CHAPTER 9

OBJECTS AND REASONS: OBSTACLES AND OBJECTIONS

1 Prefatory

1.1 In presenting new legislation to the legislature it is the practice, in some countries, to publish under the heading 'Objects and Reasons' the general purposes of the legislation and the reasons for enacting it. In this chapter we therefore propose to examine the purposes for which registration of title is intended and to set out and analyse the arguments that can be used to recommend its introduction into a country which has hitherto made no provision for it. Its adoption or rejection may depend on the clarity and persuasiveness with which these arguments are deployed.

1.2 In England and Wales, and in Australia and other countries which use English land law, registration of title has been introduced for the purpose of improving and simplifying conveyancing procedure; it is essentially a device designed to benefit the individual landowner rather than the State as a whole, and we consider it first in this connection under the heading 'Characteristic features and advantages of the English system', using a list prepared by leading English authorities.

1.3 Then under the heading 'Advantages of registration of title to developing countries', we recapitulate, in four subsections, these advantages in the wider field of developing countries generally and countries which do not use English land law. In particular we present at some length the arguments for and against land certificates (known in the Torrens system as 'certificates of title') under the subheading 'Provision of official certificate proving registration'. We go on to examine two important additional features not mentioned in the English analysis, but each of which deserves a separate section of its own. These we call 'Registration of title as a means to improve land law', and 'Registration of title as an instrument of Government'. It is under this latter heading that we consider its usefulness to the State, as distinct from its advantages to the individual landowner.

1.4 Next we turn to the other side of the medal: 'Obstacles and objections' Which impede or inhibit the introduction of registration of title. We examine these in four subsections. We conclude the chapter with a restatement of the general argument in favour of registration of tide.

2 Characteristic features and advantages of the English system

2.1 HM Land Registry has prepared a pamphlet "in reply to requests for a general explanation as to what registration of title is and how it differs from unregistered conveyancing".[1] This pamphlet has been reissued substantially unchanged for many years, and the claims it makes are followed very closely by

[1] HM Land Registry *Registration of Title to Land* 2

Curtis and Ruoff in the first chapter of Registered Conveyancing, which is the standard work on registered conveyancing in England. We can presume that, so far as England and Wales are concerned, the arguments in support of registration of title can scarcely be presented more cogently. These arguments are worth examining in some detail, for they apply with equal force to any sophisticated community accustomed to individual landowning and land dealing, and there are few countries (other than some communist countries) where such communities do not exist, though in developing countries they may be confined to a few towns.

2.2 The pamphlet begins by explaining that the object of registered title is to render the transfer of land more simple, cheap and reliable than is possible under the system of unregistered conveyancing by deeds kept in private custody. It then points out six 'essential general features'. These we might call the 'merits' or 'virtues' of the system, and they make convenient headings under which to set out the 'characteristic advantages'[1] and to make some general observations. We deal in turn with each of these six essential general features (of which the first five appeared as 'Keynote features of registration of title' in Stewart-Wallaw's Introduction to the Principles of Land Registration published in 1937).

"(l) *The abolition of the constantly repeated, relatively expensive, and sometimes inconclusive examination of title every time a transaction occurs, and the substitution of one final and authoritative examination by H. M. Land Registry.*"

"(2) *As a result of this examination, the formation at the regional offices of the Land Registry of a record of proprictors of land with a title good against the world, subject only to such mortgages and other burdens as are set out on the register, or are declared by the Land Registration Act 1925 to be overriding interests.*"

2.3 We have put these first two 'features' together because not only are they interdependent but they might also, just as logically, be presented the other way round. It is true to say that the register in England is formed as a result of the final examination of title by HM Land Registry, but it would be equally (and universally) true to say that the repeated examination of title is abolished as a result of the formation of a register 'good against the world', an expression that must not be taken too literally but is generally used to distinguish a right *in rem* which is enforceable against everybody from a right *in personam* which is merely enforceable against a specific person. Once registered, a title becomes 'indefeasible' and is 'warranted' or 'guaranteed' (words used in the 1857 Report, as also were expressions such as 'Parliamentary title' and 'statutory title'), but however it is expressed the effect is that the title needs no further investigation because the law provides that the register shows the state of title up to date and, except for overriding interests,[2] complete at all times. It is only this express provision of the law which confers on the register that special quality which distinguishes registration of title from registration of deeds. No other system enables title to be presented with the 'continuous finality' which is the unique

[1] The pamphlet lists ten 'characteristic advantages', but we have distributed them under the 'six essential general features' frorn which, of course, these 'advantages' directly accrue.
[2] See 2.5

characteristic of registration of title. Several advantages ensue. As past title no longer has to be investigated there is no use for title deeds and so no provision is needed for their safe custody; enquiries do not have to be instituted to ascertain their whereabouts, nor does their production have to be paid for when found. Fraud by duplicalion or suppression of title deeds is impossible. As the register is the final authority, mistake as to past title or as to existing burdens affecting the land is precluded. Clearly, this continuous finality tends to reduce litigation in regard to land because it removes most of the conditions which give rise to it; or, as Dowson and Sheppard expressed it, "it must inevitably take so much that is disputable out of the region of controversial opinion".[1]

