

CHAPTER 15

THE PROCESS OF SYSTEMATIC ADJUDICATION

1 Prefatory

1.1 In Chapter II we declared ourselves to be, like Dowson and Sheppard, firm believers in systematic adjudication (or 'settlement' as it is still called in some countries). We described its development and spread, contrasting it with 'sporadic adjudication' which is so slow in completing registration that it may even be doubtful whether it is worth undertaking at all, since the full benefit of registration of title — in particular the effect it has on security of tenure and on the law and practice of conveyancing — can never be enjoyed so long as registered and unregistered titles remain indiscriminately intermixed in the same locality. In Chapter 12 we considered the part systematic adjudication can play in the conversion of customary tenure to recorded title; and, of course, in the absence of an up-to-date register, it is a process prerequisite to consolidation, which we discussed in Chapter 13. It is a process which we know has been successful where it has been conducted with practical efficiency and understanding, and we now propose to describe it in detail.

1.2 As we have already related in Chapter 11, the process which Dowson and Sheppard had in mind and which has been extensively used for systematic adjudication in many parts of the world was based on that introduced into the Sudan at the end of the last century and used there ever since.¹ This also was the process which was adapted for use in Kenya where it was decided to use registration of title in conjunction with the individualization of customary tenures.²

1.3 We shall therefore consider systematic adjudication against the background of the Sudan legislation and the Kenya version of it. First, we shall discuss the legal basis for the process. Next we shall emphasize the need for the careful selection of appropriate areas, and set out the criteria for their selection. We shall then consider the composition of an 'adjudication party' and describe the qualifications and duties of the officers concerned. After that will come an account of the proceedings and an examination of the principles and rules of adjudication, which are a vital part of the law. Then there is the vexed question of appeal; and lastly, as part of the general process, we discuss the levying of fees. There are, in addition, two special features of the Kenya variant which deserve special scrutiny: first, the combined process of adjudication and consolidation and, secondly, the committee system.

¹ See 11.8.4 2

² See 11.8.9

2 The legal basis

2.1 In preparing legislation to provide for systematic adjudication, the point to be considered is whether it should be included in the statute which governs registration of title or should be contained in a separate statute of its own. Where compilation of the register is sporadic, arrangements must be made for adjudication in the day-to-day operation of the land registry in order to deal with cases as they arise, and it is therefore sensible to make provision for it in the registration statute itself. Thus provision is made for it in the English Land Registration Act 1925, and also in the Torrens Acts for the purpose of 'bringing under the Act' titles granted before the Act was applied.

2.2 Where, however, adjudication is effected systematically throughout areas which are expressly designated, and the whole operation is conducted quite independently of the registry, provision can more conveniently be made for it in its own statute. This is certainly desirable if there is any prospect of completing registration, as in some of the islands in the West Indies. As Dowson and Sheppard remarked: "A man who is building a house to live in does not want to incorporate in it as regular fixtures such constructional expedients as scaffolding, ladders and other paraphernalia of building."¹

2.3 In larger countries the point is not so obvious. In a country like the Sudan, which comprises a million square miles, the adjudication process is likely to be required practically for ever (i.e. the 'scaffolding' will always be needed), and provision for adjudication was made in the Land Settlement and Registration Ordinance 1925. Nevertheless adjudication there is effected quite independently of the operation of the land registry. It is carried out by a process which is only used when an area is specifically declared for adjudication, and provision for this process could, with advantage, have been made in a separate statute. Thus in Kenya, though the Sudan precedent was at first followed and provision was made for systematic adjudication in the Native Lands Registration Ordinance 1959, the parts governing registration were repealed and replaced by the Registered Land Act 1963, which left the part providing for systematic adjudication as a statute on its own named the Land Adjudication Act (which was later renamed the Land Consolidation Act when a new Land Adjudication Act was passed in 1968). However in Guyana the Land Registry Ordinance 1959, which governs registration, also makes provision for systematic adjudication following the Sudan precedent, and so does the Land and Titles Ordinance 1968 in the British Solomon Islands Protectorate.

2.4 The point is of little material significance but, on balance, we would recommend that legislation which provides for systematic adjudication should be separated from the legislation which governs registration of title because this helps to emphasize the need to give independent consideration to a process which should be quite distinct from the operation of the registry. Indeed it may be argued that separate Ministries should be responsible, since selection of areas for systematic adjudication will be made on administrative grounds, whereas the operation of the registry should be under the aegis of the judiciary.

¹ D&S73

2.5 What is really important, however, when preparing legislation to provide for adjudication, is to make sure that the law which governs registered title is suited to the new titles when they have been adjudicated, and to the people who will own them. The law applying to registered land may require drastic amendment if it is to be intelligible to those who will now have to use it. This vital point has frequently been overlooked by practical officers who have devised processes of systematic adjudication which will work in the field, but who tend to regard the subsequent operation of the land register as a technical matter which is not really their concern. In particular the concepts and terminology of English land law are likely to be unfamiliar and inappropriate, perhaps because they were introduced for an immigrant community rather than for the indigenous inhabitants. To those holding land by customary tenure there will appear to be little advantage in converting their customary right of ownership into 'tenancy in fee simple'. The customary law will probably be well understood locally, while a 'tenancy in fee simple' is incomprehensible without some knowledge of English legal terminology.¹ The Kenya Registered Land Act 1963 illustrates how this difficulty can be overcome, as is explained in Book 2.

3 Selection of adjudication areas

3.1 We have already emphasized the importance of devoting the available resources of manpower and finance to localities where the economic and social need for registration of title is greatest. If adjudication is undertaken in the wrong place or in the wrong circumstances, much money, effort and time can be spent to no practical purpose; worse still, if it is undertaken without due attention to planning considerations it may have the effect of fixing on the ground a pattern of land-holding inimical to good land use, and that at great cost in boundary-marking and survey generally. Close liaison between the authorities responsible for adjudication and registration and those responsible for physical and economic planning is essential since the tenurial pattern is vitally important to development, and systematic adjudication affords an opportunity to adjust it if necessary.

3.2 The first requirement in the process, therefore, is to decide where systematic adjudication is required, and we must now examine the criteria on which this decision should be made. In Chapter 9 we discussed the reasons which induce an administration to adopt registration of title, and we are assuming that there already exists an appropriate system together with suitable provision for systematic adjudication. We are here concerned merely with the circumstances which make its application to a particular area desirable, and the following should be considered:²

¹ For example "the messuages, tenements and hereditaments, corporeal and incorporeal" of the Registration of Titles Act in Uganda can scarcely have appeared to be a welcome simplification to those invited to break with custom through the medium of registration of title.

² An article in the *Journal of African Administration* in April 1954 strongly emphasized that adjudication is only appropriate to certain areas and certain conditions, and listed circumstances which may make it desirable (S R Simpson 'Land Tenure: Some Explanations and Definitions' vol. 6 no. 2 p 54). The Arusha Conference in 1956 produced a list under the heading 'The circumstances in which it is desirable to introduce a system of registration' (Report para 34), though no.4 on the

(1) *Where there is dealing in land.* The more dealing there is, the greater will be the need for registration of title, because the primary purpose of registration of title is to make dealing quick, cheap, simple and, above all, certain. Locally devised processes of private conveyancing will inevitably result in clouded titles and all the misfortunes which flow therefrom.

