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CHAPTER 11

COMPILATION OF THE REGISTER

1 Prefatory

1.1 Registration of title has so many advantages over other systems of land registration, including even the best deeds system, that there can be little doubt that we should choose it as the best method yet devised for proving title to land and enabling us to deal in it if only we had a clean sheet and could make a free choice. But unfortunately we never do have a clean sheet when the introduction of registration of title is contemplated. Obviously in any but a completely uninhabited country there is always some system of land holding already in existence, and so we are faced with the task of ascertaining title before it can be registered. Compiling the register is the real difficulty; maintaining it once it has been compiled is simple by comparison.

1.2 The objective should be to compile a complete register of all land, public as well as private, showing the ownership of every parcel and any limitation or restriction to which that ownership may be subject. The process of compilation must be suited to existing title, and the situation differs enormously not merely from country to country, but very often from place to place within the same country. Title may originate from different sources, such as official grant or occupation under customary law; it may be based on documentary or oral evidence or even merely on uncontested possession.

1.3 Even where there is documentary evidence of title there is wide variation. At one end of the scale, where a deeds register has been well kept, the introduction of registered title may involve no more than a change in the form of an existing record; at the other end, with only a poor deeds register or perhaps no register at all, careful and skilled examination of a chain of documents may be necessary before a title can be safely registered. There may not even be a chain but merely odd documents that can differ greatly in content and effect, and it may be specially necessary to bear in mind Dowson and Sheppard's warning that "great care should be exercised in admitting the validity of documents uncorroborated by independent records or in conflict with the consistent testimony of accredited local witnesses. The fabrication of specious documentary evidence presents no great difficulty and is the obvious expedient of an unscrupulous claimant."[1]

1.4 Where there is no documentary evidence of title there is an equally wide variation, ranging from the situation in which individual title is fully recognized by written law and the title-deeds have merely been lost or destroyed, to the situation where individual ownership may be as yet imperfectly understood and barely accepted under a system of customary law, even though it may be official policy to encourage its emergence for economic, social or political reasons.

[1] D & S 97

1.5 Furthermore, the straightforward recognition of existing rights may not by itself be enough, if registration of title is to have the beneficial effect which is claimed for it and which alone can justify the cost of introduction. The pattern of land holdings may be unsuitable for their economic development and to register existing titles unchanged may have the effect of perpetuating that unsuitable pattern. Replanning and, in particular, the consolidation of fragmented holdings may be essential before or at the time of registration. This is possible only where compilation is being conducted in respect of a number of properties at the same time; that is 'systematically', not 'sporadically'. These two terms dominate the discussion of compilation and it is important to make clear at once exactly what we mean by them.

2 Meaning of 'sporadic' and 'systematic'

2.1 Dowson and Sheppard pointed out that, in the early days of registration of title in England and Australia, discussion centred on the alternatives of optional and compulsory initial registration and went on to say that "the critical and decisive antithesis is not between these, but between the sporadic and the systematic compilation of the Register".[1] They expressed the distinction in the following terms:

> "By sporadic compilation is meant any process of defining parcels, of determining rights and interested parties, and of registering these effects, which is applied in a piecemeal manner, now here, now there, to scattered parcels over an indefinite and unpredictable period. It is immaterial if the selection of the parcels to be registered is due to the option of interested persons, to form of tenure or class of land, to compulsion of law on particular events (e.g. sale), or to other originating cause or causes. It is the haphazard nature of the compilation, however occasioned, that is its critical feature. By systematic compilation is meant the definition of parcels, the determination of rights and interested parties, and their registration; in a methodical manner and in orderly sequence, district by district, village by village, block by block, parcel by parcel, throughout the territory concerned."[2]

2.2 We agree that the "critical and decisive antithesis" is indeed between sporadic and systematic compilation but, whilst we favour a systematic approach, we think we should caution against the 'blanket' unselective approach which might be inferred from this quotation. There are, particularly in developing countries, many localities where the suspicion or hostility of the local people makes the introduction of registration of title impracticable. There are other localities where registration of title will serve no useful purpose and to introduce it would only be an expensive exercise in sheer futility; worse still its introduction could bring the system into disrepute, for an unneeded register will not be used, and an unused register can be not merely useless but positively harmful as it gets more and more out of line with reality on the ground. It is significant that the Sudan Land Settlement and Registration Ordinance 1925 was amended in 1947 to make provision for 'Resettlement and Re-Registration', because in some areas the

[1] D&S 93
[2] Ibid

existing register, through disuse, no longer reflected current title, and so impeded new development.

2.3 In any case, even where the need for registration is unquestionable, money and manpower are always limited and, if these are to be used to the best advantage, the careful selection of areas for systematic registration is essential. However great the effort made, registration of title must take many years to complete in all except the smallest countries. It is basically an economic and social service, and therefore it should be introduced only into areas which have been carefully chosen according to a system of priorities based upon economic and social requirements.[1] But within each chosen area complete registration should be effected 'systematically' as quickly as possible by one continuing process, and no parcels should be left outstanding.

2.4 It may be argued, however, that any selective approach is sporadic, since sporadic means "scattered; occurring here and there or now and then",[2] and therefore anything short of the blanket approach must be dubbed sporadic. Yet a process which proceeds in an orderly and methodical manner, even within a relatively small area, may fairly claim to be systematic, and we consider that any process which is effected compulsorily throughout an officially designated area of land is systematic, whatever the size of the area. A purist might call this process 'sporadic', especially if the designated areas are small and scattered, but it is the process that we have in mind when we commend systematic registration, and we regard selectivity as an essential concomitant of that process; it has too often been forgotten.

3 Compulsory, conducive, and voluntary compilation

3.1 Systematic compilation is necessarily compulsory. Registration of all land in the selected area is effected regardless of the wishes of any individual owner; his title is registered whether he wants it to be or not. The "critical and decisive antithesis" between sporadic and systematic compilation is therefore not quite as distinct from that between compulsory and voluntary as we may have made it appear in the last section. As we shall presently see, some of the arguments for and against are the same.

3.2 Sporadic compilation may be compulsory or conducive or voluntary:

(1) Compulsory, where the owner is compelled to take a registered title, even if he does not ask for it. Thus in Singapore, when a deed is presented for registration in the deeds registry, the Registrar has the power to register the title and issue a certificate instead of merely registering and returning the deed.

(2) Conducive, where registration is induced merely because serious disadvantages result from failure to register. The English process known as 'compulsory first registration'[3] is of this type. In 'compulsory areas' a sanction

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[1] See 15.3 for an examination of the factors which determine the choice of adjudication
[2] Chambers
[3] See 3.14

operates against the purchaser who fails to apply for registration.[1] The wise man will register because otherwise the 'legal estate' will not vest in him and his property will become virtually unmarketable; but registration nevertheless requires formal application, and a transferee, through ignorance or inertia or even because of a deliberate acceptance of the risk, can leave his transaction unregistered. He does not 'automatically' receive a registered title, as he does under the Torrens system when Crown land is granted freehold.

(3) Voluntary, where registration is completely optional; a landowner pleases himself whether he asks for registration or not, and he does not suffer adverse consequences if he fails to register, though, of course, he does not gain the advantages which accrue from registration.

3.3 It should be noted that even when initial registration is wholly voluntary, a measure of 'compulsion' (if only of the conducive form arising out of the disadvantage of failing to register) must enter into the maintenance of the register if it is to fulfil the purpose of registration of title; obviously the register will not conclusively show the current state of title unless subsequent transactions are entered in it and are invalid if they are not. Naturally conducive compulsion of this kind is far more effective in a community which relies on professional advisers for land dealings than it is in some areas of developing countries where such advisers are not used and the disadvantages of non- registration are imperfectly understood. In such countries, even where (as for example in Kenya) it is a punishable offence to disobey the Registrar's order to register, unregistered dealing is as difficult wholly to prevent as theft or any other undesirable social activity. In any case the authorities are reluctant to impose penalties; they prefer to encourage registration by relying on administrative propaganda.

3.4 So far as initial registration is concerned, however, more than mere encouragement is essential. The early advocates of registration of title believed that its intrinsic merits would enable it to win its way voluntarily but this soon proved to be unrealistic. We have seen how registration of title only began to make any headway in England when a measure of compulsion was introduced in 1897,[2] and how under the Torrens system in Australia voluntary application has failed to bring in all the 'general law' titles.[3] In the United States where that system is on a purely voluntary basis, it has been almost a complete failure.[4] We can say with some assurance that, without compulsion in its introduction and effective inducement in its maintenance, registration of title will not succeed. The question is not whether there should be compulsion but to what extent compulsion is feasible.

4 Components of compilation

4.1 The register must unambiguously define the parcels of land which are the subject of the record, and it normally does this by reference to a map or plan. It

[1] 2See C&R 222
[2] 3See 3.14.1
[3] See 5.4.4
[4] See 5.11

must also name the owner — State or private person (individual or corporate) — and specify any limitation of the ownership, for obviously the existence of, say, a long lease or a charge to secure a loan so affects the ownership that it must be recorded if the register is to be effective. Thus the initial compilation of a register requires two distinct operations: (1) the identification of the parcel and (2) the identification of the owner and any limitation of his rights of ownership. The former results in the map or plan; the latter in the register itself.

(1) IDENTIFICATION OF THE PARCEL

4.2 Three processes may be involved in identifying the parcel and producing the map or plan:

(i) Demarcation by physically marking on the ground the boundaries of the parcel to be recorded. The boundaries in developed areas are usually, but not invariably, marked by physical features, in length; alternatively, or perhaps additionally, the turning-points on the boundary may be marked by visible 'monuments' (i.e. mark-stones, pegs etc.). Sometimes, however, the boundary is an 'invisible line', the position of which is not demarcated on the ground either by physical features or by visible monuments.