2.4 The process even has curative powers because, on first registration, defects in title, which in unregistered conveyancing are the subject of tiresome recurrent enquiries every time there is a dealing, are permanently remedied by registering the title as 'absolute'; alternatively, some form of provisional title may be conferred, which will ripen in due course into an absolute title. Such titles, known as 'possessory' in the English system, are considered in Chapter 11 when we discuss initial registration.[2]

"(3) *The provision of an accurate plan based on the latest revision of the Ordnance Map, identifying the land*"

2.5 It should not be inferred from this that the plan which is issued in the English land certificate can be used to relocate a boundary as can the title plan under the Torrens system. No distances or bearings are shown on the English plan, which is an extract from the Ordnance Survey map. Nevertheless the plan is an accurate topographical representation of the parcel showing its position in relation to the physical features of the adjoining land (which is what really matters) and, as a result, the verbal description of the property in transfers, charges and other documents, is reduced to a few words. The English registry mapping system has been described in detail in Chapter 8 and there is no need to elaborate its virtues here.

2.6 It should, however, be remembered that the usefulness of the Ordnance Survey map for the identification of property is by no means confined to registered title; ever since the large-scale map was prepared it has been extensively used in private conveyancing.[3] Similarly in Australia there is no difference between the plan used to illustrate a Torrens title and that required in an 'old system' conveyance under the 'general law'.

"(4) *The issue to the registered proprietor of a land certificate containing a fascimile of the register and of the plan identifying the land. This land certificate takes the place of the old-fashioned title deeds.*"

2.7 This reveals an anomaly in the English system, which is repeated in the 'duplicate certificate of title' of the Torperis system. In pure theory a land certificate or duplicate certificate of title has no place in registration of title. The register, and the register alone, proves title, and a land certificate does no more than prove the state of the register at the time the certificate was issued; it starts to

[1] D & S 72
[2] Sea 11.11.6
[3] See 7.5.10

become out of date at once and it must always be checked against the register before it on be relied on; that is, in effect, an up-to-date certificate has to be issued each time it is used. Undoubtedly, however, persons accustomed to English law regard the disappearance of the title deed with some dismay; an "almost superstitious reverence for title deeds" was actually mentioned as one of the causes of the failure of the Land Transfer Act 1875.[1] The land certificate appears to be a very necessary palliative; yet, as we have seen, one of the benefits claimed for registration of title is that it gets rid of disadvantages and dangers associated with title deeds, for example, the need to keep the certificate safe because of the damage that can result if it falls into wrong hands. We discuss this in the next section.

"(5) The provision of short simple forms for the sale and mortgaging of the land which a layman can readily understand."

2.8 This is how the 1953 version of the pamphlet read but a later version altered "which a layman can readily understand" to "which can be readily understood" and added: "The fact that these forms are so easily comprehensible, however, must not be read as an encouragement to laymen to attempt to handle their own conveyancing transactions, for there are other considerations in any dealing concerning land which require expert knowledge." The amendment is disappointing but not surprising, for this is the point we tried to make in Chapter 4 when we mentioned the problems which often beset a land transaction, quite apart from proving title. Nevertheless registration of title not only makes investigation of title unnecessary and relieves the lawyer of his hardest work and his greatest responsibility, but it also enables the contract for sale (if indeed a contract is necessary) to be confined to live issues affecting the enjoyment of the property;[2] the vendor need no longer keep the matter open while his legal advisers ascertain whether or not special stipulations as to the past title and the identity of the land are required, nor has the purchaser any risk of having foisted on him an imperfect title, such as would cause trouble when he comes to sell or mortgage. Even the actual instrument of transfer is greatly simplified;[3] the registry form contains no recitals and its purport is easily understood, though this makes little difference to the layman who, relying on his legal adviser, will not try to understand it in any case. All this, however, results in reduced costs, since the solicitor has to do less work, though in England the fee which the solicitor charges is not reduced as much as might be expected.[4] Lastly, if a mistake is made in the instrument submitted for registration it is normally detected at once by the Registry and can be rectified forthwith while all the parties are available; in unregistered conveyancing such a mistake may be unnoticed for years and may cause much

[1] *Osborne Morgan's Committee Report* (1879) v
[2] See 4.7
[3] See 4.5.3
[4] At the time of the abolition of the statutory control of solicitors' conveyancing fees in 1973 the vendor and purchaser each paid his solicitor £30.00 on the transfer of unregistered land value £1,000. If the land was registered this fee was reduced to £22.50 but the purchaser also had to pay £2.60 Land Registry fee. If the value of the land was £10,000 the unregistered fee to the solicitor was £105.00 and the registered fee £62,50, with £24 added for the Registry. Solicitors, however, may now charge what the job is worth according to the work actually done.

difficulty when at last it is discovered, particularly if by then one of the parties is dead.