(2) *Where it is desired to use land as security for obtaining credit.* This is really the same point that has already been made, for the mortgaging or pledging of land is as much a dealing as is buying and selling; indeed land should not be used as security unless it is realized and accepted that default in repayment may lead to the transfer of the land just as effectively as would a sale. Also it should not be forgotten that debt is the other side of credit.

(3) *Where there is a high incidence of litigation concerning land* of a nature that could be obviated by reference to defined boundaries and ascertained interests. It should be noted that disputes as to inheritance do not fall within this category.

(4) *Where changes in land use or in pattern of landholdings are proposed.* For example the pattern of landholdings suitable to rain-grown crops may require redesigning in order to make effective use of irrigation. To safeguard the individual, land rights must be authoritatively ascertained before re-planning is effected — or the rights are changed or extinguished (e.g. where the land is required for public purposes, in which case, of course, the rights will be carried forward onto the register of title, but compensation must be paid for them). Similarly the implementation of any measure of land reform will probably entail the systematic ascertainment of existing rights; but, here again, it need not necessarily be accompanied by registration of title, however desirable that may be.

(5) *Where development is being held up or inhibited because of uncertainty or insecurity.* This may bring us into the field of customary tenure and the use of systematic adjudication and registration of title for the regulation of dealings, a matter which has been examined in Chapter 12.

3.3 The selection of areas for adjudication and the order of priority, must be determined by a central authority capable not only of weighing the merit of each proposal but also of assessing its feasibility. In the Sudan the determining authority is the Council of Ministers, but in most other countries the decision is left to the responsible Minister, acting on the advice of the departments concerned. This should be enough to ensure that each proposal is submitted only after adequate investigation.

3.4 The area declared should be of a size capable of being managed by one adjudication officer and completed within a reasonable length of time.¹ If area is too large there will be overlong delay between declaration and completion, resulting in disappointment and frustration as well as dealing 'off the register'. The adjudication officer may have two or more teams of demarcation and registration

list need not necessarily be accompanied by registration of title. We have taken both lists into account, but have not followed the same order or the same wording.

¹ The point is clearly made in s104 of the Land Commission Act for the USA Trust Territory of the Pacific Islands which reads: "The Land Commission shall designate a registration area or areas within which it will be desirable and practicable to register within a year most of the land, including all that concerning which there are no major disputes."

officers working under him, but it must be possible for him to exercise effective supervision over the whole area. Much will depend on the number of cases he is required to hear in his judicial capacity.

3.5 It is usual to publish the declaration in the official gazette. This is unlikely to be seen by the people affected, but at least it ensures a permanent record of the date and details of the declaration. The area declared can be defined either by a verbal description or by reference to a map or by both methods; but where the description is by reference to a map, provision should be made for ensuring that the original map is safely preserved; otherwise at a later date the gazette notice may be meaningless.

3.6 Great care should be taken to avoid premature or other inappropriate application of the process, but even so it will still be possible to make a mistake and include in a declaration land where adjudication is unsuitable or unnecessary. Sometimes this mistake will only become apparent in the course of the proceedings. It must be possible to correct it and provision should therefore be made in the law to enable a declaration to be cancelled or amended.

4 Composition of the adjudication party

4.1 It is, of course, always possible to form an adjudication party from serving or retired officials (or even non-officials); but where, as in most large countries, adjudication is to go on continuously over a long period, it is advantageous to maintain a permanent establishment of officers who by experience acquire special knowledge of the work. This is particularly necessary where substantial areas are held under customary tenure, and it was the reason for the appointment of permanent Land Titles Commissioners in Papua and New Guinea under the Land Titles Commission Ordinance 1962. In New Zealand special judges have been appointed to the Maori Land Court ever since it was set up in 1862 with the duty of enquiring into and establishing the titles to customary lands. In Kenya, where there is a programme of systematic adjudication which will last for many years, there is a special department with an establishment¹ concerned only with adjudication.

4.2 Nevertheless, even if a special establishment is maintained it is still important to make sure that the adjudication party is appropriate to the conditions. The type of problem and the difficulties encountered in adjudication can differ very widely not only in any one country, but even within a single district — between town and country, for instance, or between family land and land held individually — and the officers appointed must be well suited to the circumstances in the area declared. We must therefore now consider the functions of the various officers of an adjudication party, and the qualities and qualifications they will require. Their duties and powers are set out in detail in the Sudan law, and in legislation derived from it.

4.3 A full adjudication party comprises an adjudication officer and such demarcation, survey and registration officers as may be necessary. These officers will be formally appointed, by name or by office, when the area is declared for

¹ In 1969 the Kenya Land Adjudication Department employed 1,568 officers.

adjudication, though some Acts, having provided for the appointment of the adjudication officer, enable him to appoint such subordinate officers as he requires.¹

4.4 *The adjudication officer* is appointed ad hoc to take charge of, and be responsible for, the proceedings. He has very important administrative functions. He must not only make sure that no valid private claim is overlooked whether it is formally put forward or not, but he must also look after interests of government in the declared area, so that public land is properly protected. Above all he must be capable of commanding the trust and confidence of the local people. In fact he holds a key post. He may exercise any or all of the powers of the subordinate officers and may perform any of their duties. Obviously he must have enough knowledge and experience to equip him for the particular appointment, but schemes of adjudication vary greatly in both size and complexity. A straightforward scheme on routine lines will not require the adjudication officer to have any special qualification or aptitude, but where there are new problems or particular difficulties the success of the whole operation may well depend on the choice of the right person. Since almost every citizen of substance in the neighbourhood is involved in systematic adjudication, it is very much an exercise in public relations. Personality and probity are more important than professional qualifications. Nevertheless the work itself is essentially judicial in character, for the adjudication officer is given judicial powers and must follow civil procedure in disputed cases. One important factor is whether or not the claimants are allowed to be represented by lawyers, though generally this is not permitted in areas of customary tenure. The nature of existing title must also be taken into account. Titles based on statute law administered by professional magistrates and judges involve different considerations from titles based on customary law administered by non-professional courts. Clearly some legal qualification or experience is desirable, though that gained in district administration or in normal land administration may be sufficient. Conversely, if a lawyer is appointed, he must have the requisite organizational capacity and experience.

4.5 The duty of the *demarcation officer* is to ensure that the boundaries of a parcel of land, whether claimed or unclaimed, are indicated on the ground in a manner which will enable the survey officer to prepare a map on which each parcel can be shown and numbered. In open country with boundaries visible from the air it may be possible to use aerial photographs for the purpose of showing and numbering parcels.² The demarcation officer requires administrative capacity and a knowledge of the people and their language. It is he who determines the proprietary units in the first instance, though if there is any boundary dispute which he is unable to compose by agreement, he is required to refer it to the adjudication officer for decision.

