

## CHAPTER 1

# LAND RIGHTS AND RECORDS

### 1 The importance of land registration

1.1 Land is the source of all material wealth. From it we get everything that we use or value, whether it be food, clothing, fuel, shelter, metal, or precious stones. We live on the land and from the land, and to the land our bodies or our ashes are committed when we die. The availability of land is the key to human existence, and its distribution and use are of vital importance. Land records, therefore, are of great concern to all governments. The framing of land policy, and its execution, may in large measure depend on the effectiveness of 'land registration', as we can conveniently call the making and keeping of these records.

1.2 Land registration must, however, be kept in perspective. It is a device which may be essential to sound land administration but it is merely part of the machinery of government. It is not some sort of magical specific which will automatically produce good land use and development; nor is it a system of land holding<sup>1</sup>; it is not even a kind of land reform, though it may be a valuable Administrative aid to land reform. In short, land registration is only a means to an end. It is not an end in itself. Much time, money, and effort can be wasted if that elementary truth be forgotten.

### 2 Two functions of land registration

2.1 Our study of land registration must clearly distinguish between its public and its private function; the former relates to the welfare of the State or community as a whole, the latter to the advantage of the individual citizen. The point of view of the State when wishing to make an inventory of the national land resources for fiscal purposes or in order to ensure proper development is by no means the same as when it merely wishes to ensure the rights of the owner or occupier of land and to enable him to conduct his land transactions safely, cheaply and quickly. In England, and in many other countries which use English land law, land registration has nothing at all to do with land tax or a public inventory of ownership, but has been introduced solely to simplify conveyancing (as the business of creating and transferring interests in land is called). It is from the conveyancing angle that we shall first approach the subject, and not until later shall we come to the land record for tax purposes which is known as a 'cadastre', a word brought from France and meaning a public register of the quantity, value and ownership of the immovable property in a country, compiled to serve as a basis for taxation.\*

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<sup>1</sup> See D&S 79

\* The derivation of the word 'cadastre' used to be ascribed to the Latin *capitastrum* which was taken to be a contraction of *capitum registum*, a register of *capita*, literally 'heads', and so by extension

2.2 We consider cadastre at length in Chapter 7. For the moment we need only stress that it is quite a different subject from “the form of land registration more explicitly known to British readers as Registration of Title to Land”.<sup>1</sup> There is no cadastre in the European sense in England or in countries which have followed English practice, though rating lists tend to serve the same purpose and, indeed, in the USA such lists are sometimes referred to as ‘*cadasters*’. But these lists are as distinct from the ‘register of title’ as in continental Europe the ‘cadastre’ (the register for fiscal purposes) is distinct from the ‘legal register’ in which transactions are recorded for the purpose of title, a distinction which we discuss in Chapter 7. European authorities, when writing in English, sometimes refer to the cadastral record as the ‘land register’ to distinguish it from the ‘legal register’, but this is confusing because, in many countries where English is the language of legal statute, ‘land register’ is the name used to denote the register of title<sup>2</sup> and in England it is the *Land Registration Act 1925* which governs registration of title.

2.3 Some confusion is also caused by the expression ‘cadastral survey’ which undoubtedly had a fiscal connotation when it was first introduced into England; indeed, an apprehensive English landowner referred to as “a newfangled phrase, as foolish as it is unquestionably mischievous.” It has, however, long been widely, if imprecisely, used to denote a survey of the boundaries of the land units of a country whether or not the survey has any connection with taxation. Using it in this wider sense, we can say that the function of cadastral survey is to define the parcels<sup>3</sup> or pieces of land which constitute the units of the record, whatever the purpose of the record. It gives each parcel a distinctive appellation and so provides a hook upon which any information regarding it can be conveniently hung.

### 3 The unit of record and parcel definition

3.1 The purpose for which land registration is required is of great importance, for it should determine the choice of the unit of record. If the purpose is fiscal, value will be the principal objective and the most suitable unit of record may be the unit of use; for example, in agricultural property the units of use are the individual fields which vary in size and quality and so in value. The fields together make up the farm or unit of operation, an appropriate unit where development is concerned or the implementation of laws regulating land use. Two or more units of operation – whether contiguous or not – may, however, be comprised in a unit of ownership, and this appears to be the obvious unit when the purpose of the record is to give particulars of ownership and not of value or use; for example, the estate of a large landowner may comprise several farms, each separately operated and containing

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‘taxable land units’, but modern dictionaries derive ‘cadastre’ from the Greek word *katastikhon* (meaning literally ‘line by line’ and so a tax register), and the SOED now dismisses *capitastum* as a ‘figment’.