"(6) The provision of office copies and official searches whereby a prospective purchaser, mortgagee or lessee, without visiting a regional office of the Land Registry, can obtain exact knowledge of the state of the register of title and also obtain priority for his transaction over all others."

2.9 This is the service which should make a certificate of title unnecessary. The official search (which in the English Land Registry can only be made with the authority of the registered proprietor) provides up-to-date information on what the register contains and can be used to prove it. The special English provision whereby priority is assured for fifteen days to the applicant who obtains an official search has been copied in some other registries but as a general rule has been found to be unnecessary.[1]

2.10 The Land Registry pamphlet used to end by stating: "Registration of title is the only method known to civilization by which the State can secure that its chief asset, the land, may circulate among its subjects speedily, simply, cheaply, and with safety." But this has now been modified to read: "Today most progressive countries in the world recognize that the system of registration of title (or, alternatively, a system of deeds registration, such as obtains in many European countries), is desirable to give full protection, at business prices to persons dealing with land. Undoubtedly registration of title is the better method of the two and by means of it the State can secure that its chief asset, namely, the land, may circulate among its subjects speedily, simply, cheaply, and with safety."[2] Thus a very necessary concession has been made to the deeds system, for the dogmatic assertion that only registration of title can secure effective land dealing is of the same order (and as manifiestly exaggerated) as the assertion that only a registered title can confer security of tenure, on which we have already commented.[3] No case is ever strengthened by being overstated.

3 Advantages of registration of title to developing countries

3.1 The English list of essential features and characteristic advantages adequately presents the arguments for the adoption of registration of title as an improved conveyancing device in any country where English conveyancing procedure, or an adaptation of it or even a process similar to it, is being practised. This includes not merely countries like Australia and the United States but also those developing countries which, formerly administered by Britain, have received English land law and imitate English conveyancing in some localities, though much land may still remain subject to customary law. In former French and other colonial territories an analogous position arises, with a clear-cut distinction between granted land and land held in customary tenure. In all countries where there is already an established conveyancing procedure, the case for the introduction of registration of title must largely rest on such arguments (though of course financial, and even political considerations may well be

[1] See 17.9
[2] HM Land Registry *Registrailon of Title to Land* 8
[3] See 1.5.4

overriding factors). These arguments, for convenience, can be recapitulated and marshalled under four heads:

(1) CONTINUOUS FINALITY OF THE REGISTER

3.2 The register at all times shows 'the legal situation of the land', thus abolishing the retrospective examination of title and with it the need to keep title deeds. It not only secures the ownership of the land but it also safeguards subordinate or derivative interests such as the right to use land belonging to someone else, either exclusively by leasing it, or in some particular way, for example, by collecting certain produce from it or by exercising a right of way over it. This certainty of title is also the feature which makes land a reliable security for credit, though it should not be assumed (as it sometimes has been in developing countries) that a registered title automatically enables a loan to be obtained. The loan will still depend on the value of the land and the availability of credit and, as always, to a large extent on the credit worthiness of the borrower; but at least it will not be withheld because of unsound title.

(2) UNAMBIGUOUS AND BRIEF DEFINITION OF THE LAND

3.3 We discussed boundaries and maps at length in Chapter 8, and we need only mention here that topographical maps prepared from aerial photograpilest (or even the aerial photographs themselves) can be used in the same way as the British Ordnance Survey map, if physical features marking boundaries in length exist on the ground and are visible from the air.

(3) SIMPLIFICATION OF CONVEYANCING

3.4 We have seen how registration of title simplifies conveyancing in England, though its technical advantages will not be apparent to the layman since virtually all conveyancing is done by lawyers; even the reduction in cost may be overlooked, for the fee still appears very substantial. Indeed the advantages will not be very obvious to anyone whose experience is confined to England, for only a visit to a land registry in such a place as Kuala Lumpur in Malaysia, or Khartoum in the Sudan, will show how, even in capital cities where property values are extremely high, registration of title can make conveyancing simple and safe without professional legal assistance. This point is even more important in rural areas where there are holdings of such small size and value that they could not carry the cost of professional conveyancing but none the less require security and simplicity in dealing. Rural registries in Kenya are a notable example; a registry like that at Kiambu is a hive of activity, thronged with landowners and would-be landowners who are advised and assisted by the registry staff in the conduct of their affairs.