4.6 In the Sudan process the demarcation officer may “when the boundary between separate plots of land is a curved or irregular line, lay out a straight boundary in place of the original boundary and may adjust the rights of the owners of the land adjoining such boundary by exchange of land of equal value”,³ and in Palestine (where the powers and duties of the demarcation, survey and recording

¹ e.g. Kenya Land Adjudication Act 1959 s6 (now Land Consolidation Act)

² See 11.4.3

³ Land Settlement and Registration Ordinance 1925 s10

officers were not particularized) the ‘settlement officer’ (i.e. adjudication officer) was empowered to lay out a fresh boundary, not only if the boundary was curved or irregular but also if, in his opinion, it was inconvenient for the use of the land.¹ In view of the obvious need to avoid perpetuating unsatisfactory lay-outs some later statutes have given extensive powers of reparation. For example, in the Turks and Caicos Islands, the demarcation officer may “adjust the boundaries of any land in the adjudication section or reallocate the same to ensure the more beneficial occupation thereof or to effect a more suitable subdivision”,² while in Malawi “if he considers the existing lay-out of the land to be uneconomic or inconvenient for the use of the land or inconsistent with the development scheme” (prescribed by the Minister) he may “prepare a fresh lay-out and by exchange of land or otherwise adjust the existing lay-out”.³ It is evident that if the demarcation officer is to exercise planning functions of this magnitude, he will require the assistance of an agriculturist or a town-planner, or even both where areas round towns are concerned. In fact, the process moves out of the field of simple adjudication of rights into that of physical planning and redevelopment.

4.7 The duties of the *survey officer* are purely technical. He is merely required to prepare a map (known as the ‘demarcation map’) of the parcels as determined by the demarcation officer. There is no legal reason why the survey officer should not also be appointed as demarcation officer, but in working practice it will generally be found more economical to keep trained survey staff solely for survey work, and not to waste the technical ability of the survey officer on the administrative work of ascertaining boundaries, to which perhaps, he may not be specially suited. Where aerial photographs are used, as they should be wherever practicable, the survey officer will require only limited techniques, mainly photo identification and use of chain and compass. His duties will be to identify and mark on the aerial photograph the boundaries of each holding after they have been determined by the demarcation officer. In the absence of aerial photography he will be required to map the parcels by ground survey methods.

4.8 The duty of the recording officer (sometimes known as the registration officer) is to record claims and to admit any which is not disputed if, in accordance with the principles laid down in the legislation, he considers it to be valid. This gives him very considerable responsibility. Like the demarcation officer he requires administrative capacity and a knowledge of the people, but he also must refer to the adjudication officer any dispute which he is unable to compose. A good recording officer can save an adjudication officer much of the tedium and labour of adjudication, for many disputes need not go to formal hearing but can often be settled by conciliation, in which case only a brief note of the result will be necessary. An inexperienced or inept recording officer, on the other hand, will refer everything to the adjudication officer.

4.9 Where the declared area is small or there are not many interests to be adjudicated it may be convenient to appoint the same person as both demarcation and recording officer, for they perform their duties at more or less the same time.

¹ Land (Settlement of Title) Ordinance 1928 s22

² Land Adjudication Law 1967 s12

³ Customary Land (Development) Act 1967 s13

These duties can be usefully distinguished, however, and in practice, particularly in large schemes, it will be found that it speeds up proceedings and is generally more convenient for the public if demarcation is done by one officer and recording by another, though this perhaps is no more than to say two heads (or two pairs of hands) are better than one.

4.10 Where customary tenure is concerned, the demarcation and recording officers will need to be persons who are of good standing in the neighbourhood and have the essential local knowledge to verify claims and to assist in composing disputes, rather than having them formally heard by the adjudication officer. Some adjudication legislation makes special provision for the appointment of local committees to assist in the proceedings and, in the Kenya variant discussed below, these committees are themselves made responsible for some of the functions of the adjudication, demarcation and recording officers.

5 Proceedings

(1) PRELIMINARIES

5.1 The first duty of the adjudication officer is to decide whether the declared area can be dealt with as a single 'adjudication section' or should be divided into two or more 'adjudication sections'. Each adjudication section will require its own demarcation and recording officers, and its size should depend on what they can manage within a reasonable period.

5.2 The adjudication officer must next publish a notice of the intended adjudication and registration in respect of each adjudication section, and more important, he is expressly required to make sure that, so far as is possible, the information actually reaches everybody concerned. This should afford no particular difficulty, for systematic adjudication inevitably attracts great attention and is not subject to the defect, inherent in sporadic adjudication, that it may pass unnoticed by persons interested, even though it has been formally advertised.

5.3 Before the demarcation and recording officers proceed to their duties it is desirable for the adjudication officer to hold a public meeting attended by as many of the local people and land claimants as possible in order to explain what is proposed and also, if customary land is involved, to discuss the nature and extent of the rights which are to be recorded. These rights may amount to full ownership or to something less than full ownership, as we explain in the next section below. This first meeting is important, even though there has already been the careful administrative 'propaganda' which is necessary particularly where people are not yet familiar with the process.

(2) STAYING OF JUDICIAL PROCEEDINGS

5.4 In the Sudan law there is no formal provision for the staying (suspension) of lawsuits, but provision has been made for it in subsequent legislation elsewhere, since it is clearly undesirable that the same issue should be under simultaneous consideration by two judicial authorities, as can happen where land already the subject of a lawsuit is included in an area declared for systematic adjudication. It

should be noted that it is the publication of the adjudication officer's notice, not the original gazette notice declaring the adjudication area, which should stay lawsuits in respect of any land within the adjudication section. No new proceedings may be instituted after the publication of this notice and suits actually in progress must be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.¹ In sporadic adjudication this situation does not arise because, if a case is already before the court, adjudication will not be allowed until the court has given its decision; indeed, disputed cases may always be referred to the court (as, for example, in Uganda and the Cameroon Republic) instead of being determined by an 'adjudication officer', as in the systematic process.

(3) PROCEDURE ON THE GROUND

5.5 It is the demarcation officer who actually starts proceedings on the ground, having first sent a notice giving the time, date and place where he is going to begin. He sees that the boundaries of each parcel of land and of public roads and rights of way are properly marked out. He gives each plot within the section a number in sequence. Large sections containing many parcels (say, more than two hundred) should be divided into separate registration blocks so that parcel numbers do not rise too high and become difficult to find on the map. The numbers assigned on adjudication are later used for the compilation of the register.² Unclaimed parcels of land, even if they are waste, should be given numbers, for it is the purpose of adjudication to decide all rights in the whole area, and it is important to show positively that land has been found free of private rights and not merely leave it to be assumed that there are no private rights in it because none is recorded. This point needs particular emphasis because the assumption that unused land is available for disposition by the State (as distinct from the finding, after due enquiry, that it is in fact unclaimed) can lead to resentment and even to injustice. Once the State is registered as owner, it can deal with the land just like any other owner, but it should not do so until it is so registered.