<sup>1</sup> D & S Preface vi

<sup>2</sup> e.g. Singapore Land Titles Ordinance 1956 s16(1) and Tanganyika Land Registration Ordinance 1953 s3(2). In each the register of title is called the Land Register.

<sup>3</sup> The word ‘parcels’ is a term of art in English conveyancing, the ‘parcels clause’ being the part of a conveyance which defines the land dealt with. In the Kenya Registered Land Act 1963, however, and in similar acts the word ‘parcel’ is defined as ‘an area of land separately delineated on the registry map’.

several units of use. On the other hand a parcel may be a unit of use, operation, and ownership at one and the same time, like, for instance, an English smallholding. In France the *ilot de propriete* (unit of ownership) is the unit of record, except in the *Departement* of the Seine where parcels are numbered by *unites foncieres* (units of operation); thus two adjacent parcels, the property of one owner but leased to two persons, form two *unites foncieres*, but only one *ilot de propriete*.

3.2 Title and tax, however, are not the only purposes for which land records are needed. In Chapter 7 we mention the so called multi purpose cadastre in Europe as well as the land data banks of the United States;<sup>1</sup> at this stage we need only make the point that the unit of record is clearly a crucial factor in land registration. Definition of the parcel and identification of those holding rights in it are the twin problems which dominate the subject.

3.3 Land parcels may vary in size from the several hundred square miles of an Australian cattle station down to the square foot of English land sold to Americans for sentimental reasons, and in type from an oil concession granted in the North Sea and described as “ten by twelve minutes of latitude and longitude” to a parcel delimited on the ground by a wall like that of Pevensey Castle in Sussex, which has stood since Roman times in Britain over 1,500 years ago. The problems of identifying and defining land parcels are correspondingly varied. We examine these problems in Chapter 8.

#### 4 The nature of land ownership

4.1 Land when regarded as a commodity capable of being bought and sold has two special characteristics which distinguish it from all other commodities known to commerce. First, and most obvious, it is immovable, and so it cannot be physically transferred from one person to another; nor can it be possessed in the same way as something that can be actually handled and moved about. Secondly, it is everlasting. This may sound strange to persons who are accustomed to being told not to ‘destroy’ their land by, for example, allowing it to be eroded; but, in its original definition in English law, land is not regarded as comprising merely the surface; it is deemed to include everything which is fixed to it, and also the air which lies above it right up into the sky, and whatever lies below it right down into the centre of the earth;<sup>2</sup> it includes land covered with water and so even the sea bed is land. Regarded in this way as a segment of the earth continued into outer space, land is as unchangeable in extent as the earth itself; it cannot be increased or decreased or destroyed as can all other forms of wealth. Thus the land included in the Domesday survey made in England nearly nine hundred years ago is still the same land today; the individual proprietary units into which it was divided may have changed completely but today's parcels are made up of the same land, and the change is merely one of ‘mutation’, which is what we call the process of changing the boundaries of a parcel.\* This

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<sup>1</sup> See 7.1.3

<sup>2</sup> *Cujus est solum ejus est usque ad coelum et ad inferos* is how it was expressed in legal Latin.

\* Though the dictionary definition of ‘mutation’ is ‘change’ and so the word could mean any sort of change, in this book its use is confined to boundary changes, which is what it has come to signify in the registries which use ‘mutation forms’ (see 17.3).

permanence not only makes land peculiarly capable of lasting record but it also makes such record specially desirable. It should be noted, however, that horizontal subdivision does not fit in with this definition of land and the 'stratum' of a building does not have this permanence. This poses special problems which we examine in Chapter 14.

4.2 Its immovable and everlasting qualities set land apart from other commodities and have tended to make its ownership much more complicated than the ownership of goods. The very nature of the ownership appears different. The owner of goods can remove or destroy them. The owner of land can neither move it nor, in its legal sense, destroy it; his power is limited to the enjoyment or disposition of rights in or over it. This is equally true whether the ownership is recognized in law as absolute (Roman, *dominium*; Continental, *allodium*; Islamic, *mulk*)<sup>1</sup> or whether the owner is called a 'tenant in fee simple', as he is in English law, which in legal theory does not recognize the ownership of land but only the ownership of estates or interests in land, though in practice the 'fee simple' is absolute ownership.<sup>2</sup> We shall consider this theory of English land law in Chapter 3 insofar as it affects our subject.