3.5 Particularly striking confirmation of the importance to smallholders of local registries of title is to be found in Ireland where the Local Registration of Title (Ireland) Act in 1891 established a central registry of title in Dublin and local registries in each county. By that time the Land Purchase Acts had enabled tenant farmers, by means of loans from public funds, to purchase the freehold of their holdings and it was clear that "unless a suitable system of title registration were provided without delay, the titles to these small holdings would become seriously

confused".[1] Registration under the Registration of Deeds Act (Ireland) 1707 was considered quite unsuited to their needs, and the Attorney-General remarked in introducing the Bill:

> "The result of my study [of registration of deeds] and of my practical experience is that it would be an incalculable disaster to purchasing tenants if they were left under the present system of registration. The object of this Bill is to develop and localise throughout Ireland a system of registration of titles as distinguished from registration of assurances, similar to that which has been in operation with great success in the colonies. Then my proposal is to absorb the present system of recording of titles into a general system of registration, compulsory as regards tenant purchasers, but optional as regards others, and to localise it by having an office at a moderate distance from every holding."[2]

The Sana requirements of compulsory registration became applicable in respect of the title to houses bought or built under the Small Dwellings Acts and the Labourers Acts. The reasons for the introduction of the Local Registration of Title (Ireland) Act 1891 should indeed be of great interest to those many countries concerned with the establishment or preservation of title for small proprietors.

(4) PROVISION OF OFFICIAL CERTIFICATE PROVING REGISTRATION

3.6 It is under this beading that the important question of the issue of 'land certificates' (or 'certificates of title') is likely to be discussed when establisliment of registration of title is contemplated. We have already mentioned the "alimost superstitions reverence for title deeds" in England, and it is very dirficult to persuade any administration influenced by English law and conveyancing that a registered proprietor does not require some form of land certificate, even though such certificates are not to be found in the Continental systems of registration of title (e.g. in Germany and Switzerland).

3.7 The very essence of registration of title, however, is that it is the entry in the register, and only the entry in the register, which proves title. "The cardinal principle of the statute is that the register is everything", said the Privy Council of the New Zealand Torrens statute,[3] and if the register is everything, the certificate must be nothing. Yet in the Torrens system great emphasis is laid on the duplicate certificate issued to the proprietor; the original grant (or the certificate showing a subdivision from an original grant) is prepared in duplicate, one constituting the register and the other being issued to the grantee. He regards it as his title deed, though it cannot possibly be more than evidence of what was on the register at the time it was issued; if used at a later date, it must be examined against the register and certified up to date. In fact a duplicate certificate of title, like a land certificate, even when brought up to date, shows no more than does a certified copy of the register, which is just as effective, both legally and practically.

3.8 The strongest argument which is made out for a certificate of title is that it is valuable for the prevention of fraud, since failure to produce it (or say where it is) at once alerts the Registry; but in fact when reliance is placed on the certificate, rather than on identification of the proprietor, the certificate can be used for fraud

[1] *Lowry Committee Report* (1967) 7
[2] Ibid 8
[3] *Walmiha Sawmilling Co. Ltd v. Sualime Timber Co. Ltd* (1926) A.C. 101 at 106

if it is stolen or otherwise gets into wrong hands. In the next chapter we give several examples of forgery which would not have been possible if, instead of reliance on a land certificate, there had been identification of the parties. Baalman in his Singapore commentary remarks (oddly enough merely to support the need for care in looking after certificates of title and not with any idea of suggesting their discontinuance):[1]

> "History shows that the ability to produce, or to control the production of, the duplicates of registered instruments, is probably the greatest factor in the prevention of fraud. In practically every case which has come before the courts the wrongdoer has been some trusted agent of the proprietor, or some other person who has improperly gained access to the documents of title. The forger who is not in that category is wasting his time."

Thus it appears that the duplicate which is "the greatest factor in the prevention of fraud" is nevertheless indispensable if forgery is to be committed. How much safer it is if the duplicates have no significance other than to prove what was registered at the time they were issued!

3.9 There is another reason for not giving the certificate a special significance beyond merely proving an entry in the register. If its production is obligatory before the register can be altered, it can itself be used as a pledge to secure a loan. Any moneylender, no matter what the law says, will have a hold over a proprietor who has handed over his land certificate. This may be undesirable in developing countries where special provisions are needed to safeguard the interests of unsophisticated proprietors. If, however, the certificate is regarded (in law as well as in practice) merely as proof of what was recorded in the register at the time the certificate was issued, and such a certificate can be obtained at any time, then it can serve no other purpose than to prove the entry which alone is proof of title, Yet, curiously enough, this will be argued as a disadvantage, since a land certificate capable of being pledged is considered a convenience to secure, for instance, a bank overdraft without the need of executing a formal charge; in other, and plainer, words it enables the register to be bypassed.

3.10 But there is no need to breach the fundamental principle of registration of title in this way. Provision can easily be made to enable bank overdrafts to be secured merely by a notice on the register, thus complying with the basic requirement that only registration affects interests in land (with the exception, of course, of such interests as are declared to be overriding).