5.6 Roads or rivers which run over privately owned land will, of course, be shown as part of the parcel over which they run, but roads and rivers on public land need not be numbered, though in some jurisdictions they are and, indeed, must be if all land is to be shown on the register. But to give a number to a public road or river will necessitate showing imaginary boundaries running across it (usually where it enters and leaves the section or block) and on the register it will be necessary to record as a 'parcel' a road or river which has only lateral boundaries and is 'open-ended'. Also roads and rivers make convenient boundaries for adjudication sections and blocks, and to number and register them would cause obvious difficulties, involving sometimes dividing them down the centre. Moreover, in adjudication proceedings, the numbering of roads may cause

¹ See, for example, Kenya Land Adjudication Act 1968 s30(2)

² See, for example, the Sudan Land Settlement and Registration Ordinance 1925 s23(4): "Each piece of land registered shall bear a distinguishing number which, unless the Registrar-General shall otherwise direct, shall be the number assigned to it in the settlement register."

argument (to no useful purpose) where the *medium filum*: (centre line)¹ rule is in doubt, as it frequently is when the subdivision which created the lay-out is neither recent nor formal. In working practice in the registry it will be found convenient and effective not to give numbers to public roads, or even to public squares and open spaces, though this may seem technically incorrect.²

5.7 In the course of the demarcation the demarcation officer will exercise whatever power he has been given for straightening boundaries or for reparation and he can recommend to the adjudication officer compensation for any loss caused by such adjustment. If the existing lay-out is unsuitable for the agricultural or building development which is intended, and the demarcation officer finds he is unable to adjust it adequately, a decision will have to be taken whether or not adjudication should proceed before arrangements have been made for re-planning, bearing in mind the undesirability of fixing unsuitable lay-outs by registration.

5.8 The next stage of the process is the preparation of the 'adjudication record' (sometimes called the 'register of existing rights') by the recording officer. Subject, as always, to any general or particular directions from the adjudication officer, he summons the claimants and admits those claims which he considers valid in accordance with the principles which we describe in the next section. The proceedings in undisputed claims will be brief and there is no need to record more than the name of the successful claimant and the nature of his interest against the number of his parcel, but in practice it is usual to provide a form to be completed in respect of each parcel, showing briefly how the claimant acquired ownership (see example, pp 278—9). These forms together then constitute the 'adjudication record'.

5.9 Where, however, there is a dispute and the subordinate officers are unable to persuade the parties to reach agreement, it will then be the duty of the adjudication officer to hear the case. He must follow the procedure which laid down for hearing civil actions, but the strict rules of evidence are relaxed. He may call evidence on his own initiative and also he may admit evidence which would not be admissible in a court of law. Obviously, he must be on guard against the reopening of issues which have already been judicially decided, but where parcels have been rearranged or there is some new factor, a judgment might require 'readjustment'. It is therefore provided that he should have regard to but not be bound by previous court judgments. It should be noted that if a dispute has been heard in this manner and no new factor has arisen in the course of adjudication, then if either of the parties still 'objects' to the finding his recourse will be to apply for rectification of the register as described in para 7.9.

5.10 The adjudication officer has power to award compensation, in money or in land, for any loss caused by a boundary adjustment or the demarcation of a road. A local assessment board should be adequate for this purpose and it is unlikely that the services of a professional valuation officer will be required. So far as land is concerned adjustments will generally be on a 'give and take' basis and no cash

¹ See 8.2.7

² For example, public roads and rivers are not numbered in the Sudan, nor are they numbered on the English 'general map' but numbers are given in Fig 2 at 88 of Dowson and Sheppard, though not in Fig 3.

payment will be required, but a valuation schedule in respect of 'economic' trees can prove a great help in practice.

Form...

BRITISH VIRGIN ISLANDS
LAND ADJUDICATION ORDINANCE 1970
ADJUDICATION RECORD

Section

Block no.

Parcel no

Approximate area

Claim no

- 1 DESCRIPTION OF PARCEL: CROWN/PRIVATE
(If parcel is Crown land, do not complete paragraphs 2-7 and 9-10)
- 2 NAME OF OWNER(S)
(Use block capitals. Where two or more persons are entitled, number each name serially and indicate whether joint owners or owners in common and, if latter, the share of each owner — s17(S))
- 3 DESCRIPTION AND ADDRESS OF OWNER(S)
(If more than one owner, use same serial numbers as in paragraph 2)
- 4 MANNER IN WHICH OWNER(S) ACQUIRED THE PARCEL
(If more than one owner, use same serial numbers as in paragraph 2)
- 5 RESTRICTIONS, IF ANY, ON POWER OF OWNER(S) TO DEAL
(If more than one owner, use same serial number as in paragraph 2)
- 6 NATURE OF TITLE: ABSOLUTE/PROVISIONAL
- 7 IF TITLE IS PROVISIONAL - s16(1)(d):
 - (i) DATE ON WHICH POSSESSION OF PROVISIONAL OWNER(S) BEGAN
 - (ii) PARTICULARS OF ANY DOCUMENT BY VIRTUE OF WHICH A RIGHT ADVERSE TO THE TITLE OF THE PROVISIONAL OWNER(S) MIGHT EXIST.
 - (iii) ANY OTHER QUALIFICATION AFFECTING TITLE
- 8 PARTICULARS OF ANY RIGHT AFFECTING THE PARCEL WHICH IS REGISTRABLE AS A LEASE, MORTGAGE, CHARGE, EASEMENT, PROFIT OR RESTRICTIVE AGREEMENT — s18(1)(c)

(Number these rights serially and in each case record the name, description and address of the person entitled to the benefit of the right and any restriction of his power of dealing)

9 NAME AND ADDRESS OF GUARDIAN IF THE OWNER IS UNDER ANY DISABILITY - s18(l)(d)

10 LIST OF DOCUMENTS PRODUCED TO RECORDING OFFICER AND RETAINED BY HIM – s18(1)(c)

Date

Recording Officer

ACKNOWLEDGEMENT – s18(2)

I accept this record.

Signature of owner(s) listed in paragraph 8 as having an interest in the parcel

ACTION, IF ANY. TAKEN UNDER s21 OR AS THE RESULT OF A PETITION UNDER s20

Date

Adjudication Officer

6 Principles and rules

6.1 In the Sudan and similar procedures there are four ‘principles’ which recording officer must follow in preparing the adjudication record:¹

(1) First, he has to determine whether or not the land is privately owned. If he is satisfied that some person is entitled to full ownership, he must admit ownership and record his name as owner. An owner need not necessarily be a single individual, but can be a corporate body or group (if it can be adequately defined). The individual decision on each application is made by the recording officer, but what rights should be considered to amount to ownership will have been determined by the adjudication officer, who may himself have received a ‘policy directive’. In the Sudan, for example, when the Gezira was adjudicated, existing rights of cultivation were equated to ownership, though in other places similar rights had been held not to amount to private ownership but only to ‘rights’ in Government land.