(ii) Indication of the boundary by pointing out to the official concerned its position as demarcated by physical features or by visible monuments or, if it is invisible, where it lies. In this process the owner merely says," Look! There is my boundary."

(iii) Survey of the boundaries and the preparation of a map or plan illustrating them.

4.3 These three processes do not necessarily take place in the same sequence. 'Demarcation' will precede 'indication' if, for example, a pattern of land holding is already established and demarcated by visible physical features; the landowners will be required to 'indicate' (i.e. point out) their boundaries to the officer responsible for identification, and 'survey' will then follow. Or 'survey' may precede 'indication', as in England, where there has already been an official survey of topographical features, producing a topographical map which can be used to illustrate the register because the 'general boundaries' rule is in force. As explained in Chapter 8,[1] this rule dispenses with the need to specify whether the exact line of the boundary is on one side or the other or down the middle of a wall, fence or ditch, and so it enables HM Land Registry to use a topographical map on which the lines, in accordance with normal survey practice, merely represent the centre line of such features. 'Indication' need only take the form of marking by a coloured line on the map the particular physical features which border the parcel. Aerial photographs can also be marked in the same way. If, however, it is desired to record the precise legal position of the boundary, a survey must be effected at the time of 'indication' and, if the parcel is already in

[1] See 8.5.5

existence, the exact line of the boundary must be 'indicated' and surveyed, with the risk of causing needless dispute as happened in England after the 1862 Act.[1]

4.4 On the other hand, where there are as yet no boundaries on the ground as when a parcel is being newly created on subdivision, a landowner may 'indicate' where he wishes the new boundary to go (perhaps by having a sub- divisional plan drawn first); the surveyor 'demarcates' the parcel by emplacing beacons, and then makes a survey, possibly adjusting the beacons to fit a predetermined dimension. But in England, as we have explained, there is no provision for any 'official' survey.[2]

4.5 The process of identifying and mapping the parcels need not necessarily be followed by any process for ascertaining the particulars of ownership; it can be conducted as a separate exercise on its own,[3] whereas obviously the ownership, and any limitation of the ownership, cannot be authoritatively ascertained[4] unless the parcel has been identified. It should be noted that the name of the owner and particulars of any interest affecting the ownership must be ascertained at one and the same time; claims to ownership and claims to subordinate or derivative interests must be considered together if anything relevant is not to be overlooked.

(2) IDENTIFICATION OF THE OWNER AND ANY QUALIFICATION OF HIS OWNERSHIP

4.6 There are three methods by which ownership and subordinate or derivative rights can be established for the purpose of registration:

(i) Registration of Crown (or State) grants.

(ii) Adjudication (i.e. the authoritative ascertainment of existing rights), a process which can be either 'sporadic' or 'systematic'.

(iii) Conversion of deeds registers.

We will consider each of these methods in turn.

5 Registration of Crown (or State) grants

5.1 The nearest approach to a clean sheet in land holding is when the State disposes of land which it considers to be at its disposition by virtue of statute or its own prerogative. In such cases, without any process for ascertaining whether any rights exist, the State grants a title which is absolute (or indefeasible or unimpeachable — whichever word is preferred to denote this particular quality). It is easy enough to provide for a record of such grants when they are first made, and the subsequent operation of the Registry is only a matter of keeping that record up to date by entering all changes in it.

5.2 This is precisely what the Torrens system did. There was no process of initial adjudication in Australia; the Crown did not make a grant on the strength of

[1] See 8.4.7
[2] See 8.11.3
[3] For an example, see the Straits Settlements Boundaries Ordinance 1884
[4] We use 'ascertain' in preference to the more usual 'determine', because 'determine' means 'to put an end to', as well as 'to settle or decide'.

being the registered proprietor, but on the assumption that all land not already the subject of a grant was Crown land. The Torrens legislation provided that as soon as a Crown grant of freehold was made it had to be registered; indeed the Crown grant itself became a 'folio' of the register, for the grant was made out in duplicate, one to be bound into the register and the other to be issued to the grantee.

5.3 All the Torrens statutes in Australia require new freehold grants of Crown land to be automatically registered in this way, but ungranted land does not appear on the register, and so the objective of showing title to all land cannot be attained until all land has been granted in freehold. Nor does the responsible Government department have the advantage of being able to deal with land, on behalf of the Government, by the simple processes available to registered proprietors. There is also, as explained in the next section, a danger in the assumption, without investigation, that land is free of all rights, even if it is apparently unoccupied.[1]

5.4 In short, we do not think that this method of compilation has much to commend it, necessary though it may have been in the circumstances in which Torrens introduced it. Indeed some countries, which otherwise follow the Torrens system, have made express provision for the State to be recorded as proprietor,[2] though in Australia and New Zealand it is still the practice to remove land from the register when the Crown reacquires it.

6 Adjudication: definition and description

6.1 'Adjudication' is the word which is now generally used for the process by which all existing rights in any particular parcel of land are finally and authoritatively ascertained. This is the process which precedes 'first registration' in England and 'bringing land under the Act' in the Torrens system. When conducted systematically, however, it used to be known as 'settlement' because it was first used for 'settling'(i.e. fixing) the amount of land revenue due from a specified area, a process which began in India in 1789 and which entailed the systematic ascertainment of land rights throughout the area specified. It should be particularly noted that its purpose was fiscal; title was only incidental and sprang from the presumption that he who paid the tax was the owner.

6.2 When this process was under discussion in East and Central Africa in the early 1950s the name was changed from 'settlement' to 'adjudication' because 'land settlement' in ordinary English speech normally means settling people on land, while to the English lawyer 'settled land' means land which is tied up with family trusts and is the subject of legislation known as the Settled Land Acts. Thus, rather oddly, 'land settlement' can be said to mean either 'settling families on land' or 'settling land on families'; it would not denote the systematic ascertainment of rights in land, which is what we are discussing.

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[1] See para 6.4 below

[2] For example, s99 of the Sarawak Land Code 1956 reads: "All land in any settlement area to which rights are not established. . .shall belong absolutely to the Crown and shall be entered as such in the Register."

6.3 It is a cardinal principle of adjudication that it does not, by itself, alter existing rights or create new ones. It merely establishes with certainty and finality what rights exist, by whom they are exercised, and to what limitation, if any, they are subject. When it is applied to areas which are held under customary law it will, of course, be necessary to replace customary rights by what is considered to be their equivalent under written law, but the basic principle of adjudication is still recognition and confirmation of an existing right and not the grant of a new one. In Chapter 12 we shall discuss the part which adjudication and registration can play in the development of land held in customary tenure.

6.4 Adjudication, however, is not only needed where registration of the adjudicated rights is intended. It is also needed where Government wishes to grant or to use land deemed to be State land; a process of adjudication should be effected even if the land is apparently unoccupied. If no rights exist, the process will not take very long, for it will be little more than a formality. But if rights are found, it shows how necessary it was to adjudicate, because such rights must be formally extinguished before the land can be taken over; and there must be appropriate compensation, preferably in the form of alternative land, if available, or perhaps by participation in the new use to which the land is to be put. The wisdom of such adjudication can hardly be disputed; yet many examples can be found where deep-seated discontent has resulted from failure to take this precaution.

6.5 Even where there is no provision for subsequent registration of title, examples of adjudication can also be found. For instance, the Quieting Titles Act 1967 in the Bahamas provides an elaborate and very expensive process for the resolution of title by the Court; but though a certificate of title is issued to a successful applicant and serves to facilitate his immediate dealing, there is no arrangement for keeping the record of title up to date. It is as if an angler went to immense pains to unravel a fishing-line from a box containing a tangle of lines and then, having used the line, threw it back into the same box to become tangled up again. The official ascertainment of title without making provision for its subsequent registration and maintenance is not a process we can commend. It is only sensible to provide a suitable receptacle in which to keep the line once it has been untangled.

6.6 Another example is the Facilities of Titles Act 1955 in Jamaica which provides a special process whereby a smallholder without satisfactory documentary title can obtain a certificate of title which is acceptable under the Registration of Titles Act, though he is not required to register it if he does not wish to do so.

7 Sporadic adjudication

(1) 'FIRST REGISTRATION' IN ENGLAND

7.1 In England, when registration of title was introduced, it was many centuries since the land had first been occupied; title had long ago ceased to be traceable back to Crown grants, and so it could not be based on the original grant as it could under the Torrens system in Australia. Each title had to be examined

and assessed on its own merits before it could be registered. At first too high a standard was required and this was one of the reasons for the failure of the 1862 Act[1] (though in any case whilst registration remained wholly voluntary it was unlikely to succeed).

7.2 However, HM Land Registry have now worked out an effective system for the process which they usually refer to as 'first registration'.[2] "In considering or deciding whether a title that is submitted to him is eligible for the best class of registered title, the Chief Land Registrar does not seek to discover whether the title is entirely unimpeachable in every way, because few titles are of that fine quality. The test is, rather, whether the title is a sound holding one. If, on examining a title, the Chief Land Registrar is of the opinion that it is open to objection but is nevertheless a title the holding under which will not be disturbed, he has a very wide discretion to approve of it."[3] In the case of land parcels of low value he may rely entirely on the certificate of a solicitor that he has investigated the title on behalf of the applicant and that he believes the conveyance validly conveys what it purports to convey.[4]

7.3 The Chief Land Registrar may refer titles of exceptional difficulty to a conveyancing counsel and act on his opinion.[5] The examination must be conducted in the manner prescribed by law and certain precautions are laid down in the way of notices to be served and advertisements to be published. There is provision for appeal to the High Court. But even with this imaginative approach, registration remains completely haphazard and sporadic, and nowhere, not even in London after nearly seventy years of compulsory registration, can we find any district that can be regarded as an area where all land has been registered.