3.11 Experience has in fact shown that the land certificate does not really play an essential part in a system of registration of title. In the Sudan, for example, land certificates, much on the English model, were issued in Khartoum in 1914, but nobody appears to have bothered about their production on a dealing; thirty years later they had almost disappeared and it was extremely difficult to find one; even landowners who were used to European systems of conveyancing had become accustomed, like everybody else, to rely on a certificate of official search to prove title for any purpose.

3.12 Furthermore, where there is systematic and compulsory adjudication, the mass preparation of certificates of title can be a waste of paper and effort. Thus in

[1] Baalman Singapore 47

Kenya 9,190 certificates of title had been prepared by 1922 under the Land Titles Ordinance 1910 in respect of titles in the coastal strip, but 2,000 were still uncollected in 1933 and 770 remained unclaimed thirty years later.[1]

3.13 Nevertheless, when the question of individual title and registration was under consideration in the Central Province of Kenya, there was a very strong demand for 'title deeds'. This was the way European title appeared to be proved, and administrative officers and others were sure that registration of title without a document of title would be meaningless and certainly would not satisfy the people. It was therefore resolved to compromise. It was provided that issue of the certificate of title should be a voluntary matter. If a landowner wanted one, as the administrative authorities were certain he would, he could have one on the payment of a small fee, but he would not get one unless he demanded it. This at least saved the automatic preparation of a huge number of certificates for people who did not immediately want them, whilst at the same time it satisfied anyone who really did want a certificate. This voluntary system was later adopted in Guyana.

3.14 Unfortunately, however, it was not perceived that an official certificate of search can be couched in the same form and be just as impressive in appearance as a certificate of title, since it shows exactly the same thing, namely, the state of the register at the time of issue. It is useful to a proprietor because it gives the official name and number of his land, thus enabling its register to be easily found; it is also a valuable — indeed essential — safeguard against official mistake (or worse) because it would enable any improper alteration of the register to be challenged (which might be difficult without evidence to show how the register previously read). It is only when the law requires the certificate to be produced whenever there is a dealing (with a great to-do if it is not) that it then assumes an undesirable significance and makes dealing 'off the register' possible in a manner which might well make a Government pause before introducing registration of title into an area of customary tenure.

3.15 The simple remedy is to omit any such requirement from the law (as has been done, for example, in the Land and Title Ordinance 1968 of the British Solomon Islands Protectorate) and to make provision for the issue, whenever applied for, of 'certificates of registered title' as evidence of what was registered at the time of issue. "But there is no need to dramatize such an evidence and claim that it is necessary for all transfers and other important transactions concerning land and that it must be produced to be destroyed in case of transfer."[2] Nevertheless, a word of caution is needed. If certificates of title have in fact been built up to play the part of title deeds, it can be argued that an unscrupulous proprietor, having sold his land but retained his certificate, might then use the latter to 'sell' his land again to a gullible buyer. But of course the 'buyer' would have to be so gullible that he did not propose to use the Registry at all. We might suggest indeed that the only persons really likely to be 'defrauded' are

[1] See Lawrance Mission Report (1966) 72 para 258
[2] Larsson 'Land Registration in Developing Countries' 11 World Cartography (United Nations New York 1971) 33 at 46

moneylenders and merchants who accept certificates as security for money owing to them.

4 Registration of title as a means to improve land law

4.1 There is an even more compelling argument for the introduction of registration of title than falls under any of the four subheadings in the last section. Registration of title, with the simple substantive law we advocate, can be used to replace English land law which, as we have seen,[1] was quite unsuitable for export, though the usual formula in British colonial territories was to apply "the common law, the doctrines of equity and the statutes of general application which were in force in England on such-and-such a date". This 'cut-off' date varied; for example in Ghana the date was 1874, in Nigeria 1900, and in Tanganyika 1920. In Kenya there was a variation; the basic land law was the applied Indian Transfer of Property Act 1882 (a much simplified version of the Conveyancing Act 1881) and other Indian Acts were also applied; this body of law was supplemented by local enactments, while English common law as it was in 1897 was left to fill the gaps where other laws were silent.

4.2 The effect of freezing English law in this manner has been particularly adverse in the sphere of land law, since the far-reaching reforms of the 1922-25 legislation are excluded, and it is now no easy matter to ascertain the law at the 'cut-off' date.[2] Even text-books of the appropriate vintage are no longer available. In any case this law generally applies only to land granted by the Government, and in many countries wide areas are held in customary tenure under customary law which itself may be uncertain, particularly where dealing is developing and the customary law is not keeping pace with it.