(2) If, however, the recording officer is satisfied that any land is entirely free from private rights or that the rights in it do not amount to full ownership, the Sudan legislation requires him to record the Government as the owner, the rule being that waste, forest and unoccupied land shall be deemed to be the property of the Government until the contrary is proved. But this is not the rule in all Countries. In southern Nigeria, for example, all land is deemed to be owned by the local

¹ Sec Sudan Land Settlement and Registration Ordinance 1925 s13

community whether anybody uses it or not.¹ As we stressed in Chapter 12 the question of who owns unused land is a cardinal point of policy which must be decided before a satisfactory adjudication statute can be drafted.²

(3) The recording officer must also investigate and record rights which, though not amounting to full ownership, must still appear on the register of title. If he is satisfied that any such right exists over land, whether owned by the Government or by a private person (either Corporate or individual), he must record it in the name of the person entitled to the benefit of it, together with such particulars as may be necessary to define its nature and extent, so that it can be registered in a form recognized by statute law. The most obvious example of such a right is a right to exclusive possession (of the nature of a lease), but various other derivative or subordinate rights, which may exist under customary law, may require ‘translation’ into their equivalent in statute law. Trees or houses may be found to be ‘owned’ separately from the land on which they stand (i.e. customary law, like English law and indeed most other systems of law, recognizes non-vertical subdivision)³ and the relationship of the respective ‘owners’ must be reduced to a form which is capable of registration.⁴

(4) The fourth principle of adjudication is that the recording officer shall follow certain rules which are laid down in the legislation. It is important, for example, to safeguard, so far as he is able, the interests of minors and unborn persons, and also of any persons who have a right but have failed to make a claim. In Book 2 we set out and explain the adjudication rules contained in the Sudan Land Settlement and Registration Ordinance 1925, most of which will be found in some form in all legislation providing for systematic adjudication.

7 Objection, appeal, and rectification

7.1 There are three allied but distinct matters which tend to get confused under the generic heading of ‘appeal’:

First, there are objections to decisions made by the subordinate officers of the adjudication party, or to anything which appears in the adjudication record. These objections are determined by the adjudication officer.

Secondly, there is the question of appeal against the final decision of the adjudication officer. This is the true appeal and, obviously, it can only be made to some authority with power to override the adjudication officer’s decision.

Thirdly, there is the question of the finality or immutability of an entry made on first registration, and this we briefly consider under the subheading

¹ Ci Ghana, where tradition has it that when, at the end of the last century, it was proposed to introduce a Crown Lands Ordinance into what was then the Gold Coast, a petition was presented to Queen Victoria protesting against the assumption that vacant land belonged to the Crown. It is said that the ‘good Queen’ replied, ‘We want your loyalty, not your land’ - and no such legislation was ever introduced.

² See 12.6.2-3

³ See 14.1.3

⁴ In some countries, such as Jordan, it is policy to eliminate these rights at the adjudication stage by arranging compensation, or possibly a lease.

'*Rectification*', which as a general qualification on the conclusiveness of the register we have already discussed in Chapter 10.¹

(1) OBJECTIONS

7.2 The Sudan legislation did not make any express provision for the publication of the record, but more recent statutes elsewhere have provided that as soon as the record of all parcels in an adjudication section has been completed, the adjudication officer shall publish a notice saying where and when the adjudication record and the demarcation map can be inspected and objections lodged.

7.3 The period during which inspection will be allowed and objections may be made varies from one jurisdiction to another, but two or three months seems to be a suitable period. It is important that it should be long enough to allow sufficient time for the news to reach persons affected who may be temporarily absent from the locality for any reason, such as military service or pilgrimage, or because they are working elsewhere, perhaps in another country.²

7.4 During this period any person named in or affected by the adjudication register, who considers it to be incorrect or incomplete in any respect, may submit an objection to the adjudication officer. The adjudication officer determines the objection (in the manner described in paragraph 5.9 above) and this completes the adjudication. There then arises the question of appeal from his determination or from any other decision he may have made in the course of the proceedings.

7.5 In the Turks and Caicos Islands, however, a variation was tried which should be mentioned if only as a warning. Because the one magistrate was the only person with legal qualifications, and the adjudication officer was unlikely to have any legal experience, it was provided that objections to the adjudication record should be made not to the adjudication officer but direct to the magistrate. This procedure proved unsatisfactory because it inevitably confused 'objection' and 'appeal'. Its effect was to throw onto the magistrate the first hearing of disputed cases, thus cutting out the adjudication officer who should have heard them in the first instance.

7.6 As a general principle there is no doubt that the adjudication officer, whether he is legally qualified or not, should be responsible for completing the adjudication proceedings in a form which enables the register of title to be prepared from them. Appeal against his decision can be allowed within whatever period is considered reasonable, and rectification, as explained below, should then be possible within the framework of the registration law.

(2) APPEAL

7.7 In the Sudan appeal is allowed only with the leave of the adjudication officer or the Chief Justice, and has to be made within six months of the decision;³ but when the Sudan procedure was adapted for use in Kenya by the Native Lands Registration Ordinance 1959, no appeal was allowed against the adjudication

¹ See 10.3.6-9

² When sixty days was proposed for objection in the Turks and Caicos Islands, the legislature substituted ninety days because so many of the islanders were absent overseas as migrant workers.

³ Sudan Land Settlement and Registration Ordinance 1925 s19

officer's decision and no rectification of the first registration was possible. The objective was finality and it was considered "that to allow the first registration to be open to challenge would endanger the whole process".¹ The result was that the adjudication register became as uncompromisingly final as the Domesday Book completed in England in 1086 and so named by the conquered English because there was no appeal from it. Such finality, however, proved to be unsatisfactory in Kenya and indeed dangerous, because sometimes the wrong person had been registered by fraud or mistake and there was no means of putting right what could be proved to be wrong. In fact a special ordinance had to be enacted to enable the register to be corrected in one district where the machinery of adjudication had gone sadly awry.² We need not elaborate the point here because, in view of the Kenya experience, it is unlikely that anyone will repeat the mistake of making rectification absolutely impossible.

7.8 The Kenya Land Adjudication Act 1968 now makes provision for appeal against the decision of an adjudication officer, but the appeal lies to the Minister, thus keeping the whole procedure firmly in the hands of the executive. We know of no other adjudication statute which provides for appeal other than to some judicial authority but, as we explained in Chapter 11, the Kenya procedure was devised to give effect to a policy of individualization and so has always had an administrative flavour.³ Customary land was to be registered in individual holdings with perhaps more regard to policy in some cases than to strict judicial recording of the existing rights.

7.9 A disadvantage in the Sudan procedure was the delay between the completion of the adjudication proceedings and the preparation of the register, whilst appeals were being determined. To avoid this delay it has been provided in later legislation elsewhere⁴ that the register should be compiled soon as all objections have been determined, and that appeals against decisions made in the course of adjudication should take the form of applications for rectification of the register. It should be noted that Government as well as a private individual is entitled to appeal, thus making it possible for a watchful eye to be kept on the public interest.