4.3 There are many rights in land that are not found in goods or that differ in some particular from those that are; and naturally they often last longer. An easement is a simple illustration; it is a right enjoyed by the owner of land over the land of another. For example, since land is immovable its position cannot be changed to make it accessible; if its owner is unable to get to it without having to cross somebody else's land, he needs to have a right of way over that other land, and this right must last as long as his land is surrounded by land in other ownership. Then again, because land cannot be carried off and fraudulently hidden or disposed of, it becomes particularly useful as security for a loan or for the performance of some obligation without handing over its possession, as is necessary when movable property is pawned. The rightful owner of land can always lay his hand on it, unlike the owner of a watch or horse or motor car which may be stolen and never seen again. Because land is everlasting it can be made the subject of future interests or even a series of future interests, and mortal man has never ceased to exercise his ingenuity in inventing means to ensure that his land will forever be used in accordance with his wishes, be it for the continued support of his family or as a lasting memorial to himself and a projection of his own personality long after his death. It is this capacity of land to carry future interests, combined with man's desire to perpetuate his line or his memory, which has led to many of the involutions of land law.

4.4 The collection of rights pertaining to any one land parcel maybe likened to a bundle of sticks. From time to time the sticks may vary in number (representing the number of rights), in thickness (representing the size or 'quantum' of each right), and in length (representing the duration of each right). Sometimes the whole bundle

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<sup>1</sup> See D & S 9

<sup>2</sup> See M & W 68

may be held by one person or it may be held by a group of persons such as a company or a family or clan or tribe, but very often separate sticks are held by different persons. Sticks out of the bundle can be acquired in different ways and held for different periods, but the ownership of the land is not itself one of the sticks; it must be regarded as a vessel or container for the bundle, the owner being the person (individual or corporate) who has the right to give out the sticks, the 'right of disposal' as it can be called.<sup>1</sup>

4.5 This container may, at any particular time, hold all the sticks or only some of them, or indeed none of them at all; for it is possible to visualize the position where virtually all the rights in a piece of land are held by persons other than the owner who is left only with what the Romans used to call *proptietas nuda* or 'bare ownership' (i.e. ownership devoid of all rights and powers); for example, the grant of a 999 year lease at a nominal rental and free of conditions will leave the 'owner' with no presently exercisable rights at all. Nevertheless, should the leasehold come to an end for any reason, the 'container' (i.e. the 'ownership') will still be there to catch the rights which were attached to the lease. The transfer of the ownership is the transfer of the container itself and leaves the transferor with no interest at all either present or future. That is why some communities are reluctant to grant outright ownership of land when they have it at their disposition. They prefer to keep the container and merely hand out some of the sticks, or maybe all of them.

4.6 In creating and maintaining records of land rights it must, therefore, be kept clearly in mind that interests in and powers over land may be enjoyed or exercised by persons other than the owner, whose interests and powers are correspondingly diminished or excluded. Thus the definition of the parcel and the description of its owner will not alone provide an adequate land record. The record must also show any limitation of the right of ownership and any interest which has been granted or otherwise obtained out of it. Furthermore, if that interest confers the right to exclusive long term possession which can itself be the subject of dealing in the same way as the ownership itself, then a separate record must be kept of that interest, and so two or more records may be needed in respect of the same parcel. This will become clear when we consider the 'estates' of English land law in Chapter 3.

4.7 There is also a general qualification of land ownership, which is unaffected by land registration despite the wording of some registration statutes. Even where a single person has the full ownership of a piece of land in which no other person has any right at all, we know of no country in the world today which will allow him to exercise the ordinary right of an owner of other kinds of property not merely to use but also to abuse or destroy what he owns. 'Destroy', in the context of indestructible land, means 'to commit unlimited waste', and writing in 1885 a leading authority described the English fee simple estate as conferring "the lawful right to exercise over, upon and in respect to the land, every act of ownership which can enter into

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<sup>1</sup> Sonius *Customary Land Law in Africa* 35

the imagination, including the right to commit unlimited waste”<sup>1</sup>. This was already an exaggeration for, even then, statute had begun to restrict and control land use.