4.3 Dowson and Sheppard said firmly that "registration of title is a system of record and not a new substantive land law".[3] Also it has always been claimed for the English system that it is procedural or adjectival and that it in no way interferes with or alters substantive law. But nevertheless registration of title can, and indeed Torrens intended that it should, be used to get rid of much of the obscurity and complexity inherent in English land law. Title registration is therefore a process which is particularly needed in those countries where it is necessary to unify the law applying to titles granted by Government in the days of colonial rule and those titles which have developed under customary law (or in spite of it). Where there is dealing in land it is desirable, for the reasons we elaborated in Chapter 2, that it should be organized and regulated. Registration of title is the ideal means for this purpose, whether the title stems from Government grant or from customary tenure, and whatever the policy may be. We should, however, remind our readers that registration of title is not itself a policy; it is merely the instrument by which a policy can be effected.[4] It is just as possible, for

[1] See 3.1.6

[2] Barbados is an interesting example. The date of reception of English law is 25 February 1628. Thus the Statute of Uses 1535 and the Statute of Limitations 1623 are applicable, but not the Statute of Frauds 1677 (which required contracts for the sale of land to be in writing) and this therefore had to be the subject of specific enactment.

[3] D & S 72

[4] See 1.1.2

example, to conserve ‘group ownership’ under it, as it is to recognize, or even encourage, ‘individualization’.[1] But what should be avoided, once dealing of any sort begins, is the uncertainty which results from failure to provide the requisite background law, and so inevitably leads to dispute. In Book 2 we give full details of how a registration statute can provide the necessary substantive law, suitable for all title whatever its source.

5 Registration of title as an instrument of Government

5.1 Dowson and Sheppard, in a list to which students have long been referred, set out nine benefits which registration of title confers “when competently established and efficiently operated”. They concluded with the following: “The administration of every public service and every branch of national activity connected with land is greatly assisted in the execution of its work by the existence of an up-to-date and unimpeachable map and record of landed property throughout the country.”[2]

5.2 This introduces an aspect of registration of title not contemplated by the English system, which so jealously guards privacy.[3] In England even in the fiscal field, “Government Departments and local authorities may not use the register as a basis for assessing or collecting rates and taxes in the manner commonly allowed, for example, in other parts of the British Commonwealth, nor can they succeed in obtaining any evidence whatever from the Land Registry to any greater extent than is allowed in unregistered conveyancing.”[4]

5.3 Yet a register of title can be made to give useful assistance in the collection of rates or land taxes. For instance, in Kenya the Registrar may not register any instrument of transfer unless there is a certificate that all rates and taxes (and

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[1] 2 See 12.6.4—8

[2] D & S 72. We think our readers may be interested in the other eight benefits. We list these below (together with our brief comments in brackets):
“(1) An inspection of the register shows, at all times, the legal situation of the land. Consequently any person dealing on the evidence of the register need have no fear of ejectment. The registered proprietor, and he alone, can dispose of his rights.” (This is the first and unique characteristic of registration of title.)
“(ii) All dealings in land can be effected with security, expedition and cheapness.” (Simplification of conveyancing was our third principal merit.)
“(iii) A registered proprietor can borrow money quickly, easily and cheaply on the security of his land.” (This is merely one aspect of improved convcyancing; registration will not necessarily enable money to be borrowed.)
“(iv) Litigation over land is greatly reduced.” (This results from (i) above.)
“(v) Absentee landlords and reversionary beneficiaries need have no fear that they will lose their rights.” (This may not always be regarded as a benefit; we believe that prescription should operate against absentees. See 8.12.)
“(vi) The acquisition and holding of land by small proprietors is greatly facilitated.” (See para 3.5 above.)
“(vii) Complete protection is given to persons who have restrictive rights over land, e.g. a right of way, or water, etc.” (This is merely an amplification of (I) above.)
“(viii) Absolute security is given to creditors who lend money on the security of the land.” (This again is merely an aspect of improved conveyancing, though it is a good thing to emphasize that registration benefits the lender as well as the borrower, a point not always remembered by the latter.)

[3] See 3.18

[4] C & R 30, referring to Land Registration Act 1925 ssll2 and 129

Government rent, if any) have been paid.[1] In Malaysia, where rent to Government has to be paid in respect of every parcel of land, the register of title is also a rent-roll. There is, however, no reason to suppose that the assessment and collection of rates and taxes is made any less efficient or more difficult in England and the United States by the fact that such registers of title as exist have no connection at all with rating or taxation. On the contrary, there is considerable force in the argument that it is unwise to mix up registration of title with taxation.

5.4 Similar considerations apply to physical planning or replanning and to 'land reform' (as the adjustment of the proprietary structure is usually called). The English register of title does not show areas, and nowhere do registers of title, as such, show type of development and value of land and buildings or other information required to draw up a scheme of redevelopment. We must be careful not to attribute to registration of title features characteristic of cadastre and cadastral survey (which we discussed in Chapter 7). A register of title will not even necessarily reveal who is in actual occupation of land, for it will not show short-term tenants.[2] Nevertheless, if anomalies are to be avoided, an up-to-date record of ownership is prerequisite to the implementation of any scheme of land redistribution or change in the pattern of land use. A register of title if complete and public is a useful base to start from; indeed, if no such register exists it must be specially prepared.