7.10 Whether the appeal against the decision of the adjudication officer is made before or after the compilation of the register, there must obviously be a time limit for its submission, and also a restriction, such as requiring leave to appeal as in the Sudan procedure, seems desirable to prevent frivolous or vexatious appeals. In the British Solomon Islands Protectorate appeal against an act or decision of the Settlement Officer is only allowed on the ground that is erroneous in point of law or has failed to comply with a procedural requirement of the Ordinance (but we suggest that such a provision may lead to lengthy legal argument, not least as to what is law and what is fact).⁵ Once the period for appeal has elapsed, or a final decision has been made on appeal, it should be no more possible to raise that

¹ Kenya Working Party Report on African Land Tenure (1958) 28 para 67(i)

² See para 10.3 below

³ See 11.8.9

⁴ e.g. British Solomon Islands Protectorate Land and Ttlcs Ordinance 1968 s56

⁵ Ibid

particular matter again than is to raise any other issue which has been finally litigated and judicially decided. As the lawyers say, it is *res judicata*, a matter which has been finally judged.

(3) RECTIFICATION

7.11 An application for rectification of the register in respect of an issue not previously raised is quite a different matter. It is of the nature of a plea against the register on newly discovered facts, as distinct from an appeal against a decision based on facts that have already been considered. Admittedly, to allow rectification at all may appear to upset the basic principle of registration of title that the entry in the register is absolute proof of title; but, as we have already pointed out in Chapter 10,¹ its justification is that, in a human world, complete and utter infallibility is not really possible, and it would plainly be absurd if a mistake could not be put right when this can be done without injuring anyone. It would be still more absurd if, as may conceivably happen, one entry is in conflict with another and no process is provided for rectification, though clearly both cannot enjoy the legal finality which is the desired objective of the register. It is therefore essential to make some provision for the correction of mistakes which may occur in the compilation of the register.

7.12 However, under the systematic process of adjudication which we are now considering, all claims within the declared area are required to be submitted by a given date and are heard and decided by the adjudication officer. As soon as the time for objection has expired and all objections have been heard by the adjudication officer, the adjudication record is forwarded to the Land Registry for the preparation of the registers of title and a time is allowed for appeal. This will take the form of an appeal against the registration, though in fact it is an appeal against the final decision of the adjudication officer. The problem then is whether to allow, after the time allowed for appeal, any claim which is based on facts antecedent to the date of first registration and which ought to have been made during the adjudication proceedings. As certainty and finality are principal objectives of systematic adjudication, it can be argued that such a claim should be absolutely barred. It was on this principle that in Kenya rectification was not allowed in respect of first registration.

7.13 In the Sudan, on the other hand, it was provided that rectification could be ordered by the court where it was satisfied that first registration had been obtained through error or omission or by reason of any entry procured by fraud or made under a mistake.² This may have been unduly wide, and the Palestine legislation³ covered the point more neatly by providing that, after fifteen days allowed for appeal to the court from decisions made in the adjudication proceedings, no further appeal should lie unless

- (a) a new fact is established which was unknown and could not have been within the knowledge of the interested party at an earlier date; or

¹ See 10.3.6

² Land Settlement and Registration Ordinance 1925 s85(c)

³ Land (Settlement of Title) Ordinance 1928 s65

(b) owing to sickness, minority, absence from Palestine or other similar incapacity, the claimant to a right had suffered prejudice which he was not able to bring to the attention of the court previously.

But even here some time limit should be imposed; otherwise a first registration will never achieve certainty.

8 Fees

8.1 We must now consider the question of whether the cost of systematic adjudication should be met by the landowner or by the State as a charge against general revenue.

8.2 The first point to note is that, because systematic adjudication is a compulsory process, it sweeps into the net everybody in the declared area, the man with a good title as well as the man whose title is suspect. If the land then acquires a good title he gains a real advantage, particularly if he wishes to deal with his land; but the man with a good title has nothing to fear and, if he does not wish to sell or mortgage his land, he gains no advantage at all from adjudication. It would seem unfair, therefore, to expect him to pay a fee. However, if he does deal with his land, he will derive benefit from the facilities that registration of title provides for conveyancing, and so can be required to pay at that time a fee which will recover some part of the cost of first registration. It would therefore appear logical to levy enhanced fees on the first dealing after registration, while making first registration itself a free service.

8.3 There are other arguments for making first registration free. In Chapter 1 we pointed out how it is in the general interest of economic development and social progress that title should be secure and that rights in land should be transferable simply, cheaply and quickly.¹ Systematic adjudication, in conjunction with registration of title, confers these advantages, and it can be fairly argued that the State as a whole, not merely individual persons, benefits from systematic adjudication. In Kenya, for example, registration was a principal plank in the platform of Government policy, not because of the advantage it gave each individual landowner but because of the beneficial effect it would have on the economy as a whole.

8.4 Moreover, once it has been established and paid for, registration of title is a profitable undertaking for the Government in those countries where it enables stamp duty (or transfer tax) to be collected on transactions which otherwise might avoid it. Land registries recover their ordinary working costs out of the registration fees they collect for that purpose on day-to-day transactions, and therefore stamp duty is sheer profit to the State. Also, when the register has been compiled, there is always the possibility of levying land tax, and this can scarcely be regarded by the individual landowner as an advantage for which it is fair to make him pay. The availability of a complete record of who owns what land is, indeed, of inestimable value in a variety of ways to any government's normal administrative processes.

¹ Sec 1.6.1

8.5 Thus it may be argued that, provided areas are sensibly chosen, it pays the State to register land on a systematic basis and it is therefore unfair that the cost of the process should fall on persons who derive no direct advantage from it and who, indeed, if given a free choice, would refuse to have it done at their own expense.

8.6 It was on this principle that the cost of systematic adjudication in the Sudan was charged against general revenue, and the individual landowner was only required to pay if there were a dispute which necessitated the equivalent of a court hearing, in which case court fees would be payable as in a civil suit. This principle would appear to be sound, and is one which might be generally adopted.

8.7 In Kenya, however, where consolidation of fragmented holdings was combined with the process of adjudication, it was argued that the putting together of an owner's scattered fragments gave him solid and practical benefit and that, as it took time, effort and money when it was organized officially, it was reasonable to charge a fee to reimburse the government for what it was spending. It was clearly a beneficial process but one which, for reasons of staff and finance, could not be extended at once to all the areas where it was needed. It was very costly and it would have been manifestly unfair if the people who were receiving the benefit of it were not required to pay for it. These arguments, however, do not apply where no consolidation is being effected. And even in consolidation areas the trouble and cost of collecting fees have made their imposition a somewhat dubious proposition. As it is beneficial to the general economy, we think that consolidation, like adjudication, should also be a free service, a point which we have already made in Chapter 13.¹

9 Adjudication and consolidation in one process

9.1 As we recounted in Chapter 11, a process based initially on the Sudan system of adjudication was evolved in Kenya, in the 1950s, for the combined adjudication and consolidation of customary rights in land in the Central Province, where not only was individual ownership well established and understood but there was also widespread and intensive fragmentation.² This dual process is of great significance because many developing countries have similar problems where customary land is concerned, and 'rural reconstruction' is urgently needed. We will therefore describe it in detail.