4.8 Indeed, as population increases and pressure on land grows, the State takes more and more powers to ensure that land, whoever owns it, is properly used. Even the right to sell, which might be thought an essential attribute of ownership, is often withheld or restricted, for public policy demands that land shall not be allowed to fall into the wrong hands (though what hands are wrong is, of course, capable of widely differing interpretation). Moreover, the State always has the power of compulsory acquisition, the right of ‘eminent domain’ as it is called, and this itself is a drastic limitation of private ownership. It has, in fact, long been realized and accepted that in practice there is really no such thing as absolute ownership of land, notwithstanding the use of that term in some enactments providing for registration of title. Nobody can be allowed to do just exactly what he likes with land, completely regardless of the public interest. The State itself always asserts special authority over land, for this is its basic asset.

## **5 Security of tenure**

5.1 But we must not think only in terms of land ownership if we are to keep land registration in perspective. We must remember that proper development depends on ‘security of tenure’ rather than on ownership which, as we have seen, can be ‘empty’ of the right to use land, and even of the power to control that use. A person has security of tenure if he is secure or safe in his holding of land, but when the ordinary man speaks of ‘security of tenure’ he is almost certainly thinking more of security of ‘possession’ or ‘occupation’ than strictly of ‘tenure’ (a concept which we briefly examine in Chapter 3).<sup>2</sup>

5.2 To be adequate to encourage or even permit development, security of tenure need not amount to ownership, nor need it last for all time. A lessee has security for the term of his lease and, for as long as he complies with its conditions, the law will give him complete protection even against his landlord, the owner of the land. For the security to be adequate, it must of course last for a period long enough to serve the purpose for which the land is to be used. Thus, for example, the security of tenure which might be adequate for annual crops will not be sufficient if long term crops such as coffee or tea are to be planted, or a house is to be built in permanent materials. A tenant's security does not always rest on voluntary agreement between the parties, but in many countries is governed by legislation which gives the tenant a right to remain in occupation, thus depriving the landlord, so far as occupation is concerned, of the benefit of his security of tenure. But the security of tenure conferred on tenants by special legislation, and the position with regard to tenancy generally, may not be revealed by a register of ‘ownership’, though it may be the tenancy that really matters when use and development are concerned. If the register is wanted for administrative purposes, this is obviously a serious practical limitation on its usefulness, because it does not show who is actually occupying the land.

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<sup>1</sup> Challis The Law of Real Property 218

<sup>2</sup> See 3.2.1

5.3 For the purpose of our present discussion, however, the significant point is that security of tenure, that vital consideration when good land use is concerned, can be, and frequently is, enjoyed without any concrete evidence of title other than occupation. In those countries where individual property rights are recognized and the rule of law prevails, the Courts will uphold occupation against anybody, including the State or the Government, other than a person who can prove a better right. In fact, provided that nobody else can produce evidence establishing some right, the courts will not require any proof from the occupier, for there is much truth in the old saying that 'possession is nine points of the law'.

5.4 Indeed, security of tenure is a question of fact and, as a fact, it can exist whether there is documentary evidence to prove it or not. It does not necessarily rest on statutory title or on a system of written record as over enthusiastic advocates of registration sometimes assert, thereby prejudicing their whole case. Their opponents are quick to point out that there can be, and often is for all practical purposes, security of tenure without any formal record at all; and this may be so even under a system of customary law. This becomes apparent when we contemplate some of the development that has taken place in Africa. Where conditions have been favourable, there has been much good development – development by individual farmers – in land held under customary law despite all its shortcomings. We need only look at Chagga coffee in Tanzania, cocoa and groundnuts in West Africa, or cloves in Zanzibar. Cotton in Uganda has come as much from unregistered land as it has from *mailo* land where title has been registered for fifty years or more. In these areas there has clearly been security of tenure within the framework of customary law which has been quite adequate to enable extensive development to be effected.

5.5 This security has existed as a fact, whether or not there has been any evidence to prove it. Evidence does not alter fact, though witnesses sometimes seem to hope it will. The relationship of fact to evidence – in particular to documentary evidence – may be made clearer by the analogy of a passport. A boy is born in England on 1 January 1950 to parents named Smith who call him John. These are facts which exist whether or not there is evidence to support them. The issue of a passport to John Smith will not alter these facts. The passport is merely a documentary record which, because it has been issued by a recognized authority, will be accepted as proving certain facts concerning John Smith. But John Smith still remains John Smith, a British subject born in England on 1 January 1950, whether he has a passport to prove it or not. So it is with security of tenure; this is a fact which does not depend on whether there is a document of title to prove it, though it may well be convenient and important, to have such a document. Indeed, to stretch the analogy of the passport further, if John Smith remains at home he will not require a passport; he will only need it when he starts to travel abroad. Similarly a landowner in undisputed occupation of his land will not require a document of title if he does not want to deal with it in any way. As soon, however, as he does want to deal with it, it will be very necessary for him to prove his title, and he will find a document of the evidentiary value of a passport very useful for this purpose. He will

also require written evidence of ownership to take with him if he wants to leave the land but retain his ownership.