(2) 'BRINGING LAND UNDER THE ACT' IN THE TORRENS SYSTEM

7.4 There has been similar sporadic investigation of title in Australia under the Torrens system in respect of land granted before that system was introduced. But the process there is even less satisfactory than it is in England, the difficulty being how to bring in grants made before the introduction of the system which, as Torrens pointed out, "owing to the frequent trafficking in land prevalent in the new countries, are already involved in complications as intricate as those which clog the average English estate".[6] The problem was to bridge the gap between the original grant and the latest deed, while at the same time making sure that there would be no gap in respect of subsequent dealing. When his system was introduced the colonization of Australia was still comparatively recent. The task

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[1] See 8.4.8

[2] Hogg listed six different expressions used in the English Acts and Rules to denote the operation of placing land on the register for the first time: (1) registration of the land, (2) registration of the proprietor of the land, (3) registration of the title to the land, (4) entry of the land on the register, (5) entry of the proprietor on the register, (6) first registration (Hogg *Ownership and Incumbrance* 44).

[3] C&R 296

[4] See Land Registration Act 1925 s144(1)(xiv); Land Registration Rules 1925 r29

[5] See Land Registration Rules 1925 r26

[6] Torrens *South Australian Registration of Title* 22

of investigating title should not have been so very difficult as there were good deeds registers to work from, but conversion of 'old system' titles was made a voluntary matter and to this day, over a century later, no Australian State has succeeded in completing the task, though South Australia is coming near to it, having adopted the New Zealand process of compulsion we describe in paragraph 11.2 below.

7.5 "In my view", wrote the present Chief Land Registrar at HM Land Registry after spending six months looking at the Torrens system in Australia and New Zealand, "in some jurisdictions, far too much fuss is made about the process of bringing land under the Act or, as we call it, first registration. In the usual course of events there are lengthy advertisements, a multitude of inquiries, vexatious requisitions, costly surveys, and a meticulous and pessimistic scrutiny of every deed and event on the title covering a very long period, perhaps 100 years or even longer."[1] He went on to point out that public money would be saved if less energy were devoted to this examination and more reliance were placed upon the skill and integrity of the lawyer who makes the application.

8 Systematic adjudication

(1) DEVELOPMENT AND SPREAD

8.1 The alternative to sporadic adjudication is, as we have said, the process whereby throughout an expressly designated area all the land rights, both public and private and whether or not they amount to full ownership, are authoritatively ascertained in one operation by an officer specially appointed for the purpose. We emphasize again that the process does not, by itself, alter existing rights or create new ones. It merely establishes with certainty and finality what rights exist, by whom they are exercised, and to what limitation, if any, they are subject.

8.2 This sort of systematic ascertainment of rights in land was called 'land settlement' in the Sudan where the very first ordinance[2] to be proclaimed after the Reoccupation in 1898 made provision for "the settling of questions as to lands situated within the three towns of Khartoum, Berber and Dongola" and the second[3] provided for "the settlement of disputes as to the ownership of land" elsewhere.[4] It is a remarkable fact that statutory provision was made for the adjudication of rights in land before any other matter — criminal, civil or administrative.

8.3 This was the first appearance of systematic adjudication in Africa, and it is significant that Kitchener, who commanded the expedition and became the first

[1] Ruoff *Torrens System* 14

[2] Khartoum, Berber and Dongola Town Lands Ordinance 1899

[3] Title to Land Ordinance 1899

[4] Kipling tells an amusing story of the settlement of land disputes in a Sudan setting. A Provincial Governor brought some foxhounds from England to hunt the local fox on the banks of the Gihon (Nile), and all landowners were ordered to stop the foxholes on their land. When the hunted fox escaped into an unstopped hole, the Governor called for the responsible landowner to receive condign chastisement. The relative alacrity of claimants to be given the punishment enabled the ownership of the land to be determined ('Little Foxes' in Actions and Reactions 1909).

Governor-General of the Anglo-Egyptian Sudan, was an officer of the Royal Engineers, the corps responsible for the Ordnance Survey in England. He had had in fact much practical experience of survey work. After spending four years in mapping Palestine, he had become Director of the Survey in Cyprus when Great Britain assumed the protectorate in 1878. He was also given control of land registration there, and he remodelled the system. In a memorandum which he wrote in 1885, two years after leaving Cyprus, he said: "The reorganization of the Land Registry Department has been a boon to all landed proprietors. The system adopted in Cyprus might indeed be adopted with advantage as a model of what is much needed in England — a registration of titles and mortgages, and a complete arrangement for the immediate transfer of landed property without the intervention of the conveyancer."[1] For an Englishman[2] this was a remarkably uninhibited approach to private conveyancing. It was no accident that in the Sudan such emphasis was placed on land registration and, with the opportunity to frame a completely new set of laws, a system of adjudication was introduced which has since been widely copied. The success of this system depended in large measure on the fact that it could be 'systematically' effected throughout those areas where it was needed.

8.4 The procedure which was introduced into the Sudan was, after more than twenty-five years of intensive practical experience, finally enshrined in Part II of the Land Settlement and Registration Ordinance 1925, which remains in force to this day and is still in active use. It may therefore fairly claim to have stood the test of time. It has been used as a model in countries as far apart as the British Solomon Islands[3] in the Pacific and Guyana[4] in South America, and for circumstances as diverse as the conversion of customary land holdings in Kenya[5] and the resolution of titles granted generations ago or acquired by adverse possession under English law in the Turks and Caicos Islands in the West Indies.[6] It has even been used in the drafting of a Land Adjudication Bill for the Bahamas where land dealing is as sophisticated as anywhere on earth.[7]

8.5 We describe and analyse this procedure in Chapter 15. It is of the very first importance because there are still enormous areas of the world's surface to which it could be applied with great benefit. In the Sudan it enabled not only the rights in hundreds of miles of river frontage to be ascertained but also the rights in several million acres in the Gezira where the celebrated cotton scheme lies and where, as a result of systematic adjudication, title has never been in question. This was no small achievement, as much of the land had been in regular use and occupation long before the scheme was thought of and was owned, in irregular-shaped holdings, by thousands of different people. It should also be specially noted that the system of adjudication was as effective for town as for country

[1] Arthur *Kitchener* I 45
[2] Kitchener, though born in Ireland, was "of sturdy English stock" (Arthur *Kitchener* I 2).
[3] Land and Titles Ordinance 1968 Part II
[4] Land Registry Ordinance 1959 Part IV
[5] Native Lands Registration Ordinance 1959 and Land Adjudication Act 1968
[6] Land Adjudication Law 1967
[7] Session 1967, Bill No 29

land. All the main towns, which contained large populations with well-established private rights, were ‘settled’ (i.e. adjudicated) under it – most of them, unfortunately, without replanning. But Khartoum (which lay in ruins in 1898) was redesigned, and landowners with existing rights were given equivalent rights in the new lay-out. This is an early and instructive example of combining systematic adjudication with reparcelling holdings.

8.6 Systematic adjudication was introduced into Palestine by the Land Settlement Ordinance 1928. This is of special interest to us, because this Ordinance was largely copied when, on Sheppard’s advice, systematic adjudication was introduced into Sarawak in 1933 “to provide a full and sufficient purge”[1] of the old grants made by the Raja’s Government since 1863 on various terms and conditions which in many cases were by no means clear. This process, therefore, is likely to have been what Dowson and Sheppard had in mind when they described systematic adjudication under the heading ‘Initial Compilation and Establishment’.[2]

8.7 The Sarawak Land Settlement Ordinance 1933 served its particular purpose of clearing up existing titles, but it was not appropriate for the conversion of customary tenure, since the customary tenure and shifting cultivation of Sarawak had no equivalent in Palestine, and so the Palestine model gave no guidance. Nor did the Ordinance take into account existing legislation under which land was granted and registered, with the odd result that new titles continued to be issued under the old system. The Land Settlement Ordinance was repealed by the Sarawak Land Code which came into force in 1958 and included provision for adjudication.

(2) USED AS AN INSTRUMENT OF LAND POLICY

8.8 Where there is a background of established individual ownership under a system of known and accepted law, as there was in the riverain areas of the Northern Sudan, in the coast lands of Kenya, in former Palestine, and in respect of alienated land in Sarawak, systematic adjudication is largely only a matter of effective organization. This is not to belittle the effort needed, which may be very great; indeed in England it is apparently too great to be undertaken. But the problem is the magnitude of the task rather than its intrinsic difficulty. Basically, it is merely a matter of knowing the law, finding out the facts, and applying the law to them, though this may well appear a gross oversimplification to anyone familiar with legal processes.

8.9 Difficulties arise, however, where adjudication is brought into the field of customary law, and is used as an instrument of land policy. So far, we have discussed adjudication purely as a process designed to record existing rights, its purpose being to achieve certainty and enable the rights to be registered with safety. In Kenya, however, in the 1950s, the decision was taken, as a matter of major Government policy, to convert customary tenure to full individual ownership in order to promote the agricultural development which the uncertainty

[1] Sheppard’s own words in a local report

[2] D & S 92—7

of customary tenure inhibited. For this purpose a variant of the Sudan process of systematic adjudication was devised. No provision was made for group ownership, because it was considered that this would militate against the intended individualization. If group ownership existed it was not to be recognized, but had to be converted into individual holdings each in full ownership. The Kenya Native Land Registration Ordinance 1959[1] (superseding the Native Land Tenure Rules made in 1956, which themselves had validated previous experiments) in fact made adjudication an instrument of active policy and not merely of passive record.

8.10 Furthermore the Kenya statute departed radically from other adjudication statutes in providing for adjudication, consolidation and redistribution of land holdings all in one process; for there was widespread and intense fragmentation which, probably more than any other factor, precluded progressive agriculture, particularly in the Central Province. Previous legislation for land adjudication in other countries had usually enabled boundaries to be adjusted or straightened in order to improve lay-out, but the Kenya process went much further; it enabled a completely new lay-out to be substituted for the existing lay-out "having regard, so far as possible, to the site, quality, nature and extent of the lands to which the landowner was entitled...to the intent that, so far as possible, equality of exchange shall be achieved".[2] It also provided for much of the work to be done by committees, a special feature of the Kenya system which we shall discuss in detail in Chapter 15.