5.5 It is, however, where there is customary tenure in developing countries that it is specially important, as a matter of public policy, to have a system of registration of title ready for application to areas where it is needed. Not only will it stimulate and facilitate a market in land rights (so necessary to economic progress), but also, more important, it will enable that market to be organized and controlled when it begins to develop on its own, as it rapidly does when land begins to acquire an economic value and ceases to be as freely available as air, though still just as indispensable to human existence.[3]

5.6 Unless some form of registration is introduced when dealing starts in areas of customary tenure, there will inevitably grow up methods of private conveyancing which will almost certainly be inefficient and will bring in their train all the misfortunes that flow from uncertain title. Registration of title is an essential tool of administration which every developing country should have available, ready for use wherever needed; no other system, not even a good deeds system, can be an effective substitute where land dealing is developing in areas of customary tenure. Simple and efficient machinery is essential for the safe transfer and transmission of interests in land. Unless such machinery is provided vague and contentious agreements for sale (written and unwritten) proliferate, and, where sale is still contrary to customary law, a clandestine market in 'improvements' develops or landholders resort to some legal fiction such as the sale of powers of attorney.

5.7 In these circumstances the only really sensible solution is the immediate introduction of a simple and secure system of registered conveyancing. Private

[1] Registered Land Act 1963 ss6 and 86A
[2] Short-term tenancies (and occupation tenancies generally) are 'overriding interests'.
[3] See 1.6.1

conveyancing, even with the assistance of registration of deeds, will not serve the purpose; nor indeed is it practicable in the general absence of a suitably qualified legal profession, which in any case the available business is unlikely to be able to support. The initial opportunity to introduce registration of title must be recognized and seized; only in this way can an eventually painful and costly conversion from registration of deeds to registration of title be avoided.[1]

6 Obstacles and objections

(1) EXISTENCE OF AN EFFECTIVE SYSTEM OF DEEDS REGISTRATION

6.1 It is obvious that the more effective the existing system of deeds registration, the less likely will there be any disposition to change it. We have seen how the Scottish Register of Sasines was for long considered to be just about as efficient as registration of title, and how the Reid Committee postulated four conditions which must be fulfilled by any system of registration of title if it were to be preferred to the existing system of registration of deeds.[2] In Chapter 6 we set out these four conditions and commented on them against the Scottish background, but, reduced to general terms, they are worth repeating as being valid whenever the substitution of registration of title for registration of deeds is contemplated:

(1) The new system must have all the merits of the existing system.

(2) It must, at least in the long run, offer substantial advantages over the existing system.

(3) It must be so designed that it is possible to introduce it without dislocating business during the transitional period.

(4) Its introduction must not be excessively expensive or cause dispute.

(2) OPPOSITION OF THE LEGAL PROFESSION

6.2 Lawyers, the world over, are notorious for their reluctance to accept even the smallest changes in their traditional procedures. This is not necessarily based on self-interest, and we have already mentioned how Torrens, who was opposed tooth and nail by the legal profession, nevertheless felt constrained to quote a more worthy reason for their conservatism.[3] Dickens was not so kind. “The one great principle of the English law”, he wrote, “is to make business for itself. There is no other principle distinctly, certainly, and consistently maintained throughout all its narrow turnings.”[4]

6.3 Yet the very complication of the law which calls for amendment is one of the chief obstacles in the way of making that amendment. The whole subject is such a mystery to laymen that, though they know something is amiss, they do not know how to devise a remedy. “Those who make the shoe do not feel it pinch, and those who feel it pinch do not know how shoes are made.”[5]

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[1] H W West ‘The Role of Land Registration in Developing Countries’ 102 Chartered Surveyor (November 1969) 213

[2] See 6.5.10

[3] See 5.2.1

[4] Charles Dickens Bleak House Ch 39

[5] Pollock The Land Laws 4

6.4 As we suggested in Chapter 5, some encouragement, even inspiration, can be derived from the fact that Torrens, himself a layman, overcame the opposition of the lawyers in South Australia; but his story is exceptional. it takes a diamond to cut a diamond, and in most countries registration of title has, as a rule, owed its introduction to the efforts of a lawyer, handicapped as he may have been by the active opposition of the practising members of his profession; and passive opposition may be even worse than active, which at least either wins or is defeated. Passive opposition is more insidious; it can stultify progress. Not a few statutes have withered on the vine after receiving a welcome from practitioners which proved to be merely lip-service or even 'the kiss of death'; other statutes have had built into them a procedure so long-term as to make progress almost imperceptible; such statutes certainly offer no danger to established practice, and so tend to be acceptable to the legal profession, but they do not really achieve the objective; they merely swell the list, if not of failures, at least of 'non-successes'.

(3) IGNORANCE, APATHY, AND APPREHENSION OF LANDOWNERS

6.5 The early belief of advocates of registration of title that its merits would induce individual landowners voluntarily to seek its application to their land proved unrealistic even where an effective system had been introduced and a registered title was available for the asking.[1] Where no system exists, it is obviously very difficult to generate a demand for it among landowners who are likely to regard it as too technical for them to understand, particularly if they are wont to rely on legal advisers who probably show little or no enthusiasm for it, if indeed they do not actively oppose it. At best, these legal advisers are likely to exaggerate the complexity of the new law that will be required, perhaps even persuading their clients that a simple law, on the lines advocated in Book 2, will not in fact be adequate.