5.6 Perhaps we should conclude this section with a warning against a tendency to regard tenure, 'as a concept', merely as the relationship of man to land. This is quite misleading and would take us right outside our theme. The agricultural labourer has a relationship with the land – a very direct physical relationship – and his whole livelihood depends upon it. But he has no tenure, and so no title. This book is not concerned with such relationships or with questions of land use and management, vitally important though such matters are. Nor is it concerned with State ownership of land unless the State grants long term interests that can be the subject of dealing.

5.7 Tenure and the title which expresses it play an important part in a free enterprise economy. This is the sort of economy that goes back to the dawn of civilization when man first began to grow his own food and wanted 'security of tenure' in the land he had cleared. We know, as a historical fact, that dealing in land has been a feature of human society for more than 2,500 years, for it was during the siege of Jerusalem in 587BC that Jeremiah bought his cousin Hanameel's field for seventeen shekels of silver.<sup>1</sup> The idea of eliminating all individual rights in land is comparatively of very recent origin, and obviously consideration of it can have no place in a book devoted to the registration of land rights, an administrative device that cannot be needed if there are no rights to register. We must not, therefore, be drawn into any discussions of the respective merits of 'free enterprise and nationalization', 'capitalism and communism' or whatever names are given to this ideological dispute.\* The book is written for places where rights in land do exist – not necessarily rights amounting to unlimited and unrestricted absolute ownership but enforceable rights which are 'secure' enough to be worth recording. Where no such rights exist and there is no 'tenure' other than State ownership, registration can have no relevance.

## **6 Making land available**

6.1 Where improved land use is the objective, security of tenure is by no means all that matters. The best use of land may be unlikely without it, but security will not by itself ensure that land is properly used. The land may be occupied by somebody who is unwilling or unable to make good use of it, while those who would work it well or who need it most cannot obtain it. If good development is to be assured it must be possible for rights in land to be adjusted or transferred cheaply, quickly and with certainty, and, according to the economists, freedom and ease of transfer are absolutely vital to promoting the best use of land. For example, the East Africa Royal Commission on Land and Population (which included leading economists) set out the economic arguments at length and reached the conclusion "that policy concerning the tenure and disposition of land should aim at the individualization of

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<sup>1</sup> See Jeremiah 32:9

\* It has been said that the difference between capitalism and communism is that with capitalism man exploits man, whereas with communism it is the other way round.

land ownership, and at a degree of mobility in the transfer and disposition of land which, without ignoring existing property rights, will enable access to land for its economic use”<sup>1</sup>. We need not get involved in questions of freehold versus leasehold or State ownership versus private ownership. ‘Access to land’ is what matters, and land registration will help to assure it wherever individual property rights are recognized.

6.2 English history supports the economic theory, for it has been found that development is inhibited by practices which restrict the power of transfer such as the ‘settling’ of estates, as the process of tying up land in the family is called in England and the legislature has had to interfere in order to restore mobility.<sup>2</sup> The inalienability of *waqf* land in Islamic countries similarly holds up development, and progressive governments in countries like Turkey, and Egypt have intervened in order to bring such land back on the market. In Fiji, where land is owned by *mataqali* (clans) which have not been permitted to sell it, Government has introduced legislation to enable long leases to be granted.<sup>3</sup> In some developing countries a sense of tribal exclusiveness in land ownership not only restricts freedom of transfer but tends to confine tribes to their particular tribal areas. With greater freedom of transfer, pressure on the land could be relieved in some areas, uncultivated land in other areas could be brought into production by those best capable of farming it and national integration would be promoted.

6.3 In the next chapter, therefore, we consider the processes which are needed to facilitate dealing in land, it is in this connection that evidence of title becomes so important and land registration has such a vital part to play.

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<sup>1</sup> Report of the East Africa Royal Commission on Land and Population 1953 55 (1955) 346 (our italics)

<sup>2</sup> The Settled Land Act 1882 gave the tenant for life under the settlement power to deal with the land as if he were the owner in fee simple, and in the case of a sale shifted the settlement from the land to the purchase money, which had to be paid into court or to trustees. The 1922-25 legislation took the process a stage further by vesting the fee simple in the tenant for life.

<sup>3</sup> See Fiji Native Lands Trust Ordinance 1940