8.11 The Malawi Customary Land (Development) Act 1967 is a later version of the Kenya process, but enables a family to be recorded as owner under the name of the head of the family.[3] It gives full power to redistribute the land in the declared area; but it does not provide for the formal listing of the original holdings, though their boundaries have to be indicated on the ground. There is no provision for the publication of any 'Record of Existing Rights' (as the list of the original fragments is called in Kenya)[4] but only of the 'Allocation Record' (called the 'Adjudication Record' in Kenya) which is the final record after all the adjustments have been made. The emphasis is on development, as the title of the Act indicates, rather than on adjudication. Nevertheless it may be fairly claimed that both the Kenya and the Malawi processes, in essence, remain adjudication because allocation is based on the land which was previously used under custom and an attempt is made to determine the extent of customary holdings and to equate the new holdings to them.

8.12 It is doubtful, however, if a process like that conducted under the Southern Rhodesia Native Land Husbandry Act 1951 could ever be truly counted as 'adjudication', though it has been cited as an example of 'purely executive adjudication'.[5] Under that Act 'a farming right' was granted to each of those cultivating in the prescribed area on the prescribed date. A farming right was heritable and alienable, and it entitled the holder to the exclusive possession of a

[1] See Book 2 for subsequent history of this Ordinance
[2] Kenya Native Land Registration Ordinance 1959 s21(2)
[3] s19(1)(c)
[4] See 15.9.6
[5] Report of the Development Centre on Land Policy for East and Central Africa (1960) 48

defined parcel of land for as long as he used it properly. It therefore virtually amounted to individual ownership; but the same amount of land was allocated to each person and no attempt was made to relate it to what he had previously used. There were, admittedly, some instances in Kenya where the land allocated amounted merely to a distribution of the uncommitted tribal reserve, and in these cases there was no element of adjudication; but these were exceptions to the general practice.

8.13 Surplus clan land in Papua New Guinea has similarly been distributed in individual plots and the titles to these plots have been registered. This has produced full individual ownership on a planned lay-out with holdings of uniform size, but it can scarcely be called adjudication; it is more of' the nature of a sensible administrative arrangement effected with the agreement and co-operation of the local people. Such an arrangement is needed when 'waste, forest and unoccupied land' is not deemed to be at the disposition of the Government. Though it may not be 'adjudication', it is of course 'compilation' if it results in registered title,

8.14 It should be noted that when a new Land Adjudication Act was enacted in Kenya in 1968 it included provision for recording as the owner of land any group which "has, under recognized customary law, exercised rights in or over land which should be recognized as ownership",[1] thus indicating a change in Government policy in this regard.

(3) VARIOUS OTHER PROCESSES

8.15 There are other statutes which provide for systematic adjudication but which do not fit into any of the patterns we have described, and we need only briefly mention some of them. The Land Registration Ordinance enacted in Tanganyika in 1953 enabled the Registrar to declare areas where, within a specified time, application must be made for registration which otherwise is voluntary under the Act.[2] It is not surprising that this provision has not been used. Such a declaration would require a decision, both in principle and in detail, at a level much higher than that of the Registrar. Also if systematic adjudication were really to be contemplated, it would surely be desirable to make statutory provision for the procedure rather than just to leave it to the Registrar.

8.16 The Guyana Land Registry Ordinance 1959 is of particular interest because it provides for systematic adjudication (with several features derived from the Sudan) as well as for a sporadic process. The purpose of this Ordinance is to clarify titles to land in respect of which deeds have not been registered under the Deeds Registration Ordinance. Where deeds have been so registered the parcels affected are, in the course of systematic adjudication, designated as 'recorded titles' but, though shown on the new titles register and on the registry map, they are not subject to the provisions of the Land Registry Ordinance unless the owner makes special application. Until he applies, all dealings in 'recorded titles' continue to be conducted through the deeds registry and the Registrar of

[1] s23(2)(b)
[2] s9

Deeds is required by law to notify the Registrar of Lands of such dealings. This surprising provision would appear to be an unnecessary perpetuation of a dual system.

8.17 In Papua and New Guinea a Land Titles Commission was set up by the Land Titles Commission Ordinance 1962 and in 1964 an ordinance made provision "for the Conversion of the Tenure of Native Land into Individualized Tenure". This legislation (which must be read with the Land Ordinance 1962 and the Lands Registration (Communally Owned Land) Ordinance 1962) does not follow our familiar pattern, though its general purpose is similar to that of the Kenya legislation discussed in Chapter 15. The procedure has not been very successful and it is not surprising that proposals have been made to replace it by legislation following the Kenya precedent much more closely.

8.18 There has also been a process in the Gilbert and Ellice Islands under the Native Land Ordinance 1956 (an Ordinance "to consolidate and amend the law relating to native land and registration of title thereto") which has set up a system of registration that has been called a "model of simplicity, low cost, expeditiousness and suitability to local circumstances".[1] This is high praise indeed but conditions in these remote islands in the Pacific are so exceptional that it is doubtful if experience there will be much help elsewhere. It is also doubtful if the resultant register could really be classified as a register of title in our sense of the term, because it is not kept in the same way, nor does it have the same effect. For example, it is not supported by any survey and there is no warranty of title.

9 Systematic versus sporadic adjudication

9.1 Like Dowson and Sheppard before us, we are convinced that systematic adjudication has substantial advantages over sporadic adjudication, and we will now try to summarize these advantages.

9.2 The first and perhaps the most important advantage is that systematic adjudication ensures wide publicity. This is a very effective safeguard against fraud or concealment or even honest oversight. Systematic adjudication alerts the whole neighbourhood, whereas any advertisement or general notice which relates only to a single parcel may pass altogether unnoticed by interested persons. Yet, curiously enough, this very publicity would be considered a disadvantage by those brought up in the English practice which, almost alone in the world, still favours secrecy in land dealing.

9.3 Moreover, the importance of all the systematic procedure being carried out on or near the actual ground can hardly be exaggerated. This point was emphasized by Dowson and Sheppard who went on to say:

> "Only in the local setting can the Settlement Officer and the Land Court get to understand the many sided local problems on which they are required to adjudicate. And only in that setting will it be possible to obtain and weigh all the available evidence surely. A peasant who becomes fogged or lies in an

[1] R G Crocombe 'Improving Land Tenure' *South Pacific Cornrnission Technical Paper No 159* (Noumea, New Caledonia 1968) 22

unfamiliar Court-house or Government office is much less likely to do so in his local surroundings and in the presence of his neighbours who live and work near the land affected. His errors also will be more evident there and more easily rectified. Indeed faulty information and misstatements which may readily escape detection elsewhere are often obvious on the spot. Moreover, it is impossible to transport to a distance, or even to discover in advance, all the local inhabitants who have knowledge of the past history of the land and may be able to supply important information at any stage of locally conducted investigation."[1]

9.4 Systematic work greatly facilitates administration. It enables more accurate forecasts to be made of the staff required; it minimizes transport costs and reduces general overhead expenditure. The flow of work can be more competently regulated. Appropriate staff are specially appointed for each area selected for adjudication, and there is no need for the Registry to retain the professional staff who must be permanently available there if applications for first registration have to be dealt with whenever they happen to come in.

9.5 There are also many survey advantages. Only in systematic work is photogrammetry an economic proposition, and only systematic work makes complete and economical use of expensive trigonometrical control. Common boundaries are surveyed in systematic survey once only and this is much cheaper than ad hoc survey for individual owners. This fact is now recognized in England where the Ordnance Survey map, prepared at the expense of the taxpayer and required for general purposes, is also used for registration and the cost of survey does not fall on the individual landowner. HM Land Registry will not accept an application unless the map is up to date; systematic mapping is therefore now a prerequisite of registration of title in England, so at least the mapping is systematic even if the registration remains sporadic.

9.6 Where there is any question of consolidating fragmented holdings systematic adjudication is essential to enable parcels to be regrouped. Consolidation is very difficult, if not impossible, unless all fragments within the area can be taken into account at the same time.

9.7 Finally, systematic adjudication has the great advantage that a single uniform land law can immediately apply to all land in areas which have been adjudicated. No longer will two or more different laws be applied side by side as they are when registered and unregistered parcels are indiscriminately intermixed in the same locality. Certainly so long as any land remains unregistered, law appropriate to it must be retained, but systematic adjudication enables registration to be completed in those areas which matter most. Without systematic adjudication there is no real prospect of completing the register, and the benefit to the owner of his registered title will be largely lost. In England, for example, this happens because the whole conveyancing system must still cater for unregistered parcels; it cannot be reviewed in the way that would be possible if every parcel were registered. A convoy can go no faster than its slowest ship.

[1] D&S 97

9.8 The shortcomings of sporadic adjudication were trenchantly expressed in the Report of the Commission on Registration of Title to Land in Egypt:

> "Sporadic introduction of Registration of Title is vicious in principle, as it means that each property is given isolated consideration when it happens to come up for registration instead of the conflicting claims of neighbours all being thrashed out at the same time. Uncoordinated work of this character is considerably less worthy of confidence, as well as being slower and more expensive than investigation and settlement of boundaries and title systematically conducted district by district. It also necessitates the administration of two laws side by side in the same districts."[1]

9.9 However, the mere fact that England and Australia, after more than a hundred years of experience, still retain sporadic adjudication as the method for bringing existing titles onto the register warrants fuller consideration of the arguments in its favour. The most sporadic form of registration is that which is completely voluntary, and the principal argument for voluntary registration is that adjudication is precipitated only when an interested party wants it, whereas systematic adjudication subjects to investigation titles with which the owners are quite content. Voluntary adjudication leaves well alone; systematic registration may stir up trouble. Indeed, in countries with a well-established system of documentary title and effective private conveyancing the upheaval which systematic compilation would cause is generally considered a sufficient reason for not attempting it.

