence of a judge. A similar formality was required in South Africa until an Ordinance[1] in 1828 provided that all deeds of transfer, mortgages, and like instruments should be subscribed by the registrar of deeds instead of by two members of the Court of Justice in the presence of the Colonial Secretary, thus establishing the form of registration which is still in use today. This system has always been classified as registration of deeds, but it is difficult to understand why.

6.2 According to Hogg, "By deed registration – or registration of deeds is meant primarily a system under which instruments are recorded merely as such, and not with special reference to the land they purport to affect. By title registration – or registration of title – is meant primarily a system under which a record is made of the title to some particular land as vested in some particular person for the time being, or of instruments as affecting some particular land."[2]

6.3 Since there is no country in which land parcels are more closely defined than in South Africa, and since no transaction in land there can be effected without being registered under the parcel to which it relates, the only reason for classifying the South African system as deeds rather than title registration would appear to be that, technically, it is not the fact of registration which proves title but the document of transfer, if duly registered. But does this make any real difference in practice if the registrar is required to satisfy himself that a deed is in order before he accepts it for registration, and to reject it if he is not satisfied, particularly if the deed itself when registered has the effect of a certificate of title? We suggest that it is misleading to classify the South African system as a deeds system in any way comparable with the deeds systems of, for example, the United States. To all intents and purposes it is registration of title, as examination of its salient features will show.

### (1) SURVEY[3]

6.4 The Survey Law of 1927 consolidated numerous previous laws and provided for the appointment of a Director-General of Surveys charged with the control of all survey operations in the Union of South Africa and under him a Surveyor-General for each of the four Provinces (Cape of Good Hope, Transvaal, Natal and the Orange Free State). The Act defines the duties of the Surveyor-General as inter alia:

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[1] Ordinance No 39 dated 19 January 1828

[2] Hogg *Empire* 1

[3] The particulars are taken mainly from D & S 149-51. We consider them worth repeating because basically the South African survey system is similar to the Australian, New Zealand and like systems, which provide for a 'deposited plan' based on precise surveys of 'fixed boundaries' (described at length in Chapter 8).

(1) to supervise and control the survey and charting of land for purposes of registration in the deeds registry;

(2) to examine all general plans and diagrams of surveys of land before any registration of such land is effected in a deeds registry, and approve all such plans and diagrams if he is satisfied that such surveys have been carried out in such a manner as to ensure accurate results, and that such general plans and diagrams have bean prepared and the boundaries of the land surveyed have been defined in accordance with the regulations;

(3) to prepare, certify and issue, at the request of any person and on the payment by such person of such fees as may be prescribed, copies of diagrams and other documents filed in his office which we available to the public.

6.5 All surveys for title are carried out by private surveyors against payment of fees by the parties giving instructions. All records and diagrams are submitted to the Surveyor-General for examination, approval, and permanent filing. The numerical data to be given in every diagram are:

(1) The rectangular co-ordinates of all beacons, except for town lots.

(2) The lengths and directions of all straight lines forming boundaries, or the angles between the lines.

(3) The area in hectares and decimals, or square metres to the nearest square metre if less than one hectare.

In addition all curvilinear boundaries have to be accurately depicted on diagrams and all topography shown. Descriptions of beacons are given and references to the parent property. Diagrams are lodged in triplicate, one copy eventually being held by the owner with his deeds. Where a number of portions of land are laid out at the same time, a general plan is filed as well as the diagram. Subdivision is controlled by Township Boards. Natural scales are used, the choice of scale being such that all details can be adequately shown. Diagrams may not be greater than 594 mm by 840 mm or less than A4 size (297 mm by 210 mm).

## (2) POWERS AND DUTIES OF THE REGISTRAR

6.6 In South Africa the Registrar has taken the place of the judge in whose presence land transactions in Holland originally had to be conducted, and his powers and duties equate to those of a registrar of titles. "Not only must he register such documents as are capable of registration, but he must, in the exercise of his discretion, refuse to register deeds or documents tendered to him for registration which either do not comply with law in respect of their form or contents, or are incapable of registration at all, or to the registration whereof any valid objection exists. The nature of his functions indicates that he must exercise a certain discretion, and that he is not merely a ministerial officer. He may reject deeds; he may require proof in support of any matter required to be done; he may amend errors."[1] This might be a description of the powers and duties of a registrar of titles, and thus the South African system is quite different from the normal deeds system in which the registrar is not required to examine the content of a deed before registration and has no power to reject it if it is unsatisfactory.