6.6 In any case there is likely to be a fear (not always ill-founded) that Government will use the information it acquires for purposes such as taxation or compulsory acquisition which, however beneficial to the State as a whole, are scarcely welcome to the individual citizen when he happens to be a landowner. He may even be difficult to convince that systematic land registration will at least spread the load equitably.

6.7 People are always extremely sensitive with regard to their interests in land. Anything which touches them as closely as registration of title will probably be viewed with suspicion, or even with open hostility, for at the very least it will mean the loss of clan or family influence when individual ownership is recorded. 'Individualization' may be developing spontaneously, but registration of title formalizes it, and may indeed encourage it, even though specific provision can be made to retain family ownership.[2] This point is more fully dealt with in Chapter 12; here we need only stress, once again, the importance of applying registration of title only to areas which have been carefully selected as being ripe for it. The fact, however, that sections of the community will not at once welcome registration of title (which, indeed, may be unnecessary in their particular area) should not deter Governments from enacting the necessary legislation so that it

[1] See 3.13.3

[2] e.g. Lagos Registered Land Act 1965 sll(3)

can be applied when and where it is needed. There can be few countries in which it is not needed somewhere, at least in the principal towns.

(4) COST, DIFFICULTIES, AND DRAWBACKS OF INTRODUCTION

6.8 Under this heading we can examine the reasons which make some Governments reluctant even to enact enabling legislation, let alone to apply it extensively when it has been enacted.

6.9 Registration of title unquestionably does more than registration of deeds but it also costs more, and not only in initial compilation; its subsequent maintenance involves greater responsibility and so demands more reliable staff. A Government may be reluctant to face the cost, or to accept the responsibility, for it is not until registration of title is well established in areas of plentiful dealing that it can be made to pay for itself; inevitably new registries are likely to show a loss. It may, in fact, be difficult to find staff of adequate calibre at the sort of salary justified by the amount of work available, particularly if there is extensive decentralization.[1] On the other hand, it can be argued that a titles register and the cadastral survey accompanying it will provide a welcome and constructive occupation in these days of advancing education when the employment of school leavers is often a substantial problem.

6.10 Registration oltitle may, however, appear to be a technical matter not only of some complexity but also of relatively low priority when Governments are considering their programme of development, and it has not been adopted nearly as widely as might be expected. The fact that so many countries do without it may be one of the most telling arguments against introducing it, for there is a formidable list of countries which use English land law or have been subject to British administration but which have not adopted registration of title. The United States of America heads this list. In West Africa, though many of the former British territories have serious conveyancing problems, only a small area of Lagos has registered title. Title in the rural areas of India and Pakistan rests on their fiscal records, whilst their towns make do with an old-fashioned deeds register. All these countries, and many more, seem to have found difficulties and drawbacks which have dissuaded them from adopting registration of title; or at least the case for registration of title has not been presented with sufficient cogency to persuade them to adopt it, though since the days of Dowson and Sheppard there has been much endeavour to spread the system they so vigorously advocated.

7 Conclusion

7.1 We should not end this chapter on this depressing note of failure. Instead, we offer the following reasoned and powerful argument:

> "As an institution a system of land registration must stand or fall on the service it provides to the State, to the local community and to the individual landowning member of society. The idea that it is merely a sterile and technical exercise must be dispelled. Instead it must be recognized as a social and economic service, part of the administrative infrastructure so necessary for the developing of an increasingly complex economy.

[1] See 16.3

> "It may be argued that experience to date in introducing registration of title to developing countries has not been encouraging; that existing systems are faltering and do not warrant the expenditure they entail; or that a titles register is too sophisticated an institution for operation in a developing country at the present time.
>
> "But what alternative do we have, except confusion in land affairs? In Ghana and parts of Nigeria we have a foretaste of what might happen should newly evolved and negotiable property rights be permitted to be smothered under a welter of conflicting legal concepts and litigation. We must not be too discouraged by past failures, but must learn from bitter experience. In our present state of knowledge, registration of title is the best we can do to provide stability, security and clarity in land ownership and a basis for the structural and physical planning of the future."[1]

7.2 The question is not whether registration of title can be afforded, but whether any country which recognizes private ownership and allows dealing in land can afford to do without it, because there is no other system which, "when competently established and efficiently operated"[2] makes the creation and transfer of interests in land so simple, quick, cheap and certain, or which, if such be the policy, makes possible the control of transfer and other dealings. This is incontrovertible.

[1] H W West 'The Role of Land Registration in Developing Countries' 102 Chartered Surveyor (November 1969) 212
[2] D & S 72