9.10 There is, in fact, no real prospect of systematic registration in England. HM Chief Land Registrar has explained that it would be wholly inappropriate for two reasons:[2]

> "As a lawyer, the more important reason to me is that when you create a new compulsory area, property within that area is registered on sale. This has the advantage that the title to the unregistered land has been deduced by the vendor's solicitor, examined by the purchaser's solicitor, and usually – almost certainly in the case of dwelling houses – examined by the mortgagee's solicitor, so when the title comes to me I can save a great deal of expense by examining that title cursorily instead of meticulously. That is why we in this country go in for spasmodic registration. The other reason is the highly practical one that in this country we have far more registerable properties than in most if not all other countries. In this country you could have a single (and I take an extreme example) dwelling house in parts of Lancashire, where you could have 10 separate registerable titles. You could have the freehold, tiers of leasehold and tiers of rentcharges.[3] So if we went in for systematic registration

[1] Egyptian Government Commission Report on Registration of Title (1921) Paper No 6 '*Measures of Immediate Reform*' 4

[2] T B F Ruoff 'The role of survey in land registration' 104 *Chartered Surveyor* (July 1971) 14

[3] A rentcharge is a rent payable by the owner of land to a person who has no interest in the reversion. Thus, if A sells land to B in fee simple, he may agree to accept an annual sum of money from B in perpetuity instead of a lump sum down. This is called a rentcharge, but rentcharges are also known by other names such as chief rents, fee farm rents, and quit rents. That a rent should be

it would take hundreds, if not thousands, of years to register a small part of Lancashire."

(Perhaps a little rationalization of landholding in Lancashire would ease the situation.)

9.11 Indeed, a strong argument in favour of sporadic registration is that the cost can be properly charged to the individual applying for registration. Even where registration is compulsory on sale, the title is being investigated in any case and, as money is changing hands, the payment of a fee will be less objectionable than if registration is forced on an owner who has no intention of dealing and no fear that his title is insecure, and who therefore appears to gain nothing from registration. Thus it can be said that sporadic registration enables the financial burden to be transferred to the individual, whilst systematic adjudication must initially be paid for by the State, individual payment being deferred at least until there is a dealing, if indeed there is any payment at all.[1]

9.12 A less tenable argument is that inadequate or insufficient staff may make it desirable deliberately to slow the process by limiting registration to what may arise from sporadic application. This contention is fallacious. If for any reason the Registry is unable to accept more titles or if suitable staff cannot be found (or afforded) it is systematic adjudication that can be precisely adjusted to the situation; sporadic adjudication, even if it is possible to forecast its incidence, cannot so easily be turned on and off.

9.13 It was from developing countries, however, that at one time came the strongest demand for sporadic registration in order to encourage development. Agricultural officers were particularly interested in providing registered title for those progressive farmers who had broken the barrier between subsistence cultivation and commercial farming. These officers wanted a degree of selectivity that only sporadic adjudication could provide. They did not wish to see the available effort frittered away on indifferent farmers and uneconomic holdings while the demands of widely scattered progressive farmers could not be satisfied. In developing countries the paramount aim in rural areas must be to increase agricultural productivity, and a good way to do this, at least in the early stages, would seem to be to give registered title to the career farmers and to extend to them the limited credit and farm planning facilities available. The career farmers were likely to be more forceful personalities, social and political leaders, in a position to influence the rank and file. The argument was that in the long term more might be gained by winning over the support of these leaders, even though this meant sporadic adjudication which was technically less satisfactory than systematic; it might be more costly, but expense was by no means the only criterion.

9.14 But these seemingly convincing arguments have been discredited in developing countries, both in Africa and in the Pacific. Even the demand for sporadic registration may be suspect, for it is sometimes put forward by those

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payable by a freeholder will surprise many of our readers, and it is indeed an unnecessary anomaly of English land law.

[1] See 15.8.2

seeking to establish claims to land before other landholders realize the significance of such claims and before, or in anticipation of, systematic adjudication which would inevitably subject the claims to closer scrutiny. Furthermore, lone individual conversions from customary to statutory tenure do not in practice have the effect expected of them. Often they do not even eliminate custom because other members of the social group continue to exercise customary rights in the converted holding. Even if the individual holder successfully resists custom and excludes members of his group, he may then find that he is himself excluded from local society with its inbuilt system of social services and so becomes such an oddity that, far from being a shining example, he is, instead, an object of dislike, regarded as a failure rather than a success. Systematic conversion with full group understanding and participation is more likely to overcome these difficulties, though custom dies hard and persists even in areas that have been systematically adjudicated.

9.15 Nor are these the only arguments against sporadic adjudication. Even in England and Wales, it has been found necessary on practical administrative grounds to put an end to voluntary applications because of their inconvenience and expense, and in developing countries the reasons are even more compelling, particularly if systematic adjudication is the general policy. For example, the Kenya Working Party on African Land Tenure 1957—1958 sympathized with the desire of administrative and agricultural officers to encourage good farming by making the benefits of registration available to any progressive farmer who wanted it and had a holding of acceptable size and shape, but were of the opinion that it would be neither practicable nor just to be selective of applicants. It would have been quite inconsistent with the declared principle of recognizing the existing interest. They said:

> "It would, of course, be possible to provide that any person within a Native Land Unit might apply for the recognition of his ownership by an ad hoc Committee and for him afterwards to be registered as the proprietor, but it is difficult to see how such recognition and registration could be confined to good farmers or good farming units. The essence of the system which we propose is that ownership is established by proving long occupation to the satisfaction of the traditional land authority; size of holding and standards of farming are irrelevant factors which in no way affect the right to be entered in the Record of Existing Rights. Neglected fragments are recorded equally with well-planned farms. The process of adjudication must be applied equally to all and it would be unjust to allow recognition of one owner, a good farmer, and refuse another because, for instance, his holding was too small. It might well be the only land he owned."[1]

9.16 It should be specially noted that the Record of Existing Rights in the Kenya process was a preliminary step to consolidation and reallocation.[2] That process depended on the listing of all holdings and could not have been conducted sporadically because a new lay-out would not then have been possible. Inevitably

[1] Kenya Working Party Report on African Land Tenure (1958) 19
[2] See 15.9

there was a conflict between the dictates of title recognition and the requirements of good husbandry. The latter had to be disregarded where even the consolidated parcels were still below the economic minimum; the elimination of subminimum parcels, however desirable agriculturally, was not politically acceptable.

9.17 The disadvantages of sporadic adjudication have been convincingly demonstrated in the British Solomon Islands Protectorate. In 1965 new legislation was enacted to provide for systematic adjudication of customary tenures to replace a sporadic system which had in practice proved unworkable.[1] In the explanatory statement it was said that "the old system had involved the settlement of interests in isolated parcels at the whim of applicants and regardless of where the land was situated and the use to which it was being put. It had led to the frequent rejection of applications on investigation, with consequent waste of time and effort, individual frustration of applicants and considerable public discontent."

9.18 Dowson and Sheppard sum up the argument:

> "Sporadic introduction may appear attractive at first sight, because it seems to offer the same opportunity of registration to all land holders in the country or even the possibility of an entirely voluntary operation. It has indeed been advocated on the ground that it is inequitable not to do this. But any genuine offer of equal facilities to all, can only be secured by narrowing such facilities. It is a delusion to suppose that by any method or expedient equal opportunities for initial registration can be accorded to all land holders everywhere throughout a country at the same time. Under the most favourable conditions the initial definition and registration of rights throughout any considerable territory is bound to take many years to complete. Consequently somehow or another drastic selection or restriction must be exercised as to the holdings which it is practicable to register in any given period."[2]

10 Conversion of deeds register

10.1 We have described compilation of the register by the automatic registration of Crown or State grants, and we have also examined adjudication in both its sporadic and systematic forms, but there is a third process for compiling a register of title which may be used either by itself or in conjunction with a process of adjudication. We can call this process 'conversion of deeds registers'. Its possibilities are by no means always adequately appreciated.

10.2 Virtually every country which decides to introduce registration of title already operates some system of registration of deeds, and not only is there a very wide variation in systems of deeds registration, but the use made even of similar systems has also varied greatly where conversion is concerned. Therefore, before trying to classify the various processes, we think it best to recount what has actually happened in several different countries as representing various possibilities which can then be examined and evaluated on their merits. Not

[1] Land and Titles (Amendment) Ordinance 1965
[2] D & S 94

infrequently quite striking economies in conversion will be indicated merely by studying what has happened elsewhere.

10.3 Our first example of conversion is Singapore, which was persuaded in 1956 to change from registration of deeds to registration of title; its new Ordinance is one of the most interesting of modern statutes. It was drafted by Baalman, a leading expert on the Torrens system, and it is widely known, not least because of the detailed commentary which he wrote on it.[1] But it is questionable if the process devised for the changeover was adequate; it seems likely to subject Singapore to an excessive period of the duality in conveyancing procedure which is still the bugbear of the English system as well as of the Torrens system in Australia. To justify this criticism we must examine the process in some detail.