9.2 The process, which by then had already been in use for about five years, was regulated by Part II of the Native Lands Registration Ordinance 1959 (later called the Land Adjudication Act and now known as the Land Consolidation Act). Though provision was made for the appointment of demarcation and recording officers, their functions and some of those of the adjudication officer are performed by committees. These committees not only adjudicate existing rights but they also consolidate and reallocate the land parcels, and so are responsible for functions far more extensive than those normally performed by demarcation and recording

¹ See 13.5.20

² See 11.8.10

officers, or provided for in the ordinary course of adjudication proceedings. We shall discuss in the next section the use of committees for such purposes.

9.3 The proceedings begin in the usual way of adjudication. An area is declared by the Minister for Lands and Settlement and an adjudication officer is appointed from the officers on the establishment of the Land Adjudication Department. He declares adjudication sections and in consultation with the District Commissioner appoints for each section a committee of not less than twenty-five persons residing in the section.

9.4 Maximum publicity of the intention to adjudicate is given and public meetings are held to explain the procedure. Any person claiming rights within the area is invited to appear before the committee, either in person or by a representative appointed according to law or recognized custom. Every claimant indicates his parcels on the ground, a sketch plan is drawn of each parcel, and the parcel is divided (for survey purposes only) into triangles and rectangles which are measured by a team of 'measurers'. The area of the parcel is then calculated. This process is known as 'fragment gathering' and, though no great accuracy is claimed for it, it is considered adequate for the purpose. Under the name of each successful claimant, who usually has more than one fragment, is listed all the land he owns.¹ Generally no overall map is prepared for these fragments. This is a major departure from the usual adjudication procedure but the fragments are so small and so numerous that a map could only be prepared at inordinate cost.² In any case the fragments are soon to disappear and no permanent record of them is required.

9.5 If the committee is unable to reach a decision, it refers the case to an 'arbitration board' (consisting of not less than six or more than twenty-five persons resident in the district, originally appointed by the Provincial Commissioner, but now by the Minister). The arbitration board is required to decide the matter and inform the committee of its decision. It should be noted that only the committee may refer a case to the arbitration board; the parties have no such right.

9.6 What is known as 'the record of existing rights' is then compiled from the decisions of the committee or arbitration board. This record is open to inspection for sixty days during which objections may be lodged with the executive officer of the committee concerned.

9.7 A complicated process has been evolved for the hearing of these objections. If the objection is to a committee decision it is referred to the committee to hear again and submit the finding to the adjudication officer, who may then either confirm it or determine the matter after considering it with the arbitration board and making such further enquiries as he may think fit.³ An objection to a decision of the arbitration board is heard by the adjudication officer assisted, but not bound, by the arbitration board. The decision of the adjudication officer is final, though, rather oddly, no provision is made for him to intervene unless an objection has been made.

¹ For example, in Kiambu District near Nairobi, where the process has been completed, the average per claimant was about ten fragments.

² According to Elspeth Huxley in *A New Earth*, the smallest recorded fragment was one banana plant.

³ Land Adjudication Act 1959 s18

Thus in this process the adjudication officer is, in effect, merely the appellate authority: he has no jurisdiction in the first instance.

9.8 The total area within the perimeter of the adjudication section, as determined photogrammetrically by the Survey of Kenya, has to be compared with the aggregate area of the measured fragments plus any other land comprised in the section, and what is known as the 'reconciliation factor' is obtained by dividing the Survey area by the aggregate area.¹

9.9 After the expiry of the sixty days and when all objections have been resolved, the record of existing rights is declared to be final and it cannot thereafter be altered. Thus, at this point, the adjudication of the existing rights is complete, but without the benefit of any general map of the fragments. The committee then proceeds with consolidation. The total area under each owner's name is adjusted by multiplying it by the 'reconciliation factor'.

9.10 The committee next has to decide how much additional land within the section is required for the present and future needs of the community for local public purposes, such as schools, dispensaries, villages and roads. The additional acreage thus required for public purposes is calculated as a percentage of the total acreage of the section and each owner's entitlement is reduced by this percentage. This deduction is known as the 'percentage cut' and this method of providing land for public purposes has the advantage of distributing the burden among all the landowners in the section; but it is only possible because all the land is to be reallocated.

9.11 The committee then allocates to each landowner, usually in a single parcel, land equivalent in area to the sum total of all his previous fragments after adjustment by the 'reconciliation factor' and deduction of the 'percentage cut'. Every effort is made to include in the new parcel as many as possible of the substantial improvements which existed in his fragmented land; but where an improvement cannot be included special arrangements must be made with the incoming owner. For example, he might pay compensation for coffee trees which are too big to transplant or he might allow the outgoing owner to harvest the crop until trees planted on his new land are in bearing. A house built of permanent materials might be retained as a separate parcel.

9.12 It is at this stage that the 'demarcation plan' has to be prepared. This demarcation plan is not the 'demarcation map' of orthodox systematic adjudication, but is in reality an 'allocation map' which is prepared before the holdings are set out on the ground. It shows what each landowner is intended to receive in the re-parcellation and not what he actually had when the area was declared for adjudication. The consolidated holdings are set out on the ground in the presence of members of the committee and adjoining landowners. This is a task of considerable difficulty and requires much patience and ingenuity. As we have already mentioned, there is no 'official survey' of these holdings after they have

¹ Experience has shown that the 'reconciliation factor' should lie between 1.05 and 0.95 and that a figure outside these limits indicates gross error or fraud or both.

been set out, and the ‘demarcation plan’ (i.e. ‘allocation map’) is used for registry purposes.¹

9.13 The adjudication register is then prepared. This contains details of each landowner’s holding by reference to the demarcation plan. When it is completed, this register is opened for inspection and a further period of sixty days is allowed for objections. This time any objection is made to the adjudication officer, who considers it with the committee and may then dismiss it, or if he thinks it valid, he may order the committee to alter the allocation or he may award compensation in lieu of alteration. The arbitration board is not consulted, and again the decision of the adjudication officer is absolutely final.

9.14 When the period for objection has elapsed and all objections have been dealt with, the adjudication register becomes final; it is from this register that the land registrar prepares the register of title under the Registered Land Act. The effect of this is to change the landowners of the Land Adjudication Act into the proprietors of the Registered Land Act. Registration under the Registered Land Act vests in them the absolute ownership of the land registered in their names. The conversion of customary tenure to statutory title is complete.