[1] D & S 152

## (3) THE EFFECT OF REGISTRATION

6.7 An essential attribute of registration of title is that registration, whether initial or of subsequent transactions, acts as a warranty of title in the person registered as owner and bars adverse claims. In this regard, South African landowners have what can be called a negative warranty of title from the Government in that there is no way in which the ownership of land can be acquired other than through the medium of the deeds registries. This has been true for more than three hundred years – in fact from the very beginning of any process for transferring land rights in South Africa. There has been no question of substituting a new system for an old system, or of 'general law' or 'old system' conveyancing operating alongside registered conveyancing as in Australia. There are no 'equitable owners' to be distinguished from 'legal owners'; the only owners are registered owners. This 'negative warranty' is supported by the positive provision that the Government is liable for damage caused to any person by the failure of any registry official to act bona fide or to exercise reasonable care or diligence in carrying out his duties.[1]

6.8 Does the South African system, then, enable a purchaser to get a good title merely by succeeding his vendor on the register, or is some investigation of prior title needed? In other words, does the register in South Africa itself prove title, for this is the feature which really distinguishes registration of title from registration of deeds?[2]

6.9 If the evidence of title is the deed and not the register then clearly not only must the last deed be kept but also previous deeds in order to show a sound chain of title. A device like the Scottish Search Sheets may simplify search, but it does not eliminate the need for it, whereas in the South African system the deed of transfer, duly registered, becomes the title deed of the new owner and proof of his right to the land. Thus in effect the last registered deed is the equivalent of a certificate of title or land certificate issued under a system of registered title, and it is unnecessary for the owner to keep previous deeds.

6.10 It is even possible to obtain a 'certificate of registered title' from the Registry. If an owner has a survey made of part of his land he may, on application to the Registrar, obtain a 'certificate of registered title' in respect of that part. Similarly an owner whose title deeds have been lost or destroyed when the registry duplicate has also been lost or destoyed (presumably a rare combination) can also obtain a certificate of registered title after the necessary advertisement in the Gazette and the lapse of the period allowed for objection.[3] A certificate of registered title may also be issued to correct an error in registration.[4] The issue of such a certificate is clearly more consistent with registration of title than of deeds.

6.11 We doubt if it will serve any useful purpose in this book to examine the South African system in any more detail. Perhaps we should not have included it in this chapter at all, for we venture to suggest that, instead of classifying it as 'registration of deeds' (as hitherto has been the practice of proponents of

[1] Deeds Registries Act 1937 s99
[2] See 2.6.4
[3] See D & S 152-3; Deeds Registries Act 1937 s38
[4] Deeds Registries Act 1937 s39

registration of title) we should be more correct to regard it as the kind of system which, basically, Torrens aimed at introducing into South Australia in 1858. But he was handicapped by the system of conveyancing and the English land law and equity which had been brought from England with the first settlement. He no longer had the 'clean sheet' – an undeveloped country with no established law – which the Dutch had found in South Africa in 1657 and which had enabled them to introduce their own home system of conveyancing, itself infinitely preferable to the English system if the strictures of the English lawyers we recounted in Chapter 3 are to be believed. In any case, all such discussion is academic, since no longer in this world are there wide empty lands available for this sort of settlement and offering the opportunity for new institutions as there were in South Africa and Australia, not to mention America, in the seventeenth and eighteenth centuries.

## 7 The Hong Kong deeds system

7.1 We conclude this chapter with a brief account of what appears to be a reasonably effective system of deeds registration in a common law context.

7.2 Hong Kong, like Singapore, is an island with a large urban population, very high land values, English land law, and title based on Crown leasehold grants; and like Singapore it uses a system of deeds registration. The Hong Kong Land Registration Ordinance provides not only that all deeds and instruments registered under it shall have priority according to their respective dates of registration, but also that those which are not registered shall be null and void as against any subsequent bona fide purchaser or mortgagee who registers. Registration is therefore essential to the protection of title but does not guarantee it. As all land parcels leased by the Crown are given a lot number, and as a comprehensive card index, open to the public, is kept of these lots and their subdivision, it is a simple matter to trace the records relating to any property. Thus any prospective purchaser, or his solicitor, can always discover the conditions under which any property is held, any restriction on its use, and whether it is subject to any mortgage or other encumbrance. It should be noted that investigation of title is still needed for the purpose of conveyancing, though it is very easy to make for those who know how.

7.3 Hong Kong considers this system to be adequate. It is significant, however, that in 1956 Singapore, with a comparable deeds register, took the decision to introduce registration of title, as we describe in Chapter 11,[1] It should also be particularly noted that a deeds register is much less likely to be effective when title does not stem from Crown (or State) grants. In Hong Kong (and Singapore) there is no title other than State-granted title (mostly leasehold) and so all land is on the register. In many countries in Africa, however, huge areas are held in customary tenure and transactions are seldom registered. For example, a recent United Nations publication concludes a note on the deeds system in Ghana as follows: "One weakness in the register is that it is mainly a catalogue of documents supported by some individual maps, but it is not maintained on a comprehensive system. Only a small part of the total area (less than one per cent)

[1] See 11.10.3

is registered. According to information received, the lack of a proper system of title registration is a source of considerable litigation and dispute between individuals."[1] There can really be no valid comparison between this sort of deeds system (where the origin of many titles is obscure and has never been officially investigated) and the sort of deeds system which is based on State-granted titles (where the original grant, and so the root of title, is an 'act of State'). Indeed where, as in Hung Kong, the latter sort is efficiently maintained it differs from the system devised by Torrens only in the legal effect given by statute to the register.

[1] G Lasson 'Land Rgistadon in Developing Countries' in *World Cartography* (United Nations New York 1971) 33 at 65