10.4 Baalman's Ordinance provides three ways for bringing titles onto the register, or 'bringing land under the Act', as it is expressed in the phrase imported into Singapore from Australia. First, in accordance with the usual Torrens provision, new State grants are automatically registered on issue, though the grant itself is not used as the register, as it is in Australia, but is replaced by a register of the same size and content, and a duplicate is issued as a certificate of title. This appears merely to double the work to no useful purpose. Secondly, provision is made for voluntary application for registration, but naturally there are few volunteers because of the expense and also because of the general efficacy of the existing deeds system. So it is the third way — selection by the Registrar — which must be relied on for bringing land already granted onto the register.[2] Unfortunately the Registrar can only select titles in respect of which there is a dealing; he may issue a certificate of title only in substitution for a deed registrable under the Registration of Deeds Ordinance, and he cannot take advantage of the fact that examination of a title often clarifies adjacent titles or other titles in the same area, particularly where there has been a recent subdivision. Thus he cannot select for registration any unregistered title as can be done in the New Zealand process described below, nor do all titles have to be registered whenever there is a sale, as in the English compulsory system, but only those which the Registrar selects. The Ordinance was put into effect in 1961 and in nine years only some 3,000 titles had been registered. Some relaxation of the procedure in examining title resulted in a marked increase in 1969 (1,055 as compared with 59 in 1961), but, with 67,000 parcels in Singapore, it will be a very long time before conversion is completed by this means.

10.5 Yet perhaps even more regrettable than the slow compilation of the titles register is the fact that the opportunity was not taken to reform the substantive law; as a result Singapore remains saddled with the intricacies of English land law, and moreover English land law as it existed before the substantial English reforms of 1922-25.

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[1] See Baalman *Singapore*

[2] Amendments in 1970 provided for compulsory registration where planning permission to develop or subdivide unregistered land is granted and also allowed the issue of a certificate not conclusive as to boundaries (Land Titles Act (Cap. 276) ssl3 and 14).

10.6 Penang and Malacca offer a remarkable contrast, the more so because, as Straits Settlements, they once had the same laws as Singapore. All three Settlements used the Registration of Deeds Ordinance, enacted in 1886 and derived from the English Yorkshire Registries Act 1884, and all had the benefit of the Boundaries Ordinance of 1884 which is a noteworthy example of systematic demarcation and survey without adjudication and registration. As a result, each of the Settlements was able to keep records which showed all the deeds affecting each parcel of land and which had, so far as 'identification' of the land was concerned, all the merits of registration of title. The deeds, however, remained the basis of title, and the system of land holding and dealing was modelled on the English laws of property and conveyancing.

10.7 This system was quite different from that in the Malay States which, thanks to the reform introduced by Sir William Maxwell in 1891, employed a system based on the principle that private rights in land can only derive from a State grant or from State registration of a subsequent dealing under a system of registration of title based on Torrens principles. In fact the Malay States, unlike the Straits Settlements, enjoyed the simple land law which would have replaced the involved English land law in Australia if Torrens's own intentions had been fulfilled.

10.8 This difference obviously posed a problem when, in 1948, Penang and Malacca federated with the Malay States, and in 1953 a committee was appointed "to consider the introduction of a system of registration of title into the Settlement of Penang". In 1955 this committee recommended that "the most desirable form of registration of title for introduction into the Settlement would be one based fairly closely on the [English] Land Registration Act 1925" and that "this should be accompanied by a reform of the law of property based on the Law of Property Act 1925".[1] These recommendations, though not implemented, are worthy of special mention because several countries which use English land law have likewise thought that reforming legislation on the English 1925 pattern might solve their problems, and it is instructive that a much better arrangement was found in Penang.

10.9 The recommendations of the Penang committee were not implemented because a proposal to replace the various Land Enactments of the Malay States by a single uniform National Land Code enabled a scheme to be drawn up with the admirable objective of bringing Penang and Malacca into line with the other nine States. Though the National Land Code was not finally enacted until 1965, the National Land Code (Penang and Malacca Titles) Act was passed in 1963. It comprises 124 sections and, like the National Land Code itself, is a highly detailed piece of legislation.

10.10 The key to the Act was the provision for the extinguishment, on 1 January 1966 (the "appointed day"), of all existing interests in land and their replacement by titles under the National Land Code. At one fell swoop it did away with 'estates in land' on English lines and converted them into a form consistent with the Code, which provides that those who hold a grant from the State, whether

[1] *Report on Introduction of Registration of Title into Penang* (1955) 33

in perpetuity or for a fixed term, are 'proprietors of land' who can themselves create 'interests' such as leases or mortgages. Thus, so far as terminology is concerned, the lessee from the State appears to be as much the 'owner' of land as is the grantee of a right in perpetuity (which itself is of the nature of a perpetual lease).[1]

10.11 The Act made provision for the preparation of an 'Interim Register' from the information in the Deeds Register. The process was largely clerical — the transfer of the relevant information from one record to another — and no 'adjudication' was involved, The Interim Register merely reflected what appeared to be the present ownership and other current interests immediately before the Act came into force, and entry in it did not affect the title; if the title were suspect, the entry did not improve it. A purchaser must therefore still investigate title just as he did before registration, though the transaction itself would now be conducted in accordance with the procedure laid down in the National Land Code. A Commissioner of Land Titles was specially appointed to execute the provisions of the Act, and provision was made for him to hear claims in regard to replacement titles (i.e. the titles which the Act automatically substituted for the former titles) and entries in the Interim Register. Titles in the Interim Register may become indefeasible either as a result of an investigation by him or by operation of law on the expiry of a twelve-year period from the commencement of the Act. A final document of title will then be issued.

10.12 In two and a half years some thirty temporary clerks, under the supervision of five members of the permanent land staff, completed the preparation of the Interim Register in respect of 105,179 parcels in Penang and Province Wellesley. At the end of 1969 there were only some 900 'claims' (i.e. queries) outstanding in Penang out of over 100,000 entries (and so less than one per cent). A similar operation was successfully conducted in Malacca, where the titles were only about a third of those in Penang. Thus in the course of some twelve years or so Penang and Malacca will have been 'painlessly' converted to the Malaysian system.

10.13 This process is undoubtedly of great significance in the development of registration of title, but that is not to say that it is perfect. It is difficult to understand, for example, why it should be necessary to replace the neat and entirely adequate Interim Register by large 'final documents of title', and the record itself suffers from the fact that, almost incredibly, bound books and not loose-leaf binders are still used. But these are faults of the National Land Code[2] itself rather than of the system of conversion.

10.14 It is also questionable whether anything quite so elaborate as the Penang and Malacca legislation is needed where a good deeds register has been properly kept. In the Sudan, for example, in 1925 the Land Settlement and Registration

[1] This arrangement gets away from the confusing English terminology of 'estates' and the old controversy of 'freehold versus leasehold'.

[2] Section 158 actually provides that "every grant and every State lease.. shall be bound up in a book", and so, as was the case in New South Wales, only a change in the law will permit loose-leaf registers to be used.

Ordinance changed the existing deeds register into a register of title mere1y by a stroke of the legislative pen, because the moment the Ordinance came into force the rights of a person registered as the owner of land became “rights not liable to be defeated except as provided in the Ordinance”, and this is the paramountcy provision which is the hallmark of registration of title. In the Sudan, however, ‘registry conveyancing’ had long been practised and there had never been any private conveyancing like that in the Straits Settlements, where according to the Commissioner of Lands Titles in 1885, old titles were “represented by bundles of documents, many of them drawn by uninstructed persons, to use a mild term, and being somewhat gross illustrations of the art of conveyancing as practised under English land law”. In the Sudan the change in the law in 1925 did not mark any particular change in procedure and practice.

10.15 Similarly in Zambia in 1944 the Lands and Deeds Registry (Amendment) Ordinance was grafted on the Lands and Deeds Registry Ordinance 1914 and turned the existing deeds system into registration of title on Torrens lines, but here again the change was in the law governing the effect of registration and not in the practice of conveyancing. The double ordinance, as a legislative device, was not very elegant and the substantive law, based on English land law, remained unmodified, but at least there was no period of duality whilst the conversion was being effected.

10.16 It was with a view to effecting a quick changeover to full registration of title that in Kenya the Registered Land Act 1963 arranged — in half a section — for an examination in the Registry of the deeds registers kept under the Crown Lands Ordinance 1915 and the Land Titles Ordinance 1910, and for the preparation of register of title therefrom.[1] Since a ‘guaranteed’, not merely ‘provisional’ title is then accorded, this amounts to adjudication rather than to just a clerical process, but the Act was so drawn that there could be no risk to Government in this procedure, for it was expressly provided that no indemnity should be payable on matters arising out of first registration. This was not unfair, for there was no indemnity before the Act was applied and there was no reason why there should be one the moment a registered deed became a registered title, particularly as no fee was charged for the changeover. There was, however, every reason why the new Act, with its simplified conveyancing procedure and improved background law, should apply at the first possible moment to all land, so as to avoid the double conveyancing law and procedure which is so undesirable.

10.17 We conclude these examples of deeds conversion with a mention of Scotland which for long has been classed with South Africa as operating a deeds registry so effectively that it virtually serves the purpose of registration of title. Perhaps one of the most significant developments, therefore, in converting registration of deeds to registration of title is the fact that Scotland has at last succumbed to the arguments in favour of registration of title, as we have recounted in Chapter 6. Pending the enactment of the necessary legislation a pilot scheme has been conducted for the purpose of devising procedures and training

[1] Registered Land Act s12(l)(b)

staff. This pilot scheme was completely successful and 'registers of title' were prepared in respect of all the parcels within the Parishes of Renfrew and Paisley, the chosen areas. It would appear quite feasible to give legal backing to this process. However, instead of arrangements being made systematically to convert the 'search sheets'[1] into registers of title, it has been decided to adopt the English sporadic system of compulsory registration when there is a dealing, though in England there was no effective deeds register, still less search sheets on Scottish lines, and so it was scarcely an appropriate model. It seems regrettable that Scotland did not seek models further afield with deeds systems more akin to its own.