10 The committee system

10.1 There is no doubt that in Kenya the committee system contributed very substantially to an outstanding achievement in land reform. In ten years (1956—65) 1,603,597 acres in 247,582 parcels of land were brought onto the register.² The consolidation of fragmented holdings in the Central Province has had a dramatic effect on farming, and this consolidation would scarcely have been possible if the ‘traditional guardians’ of the land had not been so closely associated with it through the committee system. Yet that system had serious shortcomings and we must now examine it more closely.

10.2 Under the Kenya Land Adjudication Act (now called the Land Consolidation Act) the committees are nominally responsible for three major executive functions: adjudication, replanning and reallocation. We say ‘nominally’ because committees, almost by definition, are incapable of executive functions; in Kenya, as elsewhere, their performance has largely depended on the capabilities of the officers who serve them.

10.3 It was in fact failure in supporting staff, both superior and subordinate, which vitiated five years’ work in one district where certain persons ‘bought’ additional fragments from the measurers; that is they bribed the measurers to include fictitious fragments in the lists, so that they received more land on reallocation than was their just entitlement. Since at that time the adjudication register was, as we have explained,³ final and unalterable, a special ordinance⁴ had to be enacted to enable the whole process to be repeated in respect of no less than

¹ See 8.11.8

² Lawrance Mission Report (1966)10 para 33

³ See para 7.7 above

⁴ The Native Lands (Fort Hall) Special Provisions Ordinance 1961, later called the Land Registration (Fort Hall District) Special Provisions Ordinance

215,212 acres. The committees, as such, cannot really be blamed for this disaster. It was the system that enabled laxity at the supervisory level and plain dishonesty in subordinate staff to pass unchecked, and it demonstrated with shocking clarity how vulnerable to corruption is this system of consolidation, which perforce had to be carried out without the demarcation map to illustrate what actually existed on the ground at the adjudication stage (i.e. the original fragments).

10.4 The committees have proved particularly useful in the process of initial adjudication, where a multitude of customary rights have to be authoritatively determined and then reduced to terms of individual ownership in a manner acceptable not only to the claimants but also to the customary authorities. Who could do this better than the customary authorities themselves? But, even in this process, elaborate precautions have had to be taken to guard against corruption and partiality. For this reason it was provided that not less than twenty-five persons must be appointed to each committee. Sometimes each clan or extended family felt that it must be represented and huge committees resulted, which made effective guidance and control even more necessary.

10.5 Another weakness in the system is that committees drawn from the locality have naturally tended to recognize only sectional interests and to disregard rights established by 'strangers' from other tribes. Where 'strangers' have been concerned, such committees have ignored the cardinal principle of adjudication that it must recognize and confirm rights which actually exist. A 'stranger' might have been in undisputed possession of land for thirty years or more with the full acceptance of the local people in circumstances which unquestionably entitled him to recognition of a right in land if the normal principles of adjudication meant anything at all. Yet, on adjudication, he would find himself wholly excluded and the land awarded to a member of the local community whose claim rested more on community membership than on the actual exercise of any right in land.

10.6 It may be argued that under customary law a 'stranger' cannot acquire ownership merely by possession and effluxion of time, and that his occupation is no more than a tenancy at will, terminable at any time should the 'host' family so desire. But the alacrity with which the newly registered owner then permitted the 'stranger' to buy the land that he had been using for so long indicated no inherent or intrinsic objection even to outright transfer, provided the full value was paid.

10.7 Even among their own people, committees composed of landowners have tended to ignore rights which do not amount to ownership but which still require recognition. Where a tenant had a court judgment that so long as he complied with certain conditions he was not to be evicted, he would still lose his right on adjudication despite the express provision in the law that such rights should be recorded. It is true that on consolidation new circumstances might arise. For example A, a landowner who had allowed B to occupy one of his scattered fragments when it was still a fragment, might find that, on consolidation, he had in the aggregate sufficient land to farm himself and consequently there was no place for B in the new arrangement. Nevertheless, if B had an established interest in land, recognized and enforced by the court, then it could not be rightfully extinguished without his consent. It is in fact abundantly clear that committees, when used as adjudicating authorities, require very careful supervision and expert guidance.

10.8 The second executive function of committees is the setting apart of land for the future needs of the community and that, combined with their third function of reallocating all land in the area, clearly necessitates planning knowledge and skill of no mean order as well as outstanding tact and great patience. Admittedly such drastic reorganization of the existing holdings probably could not have been effected at all without the cloak of committee authority; but sometimes planning considerations, which were the real justification for the upheaval, have been overlooked when committees concentrated on producing individual titles for all land in the area, as if that were the sole objective. Some of their work in the Central Province of Kenya was stigmatized as ‘built-in erosion’.¹ A securely registered title serves only to mock the landowner whose topsoil has disappeared down a gully which has consumed his neat rectangular holding.

10.9 The remuneration of committee members poses another problem. In Kenya they are not paid, and this has been a frequent cause of complaint, because for nine months or even longer they must spend several hours each week on committee duties, often to the detriment of their own farming activities. They undoubtedly have a fair claim to some compensation for this loss of time. But even a token payment to so many persons would add substantially to the already high cost of the operation, and any realistic remuneration must be ruled out on financial grounds, quite apart from the administrative difficulty of discriminating between members whose performance varies so widely. The principle of voluntary service has therefore been retained.

10.10 Some committees, not unnaturally, welcome hospitality in the form of food and drink — a practice difficult to forbid, but likely to influence them in favour of the more generous provider.

10.11 Where consolidation of fragmented holdings was not required or had been voluntarily effected before adjudication began, the committees themselves had far less to do, and this was recognized in Kenya when, in 1968, provision was made requiring the demarcation and recording officers to reform their usual functions (as described in paras 4.5 and 4.8 above) and merely to refer to the committee (which was kept in being) any dispute they were unable to resolve. The committee was required to

“(a) adjudicate upon and decide in accordance with recognized customary law any question referred to it by the demarcation officer or the recording officer;

“(b) advise the adjudication officer or any officer subordinate to him on any question of recognized customary law on which he sought its guidance;

“(c) safeguard the interests of absent persons and persons under disability;

“(d) bring to the attention of officers engaged in the adjudication any interest in respect of which for any reason no claim was made;

“(e) assist generally in the adjudication process.”²

¹ Lawrance Mission Report (1966) 54 para 178

² Land Adjudication Act 1968 s20

Thus in Malawi,¹ where the reallocation of land is as drastic as in Kenya, the committees only adjudicate when disputes are referred to them, and in the British Solomon Islands Protectorate² the committees are reduced to a purely advisory capacity.

10.12 Nevertheless in draft legislation prepared for Ethiopia³ it has been considered expedient to make provision not only for adjudication by an adjudication officer, with or without the advice of a committee, but also for adjudication by a committee, presumably because it is considered that, as in Kenya, there will be occasions when only committee authority will achieve the required objective. This can do no harm provided the limitations of the committee system, as we have endeavoured to present them, are kept firmly in mind.

¹ Customary Land (Development) Act 1967 ss6 and 16

² Land and Titles Ordinance 1968 s40

³ A Proclamation to Provide for the Registration of Immovable Property (Addis Ababa, July 1968)