10.18 We can now attempt a classification in respect of deeds registers and their possible conversion to registers of title:

(1) First, there are countries which, like South Africa and Hong Kong, regard their deeds registers as the equal of registers of title and do not propose to make any alteration. India and Pakistan regard their fiscal land records in the same way. The extent to which such registers do in fact perform the functions of registration of title can be warmly debated, but one thing is certain: there is no bigger obstacle to the introduction of registration of title than the existence of an effective register which appears to be satisfactory and which, naturally, there is reluctance to change.

(2) Secondly, there are countries which, like the Sudan and Zambia, have converted an existing deeds register into a register of title merely by amending the law.

(3) Thirdly, there are countries which, like Malaysia in respect of Penang and Malacca, have devised what is little more than a clerical process for using a deeds register to compile a provisional register which becomes final in due course. This is also the way in which cadastral registers were converted to registers of title in Germany.[2] The key to this process is the provisional nature of the title; the onus is not on the Registry to produce the perfect title (though it should do its best) but on the proprietor to challenge what he does not accept.

(4) Fourthly, there are countries which, like Kenya and the Turks and Caicos Islands, make use of existing deeds registers to assist in or supplement the process of adjudication. The use made varies, and a combination of ingenuity and knowledge — local and general — is required if full advantage is to be taken of existing records when introducing registration of title.

11 The nature of the title on first registration

11.1 Dowson and Sheppard declared that economy and speed in the compilation of a register were bound to be seriously hampered and reduced if entries were restricted to legally unimpeachable titles from the outset. They pointed out that compilation "can be greatly facilitated, as well as greatly

[1] See 6.5.4(3)
[2] See Appendix B

accelerated by calling on the aid of time to test and validate initially uncertain results.[1] We will now examine this proposition.

(1) NEW ZEALAND LIMITED TITLES

11.2 We can begin the discussion by describing the ingenious, though simple, method which enabled New Zealand in twenty years to bring all privately owned land onto the register. In 1924 the Registrar was empowered to deem an application for registration to have been made in respect of any parcel of unregistered land.[2] If satisfied with the title, he could then issue an ordinary guaranteed title but provision was also made to enable titles to be 'limited as to title' or 'limited as to parcels' or 'limited as to both title and parcels' and, in fact, under this compulsory process few absolute titles were issued in the first instance.

11.3 'Limitation as to title' means that the title is subject to any defect specifically set out in the Registrar's minutes after he has examined the title, but is otherwise guaranteed free of defect. If the title is unchallenged, this limitation is automatically extinguished after twelve years, and so limitation as to title is now a rare phenomenon.

11.4 'Limitation as to parcels' means that the title is not 'guaranteed' as to the area or boundaries of the land comprised in it. But 'guaranteed' in this context appears to mean no more than 'fixed' under the English system (i.e. that the precise boundaries have been ascertained on the ground and are defined accurately on the plan). To have fixed the boundary in this way and so be in a position to 'guarantee' it would have necessitated the new survey normally required in New Zealand on voluntary application for first registration, but only required in England if 'fixed' boundaries are demanded. This would have imposed a considerable expense on landowners at a time when they were not even dealing with their land, and hence no money was changing hands. Also there were numerous cases, especially in towns, where the documentary title holder had either lost or gained land by encroachment and adverse possessions and the description in the deed did not exactly tally with what was occupied on the ground. The compulsory redefinition of the boundary in such circumstances would doubtless have occasioned unnecessary disputes like those which resulted from the English 1862 Act.[3]

11.5 Unlike limitation as to title, limitation as to parcels is not automatically extinguished; it continues until a 'plan of survey' is deposited. It is significant that it inconvenienced proprietors so little that, thirty-five years later, 25 per cent of titles in Auckland were still 'limited as to parcels' and 36,000 out of 37,000 proprietors whose lands were compulsorily registered had not bothered to have the survey made which was necessary to 'fix' their boundaries. As in England, landowners in New Zealand found it adequate, and very much cheaper, to rely on the physical features which actually delimit their land on the ground. Nor is the

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[1] D&S 95

[2] New Zealand Land Transfer (Compulsory Registration of Titles) Act 1924 now Part XII of the Land Transfer Act 1952

[3] See 3.12

value of their property in any way depreciated thereby; the Law Society in New Zealand has ruled that a requisition[1] may not be made in respect of survey, and so a purchaser can take no objection to a title on the score that it is limited as to parcels.[2]

(2) ENGLISH QUALIFIED AND POSSESSORY TITLES

11.6 The New Zealand 'limited title' can be compared with the English 'possessory title', which was an expedient first proposed by Robert Wilson in his evidence to the 1850 Royal Commission. He suggested that, throughout selected parishes, every property should be registered in somebody's name. "I conceive that, whenever you come to a dispute between two adverse claimants, you should register the person in possession; that is to say, in possession either by himself or by his receipt of somebody else's rent."[3] In. other words he advocated 'systematic adjudication' in selected areas with a provisional title in the first instance but becoming absolute in due course, and though the 1857 Commissioners rejected any form of compulsion (thus causing Wilson, who was one of them, to dissent from their Report)[4] they nevertheless proposed two sorts of title, 'absolute' and 'possessory'. In their Report these are described as 'warranted' and 'unwarranted' ownership. Unwarranted ownership was to be "subject to such rights and interests as existed in or were capable of attaching upon the property at the time of first registration" but "thenceforward the title to the property, for the purposes of transfer, will be manifested by the register, and by that alone; and so eventually the only title to land which a purchaser need examine will be the last transfer as the same is recorded in the registrar's books".[5] Lord Westbury's Act, which introduced registration of title in 1862, ignored this proposal, but in 1870 the Commissioners appointed to consider the failure of that Act, proposed a new Act, returning to the lines recommended in 1857, expressly including the principle of 'possessory title', of which they gave a very apt and striking illustration: "It is as if a filter were placed athwart a muddy stream; the water above remains muddy, but below it is clear, and when you get so far down the stream, as never to have occasion to ascend above the filter, it is the same thing as though the stream was clear from its source."[6] It should be noted that in this context the expression 'possessory title' has a special technical meaning. It is here used merely to indicate title to land registered without any warranty of the owner's title prior to registration, as distinct from an 'absolute' title; it should not be confused with a title by adverse possession under Limitation Acts, which is sometimes called a 'possessory title'.

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[1] The New Zealand device of 'limitation' has been adopted in some other jurisdictions: for example, in the Victoria Transfer of Land Act 1954 Part II Division 2, and in Uganda in the Registration of Titles Act Part IV ss39A—39E

[2] See 4.4.6

[3] *First Report of Registration and Conveyanclng Commissioners* (1850) Appendix 485

[4] See 3.12.1

[5] *Registration of Title Commission Report* (1857) para XLI

[6] *Land Transfer Commission Report* (1870) xxviii para 75

11.7 The Land Transfer Act 1875, in giving effect to the recommendation of the 1870 Report, introduced the following three kinds of title which remain in use to this day under the Land Registration Act 1925:

(i) *Absolute* — which is final, conclusive and guaranteed.

(ii) *Qualified* — which is the same as an absolute title except for some particular blemish which is specified in the register. As perhaps only one in a hundred thousand is so qualified[1] this expedient appears to serve very little purpose.

(iii) *Possessory* — which is given to an applicant who has actual possession of the land in question, or receives its rents and profits, but has incomplete documents of title. A possessory title, like the Interim Register in Penang and Malacca,[2] leaves the title subject to all rights and interests subsisting at the time of first registration, and so any prospective purchaser must investigate the title before that date just as if it were unregistered. But the particular virtue of this sort of title is that in due course it ripens into an absolute title, because, after the lapse of fifteen years in the case of freehold (or ten years in the case of leasehold), the Registrar is bound to convert a possessory title into an absolute title, provided that the applicant has proved that he is still in possession of the land.

11.8 In respect of leasehold there is a fourth kind of title which is called a 'good leasehold' title. A good leasehold title is the same as an absolute leasehold title except that the right of the lessor to grant the lease is not guaranteed which, of course, means that the freehold title is unregistered. This is a surprising feature peculiar to the English system and we need say no more about it here.

(3) THE QUALIFIED TITLES OF SINGAPORE AND THE INTERIM TITLES OF PENANG AND MALACCA

11.9 The qualified titles of Singapore and the interim titles of Penang and Malacca are similar to the English possessory title. Anybody purchasing land on the strength of a qualified or interim title must investigate the title prior to the date of registration, but in Singapore after five years, and in Penang and Malacca after twelve years, the title becomes indefeasible, which has the same meaning as absolute in the English system.

11.10 In Singapore, however, as explained above, the process is sporadic and the Registrar can select a title for registration only if a dealing is actually being effected, whereas in Penang and Malacca the conversion has been completed systematically. It should be particularly noted that this would not have been possible without the provision for interim registration; the investigation required to confer indefeasible title immediately in every case would have prolonged the proceedings almost indefinitely.

11.11 These qualified or interim titles must be distinguished from a 'qualified title' under the Malaysian National Land Code, which is merely a title pending

[1] See C & R 95

[2] See para 10.11 above

final survey and has taken the place of what was formerly known as an 'approved application'.

(4) PRESUMPTIVE TITLE

11.12 'Possessory', 'limited', 'qualified' and similar titles which can be converted or in due course ripen into absolute title must be distinguished from the presumptive title of, for example, the Indian system, in which the person shown on the fiscal record as responsible for paying tax is presumed by law to be the proprietor unless this be disproved. The Indian system does not provide for registration of title, nor did the system in Burma where copies of the record were invariably accepted both by the courts and by the authorities responsible for the registration of deeds as presumptive evidence of title, and where the number of cases in which this evidence was rebutted was negligible.[1] Nevertheless such entries can be rebutted and, unlike the possessory title of England, the limited title of New Zealand, the qualified title of Singapore and the interim title of Penang and Malacca, they never ripen into a guaranteed title for the obvious reason that no such title exists in India or Burma.

(5) THE ARGUMENTS FOR AND AGAINST 'LIMITED' TITLES

11.13 The following is an observation from the 1926—27 Report of HM Land Registrar: "While possessory titles enable land to be placed on the register with the minimum of official work and cost they confer on the public the minimum of the benefits of land registration. More than any other feature of the repealed Land Transfer Acts they have blinded the public to the advantages conferred by registration of title." This statement requires an explanation.

11.14 In England the whole idea of possessory titles made a bad start. In the beginning HM Land Registry appears to have used the possessory title to avoid the burden and responsibility of investigating title, for during the first four years of compulsory registration (1899—1902) 11,100 possessory titles, as against 74 absolute, were issued in respect of freehold, and 35,051 possessory and only 2 absolute in respect of leasehold. Moreover, these possessory titles made no mention at all of any restrictive covenant or mortgage or lease created prior to the date of the registration of the possessory title, even if such an incumbrance was known to exist. It was feared that if the possessory certificate mentioned anything at all prior to the date of registration people might begin to think it included everything. It was therefore considered that it would be safer if it was clear that the possessory certificate not only was not to be relied on to reveal any incumbrances prior to registration but had in fact entirely ignored them. As a result it was questionable if such titles could ever mature into absolute titles, since the title preceding registration would always have to be investigated, and one critic called the registration of possessory titles "a delusion and a sham".[2] It was

[1] Binns *Cadatral Surveys and Records of Rights in Land* 29

[2] Rubenstein 'The Blight of Officialdom' (paper read at the 29th Provisional Meeting of the Law Society held at Liverpool in October 1903) 13

not until 1 January 1909 that applicants were required to produce all documents of title to the Chief Land Registrar who then noted on the register incumbrances appearing therein,[1] though of course there was no warranty of such entries.

11.15 The original English process should be contrasted with the process in Penang and Malacca where every effort is made to record in the Interim Register all the facts relevant to title, and the interim period (surely overlong at twelve years; the five years of Singapore seems adequate) serves merely to enable any interested party to check the facts. In Germany it proved possible to prepare registers of title from the existing records merely by allowing eighteen months for queries. When all titles are automatically first registered as qua1ified, qua1ification obviously does not carry the stigma of doubt which must be implied when a possessory title is granted in England, where nowadays an absolute title is accorded in the vast majority of first registrations.

11.16 Where customary rights are being converted to recorded title by a process of systematic adjudication it is clear that there can be no question of provisional or possessory title. The purpose of the operation is to achieve security and certainty, and this purpose would be defeated if the resultant titles could be challenged. It would be quite inconsistent with the whole idea of the confirmation of an existing customary right — and politically very undesirable — if the registered right which replaced it were made provisional.

11.17 Where, however, some form of recognized individual title is being adjudicated in respect of a defined parcel of land it may be considered desirable to make provision for a possessory or qualified title. Thus in the Land Adjudication Law 1967 of the Turks and Caicos Islands the Adjudication Officer was enabled to grant a ‘provisional title’ where land was in course of being acquired “by open and peaceable possession”[2] or where it appeared that there might exist some document or other qualification which adversely affected what otherwise appeared to be a good title. Provision was also made for possessory title in the Palestine procedure, where a person was in possession of land “in such circumstances that, if his possession continues for the period prescribed by law, any action for recovery thereof by the registered owner will not be heard thereafter”.[3]

11.18 Yet the original Sudan law made no such concession; it was considered that the Adjudication Officer (or Settlement Officer as he was called) must himself reach a decision and he was, indeed, given full powers to do so. He was not bound by any rules of prescription or limitation. The purpose of ‘settlement’, it was argued, was to settle title, and any form of ‘provisional settlement’ would have been of the nature of a contradiction in terms.

11.19 The following note by the draftsman of the Tanganyika Land Registration Act 1953 explains why his Bill which “borrows freely from the

[1] See C & R 93
[2] s16(1)(d)
[3] Land (Settlement of Title) Ordinance 1928 s52(a)

English Land Registration Act 1925" contained no provision for possessory titles;[1]

> "Possessory titles are appropriate in England, where the greater part of the land is freehold, where the questions that arise are generally on the devolution of title rather than on the tenure of the land and consequently where possessory titles can be made absolute after a relatively short lapse of time. In Tanganyika the reverse applies; by far the greater part of the land is public land, and the majority of contested cases are those in which the Land Officer, on behalf of the Governor, asserts that the land in question is public land. In other words, whereas in England a root of title is what its name suggests, a matter of title, in Tanganyika it is much more a proof of tenure. The issue of possessory titles in Tanganyika would, therefore, serve no useful purpose."[2]

11.20 Therefore, except in the systematic preparation of a register of title from a deeds register which is undoubtedly facilitated by a transitional period for queries, we do not think that we can draw any very definite conclusions. Dowson and Sheppard said, "We do not wish to suggest…that a transitional admission of presumptive titles to an incipient register is always expedient and helpful; but…[its] disadvantages…should always be objectively realized and fully weighed." Of course, they were not using 'presumptive' in the sense we used it above for titles in India and Burma,[3] but were referring to titles "conferred after due public notice and thorough investigation on the spot, not only of claims to the parcel directly affected but also to those of all neighbouring parcels", and they pointed out that a presumptive title of that character must not be compared with a possessory title in England where in practice the security of most unregistered titles is so good that to accord possessory status to a title is to label it as defective.[4] We might perhaps add that English experience indicates that if any sort of provisional title is to be issued it should be as complete as possible so that anyone dealing with the parcel will know that the title has been carefully investigated and all available relevant information recorded.

12 Diagram

12.1 The diagram on the next page sets out the processes involved in the compilation of the register.

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[1] J F Spry 'Notes on the Land Registration Bill' (unpublished)

[2] This note, incidentally, reveals the role played by the Land Officer under the Tanganyika Act; it has no counterpart in the process of systematic adjudication described earlier in this chapter. The first duty of the adjudication (or settlement) officer is himself to decide whether land is public or private (see 15.6.1(1)).

[3] See para ll.l2 above

[4] See D & S 95

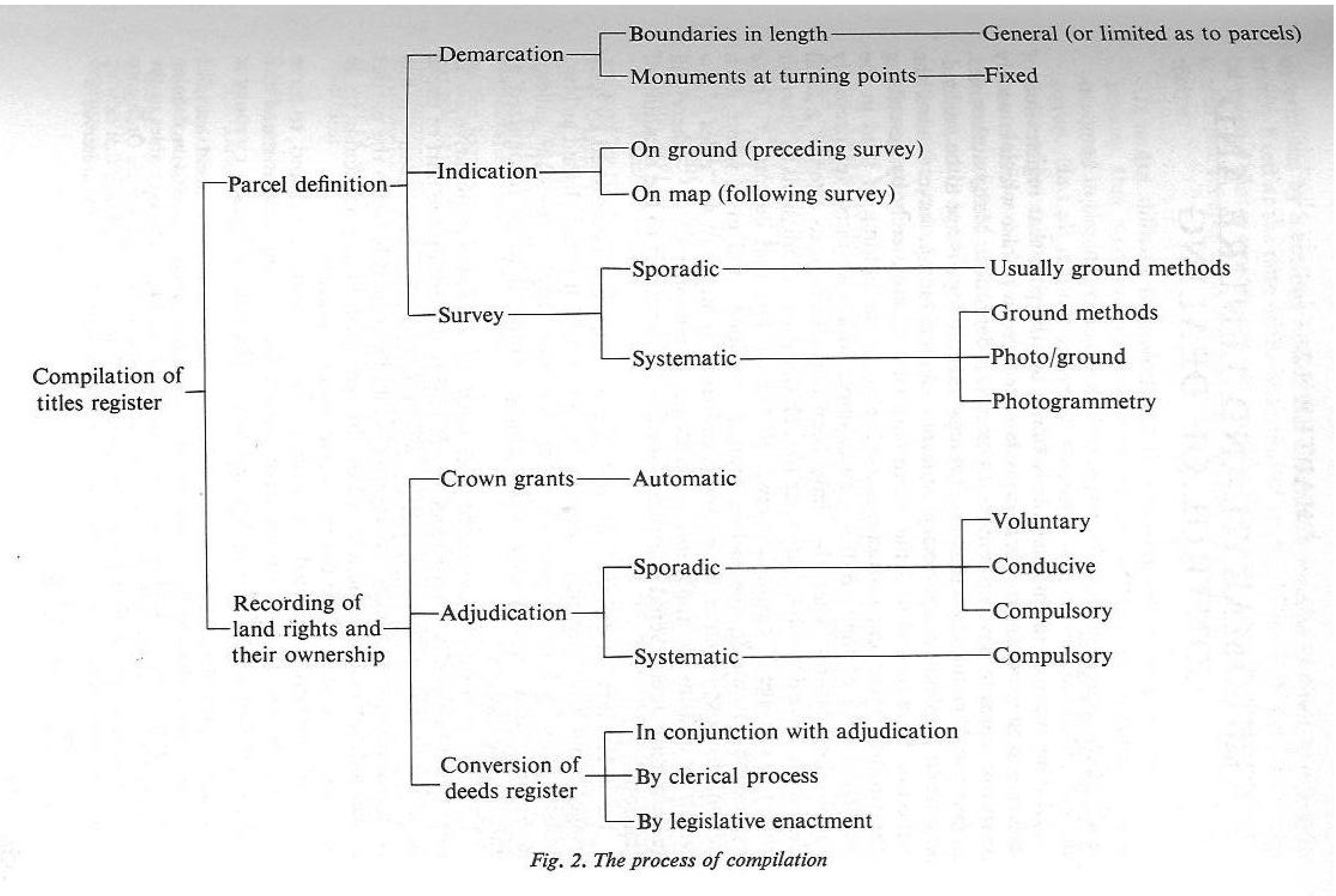

Fig. 2. The process of compilation